



**IN THE FIRST TIER TRIBUNAL**

**Appeal No: EA/2015/0273**

**GENERAL REGULATORY CHAMBER**

**INFORMATION RIGHTS**

**On appeal from the Information Commissioner's Decision Notice No FS50583261 dated 3 November 2015**

**Before**

**Andrew Bartlett QC (Judge)**

**Roger Creedon**

**Pieter De Waal**

Heard at Fleetbank House, London EC4

Date of hearing 17 March 2016

Date of decision 16 May 2016

**APPELLANT: CRUELTY FREE INTERNATIONAL**

**FIRST RESPONDENT: INFORMATION COMMISSIONER**

**SECOND RESPONDENT: IMPERIAL COLLEGE LONDON**

**Attendances:**

For the appellant David Thomas

For the 1<sup>st</sup> respondent Rupert Paines

For the 2<sup>nd</sup> respondent Robin Hopkins

Subject matter: Freedom of Information Act 2000 – qualified exemption – health and safety

Cases:

*PETA v IC* 13 April 2010, EA/2009/0076

*BUAV v IC and Newcastle University* 11 November 2011, EA/2010/0064

*Hepple v IC* 26 February 2014, EA/2013/0168

*Callus v IC* 6 May 2014, EA/2013/0159

### **DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal. The Second Respondent shall disclose the information requested in part 2(i) of the Appellant's information request dated 2 December 2014 within 35 days from the date of this decision.

### **REASONS FOR DECISION**

#### Introduction

1. The Appellant ('CFI') requested information about staffing hours at the Hammersmith animal research facility of the Second Respondent ('ICL' or 'the College'). The appeal concerns whether the exemption in Freedom of Information Act ('FOIA') s38 (health and safety) was correctly applied and, if the exemption was engaged, the balance of public interest.

#### The request, the public authority's response, and the complaint to the Information Commissioner

2. CFI (formerly known as BUAV) is a charity which conducts lawful campaigns against animal experiments. On 2 December 2014 CFI wrote to ICL with the following request:

This is a request for information under section 1(1)(b) FOIA. The background to the request is the BUAV's investigation at the College in 2012 and the subsequent report by the Brown Inquiry in December 2013.

The Inquiry recommended (*inter alia*) an increase in staffing levels 'to enable increased involvement of animal care staff with *in vivo* research programmes at Imperial'; and to 'ensure staffing resources allows [*sic*] for greater independent overview of animal welfare out of hours and during weekends, and also reduces reliance on agency staff'. The College subsequently issued a statement saying that it accepted all the recommendations of the Inquiry.

Could you please inform the BUAV:

1. Whether there is now at least one member of care staff on duty at the site at Biological Services Unit, Du Cane Road, Hammersmith all the time (i.e. 24 hours a day, 7 days a week)
2. If not, (i) during which hours there is at least one member of care staff on duty at the Hammersmith site; and (ii) what criteria are applied in deciding on care staff cover outside normal business hours (disclosing any relevant document)
3. (i) Since the BUAV investigation, whether the Home Office, by conditions attached to the licences or otherwise, has imposed any new requirements on licence holders with regard to staff cover; and (ii) if so, what they are (disclosing any relevant document).

All information can be provided in anonymised form.

3. The expression 'care staff' refers to relatively junior technicians who look after the animals, and who are to be distinguished from other persons who may be present on site at various times, such as researchers, the named veterinary surgeon (NVS) or deputy NVS, one or more named animal welfare care officers (NACWOs), and security staff.
4. In its response on 23 December 2014 the College answered all parts of the request for its animal research sites generally, with the exception of part 2(i) (which remained live because of the nature of the answer to the first question). The response to 2(i) was:

Due to the safety considerations of care staff (as a result of the activities of a number of animal rights activists) the College considers the information requested in 2(i) to be exempt from disclosure under the exemption set out in s.38 of FOIA, that the disclosure would be likely to endanger the physical or mental health (ss(1)(a)) or safety (ss(1)(b)) of any individual. This is a qualified exemption. In view of the activities of such extremists the balance of public interest must be towards protecting the health and safety of staff at Imperial College rather than providing the information sought.

5. CFI advanced arguments against the application of s.38 and requested internal review by the College. The College provided a lengthy response on 4 March 2015. This upheld the original decision and made a number of points concerning-
  - a. BUAV's campaign against the animal research conducted at the College, which included infiltration of a BUAV activist among the care staff, and publication of allegations of shortcomings.
  - b. Staff health.
  - c. Staff anxieties.
  - d. Increased risks to physical safety if the security of the site were compromised.
  - e. Why the public interest in maintaining the s38 exemption outweighed the public interest in releasing the requested information.

6. As regards physical safety the College accepted that CFI was not itself involved in violent extremism but the College was concerned that the information might be mis-used by those who were.
7. As regards staff health, the College stated:

BUAV's campaign against the College, and the increased number of FOIA requests, has undoubtedly resulted in higher levels of work-place stress and pressure for animal researchers and animal care staff. That they were spied on for a period of several months by a BUAV activist has also led to increased levels of work-place stress for staff. Those staff at the site at which the BUAV activist was based and who were spied on by that person feel particularly vulnerable. This has already had a serious impact on the mental health of some College staff, with at least one member of staff having to take time off for mental health reasons in the period since BUAV started its campaign against the College. The College's concern about the impact of this FOI request on the mental health of its staff is therefore serious and genuine.

... ..

As a result of BUAV's activities and campaign against the College, staff working in animal research at the College are now genuinely concerned about their safety and well-being and are worried about being targeted by animal rights extremists, both personally and at their place of work. If the College was to release the information requested about particular sites, it would lead to increased levels of stress and anxiety for all of the animal research staff working at those sites. Not only would they feel that their site was less secure as a result of the release of this information, but they would also feel that the College was not giving due regard to their personal health and safety. The College believes that this would present an unacceptable risk to the mental health of individuals involved in animal research, in addition to the increased risk to their physical safety from possible attack by animal extremists.

8. In view of the College's concern about the release of information 'about particular sites', CFI stated on 12 March 2015 that it would be content if the College gave the outstanding information either (i) for all its sites or (ii) for Hammersmith but with redactions to obscure the location.
9. On 22 May 2015 CFI complained to the Information Commissioner about the refusal. The Commissioner engaged with the College at some length, seeking to test the College's position.
10. The Commissioner's public Decision Notice (3 November 2015) stated that he accepted that s38 applied and that the public interest in favour of disclosure was outweighed by the public interest in maintaining the exemption. His detailed reasoning was contained in a confidential annex.
11. We note that paragraph 1 of the Decision Notice mis-characterised the information request as seeking the hours when there was 'at least one member of staff on duty' at the facility. The request related specifically to care staff, not to other staff.

The appeal to the Tribunal and the questions for the Tribunal's decision

12. CFI appealed to the Tribunal, without sight of the confidential annex to the Commissioner's decision. The Commissioner reconsidered the need for confidentiality and, after consultation with the College, released to CFI a redacted version of the confidential annex. The College was joined as Second Respondent to the appeal.
13. The issues for the Tribunal are whether s38 is engaged and, if so, where the balance of public interest lies.

Legal approach

14. FOIA s38(1) provides that information is exempt if its disclosure under the Act would or would be likely to endanger the physical or mental health of any individual or endanger the safety of any individual. This is a qualified exemption subject to the public interest test in s2(2)(b).
15. Our attention has been directed to the expositions in *Hepple v IC* 26 February 2014, EA/2013/0168 at [31]-[34] and *PETA v IC* 13 April 2010, EA/2009/0076 at [30]-[31], and to the reasoning in *Callus v IC* 6 May 2014, EA/2013/0159 at [60]. We have also kept in mind the Tribunal's remarks in *BUAV v IC and Newcastle University* 11 November 2011, EA/2010/0064 at [15]-[19].
16. Mr Hopkins further submits on behalf of the College that the word 'endanger' denotes 'risk – rather than actual or probable harm'. We are not convinced that the contrast which he draws necessarily elucidates the meaning of s38 (see further the discussion in *BUAV v IC and Newcastle University* 11 November 2011, EA/2010/0064 at [17]-[18]), albeit this rather depends on what he means by the word 'risk', which may itself be understood in more than one sense. We accept that the section requires us to consider whether there is a likelihood<sup>1</sup> of a situation that is dangerous to someone's health or safety. In the event it is not necessary for us to say more on this, because our overall conclusion is unaffected, however the word 'endanger' is read.

Evidence and analysis

17. There is a complex system of controls by which the Home Office regulates animal experiments pursuant to the Animals (Scientific Procedures) Act 1986 ('ASPA'), as revised with effect from 1 January 2013. The nature of the system is not in dispute between the parties and it is not necessary for us to set out the details here.
18. At the hearing we received written and oral evidence from Mr Hancock, the College's Head of the Central Secretariat and Assistant Clerk to the Court and Council, who had conducted the internal review. The factual case advanced by the College as regards the engagement of the s38 exemption was summarised in its revised written skeleton as follows:

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<sup>1</sup> In the sense explained in *BUAV v IC and Newcastle University* 11 November 2011, EA/2010/0064 at [15].

[18.] The College's first concern is the heightened "infiltration risk". As Mr Hancock explains, the College knows that such a risk exists: given the activities of animal rights extremists and activists (CFI being an example of the latter), it is right to conclude that there are individuals who – motivated by their opposition to the College's work with live animals – would wish to infiltrate the Hammersmith facility, so as to cause disruption and/or gather information to which they are not entitled.

[19.] To place the disputed information in the public domain would be to heighten that infiltration risk. It would assist the would-be infiltrator by telling him or her when they are most likely to find the Hammersmith facility empty of any staff.

[20.] A heightened infiltration risk is not merely of concern in its own right. It also represents a safety risk. This is because members of staff are frequently on site out-of-hours. If they are present during an unauthorised entry by someone hostile to their work (even if not physically threatening), this will cause them serious distress. An encounter between an intruder (opposed to the College's work and expecting to find the Hammersmith site unoccupied) and a distressed and alarmed member of staff would represent a danger to health and safety.

[21.] As a responsible employer, the College is justifiably concerned to avoid that danger.

[22.] The College's second concern is the heightened "distress risk". This concern takes the form of both an "overarching reason" and a "particular reason".

[23.] The overarching reason is that perceptions about the heightened infiltration risk would cause additional distress to at least some members of College staff, to such an extent that their mental health was prejudiced/ endangered. As Mr Hancock says at his paragraph 9(ii), "those who occasionally work out of hours would have well-founded and serious fears about an increased risk of encountering an intruder who – while not necessarily physically threatening to them – was hostile to their work".

[24.] To understand why those fears are serious enough to amount to a danger to mental health, one must consider the prevailing factual circumstances. Mr Hancock explains the important background issue of animal rights extremism in some detail, at his paragraphs 25-33. He does the same in respect of the College's own experience of animal rights activism, at his paragraphs 34-42. He then explains the particular activities of BUAV and CFI, at his paragraphs 45-50. Such factors account for the conditions of severe distress and anxiety experienced by some members of College staff on account of their work with animals. Those conditions are described at Mr Hancock's paragraphs 51-57.

[25.] Those issues provide the context for Mr Hancock's evidence about the likely impact of the disclosure of the disputed information: see his paragraph 58-62. The concern is then summarised at his paragraphs 85-86:

"85. That heightened risk is very likely to cause substantial stress and anxiety to at least some members of staff who sometimes work out of hours. This is not necessarily because they fear a physical attack. Staff would understandably fear being present during an unauthorised entry by someone who is extremely hostile to their work with animals, regardless of whether or not the intruder had any violent intent. The uncertainty and the nature of such an encounter is sufficient (given the context I have explained above) to cause very serious incremental stress.

86. Given the special context in which staff work, such stress and anxiety plainly constitutes a significant risk to mental health. These fears would be far from irrational or fanciful. If the disputed information were to be disclosed, a member of staff working alone would have reasonable grounds for feeling much more vulnerable when working out of normal hours. As an employer, the College has a duty of care to staff and must give due regard to staff personal health and safety.”

[26.] The Tribunal is invited to accept that evidence. Given the background and context Mr Hancock provides, his account is compelling. It is soundly reasoned and based on facts about the prevailing conditions as experienced by some members of College staff.

[27.] In addition to that overarching reason, the College advances a “particular reason” for saying that disclosure would endanger mental health. This relates to the particular circumstances of an individual or individuals. It is not a wholly distinct reason, but instead comprises concrete illustrations of why the overarching reason is sound.

[28.] The particular reason is explained in detail at paragraphs 89-99 of Mr Hancock’s statement. Both the Registrar and the Chamber President have ruled that those paragraphs must remain closed. The Tribunal – assisted by the Information Commissioner – can of course test that evidence on the public’s behalf in a closed session.

19. To the extent necessary, we permitted Mr Hancock to give some of his evidence in a closed session, at which he was questioned by counsel for the Information Commissioner and by the Tribunal. At the closed session, which occupied some 50 minutes, he gave evidence about the College’s security arrangements and about the “particular reason” referred to in the skeleton. The nature of the closed session, but not its detailed content, was relayed to the appellant before Mr Thomas made his closing submissions.
20. At the hearing we also received written and oral evidence from Ms Thew, CFI’s Chief Executive. Her evidence explained the background, context, and purpose of the information request, and identified concerns which affected the public interest in disclosure. She drew to our attention what occurred after BUAV (as it then was) submitted a report on ICL to the Home Office, based on its undercover investigation, including the following-
  - a. The Home Office’s Animals in Science Regulation Unit produced a report which identified some violations of a persistent nature and referred to a widespread poor culture of care.
  - b. The Home Office issued a compliance notice to the establishment licence holder (the University Registrar). This referred to licence violations by 6 individuals and required certain remedial steps to be taken, including re-training of some project and personal licence holders, who were reprimanded. It stated:

the number of non-compliant individuals, together with evidence of widespread poor understanding of licensee and duty holder responsibilities under the Act, indicates a generally poor culture of care at ICL.
  - c. ICL set up an independent inquiry into animal research at ICL. This was headed by Professor Steve Brown. It concluded that ICL did not have in place adequate

operational, leadership, management, training, supervisory and ethical review systems for a world-leading institution. It found there was considerable room for improvement, including in working practices and mechanisms for reporting animal welfare concerns. It recommended, among other things, an increase in staffing levels to allow increased involvement of animal care staff with in vivo research programmes, to reduce reliance on agency staff, and to ensure greater independent overview of animal welfare out of hours and at weekends.

- d. The Animals in Science Committee concluded that infringements occurred on an unacceptable scale for an unknown, but extended, period, and there was an unacceptable risk that some may have involved appreciable welfare costs to the animals. It stated that the regime clearly fell short of the standard required by ASPA.
  - e. The Secretary of State made it clear that new leadership was required, as a result of which the establishment licence holder stepped down and was replaced.
21. As regards animal welfare, Ms Thew expressed concern that in its published literature the College claimed that it gave round the clock care to its animals, whereas the reality was that care staff were not present on a continuous 24-hours a day 7-days a week basis. To state that care staff were on call 24/7 missed the point: when no one was present, animals could not seek help if they suffered unforeseen distress. Mr Hancock conceded in his open evidence that the automatic 24-hours monitoring was of the environmental conditions (humidity and temperature), not of the animals themselves. He did not accept that the College's claim of round the clock care was misleading. However, it became apparent in his answers that his rejection of Ms Thew's concern relied on the continuous availability of analgesics in feed or water and on researchers always making correct judgments on animals' condition and prognosis before leaving them unattended. Accordingly, we see the force of Ms Thew's concern. However, it seems to us that such a concern could only be relevant to the question of the public interest balance and is of no relevance to the question of whether s38 is engaged.
22. As regards the assessment of risks from animal extremists, Ms Thew pointed out that the College published names and photographs of persons engaged in animal research. The College had evidently made a judgment that such publication did not create an unacceptable risk.
23. The documents showed that the College has about 170 project licence holders across all its sites. Mr Hancock did not disagree with CFI's estimate that this meant there were in the region of 850 personal licence holders. It can be inferred that care staff represent less than 10% of the total staff working at the animal research facilities.
24. The College itself stated it was commonplace for at least some staff to work at the Hammersmith site outside normal hours. Mr Thomas submitted that disclosing the hours when care staff were in attendance (ie, the hours of care staff as a category, not individually) would not tell a potentially malevolent person when other staff, such as researchers or



security staff, would be absent; accordingly there was no sufficient basis for a significantly heightened fear of intrusion if disclosure of care staff hours took place. Moreover, in so far as the College's case relied upon a risk to mental health, the lack of medical evidence to establish likely causation of harm was 'a major lacuna'.

25. On behalf of the Information Commissioner, Mr Paines made clear that the Commissioner was unpersuaded by the general matters put forward by ICL and only regarded s38 as engaged because of what Mr Hopkins called the "particular reason".
26. Mr Hopkins submitted in his oral closing that the requested disclosure would create a materially increased risk of infiltration, and therefore of an unexpected encounter, and that this was a safety concern, but that the focus of his case was more firmly on 'the risk of distress to staff' and its potential impact on health, because of 'the enhanced vulnerability that staff would reasonably perceive'.
27. We agree with CFI and the Commissioner that a health or safety concern arising from an increased risk of unauthorised entry and an unexpected confrontation is not justified on the evidence. It is already public knowledge that care staff are not present 24/7. The College has security arrangements in place. Publishing the hours when care staff are routinely present would not tell a potential intruder when other categories of staff, such as researchers and security staff, would be present or absent. It was common ground between the parties at the hearing that the level of violent animal extremism is currently very low. Mr Hancock said in evidence that he was not suggesting that there would be a likelihood of physical assault, harassment or intimidation resulting from the requested disclosure.
28. The engagement of s38 therefore turns on what conclusions we reach about the risk of an adverse impact on the mental health of staff, which the College says could result from a perception of enhanced vulnerability arising from the disclosure of the requested information.
29. We can well understand that, after all that has happened, staff in the department may feel beleaguered and stressed, as Mr Hancock told us. But we see no sufficient basis in the open or closed evidence provided by ICL for a finding that staff would reasonably anticipate and fear an increased likelihood of intrusion, to a degree which would be likely to endanger the mental health of any person of ordinary robustness, simply from the disclosure of the working hours of care staff.
30. We keep in mind, of course, that by their very nature mental health problems are not tied to rational assessments of risk. An additional stress, which to a person in normal health might seem insignificant, might nevertheless be enough to cause a deterioration in someone suffering from or vulnerable to an adverse mental health condition. But a case that a danger might arise in this way would require to be established by evidence appropriate to the circumstances. We listened with great care to what Mr Hancock told us in the closed session and have considered it with some anxiety. Where mental health may be at issue, any Tribunal will instinctively wish to be cautious. We accept that the College has provided a

considerable degree of transparency in relation to its animal research and neither discloses nor withholds information without careful consideration in either case. We accept also that the College is mindful of its duties of care to its employees. But 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.<sup>2</sup> They are not sufficient to convince us that we should, or even could, make the necessary findings about the potential effect of disclosure. Nor is there any other material which we consider sufficient to enable us to find in favour of the case put forward by the College. The very circumstances which Mr Hancock described suggested to us that appropriate evidence would not have been unduly difficult to obtain if the concerns had had objective justification.

31. To avoid any misunderstanding, we express our full agreement with the reasoning in *PETA* at [31]. We are not suggesting any general requirement that a finding of a likelihood of danger to mental health can only be made where there is expert psychiatric evidence. Rather, our view is that in the particular circumstances of the present case the evidence presented to us by the College is insufficient to justify a finding that s38 is engaged.

Balance of public interest

32. Because of insufficient time at the oral hearing, we gave the parties permission to make additional written submissions on the public interest issue on or before 24 March 2016. In the event, because we have decided that s38 is not engaged, it is not necessary for us to consider the public interest balance.

Conclusions and remedy

33. We find that s38 is not engaged. The appeal must therefore be allowed and the requested information disclosed.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge

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<sup>2</sup> The closed sections of Mr Hancock's witness statement must remain closed because of the sensitivity of the information contained in them. We do not consider it necessary to attach a confidential annex to this decision. Referring to the closed sections (by way of explanation to the College and the Information Commissioner, and any higher tribunal in the event of an appeal) in our view there is a lack of reliable, objective evidence in relation to the assertion 'would have a direct effect' in paragraph 93, or the 'very real concern' in paragraph 94 or the assertion 'entirely well-founded' in paragraph 99. This is apparent to some extent on the face of the witness statement and was amply confirmed by the clarificatory answers given in cross-examination during the closed session.