



Appeal number: EA/2017/0166/A

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

JAMES COOMBS

Appellant

- and -

**INFORMATION COMMISSIONER
UNIVERSITY OF CAMBRIDGE**

Respondents

Before:

**JUDGE MOIRA MACMILLAN
MRS ROSALIND TATAM
MR NIGEL WATSON**

Sitting in at Field House, London EC4 on 4 March 2020

Appearances:

**Mr Coombs representing himself
Mr Daniel Isenberg for the Information Commissioner
Mr Michael Armitage for the University of Cambridge**

DECISION

1. The appeal is dismissed.

REASONS

Background to Appeal

2. Mr Coombs made a request to University of Durham ('the University') on 6 October 2016 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 subtests set (numeracy, verbal reasoning, and non-verbal reasoning) I would like to request

a. The raw test scores 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 the setting these tests in 2014/15/16."

3. The University refused the information request made in paragraphs 2 (a) and 2 (c) in reliance upon section 43 (2) of the Freedom of Information Act 2000 ('FOIA'). This exemption allows a public authority to withhold information on the grounds of harm to commercial interests where it concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure.

4. The University explained that complying with the remainder of Mr Coombs' request would exceed the appropriate cost limit, but offered instead to provide the information requested at parts 2 (b), 2 (d) and 2 (e) of his request for a single year. A selection of these final standardised scores, with the appellant's birth month, was included in the Open Bundle.

5. Mr Coombs requested an internal review, following which the University upheld its initial decision. On 3 January 2017 Mr Coombs made a complaint under section 50 FOIA to the Information Commissioner.

6. The Commissioner investigated Mr Coombs' complaint and issued Decision Notice FS50661288 on 20 July 2017. The Commissioner upheld the University's decision, having considered whether 3 criteria had been met:

- Whether the actual harm which the University stated would (or would be likely to) occur if the information was disclosed related to applicable interests within the section 43 (2) exemption;
- Whether the University had demonstrated a causal relationship between the potential disclosure of the information and prejudice to the interest the section 43 (2) exemption is designed to protect. This prejudice must be real, actual, or of substance. And
- Whether the level of likelihood of the prejudice occurring was more than merely a hypothetical possibility. The Commissioner considered whether there was a real and significant risk of prejudice.

7. The Commissioner accepted the University's assertion that CEM's tests have a unique selling point ('USP') which provides a commercial advantage. This is that CEM tests are seen to be more resistant to tutoring than the tests produced by competitors. The University explained 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, since it would enable attempts to calculate test difficulty in an effort to teach children to focus on achieving a required number of correct questions rather than attempting the whole test. Therefore, disclosing the raw scores would undermine CEM's USP.

8. The Commissioner noted that she had already issued 2 very similar decisions in cases involving requests for information comprising the raw test results of the CEM's 11+ exams. In both cases the Commissioner had decided that the requested information was exempt from disclosure pursuant to section 43 (2). She did not accept Mr Coombs' assertion that the circumstances had changed since her previous decisions because one of CEM's competitors, GL Assessment, has since had certain raw data and standardised scores disclosed relating to its test results (pursuant to a FOIA request to North Yorkshire County Council).

9. The Commissioner considered the public interest in favour of disclosure. She noted the public interest in members of the public being able to understand the different levels of difficulty faced by pupils when applying for places at different selective schools. She also considered the public interest in promoting transparency about how school places are awarded.

10. Balanced against this, the Commissioner considered there to be a strong public interest in protecting a system of 11+ testing which, so far as possible, is resistant to

tutoring. The Commissioner further considered 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. She noted that CEM had invested a significant amount of resource in developing its testing system and that this had become an important source of revenue for the University. Depriving the University of this income would ultimately deprive the public purse of funds.

11. Having considered these competing factors, the Commissioner decided that the public interest in maintaining the section 43 (2) exemption outweighed the public interest in disclosure.

Appeal to the Tribunal

12. This Appeal was previously considered by a differently constituted First-tier Tribunal. That Tribunal's Decision has been set aside by the Upper Tribunal in a Decision promulgated on 4 April 2019¹. We have therefore considered Mr Coombs' Appeal afresh.

13. During the course of these proceedings the University of Durham has sold CEM to the University of Cambridge. The University of Cambridge has therefore replaced the University of Durham as Second Respondent. In this Decision, both universities are referred to as 'the University' for reasons of simplicity, and because both universities have, in turn, sought to protect the same commercial interest.

Mr Coombs

14. Mr Coombs's Notice of Appeal dated 3 August 2017 submits that the Commissioner was in error because circumstances have changed since her previous decisions in relation to earlier, similar requests. His Grounds of Appeal have been supplemented by subsequent submissions, which collectively may be summarised as follows:

- (a) CEM's claimed USP is untrue and misleading. In 2013 Buckinghamshire Grammar Schools began using CEM's 11+ tests, and initially described them as being 'tutor proof'. However, over time the (then) head of CEM, Professor Robert Coe, distanced himself from that description, for example in a September 2016 interview with the Guardian. In the same interview Professor Coe also stated that references to the tests identifying 'natural ability' had been withdrawn from CEM's publicity material.
- (b) Although CEM still markets its tests as being more resistant to tutoring, evidence shows that fewer state school students have 'passed' the Buckinghamshire 11+ tests since CEM's tests were adopted. Mr Coombs submits that the raw scores are being withheld by CEM in order to conceal

¹ UKUT 119 (AAC) GIA/2539/2018)

a gradual increase in the prior attainment of successful candidates. He states that Buckinghamshire Grammar Schools have terminated CEM's contract.

- (c) Mr Coombs strongly challenges whether publication of the raw data would enable pupils to be tutored in a way that would enhance their chances of passing the test. He asserts that tutors can work out relative test difficulty in any event using the published standardised scores.
- (d) Mr Coombs' position on whether section 43 (2) is engaged by the withheld information has varied over time. In his most recent submissions Mr Coombs contends that the exemption is not engaged, because he says CEM's financial position has changed over time and the information no longer represents a commercial interest. He states that that CEM's profits have fallen and there is no longer a USP capable of being harmed.
- (e) Mr Coombs submits that the University has not established a causal link between the disclosure of the information and the claimed prejudice. He contends that the only way disclosure could damage any commercial interest is if the claims the University has made about the tests are false, and this is something that would be revealed by publication of the raw data.
- (f) Mr Coombs seeks to rely on the Tribunal's decision in *Reading School v ICO and Coombs EA/2013/0227* in which he submits the Tribunal rejected an argument that publishing the 'normalised' scores for the school's entrance exam would lead to prejudice.
- (g) In terms of public interest, Mr Coombs adopts 6 public interest factors in favour of publication that were cited by the Tribunal in *Coombs v Information Commissioner EA/2015/0226*, namely:
 - i. A general public interest in openness and transparency over how school places are allocated;
 - ii. a specific interest in understanding how £1 million, revised during the hearing to £800,000, has been spent on selection tests;
 - iii. the general public interest in openness and accountability;
 - iv. the fact that publication will enable an objective assessment to be carried out of the operation of the selection tests;
 - v. the public interest in uncovering potentially unsafe practices; and
 - vi. the legal requirement that parents should be able to understand how school admissions procedures operate.
- (h) To illustrate the last of these, Mr Coombs refers to the 11+ tests administered in the towns of Dover and Folkestone, which he describes as having different pass marks. He submits that publication of the relevant raw data would enable parents to better choose which of the two schools' tests their children should apply to sit.
- (i) Mr Coombs also relies on the fact that the Tribunal's decision in *EA/2015/0226* was a majority decision, which he submits is an indication of a finely balanced decision.

The Information Commissioner

15. The Information Commissioner's Response dated 22nd of November 2017 maintains the analysis set out in the Decision Notice. This has also been supplemented by subsequent submissions which may be collectively summarised as follows:

(a) The only change in circumstance since the Commissioner's previous decisions is that CEM's main competitor, GL Assessment (GLA), had its raw test data provided by a client in respect of the test it administered on behalf of 2 grammar schools. This has no bearing on whether CEM will suffer commercial prejudice from disclosure of the information requested by Mr Coombs, because there is no evidence to suggest GLA considered its tests to have the same commercial USP as CEM's tests.

(b) The evidence Mr Coombs has produced, in support of his argument that CEM's tests are not tutor-resistant, and/or that they result in state school pupils having less favourable outcomes, is not relevant to the decision the Tribunal must make. The Tribunal does not need to determine whether CEM's tests are more tutor resistant than other tests, or whether they are perceived as such.

(c) The Commissioner suggests a 4-stage approach for the Tribunal to follow when deciding whether section 43 (2) is engaged:

(i) Does CEM market its testing to schools on the basis of the claim of 'tutor resistance'?

(ii) Do schools accept that claim?

(iii) Would disclosure of the requested information undermine the efficacy of that claim?

(iv) If so, would schools be less likely to engage the services of CEM?

(d) The Tribunal must decide whether the commercial interests of CEM are engaged and, if so, whether or not they are likely to be prejudiced by publication of the raw data. The Commissioner submits that CEM relies on the unknown nature of its tests when marketing them to schools. The fact that the structure, marking, and method of standardising results for the test is unknown is a USP for the product CEM produces. It is not necessary for a USP to be true in order to be commercially effective.

(e) However, the Commissioner would expect to see a causal relationship between the accuracy of CEM's claim to be 'tutor resistant' and whether schools accept that claim. She submits that, if the claim were not true, schools would be less likely to accept the claim and, as a consequence, purchase the tests.

(f) The issue of the accuracy of the USP may also be relevant to the balance of public interest, as there may be a greater public interest in preserving the confidentiality of a test that is ‘tutor resistant’ and thereby able to reduce the ability of more affluent families to increase their child’s likelihood of obtaining a place in a selective school.

(g) The Commissioner submits that the previous majority decision by the Tribunal in *EA/2015/0226* is not an indication that the decision was finely balanced, as previously pointed out by Judge Jacobs of the Upper Tribunal (*GIA/1880/2016*).

The University

16. The University’s Response, dated 5 September 2017, has also been supplemented by a number of additional submissions. These may collectively be summarised as follows:

(a) The University agrees with the Commissioner that the disclosure of some similar information relating to GLA is not relevant, because GLA’s commercial interests have no bearing on CEM’s commercial interests. CEM’s USP is that its tests are more resistant to tutoring than those of its rivals. There is no indication that GLA has made a similar claim.

(b) In terms of Mr Coombs’ reliance on the Tribunal’s decision in the *Reading School* case, the University submits that the Tribunal found that the requested data was capable of constituting a commercial interest, but that insufficient evidence of this had been before the panel.

(c) Although Mr Coombs refers to CEM describing the tests as ‘tutor proof’, this is not a claim CEM has ever made. The tests are marketed as being ‘resistant to tuition’. This aspect of the tests is reflected in the proprietary approach CEM takes to test content and to any information that could be used to discern content or structure.

(d) The University suggests a paradox in Mr Coombs position. He submits both that there is no evidence to support the view that publishing the raw data would enable tutors to ‘game’ the tests, and also that publication would enhance understanding of the relationship between the raw and the standardised scores.

(e) The University contends that it would be possible for a tutor to discern sufficient information from the raw data to enable the tests to be ‘gamed’, because a tutor could identify which parts of the test a pupil should focus on in order to obtain maximum marks. The University acknowledges that Mr Coombs is unable to fully assess this assertion, as he has not seen the confidential information.

(f) The University submits that the tests have and continue to be marketed on the basis that they are resistant to ‘gaming’. This is a USP.

CEM has obtained new business since 2016 on that basis and the risk of prejudice to its commercial interests is continuing. Rather than having had its contract with Buckinghamshire Grammar Schools terminated, due to the quality of the tests, CEM decided not to tender for the contract when the tender was renewed.

(g) The University agrees with the Commissioner that, in any event, it is not for the Tribunal to decide the extent to which the tests are ‘tutor resistant’. The issue the Tribunal must decide is whether there is a real and significant risk of CEM’s commercial interests being harmed by publication of the raw data

The Law

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

“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.

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

18. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

19. Mr Coombs has produced a substantial body of evidence in support of his appeal, including summaries from a House of Commons Select Committee in November 2016; media articles; academic research; other information about 11+ test outcomes and online material. It includes:

- a September 2016 Guardian interview with Professor Coe;
- media coverage of CEM’s contract with the Buckinghamshire Grammar Schools; and
- CEM’s own marketing material.

20. It also includes research by the Education Policy Institute which shows an increase in the number of privately educated pupils passing the 11+ in Buckinghamshire, and a decrease in the number of state pupils, between 2014 and 2017. Mr Coombs believes that the CEM standardisation scores (to two decimal places) conflates precision with accuracy, although he concedes that it meant an additional tie-breaker was not required to allocate the final place in a school.

21. The University produced 2 witness statements from Mr Robert Byatt, Head of Operations for CEM, who also gave oral evidence at the hearing. Regrettably, one of the statements with exhibits was produced only shortly before the hearing. We decided to admit this evidence as it was directly relevant to the issues we had to decide. We were also provided with the disputed information in a Closed Bundle.

22. Mr Byatt stated that CEM had never described its tests as ‘tutor proof’ but rather as ‘resistant to tutoring’ on the basis that the tests are not easily practised for. He provided a brochure - “Information for Parents” - that addresses a hypothetical concern about whether a child should be tutored for the test in the negative. He acknowledged that this aspect did not feature prominently in the CEM marketing material Mr Coombs had produced. However, he stated that it was a central feature of CEM’s conversations with schools, when CEM’s test model was explained.

23. Mr Byatt explained that CEM’s income from the test had peaked in or around 2018 but that it still actively competes for new business. It still markets itself on the basis that it takes a proprietary approach to testing methods, and aims to make the tests as resistant to tutoring as possible.

24. Part of CEM’s strategy in making its tests ‘resistant to tutoring’ is to not publish past papers or practice papers, or the algorithms used to produce the standardised scores. Only the broad outline of the test – the fact that it consists of verbal, non-verbal and maths sections – is in the public domain. This is in contrast to GLA, who Mr Byatt described as CEM’s main competitor, and who uses the revenue from publishing past papers and practice papers to subsidise the cost of the tests it offers.

25. Mr Byatt explained that the revenue generated by CEM’s tests went in part into University funds and in part to the development of new tests. The content of the tests was generally only refreshed each year since schools tended to like consistency. Were the raw data and other requested information to be published, CEM would have to re-write a significant portion of the tests and thereby incur significant costs.

26. Mr Byatt explained that CEM considers its tests to be of a higher quality than its competitors but acknowledged that they were also more expensive, in part because the cost was not subsidised. The ‘tutor-resistance’ of CEM’s test was a strong USP, although some schools and local authorities inevitably chose cost over quality.

27. Mr Byatt explained in outline in open evidence how the raw data, if published, could be used to tutor pupils in a way which encouraged them to focus on certain parts of the test to the detriment of others. Although the tests were invigilated, a large number of pupils took the test at the same centres on the same days. Invigilators would not be able

to tell if a pupil was disobeying the recorded instructions to answer certain questions at a certain point.

28. In closed evidence Mr Byatt explained in more detail how the raw data could be used to tutor pupils to spend longer on certain parts of the tests than others.

29. Mr Byatt stated that the testing procedure was subject to Internal Audit inspection, and that the setting / outcome of the tests was audited by peer review within the University. He thought CEM would be open to allowing academic researchers to access the data for further analysis. Evidence submitted by Mr Coombs suggested that a previous request by two University of Durham academics, had been denied access to raw scores.

Oral submissions

30. We were assisted by helpful oral submissions from all parties.

Mr Coombs

31. Mr Coombs submits that his evidence shows that CEM's claim of the tests being 'tutor-proof' is false. He contends that CEM's decision not to publish the raw data is about money rather than about the fair allocation of school places. The lack of published data contributes to unfairness in the school selection system since people on lower incomes are unable to prepare for the exam to the same extent as those who can afford tutors. He further argued that non-disclosure prevents public debate on CEM's unique approach to age weighting.

32. Mr Coombs further submits that publication of the data would enable parents to pick up on mistakes and to feed that back. He contends that, keeping the pass mark the same each year and not releasing the raw data, conceals the fact that the tests are becoming more difficult to 'pass' each year. He also cited the 2014 Schools Admissions Code, which states that Admission Authorities must ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group.

33. Mr Coombs argues that the Tribunal should consider the commercial sensitivity of the information over time, and that the raw data is no longer commercially sensitive.

Information Commissioner

34. The Commissioner submits that the efficacy of CEM's marketing claim that the test is tutor-resistant is not relevant to the Tribunal's decision on whether section 43 (2) is engaged. If the schools purchase the tests because they believe the tests to be tutor-resistant, and if a commercial impact of publication is that the schools will no longer believe the USP, then the section 43 (2) criteria has been met.

35. The Commissioner submits that, although Mr Coombs challenges the assertion that the raw data could be used by tutors to ‘reverse engineer’ the tests, he himself intends to ‘reverse engineer’ the data for a different purpose if it is released.

36. In relation to the balance of public interest, the Commissioner submits that this is correctly described in paragraphs 27 and 28 of the Decision Notice under appeal. The reference in paragraph 27 to the public interest in protecting a system of 11+ testing which is resistant to tutoring should be read with the preceding sentence, and should be understood in the context of protecting CEM’s commercial interests.

37. The Commissioner submits that there is also a significant public interest in maintaining a competitive market, particularly in circumstances where a competitor is not subject to obligations under FOIA.

The University

38. The University submits that the Tribunal must consider the commercial sensitivity of the information at the date of request, although in fact this has not changed over time. It submits that the tests were marketed as ‘tutor resistant’ at the date of the request, and that there is a real and significant risk of harm to CEM’s commercial interests if the requested information is published.

39. It contends that Mr Coombs’ example of the different outcomes of the tests administered by Dover and Folkestone, and of the use that parents could make of the raw data if published, namely choosing the test their child is more likely to pass, makes the University’s point about the use that could be made of the withheld information.

Conclusion

40. We have considered whether the withheld information is commercially sensitive and have asked ourselves the Commissioner’s four suggested questions.

41. Have the tests been marketed to customers as being ‘tutor resistant’? We find that they have. We found evidence to support this view in CEM’s ‘Selection Assessment Services’ document (RB/1) where a section headed ‘Resistance to Tuition’ sets out the approach described by Mr Byatt. Mr Byatt also confirmed that subject was also regularly discussed with schools and other potential clients. Although Mr Coombs suggests that CEM has used the term ‘tutor-proof’ to describe the tests, there was no evidence before us of CEM having employed this term.

42. Further, Mr Coombs implicitly accepts that the tests are marketed as ‘tutor resistant’, although he submits that this description is misleading, relying in part on statistics that suggest a higher number of privately educated children had passed the 11+ since CEM’s tests were introduced in Buckinghamshire.

43. We conclude that the truth or otherwise of CEM’s description of the tests as ‘tutor resistant’ is not relevant to the decision we have been asked to make. We are satisfied that the tests are marketed as such.

44. Do schools accept that claim? The only documentary evidence of this before us is in the customer feedback section of CEM's marketing material (RB/1). Only one part of this page refers directly to the claim that the tests are 'tutor resistant', and it does so by reference to the lack of published practice material.

45. Mr Byatt's evidence is that the tests are more expensive for the schools to purchase than those produced by CEM's leading competitors. He further explained that the main competitor's business model includes subsidising the costs of the test by selling practice papers. CEM's view is that the schools believe its claim and that this USP is an important element in the decision the schools make. We note that Mr Coombs has not suggested an alternative explanation for why some schools choose CEM's more expensive tests rather than GLA. We find that the schools who purchase CEM's tests accept the claim that they are 'tutor resistant'.

46. Would publishing the withheld information undermine the efficacy of the claim? All parties accept that publishing 3 years of data would not by itself reveal the test content, or the educational background of individual students and their results. However, we accept the University's submission that putting the withheld information together with other publicly available information would potentially provide information of this nature. The Panel reached this conclusion having considered the closed information. We find that publishing the information would undermine the efficacy of CEM's claim that the tests are 'tutor resistant'.

47. We are satisfied that the truthfulness or otherwise of this claim is not a matter we have to decide. We are satisfied that publishing the information would assist those who wanted to learn more about the structure of the tests, in order to focus preparation as a means of maximising potential marks, and this would reduce the 'tutor resistance' of the tests themselves.

48. Would schools be less likely to engage the services of CEM if the raw data is published? Mr Byatt explained that schools have two main considerations, cost, and quality. Although CEM is confident that the quality of its tests is higher, so is the cost. We find that publication of the raw data would remove the USP of CEM's tests for the reasons already given. In addition, if the data were published, students could be tutored to prepare for tests without CEM obtaining their competitor's financial benefit of obtaining revenue from publishing past tests and practice papers. As a consequence, CEM would need to either to change their business model or to rewrite the tests.

49. Having considered all of these issues, we find that the withheld information was commercially sensitive at date of request and that the section 43 (2) exemption is engaged.

50. We further find that prejudice to CEM's commercial interest is likely to occur if the information is published. We have heard evidence of a potential contract where CEM's bid to provide a higher quality test was rejected in favour of a competitor's lower cost. We find that part of the perceived quality of CEM's test is the claim that they are more 'tutor resistant'. We conclude that there is a real and substantial risk that this quality of CEM's tests would be diminished by publishing the withheld information.

Public interest.

51. We have considered each of the public interests in favour of disclosure put forward by Mr Coombs

52. We agree that there is a significant public interest in openness and transparency about the allocation of school places. We find however that there is already a high degree of transparency about this process, with a high volume of information already in the public domain. We find that some of the arguments put forward by Mr Coombs in support of this interest amount to private interests, such as the choice of parents whether to enter their child for the 11+ test in one location or another.

53. We find that there is also a significant public interest in the process for and outcome of the allocation of places by selective schools, which is an inherently political subject.

54. We accept Mr Coombs' submission that there is a public interest in knowing how public money has been spent on school tests but find that the withheld information does not assist with this. The public already know how the schools have spent their money in terms of the tests having been purchased. We consider there to be an important public interest in knowing whether this money has been well spent. We note that there are a number of governance mechanisms in place to monitor how school's funds are spent.

55. We agree that there is an important public interest in an external, objective assessment of the quality of 11+ tests but we are not convinced that this would be furthered by the release of this information. The proper procedure for quality assurance is through academic research, as Mr Coombs himself has suggested. We note that the University indicated in oral evidence that it would be open to providing relevant data to academic researchers for such a purpose.

56. We have interpreted Mr Coombs' assertion of a public interest in uncovering potential unsafe practices as referring to uncovering flaws in CEM's standardisation model, the statistical modelling in general and/or mistakes in the allocation of individual marks. We find that this relates more to the publication of peer review information, than to the underlying raw data. Mr Coombs has suggested that anyone with an interest should be able to carry out a review of these issues. We note that less information is made publicly available about the 11+ test than some other public exams. However, having considered the closed material, we have seen nothing that gave rise to a concern that the practices of CEM are in any way questionable, or suggestive of malpractice, or of inherent unreliability in the processes followed.

57. We agree that, as a matter of law, parents should be able to understand school admissions procedures. We find that schools admissions procedures are always public, since all schools publish admissions criteria and other relevant information is made available by the Department for Education.

58. We agree that there may be a public interest in understanding any discrepancies that might exist between the withheld material and CEM's public statements, although this may not be relevant for the purposes of this exemption. However, we find that there is no evidence before the Tribunal that any such discrepancy exists.

59. We do not agree with Mr Coombs that an apparent gradual increase in the prior attainment of students going to grammar school was a matter of significant public interest with regard to this disputed information

60. We have considered whether there is a public interest in understanding the precision of the processes CEM applies in relation to the age standardisation process. We concluded that a high level of precision in this context did not necessarily give rise to an important public interest. We note Mr Byatt's evidence that the decision as to how its age standardisation process should be applied was taken by each customer. We find that much of this information is already in the public domain as a consequence.

61. We have considered the public interests in favour of the information being withheld. We note that Mr Coombs' request was for all of the raw data for a period of 3 years (subsequently restricted to data for 2016 only). We find that such a large volume of data is more likely to undermine commercial competitiveness of CEM.

62. We consider there to be a weighty public interest in supporting commercial enterprises by a public authority, including where the authority has a USP which it believes to be in the public interest for a wider policy reason. We find this to be the case, even if the commercial enterprise does not achieve the public policy outcome the authority believes it to. In this case, we have seen no evidence to suggest that the public policy outcome intended by the University has not been achieved, but our decision has been made on the basis of CEM's commercial interests, rather than the wider public policy.

63. We have considered the fact that the withheld information would not provide Mr Coombs with information to address many of his concerns about selection. For example, the raw data does not contain information about whether students receive free school meals, their home address, or their ethnicity.

64. We are not persuaded that the Buckinghamshire schools situation adds a public interest to this data request, given the number of factors involved in the change in the profile of applicants who 'passed' the test in different years. Neither would the withheld information assist parents in the Dover and Folkstone situation, because the currently published information allows them to assess the respective supply and demand at each school.

65. We accept that transparency is a value built into FOIA, but note that this must be subject to the outcome of the balance of public interests for and against disclosure.

66. We find that there is an important public interest in a public authority engaging in commercial activities in order to support higher education and in protecting its commercial interests, over and above CEM's public purpose and ethical approach. Were the withheld information to be disclosed, we find that the commercial viability of CEM is likely to be prejudiced, with a consequential commercial gain going to its privately-owned competitors.

67. We find that it is in the University's commercial interests that the raw data is not disclosed. We note that the University says this is bound up with the broader public

interest of achieving fairness in the allocation of school places, although this is not directly relevant to our decision about prejudice to its commercial interests. However, we further note that the University's reference to 'fairness' is made in the context of tests that it claims are more likely to identify the academic potential of students than those of its competitors. This is part of CEM's USP.

68. We find that there is a significant public interest in not releasing the intellectual property of a public authority into the public domain, in circumstances where it will be made less competitive against a privately-owned business.

69. Having considered all of these factors we find, on balance, that the public interest in withholding the information pursuant to the exemption in section 43 (2) outweighs the public interest in disclosing the information.

70. The Decision Notice of 20 July 2017 is upheld.

71. In the normal way a copy of this Decision was sent to the Commissioner and to the University for them to check the draft and make representations as to whether any parts of the Decision should not be disclosed. The version of the Decision provided to Mr Coombs and promulgated generally will have been redacted and/or edited if necessary in light of such representations

(Signed)

Judge Moira Macmillan

DATE: 13 May 2020