Case Reference: EA/2021/0302

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by video

Heard on: 7 June 2022
Decision given on: 27 July 2022

Before

TRIBUNAL JUDGE CL GOODMAN
TRIBUNAL MEMBER SUZANNE COSGRAVE
TRIBUNAL MEMBER KATE GRIMLEY EVANS

Between

AMIT MATALIA

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) THE UNIVERSITY OF CAMBRIDGE

Respondent(s)

Representation:
The Appellant represented himself
The first Respondent did not appear
For the Second Respondent: Azeem Suterwalla of counsel, instructed by HCR Hewitsons

Decision:

1. The appeal is dismissed.

2. Decision Notice IC-93715-S7R5 is in accordance with the law.

3. The University of Cambridge is not obliged to comply with the Appellant's request for information because it is vexatious under section 14(1) of the Freedom of Information Act 2000.

4. The reasons for our decision are set out below.

REASONS

Background

5. Centre for Evaluation and Monitoring ("CEM") is a leading provider of educational assessments, including the development and delivery of 11+ test papers used by selective grammar schools in England, established over 30 years ago. The business was owned by the University of Durham until June 2019 when it was sold to the University of Cambridge ("the University").

6. 11+ assessments for selective grammar schools are generally taken in September each year. Assessments may be scheduled on different days in different areas and by different schools. Some schools will use (or "share") the same papers and schools may permit candidates to take their assessment late in certain circumstances.

7. The Appellant is a director of Alpha-Tek Associates Limited. He runs "in excess of twenty 11+ information websites on a not-for-profit basis and his sites sell low cost mock papers (£6.95) suitable for CEM tests to level the playing field, allowing less wealthy people access to preparation material" (paragraph 6 of the Appellant's Reply).

8. The Appellant has been involved in a number of disputes and legal proceedings relating to the CEM 11+ assessments. In 2013, he registered the domain name "cem11plus.co.uk", which an independent expert found was abusive and took unfair advantage of the University of Durham's rights in the name "CEM". There have been other disputes over trade marks.

9. Injunctions were granted to Warwickshire County Council by the High Court in 2013 and 2015, restraining the Appellant from publishing or disclosing the content of CEM assessments used in its grammar schools in breach of confidence. A further injunction was granted in 2018.

10. The Appellant has made 21 requests for information relating to CEM assessments under the Freedom of Information Act 2000 ("FOIA") to the University and its predecessor, the University of Durham, from January 2018 to April 2021 [listed in an attachment to a letter from the University to the Information Commissioner at pages C138 and C139 of the Open Bundle].

11. The Appellant has made a number of complaints to the Information Commissioner about the University's response to his requests, and has appealed to the First-tier Tribunal in respect of at least four in addition to this appeal (Tribunal references EA/2020/0047, EA/2020/0106, EA/2020/0023 and EA/2021/0075).

12. On 20 September 2021 a Tribunal dismissed the Appellant's appeals in EA/2020/0047 and EA/2020/0106, finding that CEM's 11+ assessments were exempt from disclosure under section 43(2) FOIA (commercial interests).

13. On 25 March 2022, a Tribunal dismissed the Appellant's appeal in EA/2021/0075, finding that his request for information was vexatious. The Tribunal found that the request in question had no value or serious purpose, was "unlikely to be the end of the matter" [paragraph 51] and would cause those dealing with it some distress. The Upper Tribunal refused permission to appeal that decision, finding that the Appellant's application was "totally without merit" pursuant to Rule 22(4A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and that his conduct of the appeal bordered on the abusive and vexatious (reference UA-2022-000620-GIA).

The Request

14. On 19 January 2021, the Appellant submitted the following request for information to the University ("the Request"):

"I wish to make a FOIA request regarding state schools and selective 11+ testing (or they can be answered otherwise) for 2021 tests (2022 entry).

1. I would like to know which consortia and individual schools will share the same 11+ selective test supplied by CEM, Centre in 2021 (for 2022 entry) and if you have the information the main and supplementary testing dates agreed with the consortia and schools please state the dates of testing for each school

   If you believe the question has two interpretations - one literal and one otherwise please state so, as I do not think there are multiple interpretations. All schools in every consortia or stand-alone schools using tests should be listed.

   Please include schools/consortia that have indicated they will use CEM, but have not signed contracts yet as proposed admissions policies have been published and it would be difficult to change supplier at this stage. Indicate where possible, which clients have not yet signed contracts.

   Since state schools would be required to put testing out to tender this would have closed so it is not possible for a competitor to try and win this business on basis of answering this request. Companies would have already responded to a tender and would know which of the state grammar schools were considering changing supplier with a tender.

2. Which schools and consortia that did not use CEM Centre tests for 2020 will use them in 2021 (2022 entry)? [New clients]

3. Which schools and consortia that used CEM Centre tests for 2020 will not be using them for 2021 (2022 entry)? [Lost clients]

   I would be happy to receive the information in the same format as attached, which was previously provided by CEM without issue of claims of prejudice.

4. Does CEM have a contract with Bexley County Council for 2021 testing (2022 entry) and if so who will own the copyright of the test that (Bexley previous owned copyright of tests supplied by CEM)."

The Appellant attached an Excel spreadsheet with columns for schools and consortia, tests, test dates and "current status" (e.g. "under contract", "potential contract under negotiation").

15. The University responded on 15 February 2021, informing the Appellant that it was treating the Request as vexatious by virtue of section 14(1) FOIA. The University referred to a "collective pattern of requests" which had placed a significant burden, first on the University of Durham, and now the University, and had no serious purpose. The University acknowledged that some of the requested information had been provided in relation to previous years, but said that continuing to do so would enable the Appellant to form an increasingly accurate picture of its client base for the purpose of advancing his business.

16. The University's response was upheld at internal review on 10 March 2021 and the University informed the Appellant that they might not respond to further requests on CEM matters. The Appellant complained to the Information Commissioner.

The Decision Notice

17. On 6 October 2021, the Commissioner issued Decision Notice IC-93715-S7R5, finding that the Request was vexatious and that the University was entitled to rely upon section 14. The Commissioner concluded that the Request met several of the criteria which it said "may typify a vexatious request":

    a. the Request was the latest in a series designed to enact a grudge against the University;

    b. it represented unreasonable persistence and an attempt to re-open issues dismissed by multiple supervisory bodies;

    c. requests were frequent and overlapping and responses would generate more requests and correspondence; and

    d. the burden of dealing with them fell upon a relatively small team.

18. The Commissioner found that while the Appellant might have initially had a genuine purpose, his requests had drifted to the point of vexatiousness due to their "persistent and burdensome nature" (paragraph 60). The Commissioner concluded that there was no wider purpose or value to the requested information.

The Proceedings

19. The Appellant appealed. His position, as set out in his grounds of appeal and developed in his Reply and submissions, is summarised below.

20. In its Response, the Commissioner maintained that they were correct to find that the University was entitled to rely on section 14 FOIA for the reasons given in the Decision Notice. The Commissioner submitted that at least part of the Appellant's motive was to create "work and hassle" for the University because he disagreed with them on points of principle. The University had reasonable grounds for thinking that one of the key purposes of the Request was to allow the Appellant to develop preparation materials by identifying students to approach for information about CEM assessments.

21. In its Response, the University maintained that there was no error of law in the Decision Notice. On 4 November 2021, the University was joined as a party to the appeal. Its application to link this appeal to appeal reference EA/2021/0075 was refused.

The Hearing and Bundles

22. A video hearing was held on 7 June 2022. The Appellant attended and represented himself. The Commissioner did not attend. The University was represented by Mr Suterwalla. No closed session was held.

23. The Tribunal considered an Open Bundle of 730 pages, which included witness statements from the Appellant and Ms Katharine Bailey of the University, together with authorities, skeleton arguments and a supplementary bundle provided by the Appellant shortly before the hearing. Both the Appellant and Ms Bailey attended the hearing by video, gave evidence and were cross-examined. An application made by the Appellant after the hearing to adduce further evidence was refused.

24. Ms Bailey's witness statement contained a few redactions of commercially sensitive information relating to the structure of CEM assessments, its income, revenue and clients. An unredacted version was provided to the Tribunal in a Closed Bundle. Deputy District Judge Worth directed on 8 December 2021 that the closed witness statement must not be disclosed to anyone except the Commissioner and the University of Cambridge.

25. The Commissioner in the Decision Notice and Ms Bailey in her witness statement referred to objections made to the Office of the Schools Adjudicator ("OSA") about CEM 11+ assessments, which they submitted had been made by the Appellant. Such objections are made on an anonymous basis, and before giving evidence, Ms Bailey said the University no longer believed that the complaints at paragraphs 39(k) to (p) of her witness statement had been made by the Appellant. The Appellant confirmed in his witness statement and during the hearing that he had made objections to the OSA, but he refused to confirm in an open hearing that he was the complainant in the specific complaints identified by Ms Bailey. In reaching its decision, the Tribunal relied only on the Appellant's evidence about this and not on any specific complaint identified by the University.

The University's submissions

26. In submissions before and at the hearing, Mr Suterwalla set out on behalf of the University the history of the proceedings and the Appellant's longstanding issues with CEM. He addressed the law in relation to section 14 FOIA and emphasised the aggregate burden on the University of dealing with the Appellant's FOIA requests. Mr Suterwalla submitted that in considering the burden, the Tribunal must take into account the Appellant's entire course of dealing with the University and its predecessor, and the pattern of his requests. He submitted that the Appellant's conduct was unreasonably persistent and unfair and that he repeatedly made unfounded allegations of dishonesty and racial discrimination against CEM and its staff. No Court or Tribunal had upheld any such allegations against CEM.

27. Mr Suterwalla disputed that the motivation for the Request was benign as the Appellant claimed, and submitted that, even if it was, the Request served no serious purpose, lacked value and repeated earlier requests.

Ms Bailey

28. Ms Bailey is the Director of Policy and Business Development at CEM. She has worked at CEM since 1996, first at the University of Durham and then at the University.

29. Ms Bailey gave the Tribunal some background to the CEM business and its approach to testing. She set out the history of its dealings with the Appellant and explained the "aggregate" burden placed on CEM by his requests for information. Ms Bailey was aware of around 10 people who were regularly called upon to deal with the requests, including a core group of around three who "bear the bulk" of the burden. Ms Bailey described how in order to respond to individual requests, the team have to track the Appellant's other requests, and the complaints and proceedings arising from them, all in the knowledge that any response will lead to further requests, complaints and legal proceedings. Ms Bailey said that dealing with the requests was distressing because of the Appellant's frequent accusations of dishonesty and racism against CEM staff and their organisation. Ms Bailey said that these allegations are "wholly unfounded and strenuously denied" (paragraph 53 of her witness statement).

30. Ms Bailey acknowledged that the University of Durham had previously provided some of the requested information in relation to previous years, but explained that CEM's approach to this Request had been different because the University's legal team takes a more robust and commercial approach than the University of Durham.

31. In cross-examination, Ms Bailey accepted that CEM had previously incorrectly stated that it owned the copyright in its 11+ papers in Bexley. She said that this had been an honest mistake which CEM had publicly acknowledged.

The Appellant's Position

32. The main points made by the Appellant in his grounds of appeal, submissions and evidence can be summarised as follows.

a. The burden of responding to the Request was not excessive. The Appellant estimated that it would take 30 minutes to locate and provide the requested information. The University had not sought to rely on section 12 FOIA (excessive cost) and had produced no evidence about the time taken to respond to previous requests. The University had made the task of responding more difficult for themselves through their own incompetence.

b. The University could not rely on the burden placed by previous FOIA requests on the University of Durham because they were a different organisation.

c. The University had a legal obligation to deal with FOIA requests and should ensure that its FOI team was sufficiently large and adequately funded to deal with them. Far greater burden and cost had been incurred by refusing the Request and defending the complaint and appeal, than if the University had simply provided the requested information. If the University refused, the Appellant would have to request the information from individual schools, who would themselves contact the University, ultimately increasing the burden on it.

d. The University and its predecessor had provided information about schools which shared CEM assessments in previous years, and he said, even encouraged this. This proved that the Request was not vexatious and had a serious purpose. It was not unreasonable to request the information on an annual basis because it changed every year. The Appellant said that the University's response was disproportionate, obstructive and inconsistent with their previous practice.

e. The Appellant disputed the suggestion that his motive was to approach pupils about the content of CEM assessments, to identify CEM clients or to market his materials to its competitors. The Appellant said that his motive was to publish information about schools sharing tests on his websites so that parents would not inadvertently enter their child for the same test twice. This was a public service because, he said, children taking the same test twice could be accused of breach of admissions policies and fraud. At the hearing, the Appellant suggested that publishing test dates would help parents avoid applying for schools with the same test dates or booking holidays on test dates. The Appellant said that he had had feedback that parents found this information useful.

f. The wording of the Request was polite and not confrontational or accusatory. In treating the Request as vexatious, the University and the Information Commissioner had focused on the requester and not the Request. No CEM staff had sought support from HR or mental health services nor complained to the police about harassment.

g. The Appellant said that he did not hold a personal grudge against the University. In fact, "the reverse is true": the University hold a grudge against him. Previous legal proceedings had involved Warwickshire County Council and the University of Durham, not the University. The University had itself chosen to be joined to the current appeal and had attempted to intimidate him by threatening to seek an order for costs against him.

h. The Appellant said that his request had been treated differently to a similar request from a "Caucasian" lady, Ms Courtenay, and that this was evidence of racial discrimination.

i. The Appellant said that the University and its employees were dishonest and hypocritical. They falsely promoted CEM assessments as tutor-resistant, made false claims about contracts and copyright ownership, had "a long history of misleading Tribunals" (paragraph 51 of the Reply) and manipulated their tests, for example, to benefit children with English as a first language. In his witness statement, the Appellant accused the University and Ms Bailey of paranoia, of lacking integrity, misleading the Tribunal and making defamatory comments about him "which I consider to be racially motivated" (paragraph 9). In his skeleton argument, he said that statements made by Ms Bailey are "often simply untrue, and frankly ridiculous, and appear to be made to mislead" (paragraph 3).

j. The Information Commissioner's investigation had been incompetent and its decision was not based on "cogent evidence".

33. At paragraph 19 of his witness statement, the Appellant asserted that: "many people view the CEM self-claimed "evidence based unit" a "*fundamentally dishonest organisation, corrupt at its very core*"". In cross-examination, the Appellant said that he was referring to views expressed by "5 or 6" people on Internet forums and that he was unable to identify the author of the specific quotation. He was unable to identify any Court or Tribunal decision that the University had acted dishonestly or discriminated against him, nor any case where parents had been threatened with legal action because their child had sat the same assessment twice at different schools.

The Law

34. Section 1(1) FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing whether it hold information of the description specified in the request and if so, to have that information communicated to him.

35. Section 14 FOIA provides that:

"(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious".

36. In *Information Commissioner* v *Devon CC and Dransfield* [2012] UKUT 440 (AAC), the Upper Tribunal concluded that "vexatious connotes manifestly unjustified, or involving inappropriate or improper use of a formal procedure" [paragraph 27]. The Upper Tribunal suggested four broad issues or themes to be considered when assessing vexatiousness, namely (i) the burden on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request in terms of objective public interest in the requested information, and (iv) any harassment of or distress to the public authority's staff. The Upper Tribunal stressed the importance of taking a holistic and broad approach.

37. The Upper Tribunal's approach was broadly endorsed by the Court of Appeal in its decision (reported at [2015] EWCA Civ 454), emphasising the need for a decision maker to consider "all the relevant circumstances". Arden LJ observed that:

> "*vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one and that is consistent with the constitutional nature of the right*" [paragraph 68].

38. In *Dransfield*, the Upper Tribunal observed in relation to "burden" that the "present burden may be inextricably linked with the previous course of dealings" [paragraph 29]. The context and history of the request must be considered, in particular the number, breadth, pattern and duration of previous requests.

39. The Upper Tribunal noted the "FOIA mantra that the Act is both "motive blind" and "applicant blind"" [paragraph 34]. However, the application of section 14 "cannot side-step the question of the underlying rationale or justification for the request" and "the wider context of the course of dealings" between the individual and the public authority. A request arising from a genuine public interest concern may become "vexatious by drift" where that proper purpose is "overshadowed and extinguished" by the improper pursuit of a longstanding grievance against the public authority (Oxford Phoenix v Information Commissioner [2018] UKUT 192 (AAC)). Public interest is not a trump card (CP v Information Commissioner [2016] UKUT 0427 (AAC)).

40. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> "(1) If on an appeal under section 57 the Tribunal considers -
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

"(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

41. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before us. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made.

Discussion and Reasons

42. The reasons for the Tribunal's decision are set out in full below. There is no Closed Annex.

43. In reaching its decision, the Tribunal took into account all the evidence before it and the submissions made by both parties, whether or not specifically referred to in this Decision. The Tribunal took into account previous Tribunal decisions in relation to other requests for information made by the Appellant under FOIA, while noting that these are not binding upon us.

44. As noted at paragraph 41 above, in deciding the appeal, the Tribunal stands in the shoes of the Information Commissioner and may review any finding of fact on which the Decision Notice was based. The Tribunal does not undertake a review of, or make any comment on, the basis on which the Information Commissioner made their decision nor the way in which that decision was reached.

45. The Tribunal applied the law as set out in paragraphs 34 to 39 above. It took a broad and holistic approach while considering the four issues or themes set out in *Dransfield*.

Burden

46. In relation to burden, the Tribunal accepted that the Request itself, taken in isolation, was not burdensome. While the Appellant had asked about schools sharing tests and the University's contracts with schools in previous years, the Tribunal accepted that the information would be different for 2021.

47. However, the Request was the latest in a long line of requests for information made by the Appellant in relation to the CEM business, first to the University of Durham, and then the University. The Tribunal found, applying *Dransfield*, that the burden of the Request was "inextricably linked" to this previous course of dealings. The Tribunal considered the context and history of this course of dealings, in particular the number, breadth, pattern and duration of the requests, and noted that:

a. The Appellant made 21 requests for information relating to the CEM business from January 2018 to April 2021. Those requests were often multi-headed, overlapped and addressed the same, recurring themes, including whether CEM could evidence the "tutor-resistant" nature of its tests, whether candidates can recall test content, the extent to which test content is shared between schools, and copyright ownership.

b. The burden of dealing with these requests falls on a small team. While the University is a large public body, the CEM business is relatively small.

c. The Appellant's approach follows a pattern which adds to the burden on the University. The Appellant will often pose additional or clarification questions after receiving a response. He will seek internal review, complain to the Commissioner, and then appeal to the Tribunal. As a result, the University is constantly dealing with the fall out from requests, responding to Commissioner investigations, drafting pleadings for the Tribunal, dealing with applications and attending Tribunal hearings, even when no active requests are outstanding.

d. The burden on the University is magnified because the Appellant will not take "no" for an answer. He does not accept previous Tribunal and Court decisions, even if he understands that he is bound by them. He is unreasonably persistent and often pursues disputes to the highest level. As he informed the University when it took over the CEM business: "*There have been numerous legal actions regarding CEM tests in the High Court and Court of Appeal, which I assume Durham had informed you of. The issues are not over*." [paragraph 43 of Ms Bailey's witness statement]. The last part of the Request relates to an issue about copyright notices to which the Appellant has returned repeatedly over many years.

e. The burden is further increased because the Appellant continually and exhaustively "fact checks" the University's responses and statements. The purpose of the second and third parts of the Request was to "fact check" the University's responses in the previous year. In paragraph 5 of his Skeleton Argument, the Appellant described the lengths to which he went to "fact check" with several exam boards, statements made by Ms Bailey at a previous Tribunal hearing. Where the Appellant finds an inconsistency or error, his response is disproportionate and extreme, accusing the University of dishonesty, perjury and racial discrimination (see for example, paragraphs 33(i) and (j) and 34 above, and paragraphs 46 and 52 of Ms Bailey's witness statement). The Appellant does not recognise the possibility of honest mistake and unintentional oversight. As a result, the University has to take special care and a disproportionate amount of time and effort dealing with his requests.

48. The Appellant submitted that the Tribunal could not take into account requests for information made to the University of Durham because they were a different organisation. In this regard, the Tribunal adopts the reasoning of the Tribunal and Upper Tribunal in the Appellant's previous appeal, as summarised by Upper Tribunal Judge Wikeley at paragraph 11 of UA-2022-000620-GIA:

> *"To suggest, as Mr Matalia does, that a course of previous conduct is only relevant if the requests are all made to the same public authority involves a complete misreading of the principles laid down in Dransfield. It would make a nonsense of the concept of vexatiousness by drift. In any event, as the FTT explained at paragraph 45 of its decision, "Although Durham is a separate public authority, the common factor is that the questions are directed at CEM's business. The appellant has a history of questioning CEM's approach to 11+ tests and alleging that CEM and its witnesses are dishonest. CEM's business has moved from Durham to the University, and the same types of questions have continued. This Request is part of the same pattern of behaviour.""*

Motive

49. The Appellant may have been motivated initially by a genuine belief that CEM's approach to assessment makes admission to grammar school less fair and accessible. The Appellant clearly holds strong views about the integrity of CEM assessments. It is not the role of this Tribunal to make findings about this issue.

50. However, over time, the Appellant's strongly held views have developed out of all proportion into a longstanding and intransigent vendetta against CEM, which has overshadowed and extinguished any proper purpose. His grievance started when CEM was part of the University of Durham and has continued after its transfer to the University. As Judge Barker observed in granting an injunction against that the Appellant as long ago as 2018:

> *"[the Appellant] left me with the very firm impression that he is so committed to the cause of challenging the integrity of the 11+ exams, at least those set by CEM and used in Warwickshire, that both his objectivity and his regard for the truth have been overborne. [The Appellant's] fixation permeated his evidence and undermined its reliability"* [paragraph 30]

The Tribunal does not accept that the Appellant's grievance is only against Warwickshire County Council. In October 2019, the Appellant acknowledged in submissions to the Tribunal for appeal ref. EA/2020/0106: "For the record the appellant believes CEM are charlatans and intrinsically dishonest and a corrupt unit".

51. The Appellant has continued to pursue his campaign against CEM over many years through freedom of information requests, legal proceedings and objections to the OSA. The Tribunal finds that the continuing pursuit of this grievance was the main motivation behind the Request.

52. In addition, the Appellant has admitted that pursuing CEM is commercially advantageous to him, observing in an email to Warwickshire County Council in 2013 that "it is financially advantageous for me to go to trial and the publicity and media details will be invaluable for my sites" [paragraph 12 of the Court of Appeal judgment].

Value or Serious Purpose

53. There was insufficient evidence before the Tribunal that the purpose of the Request was to enable the Appellant to approach pupils about test content or CEM clients, as the Information Commissioner suggested. However, the Tribunal also did not accept, as claimed by the Appellant, that his purpose was to help parents avoid inadvertently entering their child for the same tests. The Appellant produced no evidence that any parent had been pursued for fraud or breach of admissions policy. Fraud would require intent.

54. By contrast, there was evidence that the Appellant's purpose in publishing information about schools sharing tests was to enable parents to put their children in for the same test twice, thereby increasing their chances of success. A list of schools sharing tests in 2021 was published on his website, cem11plus.com, with the relevant test dates and the observation:

> "*Why pay £60 for a mock when you can use the Warwickshire 11+ as a free mock exam this year for CEM Centre tests. Tuition Centres can hire coaches to coordinate travel. It does not matter where you live, you can apply to take the Warwickshire 11+. It is free, you just need to pay to get there! Use it as an excuse to take your own test late. Let your child experience a real 11+ test.*" (Exhibit KB25 at page D374).

The Appellant did not dispute that this was genuine content from his website.

55. While there might be some benefit to parents in finding out 11+ assessment dates in advance, this was unlikely to be of material value, given that assessments take place in the same few weeks every year, and according to the Appellant, parents start preparing 12 months before. Any such value must be balanced against the University's view that it was in the public interest for all schools, parents, tutors and teachers to find out about test dates at the same time and through the same channels.

Distress

56. In relation to distress, the Tribunal accepted Ms Bailey's evidence that the Request, as part of the ongoing course of dealing between the University and the Appellant, caused significant distress to CEM staff. As noted in paragraph 47(e) above, the Appellant's correspondence and submissions often include allegations of dishonesty, perjury and racial discrimination which are hurtful and distressing to staff. The Appellant's conduct is at times bullying and threatening: if CEM provide information, he will interrogate it exhaustively and use it against them; if they do not respond, he will threaten them with complaints and appeals. When the CEM business was transferred to the University, the Appellant warned the new owners: "Cambridge may wonder what they have let themselves in for when buying CEM and now realise why Durham dumped it." [paragraph 13 of the Upper Tribunal decision in UA-2022-000620-GIA]. This upset CEM staff who feared that their dealings with the Appellant might impact on the transfer of the business. It is not necessary for the University to produce evidence of HR, medical or police involvement for the Tribunal to find that distress has been caused.

57. The Tribunal found the evidence of Ms Bailey credible and compelling. It found no evidence that Ms Bailey or her colleagues had acted dishonestly or had discriminated against the Appellant on grounds of race and noted that similar accusations by the Appellant had been rejected in other Court and Tribunal proceedings. The Tribunal accepted that the University's approach to the request from Ms Courtenay about schools sharing tests was consistent with its approach to the Request. Even if it had not been, a different response would have been justified on the basis of its previous course of dealings with the Appellant.

Other issues and conclusion

58. The Tribunal accepted Ms Bailey's evidence that the change in the University's approach to the Appellant's requests for information was due to the different approach taken by the University's legal team. The University was entitled to take a different approach, despite having provided information about schools sharing tests in previous years. Again, as Upper Tribunal Judge Wikeley said in relation to the Appellant's appeal ref. EA/2021/0075:

> *"…Durham's approach to earlier FOIA requests is neither here nor there. As the FTT correctly explained, "different public authorities can take different approaches towards answering FOIA requests, there is no requirement to refuse a request for vexatiousness even if a request has reached that threshold, and different public authorities will have a different context and background"* [paragraph 11, UA-2022-000620-GIA]

59. Having considered each of the themes suggested in *Dransfield* and taking a broad and holistic approach, the Tribunal concluded that the burden of the Request in the context of the previous course of dealings, combined with the Appellant's motive, lack of serious purpose and the distress caused to staff, meant that the Request was vexatious. The Request was, like the Appellant's application to the Upper Tribunal for permission to appeal in EA/2021/0075:

> "*a vehicle by which he seeks to pursue, by way of FOIA litigation, his own private grievance against the public authority and CEM*" [Upper Tribunal Judge Wikeley at paragraph 34, UA-2022-000620-GIA]

and thus, as per *Dransfield*, an inappropriate and improper use of a formal procedure.

60. The appeal is dismissed.

Signed: Judge CL Goodman Date: 22 July 2022