



**Appeal number: EA/2021/0162V**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**SIMON DALLY**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL PANEL:**  
**JUDGE ALEXANDRA MARKS CBE**  
**TRIBUNAL MEMBER ROGER CREEDON**  
**TRIBUNAL MEMBER KATE GRIMLEY EVANS**

1. This was a remote hearing by agreement of the parties. It took place on Tuesday 23 November 2021. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because all issues could be determined in a remote hearing.
2. The documents to which the Panel was referred are in an Open bundle comprising 452 pages (including index) and a folder containing a further 13 documents provided by the Appellant the day before the hearing. All parties were in addition provided with Case Management Directions by the Tribunal's Registrar dated 9 November 2021. The Panel, but neither the Appellant nor the public, were also referred to a Closed Bundle of 68 pages (including index).
3. The outcome of the Appellant's appeal is stated at both the start and the end of this Decision.

**The Appellant appeared in person**

**The Information Commissioner was neither present nor represented**

## DECISION

1. The appeal is dismissed.

## REASONS

### *Background to Appeal*

2. The Appellant, Simon Dally, made a request by email on 2 March 2020 to the University of Liverpool (UoL) for information about the suppliers of canine cadavers to its veterinary school. The full text of the request is set out in Appendix A to this Decision.
3. UoL responded on 30 March 2020. It provided some information requested; said it did not hold information in respect of Element 6 of the request; and withheld other information requested, relying on the exemptions in section 12 ('costs of compliance'), section 43 ('prejudice to commercial interests') and section 41 ('breach of confidence') of the Freedom of Information Act 2000 (FOIA).
4. Following an internal review, UoL wrote to Mr Dally on 11 May 2020 and again on 5 June 2020 upholding its original response.
5. On 6 August 2020, Mr Dally contacted the Information Commissioner ('the Commissioner') to complain about UoL's handling of his request in relation to Elements 4, 6 and 9.
6. Relevant extracts of these elements are:

**“Element 4:** *...please provide the names and contact details of any individuals or organisations from whom canine cadavers were received. Please provide a separate breakdown for each organisation or individual, and for each year [from 1st January 2013 to date. If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date...]*

**Element 6:** *... please confirm whether the dogs were euthanised by:*

- i) any employee or former employee of the University (whether or not they were employed by the University, when they euthanised the dogs).*
- ii) any consultant to, or former consultant to the University (whether or not they were employed by the University, when they euthanised the dogs).*
- iii) any individual who provides or has provided services to the University.*

*Please also confirm whether any of the individuals in (i), (ii) or (iii) above subsequently used the cadavers in connection with their employment at the University or with the provision of services to the University.*

### **Element 9:**

*Please provide full details of all ethics committee decisions since 1st January 2013 in relation to the supply of the cadavers. Please include details of any*

*submissions or applications made to the relevant committees, copies of any correspondence held in relation to the submissions or applications, copies of any notes taken during committee meetings and copies of the decisions made.*

*Please specifically confirm whether or not the ethics committees were made aware that the individual who euthanises the dogs is, or was, also employed by the University or engaged in the provision services to the University. Please also specifically confirm whether or not the supply of canine cadavers was approved on the basis that the dogs had been euthanised due to injury or ill health.*

*If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.”*

7. During the Commissioner’s investigation, UoL clarified that it was relying on s.12 FOIA to refuse to provide pre-2017 data in respect of **all** elements of the request.
8. The Commissioner considered the scope of her investigation to be the determination whether UoL is entitled to rely on s.43 and s.41 FOIA, and whether UoL holds information within the scope of Element 6 of the request.
9. On 2 June 2021, the Commissioner issued Decision Notice IC-49746-T1B7 upholding UoL’s application of the provisions of FOIA, including its balancing of the public interest in withholding certain information.

### ***Appeal to the Tribunal***

10. Mr Dally submitted a Notice of Appeal to the Tribunal on 29 June 2021.
11. Mr Dally’s lengthy grounds of appeal were submitted separately on 7 July 2021.
12. In summary, these grounds were:

#### **Re. Element 4 – identity of suppliers of cadavers:**

- (1) The information requested is already in the public domain;
- (2) The supply of cadavers would be unlikely to be reduced in the event that the identities of the organisations was disclosed;
- (3) No evidence that UoL would be exposed to civil claims or suffer commercial prejudice in the event that the supply of cadavers was reduced;
- (4) No harm to the commercial interests of the three supplier organisations in the event of disclosure of their identities;
- (5) There is public interest in disclosure;

#### **Re. Element 6 – current or former employees involved in dog euthanasia:**

- (6) The information is held by UoL;

(7) UoL did not apply s.12FOIA to this element of the request;

**Re. Element 9 – ethics committee decisions:**

(8) UoL did not apply s.12FOIA to this element of the request;

(9) Disclosure of the requested information would not constitute a breach of confidence; and

(10) Disclosure of the requested information would not cause commercial prejudice to UoL.

13. The Commissioner’s Response dated 25 August 2021 maintained the analysis set out in the Decision Notice.

14. The Tribunal convened an oral hearing which was held remotely using HMCTS’s Cloud Video Platform. Mr Dally appeared in person. The Commissioner was neither present nor represented.

15. At the hearing, Mr Dally conceded his appeal in relation to Element 6 of the request so his previous submissions in respect of that aspect are not set out in detail in this decision, nor were such submissions considered by the Panel.

***The Law***

***Section 1(1) FOIA: duty to disclose***

16. The duty of a public authority to disclose requested information is set out in s.1(1) FOIA:

*“Any person making a request for information to a public authority is entitled –*

*(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) If that is the case, to have that information communicated to him.’*

17. The exemptions to this duty are referred to in s.2(2) FOIA as follows:

*“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –*

*(a) the information is exempt information by virtue of a provision conferring absolute exemption, or*

*(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

**Section 12 FOIA: Exemption where cost of compliance exceeds appropriate limit**

18. Section 12 FOIA provides an exemption that –

*“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”*

**Section 16 FOIA: Duty to provide advice and assistance**

19. Section 16 FOIA provides that:

*“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”*

**Section 41 FOIA: Information provided in confidence**

20. Section 41 FOIA provides that information is exempt information if:

*“(a) it was obtained by the public authority from any other person..., and*

*(b) the disclosure of the information to the public...by the public authority holding it would constitute a breach of confidence actionable by that or any other person...”*

**Section 43 FOIA: Commercial interests**

21. Information is exempt from disclosure under s.43 FOIA if:

*“(2)...its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”*

***‘Qualified’ exemption***

22. The exemption in s.43(2) FOIA is qualified which means that a public authority may only withhold the information if the public interest balancing exercise required by s.2(2)(b) of FOIA (set out in paragraph 17 above) favours maintaining the exemption rather than disclosing the information.

***The powers of the Tribunal***

23. The powers of the Tribunal in determining this appeal are set out in s.58 FOIA, as follows:

*“(1) If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*

### ***The burden of proof***

24. The burden of proof rests with the appellant - in this case, Mr Dally - in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion.

### ***Evidence***

25. Before the hearing, both parties had submitted written evidence which was contained in the Open Bundle and 13 additional documents erroneously omitted from the Open Bundle and submitted by Mr Dally the day before the hearing. The Commissioner had also submitted a Closed Bundle. These bundles (and additional documents) are referred to on the front-sheet of this decision.

26. No further evidence was produced at the hearing but Mr Dally made a supplementary submission to provide further evidence and submissions two days after the hearing, namely on 25 November 2021. As the Tribunal Judge on the Panel, I considered Mr Dally’s submission that the Tribunal should accept such supplementary submissions and evidence by exercising its case management powers under Rule 5(3) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Consolidated version – as in effect from 21 July 2021). My findings are:

- (1) the powers under Rule 5 do not include the ability on the part of the Panel to consider post-hearing material nor any power to re-open the decision;
- (2) however, Rule 41 (Setting aside a decision which disposes of proceedings) enables the Tribunal to re-make a decision if (a) the Tribunal considers that it is in the interests of justice to do so; and (b) one or more of the conditions in Rule 41(2) are satisfied;
- (3) as a matter of fact a condition in paragraph Rule 41(2) was satisfied, namely that a document relating to the proceedings was not sent to the Tribunal at an appropriate time. The document – or rather documents – in question accompanied Mr Dally’s supplementary submissions;

(4) it is questionable whether Mr Dally has applied (in accordance with Rule 41(3)) for the decision to be set aside but bearing in mind that he is unrepresented and unfamiliar with the Tribunal's procedures, his supplementary submissions might arguably be regarded as fulfilling the requirements of Rule 41(3) or arguably falling under Rule 45 which gives the Tribunal power to treat an application as a different type of application;

(5) however, even if the conditions in Rule 41(2) and (3) are satisfied, in my judgment it would not be in the interests of justice to set aside the Panel's decision, or re-make its decision in order to take account of Mr Dally's supplementary submissions and evidence because:

- (a) all the additional materials provided by Mr Dally with his supplementary submissions pre-date the hearing and could have been submitted prior to or at the hearing itself;
- (b) despite Mr Dally's submission that he 'was under some time pressure towards the end of the hearing', he gave no indication of this at the hearing itself and in my view had sufficient time to make his oral submissions (which largely repeated submissions he had already made in writing); and
- (c) bearing in mind the overriding objective articulated in Rule 2 that the Tribunal deal with cases fairly and justly, it would be disproportionate to the importance of the case and the complexity of the issues to accept yet more material and submissions from Mr Dally which in any event largely enlarge upon or repeat his lengthy submissions already made orally or in writing.

27. Accordingly, Mr Dally's supplementary submissions dated 25 November 2021 and related materials were neither considered nor taken into account by the Panel.

28. However, before making its decision, the Panel carefully considered all the written evidence and submissions presented by the parties prior to the hearing as well as Mr Dally's oral submissions made at the hearing.

### *Submissions*

#### **Mr Dally's submissions**

29. In his written submissions, in summary Mr Dally put his case as follows:

##### **(1) Ground 1 – re. Element 4 – public domain**

- a) Some of the information requested is already in the public domain, at least in relation to Merseyside Dogs Home (MDH), Animal Wardens Ltd (AWL) and Manchester and Cheshire Dogs Home (M&CDH) which Mr Dally believes are suppliers of cadavers to UoL.
- b) Contrary to UoL's indication to the Commissioner, UoL did not provide to Mr Dally information that one of its three sources of dog cadavers had consented to its identity being disclosed. If the identity of this source

was not exempt information, this element of his complaint to the Commissioner should have been upheld.

- c) MDH confirms on its own website that it supplies dog cadavers to vet schools so disclosure of its identity by UoL would clearly not have the deterrent effect to which UoL refers. Also:
- i. MDH is owned and controlled by the two directors of AWL (a private company which contracts with local authorities to seize and kennel stray dogs on their behalf). Because of this relationship, unclaimed stray dogs transferred by AWL to MDH remain under AWL's 'paperwork' so if a dog is euthanised, it is recorded as having belonged to AWL rather than MDH.
  - ii. On its website, AWL makes no secret of the fact it supplies dog cadavers to universities for dissection purposes.
  - iii. Knowsley and Stockport Councils confirm in their Annual Reports for 2019-20 that AWL 'gift' the bodies of unclaimed dogs 'to an academic institute for anatomy and surgery teaching'. There is no indication that either Council or AWL considered this information to be commercially sensitive.
  - iv. UoL has published the fact that it received stray dogs from M&CDH – see the RCVS 2016 Report 'Setting the Standards' on UoL's website. Disclosure of M&CDH's identity is therefore not capable of having the deterrent effect to which UoL refers.
  - v. In the Decision Notice (para. 22), the Commissioner said that UoL argued that disclosure would be likely to prejudice its own commercial interests as well as those of the sources. UoL had never told Mr Dally this changed position.

**(2) Ground 2 – re. Element 4 – reduction of supply**

- a) In relation to the two organisations which have objected to disclosure of their identity, it is very unlikely they would cease to supply UoL because AWL and MDH have confirmed publicly that they supply cadavers to universities.

**(3) Ground 3 – re. Element 4 – commercial prejudice to UoL**

- a) UoL argues that it would be unable to access cadavers in the event of these two organisations ceasing to supply, and this would undermine its ability to put forward a unique 'offer' to its students. This is a change of position from UoL's original argument (that it would be exposed to civil claims from students) and was not notified to Mr Dally.
- b) UoL has presented no evidence of its 'unique' selling point. The Commissioner appears to have accepted UoL's claims at face value.
- i. UoL has not addressed the decline in supply of cadavers (from 300 in 2015 to 95 in 2020) yet if continuing supply is integral



to UoL's teaching model, one would expect to see contingency measures in place to address this.

- ii. However, UoL by its own admission is continuing its tuition with fewer cadavers than it previously suggested it needed, so it seems that the supply is not as integral to its teaching methods as UoL maintains.
- iii. It is not credible that UoL is reliant on voluntary arrangements to discharge its teaching obligations, especially given the downward trend in the availability of cadavers since 2016. The absence of any apparent contingency plan indicates UoL has exaggerated the impact of the reduction in supply of cadavers.
- iv. UoL seems mainly concerned with public association with organisations which euthanise healthy, rehomeable dogs and the subsequent effect on its reputation rather than commercial prejudice which properly falls within the scope of s.43(2) FOIA.

**(4) Ground 4 – re. Element 4 – commercial prejudice to suppliers**

- a) UoL says that two organisations would suffer commercial prejudice if their identity was disclosed, and they claim that *'the only cadavers ...provided were dogs that ... were unsuitable for re-homing because of injuries or illness'*. However, this claim was directly contradicted by evidence Mr Dally had provided. In the Decision Notice, the Commissioner accepted this claim at face value and said that Mr Dally's conflicting evidence was not relevant.
- b) The Commissioner relies on the fact that the organisations could suffer commercial prejudice because the information could be 'misunderstood' but that is not a legitimate basis for information being withheld under s. 43(2) FOIA.
- c) The organisation on whose letter UoL and the Commissioner rely does not state that it *would* withdraw from the arrangement in the event of disclosure, only that *'we would have to consider withdrawing...'*

**(5) Ground 5 – re. Element 4 – public interest in disclosure**

There is significant public interest in disclosure of the requested information because:

- a) MDH provides misleading information on its website about the number of dogs killed and sent to UoL (it says 20 in 2017 which is inconsistent with UoL's figure of 250).
- b) A veterinary surgeon who used to be employed by UoL until 2015 is believed to euthanise all the dogs supplied by Leigh Dogs & Cats Home (LD&CH) for which he was the vet, and MDH and AWL.

- c) There is a clear conflict of interest in an individual euthanising dogs also employed as a veterinary surgeon for UoL until 2015 and who may continue to have links to UoL.
- d) UoL appears to have previously provided misleading information about this apparent conflict of interest to the Commissioner when, in 2014, a similar FOIA request was made.
- e) Information which might cast doubt on whether the suppliers of cadavers were meeting UoL's ethical standards has been provided to UoL by Mr Dally but UoL responded that '*...this is speculation and not a point to be considered for internal review...*'
- f) The Charity Commission has issued regulatory advice to the trustees of MDH about the management and administration of MDH, including its relationship with AWL and its accounts. The Charity Commission is still investigating another formal complaint about the solicitation of donations.
- g) Enforcement action by the Charity Commission is of relevance to the public interest in disclosure.
- h) Statements from former staff and volunteers at MDH contradict information provided by UoL to the Commissioner in 2015 that only sick and injured dogs were euthanised and supplied to UoL.
- i) AWL's own website confirms that a proportion of unclaimed dogs are euthanised, not due to ill-health.
- j) The Commissioner did not address any of these concerns when considering the public interest test. She did not take into account that euthanasia of healthy dogs does not breach UoL's ethical policy, and that UoL does not take steps to corroborate the stated basis upon which dogs are killed by the supplier organisations.

**(6) Ground 8 – re. Element 9 – cost of compliance re. ethics committee**

- a) UoL did not qualify its response as limited to 2017 onwards (rather than from 2013) on the basis of s.12 FOIA.
- b) The Decision Notice explained that the Commissioner had not looked at UoL's application of s.12 FOIA because her investigation was otherwise by then concluded, and Mr Dally had not previously challenged the application of s.12 FOIA.
- c) The Commissioner's approach was erroneous because:
  - i. Conclusion of the rest of her investigation was not a valid ground for not investigating this aspect of the complaint;
  - ii. The Commissioner ought to have determined whether or not UoL had complied with s. 16 FOIA (duty to provide advice and assistance) in relation to this element of the request;

- iii. The Commissioner ought to have requested UoL to respond to the revised request for Ethics Committee approvals in 2013 and 2014; and
- iv. The Commissioner's approach that Mr Dally was free to make a refined request was unreasonable in the circumstances.

**(7) Ground 9 – re. Element 9 – breach of confidence**

- a) Mr Dally asked only for committee decisions (and related material), not the project applications themselves.
- b) UoL could have provided redacted copies of the project applications to withhold commercial or confidential information yet disclose information relating to cadaveric information.
- c) The public interest would strongly support disclosure of ethics committee approvals where projects using canine cadavers were conducted or supervised by the same vet who had euthanised the dogs. The public interest would be stronger still if the ethics committee had not been notified of this conflict of interest or otherwise misled such as wrongly informed of the basis on which the dogs were euthanised.

**(8) Ground 10 – re. Element 9 – commercial prejudice to UoL**

It is not accepted that the information about ethics committee decisions was commercially sensitive and therefore exempt from disclosure under s.43 FOIA. Even if it is applicable, there is a clear public interest in disclosure of such decisions.

**Commissioner's response to the Grounds of Appeal**

30. In her response dated 25 August 2021, the Commissioner explained that '*given the voluminous nature of the grounds and in accordance with the overriding objective [she] has where possible condensed the grounds and dealt with the substantive points therein*'. In summary, her response was as follows:

**Ground 1 – public domain**

- (1) The identity of AWL, one of the three sources, was provided to Mr Dally by an amended refusal notice from UoL dated 5 August 2021.
- (2) Though Mr Dally asserts that information about MDH is in the public domain, there is no specific confirmation that dog cadavers are provided by MDH to UoL. The information reportedly obtained from MDH's website was in 2018, two years before the current request during which time circumstances may have changed significantly.
- (3) A report including information about M&CDH was published on RCVS's website (there is no evidence that the report was published on UoL's website), and that report dates back to 2016, some four years before the current request.

## **Ground 2 – reduction of supply**

(4) Because one source was willing to disclose its identity does not mean that others should do the same, nor does it automatically rule out reliance on s.43(2) FOIA.

## **Ground 3 – commercial prejudice to UoL**

(5) It is not always necessary or possible to provide evidence of a particular position or argument and, as such, the Commissioner is usually able to rely on the submissions put forward by a public authority. If Mr Dally is correct that every other vet school offers dissection as part of its courses then this supports the engagement of s. 43(2) FOIA on the basis that if UoL were unable to offer such provision, it would suffer commercial prejudice by students choosing courses elsewhere.

(6) The apparent absence of contingency measures does not necessarily mean that UoL has not dealt with the reduction in supply of cadavers by other means.

(7) The Commissioner disputes the proposition that s. 43(2) FOIA cannot be engaged if the disclosure of requested information may cause reputational damage. In this case, if such reputational damage were to lead to a reduction in students and thus income, it may well lead to UoL suffering commercial prejudice.

## **Ground 4 – commercial prejudice to suppliers**

(8) The Commissioner does not accept Mr Dally's argument that the absence of any categorical confirmation of withdrawal is indicative of the absence of intention to withdraw.

(9) The Commissioner's position is that it is *usually* possible to avoid disclosed information being misunderstood by the relevant public authority setting the disclosure in context by, for example, releasing an accompanying statement. However, in this case, the Commissioner took the view that UoL would not be able to limit the further dissemination of the information nor ensure that any explanatory statement accompany any onward transmission of the disclosed material.

## **Ground 5 – public interest in disclosure**

(10) The Commissioner notes that all the arguments put forward by Mr Dally were included in his voluminous submissions in April 2021 which she considered before making her decision. She maintains that the public interest test favours maintaining the exemption for the reasons set out in the Decision Notice.

## **Ground 8 – cost of compliance re. ethics committee**

(11) UoL indicated, even if not by specific reference to numbered requests, its reliance on s.12 FOIA to pre-2017 material. Whilst UoL's refusal notice was not as clear as it could have been, it seems unfair to suggest that the issue came to light very late, particularly when the request itself said that any pre-2017 information could be excluded if it would exceed the costs limit to include it.

(12) The fact that the Commissioner's other enquiries were complete was not the only reason for not making a finding on s. 12 FOIA: the other reason was that Mr Dally had not attempted to claim that the cost of retrieving all pre-2017 information would not exceed the cost limit.

(13) As the Commissioner did not understand that s. 12 FOIA formed the basis of Mr Dally's complaint, it was reasonable for the Commissioner not to make a finding on s. 12 FOIA or s.16 FOIA (duty to provide advice and assistance).

(14) It was not unreasonable to suggest that Mr Dally submit a refined request, nor was the Commissioner under any formal obligation to pass on that refined request.

### **Ground 9 – breach of confidence**

(15) The request asked for 'details of any submissions or applications made to the relevant committees', not just committee decisions. Further, Mr Dally appears to accept that unpublished project applications may constitute confidential information.

(16) The Commissioner did consider during her investigation whether confidential information could have been redacted but still retaining information relating to ethics committee approval. However, she concluded – as set out in the Decision Notice (at paragraph 80) – that, having reviewed the withheld information, the Commissioner was not persuaded that this would be possible. Her reasoning was that '*...Once the details of the research had been removed (so as to remove the prospect of breaching confidence) the residual information would be devoid of meaning...*'

(17) Mr Dally argues that there is no actionable breach of confidence because '*...it is likely that [UoL] could put forward a public interest defence, in particular in relation to the cadavers of dogs which were euthanised by [UoL]'s own employee...*'. However, the Commissioner maintains the position she outlined at paragraphs 77-79 of her Decision Notice.

### **Ground 10 – commercial prejudice to UoL**

(18) In light of the Commissioner's finding that s.41 FOIA was engaged in respect of the ethics committee decisions, she did not go on to consider or make a finding as to whether s. 43 FOIA was also engaged in relation to that information.

(19) Should the Tribunal reach a different conclusion on s. 41 FOIA, it will go on to consider s.43 FOIA in accordance with the Upper Tribunal decision in the *Commissioner v. Malnick and The Advisory Committee on Business Appointments [2018] UKUT 72 (AAC)*.

### **General**

(20) Mr Dally complains that the Commissioner accepted at face value, and/or failed to seek evidence of some of the arguments put forward by UoL. He also argues that the Decision Notice did not refer to all his arguments and/or fully explain why UoL's submissions had been preferred over his own.

(21) The Commissioner points to the persuasive authorities of the First-tier Tribunal decisions in *Herbert-Maynard v. the Commissioner and University of Manchester (EA/2019/0230)* where it was said that the Tribunal’s ‘... role does not involve addressing detailed criticisms of the Commissioner’s investigation... FOIA does not impose any specific procedural duties...’ and *William Stevenson v. the Commissioner (EA/2015/0017)* where the Tribunal said that an ‘... appeal is against the outcome of the Decision Notice, not the way in which the Commissioner has reached it nor the way in which he has expressed his reasons...’

### **Mr Dally’s further submissions**

31. In his response to the Commissioner’s reply (dated 29 September 2021) and in his oral submissions at the hearing (on 23 November 2021), Mr Dally added:

#### **AWL**

- (1) UoL has now disclosed AWL as one of its three suppliers but the information was initially withheld and neither UoL nor the Commissioner advised him that UoL had reversed its position as the Commissioner had indicated UoL would.
- (2) The Commissioner’s position about the correct application of the exemption is that the issue is now academic. Mr Dally disputes this and asks the Tribunal to determine whether or not the Commissioner was correct to uphold UoL’s application of the s.43(2) exemption in relation to AWL.
- (3) The late concession by UoL in disclosing the identity of AWL is supportive of his appeal because:
  - (a) The credibility of UoL’s submissions is undermined because UoL has clearly provided misleading information e.g. that its suppliers were ‘animal rescue centres’ when AWL is not such but a private company providing stray dog seizure and kennelling services;
  - (b) AWL is the supplier of the majority of cadavers, so any prejudicial effect caused by withdrawal by the other two sources would be significantly mitigated by the ongoing supply by AWL.

#### **Ground 1 – public domain**

- (4) The Commissioner states that it is not clear whether RCVS’s ‘Setting Veterinary Standards’ was published on UoL’s website – but even if it was not, its publication on RCVS’ website means it is a public document which remains freely available.
- (5) If the supply of cadavers by M&CDH has been in the public domain since 2016, the Commissioner must concede that neither M&CDH nor UoL are likely to suffer any prejudice were the charity’s identity to be disclosed.

## **Ground 2 – reduction of supply**

(6) There is no evidence that UoL consulted Sources 1 and 3 at the time of the request yet ICO guidance says there must be evidence of commercial prejudice or likely prejudice, not just speculation. It cannot be inferred that Sources 1 and 3 objected to disclosure of their identity – let alone on grounds of commercial prejudice – if they were not asked about this.

(7) UoL's reliance on frozen specimens as a contingency measure is significant because UoL has either been relying heavily on frozen specimens since 2017 (when the supply of cadavers fell below UoL's optimal number of 480 cadavers per annum) or it is not as reliant upon the use of canine cadavers as claimed.

(8) UoL refers twice to its provider in the singular. If UoL has only one provider now, then there is no case for withholding the identities of the other two.

## **Ground 3 – commercial prejudice to UoL**

(9) The Commissioner states that s.43(2) FOIA could be engaged if reputational damage in turn led to a reduction in income – but it should not be open to the Commissioner to change the basis upon which a stated exemption is said to apply.

(10) If UoL is seriously concerned about commercial prejudice should the requested information be disclosed, why is it not a party to these proceedings?

(11) UoL's claim that its 'unique offer' to students would be harmed should the supply of cadavers reduce does not stand up to scrutiny. All but one of the other eight vet schools in the UK use dog cadavers so this is not a distinctive feature of UoL's teaching. RCVS's report (mentioned at paragraph 29(1)(c)(iv) above) indicates that there is a large number of other sources and models for teaching.

(12) The absence of a contingency plan, and lack of urgent action to address the continuing trend of declining cadaver numbers, shows that UoL's claims of commercial prejudice and dependence on the suppliers of cadavers are contrived.

(13) Other vet schools use other suppliers, such as members of the public donating dead pets. This is both transparent and ethical because the owners consent to such use of the cadavers.

## **Ground 4 – commercial prejudice to suppliers**

(14) The Commissioner has not explained how the commercial interests of Source 3, which supplied few cadavers in 2018 and 2019, and none in 2020, would be prejudiced if their identity were to be disclosed.

(15) No evidence has been adduced that dog cadavers are clinical waste. The Commissioner appears to have accepted this at face value. Even if true, at least some dog homes have their own incinerators.

(16) The Commissioner characterised as 'allegations' all Mr Dally's factual evidence that UoL's ethical standards policy does not preclude the euthanasia of healthy dogs. However, UoL has previously informed the Commissioner it only

sources cadavers of dogs which had to be euthanised due to injury or ill health. Now, inconsistently with its previous position, UoL says it only accepts cadavers of dogs ‘lawfully killed’ and does not regularly audit its suppliers to ensure they comply with their own policies.

#### **Ground 8 – cost of compliance re. ethics committee**

(17) Had Mr Dally known that UoL was applying s.12 to this part of his request (and thus was providing information only from 2017 onwards), he would have refined his request to January 2013 to 2015, compliance with which would not have exceeded the statutory cost limit.

#### **Ground 9 – breach of confidence**

(18) If, as UoL claims, it would stop using any source of cadavers which does not meet its ethical standards, how can disclosure of its ethical committee’s approvals constitute breach of confidence? Mr Dally is interested in the stated basis for which cadavers are used in research yet the Commissioner has said that redaction of applications to the committee is not possible. How can the Commissioner decide that when she has not reviewed all the materials by only samples?

#### **General**

(19) Though Mr Dally accepts that the role of the Tribunal is not to address detailed criticisms of the Commissioner’s investigation, it is appropriate to do so where the Commissioner has expressly adopted many of those findings on appeal.

### ***Discussion and reasons***

#### ***Scope of the Panel’s task***

32. The Panel concluded it was neither required nor empowered to resolve many of the issues raised in this case, only those necessary to enable it to fulfil its responsibility under s.58 FOIA. The Panel therefore did not address points raised about, for example, the procedures followed by the Commissioner (or indeed UoL when considering the request for information) such as notifying or not Mr Dally of changes in position; nor did the Panel consider, for example, the Commissioner’s alleged failure to pursue possible lines of enquiry or alleged absence of reasons for certain aspects of her decision.

33. In short, the Panel’s responsibility is to assess the *outcome* of the Decision Notice and, if it finds that the Decision Notice was either wrong in law or that the Commissioner ought to have exercised her discretion differently, then the Tribunal can substitute its own decision notice to order the disclosure of information previously withheld (or vice versa).

34. In considering the outcome of the Decision Notice in the present case, the questions the Panel asked itself were:



1. Did the Commissioner make an error of law in finding that s. 43(2) FOIA (Commercial interests) was engaged in respect of Element 4 of the request (details of organisations from whom canine cadavers were received by UoL)?
2. Even if not, did the Commissioner wrongly exercise her discretion in deciding that the public interest favoured withholding information in relation to Element 4 rather than disclosing it?
3. In relation to Element 9 (details of all ethics committee decisions in relation to the supply of the cadavers), did the Commissioner make an error of law in:
  - A. not considering whether s. 12 (cost of compliance) and/or s. 16 (duty to provide advice and assistance) was engaged; and/or
  - B. concluding that s. 41 (Information provided in confidence) was engaged?

35. Taking each of these issues in turn:

### **1. Engagement of s. 43(2) FOIA re. disclosure of suppliers identities**

36. The Panel first made findings of fact, based on the evidence and submissions presented, that the information requested by Element 4 would be likely to prejudice the interests of the suppliers and UoL. Our reasons are as follows:

#### ***Prejudice to commercial interests of suppliers***

(1) According to the First-tier Tribunal decision in *Hogan v Information Commissioner [2011] 1 Infor LR 588* (adopting an approach since approved by the Court of Appeal in *DWP v Information Commissioner [2016] EWCA Civ 785*):

(a) ‘...An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, “real, actual or of substance” (*Hansard HL, Vol. 162, April 20, 2000, col. 827*). If the public authority is unable to discharge this burden satisfactorily, reliance on ‘prejudice’ should be rejected. There is therefore effectively a *de minimis* threshold which must be met...’ (at paragraph 30); and

(b) ‘... A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner (EA/2005/0005)* interpreted the phrase “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk...’ (at paragraph 34).

(2) Further, the Panel notes the Commissioner’s published guidance on prejudice to commercial interests. The guidance states that ‘commercial interests’

usually relates to profit but could also cover costs or simply remaining solvent. The meaning of ‘prejudice’ is harm to those interests.

(3) Mr Dally argues that the Commissioner made an error of law in the Decision Notice by finding that s. 43(2) FOIA applied to Source 2. UoL has since disclosed to Mr Dally that Source 2 is AWL. The Commissioner says that, now that UoL has identified AWL, the issue whether or not s.43(2) FOIA was correctly applied is academic. Mr Dally disagrees. In the Panel’s judgment:

(a) to the extent that any amendment to the Decision Notice on this issue would in practice achieve no better result than disclosure of the information Mr Dally has already received, we agree with the Commissioner; and

(b) we also consider that upholding Mr Dally’s appeal on this point would result in nothing more than disclosure of the information which he has since received direct from UoL. In accordance with the overriding objective of dealing with the case fairly and justly, including proportionately and avoiding unnecessary formality, we do not consider it fruitful to pursue the question whether the Decision Notice was correct in upholding engagement of s. 43(2) when, as a practical matter, UoL has since disclosed to Mr Dally the information sought.

(4) As regards Sources 1 and 3 (both pseudonymised in UoL’s amended refusal), we have considered evidence from the sources and UoL in the Closed Bundle (pages 1-10) and included in part in redacted form in the Open Bundle (pages 375-380). This evidence shows that, as cited in the Decision Notice, the dogs whose cadavers are donated by the suppliers free of charge to UoL would have been destroyed anyway so the relationship with UoL is mutually beneficial: UoL’s students benefit from having real cadavers to work with, and the suppliers save the costs of disposing of cadavers which they would otherwise treat as clinical waste. Consequently, the provision of cadavers to UoL enables suppliers to use more of their limited resources for supporting the welfare of dogs and at the same time UoL obtains a low cost supply of material as a key part of its educational offer to students.

(5) The evidence also shows that, were the requested information to become publicly available, the suppliers ‘*would have to consider withdrawing from the arrangement in an attempt to limit any loss and protect our reputation*’. The evidence goes on to demonstrate that were the information to be disclosed, it would be likely to have a significant and lasting impact on the sources income.

(6) Mr Dally raises two challenges to this evidence:

(a) whether damage to reputation comprises ‘commercial interests’. In this regard, the Panel considers that reputational damage is included in the concept of prejudice to commercial interests - especially when, as in this case, it would likely lead to a reduction in income for suppliers. The Panel notes that the Commissioner’s guidance on commercial interests explicitly states that disclosure of information may cause unwarranted reputational

damage and that where this would clearly be disproportionate compared with the reasons favouring disclosure, there may be a public interest in withholding the information; and

(b) Mr Dally questions whether the sources would really withdraw from supplying UoL given that the current arrangement is in the public domain and thus, he argues, it can be inferred they are 'happy' for their identity to be disclosed. Mr Dally relies on the report published on RCVS' website mentioned at paragraph 29(1)(c)(iv) above. However, the Panel notes that this report is dated 2016, and covers information about 'necropsies' at UoL up until 2014, three years before the earliest year for which UoL has provided information and six years before the information request was made. The Panel considers there is no basis for assuming that the suppliers mentioned in that report are the same as those for 2017 onwards nor that such suppliers were even aware of such report prior to these proceedings. The Panel therefore considers that these factors, coupled with the historical nature of the data, greatly reduce the weight of this evidence, and the Panel rejects the inference for which Mr Dally argues.

(7) Mr Dally has not challenged that the current arrangement between UoL and its suppliers is mutually beneficial in the manner described in paragraph (4) above, nor has he challenged that disclosure of the information would likely have a significant impact on the suppliers income.

(8) In all these circumstances, the Panel is satisfied that the sources evidence meets the threshold that disclosure of the information '*would be likely* to prejudice commercial interests' because:

(a) the sources would likely withdraw from the arrangement for reputational reasons;

(b) the risk of prejudice is both real and significant, not merely hypothetical or remote because it would likely affect both the sources income and lead to extra costs in having to pay for the disposal of cadavers; and

(c) the evidence demonstrates a link between the specific information sought (namely the sources identity) and the prejudice claimed (namely damage to their reputation and loss of income).

(9) Having found that the evidence proves as a matter of fact that disclosure of the information would likely prejudice the commercial interests of sources, we find no error of law in the Commissioner's conclusion that s.43(2) FOIA is engaged.

(10) As we find that s.43(2) FOIA is engaged by reason of likely prejudice to the commercial interests of UoL's suppliers, we consider there is no need for us to go on to consider whether UoL itself would also likely suffer prejudice to its commercial interests. However, for completeness, the Panel did consider this issue.

***Prejudice to UoL's commercial interests***

(11) As cited in the Decision Notice, UoL states that it benefits from the arrangement with its suppliers by collecting cadavers that would otherwise be disposed of as clinical waste and thus UoL obtains a valuable yet low-cost teaching resource which prepares its students to understand anatomy and competently perform surgery.

(12) UoL also states that it is the only veterinary school of the eight in the UK which sources cadavers in the way UoL does, and that disclosure of the information sought would risk damaging the close relationship and strategic partnership between the parties and thus be detrimental to the current benefits obtained by both parties as well as UoL students.

(13) While UoL uses other teaching methods too, such as use of models and simulators, it believes that the most realistic – and therefore best – way of teaching anatomy and surgery is through the use of cadavers.

(14) The Panel notes that the Commissioner's guidance on commercial interests cites as an example a First-tier Tribunal decision involving a university, in summary:

*University of Central Lancashire (UCLAN) v. The Commissioner and Professor Colquhoun EA/2009/0034* found that the selling of courses was a commercial activity which enabled UCLAN to remain solvent. The Tribunal considered that a body which depends on student fees to remain solvent has a commercial interest in maintaining the assets upon which the recruitment of students depends. The Tribunal accepted that UCLAN was operating within a competitive environment, in which other institutions of higher education were also seeking to sell similar products (undergraduate degree courses) to potential students, hence UCLAN's interests in teaching materials for its degree courses were commercial interests.

(15) The Panel considers that, whether or not UoL's use of canine cadavers is 'unique' amongst vet schools, the evidence before us shows that such use is an important part of UoL's teaching method. In the competitive higher education environment where other institutions also strive to make their courses as beneficial and attractive to students as possible, the Panel considers that UoL's current arrangements with suppliers and consequent offer to students comprise 'commercial interests' which would likely be harmed by disruption to its low-cost supply of canine cadavers and consequently adversely affect its teaching methods.

(16) The Panel does not accept Mr Dally's submissions that UoL's evidence is undermined by:

- (a) the absence of contingency measures by UoL to address the declining supply in recent years;
- (b) UoL's use of fewer cadavers now than in the past;
- (c) UoL's usage of alternative teaching tools;

(d) UoL's reliance on this free-of-charge ('voluntary') arrangement;  
and/or

(e) UoL's main concern being the effect on its reputation of association  
with organisations which euthanise healthy, rehomeable dogs

because these submissions are either unsupported by the evidence we have seen  
or are otherwise speculative.

(17) The Panel notes that even if, as Mr Dally suggests, UoL were to seek out  
alternative sources of cadavers, or were further to adjust its teaching methods by  
relying more extensively on substitute materials, the former would inevitably  
require time, effort and therefore cost to resource and the latter would -  
accordingly to UoL - provide an inferior learning experience for its students and  
hence risk the loss of student fee income.

(18) Overall, weighing up the evidence on this issue the Panel is satisfied that,  
as a matter of fact, disclosure of the information would more likely than not  
prejudice the commercial interests of UoL.

## **2. Balancing the public interest**

37. Having found that the commercial interests of the sources and UoL would likely  
be prejudiced by disclosure of the sources identity (because they would likely  
withdraw as suppliers to UoL), the Panel then considered whether – as Mr Dally  
submits – the Commissioner wrongly exercised her discretion in concluding that the  
public interest favoured withholding the information rather than disclosing it.

38. The Panel notes that where, as in this case, it is found that commercial interests  
'would be likely' to be prejudiced, the public interest in withholding the information  
is weaker than if such interests 'would be' prejudiced.

39. The Panel also notes that factors in favour of disclosure include the strong public  
interest in openness and transparency about the use of public funds and (as UoL  
submits) about the quality and type of education that UoL provides to clinical  
students. A further factor in support of disclosure is access to information which helps  
protect the public from dubious practices. In addition, Mr Dally submits that the  
Commissioner should have taken into account the other significant public interest  
factors in favour of disclosure which he had raised (as summarised in paragraph 29(5)  
on pages 9 and 10 above).

40. Mr Dally submits (both in paragraphs 29(5)(e) and (h) on page 10 above and  
orally at the hearing) that he has evidence which contradicts suppliers' claims that  
*'the only cadavers...provided were unsuitable for re-homing because of injuries and  
illness'* and implies that it would be in the public interest to expose this contradiction.  
However, the Panel notes that this allegedly contradictory evidence relates to specific  
dog welfare organisations which is relevant only if, as Mr Dally seems to presume,  
those organisations supply UoL. Moreover, the evidence adduced largely comprises  
six written 'witness' statements (at pages 353 to 374 of the Open Bundle) purportedly  
from former staff and volunteers at one specific organisation. Some of these

statements relate to periods prior to 2017 which is the earliest year for which UoL provided information. None of the statements is by a named individual – even pseudonymously – nor is any statement dated, signed or bear other typical hallmarks of witness statements. Other evidence comprises extracts from social media of unknown provenance, date or reliability (at pages 381-387 of the Open Bundle). The Panel attributes very little evidential weight to any of this evidence.

41. Several of Mr Dally’s submissions on the public interest in disclosure:

(a) are about concerns of poor practice or misleading information by specific dog welfare organisations;

(b) relate to periods of time prior to 2017;

(c) raise issues (such as internal management and administration, or the financial accounts of presumed suppliers) which have been pursued by third parties such as the Charity Commission and local authorities; and/or

(d) refer to incomplete investigation into complaints.

42. The Panel gives very limited weight to such submissions because:

(a) it is presumed, rather than evidenced, that these specific organisations are UoL’s suppliers (submissions (5)(a), (b) and (d) on pages 9 and 10 above):

(b) UoL provided information only from 2017 onwards so events prior that time are of limited or no relevance to this appeal (submissions (5)(c) and (d) above);

(c) the management, administration and accounting issues raised are of only tenuous relevance to the public interest in this context (submissions (5)(f) and (g) above); and/or

(d) such investigations of complaints are apparently ongoing rather than substantiated (submission (5)(f) above).

43. The remainder of Mr Dally’s submissions – as summarised in paragraphs (5)(e), (i) and (j) on page 10 above – appear to criticise UoL’s ethical policy and suggests that UoL should ‘corroborate’ or ‘audit’ its suppliers’ compliance with their own policies such as those relating to the euthanasia of dogs. The Panel does not consider that either of these factors are relevant to the public interest balancing exercise in this context, nor that it is fair or reasonable to expect UoL to police suppliers’ compliance with their respective internal policies, especially since UoL states that it has selected such suppliers on the basis that they are reputable. The Panel observes that some supplier organisations are also regulated by statutory bodies such as the Charity Commission and the Registrar of Companies.

44. In favour of the public interest in withholding the information sought, UoL cites:

- (a) the likely cost to UoL of its suppliers of dog cadavers, and deprivation of a unique selling point for its veterinary school;
- (b) the likely termination of its current arrangements with its suppliers;
- (c) commercial harm to both UoL and its suppliers.

45. UoL also stresses that its sources do not euthanise healthy dogs in order to provide cadavers, and during the hearing Mr Dally said that he had never suggested this. UoL submits that the cadavers it receives are of dogs that would have been destroyed irrespective of UoL's relationship with its suppliers. Consequently, no dogs are euthanised as a result of the arrangement between UoL and its suppliers: UoL merely relieves suppliers of the burden and cost of disposing of the cadavers and in return obtains valuable teaching and research materials for its students. However, UoL and the suppliers state that, despite this, some members of the public might stop their financial donations to dog welfare organisations if they knew or suspected that cadavers were being supplied to universities.

46. The Commissioner concluded that the public interest factors favouring disclosure were insufficiently compelling to outweigh or match those in favour of withholding the information. She therefore found that the balance of the public interest lay in maintaining the exemption in s.43(2) FOIA.

47. The Panel considers that an additional public factor in favour of withholding information is that the continued financial viability of the suppliers – who perform a valuable role in dealing with stray dogs – could be adversely affected by any reduction in financial donations by the public.

48. The Panel finds no basis on which to conclude that the Commissioner exercised her discretion wrongly when balancing the competing public interests. In short, Mr Dally has not satisfied us that the Commissioner should have exercised her discretion differently. On the contrary, we agree with the Commissioner that in all the circumstances of the case, on balance the public interest favours the cumulative weight which should be attributed to protecting the commercial interests of both UoL and its suppliers.

### **3. Ethics Committee decisions**

#### **A. Application of section 12 FOIA (costs of compliance) and section 16 FOIA (duty to provide advice and assistance)**

49. Mr Dally complains that the Commissioner did not consider whether UoL correctly applied s. 12 FOIA to Element 9 of his request about Ethics Committee decisions.

50. Mr Dally's request for information was made on 2 March 2020 (in a form slightly revised from his original request the preceding day) and UoL responded to such request on 30 March 2020.

51. UoL's response stated in bold text, above its reply to the first element of the request:

***'Section 12(1) FOIA states that a public authority is not obliged to respond to a request for information if it is estimated that the cost of complying with that request would exceed the "appropriate limit". The "appropriate limit" for universities set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004 is 18 hours and takes into account the activities involved in determining whether the requested information is held, locating, retrieving and extracting the information from the record containing it. We estimate that providing the information requested from January 2013 would exceed time limitation within the Act. However, within the limitations, we can provide information from 2017.'***

52. UoL's response to Element 9 began:

*'Nine project applications submitted to the Veterinary Research Ethics Committee (VREC) included research work using canine cadavers between 1<sup>st</sup> Jan 2017 to 24<sup>th</sup> Feb 2020 (emphasis added).'*

53. It appears that Mr Dally did not raise any issue about s.12 FOIA in respect of Element 9 when on 8 April 2020 he sought an internal review by UoL of its responses to his information request.

54. However, Mr Dally sought clarification of UoL's reliance on s.12 FOIA in July 2020 and again in September 2020 but received no reply.

55. It appears that the issue was not raised with UoL again until the Commissioner's caseworker wrote to UoL on 29 April 2021 (page 413, Open Bundle) saying that Mr Dally *'has noted that your response to Element 9 of his request has only provided data going back as far as 2017 – however this element sought data going back to 2013.'*

56. The Panel observes, however, that Element 9 of Mr Dally's request ended: *'If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.'*

57. In response to the Commissioner's caseworker on 14 May 2021 (pages 415-418, Open Bundle), UoL pointed out the wording of Mr Dally's request set out at paragraph 56 above and also the emboldened text set out in paragraph 51 above. UoL added, *'We understand that it may not have been clear that this exemption [namely s.12 FOIA] applied to the full request'* and went on to provide more detailed reasons for exceeding the time limit and the reason why its response took the form it did.

58. The caseworker informed Mr Dally of this three days later, on 17 May 2021 (page 419, Open Bundle).

59. Mr Dally responded to the caseworker on 24 May 2021 (page 421, Open Bundle) that *'it is very frustrating that [UoL] is only now stating that it has applied s. 12*



*FOIA to this element of my request*’ and stating that he would like to refine this aspect of his request to copies of applications to the Ethics Committee for the years 2013-2014. He added ‘*it seems unlikely that compliance with this aspect of my request will exceed the statutory time limit.*’

60. In the Decision Notice issued a few days later (on 2 June 2021), the Commissioner stated that she had decided not to look at UoL’s application of s.12 FOIA, given that she had concluded the remaining elements of her investigation and that Mr Dally had not attempted to claim that the cost of retrieving all pre-2017 information would not exceed the cost limit. She pointed out that Mr Dally was free to make a refined request if he wished to do so (page 5, Open Bundle).

61. Given the chronology and other circumstances set out above, the Panel does not consider that the Commissioner made an error of law in declining to consider UoL’s application of s. 12 FOIA to Element 9 of the request, nor that she should have exercised her discretion differently.

62. For similar reasons, and in the absence of any substantive submissions by Mr Dally – beyond the bald statement in his grounds of appeal that the Commissioner ought to have determined whether or not UoL had complied with s.16 FOIA in relation to that element of his request – the Panel does not consider that the Commissioner made an error of law in not considering this issue, nor that she should have exercised her discretion differently in that respect.

#### **B. Application of section 41 FOIA (Breach of confidence)**

63. Mr Dally appears not to challenge the Commissioner’s Decision Notice to the extent it sets out the elements of the ‘breach of confidence’ exemption in s.41 FOIA namely that:

- (a) the authority must have obtained the information from another person;
- (b) its disclosure must constitute a breach of confidence;
- (c) a legal person must be able to bring an action for the breach of confidence to court; and
- (d) the court action must be likely to succeed.

64. Mr Dally also appears not to challenge the Commissioner’s application of the three-step test set out in *Coco v. A N Clark (Engineers) Limited [1968] FSR 415* in determining whether a breach of confidence would occur, namely:

- (a) the information must have the necessary quality of confidence;
- (b) it must have been imparted in circumstances importing an obligation of confidence; and

(c) there must have been an unauthorised use of the information to the detriment of the confider.

65. Mr Dally does not apparently dispute the Commissioner's analysis in the Decision Notice that the information withheld in respect of Element 9 comprises nine applications made to UoL's Ethics Committee:

(a) by students and researchers in a private capacity (i.e. not as employees of UoL) and thus by 'another person'; and

(b) those persons would be able (at least in theory) to bring an action for a breach of confidence to court; and

(c) the evidence shows that the three-step test in Coco is met because:

i. each application represents a lengthy programme of work which may eventually prove lucrative and/or lead to breakthroughs in alleviating animal suffering – which is clearly far from trivial and is not in the public domain;

ii. the process of ethics committee approval implies a duty of confidence so that researchers can be open and honest on the understanding that any details will normally be kept confidential until the research is complete; and

iii. consequently disclosure of the information would be unauthorised by the applicants because to put it in the public domain would cause them detriment by making the research proposals easier to steal and undermine their commercial viability.

(d) as a result, the breach of confidence would be actionable.

66. The Panel adopts the Commissioner's summary of the law and her analysis set out above.

67. The Panel notes, however, that Mr Dally challenges the application of s.41 FOIA to Element 9 of his request on the basis that such actionable breach would likely not succeed because, he says, UoL could rely on a '*public interest defence*'. He submits there is '*a strong public interest in disclosure of the relevant information*', particularly in relation to the period from 1 January 2013 until 2015 when, he says, UoL's own veterinary surgeon was also employed as a vet by one of the supplier organisations.

68. In the Panel's judgement, this last point can be dismissed because the information which UoL has provided in response to Element 9 dates back only to 1 January 2017, not any earlier period. Mr Dally does not otherwise explain the nature of the '*strong public interest in disclosure*' or '*public interest defence*' for which he argues. The Decision Notice says the Commissioner is unpersuaded that such an interest or defence would be sufficient successfully to resist a breach of confidence

action because disclosure of the withheld information would have disproportionate impact.

69. In the Panel's view, Mr Dally's arguments appear to be based on his assumption that applications to UoL's Ethics Committee would be different from any actual project applications (which he accepts in his Grounds of Appeal may constitute confidential information if the projects have not been published).

70. On the basis of this assumption, Mr Dally does not accept that it would be impossible for UoL to provide him with suitably redacted copies of the relevant information.

71. Having reviewed the withheld material in the Closed Bundle, the Panel is of the firm view that Mr Dally's assumption is incorrect. As the Commissioner explains in the Decision Notice, particularly at paragraphs 78 to 80, disclosure of the applications submitted to UoL's Ethics Committee would reveal very little about the issues in which Mr Dally is interested, yet would disclose a considerable amount of confidential information about the research projects themselves. Further, we agree with the Commissioner's conclusion that, once all confidential details of the research had been removed from the copy applications so as to remove the prospect of breaching confidence, the remaining information would be meaningless. Consequently, redaction of the copy applications would serve no useful purpose, nor would it provide the information sought.

72. For these reasons, the Panel does not consider that the Commissioner made any error of law or wrongly exercised her discretion in deciding that s.41 FOIA was engaged in respect of this element of the request and that UoL had correctly applied that exemption to the information sought.

73. In view of the Panel's finding that the exemption in s.41 FOIA is engaged, the Panel did not go on to consider whether s. 43 FOIA was also engaged in respect of this Element of the request.

### ***Conclusion***

74. For the above reasons, the Panel's answer to each of the questions posed in paragraph 34 above is 'no': we find the Commissioner made no error of law in the Decision Notice nor wrongly exercised her discretion in reaching her decision.

75. Accordingly, we uphold the Commissioner's Decision Notice and dismiss the appeal.

**(Signed)**

**ALEXANDRA MARKS CBE**  
**(sitting as a First-tier Tribunal Judge)**

**DATE: 22 December 2021**

Promulgated: 22 December 2021

## APPENDIX A

### **Request for Information dated 2 March 2021 (with element 7 from the Request for Information dated 1 March 2021 clarified by the requester)**

*“Please can you provide me with the following information. Please note that this request is an amendment of my request dated 1st March 2020, as I have sought to clarify the information requested at Question 7.*

*[1] Please provide copies of all information held by the University relating to the supply of canine cadavers from 1st January 2013 to date. If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.*

*[2] Please confirm specifically the number of canine cadavers received from local authorities, animal rescue centres, animal warden services or any individuals, companies or organisations dealing directly or indirectly with dogs, between 1st January 2018 and 31st December 2018. If more than one organisation or individual provided you with the cadavers, please provide a separate breakdown for each organisation and individual.*

*[3] Please confirm specifically the total number of canine cadavers received from local authorities, animal rescue centres, animal warden services or any individuals, companies or organisations dealing directly or indirectly with dogs, between 1st January 2019 and 31st December 2019. If more than one organisation or individual provided you with the cadavers, please provide a separate breakdown for each organisation and individual.*

*[4] In relation to questions (1), (2) and (3), please provide the names and contact details of any individuals or organisations from whom canine cadavers were received. Please provide a separate breakdown for each organisation or individual, and for each year. ...*

*[5] In relation to questions (1), (2) and (3), please confirm what procedures were and are in place to ensure that each canine cadaver gifted had been euthanised due to illness or injury? ...*

*[6] In relation to questions (1), (2) and (3), please confirm whether the dogs were euthanised by:*

- i) any employee or former employee of the University (whether or not they were employed by the University, when they euthanised the dogs).*
- ii) any consultant to, or former consultant to the University (whether or not they were employed by the University, when they euthanised the dogs).*
- iii) any individual who provides, or has provided services to the University.*

*Please also confirm whether any of the individuals in (i), (ii) or (iii) above subsequently used the cadavers in connection with their employment at the University or with the provision of services to the University.*

*[7] In relation to questions (1), (2) and (3) please confirm the following.*

*i) Has the University made any contribution towards the cost of euthanising the dogs, transporting the cadavers following euthanasia, or disposal of the cadavers.*

*ii) Has the University provided the services (paid or unpaid) of any veterinary surgeons or trainees or students or any other individuals to the individuals, organisations or companies which supply the cadavers.*

*iii) Has the University made any payments, directly or indirectly, to any individuals, organisations or companies, which collect, transport or deliver the cadavers.*

*iv) Has any individual or organisation made payments on the University's behalf for the collection, transport or delivery of the canine cadavers.*

*If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.*

*[8] Please confirm whether, from 1st January 2013 to date, the University has made any monetary donations, or donations in kind (for example of goods or services) to, or carried out any fundraising activity for:*

*i) [Organisation 1] or any of its employees or directors*

*ii) [Organisation 2] or any of its trustees, volunteers or employees*

*iii) Any other individual, organisation or company from which the University sources canine cadavers, or any employee, volunteer, director of, or contractor to those individuals or organisations.*

*In the event that any such donations were made or any such fundraising activity was carried out, please provide full details for each calendar year, including the nature of the donations and the amount of money raised for each organisation and / or individual.*

*If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.*

*[9] Please provide full details of all ethics committee decisions since 1st January 2013 in relation to the supply of the cadavers. Please include details of any submissions or applications made to the relevant committees, copies of any correspondence held in relation to the submissions or applications, copies of any notes taken during committee meetings and copies of the decisions made.*

*Please specifically confirm whether or not the ethics committees were made aware that the individual who euthanises the dogs is, or was, also employed by the*

*University or engaged in the provision services to the University. Please also specifically confirm whether or not the supply of canine cadavers was approved on the basis that the dogs had been euthanised due to injury or ill health.*

*If the cost of compliance with this request exceeds the statutory limit, please provide the relevant information from 1st January 2017 to date.”*