

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2021

Public Authority: The Governing Body 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 11-plus test results and information associated with researchers seeking access to the National Pupil Database. The University of Cambridge ('the University') withheld the raw test result data under section 43(2) of the FOIA (commercial interests), released standardised test result data and advised it does not hold the information associated with researchers.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the University does not hold the information the complainant has requested about researchers and complied with section 1(1)(a) in respect of this part of the request.
 - The raw 11-plus test result data that the complainant has requested is exempt information under section 43(2) of the FOIA 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 and context

4. In October 2016 the complainant submitted a request for information to the University of Durham for the Centre for Evaluation and Monitoring's raw and standardised 11-plus test results, for tests taken in the autumn of that year. The University of Durham's response to the request resulted in the Commissioner's decision in FS50661288 in which she found that some of the requested information – the raw scores - could be withheld under section 43(2) and that the balance of the public interest favoured maintaining this exemption. The University of Durham subsequently sold the Centre for Evaluation and Monitoring (CEM) to the University. The First-tier Tribunal (FTT) upheld the Commissioner's decision in [EA/2017/0166/A](#) in a judgement promulgated in May 2020. In February 2021 the Upper Tribunal refused the complainant permission to appeal that FTT decision.

Request and response

5. On 6 March 2020 the complainant wrote to the University and requested information in the following terms:

" ... I would like to submit a new request for the [a] raw and [b] standardised test results from 2016 and request that you give due attention to my request taking into consideration all relevant factors including the two above items. In addition I would like to request raw and standardised results tests taken in 2017, 2018 and 2019.

[c] My second request arises from the evidence given by the witness who confirmed that CEM support evidence based research and explained that, whilst CEM consider my request for anonymous information to be exempt under FOI legislation, this information is made available to researchers. I assume that for research purposes rather than general public release this includes personal data held by CEM allowing this to be linked to other data sources such as the National Pupil Database (NPD). I would like to understand what measures CEM have in place to ensure that any such requests are properly vetted. For example, access to the NPD is only granted to researchers who have undergone the Office for National Statistics rigorous program of training and accreditation. Please provide copies of

1. Policy documents explaining the requirements for researchers
2. Guidance notes issued to those requesting access
3. Pro-forma non-disclosure agreements

4. The log of researchers who have been granted access and their research objectives.”
6. The complainant’s request is essentially for the same information he had requested in October 2016 that led to the Commissioner’s decision in FS50661288; for the 2016 information but also for the intervening years: 2017-2019.
7. The University responded on 3 April 2020. It refused part [a] of the request for raw test results for the period 2016-2019 under section 43(2) of the FOIA and advised that it considered the public interest favoured maintaining this exemption. The University released information within the scope of [b] for the period 2017-2019, advising that the University of Durham had already supplied the standardised test results for 2016 to the complainant. The University said it did not hold the information requested at part [c].
8. The complainant requested an internal review on 30 April 2020, disputing the University’s response to part [a]. The complainant also requested the information within the scope of part [b] to be provided in Excel spreadsheet format.
9. Following an internal review the University wrote to the complainant on 26 May 2020. With regard to part [a] of the request, the University upheld its original refusal.

Scope of the case

10. The complainant contacted the Commissioner on 15 June 2020 to complain about the way his request for information had been handled.
11. The complainant disputes the University’s reliance on section 43(2) to withhold the raw test results for 2016-2019. The complainant also considers that the University holds information within the scope of part [c] of his request. He says that evidence given by the University’s expert witness to “the Tribunal in March 2020” suggests that such policy documents are held.
12. The Commissioner’s investigation has first considered whether, on the balance of probabilities, the University holds information within the scope of part [c] of the request. She has then considered whether the University can rely on section 43(2) of the FOIA to withhold the information requested in part [a], and the balance of the public interest.

Reasons for decision

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

13. 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.
14. The complainant considers that the University holds information falling within the scope of part [c] of his request; namely information on its requirements for researchers seeking access to the National Pupil Database (NPD) and information associated with any researchers who have been granted such access.
15. In its submission to the Commissioner, the University says that it has not decided to make personal data from the NPD available to researchers. It has therefore not prepared the kinds of documents referred to in part [c] of the request and that explains why the University does not hold the information requested.
16. The University notes that the request arises out of a remark made by its witness at the oral hearing before the FTT in EA/2017/0166/A. At this hearing, the witness had said that he thought the University would be open to allowing academic researchers to access such data for further analysis. However, the University says, the witness had not said that “this information is made available to researchers”, which may have been the complainant’s recollection of the witness’ evidence. The University concludes by confirming that it does not make personal data from the NPD available to researchers.
17. The Commissioner sees no reason to dispute the University’s position – that the complainant may have mis-remembered what its witness at the FTT hearing said as, at that time and currently, the University does not give researchers access to the NPD. That being the case, the Commissioner accepts that the University would not hold information falling within the scope of part [c] of the request. She is therefore satisfied that the University complied with section 1(1)(a) of the FOIA with regard to that part.

Section 43 – commercial interests

18. The University is relying on section 43(2) of the FOIA to withhold the information requested in part [a] of the request, namely raw 11-plus test results for the years 2016 to 2019.

19. The University introduces its section 43(2) submission to the Commissioner by noting the FTT decision in EA/2017/0166/A. It has also noted that the Commissioner had found section 43(2) to be engaged in earlier complaints that the complainant had brought to her about similar requests for raw test scores submitted to the University and the University of Durham, that go back to 2014.
20. In the University's view, the subject-matter of the present request has therefore already been subjected to detailed scrutiny by the Commissioner and the FTT. It therefore maintains that the findings in EA/2017/0166/A are entirely transferable to the current request.
21. 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 subject to the public interest test. In cases where information is exempt from disclosure the information may still be disclosed if the public interest in releasing the information is greater than in maintaining the exemption.
22. 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.
23. The University has explained that the CEM business (which the University now owns) develops and delivers the CEM 11-plus test. It competes against another key provider of entrance tests, namely GL Assessment (GL). Unlike CEM, GL is a wholly private body. The information the University is withholding relates to the delivery of the CEM 11-plus test. Its disclosure would, the University says, harm its commercial interest in the delivery of that test.
24. The Commissioner is satisfied that the prejudice the University envisions does concern commercial matters and commercial interests, which are protected by section 43.
25. 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.

26. The University has referred to paragraphs 41 to 50 of the FTT judgement EA/2017/0166/A. The University says it follows that the commercial interest relates to its ability to compete on the market for the 11-plus examinations.
27. In paragraphs 41 to 50 of the FTT judgement the following points are discussed:
- Whether the tests have been marketed to customers as being 'tutor resistant' and whether schools accept that claim – with the FTT finding, for both, that they have.
 - That CEM's tests are more expensive for schools to purchase than those produced by CEM's leading competitors and that the main competitor's business model includes subsidising the cost of the test by selling practice papers.
 - Whether publishing the withheld information in that case (ie the 11-plus test raw data) would, by putting this together with other publicly available information, undermine the efficacy of the 'tutor resistant' claim – with the FTT finding that it would.
 - Whether publishing the raw data would remove CEM's tests' unique selling point (that they are tutor resistant) – with the FTT finding that it would.
 - That CEM's commercial interest is likely to be prejudiced if the information is published.
28. It is the University's position that these points remain valid in the current case. It says that disclosing the raw test scores would allow tutors to garner a significant amount of information about the CEM 11-plus test and make it easier for them to coach future candidates. If it became easier to coach future candidates, this would undermine the University's attempts to make the CEM 11-plus test as resistant to tutoring as possible and so ensure that the results reflect a student's academic ability.
29. The University has referred to the detailed explanation of precisely how the requested information would assist tutors given by its witness in EA/2017/0166/A. It has confirmed that the CEM 11-plus test's unique selling point is that it is more resistant to tutoring than other rival tests, and the test has achieved commercial success as a result of this marketing strategy. Since disclosing the requested information would serve to undermine this unique selling point, there would be a causal link between disclosure and prejudice to the University's commercial interests.

30. The Commissioner is satisfied a causal relationship exists between releasing the withheld information and prejudice to the University's commercial interests and that this envisioned prejudice is of substance. This is because releasing the requested information would, when put together with other information in the public domain, give tutors insights into the CEM 11-plus test that they otherwise would not have. At paragraphs 27 and 28, the University's witness in EA/2017/0166/A described in open and closed evidence how disclosing the raw data could be used to tutor future students. Disclosure would therefore potentially undermined CEM tests' unique selling point – that they are tutor resistant.
31. 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. In its response to the request the University advises the complainant that disclosing the raw test data "would" prejudice its commercial interests. And in its submission to the Commissioner the University again seems to suggest that the envisioned prejudice "would" occur. The Commissioner does not consider that the University has presented enough evidence to support the position that the envisioned prejudice would – definitely - occur. However, she is satisfied that the envisioned prejudice would be likely to occur ie that that the chance of the University's commercial interests being prejudiced is more than a hypothetical possibility and that there is a real and significant risk of it occurring.
32. The Commissioner has also considered the complainant's correspondence to her. Of relevance here, in correspondence of 15 June 2020 the complainant discusses: the University's handling of his request; the wider context and the motive behind his request; an explanation of standardised scores and raw scores; the Commissioner's and FTT's past decisions; whether CEM's tests are 'tutor resistant' and matters of reality or perception ie not whether CEM's tests *are* 'tutor resistant' but whether grammar schools perceive them to be. In the complainant's view there is no strong evidence to support the University's position that grammar schools continue to select the CEM tests specifically because they consider them to be more resistant to tutoring than GL's.
33. However, the complainant's discussion has not persuaded the Commissioner that the information in question does not engage the section 43(2) exemption. That some schools choose to purchase the more expensive CEM tests, over rival tests available, suggests to the Commissioner that those schools do perceive CEM's tests to have a unique selling point – that they are more 'tutor resistant' than other tests. The Commissioner therefore continues to accept that the CEM

tests have a unique selling point that provides a commercial advantage. As such, as at the point that the complainant submitted his similar request in 2016, she is satisfied that in 2020: the harm that the University alleges would be likely to occur if the withheld information was disclosed relates to its commercial interests; that there is a causal relationship between disclosing the information and the envisioned prejudice occurring; and that the envisioned prejudice is of substance. This is the case irrespective of some of the withheld information being four years old at the time of the request.

34. Since the three criteria have been met, the Commissioner is satisfied that the raw 11-plus test scores for four years that the complainant has requested 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 releasing the information

35. In his correspondence of 15 June 2020 the complainant presents the following arguments for disclosure:
- Public authorities being transparent in their decision making and in this particular case transparency over whether the allocation of school places is based on sound decision making.
 - Knowing how £1 million of public funds is being used.
 - Enabling an objective assessment of the operation of a test that is used in selection within the education system.
 - Uncovering potentially unsafe practices.
 - A view had been expressed in an earlier FTT appeal in 2016 - [EA/2015/0226](#) - that disclosing 11-plus raw scores was necessary to expose the “highly questionable” “tutor-proof” claim.
 - By law parents should be able to fully understand how schools select those they admit. In particular disclosure would mean:
 - Being able to observe longitudinal changes in difficulty in getting into a particular school. In 2014, The Guardian reported, “A sharp rise in non-Bucks children sitting the 11 plus, possibly commuting into the county to practise the test from other areas, appears to have pushed up the pass rates and squeezed out some local applicants.” Without the raw test marks, it is not possible to validate this.

- Understanding the relative difficulty of getting into different grammar schools. Slough's grammars set a pass mark. Nearby Reading grammars are super selective. There is a perception this creates an unfairness because Slough children can apply to the super selective grammar Reading schools with a fallback position of going to a local grammar but children from Reading do not have the same opportunities. Withholding the raw marks prevents this perception being validated.
 - Calculating age weighting to the exact day means admissions effectively becomes a date of birth lottery. Regardless of whether that is right or wrong, disclosing raw marks would mean that CEM has to justify its decision making to the wider public.
36. In correspondence on 18 February 2021 the complainant also drew the Commissioner's attention to articles in 'Schools Week' and the 'Times Educational Supplement' that discussed the inclusion of 11-plus entry test data in the National Pupil Database and there being too little transparency in the tests.

Public interest in maintaining the exemption

37. In its submission to the Commissioner, the University has confirmed its view that the commercial prejudice it is relying on would not be outweighed by the public interest. The University considers that the public interest would, in fact, be undermined by disclosing raw test scores. Keeping this data secret, it says, promotes fairness in the assessment process by reducing the advantage that students with more affluent parents might gain from private tuition. Keeping this data secret also ensures that the market for developing and delivering such tests is not distorted through, in this case, the University's ability to compete being damaged. And, more generally, it ensures that the playing field between the University and GL, its main competitor, is a level one. The University argues that if it, as a public body, had to disclose commercially sensitive information and GL, which is a private body, did not, the playing field between these public and private providers of 11-plus examinations would not be a level one.
38. Of further relevance, the University says, is the fact that disclosing the requested information would not just damage its ability to compete, it would have the added effect of potentially deterring the University from making future investments in tests of a similar nature. This could undermine the public interest in there being a choice of such tests in the marketplace. The University notes that there is a general public interest in promoting openness and accountability in how public money is spent.

But, it says, that public interest is significantly outweighed by the specific public interest in avoiding harm to the University's ability to compete fairly on the market for 11-plus examinations.

39. The University also adds that it is not in receipt of, or using, public money for the purposes of developing and delivering the CEM 11-plus test to schools. These activities are funded solely through the sale of the tests themselves

Balance of the public interest

40. The Commissioner has considered all the circumstances of the request and the competing arguments of both parties. She has also been guided by her decisions in previous cases that involved requests for very similar information.
41. The complainant has put forward the public interest arguments for disclosing CEM's 11-plus raw scores that were discussed in the FTT appeal EA/2015/0226 from April 2016. The Commissioner notes that, in that case, the FTT had nonetheless dismissed the complainant's appeal against the Commissioner's decision that the University of Durham could rely on section 43(2) to withhold the raw scores and that the public interest favoured maintaining the exemption.
42. 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.
43. There is certainly 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-plus exam. However, the Commissioner remains satisfied that there is a stronger public interest in withholding the requested information, for the following reasons that she outlined in FS50661288.
44. First, to protect a system of 11-plus testing which, so far as is possible, is resistant to tutoring. This ensures a fairer system for pupils attempting the 11-plus exam and reduces the advantage enjoyed by pupils with more affluent parents. Second, in a competitive market a public authority's commercial interests should not be unduly prejudiced except where there is a compelling case for disclosure. Finally, the University has invested a significant amount of resource into developing its testing system and it is an important source of revenue. Prejudicing its commercial interests would ultimately deprive the public purse of funds and have a negative impact on the University as a whole, impairing its ability to meet its core functions

45. To conclude, 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 continues to outweigh the public interest in disclosure.

Right of appeal

46. 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

47. 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.
48. 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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