

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 July 2017

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

### Decision (including any steps ordered)

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1. The complainant made a freedom of information request to the University of Durham for details of candidates' test marks for 11+ exams set by the University's Centre for Evaluation and Monitoring. The University disclosed some of the requested information but withheld other information under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that the remaining withheld information is exempt from disclosure under section 43(2) and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner also found that the University breached section 10(1) (time for compliance) in its handling of the request but requires no steps to be taken.

### Request and response

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3. On 6 October 2016 the complainant made a freedom of information request to the University of Durham which read as follows:

*"Please could you provide test marks for the 11+ tests set by The University of Durham's Centre for Evaluation and Monitoring (CEM) in the Autumns of 2014, 2015 and 2016. For each candidate I would like to request the following information*

*1. School or consortium. (I understand from the Schools Adjudicator that different groups of applicants are 'locally standardised' so the reason for requesting this information is to identify which results have been standardised as a group.)*

*2. For each of the sub-tests set (numeracy, verbal reasoning and non-reasoning)*

*I would like to request*

*a. The raw test scores for each test before any age weighting is added*

*b. The candidate's birth month (or age in months if this is how it is recorded)*

*c. The raw score for each test with age weighting added, (or the amount of age weighting if this is how it is recorded)*

*d. The final standardised scores*

*e. The mean and standard deviation values used to calculate the standard scores.*

*Please could you provide the test marks in CSV or Excel spreadsheet format.*

*Secondly please could you provide details of the overall income CEM have received for setting these tests in 2014/15/16."*

4. The University responded to the request on 27 October 2016 when it confirmed that it held the requested information. However, it said that the information in parts 2(a) and 2(c) was being withheld under the section 43(2) (commercial interests) exemption and that it had concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure. For the remaining parts of the request the University said that it estimated that the cost of compliance would exceed the appropriate limit. It did, however, advise the complainant that it could provide the information for a single year.
5. The complainant subsequently asked the University to carry out an internal review and at the same time said that he wanted to limit his request to the data for the most recent tests undertaken in Autumn 2016 so as to bring his request within the cost limit.
6. The University presented the findings of its internal review on 19 December 2016 which upheld the application of section 43(2) to the information in part 2(a) and 2(c) of the request.

## Scope of the case

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7. On 3 January 2017 the complainant contacted the Commissioner to complain about the University's decision to withhold some of the requested information under the section 43(2) exemption.
8. During the course of the Commissioner's investigation the University disclosed the information at parts 2(b), 2(d) and 2(e). Therefore, the only information which continues to be withheld is the information at parts 2(a) and 2(c) and the Commissioner considers the scope of her investigation to be to consider whether this information was correctly withheld under the section 43(2) exemption.
9. The Commissioner has also considered whether the University breached section 10(1) (time for compliance) in its handling of the request.

## Reasons for decision

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### Section 43(2) – Commercial interests

10. The University has withheld the information in parts 2(a) and 2(c) of the complainant's request under the exemption in section 43(2) of FOIA which provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person, including the public authority holding it.
11. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the

Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

12. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case the University explained that its Centre for Evaluation and Monitoring (part of its Faculty of Social Sciences) is one of two main commercial providers in the UK of 11+ testing which is used by certain secondary schools to choose their intake of pupils. It argues that disclosure would prejudice its commercial interests by undermining its unique selling point and the commercial advantage it enjoys. The Commissioner accepts that the information relates to a commercial service and that the prejudice envisaged by the University falls within the scope of the exemption. The Commissioner is satisfied that this first element of the test is met.
13. As regards the nature of the prejudice the University explained that the success of CEM's exams is built on the fact that they are seen to be more resistant to tutoring and that it works hard to design tests that are as resistant to tutoring as possible. It refers to this as its unique selling point. It said that disclosure of the raw scores would enable both competitors and tutors to understand CEM's methods in a way that would undermine CEM's ability to reduce the effects of coaching for its tests so undermining its unique selling point. It is this unique selling point that has resulted, it says, in CEM achieving considerable commercial success in this market.
14. The University went on to say that countering the effects of coaching requires there to be uncertainty over the exact method of setting and scoring the 11+ tests. CEM's assertion that its tests are more resistant to tutoring is based on the fact that the structure of its tests is not made public (test papers are not published) and that it has a proprietary approach to marking/standardising. The University further explained that disclosing raw scores will reveal too much detail about the test, and encourage tutors to attempt to calculate test difficulty in an effort to teach children to focus on achieving the required number of correct questions, rather than attempting the whole test.
15. The University provided the Commissioner with a detailed explanation of the method by which a tutor may do this which it has asked to remain confidential. Therefore, the Commissioner is limited in what she can say about exactly why the exemption is engaged and she must be careful

not to give rise to the prejudice the University is trying to protect against by repeating that explanation in this notice. However, the Commissioner would say that the method described by the University provides a clear and convincing explanation of how this information could be used by a tutor to reverse engineer the data to influence how they coach students to be successful at the tests. This would prejudice its commercial interests because the Centre for Evaluation and Monitoring's (CEM) commercial success relies on the fact that its tests are more resistant to tutoring and are seen to be more resistant to tutoring. In the Commissioner's view a link can logically be made between disclosure and the prejudice being claimed, and that there is a real and significant risk of the prejudice occurring. This satisfies the second and third parts of the prejudice test.

16. The Commissioner would also highlight at this point that she has already issued two very similar decisions in cases involving requests for raw test results of the CEM's 11+ exams. In both cases the Commissioner found that the requested information was exempt from disclosure under section 43(2) and that the public interest in maintaining the exemption outweighed the public interest in disclosure.<sup>1</sup> The Commissioner adopts the same reasoning from her previous decisions which she finds also apply in this case.
17. The Commissioner also notes that her decision in one of these cases was subsequently upheld by the First Tier Tribunal at appeal. In that case the Tribunal found that the key question was whether disclosure would undermine the CEM's unique selling point that its tests are more tutor proof.

*"It is not necessary to understand in detail whether the data would aid the understanding of the test structure...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."<sup>2</sup>*

18. The complainant is aware of the Commissioner's previous decision and the ruling of the Tribunal. However, he appears to be of the view that the circumstances have changed following the decision of the University's main competitor for 11+ testing to disclose information

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<sup>1</sup> FS50566015 & FS50553969

<sup>2</sup> James Coombs v Information Commissioner [EA/2015/0226], para. 21.

regarding its test results. The Commissioner has considered this line of argument but does not accept that this changes things in any significant sense. The University still maintains that the reputation of its tests as being 'tutor proof' is its unique selling point. Disclosure would undermine this regardless of what information may or may not have been disclosed by a competitor. Indeed, it could be argued that protecting its USP is even more important and that the University may wish to place more emphasis on this to differentiate itself from a competitor. The Commissioner is satisfied that disclosure would undermine the CEM's unique selling point and therefore its position in a competitive market.

19. The Commissioner sees no reason to deviate from her previous decisions and for the reasons given above the Commissioner finds that section 43(2) is engaged. She has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

### **Public interest test**

#### **Public interest arguments in favour of disclosure**

20. The complainant argues that the public interest favours disclosure because access to the information is the only way in which the public can understand differences in the levels of difficulty needed to gain a place at different selective schools. He said that what constitutes "grammar school standard" when assessing pupils appeared to be rising and that disclosure would allow the public to understand these changes. He suggested that this would also help inform public debate on education policy.
21. The complainant also argued that because grammar schools are publicly funded it was in the public interest to know how they selected their pupils, especially at a time when the Government was recommending an expansion in selective education.
22. For its part the University acknowledged that there is a specific public interest in ensuring that school places are allocated fairly and in ensuring that there is accountability in the spending of public money.

#### **Public interest arguments in favour of maintaining the exemption**

23. The University argued that the public interest favoured 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 for their children by paying for private tuition. It said that countering the effects of coaching requires there to

be uncertainty over the exact method of setting and scoring the 11+ tests.

24. The University also pointed to the fact that CEM's main competitors are not subject to FOIA. It argued that there is a public policy decision that permits and encourages the University to engage in commercial activities and that the release of its intellectual property into the public domain would undermine its competitive position which would not be the same for organisations not subject to FOIA. It said that this was unfair and anti-competitive.
25. Finally, it said that the income from CEM was an important revenue stream for the University and that a reduction in this revenue stream would impact the public purse.

### **Balance of the public interest arguments**

26. The Commissioner has considered the competing arguments as well as her previous decisions and accepts that there is a public interest in disclosure insofar as this would promote transparency about how school places are awarded, especially given the controversial nature of grammar schools and the 11+ exam.
27. However, any public interest in disclosure must be balanced against the harm that would be caused to the University's commercial interests. In the Commissioner's view there is a strong public interest in protecting a system of 11+ testing which, so far as is possible, is resistant to tutoring. This ensures a fairer system for pupils attempting the 11+ exam and reduces the advantage enjoyed by pupils with more affluent parents.
28. The Commissioner is also of the view that in a competitive market a public authority's commercial interests should not be unduly prejudiced except where there is a compelling case for disclosure. The Commissioner understands that the University has invested a significant amount of resources into developing its testing system and that it is an important source of revenue. Prejudicing the commercial interests of the University in the manner the Commissioner has described would ultimately deprive the public purse of funds and have a negative impact on the University as a whole. As a result its ability to meet its core functions would be impaired and this would not be in the public interest.
29. The Commissioner has been guided by her previous decisions involving very similar requests for information. The Commissioner is not persuaded that there has been any change in circumstances that would shift the public interest balance or lead her to vary from her previous

findings. Consequently, the Commissioner has decided that the section 43(2) exemption is engaged and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Section 10 – time for compliance**

30. Section 10(1) of FOIA provides that a public authority shall respond to a request promptly and in any event within 20 working days of receiving the request.
31. The complainant has asked the Commissioner to consider whether the University breached section 10 in its handling of his request and in particular if it had breached this section by failing to respond 'promptly'.
32. The complainant made his request on 6 October 2016 and the University took until 27 October 2016 to complete its response – i.e. 15 working days following the date of receipt. The complainant appears to be arguing that this is not a prompt response since he had previously made similar requests and the University "simply reiterated old arguments for refusing to release this information". The complainant referred to the Commissioner's own guidance on the time for compliance under FOIA which states that:

*"an authority which provides its response close to, or on, the final day of the 20 working day limit ought to be able to both account for, and justify, the length of time taken to comply with the request."*<sup>3</sup>

33. The Commissioner has considered the complainant's arguments but does not accept that the University has breached FOIA by failing to respond to the request promptly. In the Commissioner's view a response sent 5 working days before the statutory deadline should, in the circumstances of this case, be considered a prompt response. Whilst she appreciates that some of the University's arguments for applying the section 43(2) exemption may echo their responses to previous requests, the University would have still had to consider the nature of the information requested and collate that information which will have been updated since any previous request. This would also need to be balanced against other priorities and any other requests the University will have received during the same period.

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<sup>3</sup> <https://ico.org.uk/media/1165/time-for-compliance-foia-guidance.pdf>.



34. Whilst the Commissioner is satisfied that the University has not breached FOIA by responding to the request when it did, the Commissioner has already explained that the University only disclosed some information to the complainant during the course of the Commissioner's investigation. Clearly this was done outside the 20 working day limit and so this amounts to a separate breach of section 10(1).

## Right of appeal

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35. 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)

36. 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.
37. 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** .....

**Paul Warbrick**  
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**Information Commissioner's Office**  
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