

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 July 2016

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

#### Decision (including any steps ordered)

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1. The complainant has made a series of requests to the University of Durham (the University) for information and data relating to the 11+ transfer tests administered by the Centre for Evaluation & Monitoring (CEM), a research group within the Faculty of Social Sciences at the University. The Commissioner has only been required to consider the University's response to one request however, which asked for the correct answers for a particular section of an exam paper. The University refused to comply with this request under the 'commercial interests' (section 43(2)) exemption to disclosure in FOIA. The Commissioner has found that section 43(2) of FOIA is engaged and has decided that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption. The Commissioner does not therefore require the University to take any steps.

#### Request and response

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2. On 10 and 22 February 2016, the complainant wrote to the University and made a number of separate requests for guidelines, protocols and raw data relating to the exams administered by CEM. The present notice only concerns one of the requests submitted on 10 February 2016, which asked for information relating to a particular Buckinghamshire 11+ Transfer Test that children were entered into in 2015:

***Paper 1 – Section 3 (NVR)***

[...]

***From Question 1 through to the final question in that section the correct answers in order (e.g. B-A-C-D-C-D etc)***

3. The University responded to the requests of 10 February 2016 on 8 March 2016. With regard to the request in question, it stated that the requested information was held but advised that this was exempt information under section 43(2) (commercial interests) of FOIA. The exemption is qualified by the public interest test and the University found that on balance the public interest favoured withholding the requested data.
4. The complainant wrote to the University later the same day and asked it to reconsider the decision to refuse the request, arguing that the information was not commercially useful. Accordingly, the University carried out an internal review, the outcome of which was sent to the complainant on 31 March 2016. This upheld the original application of section 43(2) of FOIA.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 14 April 2016 to complain about the University's refusal to disclose information he had requested.
6. The complainant has confirmed in correspondence with the Commissioner that her investigation should focus on the request quoted at paragraph 2. The Commissioner's analysis of the University's reliance on section 43(2) of FOIA to refuse the disclosure of the requested information is set out in the body of this notice.

### **Reasons for decision**

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### **Background**

7. In a leaflet about the Transfer Testing Process<sup>1</sup>, Buckinghamshire County Council explains that there are two types of mainstream secondary schools in Buckinghamshire; grammar schools and upper/all-

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<sup>1</sup> <http://www.buckscc.gov.uk/media/3990218/transfer-testing-process-leaflet-2017.pdf>

ability schools. The Transfer Testing Process is used for the purposes of admission to Buckinghamshire grammar schools.

8. The leaflet goes on to clarify that all the grammar schools in Buckinghamshire are academies and their own Admission Authority. The Buckinghamshire Local Authority acts as the Transfer Testing process administrator for these schools. The CEM independently produces the admission test, which the leaflet states has been specifically designed to work out a child's potential.
9. The Commissioner has previously considered a request made to the University for 11+ test results data produced from tests controlled by CEM, albeit in connection with specific schools in Warwickshire. In her decision notice served on 10 September 2015 (FS50566015)<sup>2</sup> the Commissioner upheld the University's reliance on section 43(2) to refuse to disclose the requested information.
10. The Commissioner's decision notice was appealed to the First-tier Tribunal (Information Rights) and the Tribunal's decision has recently been published – *James Coombs v Information Commissioner* (EA/2015/0026, 22 April 2016)<sup>3</sup>. By a majority decision, the Tribunal decided that section 43(2) was engaged and agreed that the public interest favoured maintaining the exemption.

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

11. 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.
12. The exemption is subject to the prejudice and public interest tests. With regard to the prejudice test, three conditions must be satisfied in order for the exemption to be engaged.
13. First, the harm that is considered would, or would be likely to, occur should relate to the applicable interest described in the exemption.

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<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432499/fs\\_50566015.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432499/fs_50566015.pdf)

<sup>3</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i1785/018%20250416%20Coombs%20judgement%20final.pdf>

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 must be a real risk of prejudice arising as a result of the release of the information in question, with the public authority able to demonstrate that disclosure either 'would' or 'would be likely' to have a prejudicial effect. Establishing the appropriate level of likelihood is not only important for finding that the exemption is engaged but it will also have an effect on the balance of the public interest test, which is the next stage of the process for a public authority seeking to claim the exemption.

14. When considering the University's reliance on section 43(2) of FOIA, the Commissioner has highlighted to the complainant the potential relevance of the Tribunal's findings in *Coombs* to the present case. As the complainant has rightly pointed out however, the decision of the First-tier Tribunal is not precedent-setting and it is incumbent on the Commissioner to judge an individual request on its own merits. That being said, the Commissioner will inevitably be guided by the Tribunal where similar issues have been explored.
15. Upon being notified of the complaint, the University has expressed the view that it would be appropriate to use here the same arguments put forward in the *Coombs* case. These centred on the claim that disclosure would have a prejudicial effect on CEM's, and therefore the University's, commercial interests.

#### The Prejudice Test

16. The analysis of the issues that the majority of the Tribunal thought relevant to the prejudice test is set out at paragraphs 20 – 22 of its decision. A number of factors were considered but, in summary, the majority found important the following. The CEM's unique selling point (USP) is that the structure of the tests, including its marking, is not known and hence cannot be used by tutors. Disclosure would enable the identification of the intellectual property of CEM in its testing approach through data manipulation. CEM operates in a competitive market and there would be damage to reputation or business confidence flowing from disclosure as CEM have sold their services to schools on the basis of their USP.
17. The majority found that these factors were sufficiently strong to conclude that the release of the requested data would prejudice the commercial interests of University, meaning section 43(2) of FOIA was engaged.
18. The present request under consideration shares an essential characteristic with the request discussed in *Coombs*, in that it asks for

data from a test produced by CEM. Accordingly, the principles underpinning the majority's findings are likely to be relevant. Nevertheless, as a means of illustrating its position with respect to this request, the Commissioner has invited the University to respond to the concerns raised by the minority member of the Tribunal about the application of section 43(2) of FOIA. A summary of its reply is set out below.

- *Concern: there remains an onus on the University to set out in a more understandable manner how or why the exemption was engaged and how the disclosure would, or would be likely to, prejudice the University's commercial interests (paragraph 27).*

The University's response: CEM's business model is based on CEM holding an item bank of previously developed test questions and test sections, and this item bank is then utilised for the construction of future tests. Disclosure of the test answers in question would therefore mean the test section could not ever be re-used in this way, even if in a test for a different authority in a number of years' time. In the event that a tutor with access to the answers to a test section were to train tutees in those responses, and the test section happened to be used in that location in that year, this would give an unfair advantage to those children who had access to this information. On an individual level, it would be ethically wrong for a child to gain a place in a school for which they are not suitable, if they were to gain the place through artificial inflation of scores in this way. Conversely, a child tutored to learn the answer pattern by rote could be severely disadvantaged by using it for the wrong test, in the (incorrect) belief that their tutor knew where and when the section would be re-used.

Furthermore, the test is currently a live test in Buckinghamshire (i.e. it is still being used as part of the entrance testing system), and disclosure of the test answers, potentially directly or indirectly to a child who might still take the test, would undermine the entire testing process and invalidate the admissions procedure in that authority. In other words, it would not be feasible to use the test if the answers to a section had been released.

- *The argument that disclosure could in effect establish a precedent that would force the disclosure of subsequent year's raw data was rejected (paragraph 29). The Commissioner advised the University that this point appeared important in the context of the present case because the request only asks for a very narrow range of data, which may mean that the risk of undermining the overall*

*integrity of the testing process through disclosure would be minimal.*

The University's response: For the reasons given above, CEM maintains that disclosure of the test answers for the section in question would mean that test section could not be re-used in the future. The development costs of the test section would have to be written off, and CEM would directly incur costs to develop a replacement test section.

Although the release of one year's data would not guarantee the release of any future years' data, it is highly likely that this would establish a precedent whereby interested parties would request the disclosure of data for subsequent years' tests. The potential implications for the revealing of such data for future CEM tests would mean that not just one but all of CEM's future entrance tests would be in jeopardy, leading to the inability to provide an entrance testing service any longer.

19. As reflected in the points made to the University, the Commissioner is aware that the complainant's request for test data is narrower than the one considered in *Coombs*. The Commissioner is though satisfied, using both the arguments presented in *Coombs* and the above explanations, that the University has demonstrated disclosure would have a prejudicial effect. The Commissioner has therefore decided that section 43(2) does apply and she has gone on to assess the public interest test.

#### The Public Interest Test

20. Insofar as both requests relate to test data, the Commissioner considers that the public interest arguments featuring in the present case will generally reflect those considered in FS50566015 and by the Tribunal in its corresponding decision on *Coombs*. It will be for the Commissioner to consider however whether the respective strength of the different arguments vary which mean the public interest test should be exercised differently.
21. In her decision notice issued on FS50566015 the Commissioner acknowledged the strength of the arguments for disclosure expounded by the complainant on that case. The submissions considered by the Commissioner included the following:

*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 are. 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.*

22. The majority in *Coombs* also accepted there was a public interest in transparency over whether the allocations of school places are based on sound decision making. Notwithstanding this, the majority felt that the public interest factors in favour of maintaining the exemption clearly outweighed those factors in favour of disclosure. The reasons for this can broadly be grouped into three categories.
23. Firstly, the majority considered that the release of the selection of data requested would not provide the 'answers to questions as to whether the test is tutor proof nor aid general research into education policy and practice'. Secondly, the issue of whether public funds are being well spent seems to be one for the schools' decision makers to address and they, and not the University, should be held to account for their purchasing decisions and any consequential unsafe practices. Thirdly, it would not be in the public interest to undermine a public body's ability to engage in commercial activities – the public funds that could potentially be lost to the University may be gained by a body outside the public sector.
24. The complainant is clearly dissatisfied with the integrity and robustness of the testing procedure and the Commissioner appreciates he has a genuine concern about whether the process is fair. The Commissioner also considers though that the submissions advanced in favour of the release of the information do not substantially add to the existing arguments considered in *Coombs* nor do they introduce anything new that might swing the balance of the public interest in favour of disclosure. Indeed, with reference to the first of the majority's arguments outlined above, the fact that the request asks for an extremely limited range of data arguably serves only to weaken the value of the information to the public.
25. The University has similarly argued that the release of 'the answers for a test section alone would not give any understanding of the attainment of the intake of different schools or allow research bodies to carry out research into education policy and practice. It would simply give the structure of the test itself, and would carry no educational research value.' Furthermore, it considers that releasing the data in response to the request could 'potentially invalidate the current round of entrance testing in Buckinghamshire, which would have far reaching

consequences for the pupils and schools that have already participated in the process.'

26. As stated, the Commissioner is required to consider each request on an individual basis and she has therefore analysed the public interest arguments in the context of the particular circumstances in which the request was made. In doing so, the Commissioner has found that the strength attributed by the majority to the arguments for maintaining the exemption is similarly reflected in this case. Against this, the Commissioner has not been provided with, nor is she aware of, any arguments that would significantly enhance the case for disclosure. For this reason, the Commissioner has concluded that the public interest in the release of the requested data is outweighed by the public interest in favour of withholding this information.

## Right of appeal

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27. 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)

28. 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.
29. 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** .....

**Alun Johnson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**