

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 October 2021

**Public Authority:** The Council of the University of Cambridge  
**Address:** Trinity Lane  
Cambridge  
CB2 1TN

### Decision (including any steps ordered)

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1. The complainant has requested information relating to 11+ tests provided by the Centre for Evaluating & Monitoring (CEM). The CEM is part of the University of Cambridge.
2. The University refused the request in accordance with section 14 (vexatious requests) of the FOIA.
3. The Commissioner's decision is that the request was vexatious and the University was therefore entitled to rely upon section 14 to refuse it.
4. The Commissioner requires no further steps.

### Request and response

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5. On 19 January 2021 the complainant requested information in the following terms:
6. *"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).*

*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.*

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

*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.*

*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)."*

7. The University responded on 12 February 2021 and refused to comply with the request in accordance with section 14.
8. Following an internal review the University wrote to the complainant on 10 March 2021, upholding its original position.

## **Background information**

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9. In order to assist the Commissioner with her investigation, the University has provided background information to this case.
10. The Centre for Evaluating & Monitoring (CEM) is involved in the development and delivery of 11+ tests in the U.K. The University of Cambridge acquired the CEM business from the University of Durham in 2019.

11. CEM markets its tests on the basis that they are as resistant to tutoring and excessive preparation as possible.
12. CEM's main competitor is GL Assessment Limited<sup>1</sup> which is a private company and therefore not subject to the FOIA. Unlike CEM, GL Assessment makes practice materials available for its assessments.
13. The complainant is the sole director and majority shareholder of a business, the functions of which include selling practice materials for 11+ tests, including tests provided by both CEM and GL Assessment.
14. CEM does not authorise or endorse the selling of practice materials for its own 11+ test, to do so would undermine CEM's own business model.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 12 March 2021 to complain about the way that their request for information had been handled.
16. The Commissioner therefore considers the scope of her investigation to be to determine if the University has correctly refused to comply with the request under section 14.

### **Reasons for decision**

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#### **Section 14 – vexatious requests**

17. Section 1(1) of the FOIA states that:

*"Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

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<sup>1</sup> [About Us - GL Assessment \(gl-assessment.co.uk\)](http://gl-assessment.co.uk)

*(b) if that is the case, to have that information communicated to him."*

18. Section 14 of the FOIA states that:

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

19. The term 'vexatious' is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that 'vexatious' could be defined as the '*manifestly unjustified, inappropriate or improper use of a formal procedure*'. The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.
20. The Dransfield case also considered four broad issues: the burden imposed by the request (on the public authority and its staff), the motive of the requester, the value or serious purpose of the request and harassment or distress of and to staff. A public authority may take these factors into account when considering if a request for information is vexatious.
21. The Dransfield definition confirms that it is important to consider proportionality and justification of any request before deciding it is vexatious.
22. The Commissioner has published guidance<sup>2</sup> on the factors that may typify a vexatious request. However, it is important to note that even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious and the request must be considered against the issues outlined above.
23. When considering the question of vexatiousness, a public authority can consider the context of the request and the history of its relationship with the requestor, as the guidance explains: '*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request.*'

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<sup>2</sup> [dealing-with-vexatious-requests.pdf \(ico.org.uk\)](https://ico.org.uk/dealing-with-vexatious-requests.pdf)

24. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: *'In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.'*
25. The Commissioner would like to emphasise that in all cases it is the request that is considered vexatious and not the requestor.

#### *The complainant's position*

26. The Commissioner notes that it does not fall upon the complainant to explain why the request is not vexatious; rather the burden falls upon the University to explain why the request is vexatious. In line with her processes, the Commissioner wrote to the complainant setting out the scope of her investigation and invited the complainant to submit any comments.
27. The complainant raised concerns that previous requests they had submitted to the University of Durham had not been deemed vexatious.
28. The complainant believes the University has misapplied section 14 in deeming all requests it receives from the complainant as vexatious.
29. The complainant also expressed concerns that the request had been refused on grounds of racial discrimination. The complainant singled out one member of staff specifically regarding this matter.
30. Ultimately, the complainant believes that the University's application of section 14 represents attempts by the University to shut down the complainant's business.
31. The complainant noted that a similar request to the University, made by another individual, had not been deemed vexatious. The complainant believes that the University's differing approach to these two requests acts as evidence of discrimination and the inappropriate use of section 14.

#### *The University's position*

32. To reiterate, the burden falls upon the University to explain why the request is vexatious. In explaining its position, the University has relied heavily upon the background and context in which the request has been made.

33. The University has explained that *'there is history of litigation between the complainant and various parties involved in the selling of the CEM 11+ test.'* The University believes such proceedings evidence the complainant's personal grudge against CEM and their persistent efforts to undermine the CEM business model.
34. The complainant was party to three sets of proceedings initiated by the previous owner of the CEM business, the University of Durham. The complainant had registered domain names that included the CEM name. Durham's complaints about such registrations were upheld on the grounds that they were registered in bad faith.
35. Furthermore, the complainant published the questions in the 2013 CEM 11+ test being run by Warwickshire Council in conjunction with CEM. The complainant had sourced the questions from candidates who had taken the test and, since the Council sat tests on different days for different school areas, the Council required the complainant to remove the material. The complainant failed to do so.
36. The Court of Appeal upheld a permanent injunction prohibiting the complainant from publishing or disclosing the contents of the CEM 11+ tests used by the Council and taken by candidates in the years 2013 to 2015.
37. The complainant appealed this injunction on the grounds that the candidates had not been told the material was confidential and, as the questions themselves are trivial and the publication had not caused any detriment, there was no breach of confidence. This appeal was rejected.
38. A similar incident occurred in 2018, where the complainant *'encouraged parents to ask their children about the content of the tests in the aftermath of the assessment, and to send those details either to the Appellant or to CEM.'*
39. In the 2018 proceedings, the presiding judge noted *'the complainant is so committed to the cause of challenging the integrity of 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 complainant's fixation permeated his evidence and undermined its reliability.'*
40. The complainant has also been involved in trade mark disputes relating to CEM - the complainant was unsuccessful in his attempts to undermine the University of Durham's rights to the CEM business trademark.

41. The complainant has also raised the issue of 'late sitters' several times with the Office of the Schools Adjudicator ('OSA').<sup>3</sup> Late sitters refer to pupils who take the CEM 11+ tests after the main sitting date for a variety of reasons, including illness or move to a different area. The complainant raised objections against late sittings on the grounds that pupils who have already sat the test may pass information onto these late sitters. The complainant is concerned therefore that the CEM 11+ test is not an accurate reflection of test takers ability and is in breach of the Schools Admission Code<sup>4</sup>.
42. The Commissioner understands that the complainant's appeals to the OSA have all been dismissed; the adjudicator taking the view that there was minimal risk of information being passed on to late sitters.
43. The complainant has also made multiple appeals to the First Tier Tribunal (Information Rights) against the Commissioner's decisions that various public authorities are entitled to withhold CEM 11+ test papers under section 43(2) (commercial interests).
44. The University has also explained that *'We believe that the complainant has made at least twenty-one requests of Durham and Cambridge since 2018... we consider that the requests go to the complainant's challenge to the integrity of the 11+ exam and, furthering his personal grievances with CEM.'*
45. The University has provided the Commissioner with a summary of the complainant's previous requests and the Commissioner notes that the following themes recur: whether CEM is able to evidence, or if it has ever provided its customers with evidence, of the tutor resistant nature of its tests; whether candidates can recall test content, and whether that compromises the tests sat by late sitters; test content; whether object to the collation of test content; the extent to which CEM 11+ plus test content is shared between schools and consortia; the identity of the copyright owner(s) of a number of CEM 11+ tests.

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<sup>3</sup> [Office of the Schools Adjudicator - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<sup>4</sup> [School admissions code 2021 \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

46. The University believes this evidences the complainant's unreasonable persistence and efforts to pursue their personal grudge against the CEM business model through an abuse of the FOIA.
47. The University has highlighted the intertwined nature of the complainant's legal appeals and requests under the FOIA. The University believes that the complainant uses requests made under the FOIA as a means to attempt to open up other avenues for potential litigation.
48. The University has explained that compliance with the request would put significant pressure on the University's resources and staff, specifically the small number of employees responsible for delivering CEM tests. These are staff who normally spend time working with and supporting schools utilising CEM tests. However, such resources have been diverted to deal with the complainant's FOIA requests, as well as threatened or actual litigation.
49. The University has highlighted 'The litigious context in which the requests themselves have to be handled places an added burden on these individuals, who have to ensure that they are aware of and tracking the progress of any related litigation and making appropriate contributions to any submissions which Cambridge is required to make.'
50. The University considers that the request is demonstrative of a pattern of requests, beginning with those made to Durham and continuing with the University, designed to elicit information to further the complainant's personal issues against CEM.
51. The University also notes that the complainant's requests and appeals '*often contain very serious allegations against CEM and its customers including, without limitation, unfounded allegations of dishonesty and racial discrimination.*'
52. Any type of discrimination is an extremely serious matter. To clarify, it is not the role of the Commissioner to investigate or comment on such allegations – it is simply her role to consider whether the request is vexatious. Whilst the Commissioner notes that unfounded accusations are one of the criteria that may typify a vexatious request, the inclusion of such an accusation on its own does not mean that a request is automatically vexatious.



*The Commissioner's view*

53. A public authority is not required to consider each request that it receives in isolation and, returning to paragraph 23, the context and history in which a request is made will often be a major factor in determining whether the request is vexatious. A request that, on the surface, appears benign may be vexatious when considered against the backdrop of the requestor's relationship with the public authority or, in this case, the CEM business. With this in mind, a request from one individual may not be considered vexatious but the same request from another individual might be.
54. This would explain why a similar request to the University, made by another individual, has not been deemed vexatious. However, that separate request is not the subject of this notice and therefore the Commissioner cannot comment any further on this matter.
55. The Commissioner notes that the request in question meets several of the criteria that may typify a vexatious request.
56. For example, the request appears to represent the latest in a series of requests designed to enact a grudge that the complainant has against CEM. To reiterate, the complainant's business sells unauthorised and unendorsed practice materials for the CEM 11+ tests. CEM markets its tests on the basis that they are as resistant to tutoring and excessive preparation as possible.
57. Furthermore, the request appears to represent the complainant's unreasonable persistence and attempts to reopen issues which have been dismissed by multiple supervisory bodies, including the Commissioner, the OSA and the courts.
58. This unreasonable persistence is demonstrated by the frequent and overlapping nature of the complainant's requests and the University notes *'the indications that responding to one request will generate more requests and correspondence, often overlapping and causing a burden.'*
59. As previously discussed the presence of one or more of these factors does not automatically mean that a request is vexatious and the key question is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the purpose that the request may hold.
60. Although the complainant may have set out with genuine purpose, and these requests continue to have purpose for the complainant themselves, these requests have drifted to the point of vexatiousness due to their persistent and burdensome nature.

61. The Commissioner recognises there may be some public interest in the 11+ test, specifically from parents of any children who take the test. However, she also considers that these parents would recognise the appeal for schools in utilising CEM 11+ tests and, in doing so, making the entry process for such schools as robust as possible.
62. The Commissioner considers that, whilst the information outlined in paragraph 45 is of significant interest to the complainant, there doesn't appear to be any wider purpose or value to this information. For this reason, the Commissioner does not consider that the burden compliance with the request would cause is justified.
63. Though the Commissioner accepts that the University itself is a large institution, the majority of the burden of dealing with the complainant's request is likely to fall upon a relatively small number of individuals who would be detracted from their usual duties in assisting schools utilising the CEM 11+ test.
64. Taking into account the context of the request and the complainant's litigation, both concluded and ongoing, in relation to the CEM business, the Commissioner considers that the request was vexatious and that the University is entitled to rely upon section 14 as a basis for refusing to comply with the request.

### **Other matters**

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65. The Commissioner notes that the circumstances of this case are extremely similar to [ic-39470-k8n4](#) and the Commissioner also considered this request vexatious.

## Right of appeal

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66. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

67. 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.
68. 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

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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