

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 September 2015

**Public Authority:** Durham University  
**Address:** The Palatine Centre  
Stockton Road  
Durham  
DH1 3LE

#### **Decision (including any steps ordered)**

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1. The complainant has made a number of requests to Durham University (the University) for information relating to the testing methods used with regard to Reading, Kendrick and Slough schools. This decision notice concerns one request, which asked for copies of raw test results. The University considered the test data engaged the 'commercial interests' (section 43(2)) exemption in FOIA and found that on balance the public interest favoured maintaining the exemption. The Commissioner's decision is that the University correctly applied section 43(2) of FOIA and has decided that in all the circumstances the public interest in favour of maintaining the exception does outweigh the public interest in favour of disclosure.

#### **Request and response**

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2. On 24 October 2014, the complainant wrote to the University and requested information in the following terms:
  - 1) *Copies of all letters/emails or minutes from meetings between Reading/Kendrick schools and CEM in which the appropriate level of precision to be used for the final standardised results was discussed.*
  - 2) *Copies of the raw test results, including birth month and cohort (cohort being either Slough, Reading Boys or Kendrick) and final standardised scores with all personal identifiable data removed.*

*3) If CEM use information from other tests to calculate age weighting I'd like a summary of that information (eg. "age weighting is based on xxxxxx number of children sitting similar tests over years") and details of the calculations applied to the Slough/Reading/Kendrick tests.*

*4) The 95% confidence interval of their 11+ tests at the respective cut off points set for each cohort. (For the Slough schools this was 111. For Reading/Kendrick 110.)*

*5) I'd like to know the mean and standard deviation values used in calculating the standardised results for each cohort, however this should be covered by request #2.*

*Requests 2 & 3 should between them clearly indicate how the raw data has been processed in order to arrive at the final standardised results including age weighting. The information should be provided in a format which allows further analysis to be done on it such as CSV or Excel spreadsheet(s)*

3. The University responded on 21 November 2014 by: explaining that it did not hold information for requests 1 and 4; stating that it was relying on section 43(2) to withhold information it held in respect of request 2, although it did provide information that showed birth month, gender, cohort and standardised scores; advising that request 3 was not applicable; and, providing certain test data in relation to request 5.
4. The complainant wrote to the University the following day and, with the exception of request 3, challenged the University's handling of his requests for information. In light of the complainant's dissatisfaction, the University carried out an internal review which was completed on 19 December 2014. This upheld the University's original findings.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 23 December 2014 to complain about the way his requests for information had been handled.
6. The Commissioner initially sought clarification from the University with regard to its handling of requests 1), 2) and 4). The complainant has confirmed, however, that he does not require the Commissioner to make a determination on requests 1) and 4), although he remains of the view that the University's responses were unhelpful. It has therefore been left for the Commissioner to consider whether the University properly dealt with request 2).

7. The University has maintained a reliance on section 43(2) of FOIA to withhold information covered by request 2). The Commissioner's analysis of the application of the exemption follows.

## **Reasons for decision**

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### **Background**

8. CEM is a research group within the Faculty of Social Sciences at the University. The 11+ entrance tests are provided as a commercial service for grammar schools where the age-adjusted overall marks of entrants (and optionally the Pass/Fail status results) are returned in confidence to the contracting school/Local Authority and the age-adjusted results of individual entrants is communicated to parents/guardians.
9. CEM has provided entrance tests for over 10 years and usually provides results to 0, 1 or 2 decimal places, depending on the contract. The University has explained that there is not only one acceptable way to report standardised scores. While the testing requirements will generally be the same, schools may request at the beginning of a contract that CEM provides a greater degree of precision in its results. This could be, for example, to maintain continuity with the previous system used by the school.

### **Section 43(2) – commercial interests**

10. Section 43(2) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.
11. The construction of section 43(2) of FOIA means that a public authority is initially required to consider the prejudice test. This test has three stages, each of which must be satisfied in order for the exemption to be engaged.
12. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure, with the public authority able to demonstrate that either disclosure 'would be likely' to have a prejudicial effect or the higher threshold that disclosure 'would' have a prejudicial effect.

Although the first limb of the prejudice – ‘would be likely’ – places a weaker evidential burden on a public authority, the risk of prejudice must nevertheless be real and significant and more than a hypothetical possibility. Section 43(2) is also qualified by the public interest test. This means that if the exemption is found to be engaged on the basis that the prejudice test is satisfied, the public authority must go on to assess the balance of the public interest in disclosure.

13. The University has confirmed that it has provided the complainant with a spreadsheet that contained data for each cohort (Reading, Kendrick and Slough) on separate Excel tabs. This contained month of birth and age standardised scores for Verbal, Maths, Non Verbal and Total. The mean and standard deviations used for reporting the scores was also provided for each of these cohorts. The only part of the information covered by the request that has been withheld is the calculation of the age-adjusted raw scores. The University explains that the raw score information and Age were used by CEM to calculate the standardised scores and so could be used by a third party to deduce the method by which standardised scores were produced.
14. The Commissioner outlines below his consideration of the arguments presented in relation to the prejudice test.

*The prejudice test*

15. The University has argued that the data set requested contains sensitive commercial information about the marks allocated to groups of questions. Placing this information in the public domain will disclose the core intellectual property of the test that resides in the unique method of setting questions and scoring them. Disclosure would reveal this intellectual property to competitors and, in the University's view, destroys its commercial advantage.
16. The University further considers that it is a unique selling point (USP) of the CEM 11+ entry tests that they are designed to be more resistant to coaching influences and question spotting. The release of the information under FOIA would make public information about sections of the test paper that could be used for coaching purposes by tutors and so destroy the USP and the commercial advantage over competing tests.
17. The Commissioner accepts that the prejudice cited by the University is applicable to the commercial interests exemption. He has therefore gone on to consider whether a causal link between disclosure and the prejudice cited has been established and the nature and severity of the prejudice.

18. The University has argued that disclosure would introduce unfairness into the testing system. It considers that the data sets would provide tutors with a better understanding of the CEM tests structures and test difficulties, therefore giving an advantage to those able to afford tutors. A further consequence is that tutors and competitors would be highly likely to emulate CEM's tests by creating commercially available practice materials.
19. The University notes that publishing companies have already re-branded their existing practice booklets to make them appear that they are for CEM's tests, without ever seeing their content or data. The University considers this strengthens its view that the data would be used by competitors for their commercial gain. Underpinning this position is the University's belief that elements of the raw data could allow aspects of the test to be reverse engineered and modelled by a competitor, a consequence of which may see the CEM's position undermined in its specialist and competitive market. In this regard, the University indicates that the consequences of disclosure should not be viewed in isolation but should incorporate the likelihood that further requests will be made that would lead to a comprehensive history of CEM's test development being made public.
20. The complainant, however, has firmly resisted the argument that a link can be made between disclosure and the prejudice being claimed. The complainant acknowledges that CEM will go to great efforts to produce new questions each year and recognises that intellectual property of this nature may need protection. Yet, he does not consider that this general principle extends to the information that has actually been requested.
21. In the first place, the complainant disputes that the raw data itself would give away *any* information about the content of a test question. However, the complainant further advances that even if it was hypothetically allowed that a competitor could gain an advantage by understanding how those sitting the test performed against specific questions, this risk could easily be managed by CEM randomising the question numbers in the released information to prevent altogether any possibility of matching specific scores to specific questions. The complainant argues that this issue remains hypothetical though as, in his view, the link appears tenuous.
22. To support his position, the complainant has directed the Commissioner to the First-tier Tribunal's decision on *The Governing Body of Reading School v The Information Commissioner & James Coombs* (EA/2013/0227, 15 April 2014). This concerned a request for '*the full test results (just the normalised scores for each test and the age weighting) for the last three years in electronic format*' in respect of the entrance test operated by Reading School. The Tribunal was required to

consider Reading School's application of section 40(2) (personal information) and section 43(2) of FOIA and dismissed the School's appeal in each case. For illustrative purposes, the complainant has quoted paragraph 30 which outlines the Tribunal's approach to section 43(2) of FOIA:

*30. In its Grounds of Appeal the School asserted that release of the scores achieved on the test would have a prejudicial effect on the commercial value of the assessment and its value as a research tool for the School. In particular it suggested that members of the public, including tutors, could reverse engineer the data to calculate the number of questions under each assessment criteria and in that way provide an unfair advantage to certain candidates. It was said that for a selective school release of the data contained in the Disputed information would severely prejudice the effective administration of the admissions process and undermine validity and accuracy of the selection process.*

23. The complainant considers this is a powerful argument against the University's argument that there is a causal relationship between disclosure and the prejudice cited, the only difference between the cases being that the University has developed the argument to find that the data could be exploited by competitors.
24. The Commissioner has taken into account the complainant's submissions in the context of the prejudice test. He has, however, also been instructed by a recent decision notice served on the University (FS50553969, 1 June 2015), which included the consideration of the application of section 43(2) of FOIA to '*results (data) of the pilot testing conducted on the new 11+ test commissioned by Bucks Grammar School Heads*'. Reminiscent of the present case, the University explained that it is one of two key providers for the 11+ test in the market place and stated that it is CEM's non-formulaic approach to tests that made their test more marketable than their competitors.
25. The Commissioner rejected the University's argument that it would be possible for tutors to 'question spot' from the disclosure of the information and tailor their teaching accordingly. The Commissioner did accept, however, that disclosure would have a wider prejudicial effect and found that the exemption was engaged on this basis.

*36. [...] The information can then be used to work out which sections tend to be more difficult to others and enable tutors to tailor their teaching and coaching accordingly. The overall pass score is published beforehand and because it is the overall score across the test that it used and there is not minimum score require per section, such information would be likely to enable tutors to coach pupils particular*

*examination techniques and to concentrate their efforts on certain sections of the test in order to achieve the pass mark required. It is for these reasons that the Commissioner consider section 43 of FOIA applies.*

*37. Disclosure of information which would enable tutors to increase their coaching and tailor their teaching to the specifics of the test would be likely to prejudice the commercial interests of the university. The university has explained that it is its non-formulaic approach and the very fact that its tests cannot be second-guessed which attracts its existing customers to use the CEM centre's testing rather than one of its competitors. If these qualities were to be prejudiced it is likely that existing customers and potential others may be deterred from using the CEM centre as opposed to its rivals.*

26. Unlike the circumstances of the *Reading School* case, the Commissioner considers that CEM does have a commercial interest in the information and particularly its testing model. He therefore considers that a distinction can be drawn between the present case and the Tribunal's findings on the *Reading School* appeal.
27. The Commissioner does though consider that the complainant has provided cogent arguments against finding that a causal relationship exists between disclosure and the prejudice. Ultimately, however, the Commissioner has been informed by the analysis contained within the decision notice served under FS50553969. Although a decision notice is not precedent setting, the Commissioner considers that the general principles underpinning the determination do extend to the withheld information in question.
28. The Commissioner has therefore decided that the causal relationship has been established. Furthermore, the Commissioner accepts the University's position that disclosure 'would' harm the commercial interests of CEM, in that there is a real and significant risk of the prejudice occurring. On the basis that the prejudice test is met and the requested information has therefore been shown to engage section 43(2) of FOIA, the legislation next requires that the public interest in disclosure is assessed.

*Public interest arguments in favour of disclosure*

29. The complainant has provided a number of powerful and logical arguments for disclosure.
30. With regard to the need for transparency, the complainant has prefaced his arguments by highlighting that CEM's revenue from 11+ testing more than doubled between 2012 and 2012 and reportedly provides a

significant revenue stream. The complainant explained that the reason for this growth could largely be attributed to recommendations made by the Sutton Trust in 2013<sup>1</sup>, which included calling on grammar schools to change their entrance tests regularly so they are tutor proof.

31. The complainant states that places at the country's most sought after publicly funded schools are increasingly being decided on the outcome of tests operated by CEM. He also highlights that questions and concerns have been raised about the CEM's approach to testing and particularly the weighting placed on different test questions. Transparency would therefore not only assist the public to better understand the testing programme but would also help ensure there are additional checks and safeguards in an important education area. In the complainant's view, the expenditure of a considerable amount of public funds on CEM's services only adds to the case for disclosure.

*Public interest arguments in favour of maintaining the exemption*

32. The University considers the severity of the harm that would flow from disclosure is such that the public interest favours maintaining the exemption. The harm referred to by the University has two parts.
33. First, it is the University's view that the release of the raw data would effectively remove the USP of CEM's testing mechanism and therefore its advantage over competing interests. It considers this would be unfair. Second, it argues that there is not a net public interest in disclosure since it will destroy the benefit of having a fairer test available for pupils that is resistant to intensive exam coaching.

*The balance of the public interest*

34. It is clear that there is a significant public interest in disclosure. This is supported by the logical and well-argued submissions of the complaint. Put simply, the Commissioner recognises that parents will benefit from greater transparency in respect of a testing system that will determine children's places at sought after schools.
35. The benefits of disclosure must, however, be assessed against the harm that the Commissioner has accepted would occur through disclosure. In his view, the severity of the harm is acute and ultimately sways the balance of the public interest in favour of withholding the requested

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<sup>1</sup> <http://www.suttontrust.com/newsarchive/sutton-trust-prep-schools-provide-four-times-grammar-school-entrants-fsm-pupils/>

information. Returning to the decision notice issued on FS50553969, which has some similarities to the issue under consideration here, the Commissioner said the following:

*65. The Commissioner considers there is a strong public interest in maintaining the fairness and equality of the university's current testing system to ensure that all pupils sitting the tests have equal opportunities. The results and allocation of grammar school places are then based on true academic ability rather than being influence by coaching and testing strategies.*

*66. The Commissioner also considers that it is not in the public interest to release information which would be likely to damage the university's commercial interests. It is apparent that it has invested significant resources into developing its testing system and it is an important source of revenue for the university. If the university's commercial interests were to be hindered as a result of disclosure this would have a negative impact of the university as a whole and its ability to meet its core functions and against such consequences are not in the public interest.*

36. The Commissioner considers that similar factors are present in this case and, following his determination on FS50553969, has decided that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exemption.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

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

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

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

**Signed .....**

**Rachael Cragg**  
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