

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 March 2015

**Public Authority:** Queen Mary University of London  
**Address:** 327 Mile End Road  
London Borough of Tower Hamlets  
E1 4NS

### Decision (including any steps ordered)

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1. The complainant has requested information from Queen Mary University of London (QMUL) regarding the timing of changes to the PACE Trial recovery criteria. QMUL has refused the request on the basis that it is vexatious, citing FOIA section 14(1).
2. The Commissioner's decision is that QMUL has correctly applied the vexatious provision at section 14(1) of the FOIA. He notes however that the response was provided outside of the statutory time limit of 20 working days and therefore QMUL has breached section 17(5) of the FOIA. He does not require QMUL to take any further steps.

### Request and response

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3. On 26 April 2014 the complainant wrote to QMUL providing five paragraphs of background and submitting a request for information in the following terms:

*"Can you please confirm, deny, or clarify, the following:*

*a) Confirm or deny that the post-hoc normal range in fatigue and physical function was explicitly approved by the relevant trial oversight bodies before publication of the Lancet paper in February 2011. If it was approved, who approved it?*

*b) During the peer review stage of the Lancet paper, a reviewer suggested what is now known as the 'normal range'. [6] What did this reviewer suggest should be the normal range threshold in physical function? Did the reviewer explicitly suggest that it should be the mean minus 1 S.D. score of the general population (incorrectly described in the Lancet paper as a working age population [8]) from the ONS Omnibus Survey 1992 sample published by Bowling et al. in 1999? Or was it an open suggestion, such as establishing a threshold using any method and any normative dataset, therefore giving White et al. some freedom to establish this threshold as however they saw fit? What about for the normal range in fatigue? Please note that I am not requesting any personal information about the reviewer in question.*

*c) Confirm or deny that the change to the physical function threshold for recovery (from  $\geq 85$  to  $\geq 60$  points out of 100) was made after the normal range was first suggested and calculated during the Lancet's peer review process.*

*d) Approximate dates for when the three threshold changes (fatigue, physical function, CGI) were made to the recovery criteria, for when the authors were first unblinded to outcomes data, and if possible, for when the authors first conducted the main analyses of the primary outcomes for the Lancet paper.*

*e) Confirm or deny that any changes to the 2007 version of the trial protocol relating to the primary outcomes (fatigue and physical function) and the criteria for recovery was guided by any data produced from the trial itself, either blinded or unblinded. If so, please specify which changes were guided by trial data.*

*f) Confirm or deny that the relevant trial oversight bodies had explicitly approved all the changes made to the 'recovery' criteria prior to publication of the Psychological Medicine paper in February 2013. If approved, please specify which oversight body approved them. If some were approved but others were not, please specify which ones were approved or not approved."*

4. On 28 May 2014 QMUL responded. It refused to provide the requested information. It cited the following exemption as its basis for doing so: section 14(1) – vexatious request.
5. The complainant requested an internal review on 18 July 2014. QMUL sent the outcome of its internal review on 24 September 2014. It upheld its original position.

## **Background**

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6. The request relates to the PACE trial. This was a large scale randomised clinical trial testing treatments for chronic fatigue syndrome (CFS) also known as myalgic encephalomyelitis (ME). QMUL describes this area as contentious both in science and in medicine. It acknowledges that the research into this area is divisive and that the PACE trial is no exception. The results of the trial were first published in the Lancet in 2011.
7. For the purposes of considering the application of section 14 to this case, the Commissioner does not feel it necessary to include in this notice, detailed information regarding the trial and its outcomes.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 15 October 2014 to complain about the way his request for information had been handled. He submitted a detailed document in support of the position that his request for information was neither vexatious nor was it likely to meet the criteria for the application of the exemption at section 12 – costs exceed the appropriate limit.
9. QMUL has not, at any point, applied the exemption at section 12 to this request.
10. The Commissioner considers that the scope of his investigation is to determine whether QMUL is entitled to rely on section 14 as a basis for refusing to comply with this request.

## **Reasons for decision**

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11. Section 1(1) states that “Any person making a request for information to a public authority is entitled –
  - a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - b) if that is the case, to have that information communicated to him.”
12. This is more commonly known as the right of access to information and is at the heart of the FOIA.

13. Section 14(1) states that: "Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".
14. In other words, reliance on section 14(1) cannot be construed as a tacit confirmation that information described in a request is held. Where a public authority relies on section 14(1), it is asserting that it is not obliged to comply with any element of section 1(1) because the request is vexatious.
15. The term 'vexatious' is not defined in the legislation. In the *Information Commissioner vs Devon County Council & Dransfield*<sup>1</sup> (the "Dransfield case"), the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal concluded that 'vexatious' could be defined as the "...manifestly unjustified, inappropriate or improper use of a formal procedure" (paragraph 27). The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.
16. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) harassment or distress of and to staff.
17. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed the "importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).
18. The Commissioner has therefore considered whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the purpose and value of the request. He considers there is in effect a balancing exercise to be undertaken, weighing the evidence of the request's impact on the authority against its purpose and value.

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<sup>1</sup> UKUT 440 (AAC) (28 January 2013)

19. The Commissioner has identified a number of “indicators” which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests<sup>2</sup>. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
20. In its initial response and in its internal review response, QMUL did not provide the complainant with any explanation as to the application of section 14.
21. In contrast, QMUL has provided the Commissioner with an extremely detailed submission regarding its reasons for determining that this request is vexatious.
22. It is QMUL’s position that this request should be viewed in the context of a campaign of opposition to the PACE trial, its investigators and its findings. QMUL has asserted that correspondence and the submitting of FOI requests have been encouraged as part of an effort which is hostile to the trial.
23. QMUL asserts that there is a belief amongst those involved in the campaign that QMUL is trying to withhold information which, if disclosed, might discredit the trial. It further asserts that contrary to this belief, the results of the PACE trial have been, and continue to be, published. These results, QMUL asserts, have been independently verified.
24. In order to support this assertion regarding a campaign, QMUL has explained that one particular forum actively promotes the use of FOIA stating:  
  
*“Let’s have some more FOI requests please...I always thought FOI requests were our best weapon and we need to play that card more strongly in all areas.”*
25. Furthermore, QMUL details a hashtag on Twitter which is used to promote attacks on the trial.
26. The campaign has also included PACE related correspondence to the British Medical Journal website from different individuals including from the complainant.

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<sup>2</sup> [http://www.ico.org.uk/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/dealing-with-vexatious-requests.ashx](http://www.ico.org.uk/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx)

27. Since March 2011, following the publication of the trial results in the Lancet, QMUL has received 35 requests for information about the trial. These requests have asked for 160 pieces of information. QMUL states that it has never experienced such quantities of requests on any one subject previously or since and cannot see an end to these requests.
28. It is acknowledged by QMUL that although the quantity of requests alone could not be described as overwhelming, the persistent and aggregated burden on staff has caused growing concern and has had a detrimental impact.
29. Given the very specific nature of the subject matter, QMUL has explained that the requests need to be handled mainly by one person, Professor Peter White who is the lead Co-Principal Investigator of the trial. Whilst Professor White acknowledges the legal responsibility he has to respond to requests, these take him away from other important responsibilities such as providing responses to Parliamentary Questions from both Houses, finalising the publications which remain, oversight of the current trial of a self-help treatment for patients suffering from CFS/ME, oversight of his research into the causes of this condition and undertaking all of his other academic and clinical duties.
30. In addition to Professor White's input, the requests take up a disproportionate amount of the Records & Information Compliance manager's time. Handling FOI requests is only part of the role, and with already stretched resources, this represents a further burden especially when the history of requests suggest that these will continue.
31. Professor White has made it clear that the requests are causing annoyance and frustration both to his colleagues and himself who have to deal with the requests. He has stated that he believes that the requests are clearly part of a campaign to discredit the trial and are not in the public interest.
32. The requests have been for data generally although there have also been requests for minutes from the Trial Steering Committee and Trial Management Group. QMUL has submitted that these requests, coupled with complaints to other parties including the Lancet and the British Medical Journal, demonstrate that the individuals involved are looking for any way to discredit the trial. Given this wider context QMUL argues that the request under consideration can be considered vexatious
33. QMUL has advised that the effect of these requests has been that the team involved in the PACE trial, and in particular the professor involved, now feel harassed and believe that the requests are vexatious in nature.

34. In terms of the papers relating to the trial, QMUL has asserted that the trial team has made sure that all papers are available free to the public. This is something that has cost the team, its funders and sponsors in the region of £15,000 in fees to publishers.
35. The team has also established a website to provide the latest trial information. The website includes 56 frequently asked questions including some from the complainant.
36. QMUL has stated that with regard to the current request, the professor involved in the trial firmly believes that the request does not represent a true seeking of information in the public interest, but is an attempt to find out information which the complainant believes will discredit the trial and those involved. The professor believes this is borne out by the five paragraph introduction. The subsequent questions are seen as leading and any response issued would only lead to further requests. It is QMUL's belief that the tone of the correspondence is bullying in nature.
37. In particular, QMUL asserts that the questions worded in terms of either confirm or deny are not valid requests under FOIA as they do not constitute a request for recorded information. It is the view of QMUL that the requests are worded in such a way as to suggest that the requestor appears to be fishing for information based on suspicion or general scepticism and to elicit a specific reply.
38. In seeking an internal review of the request, the complainant submitted correspondence which ran to in excess of 1400 words and which, in QMUL's view, used challenging language to apparently question the credibility of the trial.
39. It is QMUL's assertion that it could have sought to rely on section 14 in its response to previous requests for information regarding the PACE trial but sought to be as open as possible. Following the Dransfield case, QMUL states that it has taken a holistic and broad approach to determine if the requests it has received are vexatious and has deemed that this request in particular is vexatious.
40. QMUL has assessed this request in the context of the stream of similarly themed requests and has asserted that the request should be considered against the backdrop of a campaign to discredit the PACE trial, its findings and investigators.
41. QMUL does however acknowledge that the complainant in this case does not seem as prolific as others assuming that he uses his real name.

42. In its submission to the Commissioner, QMUL has explained that it feels that the spacing of the requests seem likely to have been coordinated in such a way as to prevent aggregation. However QMUL has treated each request on its own merit and has either disclosed information where possible or relied on exemptions. Its decisions have, it stated, always been upheld at internal review or externally.
43. The Information Tribunal, in a previous FOIA appeal (EA/2013/0019) relating to the PACE trial, acknowledged that the request in that case was:

*"part of a campaign which has now extended to the use of FOIA as a means of advancing an argument which in essence has roots in clinical medicine and in a black and white view of the mind/body problem. There is a view among some members of the CFS/ME community that the distressing disorder which they suffer from has a simple and straightforward physical cause which if properly researched will lead to a cure. They view any diversion from that as wasteful and indeed duplicitous."*

44. The Tribunal went on to say that it had no doubt that properly viewed in context that request should have been seen as vexatious and did not constitute a true request for information.
45. QMUL stated that its strategic aims are to create and disseminate knowledge and that staff have a right to be able to carry out the research on which they decide and which is reviewed by their peers. Handling requests for information takes staff away from their core duties and impacts on the primary purpose of the institution.
46. Furthermore, QMUL has highlighted the issue of defending academic freedom. It has submitted that the importance of this was set out by the Information Tribunal (EA/2013/0019).
47. In providing the Commissioner with evidence to support the application of section 14 of the FOIA, QMUL has explained that since this and one other case was refused under section 14 in May 2014 and July 2014 respectively, there has been only one request received for information on this subject. QMUL has asserted that in the event that its decision is not upheld, the requests will restart.
48. The Commissioner has considered all of the evidence put forward by both the complainant and QMUL. He notes that the complainant has provided a seven page detailed document addressing the background to the case, why the FOIA should cover the information sought and why his request should not have been refused as vexatious. The Commissioner notes that in this submission the complainant has addressed the fact that he does not think that his request could be refused under section



12 – costs exceed the appropriate limit. (In a previous case where QMUL had initially relied on section 14 to refuse a request it subsequently withdrew its reliance on this exemption in favour of the exemption at section 12 and it seems that the complainant now seeks to pre-empt this possibility in his case.)

49. In considering the complainant's submission the Commissioner notes that he has asserted that the list and description of indicators, although only a guideline rather than a list of qualifying criteria, do not match the characteristics of his request. He also asserts that his request has certainly not been a manifestly unjustified, inappropriate or improper use of a formal procedure. He further states that he does not understand how his request could be mistaken by QMUL as genuinely vexatious and that QMUL would have no evidence to show that he intended to harass them.

50. The complainant has stated that:

*"There have been numerous articles and other efforts to generally frame the extensive public and academic criticisms of the PACE Trial as a campaign stemming from ideological convictions about ME/CFS and prejudices against mental illness, etc."*

51. The Commissioner notes too that the complainant has stated that his request has significant value to him and to the ME/CFS community. He also pre-empts the issue of a campaign by stating that his request was made independently from other requests or requesters.

52. Much of the submission covers the background specifically relating to the PACE trial. Given that the scope of the investigation is to determine whether or not QMUL has correctly engaged the exemption at section 14, the Commissioner will not consider the detail of the PACE trial itself. He would note that there is no question that the subject matter is extremely important to the complainant and to the wider ME/CFS community. However, the Commissioner is content that QMUL has in place processes for review and dissemination of the information relating to the PACE trial and that Professor White has put in place mechanisms to ensure that as much information as possible is in the public domain.

## **Conclusion**

53. In considering the case in a broad and holistic way, the Commissioner accepts that the request has, for the reasons set out by QMUL, had the effect of harassing the public authority. Viewed in the context of the other requests received, online posts and complaints to the Lancet and BMJ, the Commissioner accepts that QMUL is correct to view the request

as part of a campaign – despite the complainant's assertion to the contrary.

54. The Commissioner considers that this request is more focussed on attacking and attempting to discredit the trial than in obtaining useful information on this topic. As such, the relative merits of the complainant's motives are considerably diminished.
55. In reaching his conclusion, the Commissioner has also considered the Information Tribunal judgement referred to by QMUL (EA2013/0019). He considers that it does have considerable relevance to this case.
56. In its consideration the Tribunal placed significant weight on the profound importance of academic freedom, particularly in the area of scientific research. It went on to state that the Commissioner has a duty to give effect to Article 13 of The Charter of Fundamental Rights of the European Community [European Union] in his decisions and guidance. The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Proclaimed in 2000, the Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009.
57. The Tribunal commented further that the primary purpose of universities is the dissemination and generation of knowledge through teaching and research. It went on to question the value of a parallel process of dissemination through FOIA.
58. The Tribunal went on to say that all too often such requests are likely to be motivated by a desire to divert and improperly undermine the research and publication process. It observed that this was particularly true when information was being sought as part of a campaign. It observed also that the Commissioner must, in accordance with his Article 13 duty,  
  

*"be robust in protecting the freedom of academics from time-wasting diversions through the use of FOIA"*
59. The Commissioner considers that this particular request for information clearly meets the criteria for the application of section 14 as it has had the effect of harassing QMUL and placing on it a further burden. The request itself at a), c), e) and f) seeks confirmation or denial; it is not a request for recorded information. At a) and c) the complainant's requests seek to have QMUL confirm its actions in terms of times in relation to the publication in the Lancet. At e) the complainant seeks to have QMUL identify any changes to the 2007 version of the trial protocol

and whether they were guided by trial data. At f) the complainant seeks to have QMUL confirm or deny that changes to the 'recovery' criteria had been explicitly approved by the relevant trial oversight bodies. The requests are accusatory in tone, suggesting that the position is different from that set out over several years by QMUL. At b) the request seeks 'suggestions' made by one of those involved in a peer review and at d) seeks 'approximate dates'. It is difficult to see how this request could have been intended as anything other than an attempt to undermine QMUL and consequently the trial itself..

60. In terms of academic freedom the Commissioner notes that Professor White has sought to publish as much information as possible regarding the trial. Irrespective of this he has been put in a position of handling FOIA requests about his research. There is no question that the number of FOIA requests are an attempt to discredit the trial which of course calls into question the ability to retain that academic freedom; not only on Professor White's part but on the part of those conducting peer reviews.
61. In reaching his conclusion, the Commissioner would note that he is aware that this is a particularly contentious and controversial area of research. He has no doubt that the PACE trial is of significant interest within the ME/CFS community. However, his role is solely to determine whether the FOIA has been correctly applied. In this particular case he finds that, in all the circumstances, the request has caused a disproportionate amount of distress, irritation and disruption to the public authority. He also finds that it has been submitted as part of a campaign, the nature of which undermines its serious purpose and value.

## **Other matters**

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62. The complainant raised the issue of QMUL's non-compliance with the statutory timescale of 20 days for responding to a request. The Commissioner notes the response was issued after 21 working days (using a UK calendar reflecting UK public holidays), not 24 as stated by the complainant. He has addressed it in this decision notice but does not require QMUL to take any further steps.

## Right of appeal

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63. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

64. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
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