

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 January 2021

Public Authority: The Council of the University of Cambridge

Address: University Offices
The Old Schools
Trinity Lane
Cambridge
CB2 1TN

Decision (including any steps ordered)

1. The complainant has requested information about selective tests supplied by the Centre for Evaluation and Monitoring. The University of Cambridge ('the University') released some information and withheld other information under section 22 of the FOIA (information intended for future publication) and section 43 (commercial interests). The University advised it does not hold the remaining information the complainant has requested.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the University has released all the recorded information it holds that is relevant to part of question 1, and questions 4, 7, 8 and 9 and has complied with section 1(1) of the FOIA.
 - The University is entitled to rely on section 22(1) of the FOIA to withhold information within the scope of question 1, and the balance of the public interest favours maintaining this exemption.
 - The University is entitled to rely on section 43(2) of the FOIA to withhold information within the scope of question 2, and the balance of the public interest favours maintaining this exemption.

3. The Commissioner does not require the University to take any remedial steps.

Background

4. The Centre for Evaluation & Monitoring (CEM) is a research group providing formative assessments for children. In 2019 Cambridge Assessment and Cambridge University Press jointly acquired CEM.
5. In its submission to the Commissioner the University has explained that CEM is involved in developing and delivering 11+ tests to schools within the UK. The University says that CEM does not sell practice materials or revision guides and takes a proprietary approach to testing. This is to ensure, as far as is possible, fairness in the assessment process, and to make the assessments as resistant to tutoring and/or excessive preparation as is possible. CEM's revenue comes from the sale of CEM 11+ tests in the UK.

Request and response

6. On 26 December 2019 the complainant wrote to the University and requested information in the following terms:
 - "1. I would like to know which consortia/schools will share the same 11+ selective test supplied by CEM, Centre in 2020 (for 2021 entry) and if you have the information the main and supplementary testing dates agreed with the consortia and schools.
 2. 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.
 - 2 [b]. Which schools/consortia that did not use CEM Centre tests for 2019 will use them in 2020 (2021 entry)? [New clients]
 3. Which schools/consortia are that used CEM Centre tests for 2019 will not be using them for 2020 (2021 entry)? [Lost clients]
 4. Please disclose which party owns the copyright of each of the tests first taken in 2020 (for 2021 entry), the schools/consortia or the University?

5. Has CEM informed any of its clients using 2020 tests that the tests are suitable for reuse for late sittings?
 6. Has CEM provided any of its clients using 2020 tests that children do not remember sufficient content to make a difference to late sitters, including schools that rank on score alone?
 7. Has CEM undertaken any studies to demonstrate whether children recall content from its selective tests and whether reuse cannot disadvantage first previous sitters?
 8. Has CEM informed any clients using its tests in 2020 that the tests are resistant to preparation and provided any evidence to such a claim?
 9. Does CEM object to collation of test content gleaned from children who sit any of its selective tests?"
7. The University responded on 23 January 2020. It advised that it does not hold information within the scope of parts 5, 6, 7 and 8 of the request. It released information relevant to parts 3 and 4. The University released some information relevant to part 1 and refused to release some under section 22 of the FOIA. Finally, it refused the information requested in parts 2 and 2b under section 43(2) of the FOIA.
 8. The complainant requested an internal review on 24 January 2020. He disputed the University's response to parts 1, 2 (including 2b), 4 and 9 of his request. Following an internal review, the University wrote to the complainant on 14 February 2020. It upheld its response to the above four parts.

Scope of the case

9. The complainant contacted the Commissioner on 14 February 2020 to complain about the way his request for information had been handled. In his request for an internal review, the complainant had disputed the University's response to questions 1, 2, 4 and 9. In his complaint to the Commissioner however, the complainant expresses dissatisfaction with the University's responses to questions 1, 2, 4, 7 and 8.
10. For the sake of completeness, the Commissioner's investigation has focussed first on whether, on the balance of probabilities, the University holds further information relevant to questions 1, 4, 7, 8 and 9 of the request. She has then considered whether the University is entitled to withhold information requested in question 1 under section 22(1) of the

FOIA. Finally, the Commissioner has considered whether the University is entitled to withhold the information requested in questions 2 and 2b under section 43(2) of the FOIA, and the balance of the public interest.

Reasons for decision

Section 1 – right of access to information held by public authorities

11. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to him or her if it is held and is not exempt information.
12. In question 1 of his request, the complainant requested the following:

“I would like to know which consortia/schools will share the same 11+ selective test supplied by CEM, Centre in 2020 (for 2021 entry)...”
13. In its response to this element of the request, the University provided the names of such schools and groups of schools. In his request for a review the complainant said that the University’s response had not covered “many schools”. The University’s internal review response advises that it had interpreted this element of the request literally – as it should have done – and that the complainant had not requested a list of all consortia/schools taking the 11+ selective tests.
14. The Commissioner is satisfied that the University’s interpretation of the first part of question 1 of the complainant’s request was satisfactory and it released information it holds that is relevant to its interpretation of this part. The complainant had requested the names of consortia/schools sharing the same 11+ test and the University has released this information. The Commissioner therefore finds that the University complied with section 1(1) of the FOIA in respect of question 1.
15. In question 4 of the complainant’s request he asks which party owns the copyright of particular tests; the schools/consortia or the University. In response to this part, the University answered the University owns the copyright. In his request for a review the complainant queried whether London Borough of Bexley previously owned copyright. In its review response the University confirmed that London Borough of Bexley owns the copyright of CEM tests provided in that borough.

16. In its submission to the Commissioner the University has clarified the position concerning copyright. It says that as a matter of policy Cambridge does not sell its copyright to CEM's customers. The University confirmed that Cambridge has not assigned the copyright in any of CEM's tests for 2020 sittings, as it has only signed contracts in line with this policy. However, the Bexley contract pre-dated CEM's acquisition by Cambridge. The commencement date is 1 February 2018, is due to terminate on 31 January 2021 and covers sittings between September 2018 and 31 January 2021.
17. The complainant is dissatisfied as he considers that the University "lied" in response to question 4, "knew what [he] meant" and only fully addressed that question when challenged. As noted above, the FOIA concerns information held in recorded form. The FOIA does not oblige a public authority to answer general questions or give opinions. The Commissioner does not consider that question 4 is a clear request for recorded information. In so far as the University may hold recorded information that falls within the scope of the question, the Commissioner finds that at the point of its internal review, and on the balance of probabilities, it had fully addressed the complainant's question and provided the relevant information it holds. The Commissioner therefore finds that no breach of section 1(1) occurred regarding the University's response to question 4.
18. In question 7 of his request, the complainant asks whether CEM has undertaken any studies to demonstrate whether children recall content from its selective tests and whether reuse cannot disadvantage previous sitters of the test. In its response the University advised that it did not hold any relevant information. The complainant did not ask the University to review its response to this question. However, in his complaint to the Commissioner the complainant has disputed that the University does not hold any relevant information.
19. In a submission to the Commissioner the University has confirmed that it has not undertaken any studies of the kind the complainant has referred to. In the absence of any evidence the contrary, the Commissioner accepts this is the case and that therefore, on the balance of probabilities, the University does not hold the information requested in question 7 and has complied with section 1(1) of the FOIA.
20. In question 8 of his request, the complainant asks whether CEM informed any clients using its tests in 2020 that the tests are resistant to preparation and provided any evidence to such a claim. In its response the University advised that it did not hold any relevant information. Again, the complainant did not ask the University to review its response to this question but has disputed that the University does not hold any relevant information in his complaint to the Commissioner.

21. In its submission the University has confirmed that it does not hold this information. This is because it does not make this kind of claim in respect of CEM tests when marketing or selling to clients. The University says that this fact was made very clear to the complainant in two witness statements it submitted to the First-tier Tribunal (Information Rights) and shared with the complainant (and the Commissioner) in 2020 in the course of two appeals to the Tribunal. In the University's view it follows that it holds no records of any evidence being provided to clients in support of the claim that CEM tests are tutor-proof.
22. The University has added, for completeness, that information provided, or statements made in the course of any marketing or any sales pitches are not normally recorded in writing. The University says it is also the case that many of the clients using the CEM 2020 tests will be clients from previous years (or 'repeat clients'). They will already have been familiar with the attributes of CEM tests so it would not have been necessary to sell these attributes to them.
23. Finally, the University has confirmed it sought confirmation of these matters (ie questions 7 and 8) by speaking with its Head of Product and Assessment and the Director of Policy and Business Development. They in turn discussed the matter with their teams. They confirmed that no relevant records are held.
24. The Commissioner has considered the University's explanation. She notes that the witness statements the University has referred to were likely to have been provided to the complainant after he submitted this current request. However, in the absence of any evidence to the contrary, the Commissioner accepts the University's position and is satisfied that, on the balance of probabilities, the University does not hold information relevant to question 8 and has complied with section 1(1) of the FOIA.
25. In question 9 of his request the complainant asks whether CEM objects to the collation of test content gleaned from children who sit any of its selective tests. In its response to this part the University had provided the complainant with a copyright statement that is published in test booklets. In its internal review the University advised that question 9 was speculative and that it could not answer it as it does not hold any relevant information. It said it had provided the copyright statement as this was the most relevant information it does hold.
26. In his request for a review the complainant said he was dissatisfied with the University's response to question 9 as it could have answered "Yes" or "No" and that the text it provided was not helpful.

27. Unless it is responding "Yes, we hold relevant information" or "No, we don't hold relevant information" the FOIA does not oblige a public authority to answer "Yes" or "No" to a general question. As has been noted above, the FOIA concerns only information held in recorded form.
28. In its submission to the Commissioner the University has provided a background to this question. It has also advised that it is prepared to provide the complainant with clarification on its position regarding this question. The University is free to do that as a matter of customer service. However, from a FOIA perspective the Commissioner is satisfied that, on the balance of probabilities the University released all the information it holds that is of any relevance to question 9 and complied with section 1(1) of the FOIA.

Section 22 – information intended for future publication

29. Section 22(1) of the FOIA says that information is exempt information if a) it is held by the authority with a view to its publication, by the authority or any other person, at some future date b) the information was already held with a view to such publication at the time of the request for it and c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in a).
30. The University is relying on section 22(1) with regard to an element of question 1 of the request, namely the complainant's request for the main and supplementary testing dates agreed with the consortia and schools.
31. In its submission to the Commissioner, the University has confirmed that its customers publish the test dates for the exams they host when they deem appropriate before the test date. The University says that at the time of the request it did not know the date on which the information would be published, but it did know that its customers would publish the test dates before the 2020 tests.
32. The Commissioner has decided that the University was entitled to rely on section 22(1) of the FOIA to withhold the information about test dates requested in question 1. She is satisfied that at the time of the request the disputed information was held with a view to being published at a future date (by another person, namely the University's customers ie schools). The Commissioner notes that the University has advised that, in the interim, the test dates were indeed published. However, she considers that at the time of the request it was reasonable in all the circumstances to withhold the information until the publication date: it would be sensible to do so, fair to those concerned and in line with accepted practices.

33. The Commissioner notes that in his request for an internal review the complainant had stated that because it was not the University that would publish the test dates, section 22 could not be applied. The complainant is not correct. As above, section 22 of the FOIA refers to the information being published by the authority *or any other person*. In this case the other person was the schools that are the University's customers. The Commissioner has gone on to consider the public interest test associated with this exemption.

Public interest test

Public interest in disclosing the information

34. In his request for an internal review, the complainant argued that test dates are important to the public "as tests are shared and people need to know which tests are shared and when they are held".
35. There is also a general public interest in public authorities being open and transparent.

Public interest in withholding the information

36. The University considers that it was in the public interest that the test dates were withheld until such time as published by the schools. It strongly believes it is in the public interest that all interested parties (eg students, parents, private tutors or teachers) should find out about the test dates from the same channel and at the same time and that no student has any greater time to plan their study. The University argues that this leads to fairness in the process so that no candidate can gain an unfair advantage.
37. The University also believes that schools should be able to control how they communicate the test dates and at what time. It argues that they are best placed to take into account different circumstances, including adapting such communications for students with special needs.
38. Finally, the University has observed that this is not information that CEM's main competitor could be required to disclose. Disclosing the test dates in advance of disclosure by the schools would risk those students with access to private tuition gaining a head start on their preparation for CEM's tests. Candidates sitting CEM's competitor's test would not gain such a head start, as the competitor would not be compelled to disclose that information.

Balance of the public interest

39. The Commissioner does not consider that a compelling public interest case has been made for the release of the disputed information ahead of

its publication. She considers the public interest in transparency has been adequately met through the University's responses to other parts of the request. As such, the Commissioner is satisfied that there is greater public interest in all parties finding out the test dates at the same time and in a controlled way. This enables the process to be fair for all those taking the test.

Section 43 – commercial interests

40. Section 43(2) of the FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Section 43(2) is also subject to the public interest test.
41. The University is relying on section 43(2) to withhold the information requested in question 2 and 2(b). This is the names of schools/consortia, sharing the same 11+ test, that have indicated they will use CEM, but have not signed contracts for a particular reason. Question 2(b) is for the names of schools/consortia that did not use CEM tests in 2019 but will use them in 2020.
42. For section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the applicable interests within the relevant exemption.
43. The University has explained that at the time that request/question 2 was submitted CEM was in negotiations with potential customers about providing the 11+ test for the 2020 sitting. It says that if it were to reveal information about customers CEM was in negotiations with, this would provide CEM's competitors with an insight into which schools/consortia/authorities were not contractually bound to use CEM's assessments. This would enable those competitors to try and secure their business.
44. At the time that request/question 2(b) was submitted a potential customer had expressed an interest in using CEM entrance tests for 2020. The University says in its submission that it relied on section 43(2) to withhold this information for the same reasons as above. The Commissioner is satisfied that the envisioned prejudice associated with disclosing the information requested in questions 2 and 2(b) does concern commercial matters and commercial interests, which are protected by section 43.
45. Second, 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 that is alleged must be real, actual or of substance.

46. As above, the University has said in its submission that releasing the information in question 2 and 2(b) would provide CEM's competitors with an insight into which schools/consortia/authorities were not contractually bound to use CEM's assessments. This would enable those competitors to try and secure their business. The Commissioner is satisfied a causal relationship exists between releasing the withheld information and prejudice to CEM's commercial interests and that such commercial prejudice would be of substance.
47. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. The University's submission is not clear on this point but the Commissioner notes that in its refusal of question 2 and 2(b) it advised that disclosure "could" allow a competitor to contact the customer(s) and secure their business. As such, the Commissioner will assume that the University considers that the envisioned prejudice would be likely to happen rather than would happen. Nonetheless, she is satisfied that the chance of prejudice occurring is more than a hypothetical possibility and that it poses a real and significant risk.
48. Since the three criteria have been met, the Commissioner is satisfied that the information the complainant has requested in question 2 and 2(b) engages the exemption under section 43(2) of the FOIA. She has gone on to consider the public interest test associated with section 43.

Public interest test

Public interest in disclosing the information

49. The complainant has not provided any arguments for the information's disclosure in his request for an internal review, complaint to the Commissioner or subsequent correspondence to the Commissioner. As such, the Commissioner will take account of the general public interest in public authorities being open and transparent.

Public interest in withholding the information

50. In its submission to the Commissioner the University has again noted that its main competitor in the 11+ test market is not subject to the FOIA, and would not be required to disclose information about who it was in negotiations with to provide assessments. In the University's view it follows that there is a real and significant risk that disclosing this information would make CEM considerably less competitive against a

privately owned business. It considers that (as was accepted by the First-tier Tribunal (Information Rights) decision in *James Coombs v (1) Information Commissioner and (2) University of Cambridge*, [2020] UKFTT 2017/0166) there is a significant public interest in public authorities engaging in commercial activities to support higher education. The University argues that information should not be disclosed which would risk damaging CEM's position in the higher education market where that gain would go directly to CEM's privately owned competitors.

51. The Commissioner notes that in its refusal of these parts of the request the University advised the complainant that disclosure would have the added effect of potentially deterring CEM from making future investments in tests of a similar nature. It considered this would potentially undermine the public interest in there being a choice of such tests in the marketplace. The University also acknowledged that the public interest is served by being accountable and transparent in how public money is spent. It noted however that CEM is not in receipt of, or using, public money to develop and deliver the 11+ test to schools. The University said that these activities are funded solely by selling the tests to schools.

Balance of the public interest

52. The Commissioner finds that the public interest in the University demonstrating that is open and transparent has been met through its response to other parts of the complainant's request. In the absence of any compelling public interest arguments for disclosing the specific information requested in questions 2 and 2(b), the Commissioner is satisfied that there is greater public interest in the University and CEM being able to compete fairly in the higher education market (and in there being a range of 11+ tests available in that marketplace). At the time of the request this would have been more difficult to achieve had the requested information been disclosed.

Right of appeal

53. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.
55. 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

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