FOIA s.12 – Cost of compliance and appropriate limit

FOIA s.41 – Absolute exemption: confidential information

FOIA s.43 – Qualified exemption: **Commercial interests/trade secrets**

John Jenkins v IC & Department for Environment, Food and Rural Affairs

EA/2006/0067
2nd November 2007

Cases:
Hogan and Oxford City Council v Information Commissioner [2006] UKIT EA_2005_0030

Facts
By letter dated 1 November 2004, the Appellant asked the Veterinary Medicine Directorate (VMD) an executive agency of DEFRA for all data in the VMD's possession regarding clinical trials and results and adverse reaction reports supplied to VMD by the licence holder in respect of a pharmaceutical product called Rimadyl. Rimadyl had been prescribed and administered to the Appellant's dog. In the opinion of the Appellant, the dog died as a result. Subsequently, the Appellant made a second request about the marketing authorisation applicable to Rimadyl in the UK.

The VMD provided a significant amount of information as requested. It also asked the Appellant to narrow down his request. He was also told the cost of supplying the information he sought would exceed £600 being the applicable limit specified by section 12 of the Act and the Fees Regulations.

The Appellant issued a third request, if anything constituting a further widening of his earlier request. Although the licence holder did not give its consent to disclose certain data, e.g. safety data, the cost of compliance still exceeded the £600 limit.

An internal review confirmed that the information sought was "extensive" and that the £600 limit had been "greatly exceeded". The VMD reported as much to the IC adding that the cost of "processing" the request went well beyond the monetary limit.

The Notice found that the VMD had not "fully" complied with its section 16 obligations but no action was ordered save in respect of an existing offer to provide the Appellant with a copy of the VMD's catalogues and indexes which it duly did. The Notice also noted that a substantial amount of information had already been provided by VMD, however, 37 volumes of pre-clinical trial information had been provided in confidence. Reliance was placed on ss.41 and 43 of FOIA as well as s.12. With regard to s.43, the IC found that the public interest in maintaining the exemption justified non-disclosure. He also found that the s.12 limit had been reached and the VMD was justified in refusing to do anything more beyond offering help as to the catalogues and indexes.

Findings

Section 12 and the fees regulation

The issue between the IC and DEFRA was whether the words "extracting the information from a document containing it" in Regulation 4(3)(d) of the Fees and Regulations included the redaction of exempt information containing it. The Tribunal adopted the IC's arguments that:

(1) the actions in Regulation 4(3) are sequential;

(2) extracting information of a document means exactly that;

(3) redaction can be viewed as part of the time spent in considering whether information is exempt and can be charged as part of Regulation 6; and

(4) the extraction would be from a document which had been located or retrieved and therefore for a document to "contain" information requested, there must be other information not requested within it.

The Tribunal however did think that the Regulations could perhaps have been expressed more clearly and that the point was not "entirely free from doubt". The Tribunal however pointed out that the determination on that issue was not directly relevant given that the costs incurred by DEFRA in dealing with the request had already amounted to a very large amount and that the issue of whether the costs of redacting the exempt information was in fact largely, if not wholly, "academic".

As to the question relating to the despatch of information already retrieved and extracted, on the facts the Tribunal found, and in relation to information held on microfiche, such information still had to be extracted by means of a print out and therefore the information was not ready to be communicated to the Appellant without additional time being spent.

Sections 41 and 43

There was no doubt that the information provided by the pharmaceutical company was a trade secret or information which had it been disclosed would have caused significant harm to the company. There was therefore an obligation of confidence. The Tribunal agreed with the IC and DEFRA that there was little, if any, public interest in disclosure.

With regard to s.41, the Tribunal agreed with the decision of the Tribunal in *Hogan* (EA/2005/0026), especially at paragraphs 59 and 60, that focus should be on the public interest and expressed explicitly or implicitly in the particular exemption. Here, the position was academic. There was clearly a prejudice to the pharmaceutical company's commercial interests.

Conclusion

The Tribunal dismissed the appeal.