IN THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS) **EA/2015/0269**

BETWEEN:

QUEEN MARY UNIVERSITY OF LONDON

Appellant

- and -

(1) THE INFORMATION COMMISSIONER

First Respondent

(2) ALEM MATHEES

Second Respondent

INFORMATION COMMISSIONER'S RESPONSE

- *References to paragraphs in the Decision Notice are in the form "DN/x".*
- *References to paragraphs in the Notice of Appeal are in the form "NA/x".*

1. This Response is served in accordance with r. 23 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, with time extended by a Case Management Note dated 11 December 2015. The Commissioner is grateful for the extension.

2. The Commissioner submits that the Notice of Appeal dated 23 November 2015 should be dismissed for the reasons given in the Decision Notice FS50565190 ("**DN**") and in this Response.

3. This Response takes six parts:

    a. Background Facts;
    b. Ground 1: Section 40(2);
    c. Ground 2: Section 41;

d. Ground 3: Section 43(2);
e. Ground 4: Section 22A; and
f. Ground 5: The Commissioner's Discretion.

BACKGROUND FACTS

4. On 24 March 2014 the requestor (the Second Respondent) wrote to Queen Mary University of London requesting information relating to the PACE trial under the Freedom of Information Act 2000 ("**FOIA**").

5. The nature of the PACE trial is summarised at **DN/12-15** and **NA/5-9**. In essence, the trial was a large-scale and long-running clinical trial testing the effectiveness of four of the main treatments available for people suffering from chronic fatigue syndrome ("**CFS**"), which has some relation to the condition known as myalgic encephomyelitis ("**ME**")[1].

6. The initial class of participants was 641: it appears that each participant was assessed for up to 52 weeks, and that the research period in total was between 2005 and 2010. One participant withdrew his/her consent, and a number of individuals were excluded for lack of follow-up data: the number of participants whose complete data was collected at the end of the trial was 630[2].

7. The information requested was identified in these terms:

"...

In order to help ease the burden of staff having to perform the required calculations themselves once the relevant data is located and retrieved, I would like to request the <u>*following selection of baseline and 52-week followup data on all 640 individual PACE Trial participants*</u> *for which the data exists, in a spreadsheet or equivalent file with separate columns for each variable:*

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[1] As noted at **NA/5**, the question whether these two conditions are the same is a matter on which medical opinion is divided.
[2] **NA/7**.

- *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];*
- *CFP 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 meteres) [baseline and 52-week followup];*
- *The group which each participant was allocated to after randomisation (ie. either to APT, CBT, GET, or SMC).*

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 information which can identify individual participants (not even the participant ID numbers if those are deemed to be inappropriate to include, so long as each individual row only contains values from the same participant)."

(Emphasis supplied)

8. The Appellant correctly notes that "*[t]he PACE trial, and its published outcomes, have given rise to a significant level of controversy*" (**NA/12**). There has been public debate relating to the treatment methods used in the trial, and to certain other aspects of the trial.

9. It is apparent from the request for an internal review, and from the documents provided by the Second Respondent to the Commissioner during his investigation, that the Second Respondent's concerns relate to the methodology of the trial. Particular criticisms are that (in his view) the PACE trial's definition of, and criteria for, 'recovery' following treatment methods

are (a) weak/inappropriate[3] and (b) were inappropriately altered following governance approval[4].

10. Following the rejection of his request for an internal review, the Second Respondent complained to the Commissioner, who investigated. During the investigation both QMUL and Mr Mathees provided very considerable submissions to the Commissioner. QMUL's submissions covered the exemptions in ss. 40, 41, 43 and 22A FOIA (which are now grounds 1-4 of the appeal).

11. The Commissioner, in a comprehensive DN, considered the arguments raised by QMUL in detail. He rejected them, and ordered that the disputed information be disclosed. The Appellant now appeals against that decision.

12. The Appellant has provided a detailed Notice of Appeal. The Commissioner responds below to each ground of appeal raised.

GROUND 1: SECTION 40(2)

13. The Appellant's contentions (**NA/24-37**) are in essence that:

    a. The requested information constitutes the personal data (indeed, the sensitive personal data) of the individual participants;
    b. Disclosure of the information would breach the first data protection principle in that (i) it would be unfair, (ii) it would not satisfy a

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[3] The Second Respondent included a section in his internal review request setting out his views on the public interest in disclosure. This includes the statement that "*[t]he thresholds used for the 'normal range' score of fatigue and physical function inappropriately overlapped with the trial eligibility criteria for 'severe fatigue' and 'significant disability'. The Recovery definition allowed participants to be classified as 'recovered' without reporting clinically significant improvements to fatigue and physical function, as such improvements were not required and allowed a 5 point decline in physical function.*"

[4] From the same request: "*The relevant trial oversight bodies approved the original 2007 protocol published in BioMed Central, which included a much more stringent definition of clinically significant improvement ('positive outcome') and complete 'recovery'. ... The thresholds for clinical improvement on an individual patient level for the primary measures of fatigue and physical function were abandoned and replaced with weaker thresholds which have been criticized for being minimal. Similarly, all components of the recovery definition were significantly modified in a manner which made them substantially less stringent and easier to qualify*".

Schedule 2 condition, and (iii) it would not satisfy a Schedule 3 condition;

c. Disclosure of the information would breach the second data protection principle, in that it would involve the use of the information for a purpose incompatible with the purpose for which the information was obtained.

Personal Data

14. The definition of personal data applicable to s. 40 FOIA is set out at s. 1 DPA 1998:

""personal data" means 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,
..."

15. It is not in dispute that the relevant data relate to living individuals[5]. The question is whether those individuals can be identified from the data as requested.

16. As set out above §7, the Request was explicitly for anonymised data, including if necessary the removal of participants' individual pin numbers. The question is whether anonymisation is capable of rendering the 'living individuals' who are the data subjects non-identifiable, such that the data that is the subject of the request (as opposed to the non-anonymised data held by the Appellant[6]) is not personal data when disclosed.

[5] It is, of course, possible that certain of the trial participants have died bearing in mind the lapse of time between the trial and the request. However, it is unlikely that this applies to a significant number of the participants.

[6] Cf. ***Department of Health v Information Commissioner*** [2011] EWHC 1430 (Admin) at [50]-[51].

17. In the Commissioner's submission, anonymisation would plainly be capable of achieving that end. Two interlinked issues tend to that conclusion.

18. Firstly, in order for information to be personal data it must be possible for a third party using that data (and, if necessary, other information in or likely to come into the possession of the third party) to identify discrete individuals: not, for example, to be able to identify a class of individuals of whom the relevant individual is likely to be one. The pool of PACE trial participants is large: 640 individuals. The Appellant has indicated that the incidence of CFS and/or ME in the general population is at around 1% (**DN/36**). Taking the UK population as being around 60m, the class of potential trial participants therefore vastly exceeds the number of actual trial participants. Any third party seeking to identify the trial participants from the disputed information would not, realistically, be able to do so.

19. Secondly, the information requested is not, in general, information which is directly linked to the individuals concerned. The Commissioner understands that the disputed information comprises scores derived from participants filling in questionnaires, answering verbal questions or undertaking physical test such as walking exercises. As the DN notes at **DN/50**, "*[t]here are a range of potential scores for each column with the results for some columns having wider ranges of scores than other columns*". The Appellant has yet to provide any convincing explanation of how such scores could be used to identify discrete individuals. In the absence of such an explanation, the conclusion must be that they cannot be so used.

The Appellant's Arguments

20. The Appellant suggests (**NA/28**) three ways in which individuals could be identified if the data is disclosed.

21. The first is that "*individual participants might well self-identify*" from the information. This is erroneous. Firstly, an individual participant will only be able to "*self-identify*" if that participant has access to their own data from the

tests in the first place. It is not obvious that participants do have access to that data[7]: doubtless the matter will be clarified in the Appellant's witness evidence. Pending such clarification, the Commissioner reserves his position as to whether or not this is possible.

22. More fundamentally, the fact that a data subject is able, using his personal knowledge of his own circumstances, to identify himself from otherwise anonymised data does not cause that data to become personal data within the meaning of the Act. This follows both from the language of the DPA and its underlying policy.

23. As regards the language: the definition of personal data in s. 1(1) DPA uses the passive form (*"can be identified"*), indicating that the putative identifier is distinct from the *"living individual"* data subject. This reflects the wording of Article 2(a) of the Data Processing Directive (Directive 95/46/EC), which the DPA implements in English law. That wording is further elucidated in recital 26 to the Directive:

> *"Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, <u>to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person</u>; whereas the principles of protection shall not apply to data <u>rendered anonymous in such a way that the data subject is no longer identifiable</u> …"*
>
> (Emphasis supplied)

24. It is, with respect, plain that the test for identification (particularly where anonymity is in issue) is to be assessed by reference to a third party's capacity to identify: not by reference to the capacity of the individual to identify him/herself. Were it otherwise, the possibility of anonymisation would be of extremely limited utility.

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[7] Where, for example, an individual score for a variable is derived from answers to a multiple-choice question set, the participant is unlikely to be able to identify themselves from that score. They could only do so with (a) their original answers and (b) the mark scheme.

25. This reading moreover accords with the purpose of the DPA and the Directive[8], namely to "*protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data*"[9]. It is obvious that an individual's right to privacy with respect to the processing of his data is not infringed by the disclosure of data which only the individual can link back to himself.

26. The second and third are that those with "*detailed prior knowledge of the individual participants*" such as family, friends, colleagues, or medical practitioners, or "*motivated intruders*", might be able to identify the individuals. As regards these:

    a. The Commissioner does not consider it reasonably likely that medical professionals, bound by confidentiality and ethical obligations, would seek to identify individuals in this fashion. Nor does he consider that family, friends, or work colleagues, even those with some knowledge of the physical capabilities of the individual participants, would realistically be able to identify them from the information sought.
    b. The DN noted QMUL's failure to provide any evidence as to how a motivated intruder might be able to actually identify participants from the trial: **DN/58, 66**. The NA provides no greater detail than was provided to the Commissioner during the investigation. The speculative assertion that a 'motivated intruder' might be able to link the variables with "*other information previously released relating to the PACE trial*" is entirely unspecific. The possibility of identification remains hypothetical.

27. The Appellant also indicates (**NA/28-29**) an intention to rely on Opinion 05/2014 of the Article 29 Working Party, and on the Commissioner's Code of Practice on Anonymisation. Neither of these assist the Appellant.

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[8] It is the task of domestic courts and tribunals to interpret the DPA consistently with the Directive, taking a purposive approach: ***Campbell v MGN Ltd*** [2003] 2 WLR 90 at [96] per Lord Phillips MR.

[9] Article 1 of the Directive.

28. The Article 29 Working Party is an advisory body that examines questions relating to the Directive in order to advise the European Commission on possible action in the data protection sphere: see Arts 29-30 of the Directive. Its Opinions (which do not even represent the views of the Commission, still less those of the legislator) may contain helpful reflections on the Directive: however, they are not authority on its proper interpretation.

29. In any event, the Opinion is aimed at a particular situation, which is not the FOIA situation. The Opinion deals with the irreversible anonymisation of the data such that the data subject is not identifiable to anyone including the data controller[10]. Where that is done, the character of the information as personal data is expunged for all purposes. That may well be an appropriate approach to the issues surrounding anonymisation in certain contexts and for certain classes of data: when considering, for example, mobile operators' retention of mobile telephone traffic data[11] or data collected for dissemination at a high level of abstraction[12]. However, it is plainly not the test applicable to FOIA disclosure. As authorities such as ***Department of Health v Information Commissioner*** [2011] EWHC 1430 (Admin) make clear, under FOIA anonymisation may render information no longer personal data despite the fact that the public authority data controller retains the data in non-anonymised form. The question under FOIA is whether the form of information sought to be disclosed is personal data, not whether the original dataset is personal data.

30. As the Opinion makes clear throughout, the key to anonymisation is that "*to anonymise any data, the data must be stripped of sufficient elements such that the data subject can no longer be identified*". That is the relevant test for the Commissioner and Tribunal (albeit in the context of third party identifiability,

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[10] See the second and third paragraphs on page 9 of the Opinion (section §2.2.2), particularly the statement "*it is critical to understand that when a data controller does not delete the original (identifiable) data at event-level, and the data controller hands over part of this dataset (for example after removal or masking of identifiable data), the resulting dataset is still personal data. ... But if the data controller would delete the raw data, and only provide aggregate statistics to third parties on a high level ... that would qualify as anonymous data*".
[11] To use the example given in the third paragraph of page 8 of the Opinion (section §2.2.1).
[12] Such as the travel data discussed in the second paragraph of page 9.

rather than identification by the data controller or, indeed, the individual himself).

31. The paragraph relied upon from the Commissioner's Code of Practice (**NA/30**) makes the generic point that there is a spectrum of risk of re-identification, depending on (among many other factors) the granularity of the data. Again, it is of very limited utility in considering whether or not anonymisation will be effective in any given factual instance. The touchstone for the Tribunal remains the statutory test.

The Data Protection Principles

32. Because the disputed information is not personal data, none of the data protection principles would be breached by disclosure.

33. The Commissioner accepts that, if the Tribunal takes a different view on the status of the data as personal data, (a) the disputed information would be sensitive personal data within the meaning of s. 2(e) DPA and (b) no Schedule 3 condition would be met. In those circumstances the first data protection principle could not be satisfied and the exemption in s. 40(2) with s. 40(3)(a)(i) would apply to bar disclosure.

GROUND 2: SECTION 41

34. The Appellant's contentions (**NA/38-45**) are that:

    a. Disclosure of the requested information would constitute a breach of confidence since the information:

        i. Possesses the necessary quality of confidence;
        ii. Was imparted in circumstances importing an obligation of confidence, namely a doctor-patient relationship;
        iii. Its disclosure would cause a detriment to participants in the PACE trial; and

iv. There would be no public interest defence to a claim for breach of confidence.

35. The Commissioner does not intend to address the Appellant's assertion that, if individuals can be identified from the disputed information, disclosure will constitute a breach of confidence: for the reasons given above, it is accepted that disclosure of identifying material would be barred by s. 40 FOIA, and so it would not be necessary for the Tribunal to consider the position under s. 41.

36. However, the Appellant seeks to go further and asserts that even if the information was anonymised, "*[t]here would be an expectation of confidence in relation to the disputed information, by reason of the express and specific assurances given to participants*", which would be contravened by disclosure "*regardless of whether individuals could be identified from the information disclosed*" (**NA/44**).

37. The Appellant's position appears to be that a duty of confidence created in respect of personal information confided in the context of a professional relationship of trust is breached if <u>any</u> part of that information is disclosed, even if the relevant part is anonymised such that there is no (greater than hypothetical) possibility that the information can be linked back to the individual concerned. It would be remarkable if the law required such a conclusion. It does not: ***R v Department of Health ex p Source Informatics Ltd*** [2001] QB 424. Disclosure of patient information on an anonymised basis to third parties (in that case, by pharmacists) does not constitute a breach of confidence: see judgment of Simon Brown LJ at [31]-[35][13].

GROUND 3: SECTION 43(2)

38. The Appellant's contentions (**NA/46-51**) are in essence that:

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[13] It is worth noting in passing that at [45] Simon Brown LJ indicated that in his view "*commonsense and justice*" favoured the view that the Data Processing Directive, as well as the common law of confidence, had no application to anonymising or anonymised data since the central concern of both (leaving aside confidential commercial information) is individual privacy.

a. The Appellant has a commercial interest in its own ability to carry out research and to attract funding for that purpose;

b. Disclosure would prejudice that interest in that (i) it would encourage existing participants in the PACE trial to withdraw permission for the continued use of their data in the context of the trial, (ii) it would deter those participants from taking part in a follow-up study[14], and (iii) it would deter other individuals from agreeing to take part in similar trials organised by QMUL in future.

c. There is a *"substantial and important public interest in avoiding prejudice to the commercial interests connected with QMUL's research activities"*.

39. It is accepted that QMUL's ability to attract research funding is a commercial interest. However, disclosure would not be likely to prejudice that interest.

40. For the Appellant's argument to be true, disclosure would have to be likely to lead to withdrawal of consent by a sufficiently significant number of existing participants to affect the validity of the PACE trial (or the viability of the future study for which QMUL was seeking funding). That effect would have to be such as to affect QMUL's reputation for research in this area, such that it had a material effect on its ability to secure future funding.

41. For the reasons given above, disclosure in this case would be of anonymised information that would not identify any given individual. It would be open to the Appellant to make this plain to any concerned individual. The Commissioner does not consider that the consequences which the Appellant must show would follow from any disclosure.

42. The Appellant has already indicated that 600 pages of information on the PACE trial has been released by a Special Health Authority in response to a FOIA request (**NA/28, DN/86**). This release included *"all the data and files that the University had submitted to the Research Ethics Committee over the years"*,

[14] The Appellant indicates that QMUL was seeking funding for such a study around the time of the request: **NA/11, 49**.

including the details of all serious adverse events and reactions recorded during the trial. Following that release, only one participant withdrew his/her consent to participate. It appears from the Appellant's account that the PACE trial was a very large trial and that the withdrawal or non-collection of data of a small number of participants did not materially affect its quality: §6 above.

43. For these reasons, it would not be likely that disclosure of the withheld information would lead to a sufficiently significant number of participants withdrawing (or a sufficiently significant number of future participants being unwilling to become involved) so as to affect the University's commercial interests.

44. In any event, even were there some likelihood of prejudice to QMUL's commercial interests, the public interest balance would fall in favour of disclosure. Beyond the general public interests in transparency and accountability, it is accepted on all sides that there is significant public debate and comment relating to the PACE trial, its effectiveness and methods. Release of the raw data from the trial, in an anonymised form, would significantly benefit that debate and enhance its quality (and possibly also be of benefit for related research interests).

GROUND 4: SECTION 22A

45. It is common ground that s. 22A entered into force after (a) the request was made, (b) the Appellant refused the request, (c) the internal review was requested, and (d) the Appellant on internal review upheld the original decision. The Appellant nonetheless seeks to rely upon it.

46. The Appellant's contentions (**NA/52-59**) are that:

    a. There is *"no universal rule that statutory amendments cannot have retrospective effect"*. The implication appears to be that s. 22A has retrospective effect;

b. *"In all the circumstances, the Commissioner should have held that it was open to QMUL to rely on FOIA section 22A"*; and
c. S. 22A applied in this case: the disputed information was obtained in the course of a programme of research which was and is continuing with a view to the publication of a report of the research. Disclosure would be likely to prejudice the programme, and there is a public interest in avoiding that prejudice which outweighs any public interest in disclosure.

Retrospectivity

47. The Appellant accurately states the Commissioner's position, namely that there is *"a general presumption in English law that statutes [do] not operate retrospectively"*: **NA/53.** It does not appear to dissent from that proposition, but instead states that there is no *"universal rule that statutory amendments cannot have retrospective effect"*. While that proposition can readily be accepted, it is no more than the converse of the general presumption: where one has a general presumption, it is capable of being displaced.

48. That general presumption is as stated in Maxwell on the Interpretation of Statutes (12th ed, 1969) at p. 215:

"It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication"

49. The principle is uncontroversial and frequently applied, cf. eg. ***Spread Trustee Co Ltd v Hutcheson and others*** [2012] 2 AC 194 (PC, Guernsey) at [65]:

"The general principle is not in dispute. It is stated in Bennion on Statutory Interpretation *... as being that, unless a contrary intention appears, an enactment is not intended to have a retrospective operation"*.

50. That presumption exists as a matter of statutory construction. As the Maxwell quotation illustrates, it is capable of being displaced only by contrary indicators of legislative intent (whether arising from the text or by necessary implication). The Appellant has been unable to point to any such indicators, but instead suggests that the Commissioner should have found *"in all the circumstances"* that the statute does have retrospective effect[15]. This is erroneous. S. 22A does not have such an effect, and it is not open to the Appellant to rely on it.

Section 22A

51. In any event, the desiderata of s. 22A are not satisfied in the instant case.

52. It is accepted that the PACE trial constitutes a programme of research. If the Appellant's witness evidence establishes that (as stated at **NA/57**) papers from the original programme continue to be published, the Commissioner would accept that the programme is 'ongoing'[16].

53. However, for the reasons given at §§40-44 above the Commissioner does not accept that disclosure of the relevant information would be likely to prejudice the programme within the meaning of s. 22A(1)(b)(i). Nor does he accept that the public interest would fall in favour of the maintenance of the exemption.

GROUND 5: THE COMMISSIONER'S DISCRETION

54. The Appellant suggests (**NA/60-61**) that even if the Commissioner was correct to conclude that none of the claimed exemptions applied, *"[h]aving regard to*

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[15] If the statement at **NA/54** that *"giving retrospective effect ... would not impair the requester's vested rights, or impose new liabilities upon him"* is intended to suggest that in such circumstances statutes may generally be considered to have retrospective effect, that is erroneous. Further, the right to receive information from public authorities on request under s. 1 FOIA is a form of statutory right: individuals are entitled to exercise it, and to expect that their request will be dealt with applying the legislative scheme existent at the time of the request.

[16] Contrary to what is suggested at **NA/57**, the Commissioner would not accept that a further follow-up study, the commissioning of which was contingent on fresh funding, would constitute part of the same 'programme' of research for the purposes of s. 22A.

the enactment of FOIA section 22A, the Commissioner should in the exercise of his discretion [under s. 50 FOIA] 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".

55. It is common ground that the Commissioner has such a discretion, and that the discretion should only be exercised exceptionally: ***Information Commissioner v HMRC and Gaskell*** [2011] UKUT 296 (AAC) at [31]. It is also the case that the discretion must be exercised lawfully on public law principles: ***Home Office v Information Commissioner and Cobain*** [2015] UKUT 0027 (AAC) at [26].

56. ***Gaskell*** concerned the situation where a statutory prohibition on disclosure under s. 18(1) Commissioners for Revenue and Customs Act 2005 ("**CRCA**") positively prohibited any disclosure of information held by HMRC in connection with a function of the Revenue and Customs[17]. Mrs Gaskell made a request for information to the Rent Service, which before the Decision Notice in that case became incorporated into HMRC. The effect of a Decision Notice compelling disclosure would therefore have been, as Judge Wikeley noted, that HMRC staff would have been required to break the law (at [10]): either by disclosing the information contrary to s. 18 CRCA, or by refusing to take the steps ordered by the Commissioner. At [40], the Judge summarised the reasoning behind his conclusion:

"The Commissioner was accordingly entitled to exercise his discretion in the way that he did – both because the fact that any request after 1 April 2009 would have been subject to the statutory bar was a relevant consideration, and because requiring disclosure after that date would on the undoubted facts of this case have required the commission of a criminal offence under CRCA 2005"

57. The Judge considered that the discretion should only be exercised in *"exceptional cases such as the present one"*: at [31]. Paragraph 25 of the judgment

[17] So that the exemption in s. 44 FOIA was engaged.

suggests that these are likely to be when, given the change of circumstances, disclosure under the Act would be *"unlawful, impossible or wholly impractical"*[18].

58. That situation is a far cry from the instant case, where there is no mandatory prohibition: the relevant change of circumstances is the enactment of an additional exemption on which a public authority may or may not choose to rely. It is notable that in ***Gaskell*** the Judge drew comfort from the Commissioner's statement that that was the only case in which the Commissioner had chosen to exercise his discretion (at [29]).

59. In the Commissioner's view, it would not normally be appropriate for him to exercise his discretion so as to require no steps to be taken in circumstances such as the instant case. S. 1 FOIA gives individuals a general right to receive information held by public authorities on request, subject to a scheme of exemptions. It is trite that the legal treatment of the request is to be assessed by reference to circumstances prevailing at the time of the request. Accordingly, the requester is in general entitled to expect that his request will be dealt with under the scheme of exemptions existing at the time of the request and that, where none of those exemptions bar disclosure, he/she will receive the information requested: if necessary, through a Decision Notice by the Commissioner. The Commissioner's steps discretion is a derogation from these principles. It is only in very limited circumstances, such as those envisaged in ***Gaskell,*** that it will be appropriate for the Commissioner to permit a public authority not to disclose information when (judging matters at the time of the request) no exemption bars its disclosure.

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[18] Since ***Gaskell,*** the only applications of the 'steps discretion' has been to preclude disclosure where the effect of disclosure of non-exempt information would be inevitably to reveal absolutely-exempt national security information: ***Cobain v IC*** [2014] UKUT 0306 (AAC), [2015] UKUT 0027 (AAC). In a later case, the same judge described the discretion as one to be exercised only in *"very exceptional"* cases: ***Information Commissioner v Colenso-Dunne*** [2015] UKUT 0471 (AAC).

CONCLUSION

60. The Tribunal is respectfully invited to uphold the Commissioner's decision and dismiss the appeal.

RUPERT PAINES
11KBW

12 JANUARY 2016

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