



Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0226

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50566015

Dated: 10 September 2015

Appellant: James Coombs

Respondent: Information Commissioner

Public Authority: Durham University

Heard at: Fox House, London

Date of hearing: 9 March 2016

Date of decision: 22 April 2016

Before

Angus Hamilton

Judge

and

Melanie Howard

and

Suzanne Cosgrave

Subject matter: s 43(2) (commercial interests) Freedom of Information Act 2000

Cases considered:

R (Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin)

John Connor Press Associates v IC, IT 25 January 2006

Board of Governors of Reading School v IC and James Coombs FTT, 31 October 2013

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal by a majority dismisses the appeal for the reasons set out below.

REASONS FOR DECISION

Introduction

- 1 A person requesting information from a public authority has a right:
- *to be informed by the public authority whether it holds the information (s. 1(1)(a) FOIA) and*
 - *to have that information communicated to him if the public authority holds it (s. 1(1)(b) FOIA)*

- 2 These rights are subject to certain exemptions and for the purposes of this case the relevant exemption is s43(2) FOIA which provides that:

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

- 3 The Commissioner submitted **[Response to Appeal para 16]** and the appellant did not disagree that in relation to s43(2) *'there are two possible thresholds of probability: (i) that prejudice would be incurred – which is to be assessed on the balance of probabilities, and (ii) that prejudice would be likely to be incurred. The latter threshold does not require it to be 'more likely than not' that prejudice would occur (which would equate to a finding of fact on the balance of probabilities); nonetheless there must be a real and significant likelihood of prejudice occurring: R (Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin); John Connor Press Associates v IC, IT 25 January 2006.'*

- 4 Many of the exemptions in FOIA, including the one under s 43(2) are 'qualified' exemptions. For all qualified exemptions in accordance with

s2(2) of FOIA it is also necessary to consider whether:

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

This Tribunal has described this as the ‘public interest balancing exercise’.

The Request & the Decision Notice

5 The appellant wrote to the Director of the Centre for Evaluation and Monitoring (CEM) on 24 October 2014 and requested certain information. It is not necessary for the purposes of this appeal to set out the full request because during his correspondence with the Commissioner the appellant agreed to narrow the scope of the Commissioner’s investigation. Consequently, the pertinent request for information is the request (which was originally Request 2) for:

Copies of the raw test results, including birth month and cohort (cohort being either Slough, Reading Boys or Kendrick) and final standardized scores with all personal identifiable data removed Requests 2 [& 3] should between them clearly indicate how the raw data has been processed in order to arrive at the final standardized 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).

6 CEM is a research group within the Faculty of Social Sciences at Durham University (Durham). It is described as one of the two main commercial providers in the UK of 11+ testing which is used by certain selective secondary schools to choose their intake of pupils. The ‘Slough Consortium’ of grammar schools which includes grammar schools in Slough Reading and Kendrick is a group of schools that has started using the CEM 11+ tests in recent years.

7 Durham responded on 22 November 2014 confirming that it held the requested information but declining to provide it in full. Durham relied on the exemption at s. 43(2) FOIA. It did provide the appellant with information showing birth month, gender, cohort and standardized scores. The information within the agreed scope of the Commissioner's investigation that it withheld therefore was the raw test results for the relevant pupils.

8 The appellant sought an internal review but Durham upheld its original decision although it did add what the Commissioner describes as a further fairly short and high-level explanation of the standardization process. The appellant then complained to the Commissioner on 22 December 2014. The Commissioner concluded, after an investigation, that s 43(2) FOIA was engaged and that the public interest balancing exercise favoured maintaining the exemption. The appellant had brought to the attention of Durham and the Commissioner the decision of the First Tier Tribunal (FTT) in *Board of Governors of Reading School v IC and James Coombs* FTT, 31 October 2013, which the appellant asserted was a decision rejecting the suggestion that the disclosure of just test results could damage an examiner's commercial interests. The Commissioner distinguished the Reading case on the basis that in that case the school had failed to make out any clear commercial interest or prejudice whereas the Commissioner considered that the commercial interest in the present case was clear.

9 The Commissioner rejected the submission that disclosure in the present case would facilitate 'question spotting' but he accepted that both competitors and tutors would be able to understand CEM's methods in a way that would undermine CEM's claimed ability to 'tutor-proof'¹ the tests

¹ CEM asserts that one of the benefits of its 11+ testing is that it is 'tutor proof', or more 'tutor proof' than the alternatives. That is to say that it is harder for pupils to be coached to perform well in its tests simply by approaching the test in a certain way. The claimed result is that the test is a better predictor of natural ability and the advantage gained by children in families that can afford private tuition is reduced

and so undermine its USP. The Commissioner accepted that there was a significant public interest in disclosure this was outweighed by the '*public interest in maintaining testing system that provided equal opportunities to children from all backgrounds*' [Response to Appeal para 14].

The appeal to the Tribunal

- 10 The appellant submitted an appeal on 25 August 2015. The Tribunal examined the Grounds of Appeal and the Commissioner's Response to Appeal. The Tribunal considered that the Commissioner had fairly summarised the appellant's Grounds of Appeal and had done so in a helpful way and the Tribunal adopted that summary. However, this judgement omits that part of the Grounds of Appeal that relates to procedural matters as the Tribunal did not consider that it had the jurisdiction to consider these matters – any procedural matters, and in particular the issue of what was contained in the 'closed material' which was not disclosed to the appellant, having been dealt with by case management leading up to the appeal hearing.
- 11 Thus the Grounds of Appeal asserted that commercial prejudice had not been made out because:

The University is seeking to protect 'the method by which standardised scores were produced' but this method is a well-understood statistical technique in the public domain.

Little or no weight should be placed on the argument that the disputed information contains sensitive commercial information about the marks allocated to groups of questions.

The CEM tests appeared to be less tutor proof than the alternatives so that CEM was claiming prejudice in respect of a USP that did not exist.

- 12 And the Grounds of Appeal asserted that the public interest balancing exercise favours disclosure because the Commissioner failed to give weight to:

The public interest in members of the public being able to compare the attainment of the intake of different schools, but because CEM uses 'local standardisation', such a comparison could only be performed with access to the raw test data.

The research interests of organisations such as the Sutton Trust in being able to access the data.

The schools admissions code which requires transparency of admission criteria. This would be served by disclosure of the disputed information. [Response to Appeal para 15].

Evidence and the Questions for the Tribunal

- 13 All parties agreed that this matter should be considered 'on the papers' only and we heard no live evidence or oral submissions. No parties or representatives attended the hearing.
- 14 The Tribunal considered, principally, from the Appellant, the Notice and Grounds of Appeal and his Response to the Commissioner's Response to Appeal. We considered, from the Commissioner, the Decision Notice and the Response to Appeal. There were no submissions from the public authority and the Tribunal understood that they had not been joined as a party to the proceedings. The Tribunal also had access to the correspondence between the parties and the public authority relating to the appellant's request and complaint to the Commissioner and the Commissioner's investigation. The Tribunal also had a copy of the disputed information in this case also referred to as the 'closed bundle'. The Tribunal noted that the closed bundle had been the subject of review and case management by a Tribunal Judge prior to the appeal hearing so

that the material withheld from Mr Coombs was kept to the minimum possible.

- 15 The Tribunal judged that the principal questions for them to consider were first, whether s43(2) of FOIA was 'engaged' and then secondly, to consider whether the public interest balancing exercise favoured maintaining the exemption or disclosure.

The Commissioner's Response to the Grounds of Appeal

- 16 In summary, the Commissioner contended that the university had made out a clear case that section 43(2) was engaged in relation to the disputed information:

It has identified a relevant commercial interest: CEM's contracts to provide the 11+ testing, which depend in part on its USP of reducing the influence of coaching on test results. It has demonstrated that its interest would, on the balance of probabilities, be harmed by disclosure of the disputed information (and further related disclosure); or at least that there is a real and significant risk of harm. In particular, it has provided specific examples of ways in which tutors could manipulate the disputed information in order to learn facts about the test methodology that could inform their coaching of tutees. The Commissioner finds its explanations of this point to be clear and convincing. [Response to Appeal para 25]

- 17 In answer to the specific points raised by the appellant in the Grounds of Appeal as to the engagement of the exemption the Commissioner contended:

- That the standardisation methodology could not be public knowledge as otherwise the appellant would not need the disputed information to understand the data manipulation carried out by

CEM

- That there '*would be clear prejudice to CEM's commercial interests if it were routinely obliged to disclose raw test data, so that its efforts to reduce the predictability of tests (which constitute its USP) were undermined. This is particularly so in circumstances where the main competitor CEM is a private company that is not subject to FOIA*'. **[Response to Appeal para 31]**
- That it was irrelevant (in terms of assessing whether the exemption was engaged) whether the claimed USP was valid or not – it was still a USP. What mattered was whether CEM's customers believed in the USP as this point might be influential in the public interest balancing exercise.

18 In answer to the specific points raised by the appellant in the Grounds of Appeal as to the public interest balancing exercise the Commissioner contended:

- *That there is a very significant public interest in the development of testing systems for pupils that more closely reflect a pupil's underlying intellectual ability, and reduce the advantage that more affluent parents are able to gain their children by paying for private coaching.... Because countering the effects of coaching requires there to be public uncertainty over the exact method of setting and scoring the 11+ tests there is, very unusually and on the particular facts of this case, a clear public interest in non-transparency of testing methods. **[Paras 37-38 Response to Appeal]***
- That information enabling the comparison of the absolute academic attainment of different schools was available from other sources and would not in any event be enabled by the disclosure of the disputed information in this case but only, possibly, by repeated disclosures.

- That research could be enabled by the disclosure of the disputed information to research bodies only on a confidential (and repeated) basis and did not require disclosure to 'the world at large'.
- That, in relation to the Admissions Code, the disputed information was only likely to confuse parents' understanding of the admissions process and would not clarify it.

Conclusion

- 19 The Tribunal was unable to reach a unanimous verdict in this case. The majority considered that the exemption was engaged and that the public interest balancing exercise favoured maintaining the exemption. The minority strongly doubted that the exemption was engaged and even if it was that the appellant had provided sufficient material and evidence for the public interest to tilt in favour of disclosure.

The Majority Decision

- 20 Is s43(2) engaged? The majority took into account the following issues:
- The USP of CEM's 11+ testing is the basis upon which CEM sells that testing and it sells successfully. That USP is that the structure of the tests including its marking is not known and hence cannot be used by tutors to help students prepare so they maintain it is **more** tutor proof than other 11+ testing. **[DN16 Durham letter bundle page 82 and quote by Robert Coe p173]**
 - Durham's detailed response to the Commissioner's enquiries **[Bundle page 128 onwards and 132 in particular]** establishes that the information would disclose or by its disclosure enable through the sort of data manipulation described in unredacted version of Durham's response the identification of the intellectual

property of CEM in its testing approach.

- Durham argues strongly that their USP is what has given rise directly to their growth in this commercial business over a short period. Bundle page 132 refers to “over 3-4 years” and to it being a “direct response”. Even the appellant's case for disclosure would seem to support that CEM have seen significant commercial success and cites this as one of his reasons for wanting to have greater transparency of their approach. **[Para 13 page 21 bundle – Grounds of Appeal]**
 - This is a competitive market i.e. it is not a monopoly and the other main competitor is not bound by FOIA **[Bundle 60 para 31]**. There are real and substantial commercial considerations namely £1m of revenue which CEM have from this work which might be at risk if the disputed information were disclosed – and this is said to be now 40% of market of grammar schools in England. There has been no quantification of other markets such as other United Kingdom countries.
- 21 The majority also took into account the following additional appoints in considering whether the exemption was engaged:
- The Commissioner's guidance on commercial interests states that: *‘Commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase or sale of goods or services.’* The Commissioner's guidance makes explicit reference to those public authorities that have their own commercial activities. And states that: *‘Any information held in relation to these will potentially fall within the scope of the exemption.’* The information requested relates directly to that commercial activity and that is exactly the reason given by the appellant for wanting what he has requested, it isn't information somehow

tangential to the activity the university is undertaking it is directly germane to it.

- CEM assert that their USP is threefold, the structure of their tests are not known – it might be said to be a black box - they maintain this by not publishing past papers, by a proprietary approach to marking/standardising and they assert that by maintaining this degree of secrecy they have an increased ability to provide a testing regime which is more tutor-proof and hence fairer to the pupils.
- The merits of those assertions are not the issue for the Tribunal (if they cannot be justified there may be an argument about advertising standards and/or what decision making process schools used when determining which supplier to use). It is for the Tribunal to determine whether the commercial interests of CEM are engaged and would or would be likely to be prejudiced. As we are told that one of the key selling points is that the information about the test structure is not in the public domain it seems to be self-evident that one of the features that CEM sell is this 'black box' quality. It is not necessary to understand in detail whether the data would aid the understanding of the test structure though the partially redacted letter does seem to show how the data could be manipulated to do so. The university has said it competes and competes successfully by asserting the structure of its tests are not known and requiring release of the information which the appellant (and others) would say allow them to determine whether the tests are or are not more tutor proof would fundamentally undermine that assertion.
- The commercial activity is in a competitive environment and one where the impact of FOIA would be unequal as the

other “main” competitor is said to be a charity and hence not subject to FOIA. The Commissioner’s guidance looks at the situation where the commercial activity is a monopoly and hence not a competitive environment. This is not the case here as there is competition at play as evidence from CEM suggests they have been successful in recent years. This evidence not disputed by the appellant.

- There would be damage to reputation or business confidence flowing from disclosure as CEM have sold to schools on the basis of their USP. The appellant doesn’t dispute this has been Durham’s selling message rather he doubts the veracity of message. This would seem more to call into question the decision making skills of schools or the analysis by schools of CEM’s offering as against their competitors.
- The commercial interests in question are, in this appeal, the public authority’s directly. Often s 43(2) type appeals deal with commercial interests of a third-party this is not so here. It is the university that would or would be likely to be affected and that effect would be to the revenue streams generated by the contracts with CEM. Hence there would be an impact on the public purse in the sense of the loss to the university. The prejudice to the commercial interest works to disadvantage of public authority directly.
- Is the information commercially sensitive? Yes - CEM say it is a crucial distinguishing feature from their competitors that tests cannot be replicated by others. This they say is something competitors would want it is not a matter of indifference to the competitors they support this by evidence that there were tutoring books which claim to have CEM type questions reference... **[page 5 Decision Notice para**

19]

22 The majority felt that these factors established that there were commercial interests and that there would be prejudice to Durham and the prejudice that would be likely to arise would flow directly from the release of the information since it would undermine the stance taken by CEM in its selling. The majority did not think it was necessary for CEM to establish that its USP was in fact true.

23 In considering the public interest balancing exercise the majority took into account the following factors favouring disclosure:

- The majority accepted that there is general public interest in public authorities being transparent in their decision making and in this particular case transparency over whether the allocation of school places is based on sound decision making is desirable.
- There is a clear public interest in knowing how £1 million of public funds is being used.
- There is a desirable public policy encapsulated in FOIA of openness and accountability in the public sector generally for its spending decisions.
- Disclosure would enable an objective assessment of the operation of a test that is used in selection within the education system.
- The public interest in uncovering potentially unsafe practices.
- The Schools Admissions Code states that 'Parents should be able to look at a set of arrangements and understand

easily how places for that school will be allocated.’ **[Bundle page 27 para 30]**.

24 The majority took into account the following public interest factors in favour of maintaining the exemption:

- The disputed information deals only with the data relating to three schools who have had the CEM tests in place for one year only. We are told by appellant that there is no objective assessment of whether the USP of CEM is valid without a longitudinal study hence the release of the requested one year’s data only would not provide that answer. **[Para 15 page 22 bundle]**.
- In addition, the appellant states **[Page 27 para 29 bundle]** *‘On a wider level the release of this type of information by both CEM and the other key provider would help ...to continue with their objective quantitative research into education policy and practice.’* But the disclosure requested is by one of the providers and of one year’s data so it does not in fact by appellant’s own admission provide the answers to questions as to whether the test is tutor proof nor aid general research into education policy and practice. See the Commissioner’s Response to Appeal **[page 61 para 36 bundle]** *‘it is premature to jump to this conclusion ..on basis of one year’s results in a single county’.*
- The appellant’s final submission of 14 February 2016 para 16 asserts that release of the requested information which is one year’s data *‘would enable public to build up picture’.* But

clearly one year's data alone does not do this, it is only if the data is provided on a recurring basis.

- See also – the Grounds of Appeal page 27 para 30 bundle *'and in due course to be able to see if the grammar school standard for a particular school was increasing or decreasing over time'*. By which the appellant appears to implicitly accept that the release of one year's data would not assist.
- The one year's information for three schools does not represent the totality of the £1m of public funds: the question Appellant quite justifiably wants answered seems to be, 'Are the schools spending that money wisely?' Hence the issue seems to be one for the schools' decision makers to address.
- A contrary perspective on the 'public purse' argument is that if the release of this information does prejudice CEM's competitive position the beneficiary of the business currently worth £1m would be a non-public body (NFER) **[see bundle page 60 para 31]** i.e. the £1m of public funds could be lost to Durham in the public sector and be gained by a body outside the public sector.
- The potential unfairness to public authorities seeking to compete against non-public authorities in a commercial sector. There is a public policy decision that permits/encourages public bodies such as Durham to engage in commercial activities – the release of their intellectual property into the public domain would seem to undermine their competitive position in a manner not applicable to the non-FOIA bodies they are competing with and hence make it more difficult for public bodies.

- The majority agreed with the Commissioner's conclusion '*on the particular facts of this case there is a clear public interest in non-transparency of testing methods*' [**page 62 para 38 bundle**]. The release of the data would be insufficient to enable that analysis and by undermining the competitive position of CEM at this stage might mean their loss of market share and hence the source of the data which over time might have enabled just such a comparison/assessment. Those who have capability to undertake such analysis viz Sutton Trust and others [**bundle page 27**] would need population data i.e. all test providers not just data from three schools for one year.
- The schools are the purchasers of the tests and base their admissions decisions upon the results: it is the schools who should be held to account for their purchasing decisions and any consequential unsafe practices.
- In relation to the Schools Admission Code point - It is not clear what the parents of the later cohorts would learn from one year's data for the schools in question and how that would assist them. If the arrangements are not clear, the course of action would seem to be for the school to remedy this not the providers of the 11+ test. The information is the test results for three schools leading to an understanding of how the tests of one provider are constructed it does not relate to all selective schools.

25 The majority felt that the the public interest factors in favour of maintaining the exemption clearly outweighed the public interest factors in favour of disclosure.

The Minority Decision

- 26 The minority took the view that the public authority in this case had failed to establish, even bearing in mind the two possible thresholds of probability mentioned in paragraph 3 of this judgement, that the exemption was engaged.
- 27 The minority found the explanation (contained in the closed bundle) from Durham as to how the disclosure of the disputed information might result in the loss of the claimed 'tutor-proofing', and thus the loss of Durham's 11+ testing USP, to be highly technical and incomprehensible to anyone without a qualification in statistics. The minority considered that there was an initial onus on the public authority to set out, in a readily understandable manner, how or why the exemption was engaged and how the disclosure would, or would be likely to, prejudice the public authority's commercial interests. The minority felt that Durham had failed to do this. The minority was very surprised that, in a case as technical as this, the public authority had failed to ask to be joined as a party and had failed to send a representative to the hearing who could deal with the incomprehensibility of Durham's explanation and could answer questions from the Tribunal. In the absence of such clarity the minority was not prepared to find that the exemption was engaged.
- 28 Even if wrong on this issue the minority considered that the public interest balancing exercise favoured disclosure. The minority found that the arguments set out by the appellant at paragraphs 22-30 of his lengthy Grounds of Appeal to be compelling. The minority also considered that the appellant had provided evidence that the claimed USP of tutor-proofing was highly questionable and that the public interest warranted close examination of this claim which could only be achieved through the disclosure of the disputed material.

29 The minority also rejected the Commissioner's concern that a decision in favour of the appellant in this particular case would establish a precedent that would force the disclosure of subsequent year's raw data [**paras 29-30 Response to Appeal**]. Decisions of the FTT do not establish precedents and it would always be open to the Commissioner and the public authority to argue that further disclosures would damage the public authority's commercial interests.

30 The appeal was therefore dismissed by a majority of the Tribunal.

Signed:

Suzanne Cosgrave (Tribunal Member) Melanie Howard (Tribunal Member) and Angus Hamilton DJ(MC) (Tribunal Judge)

Date: 22 April 2016