Amended under the slip rule on 16 April 2019 on Mr Peters' request

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0152

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS ALISON LOWTON AND MARION SAUNDERS

Between

JOHN PETERS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Decision

The appeal is dismissed. No action is required by Queen Mary University of London (QMUL).

NB Numbers in [square brackets] refer to the open bundle

Introduction

1. This is the appeal by Mr John Peters against the rejection by the Information Commissioner (the Commissioner) on 12 July 2018 of his complaint that QMUL

had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).

2. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).[1] QMUL is not a party to the appeal.

Factual background

3. Mr Peters suffers from chronic fatigue syndrome (CFS). The term CFS is often, but not always, used interchangeably with myalgic encephalomyelitis (ME). The Tribunal will refer compendiously to CFS/ME. Mr Peters and others are much exercised by some of the research carried out into the condition. In brief and probably crude summary, he and other sufferers believe that the condition's aetiology is physiological rather than psychological; they dispute research findings which indicate the contrary. At least some sufferers believe that there is an underlying infection or muscle disease.

4. In his Grounds of Appeal, Mr Peters said that it was impossible to describe the pain caused to very many patients by the claim that their belief that they were ill was not based on any underlying pathology. A researcher had found that patients were 'often treated with skepticism, uncertainty, & apprehension and labelled as deconditioned or having a primary psychological disorder'.

The PACE trial and the controversy it has engendered

5. A major piece of research into CFS/ME was carried out at QMUL. It is known as PACE. [2] One of the principal investigators (PIs) was Professor Peter White, who was based at the university until his retirement at the end of 2016. Recruitment of over 600 participants began in 2002 and ended in 2009. The major findings were reported in *The Lancet* in 2011 and in mid-2012 follow-up research was completed. At least 100 clinicians and researchers were involved in the trial.

6. The purpose of the research was to determine whether pacing, cognitive behavioural therapy (CBT) and graded exercise therapy (GET) could help when added to specialist medical care. CBT and GET were recommended by National Institute of Clinical Excellence (NICE) guidelines. The trial showed, or purported to show, that CBT and GET, when used in conjunction with specialist medical care, were indeed associated with significant improvements in self-rated fatigue and physical function (the primary outcomes) after 52 weeks.

[1] SI 2009 No 1976

[2] 'Comparison of adaptive pacing therapy, cognitive behaviour therapy, graded exercise therapy, and specialist medical care for [CFS]'

7. The research has proved controversial. According to an editorial in *The Lancet* on 17 May 2011, [3] much of the criticism the journal had received critiqued the definitions of secondary outcomes, questioned protocol changes and expressed concern about generalisability. Mr Peters claims that criticism of it is now much greater than at the time of previous Commissioner and Tribunal decisions. In his Grounds of Appeal, he suggested that mainstream scientific opinion was now that the methodology used was fundamentally flawed. All 29 MPs who spoke in a Westminster Hall debate on 21 June 2018 supported a change in NICE guidelines to remove CBT and GET (in other words, to reject the PACE findings). One MP described PACE as 'one of the greatest medical scandals of the 21st century'. American medical institutions had rejected the trial's findings. Mr Peters surmised that they were defended only by a small circle of people who were either involved in the trial or who were linked to the investigators or the scientific model used. A professor of biostatistics at Columbia University Mallman School of Public Health described had the trial 'as the height of clinical trial amateurism' and Professor Jonathan Edwards, an emeritus professor of connective tissue medicine at University College London, regarded it as valueless because of the combination of lack of blinding of treatments and choice of subjective primary endpoint, with maximisation of bias more or less guaranteed. None of the PIs had, according to Mr Peters, disclosed their financial conflicts of interests when they applied for and were granted £5 million of public funds to conduct the trial (he had made a number of complaints to the Medical Research Council (MRC) about this [4]).

8. It is important to state that QMUL dismisses these criticisms and strongly defends the research; it says that it has widespread scientific support outside the university. It is no part of the Tribunal's function to assess who is right. Its role is simply to determine whether Mr Peters is entitled to the information he has requested. But the fact that PACE has excited controversy is relevant background.

Harassment

9. Prof White and his co-researchers, both inside and outside QMUL, claim that there has been a campaign of harassment against them. This has, they say, taken the form of abuse on social media and a barrage of FOIA requests and other critical correspondence, which has had the effect of disrupting their work. That, indeed, was the intention of campaigners, it is alleged. Researchers had considered ending their involvement in CFS/ME research, or not entering the field in the first place. Indeed, it is a matter of public record that Professor Michael Sharpe, professor of psychological medicine at Oxford University and a co-PI of PACE, has very recently announced that he is abandoning research into CFS/ME because of the abuse to which he has been subjected; he is moving into different fields.

[3] Quoted in *Mitchell v Information Commissioner* EA/2013/0019

[4] In its letter to Mr Peters of 6 December 2018, UK Research and Innovation said it had referred his complaints to QMUL

10. It is not only researchers who have allegedly been subject to harassment. In *R (Fraser and another) v National Institute for Health and Clinical Excellence*, [5] an unsuccessful challenge to the NICE guidelines, Mr Justice Simon said this in an afterword:

> *'129. First, unfounded as they were, the allegations [against members of NICE's Guideline Development Group] were damaging to those against whom they were made; and were such as may cause health professionals to hesitate before they involve themselves in this area of medicine. A perception that this is an area of medicine where contrary views are not to be voiced, and where scientific enquiry is to be limited, is damaging to science and harmful to patients.*
>
> *130. Secondly, these types of allegation may also have the effect of putting people off from serving on GDGs …'*

11. Mr Peters does not deny that some campaigners have overstepped the mark but says they are a small minority. He believes that QMUL is greatly exaggerating the claims of harassment and that it is doing so in order to denigrate and marginalise those who are critical of the research and therefore to undermine the validity of their criticisms. He says that the researchers have found allies in parts of the mainstream science and national media, to the extent that there is a campaign against patients critical of PACE. He points to the finding by the Tribunal in *Queen Mary University of London v Information Commissioner and Matthees*: [6] 'It was clear that [Prof Anderson's] assessment of activist behaviour was, in our view, grossly exaggerated and the only actual evidence was that an individual at a seminar had heckled Prof Chalder [a CFS/ME researcher at the University of Bristol]'. Prof Anderson was QMUL's expert witness; he gave oral evidence.

12. In his complaint to the Commissioner **[88]**, Mr Peters provided some more background about what he regards as demonisation of campaigners against PACE. An article in *Nature* entitled *Don't let transparency damage science* had argued that more limited transparency should apply to CFS/ME research. A piece in the *Observer* in 2011 was titled *Chronic fatigue syndrome researchers face death threats from militants* and an article in the *Guardian* in 2017 had suggested that a minority of activists opposed to characterisation of CFS/ME as a psychological illness were 'deterring scientists from research and doctors from going into the field to treat people who desperately want to get better'. Similarly, allegations of harassment played a part in the Commissioner's decision in FS5067719: the only examples QMUL could produce of harassment there, according to Mr Peters, were a second-hand account of what a journalist was told in an article in the *British Medical* Journal (*BMJ*) in 2011 and a reference to a discussion on a patient forum a few years ago.

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[5] [2009] EWHC 452 (Admin) 452 (13 March 2009)
http://www.bailii.org/ew/cases/EWHC/Admin/2009/452.html
[6] EA/2015/0269 (11 August 2016) **[125]**

13. There is, therefore, both a claim by QMUL of harassment and a counterclaim by campaigners that that claim, said to be exaggerated, is being used to silence them. Once again, it is not the Tribunal's function to assess precisely where the truth lies. However, it can say that, to put it at its lowest, neither claim nor counterclaim is wholly without substance. That, too, is important context.

FOIA requests relating to PACE

The present request

14. On 7 November 2017, Mr Peters made the following request of QMUL **[81]**:

> '*These requests relate to the university's role as an employer and its responsibilities under Health and Safety legislation.*
> *These requests refer to harassment of researchers working in the field of [ME/CFS] only. Please do not include any incidents other than those specifically related to work on ME/CFS.*
> *The requests are only for incidents involving harassment from outside parties. Please do not include any possible internal staff disputes.*
> *Please provide the following:*
> 1. *The number of incidents of harassment recorded by the university in the period 2000-2017 (inclusive). Please give the total number of incidents per year.*
> 2. *The number of occasions when the police were involved in cases of harassment at the university in the period 2000-2017 (inclusive). Please give the total number and the number each year.*
> 3. *The number of occasions when the police issued a crime reference number for cases of harassment at the university in the period 2000-2017 (inclusive). Please give the total number and the number of incident per year.*
> 4. *The number of assessments carried out by the university about the risks to staff welfare posed by such harassment in the period of 2000-2017. Please give the total number and the number for each year. Please do not include routine assessments or any general assessments, but give only the number conducted specifically as a result of incidents of ME/CFS-related harassment.*
>
> *These requests concern FOI requests received by [QMUL] regarding work related to [ME/CFS] only, from 2000 onwards (including 2000 and the current year, 2017.*
> *Please provide the following, giving the total number of and the number each year, where appropriate:*
> 1. *The number of requests received by QMUL. Where a communication makes multiple requests, please give the number of communications and the number of requests.*
> 2. *The number of requests refused by QMUL as deemed vexatious*
> 3. *The number of requests rejected by QMUL as deemed otherwise exempt.*
> 4. *The number of requests where information was provided.*
> 5. *Please also give in each of the four instances (total numbers; numbers deemed vexatious; numbers deemed otherwise exempt; numbers where information was provided), the numbers of requests relating to the PACE trial (Comparison of*

adaptive pacing therapy, cognitive behaviour therapy, graded exercise therapy, and specialist medical care for [CFS] (PACE): a randomised trial).
I am happy to receive this information in electronic format'.

15. It will be seen that the request fell into two distinct parts: information about harassment by persons external to QMUL and information about previous FOIA requests relating to CFS/ME research (including PACE). Although distinct, both parts appear designed to assess how much - or conversely how little - pressure campaigners have exerted on QMUL and its staff.

16. With its email of 13 June 2018 to the ICO **[104]**, QMUL provided a table giving comprehensive information about FOIA requests it had received about the PACE trial and their outcome. Mr Peters now has that table. He has therefore been given some of the information he has requested in the second part of his request. He still does not have the information relating to other CFS/ME requests and so is unable to make the desired comparison with PACE requests.

Other requests made by Mr Peters of QMUL

17. Including the present request and a subsequent one, Mr Peters has made nine requests of QMUL related in some way to PACE (though he says that one was simply clarification of another). They cover: the cost to QMUL of appealing to the Tribunal in *Matthees* (some information supplied); whether VAT was paid on those fees (supplied); the minutes of the meetings of the PACE Trial Steering Committee (TSG) and Trial Management Group (TMG) (refused); information about conflicts of interest declared to the TSG (supplied with further information after a follow-up request); information about conflicts of interest declared to the TMG (refused because otherwise accessible); the number of FOIA requests received about PACE with the number of internal reviews and the time taken (supplied); the minutes of the trial analysis strategy group and the writing and publication oversight committee (refused as vexatious); and various patient scores at baseline, 24 and 52 weeks (some information not held, the remainder refused).

18. The first request was made in May 2016, the current request in November 2017 and the most recent request in March 2018. The nine requests therefore span just under two years. QMUL has again relied on section 14(1) in relation to the one request which came after the present request.

Requests made by Mr Peters of other public bodies relating to PACE

19. Mr Peters says he has made a number of FOIA requests to get to the bottom of the harassment claim. In his Grounds of Appeal, he lists the public bodies as: the Metropolitan Police Service, Scotland Police, Avon and Somerset Police and Thames Valley Police, as well as to King's College London (KCL), the University of Edinburgh, Oxford University, Royal United Hospitals Bath, St Bartholomew's Hospital, South London and Maudsley, Oxford Hospitals and Lothian Hospital.

20. The responses to two of these requests are in the papers. Avon and Somerset Police told Mr Peters in September 2016 **[241]** that it did not hold any information on whether a special unit had ever been set up to combat CFS/ME crimes and, if there was no such unit, whether a police officer had ever been assigned exclusively to such possible crimes. Mr Peters has, probably correctly, taken this to mean that the force has no such unit or assigned officer.

21. On the same date as the present request of QMUL, he made the identical request of KCL. The university's reply **[242]** was:

> '*We have contacted the relevant faculties and they have no recorded information available and are not aware of any cases. HR do not have any information recorded centrally and to go through individual files to check for information would take more than 18 hours and therefore exceed the cost limit.*
> *The FOI team have looked back over the available information for FOI requests no relevant requests could be found*'.

It is not known whether Mr Peters has challenged this decision.

Request by Mr Peters of the University of Bristol relating to the SMILE trial

22. Mr Peters has not only challenged PACE. He is also concerned about the SMILE trial of children with CFS/ME conducted at the University of Bristol. The result of this trial also purported to show that there is a psychological component to the condition and therefore to its treatment.

23. Mr Peters sought some of the trial data. The university refused on the basis that it constituted personal data. Mr Peters succeeded before the Tribunal. [7]

Requests of QMUL relating to PACE made by others

24. In his email to the Commissioner, Mr Smallcombe said there had been 62 requests (incorporating over 200 separate requests) of QMUL relating to PACE. These included Mr Peters' requests.

Previous Commissioner and Tribunal decisions relating to PACE

25. There have been some 15 decision notices issued by the Commissioner arising out of PACE. One of those related to Mr Peters' request for information about conflict of interest statements associated with PACE. [8] QMUL had relied on the exemption in section 21(1) FOIA (information accessible by other means). The Commissioner upheld his complaint.

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[7] *Peters v Information Commissioner and the University of Bristol* EA/2018/0142 (11 March 2019)
[8] FS50696884 (14 March 2018) **[179]**

26. A number have been appealed to the Tribunal. In *Queen Mary University of London v The Information Commissioner and Robert Courtney*, [9] Mr Courtney asked for the 'deterioration rates' for each of the therapy groups for both primary measures (Chalder fatigue and physical function). The Tribunal held that QMUL was entitled to rely on the exemption in section 22 (information intended for future publication): although *The Lancet* had by this time published the main research findings, further publication was proposed.

27. In *Mitchell v The Information Commissioner*, [10] Mr Mitchell asked for the minutes of the Trial Steering Committee and Trial Management Groups (as Mr Peters did later). The Tribunal ruled that QMUL was entitled to rely on the exemption in section 36 FOIA (prejudice to the effective conduct of public affairs) and suggested that inappropriate use of FOIA in relation to academic research could run counter to Article 13 of the Charter of Fundamental Rights of the European Community [11] and the Education Reform Act 1988, [12] each of which promote academic freedom.

28. In *Matthees*, the request was for patient-level data. QMUL relied on the exemption in section 40 (personal information) and 41 (information provided in confidence). The Tribunal, by a majority, upheld the Commissioner's decision that the information should be disclosed.

The initial response to the present request and review

29. QMUL refused the request on 5 December 2017 **[83]**. The reply, from Paul Smallcombe, its Records & Information Compliance Manager, said simply that the request was refused under section 14(1) FOIA (vexatious requests). Mr Smallcombe did not explain why section 14(1) applied.

30. Despite having nothing to work with, Mr Peters, in his review request made on 10 December 2017 **[84]**, argued why the request was not vexatious. For example, meeting it would not require grossly oppressive effort; its tone was respectful; it made no accusation and did not reveal any intransigence; he had no intention of causing annoyance; he had made no previous requests about harassment; he was not acting as part of a campaign; researchers, including a QMUL employee, had made the question of harassment one of public interest; the claims of harassment had been widely broadcast but not subjected to independent scrutiny (QMUL was, he said, unable to provide evidence of them in *Matthees*); and there was a clear, serious purpose to the request. It is clear that Mr Peters is familiar with caselaw on section 14.

[9] EA/2010/0229 (22 May 2013)
[10] EA/2013/0019 (22 August 2013)
[11] 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected'
[12] Section 202(2) says that, in exercising their functions, University Commissioners shall have regard to the need to '(a) to ensure that academic staff have freedom within the law to question and test received opinion and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs and privileges they may have at their institutions; …'

31. QMUL was equally non-forthcoming in its review on 10 January 2018, simply saying 'The reviewer has upheld the decision to refuse the request as vexatious'. This was an unhelpful and discourteous reply to Mr Peters' carefully-reasoned request.

Proceedings before the Commissioner

32. In his complaint to the Commissioner, Mr Peters suggested that the public interest in the requested information was all the greater given that researchers, including Prof White, had benefitted from their work on CFS/ME through publications and consultancies for government departments and private insurance companies. Mr Peters said he had not asked for personal information or details about alleged harassment. There was, therefore, no possibility of any distress, disruption or irritation to employees.

33. In contrast to its peremptory replies to Mr Peters, on 13 June 2018 QMUL provided a very long (12 pages) reply, along with a five-page table, to queries raised by the Commissioner **[104]**. Mr Smallcombe, the author, suggested that, although the PACE trial was only mentioned once in the request, it clearly related to it and was therefore inextricably linked to the stream of FOIA requests and other correspondence sent to the university since February 2011. As well as Mr Peters, there were other regular requesters. Mr Smallcombe anticipated that the requests would continue, although he acknowledged that frequency had diminished. Some of the 14 decision notices issued by the Commissioner (with another one pending) arising out of PACE upheld the university's reliance on section 14.

34. There had also been FOIA requests of the MRC (one of the funders of the trial) and complaints to *The Lancet*, where the main results were first published. The trial had generated controversy, with debates in Parliament and a petition to the Government about Prof White, but Mr Smallcombe suggested that it was not controversial amongst most scientists or indeed experts in clinical trials. Some messages on Twitter used language such as 'rubbish', 'fraudulent'. 'sleight-of-hand', 'travesty' and 'unscientific claims'.

35. Mr Smallcombe said that, after seven years, the PACE team and QMUL felt harassed. The present request, he argued, was 'motivated by a desire to smear the researchers; an effort to dig for information to use to attack or discredit them'.

36. He justified the use of section 14(1) on four bases. First, there was evidence of a campaign of which Mr Peters was 'demonstrably a part'. Mr Smallcombe set out the links between the various protagonists in some detail. The explicit aim of the campaign was to discredit the trial and its authors. Second, there was burden on QMUL and its staff. Prof White had complained that '[t]hese serial requests have caused my colleagues [who are mostly external to QMUL] and me annoyance and frustration ...'. He had had to bear the brunt of the requests, which took him away

from his other work. Mr Smallcombe said that, to deal with the first part of the present request, he would have to contact colleagues in a number of departments as well as the trial co-PIs at KCL and Oxford. In relation to the second part, although he had kept some relevant data, each request would need to be consulted individually. He dealt with all FOIA requests and this was part only of his role.

37. Third, and linked to burden, was harassment. One of many critical comments made by campaigners was: 'Our PACE authors have 2 years before their careers are over and they face justice. They will come out fighting I am sure but don't worry every day is one day closer to the end for these fraudsters. In the meantime we can enjoy turning the screw on them'. All the co-PIs had experienced degrees of harassment. Mr Peters had, Mr Smallcombe said, used information QMUL had previously released to him to harass Prof Sharpe on Twitter.

38. Fourth, requesters were guilty of unreasonableness in their refusal to accept rejection of requests. Mr Smallcombe gave examples. The length and complexity of some correspondence also indicated a degree of obsessiveness. The Commissioner's decision in FS50568116 had found that the online presence of the requester criticising the public authority contributed to the finding of vexatiousness. The Tribunal in *Mitchell* [13] had held that the requests (relating to PACE) were essentially vexatious because of their polemical nature, as well as being part of a campaign: [14]

> '*All too often such requests are likely to be motivated by a desire not to have information but a desire to divert and improperly undermine the research and publication process – in football terminology – playing the man and not the ball. This is especially true where information is being sought as part of a campaign – it is not sought in an open-minded search for the truth – rather to impose the views and values of the requester on the researcher. This is a subversion of Academic Freedom under the guise of FOIA and the Commissioner, under his Article 13 duty must be robust in protecting the freedom of academics from time-wasting diversions through the use of FOIA*'.

39. Mr Smallcombe finished his letter with this assertion: '… we believe that this request should be assessed within the context of a campaign, the opposition generally to CFS/ME research of a certain kind, and a motivation to extract more information that can be used in some way to attack QMUL and/or certain researchers … the request would be likely to have an unjustified and disproportionate effect on QMUL and could lead to distress of certain individuals'.

[13] EA/2013/0019
[14] Para 34

The Commissioner's decision

40. The Commissioner set out at length QMUL's case as contained in Mr Smallcombe's letter. Her reasoning for upholding reliance on section 14(1) is short. She said that the purpose of the provision was to protect public authorities and their employees in their everyday business. Dealing with unreasonable requests could get in the way of delivering mainstream services and answering legitimate requests. They could also damage the reputation of the legislation. It was clear that Mr Peters was acting in concert with others in a campaign directed at QMUL. The cumulative impact of the requests made of QMUL placed a significant burden on it. This particular request was not patently vexatious viewed in isolation, but any response would be likely to result in further requests. The request had to be viewed in the overall context.

The Grounds of Appeal and the Commissioner's Response

41. Mr Peters' **Grounds of Appeal** ran to 34 pages, with over 50 citations. His explanation for the length is that he was given no opportunity to respond to the concerns raised by QMUL before the Commissioner made her decision. (In fact, he would not have seen Mr Smallcombe's letter until later in the appeal process).

42. Mr Peters addressed each of the four arguments relied upon by QMUL as justification for a finding of vexatiousness. He denied that there was a campaign of disruption. Indeed, there was no formal organisation and no central authority, but merely a large number of patients with a shared view, with just occasional coalitions (in fact, he and a few others wished that they had been able to exercise authority because patients had not always helped themselves). He accepted that the actions of a few patients might reasonably be described as a campaign of disruption, but this was a minority. The use in campaigning of wikis, hashtags, videos, blogs, forums, correspondence, responses, petitions – all relied on by QMUL in a negative way – was legitimate. There was no evidence that requests had been spaced to prevent aggregation, as the university suggested, although he did accept that supplementary requests were sometimes made (this was acceptable, he thought, if they raised legitimate additional questions). He was prepared to state on oath that he did not discuss the request with anyone; no one knew it had been made until the decision notice was issued. In fact, he had acted alone for all his requests of QMUL, partly because temperamentally he preferred to work alone and partly because he was aware that the Commissioner regarded acting in concert as a factor pointing to vexatiousness.

43. As to burden, Mr Peters said he would not dispute that the trial had generated work for QMUL. However, it was inevitable that important trials in controversial areas would generate greater scrutiny. At least some of the burden was self-inflicted in that the university vigorously resisted releasing trial data (until required to by the Tribunal in *Matthees*). Significantly, it had not relied on section 12 FOIA (cost of compliance) in relation to the present request. It acknowledged

that the number of requests had not been excessive but was nevertheless arguing unreasonable burden: that, Mr Peters said, was an unreasonable position.

44. He strongly disputed that he had abused Prof Sharpe on Twitter, and explained the background at some length, including criticism made of Prof Sharpe by a minister for an email he had sent another MP. [15] In any event, QMUL had alighted on just a couple of tweets out of some 85,000 Mr Peters had sent. He had not, he said, made any potentially libellous remarks, as alleged; he had not harassed anyone; unlike the requester in FS50568116, he had not behaved obsessively. In short, he had not abused FOIA but rather had used it exactly how it was intended to be used: to shed light on relevant issues of public interest.

45. Mr Peters was concerned that QMUL, assisted by the Science Media Centre (SMC) (whose director had 'a particular view' about CFS/ME), was using the allegations of harassment to denigrate campaigners and therefore undermine their case. Campaigners had been labelled 'anti-science'. The former Science Correspondence for BBC Radio had criticised the SMC's tactics to a parliamentary committee; these represented 'another example of the lack of independence of science journalism'. One of the more outlandish claims made by a journalist was that the police may have a dedicated unit for 'ME crimes'.

46. A few angry emails (by others) had, Mr Peters argued, been blown out of proportion, with phrases such as 'you will all pay' inflated into 'death threats'. One researcher had claimed, absurdly, that he felt safer in Iraq and Afghanistan.

47. The Commissioner defended her decision and its reasoning in her **Response** (see below). A campaign need not be aimed at causing disruption; it was enough if it had that effect. As to the value of the requests, she suggested that they were essentially secondary or parasitic, designed to elicit information about the controversy arising from PACE rather than information about the trial itself. That substantially reduced the level of public interest.

48. Mr Peters reiterated and expanded upon many of the points in his Grounds of Appeal in his **Reply [74]** and **witness statement of 13 November 2018**. In the former, he quoted from an article by Blease and Geraghty: [16]

> '*Of critical importance is the observation that the purported actions of a few individuals (out of 250,000 U.K. sufferers) appear to have been characterised by the medical establishment as representative of many (arguably even most) patients with ME/CFS and P[atient] O[rganization]s. Certainly, the medical establishment does not appear to have challenged or sought to distance itself from newspaper headlines and features which have constructed negative global characterizations of ME/CFS POs and patient groups on the basis of individual incidents. Similarly, a feature article in BMJ*

[15] in fact, Mr Peters' exchange with Prof Sharpe post-dated QMUL's rejection of his FOIA request

[16] *Are ME/CFS Patient Organizations 'Militant'?* Journal of Bioethical Inquiry 2018 Sep; 15(3): 393-401 https://www.ncbi.nlm.nih.gov/pubmed/29971693

resonates with a similar timbre: POs and ME charities are describes as "militant" and it is claimed that conducting ME/CFS research is "dangerous"'.

Discussion

Should the Commissioner have given Mr Peters the opportunity of commenting on Mr Smallcombe's email of 13 June 2018?

49. One of Mr Peters' Grounds of Appeal is a challenge to the procedure which the Commissioner followed. She made her decision without giving him an opportunity of commenting on Mr Smallcombe's email. He says that she should have done.

50. The Tribunal has sympathy for the frustration Mr Peters evidently feels. Natural justice dictates that a party to a legal dispute should be given an opportunity of commenting on an opponent's case. This is under the principle *audi alteram partem* ('listen to the other side'). The principle is particularly important where serious allegations are made by one party against the other. In his email, Mr Smallcombe says that QMUL believes that Mr Peters' request 'is motivated by a desire to smear the researchers; an effort to dig for information to use to attack or discredit them'. That is an attack on Mr Peters' integrity. The allegation, made in the same email, that Mr Peters had used information previously supplied to him by QMUL to harass Prof Sharpe (one of the trial's principal investigators) on Twitter is also serious. The Commissioner refers to both allegations in her decision, without questioning whether they are justified. Presumably they formed part of the basis for her decision (otherwise, why refer to them?). She also cites QMUL's claim that Mr Peters had made potentially libellous remarks in previous correspondence. Mr Peters strongly denies all the allegations, but they appear in a decision by an official governmental agency. It is true that the published version is anonymised, but it is foreseeable that some people might recognise Mr Peters as the complainant.

51. There is an important practical consideration, too. If a requester knows the case made by the public authority and has an opportunity of commenting, that could well influence the Commissioner in her decision. That may in turn avoid the need for an appeal and therefore unnecessary expenditure (by the Commissioner, the public authority and the tribunal service as well as the requester). In fairness to the Commissioner, she does sometimes give a requester an opportunity of commenting on what the public authority says. In the Tribunal's view, she should have done so in the present case. It is clear that the Commissioner based her assessment of the case on Mr Smallcombe's email: the email was effectively determinative of the complaint.

52. However, whether the *audi alteram* principle applies in the present context is not a straightforward question. The Tribunal's jurisdiction derives from section 58 FOIA:

'(1) If on an appeal under section 57 the Tribunal considers –

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based'.

53. The jurisdiction is a strange one because, one the hand, the Tribunal is asked to identify whether the Commissioner has made an error of law (or should have exercised a discretion differently) whilst, on the other, caselaw makes it clear that an appeal is a complete rehearing and the Tribunal may reach a different decision even if it does not identify an error of law (or inappropriate exercise of discretion): it may make a different, determinative finding of fact, even though a finding by the Commissioner is reasonable on the evidence. Nevertheless, in the present context a key question is whether the failure to give Mr Peters an opportunity of commenting on Mr Smallcombe's email constitutes an error of law. That in turn involves considering whether the public law principle under which a material procedural error constitutes an error of law applies to the Commissioner.

54. The Tribunal tends to the view that it does because the Commissioner is a public body (herself subject to FOIA, for example) and is performing at least a quasi-judicial function. However, the Tribunal has not heard full argument on the issue and Mr Peters, prejudiced though he was by the Commissioner's investigation, is not prejudiced in the appeal because he has had the opportunity of commenting on the points made by Mr Smallcombe. The Tribunal has taken full account of those comments and, because this is a full rehearing, it is not limited to considering whether the Commissioner's decision was a reasonable one on the facts known to her.

55. It should be said, however, that an unsatisfactory consequence of the nature of the Tribunal's *de novo* jurisdiction is that the content of the Commissioner's procedural duties is never determined: the Tribunal can always cure a procedural error which she makes. It is hoped that when the opportunity arises the Upper Tribunal will give guidance on the procedure adopted by the Commissioner.

The law on vexatiousness

56. It is trite law that, for section 14(1) to apply, it is the request which must be vexatious, not the requester. Although the motives and behaviour of the requester may be relevant, vexatiousness looks at the effect on a public authority of having

to deal with a request. The central question is: is the public authority vexed by the request?

57. The leading case is the Court of Appeal decision in *Dransfield v Information Commissioner and another; Craven v The Information Commissioner and another* (collectively *Dransfield*). [17] The only substantive judgment was given by Lady Justice Arden. She cited, [18] with apparent approval, this passage from the decision of Judge Wikeley in the Upper Tribunal: [19]

> *'27. … I agree with the overall conclusion that the [Tribunal] in Lee [Lee v Information Commissioner and King's College Cambridge] reached, namely that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure".*
> *28. Such misuse of the FOIA procedure may be evidenced in a number of different ways. It may be helpful to consider the question of whether a request is truly vexatious by considering four broad issues or themes – (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). However, these four considerations and the discussion that follows are not intended to be exhaustive, nor are they meant to create an alternative formulaic check-list. It is important to remember that Parliament has expressly declined to define the term "vexatious". Thus the observations that follow should not be taken as imposing any prescriptive and all-encompassing definition upon an inherently flexible concept which can take many different forms'.*

58. Arden LJ then said:

> *68. In my judgment, the UT [Upper Tribunal] was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable*

[17] [2015] EWCA Civ 454 (14 May 2015)
[18] Paras 18 and 19
[19] *Information Commissioner v Devon County Council and Dransfield* [2012] UKUT 440 (AAC) (28 January 2013) http://www.bailii.org/uk/cases/UKUT/AAC/2013/440.html

foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available. I understood Mr Cross [Counsel for the Commissioner] to accept that proposition, which of course promotes the aims of FOIA.

…

72. Before I leave this appeal I note that the UT held that the purpose of section 14 was "to protect the resources (in the broadest sense of that word) of the authority from being squandered on disproportionate use of FOIA" (UT, Dransfield, Judgment, para. 10). For my own part, I would wish to qualify that aim as one only to be realised if the high standard set by vexatiousness is satisfied. This is one of the respects in which the public interest and the individual rights conferred by FOIA have, as Lord Sumption indicated in Kennedy [Kennedy v Charity Commission [2014] 2 WLR 808] (para. 2 above), been carefully calibrated'.

59. There is, therefore, a high hurdle for a public authority to cross before it may rely on section 14(1). All the circumstances of the case have to be considered. On one side of the equation, these include the burden on the public authority, the motive of the requester and any harassment or distress caused to staff by the request. On the other side is the value of the information to the requester or the public at large. However, it is not a simple weighing of the two sides of the equation. Where information has value, that is likely to be a particularly important factor, because of the need to promote the aims of FOIA to facilitate transparency in public affairs, accountability of decision-making and so forth.

60. However, the fact that a request has value is not determinative. In *Parker v Information Commissioner*, Upper Tribunal Judge Knowles said: [20] 'The lack of a reasonable foundation to a request was only the starting point to an analysis which must consider all the relevant circumstances. It is clear from the Court of Appeal's decision that the public interest in the information which is the subject of the request cannot act as a trump card so as to tip the balance against a finding of vexatiousness'.

Application of the law to the facts of the case

61. The four themes identified by Judge Wikeley in *Dransfield* – burden, motive, value and harassment/distress – are neither exhaustive nor determinative but they do provide a useful starting-point and the Tribunal will therefore consider them, leaving value to last.

i. Burden

62. Mr Peters' request is multipart: there are a total of nine sub-parts and several require more than one statistic. The first main part, relating to complaints of harassments, asks for information between 2000 and 2017. It therefore expects

[20] [2016] UKUT 0427

QMUL to trawl through its records over a long period. The second main part asks for information about FOIA requests received by QMUL, in relation to PACE and other CFS/ME research. Although again expressed to cover the period from 2000, in reality the start point is January 2005, when the main provisions of FOIA came into force. Once again, nevertheless, Mr Peters expects the university to trawl through its records over a long period.

63. In paragraph 83 of her decision, the Commissioner says that the request is not patently vexatious when viewed in isolation. However, she goes on to say, correctly, that it must be seen in the context of other requests both by Mr Peters and by others. Mr Peters has now made a total of nine requests relating to PACE (directly or indirectly), though one postdates the present request and another, he says, was simply clarificatory. That is a significant number of requests on one topic. The requests were over less than a two year period. In *Dransfield*, UTJ Wikeley said [21] that 'a torrent of individually benign requests may cumulatively cause *disruption*, such that one further request is vexatious' (his emphasis). Mr Peters' PACE requests may not have reached torrent proportions but equally they are more than a steady trickle. He argues that the request is not about PACE and should not be bracketed with those which are, but there is clearly a connection.

64. The Commissioner concluded that, were QMUL to reply to the present request, others would be likely to follow. The Tribunal agrees. Mr Peters is resourceful and determined. His requests have covered a range of subjects relating to the PACE trial. Along with others, he wants to get to the bottom of the methodology used and conclusions drawn but also how the university has publicised and defended the results. Any response to a FOIA request is almost bound to give an opportunity for a follow-up request, often legitimately so. Despite Mr Peters' denials that he intends to follow up with a 'barrage of correspondence', there is every reason to believe that he would want to dig deeper.

65. In any event, it is not just Mr Peters' requests which are relevant. In considering vexatiousness, the overall context matters. Mr Peters insists that, with the present request as with his other ones, he has acted alone. That better suits his temperament, he says. The Tribunal accepts that. But, given that it is the effect on a public authority which is important for section 14(1), it is not just requests by the person who made the request at issue which have to be considered. It is clear from Mr Smallcombe's evidence that a large number of requests have been made, by a variety of requesters, in relation to PACE. Equally relevant, a sizeable volume of correspondence has been directed at the university and its researchers about the trial.

66. Mr Peters makes the point, quite fairly, that the more important and the more controversial an issue is, the more it is appropriate to subject it to public scrutiny and the more FOIA requests there are likely to be, given that FOIA is a key tool for scrutiny. He quotes Judge Wikeley in *Dransfield*: 'It may be both annoying and

[21] At [26]

irritating (as well as both dissatisfying and disappointing) for politicians and public officials to have to face FOIA requests designed to expose possible or actual wrongdoing' - [22] that does not of itself mean that a request is vexatious. In light of the controversy which has surrounded PACE, QMUL has to expect a high level of scrutiny. But FOIA requesters have to exercise responsibility, too, and choose their targets carefully, conscious of the burden already faced by a public authority. Through his involvement, however loosely, in the pushback against PACE, Mr Peters knows that QMUL has faced a very considerable burden. Whether it is the author of its own misfortune, as he and others clearly believe, does not diminish that burden. In that context, it is questionable whether some of his other requests – about, for example, how much the appeal in *Matthees* cost the university (and how much VAT it paid) – were proportionate.

67. Viewed both in isolation and in context, therefore, the Tribunal accepts that the request imposes a significant burden on the university.

ii. Motive

68. As already noted, Mr Smallcombe suggested that Mr Peters 'is motivated by a desire to smear the researchers; an effort to dig for information to use to attack or discredit them'. The Tribunal rejects that. Mr Peters believes that the PACE trial is fundamentally flawed and he questions some of QMUL's tactics in defending it. Whether his concerns are justified is not the point. As is almost inevitable with any campaigner, he began his journey from a certain position (unfavourable to the research and the researchers) and he may not be easily shifted from it. But the Tribunal accepts that his objective is to get to the truth, however that is defined.

69. In his Grounds of Appeal, [23] Mr Peters says that '[t]here is an important role for the FOIA as a tool for those without power to fight against injustice, to use the Act to shed light on relevant issues. While the Act must be protected from abuse and public authorities from disruption, those who are using the Act responsibly must also have their rights protected'. That is an eloquent summary of how FOIA should be used and the Tribunal accepts that it reflects Mr Peters' motives, even if he may be criticised on occasion for overusing the Act.

iii. Harassment/distress

70. This is linked to burden. The Tribunal accepts that it is not Mr Peters' intention to harass or cause distress. His communications are always politely-worded and reasonable in tone and content. That said, someone can feel harassed or distressed even if the other person did not intend that they should be. QMUL researchers and certain other staff (perhaps including Mr Smallcombe) are likely to feel harassed, and even distressed, as a result of the unrelenting public focus on, and

[22] At [25]
[23] **[32]**

criticism of, their work, and a further detailed request such as Mr Peters' can only add to that feeling.

iv. Value

71. As explained above, the value of a request and the information it seeks is particularly important in the context of section 14(1) FOIA. Significant burden, and even a feeling of harassment or distress, may have to be tolerated if the information sought is important. One of the key purposes of FOIA is to facilitate campaigning in the public interest, and campaigning without information is an empty vessel. Campaigning requires persistence and the more important an issue, and the more those in authority are suspected of having something to hide, the more persistent it may need to be.

72. The present request does not seek information about the PACE trial itself, but rather about the strategy and tactics adopted by QMUL in defending it. In her Response, [24] the Commissioner describes the request as 'essentially, secondary or parasitic … – [it seeks] to provide the Appellant with information concerning the controversy arising from the PACE trial (and, presumably, to "vet" QMUL's statements about the controversy arising from the PACE trial), rather than to elicit information about the PACE trial itself'. That is a fair summation, and Mr Peters would no doubt accept it.

73. However, the secondary or parasitic nature of a request does not of itself detract from its importance. Mr Peters' thesis is that QMUL has, aided by interlocutors such as the SMC, wrongly used claimed allegations of harassment to influence the public debate about the PACE trial. The thinking, he says, is that if one attacks the behaviour of a critic, that diminishes the credence given to his criticisms. He and others maintain that the university has sought to denigrate CFS/ME patients who have criticised the trial, with the result (even if not the intention) that it is easier for their concerns to be marginalised in the public space and for the trial therefore to be insulated from appropriate scrutiny.

74. QMUL, no doubt, strongly denies the charge. It is clear, however, that Mr Peters' thesis is supported by some scientists who have observed the PACE narrative. It cannot be said to be a groundless flight of fancy embarked upon by patients offended by the suggestion that there is a psychological, or psychosomatic, component to their debilitating condition. Academic research is fiercely competitive and researchers have careers to promote, reputations to defend and grants to secure. Conflicts of interest are not always respected or declared. It is well-documented that results from a wide range of medical research have been skewed or suppressed where inconvenient, with pharmaceutical company sponsors commissioning placemen to author articles with a favourable spin amidst a range of other questionable practices.

[24] Para 18 at **[71]**

75. The Tribunal stresses that it reaches no conclusion whether QMUL has been guilty of any nefarious tactics. But establishing whether it has would undoubtedly be in the public interest. Academic freedom is precious, but so is the freedom to criticise research – that is how science advances – and the way its findings are promoted.

76. The problem for Mr Peters, however, is in showing that the information sought by his request is likely to resolve the controversy, or even advance the debate, about whether QMUL has engaged in the tactics which he suspects. His expectation, clearly, is that the figures about external harassment will be low or even zero. Unfortunately for him, that would prove nothing. It is far from clear that incidents of external harassment would routinely be reported by those at the receiving end to their employers. That is because they may feel that there is little their employer can do about them, at least until they reach such a pitch that protective measures need to be put in place. This is in contrast to where the allegation is that a fellow employee is guilty of harassment: in that case, the victim will know that his or her employer is duty bound to investigate and, if appropriate, take remedial action.

77. In addition, whether behaviour constitutes harassment is not always easily recognised. There is, inevitably, an element of subjectivity. What one person may regard as harassment a colleague may regard simply as legitimate, if irritating, criticism. Just as the fact that a sensitive employee reports what they regard as external harassment does not make it so, so a more forbearing employee may fail to report something which most would regard as harassment..

78. Linked to this, even if an employee reported to the university their concerns, it is not certain that they would use the word 'harassed'. They might just as easily use words such as 'pressurised', 'bullied, 'targeted' or 'intimidated'. Would QMUL be expected to trawl through its records – over 17 years – to identify complaints about what might objectively be considered harassment, even though the complainant had not used that term? That would add considerably to an already considerable burden, and quite possibly enable the university to rely on section 12.

79. In principle, one benchmark could be the Protection from Harassment Act 1997. Section 1(1) provides: 'A person must not pursue a course of conduct—(a) which amounts to harassment of another; and (b) which he knows or ought to know amounts to harassment of the other'. Unfortunately, 'harassment' itself is not defined, save that section 7(2) says that '[r]eferences to harassing a person include alarming the person or causing the person distress'. Neither 'alarm' or 'distress' is defined. 'Course of conduct' essentially means on at least two occasions. It is not known whether Mr Peters had the 1997 Act in mind, but more importantly it is extremely unlikely that victims would apply the statutory tests when deciding whether to report unwanted attention to the university. It is not a criticism of Mr Peters – even with his forensic mind, crafting a request of this nature is difficult –

but the concept of harassment is too vague to elicit reliable information, even supposing that victims are likely reliably to have reported external incidents.

80. Mr Peters also asks about incidents of harassment reported to the police. In practice, only serious cases – stalking, threats of personal harm or persistent unwanted attention over a lengthy period – are likely to be reported to the police. A nil or low return would again not prove that external harassment has not taken place.

81. In short: any statistics held by QMUL about external harassment are unlikely to be a reliable indicator of the extent of the problem. KCL was not able to give a definitive answer, but this does not mean that KCL researchers have not felt harassed. The Tribunal has concluded that the unreliability of any QMUL statistics means that this part of the request has little value. It bears in mind that there is already considerable information in the public domain which Mr Peters and others can use to support their hypothesis – for example, articles by other scientists and the apparent paucity of evidence of harassment which QMUL was able to lead in *Matthees*. The additional information Mr Peters requests would add little to the debate, but seeking to identify it and then assessing whether any exemptions applied would represent significant additional burden for the university.

82. With regard to the second part of the request, QMUL has provided some of the information through Mr Smallcombe's letter to the Commissioner. He has provided a table setting out all the requests relating, directly or indirectly, to PACE and what happened to them. He has not given the same information for non-PACE CFS/ME requests, but has said that 14 out of the 19 decision notices issued by the Commissioner where it was the public authority relate to PACE. That gives a flavour of the amount of PACE-related work which Mr Smallcombe (the sole FOIA employee) has been asked to undertake. PACE has dominated QMUL's FOIA responsibilities. The more detailed analysis which Mr Peters seeks is unlikely to give a different flavour, and would be considerably burdensome to produce. Once again, therefore, there is little value in this part of the request.

83. The Tribunal has therefore concluded that the requested information as a whole would be of negligible value. When set against the very considerable burden which this request, other requests which Mr Peters has made and the numerous requests and other correspondence generated by others, the Tribunal considers that the Commissioner was right to regard the request as vexatious.

84. That is not to say that other requests which Mr Peters may in future make of QMUL relating to PACE should necessarily also be regarded as vexatious. Whether they are will depend on all the circumstances, and in particular on the value of the requested information.

Conclusion

85. For these reasons, the appeal is dismissed. The decision is unanimous.

Signed Judge David Thomas

Judge of the First-tier Tribunal
Date: 4 April 2019