Animal experiments — putting FOI to the test?

David Thomas, Solicitor and legal consultant to anti-vivisection organisation BUAV, and Bindman and Partners, examines public authorities' arguments against disclosure in this controversial area

The right to receive and impart information, contained in Article 10 of the European Convention on Human Rights ('the Convention') has been described (by Lord Steyn in *R v Home Secretary, ex parte Simms*) as "the lifeblood of a democracy."

The litmus test of how freely the 'lifeblood' is flowing under a freedom of information ('FOI') regime is the extent to which information in controversial areas becomes available, and how fiercely public authorities seek to impede the 'flow'. Animal experiments is one such area: acutely controversial, the area has public opinion not only divided, but on occasion volatile.

By this yardstick, the Freedom of Information Act 2000 ('FOIA') has a decidedly mixed record thus far.

Animal experimentation—brief background

The Home Secretary can grant a project licence to conduct particular animal experiments under the Animals (Scientific Procedures) Act 1986 ('ASPA'), but before he does so he must apply a cost benefit test, i.e. assess whether the hoped-for benefit to human health and so forth justifies the anticipated suffering of the animals. This is primarily an ethical assessment, but the quality of the science is also a key consideration. If animal experiments represent unreliable science, as some scientists believe they do, this has huge implications for human health. The public then has an obvious stake in scrutiny of animal experiments being rigorous but above all informed. Further, under ASPA, a separate assessment should be carried out to establish whether non-animal alternatives and less invasive procedures can be used.

Early requests

Soon after the main provisions of FOIA came into force in January 2005, the British Union for the Abolition of Vivisection ('the BUAV') requested information in five particular project licences issued by the Home Office. The BUAV was aware of the existence of the licences because the Home Office had just begun to encourage licence applicants to prepare abstracts (summaries) of their applications, which it would then publish under its publication scheme pursuant to section 19 FOIA (which requires every public authority to have a publication scheme setting out what the authority intends to disclose voluntarily).

In response to the requests, the Home Office supplied a little information over and above that contained in the abstracts, but for the most part rejected the requests. It relied on a number of exemptions, including sections 21 ('information accessible by other means' — the argument being that the published summaries equated to the requested full information), 38 ('health and safety'), 41 ('information provided in confidence'), and 43 ('commercial interests'). Later on, section 44 was also relied on. Section 44 is an absolute exemption which applies if a separate legislative provision prohibits disclosure. The provision in question was section 24(1) ASPA, which states that:

"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".

The maximum sanction is two years in prison and/or an unlimited fine. Where it applies, section 24 prevents a minister from giving information even to Parliament.

The BUAV complained to the Information Commissioner ('the Commissioner'), who decided that the disputed information should not be released because section 44 applied. The BUAV then appealed to the Information Tribunal ('the Tribunal') which had to consider whether the confidentiality requirement in section 24 was satisfied. The BUAV argued that information could not be given in confidence unless it was of the type which the general law of commercial confidentiality would protect. The Tribunal agreed that this was the correct test but Mr Justice Eady sitting in the High Court held that that the correct test (derived from the post-Human Rights Act privacy

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cases under Article 8 of the Convention) was whether there could be said to be a reasonable expectation of privacy. On this basis, information could sometimes be protected under section 24 "even if [it] would not, when judged objectively, be characterised as a commercial secret or as having the 'quality of confidence'".

The judge did not explain when such circumstances might arise. However, he did indicate that project licences would ordinarily contain considerable information which was not confidential, and commented that public authorities should adopt a presumption of disclosure of applications, with confidential annexes to be deployed if necessary.

Mr Justice Eady indicated that protocols setting out what is to be done to the animals, anticipated adverse effects, and what consideration has been given to alternative methods, would not normally attract the cloak of confidentiality.

In other words, section 24 ASPA, as the judge had felt constrained to construe it, should go. The judgment stated:

"Whether [section 24 ASPA] is compatible with FOIA purposes, and whether it will stifle the free flow of information sought to be achieved, will be for legislators to decide in due course. Whenever section 24 is next considered, the ultimate conclusion may well be that it requires to be repealed or amended in the pursuit of freedom of information".

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Court of Appeal decision

Mr Justice Eady's legal approach was not supported in the Court of Appeal. The Court went considerably further and held that it was entirely for the provider of information to decide whether he gave it to the Home Office 'in confidence'. There was no warrant for importing the law of confidence. The task of the Home Office was simply to assess whether the provider wanted to block disclosure.

The Court of Appeal's decision has a number of unfortunate consequences for greater transparency. It means that animal researchers can prevent the disclosure of the trivial and embarrassing, and information about their own wrongdoing (none of which would be protected by the law of confidence). It also means that, as a Home Office official candidly accepted in evidence, judicial scrutiny of regulatory decisions under ASPA is all but impossible, short of undercover investigations producing detailed information.

The consequences of the Court of Appeal decision is well illustrated by another BUAV FOIA request to the Home Office, currently before the Commissioner.

The Home Secretary says he cannot license experiments that would cause "severe pain or distress which cannot be alleviated". However, the particular licensed experiment which was the focus of scrutiny involved, according to the Chief Inspector, "persistent, severely disabling and distressing clinical signs...requiring a prolonged period of intensive care and leaving residual neurological damage requiring high dependence special care thereafter...causing devastating welfare costs". This might be thought to fall within the prohibition but the Home Office has declined to disclose any information about the animals' anticipated suffering, relying on section 24 ASPA (via section 44 FOIA), and thereby effectively preventing judicial scrutiny.

Another recent case (*Home Office*, 19th October, FS50164497) provides further illustration of the accountability deficit left by the Court of Appeal.

Overseas suppliers of primates to UK laboratories need Home Office approval. The Home Office withdrew approval from a particular supplier in Vietnam because of poor welfare conditions discovered there by its inspectors, but shortly afterwards reinstated it following evidence supplied by a third party. Following a complaint to the Commissioner, the Home Office confirmed that the third party was a UK laboratory, which has an obvious interest in maintaining its supply of primates — the BUAV, seeking to avoid any section 38 arguments, had asked for the category the third party fell into (rather than its identity). However, the Commissioner has ruled, not surprisingly, that the information passed on by the lab was exempt.

The Court of Appeal decision also has the unfortunate result of meaning non-governmental public authorities involved in animal experiments are in a different FOIA position to the Home Office. Universities conducting animal experiments, for example, cannot rely on section 24 (and therefore section 44 FOIA) because the information will generally be theirs — unlike the Home Office, they will not have been given it by others.

Requests and universities

Universities tend to rely heavily on the section 38 exemption, because of the historic actions of a tiny minority of animal rights activists.

Success of section 38 arguments: In 2006, the BUAV asked a number of universities how many primates they had used in particular years, and for a summary of their current primate research. Some complied, but others strongly resisted.

The universities failed to convince the Commissioner that the disclosures were not warranted. The Commissioner accepted that there might be a generalised risk to the safety of some animal researchers, but found that it was necessary to show that there was a causative link between disclosure of the particular information requested and the risk. In addition, the risk had to be 'substantially more than remote'.

The BUAV produced lists of the numerous articles about primate work published by researchers for the universities. In the case of Oxford University, there were over 80 articles. Any risk to safety had therefore already been voluntarily assumed by the researchers. It could not realistically be said that the disclosure of the requested information would add to the risk.

More generally, it is important for requesters to ask for information about animal experiments in anonymised form. The complainant in FS50082472 had asked for 'the names of individuals/companies/ academic institutions who hold [ASPA] licences [in Scotland]'. The complaint was doomed to fail because of residual safety concerns.

Success of section 43 arguments: Some of the universities also relied on section 43(2) ('prejudice to commercial interests') in seeking to prevent disclosure. Disclosure could, it was argued, have an adverse effect on research funding in a highly competitive field.

The Commissioner noted that, in *John Connor Press Association Ltd v The Information Commissioner*, the Tribunal had said that there must be a real and significant risk of prejudice resulting from disclosure of the requested information. On the facts of these cases, there was no such risk.

Sections 30 and 36 FOIA

In a separate case, the BUAV asked for anonymised information about particular licence infringements referred to in the minutes of the Animals Procedures Committee ('APC'), the statutory advisory body.

The Commissioner found that section 38 applied to some of the information. In relation to information concerning the ASPA inspectorate's investigations, the Commissioner accepted that a different exemption (section 30) was engaged. Section 30 FOIA protects from disclosure information held by a public authority for the purposes of a criminal investigation (including an investigation which is closed). Unusually, the minister gave a section 36 exemption, on the basis that disclosure would 'prejudice the effective conduct of public affairs'. The Commissioner ruled that that was legitimate.

Sections 30 and 36 are qualified exemptions (i.e. subject to a public interest test) and the Commissioner was persuaded by BUAV's arguments that the public interest required disclosure in this instance. This was because the Home Office has traditionally run a light sanctions regime under ASPA, (to the occasional disapproval of the APC). There has only ever been a single prosecution, which resulted from a Channel 4 undercover investigation. The Commissioner decided that disclosure would "enable the public to robustly debate the appropriateness of decisions made by the Home Office and judge the ASPA as a regulatory tool."

Section 11 FOIA

Section 11(1)(c) FOIA states that an applicant can request that information be supplied in digest or summary form, and a public authority should comply if reasonably practicable. The Tribunal has suggested that a public authority might be able to supply a summary in response to an information request even where that was not requested. This seems wrong: a summary is not the same as the information it summarises and may not properly reflect the original even if all the facts are included. This is why documents rather than summaries are now generally required under the best evidence rule in judicial reviews.

Section 12 FOIA

Project licences can be highly technical and detailed, and it can potentially be time-consuming for public authorities to decide what is exempt.

Under section 12 FOIA, a public authority does not have to supply information if it estimates that the cost of complying would exceed the 'appropriate limit', set out in regulation 3 of the Data Protection (Appropriate Limit and Fees) Regulations 2004. In the case of non-central government departments, the appropriate limit is £450. Eligible time is computed at the rate of £25 an hour. Regulation 3(3) sets out the types of work which can be taken into account. This includes '(d) costs [of]… extracting the information from a document containing it'. However, it was decided by the Tribunal in *Jenkins v The Information Commissioner and another* that this referred to time spent separating requested information from unrequested information, and not time spent deciding what was exempt.

In light of this, the Commissioner has indicated in a complaint brought by the BUAV against Newcastle University (relating to another project licence) that the university cannot include thinking time in its section 12 computation.

Conclusion

The Court of Appeal decision is the biggest stumbling-block to true transparency in the controversial area of animal testing. Indeed, at the time the court expressed unease about its decision in the era of so called greater transparency.

A Home Office QC had told the court that the government would be carrying out a further review of section 24 ASPA as a matter of urgency. A year later, in July this year, a Home Office minister said in a parliamentary answer that there were no plans to conduct a review, pending the current revision of the European directive on animal experiments. It would seem that the Home Office is intent on keeping keep animal experiments away from public gaze as much as possible.

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