



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL GENERAL  
REGULATORY CHAMBER UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

**Information Tribunal Appeal Number:** EA/2009/0076  
**Information Commissioner's Ref:** FS50194251

**Decided at an oral hearing sitting** Promulgated  
**At Bromley Magistrates Court** 13<sup>th</sup> April 2010  
**On 8-10<sup>th</sup> February 2010**

**BEFORE**

**Fiona Henderson**  
**And**  
**Andrew Whetnall**  
**And**  
**Jacqueline Blake**

**BETWEEN:**

**PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS EUROPE**

**Appellant**

**And**

**THE INFORMATION COMMISSIONER**

**Respondent**

**And**

**THE UNIVERSITY OF OXFORD**

**Additional Party**

Appeal Number: EA/2009/0076

**Subject Matter:** - Public interest test s.2 FOIA

Qualified exemptions

- Health and safety s.38 FOIA

Tribunal Procedure (First-tier) (General Regulatory Chamber) Rules 2009

- Overriding objective 2

**Cases:** *Hogan and Oxford City Council v IC EA2005/0026 and EA2005/0030*

*BUAV v IC EA/2007/0059*

*Secretary of State for the Home Department v BUAV [2009] 1 WLR 636*

*Secretary of State for the Home Department v BUAV [2008] EWCA Civ 417*

**Representation:**

**For the Appellant**                      **Mr Alan Bates**

**For the Respondent**                **Miss Anya Proops**

**For the Additional Party**        **Mr Timothy Pitt-Payne**

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**Decision**

The Tribunal Upholds the decision notice FS50194251 dated 10<sup>th</sup> August 2009 and dismisses the appeal for the reasons set out below.

**Reasons for Decision**

**Introduction**

1. Animal experimentation in the UK is governed by the Animals (Scientific Procedures) Act 1986 (ASPA). Under ASPA, each research project requires a Project Licence granted by the

Home Office. The information at issue in these proceedings (“the disputed information”) consists of extracts from the relevant Project Licence. Under ASPA:

- Research must be conducted at an approved institution holding a Certificate of Designation.
  - Each research project requires a project licence setting out in detail the work to be carried out, the impact on the animal(s) and the object of the project
  - Each individual researcher must hold a personal licence which requires personal compliance with the regulatory framework.
2. A project licence will only be approved by the Home office if:
- The scientific objectives cannot be achieved without the use of animals,
  - The benefits are judged to outweigh the likely adverse effects on the animals
  - The number of animals to be used and the level of animal suffering are the minimum necessary to achieve the scientific objectives.

### **The Request for Information**

3. On 2<sup>nd</sup> August 2007 the Appellants requested information from the University of Oxford (the University) about scientific experiments that were to be carried out on a macaque featured in a BBC television documentary “*Monkeys Rats and Me*” which was broadcast on 27<sup>th</sup> November 2006, in relation to a licence held by Professor Aziz of Oxford University. The letter stated inter alia:

“*All requests relate to the Macaque known as Felix.*” (the section numbers of the pro forma licence application were given in parentheses):

- a The intended duration of the project involving Felix (section 16)*
- b The scientific background of the work (section 17). Including references where given*

- c The expected benefits of the work and the likelihood of achieving them (section 17) including references where given*
- d The detailed plan of the work and how the objectives for the project are intended to be achieved (section 18), including experimental designs and/or illustrative experiments*
- e How the number of animals used will be kept to a minimum, why animals have to be used, why no other species is suitable or practicably available, and why the animal model chosen is the least severe one that would produce satisfactory results (section 18)*
- f Whether Felix was sourced from an overseas breeding centre or was wild-caught (section 18c)*
- g A list of each protocol to be applied to Felix under the project licence, including a description of procedures, each step of the experimental protocol and for each step, the nature or use of anesthetic, the specific adverse events, their frequency, controls and endpoints (section 19)*

- 2. Which of the procedures specified in the licence have already been performed on Felix, and when?*
  - 3. Please provide all available information about Felix's health status throughout the project, including details of all veterinary care that he has received. ..."*
4. On 5<sup>th</sup> September 2007 the University confirmed that it held the information and answered some of the request. It stated that. *"The work on the animal concerned began on 12 June 2006 and was completed on 5 June 2007"*. In relation to items (b)-(e) it provided a summary of some of the information contained in the project licence. In relation to item (g) the University responded that:

*"The animal was trained, injected with neuronal tracers (under general anesthesia), and killed humanely, in accordance with the protocol described [earlier in the letter]."*

The remainder of the disclosure was refused under inter alia section 38 FOIA, that disclosure would be likely to endanger the physical or mental health or the safety of any individual.

5. On 13<sup>th</sup> February 2008 following a review dated 15<sup>th</sup> November 2007 in which the original decision was upheld, the Appellant complained to the Information Commissioner.
6. During the currency of the investigation the ICO identified certain further information which could be disclosed. This included:
  - academic references cited in the body of the licence application which were authored or co authored by Professor Aziz,
  - the veterinary records relevant to Felix's care during the project,
  - some additional redacted material from the body of the licence relating to items b, c and e of the request.

This information was disclosed to the Appellants on 21<sup>st</sup> May 2009.

7. The Commissioner issued a decision notice reference FS50194251 dated 10<sup>th</sup> August 2009 in which he found that in relation to the rest of the information which fell within the scope of the request and had remained withheld, section 38 FOIA was engaged and that the public interest lay in withholding the information.

### **The Appeal**

8. The Appellants appealed on the grounds that:
  - the Commissioner and the University were incorrect to conclude that section 38 FOIA is engaged in respect of the disputed information; and
  - if section 38 was engaged, they were wrong to conclude that the public interest in maintaining the exemption outweighs any public interest in disclosure.

9. At the date of the appeal the disputed information relates to details from the project licence application form and the titles and authors of academic references cited in support of the project licence application which do not include Professor Aziz as a co-author.

### **Scope**

10. At the date of the request the terms of the request related to information about the protocols that could be applied to Felix, because the Appellant did not know which processes had been applied to Felix, and whether or not all the potential processes had been completed at the time of the request. However, by the date of the information request and the Commissioner's investigation, Felix had already been killed humanely.

11. In the ICO's letter to the Appellant dated 28<sup>th</sup> May 2009 the ICO stated:

*“Your request specifically related to procedures performed on Felix. Therefore, where the project licence relates to the procedures or protocols, which were not performed on Felix, these are deemed to fall outside the scope of the request. The ICO has not considered whether this information should be provided to you.”*

12. The submission of the ICO, supported by the University, is that this formulation made it clear that only those protocols that were actually applied to Felix were to be considered, and that if PETA wished to challenge this definition of scope and extend it to all the protocols that could potentially have applied to Felix at the time of the licence application/approval, they should have done so.

13. The Tribunal concludes that it was reasonable for the University and the ICO to proceed within the confined scope of the terms of the initial request. This conclusion is supported by the following factors:

- The ICO provided a schedule of what was to be disclosed and withheld with the letter dated 28<sup>th</sup> May 2009. In relation to veterinary care during the period of

experimentation, the only information designated to be withheld in this category was the veterinary surgeons' initials. It was therefore clear that no substantive veterinary care information relating to the period of experimentation was being withheld. In the attachment to a letter of 21 May 2009 providing further information the University included a table of veterinary records relating to Felix during the project, from which it is clear what has not happened as well as what has happened. These veterinary care records made clear that Felix was only subjected to anaesthesia when he was humanely killed and he was not subjected to any earlier surgical procedure.

- General information relating to the protocol applied to Felix was given in the University's initial response on 5<sup>th</sup> September 2007 which stated:

*“(g) the animal was trained, injected from neuronal tracers (under general anaesthesia), and killed humanely, in accordance with the protocol described above.”*

- The Felix's date of death was given as 7.06.07, this was before the date of the request for information and meant that there could be no further protocols applied after the date of the request.
- The ICO's schedule of disclosure includes no entries for stages 3,4,5 and 6 of Section 19 (b) (vi) of the protocol, from which it should have been clear that those stages applied to other monkeys and not to Felix, and were accordingly being treated as outside the scope of the request.

14. The appeal relates to the decision of the Commissioner, and the scope is therefore as defined in his decision notice unless the grounds of appeal challenge the scope, or a point has been successfully raised about scope in the exchanges leading to the hearing. The Tribunal is satisfied that the Commissioner was explicit in defining his understanding of the scope of the request both before the issue of the Decision Notice, and in the Decision Notice. This information had been with PETA since May 2009, and on the first day of the hearing Counsel for the University again described scope as confined to procedures that had related to Felix, and not to the project licence in full namely:

- information revealing the title and authorship of publications not co-authored by Professor Aziz which were cited in support of the Application;
- information detailing the description of procedures and adverse effects that had related to Felix; and
- information describing the application of the reduction, refinement and replacement principles (“the 3 Rs”).

15. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009

(GRC Rules) provides as follows:

2. (1) *The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.*
- (2) *Dealing with a case fairly and justly includes—*
  - (a) *dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;*

16. The Tribunal notes that at the time that the issue was raised:

- the evidential part of the hearing was concluded,
- the Appellants were represented,
- The issue of scope was not a legally or factually complex issue.

Therefore the Tribunal is satisfied that it would not be just or fair to the other parties or proportionate for the Tribunal to allow the Appellants to extend the scope of the appeal at this late stage.

**Evidence**



17. The Tribunal sets out the evidence relevant to the general background here and refers in more detail to additional evidence when considering whether section 38 is engaged and the public interest test. The Tribunal has looked at the disputed information and addresses the specifics in the confidential schedule, however, the Tribunal has endeavoured to set out the factors that it has taken into consideration in a generalized form in the open decision.

18. The Tribunal viewed the documentary in its entirety which portrayed the construction of the new animal research facility at the University of Oxford juxtaposed with the campaigns by:

- an organization called SPEAK who were opposed to the new lab and
- Pro-test, an organization who were supportive of the research and its aims.

The programme featured Professor Aziz's research into the role of the pedunclopontine nucleus (PPN) in Parkinsons disease. It portrayed Felix in a monkey lab in a barred cage. Viewers were told that he was trained by being induced in reward for treats until he will sit in a chair which restricts his movement, then he would be trained to do a simple touch test. Once trained, electrodes would be implanted deep into the brain to enable a study of the PPN. At a later stage he would be made Parkinsonian and the same study would be repeated.

19. The Tribunal heard evidence from 2 scientists:

- Dr Bailey who has co- authored dozens of research papers including reviews and meta-analyses on the efficacy of animal models generally, and in relation to non-human primates. He is Scientific Consultant for British Union for the Abolition of Vivisection (BUAV) and Science Director for the New England Anti-Vivisection Society in the USA.
- Professor Phillips (Professor of Clinical Medicine at the University of Oxford for the last 13 years). His own research does not and has not involved the use of animals, however, he has considerable experience sitting on Ethics committees including the University's Central Animal Care and Ethical Review Committee

since 2007 with a responsibility to promote best practice and a culture of care for all animals held by the University.

20. They both gave evidence that 2 of the principles articulated in legislation, policy and practice in the UK were:

- Reduction, Refinement and Replacement (the 3 Rs). That scientists should strive to replace the use of animals in scientific procedures with non-animal methods, reduce the number of animals used and where animals are used take measures to ensure that suffering is minimized and any pain or discomfort is no more than necessary consistent with the purpose of the experiment.
- Necessity and proportionality (also known as the cost-benefit analysis), where the welfare cost to the animal is assessed as being outweighed by the anticipated or potential benefits (e.g. scientific advances and/or human medicine).

21. Dr Bailey gave evidence that it is difficult for a third party to assess the cost/benefit without access to the relevant part of the project licence. The applications “make the case” for authorization. Evaluation of whether the case was a strong one and the amount of detail that the Home Office required before accepting that the procedures were ethically justified is impeded without the detail. It was therefore impossible to scrutinize the level of regulation by the Home Office. When researching his articles Dr Bailey did not have access to project licences. His evidence was that:

- it would have helped.
- There is a wealth of published material which is difficult to navigate.
- A third party has no way of knowing whether up to date science is being relied upon.

22. In his own publications he had been reviewing published literature, this is less problematic in terms of general principles. To assess a particular project it is more important to have access to the detail. It was important to know scientifically what publications had been relied upon to validate the model and exactly what has been done to assess the cost. If he wanted to

replicate a non-animal experiment, and needed more information, he would approach the scientist directly, in animal cases there is secrecy and this inhibits the free-flow of information that there would otherwise be.

23. Some information in the project licence would come into the public domain through publication of the results but not all of it. Important information was likely to be omitted or under-represented in the published work:

- Information relating to suffering and welfare was scarce or omitted in such publications,
- Little detail was given in relation to the protocols and models as the focus of the publication was the results.
- It ought to be possible to replicate an experiment from the published results, in his experience there was often insufficient information in cases involving animal experimentation.

24. Whilst a third party can mount the argument e.g. that “research on a monkey is of no value because they are too different to humans” on the basis of material already in public domain; the point can be made more effectively and rigorously if the author knows the scientific papers relied upon, as the work relied upon in the licence application directs the critique. Some of the references would be routinely cited to make a particular point, but other references might be relied upon for a tangential point rather than because of their prime subject matter.

25. Professor Phillips did not substantially disagree with Dr Bailey in terms of the uses to which the disputed information could be put. His evidence was that:

*“if there was no special extreme threat here, the exposition of this information would be for the good”*

26. However, he gave evidence relating to the threat that existed at the time that the information request was considered (see para 33 below) and gave evidence relating to the checks and balances within the regulatory regime. His evidence was that:

- The regulatory regime (ASPA) in the UK is amongst the strictest regulatory system in the world.
- Any breach of licence terms may be construed as a criminal offence.
- Home Office Inspectors regulate the project.

27. In order to obtain a licence to experiment on non-human primates 3 stages had to be undergone.

- i) A Grant application had to be made. Funding is usually split between the University and a grant provider. Funding bodies do not want to support research that is not of the highest value to human health. Animal experimentation is extremely expensive (he estimated that this project would have cost between £1-5 million) and therefore would attract the most scrutiny.
  - Grant funding bodies submit applications to a rigorous process of peer review [the evaluation of work by a professional in the same field], generally involving 10-15 leading international scientists in the relevant field. This would include the cost benefit analysis ensuring that sufficient animals were being used to be statistically significant to enable conclusions to be drawn and to evaluate the science of the methodology etc.
  - Then a specialist committee would make a final evaluation of the research proposal.
  - Often in the cases of non-human primates the proposal would be reviewed for advice to the National Centre for the Replacement, Refinement and Reduction of Animals in Research (NC3Rs) an independent scientific organization, that funds 3Rs research in the UK and advises those

involved in research. There was no evidence before the Tribunal as to whether this project had in fact been reviewed by the NC3Rs.

ii) Internal ethical approval by the University

- In the case of primate research the proposal would be reviewed by the Central ethics committee. This is made up of approximately 20 people. It includes scientists not involved in animal research and those not employed by the University. Typically membership would include a statistician, an ethicist and a member of the clergy.
- It reviews all applications involving use of non-human primates and advises the Certificate Holder on whether the benefits outweigh the costs to the animal.
- Only once internal ethical approval has been granted will the Home Office consider a licence application.

iii) Application to the Home Office (HO)

- The HO refers applications to the Animal Procedures Committee (APC) for advice in any non human primate case.
- The proposal is reviewed by the primate sub-committee of the APC prior to going to the full committee.
- The APC is a body set up under ASPA to advise the Home Secretary. It also sponsors research exploring ways of reducing animal use or substitution of non-animal methodology and reducing the suffering experienced by animals. Its membership includes philosophers, ethicists, lawyers and those involved in animal welfare.

28. Once the licence was granted the regulation and evaluation would continue:

- The work on the project would be reviewed by Home Office Inspectors.
- The University ethics committee retrospectively reviewed all project licences after 2 years and 4 years to ensure the initial cost benefit analysis remained valid and that the licence holder was applying the 3Rs to the maximum extent possible.
- Results were often published. These would be subjected to peer review.
- Reports of innovations and mistakes from existing projects were circulated within the University to improve and refine procedures.

### **Legal Submission and Analysis**

#### **Is section 38 engaged?**

29. Section 38 FOIA provides:

*“(1) 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.”*

30. All parties agreed that in the context of section 38 “endangering” and “prejudicing” came to the same thing and that consequently the Tribunal could read across the existing body of case law. The case of *Hogan and Oxford City Council v IC EA2005/0026 and EA2005/0030* (at paragraph 29 onwards) concluded that the application of the ‘prejudice’ test should be considered as involving a number of steps. The Tribunal agrees with the questions identified and applies these to the issue of endangerment.

- i The Tribunal needs to identify the applicable interest(s) within the relevant exemption.
- ii The nature of the endangerment being claimed must be considered
- iii Some causal relationship must exist between the potential disclosure and the endangerment
- iv The endangerment must be “*real, actual or of substance*” There is therefore effectively a de minimis threshold which must be met.
- v The University relies upon the “*would be likely to endanger limb*” of section 38. As per *Hogan* at para 35 the Tribunal must be satisfied that:

*“ there is a real and significant risk of [endangerment] even if it cannot be said that the occurrence of [endangerment] is more probable than not. ...”*

31. In considering the withheld references, information relating to the 3 Rs and procedures and adverse effects, Oxford and the Commissioner argue that the endangerment was to physical and mental health and safety. It was suggested by PETA that for the Tribunal to be satisfied that there was a danger to mental health that positive evidence from e.g. a psychiatrist as to the clinical impact of the campaign upon the mental health of those affected would be necessary. The Tribunal rejected that contention and was satisfied that the level and nature of the physical threat was sufficient that on a balance of probabilities the effect upon the mental health of those involved would go beyond stress or worry and constitute an endangerment to their mental health.

32. It was agreed by all parties that at the date of the information request as a result of the actions of animal rights extremists there was an existing danger to Professor Aziz, his colleagues and anyone visiting or associated with the University. This danger was at the most serious level. The Tribunal heard that individuals at the University had been targeted by animal rights extremists since the 1990s including bomb threats and in one instance a letter bomb that was delivered to the home address of a scientist. The campaign was re-invigorated in 2004 when activity began to prevent the construction of the new Oxford Biomedical Services Building. The

campaigners adopted the title SPEAK. Building work was halted in July 2004 and resumed in November 2005 after special measures were taken to secure the anonymity of the contractors including the use of injunctions, unmarked vehicles, workers wearing balaclavas and alternative locations arranged for the transfer of materials.

33. Extremists targeted companies connected to the University regardless of whether they were connected to biomedical research. Prior to the Documentary being aired attacks included the following:

- 04.7.05 – Arson attack by “Oxford Arson Squad” (OAS) on Longbridges boathouse
- 23.9.05 – OAS claim responsibility for a failed arson attack on Corpus Christi College.
- In January 2006 a communiqué claimed by the Animal Liberation Front (ALF) said:  
*“Every individual and business that works for the University as a whole is now a major target of the ALF. Everyone linked to your institution is right now being tracked down and sooner or later, they will be made to face the consequences of your evil schemes.”*
- 28.10.06- 6 lorries were destroyed by remote control incendiary devices at Deans Farm Oxfordshire.

34. In light of the pre-existing risk the Tribunal was satisfied that in order for section 38 FOIA to be engaged, disclosure of the withheld information must **increase** the risk of endangerment. The University relied upon the evidence that after the documentary was shown amongst other incidents the following took place:

- 8.11.06 – Arson attack – Queens college Sports Pavilion (This is a Humanities and Arts College),
- February 2007 – Incendiary device found at Templeton College (a business college) that failed to ignite,
- April 18 2007 – death threat to Professor Aziz who in consequence was receiving and remains under Police protection.
- Since the documentary featuring Felix there have been pages on the SPEAK website headed “Felix campaign”.



35. The information request was made in August 2007 and the partial disclosure was made on

5.9.07. After this disclosure:

- The information was posted upon the SPEAK website within a few days and used in an inflammatory manner to portray Professor Aziz as a “monster” who tortures and starves animals.
- A SPEAK film mixed video footage of Professor Aziz’s research from the TV documentary with emotive images from other projects unconnected to Oxford without attribution and thereby suggesting that he was responsible for all the work shown.
- 13.9.07 – A Butcher’s shop in Kent was vandalized – on “biteback” a website publicizing extremist animal rights action, the attack was dedicated to Felix “*one of the innocent victims of Oxford University*”..
- 4 November 2007 - 2 cars belonging to University researchers were destroyed by incendiary devices outside their houses in Oxford. (The researchers were retired and whilst former members of the department of experimental psychology were not recorded as having ever worked in animal research). The ALF claimed responsibility stating “*There will be more. For Barry and Felix*”.
- December 2007 – Mel Broughton, the public face of SPEAK was convicted of and sentenced to 10 years imprisonment for conspiracy relating to the arson attempts at Queen’s College and Templeton College.
- April 2008 – A University contractor’s premises were sabotaged. The Contractor was not linked to the construction of the new lab. The attack was dedicated to Felix on Biteback.
- May 2008- an incendiary device destroys the car of a University researcher on her driveway.

36. The Appellants argued that despite the history of the attacks the risk would not be increased by disclosure. They pointed to the facts that:

- there was a pre-existing risk before the programme because of the building of the animal research centre,
- Professor Aziz was already well known in the context of his defence of the importance of animal experimentation,

- Through his published scientific works Professor Aziz was already publically associated with monkey experiments.
- the risk to him and the University was increased because of the television programme,
- there was already detailed disclosure being given in response to the information request in September 2007,

and that consequently in this context there would have been no additional risk by the disclosure of the rest of the disputed information.

37. From the evidence above the Tribunal is satisfied that the threat was indiscriminate, unpredictable and wide spread. Those targeted have often been “soft” targets (the retired or those with no connection to animal research). Incendiary devices have been left in public places (the sports pavilion) putting at risk any visitor to the University. The risk to health and safety from disclosure of the disputed material affects some individuals who would not otherwise be at risk or who would have their profile raised substantially in this context thus putting them at additional risk.

- a) disclosure of the publications named authors,
- b) potentially identifiable groups – to members of those groups
- c) raising the temperature, because of the indiscriminate nature it could affect any one in the wrong place at the wrong time. i.e. visitors to the town or the university.

38. The Tribunal must consider the situation that existed around the time of the request however, whilst Tribunal cannot use subsequent events to justify retrospectively the decision not to disclose, the Tribunal has considered evidence of events after the “relevant time” (as set out above) in order to:

- Satisfy itself that the University and Commissioner’s judgments were reasonable and their concerns were well-founded when they concluded that this was an on-going threat,
- Confirm the level of threat which existed at the time,
- In support of the University’s contention that the threat was directly linked to Felix,

- Justify the University's assessment that the importance of Felix as a symbol and a justification for violent extremism was not neutralized by the fact that Felix was no longer alive.
- To provide examples of the types of use that criminal and irresponsible activists in fact made of information disclosures; and to accept these in support of the University's contention that there was additional risk in further disclosure.
- To Counter the evidence from PETA that by September 2007 extremist activity was in decline. (They relied upon 2 Association of British Pharmaceutical Industry articles from October 2006 and January 2007). The Tribunal were satisfied that whatever the general picture the campaign against Oxford and related to Felix was not in decline and noted that it was not clear whether the statistics were limited to the pharmaceutical industry or were drawn from all animal research).

39. The Tribunal takes into account the evidence of the methods used by those involved in extremist activity in considering how likely it is that steps would be taken to identify those referred to obliquely in the disputed information. DCI Robbins was involved in the investigation of those prosecuted and imprisoned in connection with the violent campaign to Stop Huntingdon Life Sciences (SHAC). SHAC compiled systematic detailed spreadsheets of targets including details of their home addresses, names and ages of children, searches performed against the personal details e.g. with the Council, bin day collection (believed to be so that information could be obtained from rubbish) and security reconnaissance.

40. In DCI Robbins' experience lawful and unlawful campaigns by activists were prioritized by any new revelations about the targets, and criminal action and lawful demonstrations were concentrated on the prioritized targets, whether they were previously known to them or not. SHAC was in contact with Mel Broughton leader of SPEAK. When Mel Broughton was arrested a list of targets for direct action, a University employee pass and the means to make incendiary devices were found hidden in his house. Whilst PETA is a lawful, peaceful, campaigning organization, disclosure under FOIA is disclosure to the world at large. Once in

the public domain the disputed information could be used by any part of the animal rights community including those who were extremist and violent.

## **References**

41. In the licence application there are 3 categories of academic references cited in support of the science in the application:

- References co-authored by Professor Aziz,
- Published references in which Professor Aziz was not an author,
- References to scientific work that was done by named individuals but which was not in a published reference.

42. In their letter of 27<sup>th</sup> April 2009 the ICO indicated that:

*“... The ICO has conducted an internet-based search against Professor Aziz’s name. The references from within the licence which were written or co-written by Professor Aziz are available on the following webpage:...*

*The ICO considers that the names of those who have written these papers alongside Professor Aziz are already in the public domain and therefore it is unlikely that disclosure of these names now would lead to an increased risk to the health and safety of these or other individuals... the ICO does not consider the exemption to be engaged, and is therefore not required to consider the public interest test. The University should disclose the requested information.,”*

43. In consequence the information was released by the University in May 2009. There was no evidence that the co-authors were in fact targeted as a result of this disclosure.

44. During the hearing both the University and the Commissioner argued that this reasoning was erroneous and that the Commissioner ought to have upheld the University’s original decision to withhold these references.

45. PETA relied upon the obiter comments of this Tribunal (differently constituted) in *BUAV v IC EA /2007/0059* :

*“...it is already relatively easy to identify, from publicly available information, the individuals and organizations that are prominent in a particular area of research and have used animals in experiments in the past. We are not convinced that the disclosure of the bibliography ... will therefore increase significantly the risk that those working in this area face from extremists.”*

46. Applying those comments to the facts in this case PETA argued that:

- the co-authored references were already in the public domain,
  - the link to Professor Aziz was direct and immediately apparent,
  - in the context of these articles the co-authors were already identified as experimenters upon primates,
  - the authors and co-authors had chosen to publish the research in the context that there were extremist groups opposed to this type of experimentation,
- and that consequently there was no additional risk to the co-authors by their disclosure in the context of this FOIA request.

47. Additionally PETA argued that the purpose of the “Felix” campaign was to close down the Oxford lab and that there was no reason to target those whose research revolved around other universities. The Tribunal was satisfied that identifying those who were prepared to collaborate with Oxford would make them a legitimate target and satisfy this end. Additionally, from the examples listed above, the Tribunal was satisfied that SPEAK and ALF were indiscriminate and did not choose their targets carefully or logically.

48. This Tribunal is not bound by the observations made in the *BUAV* case and on the facts of this case is satisfied that disclosure of the references would increase the risk of endangerment. The Tribunal was persuaded by the Commissioner and University’s

arguments that whilst Professor Aziz was already known to experiment on monkeys, his profile and the threats against him had been significantly raised by the television documentary and his connection to Felix. The fact that images of the monkey had been shown and his name given had enabled Felix to be used as a symbol. Disclosing the references went beyond identifying someone as connected with Professor Aziz or as someone who experimented upon monkeys in general. The new piece of information provided by way of disclosure of these references in this context was the link to Felix; namely that the work done by these co-authors had been used to support the application to experiment upon Felix. Consequently there was now a direct link between the authors and the experimentation upon Felix.

49. Additionally whereas they could have become a target through internet research on scholastic websites, disclosure in this atmosphere both raised their profile, placed them in a new context (someone whose work had inspired the work on Felix and enabled Professor Aziz to get permission to experiment upon Felix) and consequently put them into a context of a suggested target. To use a colloquialism this was placing them in the cross hairs.

50. Just because there was no evidence of any threats to the co-authors resulting from the disclosure, the Tribunal was not satisfied that this meant that there was not an additional risk at the relevant time. The Tribunal has to consider the situation that existed at the relevant time (around the date of the request) and took into consideration the fact that the circumstances were different at the date of actual disclosure in 2009 for example Mel Broughton was by then imprisoned and not himself able to take any further direction action. Additionally the test to be applied was on a balance of probabilities “would be likely” to endanger.

51. The above arguments all apply to the rest of the references within the disputed material of which Professor Aziz was not an author or co-author. Mr Currie (policy advisor at PETA who made the request for the information) gave evidence that when he used the keywords: “*Aziz Parkinson’s Primate*” on “*Google Scholar*” a free online search engine for academic papers, there were 1030 results. 9 of the first 10 were co-authored by Professor Aziz and 5 of these were

the ones disclosed as a result of the Commissioner's investigation. 3 of these 9 co-authored papers could be obtained free (although all were available for a fee). He conducted an analysis of these 3 papers which revealed a total of 151 additional references, 38 stated in their title that they involved primates and 13 involving other animals.

52. PETA argued that the references cited did not "support the research" but supported statements made within the project licence. This did not increase their risk because it did not mean that they would have themselves endorsed the project.

- Many of the still withheld published references would be footnoted in Professor Aziz's existing published work,
- The names were therefore already linked to Professor Aziz, even if these references did not involve primate research or even animal research they were linked to primate research in this context,
- Many of the titles would not indicate that animals had been used and that would reduce the risk to those authors,
- The names were in the public domain,
- An activist could already make the link and make a list of "people whose research has been relied upon by Professor Aziz in the context of his primate experimentation" which was likely to overlap substantially with the withheld references.

53. In light of the 1030 results on the search and the fact that most publications have several authors, the Tribunal noted that such a list would be so long as to be virtually meaningless. It would require additional work and expense to collate the list and there is a safety in numbers in that the list of possible targets using the "google search method" would be overwhelming and consequently meaningless.

54. Additionally the Tribunal accepted Professor Phillips' evidence that not all the references would necessarily appear in past or future work, as some of the references would be used to support the protocol or methodology when the published research was more likely to deal

with the research. He accepted that sometimes specific papers were published on methodology, but this would not be so easy to link to Felix.

### **The Public Interest test**

55. For the reasons set out above the Tribunal is satisfied that section 38 is engaged and now considers the balance of public interest.

56. Under section 2 FOIA, Section 38 is not an absolute exemption and is consequently subject to the public interest test set out in section 2(2)(b):

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

57. The following factors were identified as supporting disclosure of the disputed material:

- i) Transparency in the way research is conducted.
  - o Professor Phillips agreed that science being as transparent as possible was good for science, and if it were not for the risk of endangerment that disclosure of the disputed information would be for the good.
  - o Published results may not report experimental or statistical methods or even their hypotheses in sufficient detail to allow proper analysis.
  - o Other scientists are hindered from replicating the work,
  - o Other scientists are hindered from critiquing, or challenging the model, methodology, hypotheses upon which the research is based etc.
  - o There is the potential for the retardation of progress as the pool of those who might have a contribution to make is greater than those who have access to the detail.
  - o The Tribunal accepts that the prospect of a decision being scrutinized tends to drive higher quality decision making.
  
- ii) Transparency in the way the public were kept informed



- Further information could and should lead to public ethical scrutiny. Informing the public as to the costs and benefits so as to form a view as to what they will tolerate. The more information they have the better to facilitate this.
- Whilst the public are informed by that which is already published it is insufficient in that it lacks details.
- Dr Bailey believed that there was concern by campaigning organizations that “lip service” was paid to the 3 Rs and the cost benefit analysis and the detail would enable this to be assessed. David Thomas (a Solicitor and legal consultant for BUAV) gave examples from other projects unconnected to the University or Professor Aziz :
  - a project where mice were routinely being found dead having suffocated, as a consequence of a side effect of the protocol. They should have been killed humanely before reaching that stage in order to keep suffering to a minimum but the level of monitoring appeared wrong.
  - Batches of Botox were tested and the HO had no way of knowing the end use of each batch. Some were used cosmetically. This raised the question of how the cost/ benefit of the suffering of the testing was justified if the end use was cosmetic.
  - Alternatives to toxicity testing for Botox have been available for 10 years yet it is still licenced on animals by the HO.

iii) Transparency in open public debate

- In the absence of detail it was difficult to stimulate political interest. Mr. Currie’s evidence was that to hold the regulatory system to account he needed public examples of what was happening. In the absence of this Politicians do not believe there is a problem.

- Reporting of pain and distress in published work is variable and can be inadequate,
- There was insufficient information in the public domain to allow the public to undertake their own cost benefit analysis.
- The information in the public domain relating to benefits was not systematic or dispassionate and was often news led.
- PETA argued that the University had had a platform to present its case in relation to this project licence and had been able to “cherry pick” the information that was presented.
- The testing of competing claims is an important part of rational informed debate.

iv) Transparency in the regulatory system:

- Allowing evaluation of whether the Home Office are requiring sufficient evidence before permitting an application. (PETA relied upon the fact that between 2004-6 the Home Office received 1709 applications for project licences none of which were refused).
- The public can only see if the Home Office are not fulfilling their regulatory role if they can see how the Home office operates in practice – without the detail of the disputed information they cannot be scrutinized properly. (PETA relied upon the figures that 22 Home office inspectors conducted cost/benefit analyses of 2652 animal research programmes in 2008 over 200 establishments involving millions of animals in support of their contention that there were reasonable grounds for concern that the resources were overstretched).
- David Thomas’s evidence was that potential claimants need sufficient information to assess whether to bring a case of judicial review given the financial risks that litigation holds. At present only undercover investigations or leaks to organizations provided sufficient detail to enable them to decide whether they have good arguments, and what they are.

- The Tribunal noted that the same argument applied to the possibility of subjecting the HO to Parliamentary scrutiny by way of a complaint to the Ombudsman, in that sufficient detail would be required in order to trigger a complaint.
  - If the system is working well there is a public interest in that the public would be reassured by this, and it sets out an example of best practice from which other countries can learn.
  - If the system is not working well it enables the gaps to be identified and addressed.
- v) The public interest factors in favour of disclosure relating specifically to the References were:
- To establish the grounds on which Professor Aziz claims his research has human relevance, informs knowledge of human Parkinson's disease and is beneficial with regard to translation to clinical practice.
  - PETA argued that whilst the public can make points from material already in the public domain, the point is better made and more rigorous if they know the scientific papers relied upon.
  - The previous work that an author relied upon, directs the approach of someone trying to assess or analyse that work.
  - Scientists need to know what publications have been relied upon to validate the model and to ascertain what has been done to assess the cost .

58. Both Oxford and the Commissioner accepted that the factors identified in paragraph 56(i)-(v) above were valid public interests in favour of disclosure. They differed in the degree of weight to be attributed to them with the University attributing less weight than the

Commissioner in general terms. They both argued that the public interests in disclosure as listed above were limited by:

- The mismatch between the scope of the request (limited to the back ground, 3Rs and the actual protocols undergone by Felix) and the contents of the other protocols in the project licence.
- The fact that this request related to a single project licence (rather than all project licences),
- Information had already been given in the television programme, and in response to this information request. The University had provided a redacted version of the application and believed it had gone as far as it felt it could without extending the risk of harm addressed by s38. Further disclosure would lead to distortion or inconsistency.

59. The Tribunal agreed with this assessment and also took into consideration that:

- a) That whilst not all information was in the public domain there was already substantial material relating to results, methods, retrospective cost benefit analyses, alternative methods, already in the public domain in relation to this type of experiment relating to other projects.
- b) There are a number of independent scientific bodies funding research into the 3Rs and the cost/benefit analysis (such as NC3Rs, the Royal Society, the Academy of Medical Sciences and the Medical Research Council) which contributes to the wider public and scientific debate.
- c) Benefits can be assessed via published outcomes including a retrospective exercise of how much benefit was gained.
- d) Costs – there is sufficient information for the lay public to make an assessment of the costs. The outline of the experimental procedure is known, as is the severity limit (in this case the project was categorized as “substantial”). The public can already ask the question: *Is it worth 2 monkeys per year over 5 years at a substantial severity limit to achieve the benefits outlined?*

60. Whilst it was the evidence of Mr. Thomas that the detail helps to select cases for Judicial review, in Secretary of State for the Home Department v BUAV [2008] EWCA Civ 417 Lord Justice May noted that:

*para 60* “in practice there had to be an exercise of judgment; and that the view of scientists and veterinary surgeons who make the judgment must be given proper respect up to the point at which the judgment can be shown to be vitiated by legal error or clearly wrong”

*para 66* “[Mr Justice Mitting] could not in the circumstances have properly [found that the conclusions were perverse] without an intense analysis of expert scientific material which he rightly did not attempt to undertake.”

This Tribunal is satisfied that these comments have the effect of limiting the role of judicial scrutiny in that the Court must be careful not to substitute its own inexpert view of the science for a tenable expert opinion.

61. In making the case for the need for external scrutiny, Dr Bailey observed that scientific literature was “*replete with projects which fail in their goals, are irrelevant to humans and poorly conducted all of which had peer review committees, ethics committees, funding and licences*”. However, the Tribunal notes from the evidence that:

- Research into the 3Rs continues with refinements and improvements being made,
- Dr Bailey was able to quote from numerous inquiries and reports from organizations such as the APC, the Nuffield Council on Bioethics etc. which reviewed and refined the information and detail which should be provided and the procedures undergone in such applications.
- The University circulates internally, its mistakes and failures and its innovations to improve practice,
- The failings identified by Dr Bailey have made their way into publically available literature and in this respect is an endorsement of the culture of publication and peer review.

62. The Tribunal recognized that the opportunities for external scrutiny are limited, however they accepted the evidence of Professor Phillips that the “internal” scrutiny involved in the 3 stage process of: grant application, ethical approval and Home office licence was rigorous. This was not a public process, however, those involved were drawn from a wide variety of backgrounds including scientists in other fields, ethicists, statisticians and those opposed to animal experimentation. Whilst it was accepted that no regulatory system was flawless and there would be individual cases where the system broke down, there was no evidence that as a system it is malfunctioning. The Tribunal reminds itself that the withheld information in this case is but a part of one example of a project licence and would therefore have a very limited contribution to make in this context. PETA’s arguments addressed general concerns, rather than the impact and effect of disclosure on the facts and in the context of this particular case.

63. PETA believed that the Television programme had provided a platform for the University to put the case in favour of animal experimentation and fairness required the rest of the information to be disclosed to enable those on the other side to make their case. Jeremy Harris Director Of Public Affairs at the University gave evidence that:

- The University would not have sought involvement in the making of such a programme,
- They were informed that the Production company planned to make the programme with or without the involvement of the University.
- They became involved to ensure that it was accurate, balanced and did not jeopardize the wellbeing of individuals, the construction process or the academic activity of the University.
- Whilst the University previewed the documentary prior to broadcast to allow any outstanding concerns about security and accuracy to be addressed, the University did not have editorial control.

64. Additionally PETA believed that the information released thus far painted a misleading and partial picture and that disclosure was necessary to redress the balance. An example given was that Professor Aziz had said in the documentary that:

*“pain is not a feature – surgery is under full anaesthetic. The monkeys are not subjected to pain. Pain is not part of the process”.*

65. The Tribunal has viewed the documentary and the disputed material and is satisfied that any question as to programme balance was not within the control of the University, and that it follows that there is no additional weight to be given to such arguments in favour of disclosure of the disputed information in this case.

66. The Tribunal considered the argument that it is in the public interest to disclose the withheld material because non disclosure would increase the risks of endangerment because extremists might believe that the University was “hiding something terrible” and escalate their campaign upon that assumption. The Tribunal is satisfied that the risk that exists is irrational and indiscriminate and having seen the ways that the material disclosed thus far has been used considers that the risk of escalation from distortion and an increased pool of identifiable targets is greater.

### **In favour of withholding information**

67. The University argued that once the exemption was engaged and consequently it was accepted that disclosure of the disputed information would endanger health and safety it requires a very strong public interest to equal or outweigh it. The Tribunal found support for this contention in *Hogan* para 35.

*“... In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question”.*

68. Additionally the University argued that there was significant additional weight in favour of withholding the disputed information because of the nature of the threat (in this case an increased risk of indiscriminate and extreme acts of bombing and arson). It was not suggested that the nature of the risk has the status of turning section 38 into an absolute exemption but that it requires a very strong public interest to equal or outweigh it. The Tribunal agrees with this assessment of the weight that should be given to the nature of the additional endangerment in this case, and in light of the history (set out in para 33 above) considers that section 38 is engaged,<sup>1</sup> and that significant and conclusive weight should be given to the factors weighing against disclosure of the disputed information in this case.

69. The Tribunal identified the fact that private sector organizations applying for a HO Licence were not subject to the FOIA regime. Their licence applications would not be disclosable from them under FOIA or from the HO as section 44 FOIA applies (disclosure is prohibited by section 24 ASPA) *Secretary of State for the Home Department v BUAV [2009] 1 WLR 636* In light of the risk of endangerment the Tribunal was satisfied that it was in the public interest that there should be a “level playing field” so that those working for public bodies engaged in this type of work were not exposed to a greater risk than their counterparts in the private sector.

70. The University argued that there was an additional aspect – consequential to the risk of health and safety, that scientists would be deterred from future research of this type and that in light of the potential advances to science and benefits to human health this would be against the public interest.

71. PETA and the Commissioner argued that this was too remote from the exemption claimed. Additionally it was argued that the Tribunal would need to form the view whether it was in

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<sup>1</sup> *In assessing the additional risk as high and outlining the very serious nature of the endangerment that would be likely to be caused, the Tribunal does not intend to indicate that this is the threshold that must be passed before section 38 can be relied upon. Each case depends upon its own facts.*



the public interest to experiment upon animals to determine this issue (i.e. would human health suffer if it did not happen?)

72. To the extent that it was suggested that it would not be in the public interest if scientists were prevented from pursuing their careers in a lawful and regulated field because of the risk of endangerment, the Tribunal was satisfied that was not remote from the exemption claimed. To consider this argument it was not necessary for the Tribunal to decide the wider philosophical and scientific issue of to what extent animal experimentation was in the public interest, since the harm being addressed was the risk of unlawful pressure and discouragement of the research; rather than the balance of benefits which is addressed by the regulatory framework and is a matter beyond our competence or the evidence before us. In any event the Tribunal did not think that the evidence supported the contention that disclosure of **this information** would lead to a widespread abandonment of this type of work because:

- There was already a well publicized high degree of risk associated with this type of work, it was likely that those who remained in this field were prepared to work in this field in the knowledge that there was a risk attached.
- The example given by Professor Phillips was of someone who relocated to continue their work but did not change their field of practice.
- Some of the authors of the references would have had no involvement in animal research anyway.

73. It was also argued that disclosure would harm animal welfare and undermine the regulatory process in that:

- Applicants would not be as detailed in their applications,
- The terms of licences would be vague and therefore unenforceable.
- It would affect the frankness of the record in that more information would be conveyed orally to e.g. HO inspectors rather than committed to paper.

74. The Tribunal was satisfied that the Home office and Animal Procedures Committee would not let this happen. As articulated by Dr Bailey, scientists need to persuade the regulators to allow them to undertake the work. Detail helps that process.
75. The Tribunal considered the fact that it is likely that work relating to this project licence would be published by Professor Aziz or his colleagues in due course and that many of the references both involving co-authors of Professor Aziz and those who have never had any direct contact with him and who may never have experimented upon animals would be listed in support of the research done and the conclusions drawn. This, it was argued, might be held to indicate that the University can choose to disclose the information when it suits their academic purposes but not in time to enable others to challenge the licence before the work is completed. The Tribunal concluded that this is not a compelling reason why the information request could or should have been treated differently. We do not accept that the purposes of the University are narrow or their handling of information has been shown to be calculated or conspiratorial. Within the framework laid down by law there are controls over animal experimentation but they do not make all experimentation unlawful. There will always be those who take a different view and seek evidence to support their democratic and ethical arguments. To the extent that there is a security threat created by less responsible activists, their access to information may, in some particulars, be curtailed, but this does not invalidate all the checks and balances within the system of regulation.
76. For the reasons set out above the Tribunal is satisfied that the public interest in maintaining the exemption substantially outweighs the public interest in disclosing the information. Additionally in making this finding in relation to the references the Tribunal took into account:
- The general matters set out above at paragraph 33 et seq in relation to the additional risk of endangerment and the level of the danger,
  - the evidence that at the time of the Commissioner's investigation no such research had been published,
  - The Tribunal also presumed that it was not inevitable that the research would be published – if the risk was too high no doubt it would not be published.

- Not all of the references cited in the licence application would be relied upon in the published research (Professor Phillips' evidence was that most published research did not deal with the methodology of the protocol).
- The risk level applicable at any date of publication would have to be assessed then.
- The research would not necessarily be so obviously linked to Felix

77. For the reasons set out above, the Tribunal was satisfied that the public interest factors in favour of disclosure were substantially outweighed by those factors which supported withholding the disputed information.

### **Other matters**

78. The Tribunal recognizes that non human primate research is a sensitive topic which provokes a strong emotional response in many people, and that those on both sides of the debate may therefore be hesitant to draw attention to themselves by discussing these matters publicly. The Tribunal was greatly assisted by the evidence before it and would wish to express its appreciation of the co-operative and measured approach adopted by the parties in relation to this highly emotive subject.

### **Conclusion**

79. The Tribunal is satisfied that section 38 FOIA is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure. For the reasons set out above the appeal is dismissed.

**Dated this 13<sup>th</sup> day of April 2010**

**Fiona Henderson**  
**Tribunal Judge**