# Freedom of Information and Animal Experiments: A Case Study

David Thomas, Legal Consultant to Cruelty Free International (CFI)

## Introduction

Animal experiments in the UK are enmeshed in secrecy. Animal researchers increasingly talk about accepting the need for greater transparency, with many institutions signing up to a Concordat on Openness. [1] However, my experience is that universities and other public bodies conducting animal experiments often resist requests under the Freedom of Information Act 2000 (FOIA) for particular information.

Reliance on FOIA exemptions can be spurious. It is hard to resist the conclusion that many researchers confuse transparency with propaganda: they prefer to tell the public about what they see as the value of their animal experiments, and how well their animals are allegedly looked after, than subject what they do to proper scrutiny. A few years ago, Newcastle University spent an astonishing £250,000 in legal fees resisting, ultimately unsuccessfully, a Cruelty Free International (CFI) [2] request for information about controversial neuroscience research on macaques. [3]

Section 24 Animals (Scientific Procedures) Act 1986 (ASPA) [4] then provides a real obstacle to openness about how the Home Office regulates animal research. The provision prohibits officials and ministers from disclosing information given to them in confidence, save in the exercise of their ASPA functions. In the first FOIA case to reach the Court of Appeal, brought by CFI in 2008, [5] the court ruled that it was entirely up to researchers whether they gave information to the Home Office 'in confidence': the fact that the law of confidence would not recognise information as confidential – because, for example, it was trivial or evidenced wrongdoing – was irrelevant.

Information caught by statutory disclosure prohibitions such as section 24 is exempt from disclosure under section 44 FOIA. The result is that project licences, showing how the Home Office applies key statutory tests, cannot be obtained from the department. It claims to have been reviewing section 24, as it is required to do by section 75(1) FOIA, for over 12 years.

"A few years ago, Newcastle University spent an astonishing £250,000 in legal fees resisting, ultimately unsuccessfully, a Cruelty Free International (CFI) request for information about controversial neuroscience research on macaques."

There are some chinks of light. Academics conducting novel research need to publish (although they tend to say only the minimum necessary about

[1] http://www.understandinganimalresearch.org.uk/policy/concordat-openness-animal-research/

[2] Then known as the BUAV

[3] *BUAV v Information Commissioner and University of Newcastle* EA/2010/0064 (11 November 2011)

[4] Section 24(1): '*A person is guilty of an offence if otherwise than for the purpose of discharging his functions under this Act he discloses any information which has been obtained by him in the exercise of those functions and which he knows or has reasonable grounds for believing to have been given in confidence*'

[5] British Union for the Abolition of Vivisection v Home Office & Anor [2008] EWCA Civ 870 (30 July 2008) [2008] EWCA Civ 870, [2009] 1 All ER 44, [2009] 1 WLR 636, [2009] WLR 636 http://www.bailii.org/ew/cases/EWCA/Civ/2008/870.html

how their animals suffer to explain the experiments). Section 24 does not apply to universities and other public bodies conducting animal research, because they generate the information and so it is not 'given' to them – in the CFI case, Newcastle University's attempt to rely on the provision failed.

Undercover investigations are time-consuming and expensive and raise all manner of legal issues, and are no substitute for a proper system of transparency. However, they do give invaluable insight, not only into what is done to animals and why but also into standards of care and the attitudes of staff and Home Office inspectors. [6]

One such investigation pitched CFI against one of the world's leading science institutions in an FOIA case. [7]

## CFI's Investigation at Imperial College London

The investigation took place over seven months in 2012 at Imperial College London (ICL). [8] It was initially reported in *The Sunday Times* and then in numerous other media around the world. It caused quite a stir in the animal research community.

ICL carries out some 110,000 experiments on animals a year, down from 130,000 at the time of the investigation. It uses rodents, monkeys, pigs, guinea-pigs and many other species. During the investigation, animals underwent painful gastrointestinal surgery; had both kidneys removed and were left only with a transplanted one; received high doses of radiation, severely depleting their bone marrow; suffered heart failure induced by cutting off blood supply and were given diabetes; developed chronic proliferative dermatitis, potentially affecting more than *half* of the body; experienced up to *40%* body weight, indicative of high morbidity; and were anticipated to experience abscesses, ulceration, diarrhoea, reduced mobility, respiratory distress, dehydration, hypothermia and other serious adverse effects. In some protocols, up to 15% of animals were anticipated to die from surgery: the actual figures were sometimes much higher.

The level of suffering *lawfully* inflicted at ICL is important because the investigation discovered that animal care staff were only on duty from 8 in the morning until 5 in the afternoon, considerably less at weekends and on public holidays. CFI was concerned that this meant that ICL licence-holders could not comply with their duty under ASPA to keep suffering to a minimum at all times. Licences foresaw, as indeed was obvious, that serious adverse effects could occur out of office hours, especially post-operatively. [9] It is, of course, inconceivable that hospital patients would be left unattended overnight after operations of this severity – and patients, unlike animals, are usually able to summon assistance.

"…the investigation discovered that animal care staff were only on duty from 8 in the morning until 5 in the afternoon, considerably less at weekends and on public holidays."

The annex to this article contains an exchange between care staff about one incident: it provides an insight into the attitudes of ICL researchers and the impossibility of looking after the animals properly simply within office hours. It also highlights the

[6] In the Imperial College London (ICL) case discussed in this article, CFI explained the importance of undercover investigations more generally:

> '*Undercover investigations are an entirely legitimate method of campaigning and exposing wrongdoing. Indeed, they are essential in a democracy, particularly in areas where secrecy is endemic and an issue is controversial. As is well known, they are routinely deployed by major broadcasters such as the BBC, by newspapers and by many NGOs. Without such investigations, the public would not, for example, have found out about cruelty to care home residents, racism amongst police recruits and MPs being paid to ask questions in Parliament. Those activities would have continued unchecked …*'

[7] *CFI v Information Commission and Imperial College London* EA/2015/0273 (16 May 2016) http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1795/Cruelty%20Free%20International%20EA-2015-0273%20(16.5.16)%20.pdf

[8] https://www.crueltyfreeinternational.org/what-we-do/investigations/animal-experiments-imperial-college-london

[9] For example, a licence protocol stipulated that '[animals] that undergo a bilateral nephrectomy [removal of both kidneys] and transplant in a single procedure will be carefully monitored for signs of rejection as indicated by signs of deterioration in health … and will be killed by a Schedule 2 method within 12 hours of the onset of such deterioration'. Clearly, if the deterioration began during the 15 hours or so when the animals were not monitored, staff would not know when the 12 hour period had begun and when, therefore, they should kill the animals to end their suffering

conflict inherent between the needs of research and the welfare of animals.

ICL's animal research annual report for 2014 claimed extravagantly:

> 'We have a great responsibility to care for our animals in the same way that we care for our staff or students.'

CFI said this claim of equivalence insulted the intelligence of the public: ICL does not carry out highly invasive experiments on its staff or students and does not then leave them unattended overnight.

"…the statutory Animals in Science Committee concluded that the regime at ICL fell short of the standards required by ASPA and that infringements occurred on an unacceptable scale for an unknown, but extended, period."

An inquiry commissioned by ICL – the Brown Inquiry – following the CFI investigation recommended an increase in staff and greater independent review of animal welfare out of hours and at weekends, and a Home Office investigation found a 'widespread poor culture of care' and breach by the establishment licence holder (ELH) – the person in overall charge of animal experiments at a laboratory – of a licence condition requiring appropriate staffing. The Minister forced the replacement of the ELH, the university registrar, although sanctions generally were lenient. Finally, the statutory Animals in Science Committee concluded that the regime at ICL fell short of the standards required by ASPA and that infringements occurred on an unacceptable scale for an unknown, but extended, period. [10] None of this would have come to light but for the investigation.

CFI wanted to know whether the care regime had now changed, so it made a FOIA request. ICL confirmed that there was still no 24/7 cover by care staff but declined to say during which hours there was at least one care staff member on duty (the disputed information).

## The Competing Arguments

ICL relied on the exemption in section 38(1) FOIA (health & safety):

> 'Information is exempt information if its disclosure under this Act would, or would be likely to —
>
> (a) endanger the physical or mental health of any individual, or
>
> (b) endanger the safety of any individual'.

Section 38 is a conditional exemption, which means that, even if it is engaged, the public interest in disclosure must still be weighed against the public interest in withholding information. [11]

ICL argued that disclosing the disputed information would alert potential intruders to when the premises would be unstaffed: this would, it said, increase the risk of unauthorised entry, and the prospect or reality of such an entry would in turn risk damaging the mental health of personnel (including researchers) who were, in fact, on duty at the time. As well as this general reason, ICL relied on a 'particular reason' affecting one or more staff but refused to tell CFI what this was. It did, however, disclaim any fear of physical assault, harassment or intimidation.

The Information Commissioner upheld ICL's reliance on section 38. Initially, he declined to give reasons in public, simply, it seems, because ICL asked it not to. He relented when CFI appealed to the First-tier Tribunal (Information Rights) (the FtT): CFI argued it could not formulate its grounds of appeal without knowing the basis of the Commissioner's decision and pointed out that ICL itself had given reasons when rejecting the request.

More substantively, CFI maintained that section 38 FOIA was not engaged. It pointed to the fact that ICL had recently published the photographs of a number of care staff (and researchers) in its annual report and on its website. Given the emphasis ICL put on protecting its staff, it must have concluded that there was no risk to them from doing so – armed with the photos, a malevolent person could, in principle, follow staff home, for example. It was common ground that the incidence of animal rights militancy is currently very low. It

[10] Despite all this, the Home Office simply issued reprimands to licence holders (and required additional training) found to be in breach, even where a high degree of unnecessary animal suffering resulted.

[11] See section 2(2)(b) and 3 FOIA

was difficult to understand, CFI argued, why ICL nevertheless saw a realistic prospect of an illegal entry: none had, in fact, taken place at any animal research establishment for years.

In any event, the disputed information would not aid a hypothetical intruder because it would simply tell him or her when the site in question was *empty of care staff*, not when it was *empty of all staff* (including, in particular, security personnel and researchers). CFI established that care staff made up less than 10% of the staff complement in the animal research units. The would-be intruder would have to assume, it argued, that there were stringent security measures in place, particularly after all the unwanted attention on ICL's animal research, and would be highly unlikely to attempt a break-in.

## Procedural Skirmishing

Things then took a Kafkaesque turn.

It is routine in FOIA appeals that requesters, for obvious reasons, do not get to see the disputed information. Part of a hearing is open and part closed, and the same goes for pleadings. The result is that requesters fight appeals with one arm tied behind their back: it can be difficult to argue why an exemption has been inappropriately applied without seeing the information to which it has been applied.

In the present case, CFI accepted that it should not see the disputed information. However, ICL, with the Commissioner's support, also wanted to withhold *other* information, said to support the 'particular reason' for its reliance on the exemption, under rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. This, again, was on health and safety grounds. Moreover, it refused to say even whether the particular reason applied to one or more than one member of staff.

In *Browning v Information Commissioner and another*, [12] a case exploring the suggestion made by the Information Tribunal (as the FtT was then called) in an earlier CFI case that a requester's legal team and experts should be allowed to attend closed sessions in FOIA appeals on confidentiality terms, the Court of Appeal cited Supreme Court case law emphasising the importance of the principles of open justice and of parties knowing the case they had to meet, each principle to be abrogated only to the minimum extent necessary. [13] A Practice Note on rule 14 [14] makes the same point.

CFI argued, for example, that it was impossible, as a matter of logic, to see how disclosing the number of staff said to be affected by the 'particular reason' could reveal anyone's identity. Around 1,000 staff work at ICL's animal research units.

However, the President of the Chamber granted ICL's rule 14 application. He regarded it as significant that 'CFI had a covert operator working [at ICL] for some seven months', but did not explain why. [15]

CFI was therefore lift to prosecute the appeal with not one but one and a half arms tied behind its back: it did not know the case it had to meet save in the most general terms. But for the proximity of the hearing and the discouragement by the Upper Tribunal in *Browning* of satellite litigation about rule 14 applications, it would have challenged the President's ruling.

ICL had put in a witness statement strongly attacking CFI's investigation and the organisation's *bona fides*. That was a tactical mistake because it enabled CFI to seize the high moral ground by explaining what the investigation and the inquiries which followed had found:

> '[The inquiries] give the lie to the claims by Mr Hancock [ICL's sole witness] that ICL fully applies the Three Rs [the principles of replacing animals, reducing numbers and refining techniques to minimise suffering which govern the grant of licences[16] ]; that it complies with all legal and regulatory requirements (including by providing appropriate staffing); that CFI published a "lurid series of allegations … which purported to demonstrate the cruel and illegal treatment of animals at the College"; that CFI's campaign is "largely untruthful and misleading"; and that its allegations are "unsubstantiated"'.

[12] [2014] EWCA Civ 1050

[13] *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38 (not *Bank Mellat (No 2)* as cited by the Court of Appeal) and *Al Rawi and others (Respondents) v The Security Service and others*. [2011] UKSC 34 (13 July 2011)

[14] *Closed Material in Information Rights Cases* (May 2012)

[15] Insult was added to injury by the strange refusal by the FTT Registrar to include the rule 14 submissions in the bundle for the hearing, leaving CFI to create a separate bundle

[16] See section 2A ASPA

It is always important, where possible, to get judicial decision-makers on side about the justice of one's case as they address the legal issues.

## The Hearing before the FtT

The credibility of ICL's position was further tested at the hearing.

Its annual report came under particular scrutiny. The report claimed:

> 'In addition to world-class facilities, we are committed to providing round the clock care for all our animals, with at least one veterinarian and five senior animal care staff on call 24/7 …' (emphasis added).

CFI argued that this was plainly untrue. A reader would assume that there was always someone on hand to care for the animals. Although researchers might occasionally work into the evening, there was never 24 hour care, and most days there was no one to care for the animals between 5pm and 8am.

Mr Hancock repeated ICL's mantra that vets were on call 24/7, which laid himself open to the obvious cross-examination question: 'But if there is no one on site, who calls the vets when an animal is in distress?'. The question was met with silence. In its decision, the Tribunal said it could 'see the force of' CFI's concern' that ICL was misleading the public. [17]

In addition, Professor Maggie Dallman, Associate Provost, said in the annual report:

> 'We felt that [a particular protocol] was so valuable that we asked the project licence applicant if we could share that with our community, to encourage more people to use this comprehensive list of signs and symptoms to judge how well their animals are and to take appropriate action immediately if there is any sign of suffering beyond the terms of the licence' (emphasis added). [18]

Clearly, it is not possible to take appropriate action immediately unless there is someone present when the action is needed.

"In its decision, the Tribunal said it could 'see the force of' CFI's concern' that ICL was misleading the public."

The attack on ICL's credibility was felt to be important in persuading the FtT to scrutinise closely claims about safety concerns. There was no direct evidence (open or closed) before the tribunal from anyone whose mental health was alleged to be at risk. Both ICL and the Commissioner, in resisting CFI's calls for such evidence, had insisted that it was for ICL to decide which witnesses to call. The FtT had said that it would assess what weight to give hearsay evidence.

Under cross-examination, Mr Hancock also claimed that the reason ICL operated an office hours regime for care staff had nothing to do with saving money; rather, it was to avoid disturbing the animals. To which the riposte was obvious: would not animals in distress prefer to be disturbed so that their distress could be relieved? In any event, as noted above researchers have a legal duty under ASPA to minimise suffering at all times, whether it is experienced during the day or the night.

## Post-hearing Submissions about Public Interest

CFI does not normally rely on public interest if endangerment to safety is established. However, what differentiated this case, it explained, was the ease with which ICL could remove any endangerment to mental (or physical) health. In the vast majority of cases where section 38 is engaged, there is very little or nothing which the public body can do to remove or mitigate the identified risk. Not so here. ICL could easily ensure, for example, that staff did not work alone and that vulnerable staff did not work past a particular time.

On ICL's case, there was *already* a risk of a break-in out of hours. Section 2(1) Health & Safety at Work etc Act 1974 provides: 'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'. Regulation 3 of The Management of Health and Safety at Work Regulations 1999 [19] then requires employers to conduct risk assessments and keep them under review. Measures have to reflect the general principles set out in Article 6(2) of Directive 89/391/EEC, including avoiding risks and adopting the work to the

[17] Para 21
[18] p21
[19] 1999 SI 1999/3242

individual. The Health & Safety Executive, finally, issues guidance on lone working, requiring an employer to ensure, where appropriate, that it does not happen.

The measures open to ICL to avoid any endangerment to health arising out of disclosure of the disputed information should, CFI argued, weigh heavily with the FtT in exercising its public interest judgement. In that way, the public interest in transparency and accountability could be satisfied without there being any endangerment to anyone's health. This was precisely the sort of circumstance, it suggested, that Parliament would have had in mind when deciding to make section 38 a conditional exemption.

In the CFI Newcastle case, the FtT made the important point that the existence of statutory regulation and internal controls around animal experiments was not sufficient to satisfy the public interest: [20]

> 'The existence of the statutory controls operated by the Home Office does not annul [the strong public interest in animal welfare and transparency and accountability], which extends to seeing how, and the extent to which, the statutory system is working in practice. Such private scrutiny as takes place inside the statutory system is not a substitute for well-informed public scrutiny. In the present case these interests are further underlined by the fact that the research was supported by public funds'.

That must be all the more so, CFI argued, when the statutory regulation had failed – Home Office inspection indisputably failed to pick up the systemic failings at ICL later identified by, *inter alia*, its own inquiry into CFI's allegations; and so had internal controls – the Brown Inquiry was strongly critical of such controls, noting (for example) the existence of 'two tribes' (researchers and care staff) [21] and describing the key Animal Welfare Research Ethics Body as 'not fit for purpose'. [22]

## What did the FtT Decide?

The FtT concluded that there was no likelihood of danger to anyone's health or safety from release of the disputed information. Public interest did not, therefore, need to be considered.

ICL had argued that 'endanger' in section 38(1) denotes risk, rather than actual or probable harm. The Tribunal said that that rather begged the question of what 'risk' meant. The exemption was engaged, it explained, where there was a likelihood of a situation dangerous to someone's health or safety. It referred to a 'person of ordinary robustness'. More importantly, it said: '… we cannot make positive findings that there is a likelihood of danger to someone's mental health without appropriate evidence to justify such a finding. In reality the concerns which Mr Hancock expressed amount to nothing more than speculation based on second-hand lay opinion'. In other words, whatever the legal threshold, ICL failed to meet it.

In *People for the Ethical Treatment of Animals v Information Commissioner and the University of Oxford* [23] (another animal research case), the FtT said that the fact that Oxford University had not led psychiatric evidence did not prevent it from relying on the section 38 exemption on mental health grounds. There was no such evidence in the ICL case either. The FtT in that case said that whether such evidence is required depends on the circumstances. Unlike ICL, Oxford University had been subjected to sustained illegal and threatening forms of activism.

## Has ICL now Revealed the Information in Dispute?

ICL did not seek to appeal the FtT decision. Just before the deadline set by the tribunal, it told CFI that core hours for care staff had not increased. Subsequent FOI requests revealed that care staff and vets rarely come in outside those hours.

> "ICL had not implemented the recommendation of the Brown Inquiry for an increase in care staff cover… despite claiming to have implemented all the Inquiry's recommendations"

In other words, nothing had changed in this respect since the CFI investigation. ICL had not implemented the

[20] Para 52

[21] Para 7.26

[22] Para 3.4

[23] EA/2009/0076

recommendation of the Brown Inquiry for an increase in care staff cover, especially out of hours and at weekends, despite claiming to have implemented all the Inquiry's recommendations.

The Home Office has not required the care hours to be increased either. This is despite finding the ELH in breach of a standard condition which requires appropriate staffing and finding that researchers were in breach of another standard condition to the same effect, leading to particular animals being allowed to suffer 'a major departure from [their] usual state of health or well-being …', greater suffering than permitted by the project licences.

Part of the problem may be that Home Office inspectors are too close to the institute. The inspector with responsibility for ICL wrote an article for the ICL annual report. ICL inevitably wanted the report, its first, to put its animal research in as favourable a light as possible, after all the criticism it had received. Many will find it astonishing that the Home Office allowed the inspector with responsibility for ICL to contribute to a PR document of this nature. It will inevitably strengthen suspicions that it was this closeness which led to the inspector failing to identify all the problems which the CFI and the Brown Inquiry found and to the lenient sanctions imposed by the Home Office on licence-holders.

Other universities are no better than ICL, sadly. For example, a CFI undercover investigation of neuroscience research at Cambridge University some years ago discovered that macaques were left for 15 hours overnight after brain surgery, despite suffering uncontrolled seizures and numerous other serious aide-effects. A number were found dead in the morning.

In fact, 24/7 care is extremely rare at any of the 180 or so UK establishments where animal experiments are carried out. CFI believes that the Home Office is allowing establishments to put financial considerations before animal welfare, and is therefore regulating animal experiments unlawfully.

## Conclusion

Section 38 is an important exemption. Safety has to be a priority. However, it is all too easy for public bodies operating in controversial areas such as animal experiments to claim a concern about safety and refuse to disclose information for that reason. This is particularly so with mental health: it can feel to requesters that they have to

prove a negative – that no one's mental health will be endangered by disclosure of the disputed information. That can be extremely challenging, particularly where requesters are denied crucial evidence said to support the exemption.

The importance of the FtT's decision is that it shows that it is not enough for a public body to raise the spectre of endangerment to mental health, even where there has been a history of militancy in the area in question and public attention has recently been directed at failure by the public body to perform its statutory duties. The decision makes it clear that the public body has to demonstrate, with evidence appropriate to the circumstances, why there would be endangerment to health from disclosure of the information in question.

(David Thomas, a solicitor, acted for CFI in this case.)

## Annex: Example of an Infringement at ICL

31 out of 56 mice in a protocol died or had to be euthanised on welfare grounds following a procedure involving sub-lethal irradiation and reconstitution with spleen cells/bone marrow cells with the aim of generating a chronic disease model in the mice. Of the 31, 14 were found already dead (presumably overnight) and 17 had to be culled as they had breached the severity limits authorised by the protocol (i.e. the suffering they were experiencing exceeded that permitted). The mice died or were euthanised over a period of more than two weeks.

These are conversations recorded by the CFI investigator:

Named Animal Welfare Care Officer (NACWO) 2 (17 October 2012): 'This is what she [the personal licence holder] does all the time. Then you've got some like that [inaudible] I understand they are meant to get sick but not like at death's door'

NACWO 1: 'I said [to the deputy named veterinary surgeon [DNVS]] they are shit for want of a better term. I said there's no other way about it. I said I think she's exceeded her endpoint [the point at which use of an animal must be brought to an end to avoid unacceptable suffering] and they should go, the whole lot'

"The thing is if the Home Office had seen it that would have been the end of that project licence probably."

NACWO 2: 'We have gone through things with her before [inaudible]'

NACWO 1: 'The thing is if the Home Office had seen it that would have been the end of that project licence probably'

NACWO 2 (19 October 2012): 'They're all still alive in there on their wet diet. They look like shit but they're eating their wet diet'.

NACWO 1 (22 October 2012) said that she had sent an email to the DNVS: 'I've emailed [the DNVS] and asked him and explained that [NACWO 2] and I are extremely concerned because I'm sure [the personal licensee's] violating her endpoints [the point at which suffering must be brought to an end] and severity limit. If it dies then it's not moderate anymore is it, it's substantial and if you've got to cull them before they die and we're already finding them dead then they're exceeding their endpoints'. She looked at some of the mice and stated: 'They all look shit' and 'That looks manky, that looks, I mean look at the state of that one'.

NACWO 2: 'Should [get rid of them] but we're not going to do that … [NACWO 1] has sent an email to [the DNVS] asking him for advice and funnily enough he hasn't got back to her … Cos [NACWO 1] told [the DNVS], she said we're really concerned about this. It could be that there might be a breach of their project licence.'