MILLS & REEVE

Your reference:
Our reference: NEHA/4013052-0079
Document number: 213685770_1

Direct line: +44(0)1223 222205
Direct fax: +44(0)1223 222254
Edward.Hadcock@mills-reeve.com

23 November 2015

First-tier Tribunal (Information Rights)
2nd Floor
Arnhem House
31 Waterloo Way
Leicester
LE1 6LR

Sent by email to grc@hmcts.gsi.gov.uk

Dear Sirs

Appeal against the Decision Notice dated 27 October 2015
Reference: FS50565190
Public Authority: Queen Mary University of London

We act on behalf of Queen Mary University of London ("QMUL").

We enclose the following documents for filing with the Tribunal:

1 Notice of Appeal to the Information Tribunal.

2 Grounds of Appeal.

3 A copy of the Commissioner's Decision Notice dated 27 October 2015.

We trust that the above is in order and we look forward to hearing from the Tribunal in due course.

Please do not hesitate to contact our Edward Hadcock on 01223 222 205 or edward.hadcock@mills-reeve.com in the event that you have any queries.

Yours faithfully
Mills & Reeve LLP
Mills & Reeve LLP

Encs

Cc: Information Commissioner's Office

General Regulatory Chamber (GRC)

Notice of appeal

This form is for making an appeal to the First-tier Tribunal (General Regulatory Chamber). The First-tier Tribunal (General Regulatory Chamber) is administered by HM Courts & Tribunals Service, an executive agency of the Ministry of Justice, and is independent of regulators.

Please read ***'Guide to completing the notice of appeal'*** before completing this form.

Please complete the form legibly, using black ink and CAPITAL LETTERS.
You may use extra sheets of paper but please add your name at the top of each extra page.

1 Your details

Name of appellant	QUEEN MARY UNIVERSITY OF LONDON
Address Postcode	MILE END ROAD LONDON E1 4NS
Telephone number	SEE PAGE 2 FOR REPRESENTATIVE DETAILS
Mobile number	SEE PAGE 2 FOR REPRESENTATIVE DETAILS
Email address	SEE PAGE 2 FOR REPRESENTATIVE DETAILS

2 Representative details

Do you have a representative? ☒ Yes ☐ No

If Yes, please give your representative's details below

Please note: all correspondence including the hearing notification, will be sent to the representative, not directly to you. If a representative stops acting for you, please notify the tribunal straightaway.

Name of representative	GARY ATTLE
Firm/Organisation	MILLS & REEVE LLP
Address	BOTANIC HOUSE 100 HILLS ROAD CAMBRIDGE CB2 1PH
Postcode	
Telephone number	01223 222394
Mobile number	
Email address	GARY.ATTLE@MILLS-REEVE.COM
Reference number *(if any)*	CGA/4013052-0079

3 About the decision notice

The decision notice reference number:	FS50565190

Name and address of the regulator issuing the decision notice

Name	INFORMATION COMMISSIONER
Address Postcode	INFORMATION COMMISSIONER'S OFFICE WYCLIFFE HOUSE WATER LANE WILMSLOW, CHESHIRE SK9 5AF
Date on the decision notice you are appealing against	27 OCTOBER 2015
Date you received the decision notice you are appealing against	28 OCTOBER 2015

You must attach a copy of the decision notice with this form

Please tick the box to show that it is attached: ☒

4 Time limit for making an appeal/application

An appellant is required to lodge an appeal with the tribunal **usually** within 28 days of the decision notice being sent to them (see explanatory notes). The tribunal may accept a notice of appeal outside this time limit under certain circumstances.

For the tribunal to do this, you should request an extension of time and provide reasons why it is late. The tribunal will then consider whether to grant you the extra time you have asked for.

Please tick this box if you would like the tribunal to consider an out of time appeal. ☐

Please give reasons what you would like the tribunal to take into account when considering whether to accept your out of time appeal.

N/A

5 Grounds of appeal

Please give your grounds of appeal.

Your grounds should explain why you think the decision notice you have been given is wrong. You may find it helpful to refer to the individual paragraphs you disagree with and explain why you disagree with them. If required, please use an extra sheet of paper.

PLEASE SEE ATTACHED GROUNDS OF APPEAL

6 Outcome of appeal

Please tell us what outcome you are seeking from your appeal

PLEASE SEE ATTACHED GROUNDS OF APPEAL

7 Type of hearing and venue

The tribunal makes its decision after reading all the papers in a case. Please indicate by ticking the appropriate box whether you wish your case to be considered on the papers only or after a hearing where parties can put their arguments in person. Please see the explanatory notes before making your selection.

☐ **Paper decision** ☒ **Decision after a hearing**

The tribunal will decide where any hearing takes place but will usually take into account the preference of the parties.

If you would like the hearing to be in a particular town or city please state it here. (The tribunal will endeavour to meet this request. However, HM Courts & Tribunals Service do have limited facilities and so this may not always be possible.)

LONDON

Parties will be informed in writing by post or email as soon as the hearing date has been set.

8 Supporting document

Please list any documents that you wish the tribunal to consider in support of your appeal. You may use an extra sheet of paper if required.

Please attach the documents and tick the box to indicate that they have been attached. ☒

GROUNDS OF APPEAL

9 About your requirements

Please state if you, your representative or any witnesses have a disability or other special needs that you need to bring to the attention of the tribunal in order to help at your hearing. Please also state if an interpreter is required and, if so, please state the language needed.

N/A

10 Declaration

Signature of person appealing or their representative	Mills & Reeve LLP
Date	23 NOVEMBER 2015

Please refer to the contact details for the individual General Regulatory Chamber jurisdictions at www.justice.gov.uk/tribunals

We can help if you need information in a different format (e.g. Braille, large print). We can also provide this form in Welsh if required. If you need any of these services please contact the tribunal.

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

BETWEEN

QUEEN MARY UNIVERSITY OF LONDON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

GROUNDS OF APPEAL

---

1. This is an appeal by Queen Mary University of London ("QMUL") against a Decision Notice issued by the Information Commissioner ("the Commissioner") dated 27th October 2015, ref. FS50565190 ("the Decision Notice").

2. In the Decision Notice, the Commissioner required QMUL to disclose certain information relating to a clinical trial ("the PACE trial"), of which QMUL was the main sponsor, comparing various treatment options for chronic fatigue syndrome ("CFS"). Specifically, the Commissioner required QMUL to disclose information relating to each of the 641 individual participants in the PACE trial, by reference to 12 different variables. The information that the Commissioner required QMUL to disclose is referred to in these Grounds of Appeal as "the disputed information".

3. QMUL contends that the Commissioner was wrong to require disclosure of any of this information. The Commissioner ought to have found that all of the requested information was exempt from disclosure under sections 40(2), 41, 43(2) and 22A of the Freedom of Information Act 2000 ("FOIA"). Alternatively, the Commissioner in the exercise of his discretion ought not to have required QMUL to disclose any of the requested information, having regard to FOIA section 22A.

THE PACE TRIAL

4. The PACE trial is described in a paper published in "The Lancet" (Vol 377, pp 823-836), entitled "Comparison of adaptive pacing therapy, cognitive behaviour therapy, graded exercise therapy, and specialist medical care for chronic fatigue syndrome (PACE): a randomised trial" ("the Lancet Paper"). The account of the PACE trial given in the Lancet Paper is summarised at §§5-9 below.

5. Chronic fatigue syndrome (CFS) is characterised by chronic disabling fatigue, in the absence of an alternative diagnosis. Its relationship with myalgic encephalomyelitis (ME) is disputed: some researchers consider that CFS and ME are the same disorder, and others regard them as different with separate diagnostic criteria. Several diagnostic criteria exist for both CFS and ME.

6. The PACE trial was intended to investigate four treatment options for CFS The first option was specialist medical care (SMC) alone. The other options were SMC supplemented by one of the following therapies: adaptive pacing therapy (APT); cognitive behaviour therapy (CBT); and graded exercise therapy (GET). The trial was designed to compare APT, CBT, and GET, when added to SMC, with SMC alone. It sought evidence of benefit and harm. It also aimed to compare APT with CBT and GET, and to examine those comparisons in subgroups satisfying different diagnostic criteria for CFS and ME.

7. The research team recruited 641 participants, who satisfied a particular set of diagnostic criteria (known as the Oxford criteria) for CFS together with various other

eligibility criteria. The 641 participants were randomly allocated to four treatment groups, with outcomes being assessed up to 52 weeks after randomisation. 160 were assigned to receive APT and SMC; 161 were assigned to receive CBT and SMC; 160 were assigned to receive GET and SMC: and 160 were assigned to receive SMC alone. A few individuals were subsequently excluded due to lack of follow-up data or (in the case of one participant) late withdrawal of consent: the total number of participants analysed in each of these four groups was, respectively, 159, 155, 159, and 157.

8. The 641 participants were recruited between 18th March 2005 and 28th November 2008 from consecutive new outpatients attending six specialist CFS clinics in the UK NHS. Outcome data collection was completed in January 2010.

9. The findings, and the research team's interpretation of their findings, are summarised in the Lancet Paper. The research team's interpretation was that CBT and GET could safely be added to SMC to moderately improve outcomes for CFS, but that APT was not an effective addition.

10. Including the Lancet Paper, 13 papers have been published describing the results of the PACE trial. All but one of these papers are available free of charge to any member of the public (the one exception is a technical paper describing the training and supervision of therapists in the trial). The PACE trial also has its own website with extensive information about the trial, including all the treatment manuals used in the trial, the patient information sheet, links to the protocol, the newsletters sent to participants, and many answers to frequently asked questions (see http://www.wolfson.qmul.ac.uk/current-projects/pace-trial).

11. At the time of the FOIA request giving rise to the present appeal (described below), an application was underway for funding for a long-term (five years and more) follow-up trial of the participants in the PACE trial. Funding for a feasibility study to do this follow up study has now been agreed and this study will start shortly, once research governance approvals have been obtained.

12. The PACE trial, and its published outcomes, have given rise to a significant level of controversy. Some patients suffering from CFS and/or ME, and some patient groups, have been critical of the trial, largely on the basis of a strongly-held belief that CBT and GET are inappropriate (and sometimes harmful) as treatments for CFS or ME. Such criticisms have been vigorously expressed, including via a number of patient websites.

THE REQUEST FOR INFORMATION

13. There have been repeated FOIA requests for information relating to the PACE trial, reflecting the controversy referred to above. Between February 2011 and May 2014 QMUL received some 34 such requests. The Commissioner issued 5 Decision Notices relating to the PACE trial, between September 2012 and January 2014. The Information Tribunal has issued two previous decisions, in cases no. EA/2012/0229 and EA/2013/0019.

14. The request for information giving rise to the present appeal was made on 24th March 2014, via the website Whatdotheyknow.com.

15. The requester sought disclosure of a selection of baseline and 52-week follow up data on "all 640 individual PACE Trial participants" (there were in fact originally 641 participants, one of whom subsequently withdrew consent to use their data, but nothing turns on this). The requester asked for the information to be provided in a spreadsheet or equivalent file, with separate columns for each variable. The requested variables were described by the requester as follows:

- *SF-36 physical function scores (range 0-100 points) [baseline and 52-week followup];*
- *CFQ fatigue Likert scores (range 0-33 points) [baseline and 52-week followup];*
- *CFQ fatigue bimodal scores (range 0-11 points) [baseline and 52-week followup];*

- *Oxford criteria CFS caseness (does participant meet criteria, yes or no) [52-week followup only];*
- *Participant-rated CGI scores (range 1-7) [52-week followup only];*
- *Doctor-rated CGI scores (range 1-7) [52-week followup only];*
- *6MWT walking distances (in meters) [baseline and 52-week followup];*
- *The group which each participant was allocated to after randomisation (i.e. either to APT, CBT, GET, or SMC).*

Allowing for the fact that some items were sought both at baseline and at 52 weeks, in total 12 variables were requested in respect of each trial participant.

16. The requester further explained the information that he was seeking, as follows:

If granted, please make sure that each individual row only contains values from the same participant, as is common practice for such data in spreadsheets, so that more than one variable can be analysed at a time. To clarify, I am requesting only 'anonymised' data, I am not requesting any data which can identify individual participants (not even the participant ID numbers if these are deemed to be inappropriate to include, so long as each individual row only contains values from the same participant)

17. As is clear from the above, the requester was seeking information relating to each individual participant, rather than seeking aggregated or statistical information related to a number of participants: he was asking for a spreadsheet, with a column for each variable, and with each row containing values from the same participant.

18. QMUL replied to the request on 22nd April 2014. It refused to disclose any of the requested information, contending that all of that information was exempt under FOIA section 40(2) (personal data) and FOIA section 41 (information received in confidence).

19. On 18th June 2014 the requester asked QMUL to carry out an internal review.

20. QMUL wrote to the requester on 16th September 2014 giving the outcome of the internal review, which was to uphold QMUL's original decision.

THE COMMISSIONER'S DECISION

21. The requester contacted the Commissioner on 15th December 2014 to complain about the way in which his request had been handled.

22. In the course of the Commissioner's investigation QMUL maintained its previous reliance on FOIA sections 40(2) and 41, and also relied on the exemptions in section 43(2) (commercial interests) and section 22A (research data).

23. The Decision Notice rejected QMUL's reliance on each of these exemptions and required the data to be disclosed.

FIRST GROUND OF APPEAL: SECTION 40(2)

24. The Commissioner dealt with this issue at §§25-66 of the Decision Notice. He concluded that section 40(2) did not apply since the requested information did not constitute personal data. The Commissioner thereby erred: he should have found that the information was exempt under FOIA section 40(2) (read with section 40(3)(a)(i)), since it was personal data relating to the trial participants, and that its disclosure would breach the data protection principles.

The disputed information was personal data relating to the trial participants

25. The concept of personal data is defined in section 1(1) of the Data Protection Act 1998 ("DPA"), as meaning data:

which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

26. The disputed information clearly *relates* to the participants in the PACE trial. The Commissioner concluded, however, that the relevant individuals could not be *identified* from the disputed information.

27. The Commissioner's conclusion on this issue was in error. As indicated above, the disputed information is not aggregated or statistical, but is at an individual level. The requester made clear that he was seeking disclosure of information structured so that each row of the information would relate to the same individual participant. Twelve separate linked pieces of information would be disclosed, in respect of each participant. In these circumstances, the possibility of individuals being identified as a result of the disclosure would be more than hypothetical or speculative, and would be sufficient for the information disclosed to constitute personal data.

28. Such disclosure could take place in at least three ways.

(i) *First*, individual participants might well self-identify on the basis of the disputed information. The Commissioner acknowledged this (see §57 of the Decision Notice), but concluded – without explanation – that this was insufficient to establish that the information was personal data.

(ii) *Secondly*, those with detailed prior knowledge of the individual participants might well be able to identify them. This could apply in relation to persons such as family members of the participants, their friends or work colleagues, and medical practitioners involved in their treatment.

(iii) *Thirdly*, "motivated intruders" - that is, persons with a particularly strong motive to ascertain the identity of trial participants – might well be able to

identify them. This could apply in relation to persons such as campaigners on issues regarding CFS and ME, or journalists interested in those same issues.

A "motivated intruder" seeking to identify individuals from the disputed information could seek to link that information with other information previously released relating to the PACE trial; this includes some 600 pages of information released by a Special Health Authority, containing all of the trial's research ethics committee papers, including details of some 50 serious adverse events incorporating a great deal of detailed medical information.

29. QMUL will rely on Opinion 05/2014 of the Article 29 Working Party, on Anonymisation Techniques. Adopting the language of the Opinion, the disputed information would be regarded as "pseudonymised" data (because the information is at individual level) rather than being "anonymised", and hence as being likely to constitute personal data: see e.g. §2.2.3 of the Opinion.

30. QMUL will also rely on the Commissioner's own Code of Practice on Anonymisation. Chapter 7 of the Code, at page 36, states:

> *Different types of anonymised data have different vulnerabilities and pose different levels of re-identification risk. At one end of the spectrum, pseudonymised or de-identified data may be very valuable to researchers because of its individual-level granularity and because pseudonymised records from different sources can be relatively easy to match. However, this also means that there is a relatively high re-identification risk. At the other end of the spectrum, aggregated data is relatively low-risk, depending on granularity, sample sizes and so forth. This data may be relatively 'safe' because re-identification risk is relatively low. However, this data may not have the level of detail needed to support the data linkage or individual-level analysis that some forms of research depend on.*

The disputed information has precisely the element of individual-level granularity that gives rise to the "relatively high" risk of re-identification referred to by the Commissioner in the above passage.

Disclosure of the disputed information would have breached the data protection principles

31. Because the Decision Notice concludes that the disputed information did not constitute personal data, it does not address whether disclosure would breach the data protection principles.

32. The issue in this context is whether disclosure *to a member of the public, otherwise than under FOIA*, would contravene any of the data protection principles: see FOIA section 40(3)(a)(i) (emphasis added). Hence the issue is not solely whether disclosure *to this specific requester* would contravene the data protection principles; the issue, rather, is whether QMUL would contravene the data protection principles if (other than under FOIA) it chose to put the information into the public domain. The answer to this question is yes: such disclosure would breach both the first and the second data protection principle.

33. The *first principle* requires that personal data shall be processed fairly and lawfully, and in particular that they shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met, and in the case of sensitive personal data at least one of the conditions in Schedule 3 is also met.

34. Disclosure of the requested information to a member of the public would constitute processing of the data in breach of this principle, because such disclosure would be unfair. In particular:

    (i) Disclosure would contravene the legitimate expectations of the participants in the PACE trial, based on the express and specific assurances given to the participants that their data would be used by the PACE research team and would not be made public. Those assurances were set out in the consent forms that were signed by the participants when they agreed to take part in the PACE trial.

(ii) Disclosure would cause unwarranted distress to participants in the trial. Participants would be distressed by the fear that information about themselves and their health would be made public as a result of the disclosure. They would also be distressed by the fear that their participation in the PACE trial would be made public as a result of the disclosure, and that as a result they would be exposed to criticism or harassment from opponents of the trial.

(iii) To the extent that fairness requires a balance to be struck between the interests of data subjects and those of others (including members of the public wishing to have access to the data), the interests of the data subject should take precedence in this case. That is so, having regard to the amount of information already in the public domain in relation to the PACE trial, including the information contained in the 12 scientific papers relating to the trial that are publicly available for free, and the further detailed information available on the trial website and described above.

35. The disputed information constitutes sensitive personal data, since it relates to the physical or mental health or condition of participants in the PACE trial: DPA section 2(e). Hence disclosure of the data would need to satisfy both a Schedule 2 and a Schedule 3 condition. In fact, disclosure would not satisfy any of the conditions in either Schedule.

36. The *second principle* requires that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

37. Disclosure of the requested information to a member of the public would breach this principle. It would involve the use of the information for a purpose incompatible with the purpose for which the information was obtained, namely, its use by the research team for the purposes of the PACE trial.

SECOND GROUND OF APPEAL: SECTION 41

38. Section 41 of FOIA provides that information is exempt information if:

> *(a) it was obtained by the public authority from any other person (including another public authority), and*
>
> *(b) the disclosure of the information to the public (otherwise than under [FOIA]) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

39. Here, the disputed information was obtained by QMUL from the participants in the PACE trial, and from the medical personnel involved in the treatment of those participants.

40. The Decision Notice, at §70, sets out the requirements for an actionable breach of confidence, deriving from *Coco v Clarke* [1969] RPC 41. Disclosure of the disputed information would meet all of these requirements.

41. *First,* the information possesses the necessary quality of confidence. It is not in the public domain, and it is non-trivial: on the contrary, it relates to individuals' health, and to their experience of a condition (CFS and/or ME) to which some degree of social stigma is attached.

42. *Secondly*, the information was imparted in circumstances importing an obligation of confidence. The information was generated in the context of a doctor-patient and therapist-patient relationship, which themselves give rise to a well-established obligation of confidence. In addition, it was obtained by the PACE research team on the basis of specific undertakings of confidentiality, set out in the consent forms by which the participants agreed to take part in the trial.

43. *Thirdly*, unauthorised disclosure would cause a detriment to participants in the PACE trial.

44. The Commissioner considered that this requirement was not satisfied: see §75 of the Decision Notice. His view partly rested on his earlier conclusion that it was not possible reliably to identify an individual as the subject of the disputed information. That conclusion was itself erroneous: see the discussion above in relation to FOIA section 40(2). However, even if the Commissioner's conclusion on this issue was right, the disputed information would still be exempt under FOIA section 41. There would be an expectation of confidence in relation to the disputed information, by reason of the express and specific assurances given to participants at the time when they agreed to take part in the PACE trial. Disclosure would contravene that expectation – regardless of whether individuals could be identified from the information disclosed – and hence disclosure would constitute a detriment. The Commissioner's reasoning at §75 of the Decision Notice appears to assume that an action for breach of confidence is available only for disclosures that would constitute an invasion of privacy. This is misconceived: for instance, actions for breach of confidence are often brought to protect industrial or commercial information (*Coco v Clarke* itself was a case about information relating to the design of a moped engine).

45. *Fourthly*, there would be no public interest defence to a claim for breach of confidence. Having regard to the amount of information already in the public domain about the PACE trial, there is no interest in disclosure that would outweigh the important public interest in maintaining confidences.

THIRD GROUND OF APPEAL: SECTION 43(2)

46. FOIA section 43(2) provides that information is exempt if:

> *its disclosure under [FOIA] would or would be likely to prejudice the commercial interests of any person (including the public authority holding the information).*

47. In the present case, the Commissioner wrongly held that the requested information was not exempt under section 43(2).

48. QMUL's case is that it has a commercial interest in its ability to continue to carry out research and to attract funding for that purpose; disclosure of the disputed information would be likely to prejudice that interest. The Commissioner appears to have acted that QMUL had a relevant commercial interest; but he did not accept that disclosure was likely to prejudice that interest.

49. Disclosure was in fact likely to prejudice that interest in three respects.

    (i) It would encourage existing participants in the PACE trial to withdraw permission for the continued use of their data in the context of that trial.

    (ii) It would deter those participants from taking part in any long term follow-up study, of the kind for which QMUL was seeking to obtain funding at the time of the request.

    (iii) It would deter other individuals from agreeing to take part in similar research trials organised by QMUL in future.

50. QMUL's case in this regard is not merely speculative. In the course of the Commissioner's investigation QMUL gave two examples of individuals who had either withdrawn permission for or expressed concern about the continued use of their data for research purposes: in both cases, the individuals had raised concerns about confidentiality.

51. In relation to the public interest test, there is a substantial and important public interest in avoiding prejudice to the commercial interests connected with QMUL'sresearch activities. That interest outweighs any public interest in the disclosure of the relevant information.

FOURTH GROUND OF APPEAL: SECTION 22A

52. The Commissioner considered that the exemption in section 22A was not available, because the provision did not come into effect until 1st October 2014, and the requester made his request on 24th March 2014 (with QMUL responding on 22nd April 2014).

53. The Commissioner considered that there was a general presumption in English law that statutes did not operate retrospectively: see §24 of the Decision Notice. He also relied on the absence of any specific indication in FOIA section 22A that the amendment was intended to have retrospective effect.

54. In fact, there is no universal rule that statutory amendments cannot have retrospective effect. In the present case, giving retrospective effect to section 22A would not impair the requester's vested rights, or impose new liabilities on him in respect of transactions already completed: compare *Barber v Pigden* [1937] 1 KB 664, and *Polyukhovich v Commonwealth of Australia* [1991] 172 CLR 501. In the United States, it has been held (by the US Court of Appeals for the Ninth Circuit) that the Court can apply an exemption to freedom of information legislation that was enacted after the request but before the appeal in question: *Southwest Centre for Biological Diversity v US Department of Agriculture* 314 F. 3d 1060. In all the circumstances, the Commissioner should have held that it was open to QMUL to rely on FOIA section 22A.

55. The requirements of FOIA section 22A were clearly met in this case.

56. *First*, the disputed information was obtained in the course of a programme of research (the PACE trial).

57. *Secondly*, the programme was and is continuing with a view to the publication of a report of the research. Analysis of the data generated by the PACE trial is continuing, and papers continue to be published. As indicated above, at the time of the request the university was applying for funding for a long-term (five years and more) follow-

up trial of the participants in the PACE trial. The results of that follow-up trial would be published in due course.

58. *Thirdly*, disclosure of the information prior to publication would be likely to prejudice the programme. It would be likely to induce some participants to withdraw from the programme, and to withhold consent for the continued use of their data.

59. *Fourthly*, there is a substantial and important public interest in avoiding prejudice to a research programme of this nature. That interest outweighs any public interest in the disclosure of the relevant information.

FIFTH GROUND OF APPEAL: DISCRETION

60. Even if (contrary to QMUL's case) its handling of this request had been in breach of FOIA, under section 50 of that Act the Commissioner had a discretion as to what steps (if any) it should direct QMUL to take. Although usually where the Commissioner finds that information has been withheld in breach of the Act he will order disclosure, he nevertheless has a discretion not to do so where the circumstances are exceptional: *Information Commissioner v HMRC and Gaskell* GIA/3016/2010, §31.

61. Having regard to the enactment of FOIA section 22A, the Commissioner should in the exercise of his discretion have refused to order QMUL to make any further disclosure, on the ground that even if the requested information was not exempt from disclosure when the request was made, an exemption would now apply in respect of any further request for the information.

CONCLUSION

62. By reason of the foregoing, QMUL asks the Tribunal to allow the appeal, set aside the Decision Notice, and substitute a Decision Notice to the effect that QMUL is not required to disclose any of the disputed information.

TIMOTHY PITT-PAYNE QC
11KBW

11 King's Bench Walk
Temple
London
EC4Y 7EQ

23 November 2015

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

BETWEEN

QUEEN MARY UNIVERSITY OF LONDON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

GROUNDS OF APPEAL

Mills & Reeve LLP
Botanic House
100 Hills Road
Cambridge
CB2 1PH

Ref: CGA/4013052-0079