

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 3 March 2020

Public Authority: London Borough of Bexley
Address: Bexley Civic Offices
Broadway
Bexleyheath
Kent
DA6 7LB

Decision (including any steps ordered)

1. The complainant has requested a test paper used for grammar school applications in the London Borough of Bexley ("LB Bexley") in 2018. LB Bexley refused to provide it citing section 43(2) (prejudice to commercial interests) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that LB Bexley is entitled to rely on section 43 as its basis for doing so.
3. No steps are required.

Request and response

4. On 4 July 2019, the complainant requested information of the following description:

"1. Since the testing for 2018 is now over, I am asking you to release a copy of the 2018 test paper used in Bexley under the FOIA.

Note: I wish to compare what children recall on from the test and compare it with what was actually on the test. [Identifying information about personal interest in the information] and it is my view that many tutors are obtaining feedback from children and passing it on to late

sitters, providing an unfair advantage. There is organised cheating. Past content is also been sold.

CEM are misleading clients in by claiming children do not recall content to make a difference to late sitters. The same test should never be reused, just as for GCSEs and A levels.

Two High [Court] cases have indicated they do. I believe another County Council has deliberately attempted to pervert the course of justice and I wish to present evidence to the High Court and initiate proceedings for contempt of court."

2. Does Bexley have plans to sell the 2018 test back to CEM at any point, if so for what value?
3. Is Bexley willing to sell the 2018 test, if so what procedure will be used to obtain the best price? Note, I am willing to buy the copyright of 2018 test.
5. On 21 May 2019 LB Bexley responded. It refused to provide the requested information described in request 1. It cited the exemption at section 43(2) as its basis for doing so.
6. It also denied holding recorded information within the scope of the second and third requests although it provided answers to the matters raised in them.
7. The complainant requested an internal review on 21 May 2019 specifically on the use of section 43(2). LB Bexley sent them the outcome of its internal review on 14 June 2019. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 14 June 2019 to complain about the way their request for information had been handled.
9. The Commissioner has considered whether LB Bexley is entitled to rely on section 43 as its basis for withholding the information described by the complainant in their request 1.

Reasons for decision

10. CEM stands for Centre for Evaluation and Monitoring.¹ The Commissioner has previously considered a request for 11+ test results data produced from tests controlled by CEM. In her decision notice served on 10 September 2015 (FS50566015)² the Commissioner upheld the public authority's reliance on section 43(2) to refuse to disclose the requested information. The Commissioner's decision notice in that case was appealed to the First-tier Tribunal (Information Rights) and the Tribunal's decision has been published – *James Coombs v Information Commissioner* (EA/2015/0226) ("*Coombs*")³. By a majority decision, the Tribunal decided that section 43(2) was engaged and agreed that the public interest favoured maintaining the exemption.
11. The Commissioner also considered a similar matter in 2016 in FS50624975⁴. However, it is important to note that the Commissioner considers each case on its own merits. Decisions of the First-tier Tribunal are not binding upon the Commissioner nor are previous decisions she has made on earlier cases. Factors prevailing at the time any decision is made on a related matter may have changed or the Commissioner's position can change in the light of new evidence.
12. Section 43(2) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.
13. The exemption is subject to the prejudice and public interest tests. The latter is only applicable if the exemption is engaged. With regard to the

¹ <https://www.cem.org/entrance-assessments>

² https://ico.org.uk/media/action-weve-taken/decisionnotices/2015/1432499/fs_50566015.pdf

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i1785/018%20250416%20Coombs%20judgement%20final.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624734/fs50624975.pdf>

prejudice test, three conditions must be satisfied in order for the exemption to be engaged.

14. First, the harm that is considered would, or would be likely to, occur should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there must be a real risk of prejudice arising as a result of the release of the information in question, with the public authority able to demonstrate that disclosure either 'would' or 'would be likely' to have a prejudicial effect. Establishing the appropriate level of likelihood is not only important for finding that the exemption is engaged but it will also have an effect on the balance of the public interest test, which is the next stage of the process for a public authority seeking to claim the exemption.

The complainant's arguments

15. The complainant argued that there was not likely prejudice to LB Bexley and that, in fact, it would be to its advantage to be able to allow another party to provide the same service, possibly at a cheaper cost to the public purse. The Commissioner notes that the contract to provide this service was, in fact, put out to public tender and that the tender document was provided to her as part of LB Bexley's submissions. The tender process would take costs to the public purse into account.
16. He also argued that LB Bexley now purchased the copyright to the examination questions and therefore was free to do with it what it wished. Regardless of whether this is the case, the Commissioner would observe this does not automatically negate likely prejudice to the commercial interests of third parties.

LB Bexley's arguments

17. LB Bexley argued that the above referenced cases were relevant but acknowledged that the matter must be considered on a 'case by case' basis. It submitted it was likely that disclosure would prejudice its own commercial interests and that of the four grammar schools in its area. It also argued that disclosure would be likely to prejudice the commercial interest of CEM. It set out arguments in support of this submission including direct submissions from the third parties in question.
18. It argued that the cost of selection test was a large amount of public money split between itself and four grammar schools – it provided the Commissioner with further detail.

19. It also argued that disclosure would enable people who could afford it to be coached in order to pass the relevant exam contrary to its policy of seeking to ensure that applications succeed on merit rather than via extra coaching. This would create a flawed outcome at public expense.
20. It submitted that rather than taking a co-ordinated approach as they do now, grammar schools may start to operate separate selection processes which may mean that it could not guarantee that school places would be taken exclusively by Bexley residents. It estimated that 100 places per school could be lost to local residents. This could mean it would have to invest in school building to create sufficient school places for local children in accordance with its legal obligation to provide such places.
21. It also set out likely prejudice to the commercial interests of third parties as follows: referring to CEM, it explained that it had invested considerable resources into preparing the exam questions. Disclosure would allow others to take financial advantage of this and would require it to make further investment to create new product. It referred to the Tribunal decisions referenced at Notes 3 and 4 in support of this.
22. In addition, it set out likely prejudice to the four grammar schools in its area that used the examination in question. It explained that each had a contract with the company that designed the questions and that disclosure would be likely to undermine the expectation of confidentiality for parties to the contract. The submissions direct from the schools emphasised the likely prejudice to disadvantaged families who would not be able to access coaching materials. The Commissioner would note that arguably this is less persuasive as an argument specifically regarding prejudice to commercial interests although it may feed into arguments as to the balance of public interest. That said, all four schools also emphasised the expectation of confidentiality by CEM and the likely commercial cost there would be if that were undermined.

The Commissioner's view

23. Having considered the arguments and having read the withheld information, the Commissioner would observe that the grammar schools' arguments appear to focus more on the likely prejudice to their financial interests rather than their commercial interests. While this may be relevant for engaging other exemptions, it is not relevant for consideration of prejudice to commercial interests. Commercial interests relate to selling a product or service. The schools in question do not appear to provide educational services in a commercially competitive

environment, that is, they are not competing commercially with other service providers.⁵ Similarly, while they express concern about the impact on disadvantaged families and an uneven playing field, so to speak, this possible prejudice does not relate to a commercial interest. That said, the Commissioner notes LB Bexley's argument that it is acting in commercial concert with the grammar schools in its contract with CEM. Arguably, undermining the confidentiality of the contractual arrangement affects the parties' ability to engage in a contract of a similar nature.

24. In the Commissioner's view, the strongest argument regarding likely prejudice to commercial interests relates to LB Bexley's arguments regarding likely prejudice to CEM and, to a lesser extent, to itself. The Commissioner is satisfied that the likely prejudice envisaged to CEM's commercial interests and to LB Bexley's own is one described in the exemption. LB Bexley has also explained satisfactorily the causal link between disclosure and that prejudice – the commercial product revealed through disclosure which was created by CEM could be reproduced without the commitment of resources that CEM needed to create it in the first place. Similarly, and this is supported by the Tribunal's judgement in *Coombs*, the Commissioner is satisfied that there is a real risk of likely prejudice to LB Bexley's commercial interests and to CEM's.
25. The Commissioner has therefore decided that section 43(2) is engaged. Consequently, she has gone on to assess the balance of public interest in maintaining that exemption.

The public interest test

26. The complainant set out the following arguments as to the public interest in disclosure:
27. There is increasing concern that late sitters are getting information in advance about the content of the exam such that there is no longer a level playing field based on merit. Late sitters are, in fact, being coached to assist them in passing the exam with additional information about what is in that exam. As noted in the complainant's request, he asserts that this matter is so serious it has been heard at a senior court and alleges that another unnamed County Council has deliberately

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i1785/018%20250416%20Coombs%20judgement%20final.pdf>

attempted to pervert the course of justice with respect to this. He did not provide supporting evidence to the Commissioner support these assertions.

28. The Commissioner did not require him to provide arguments in support of maintaining the exemption.
29. LB Bexley acknowledged a public benefit in disclosure but argued that this was outweighed by the public interest in maintaining the exemption. It identified the following arguments in favour of maintaining the exemption:
 - The likely damage to its own and third parties' commercial interests as set out above was not in the public interest because their ability to negotiate or compete in a commercial environment would be diminished.
 - It stressed in particular the damage to CEM's commercial interest where it would no longer be able to use the material that it had created investing its own resources to do so. Competitors and other businesses could take advantage of its product at little cost to themselves. It also stressed that other companies would be less willing to compete for future similar contracts because of the possibility their investment would be undermined by being made available freely and more widely following initial use. It argued that these factors were contrary to the public interest.
 - There is a strong public interest in maintaining the "fairness and quality of the current testing system to ensure all pupils sitting the test have equal opportunities". It emphasised the public interest in ensuring places were allocated on academic ability and not as a result of the influence of coaching. It argued that undermining merit-based allocation would diminish the appeal of grammar schools as "academic centres of excellence". It claimed that GCSE results would be poorer as a consequence of less academically able students making successful applications following private coaching that their families could afford.

The Commissioner's conclusion

30. The Commissioner expresses no view on the use of grammar schools in secondary education – that is a matter of public policy for local and national government. Her focus in considering this case is whether the public interest in avoiding the likely prejudice to commercial interests is weightier than the public interest in disclosure.
31. There is a general public interest in transparency and accountability which could be served by disclosure in this case. The public could see in more specific detail what public money has been spent on.

32. There is a clear public interest in informing the debate about the use of grammar schools in secondary education although the Commissioner does not think that public interest would be particularly served by disclosure in this case. If the withheld information were, for example, policy papers or records of formal discussions about the use of grammar schools, such information would more readily inform that debate.
33. The Commissioner notes the complainant's very serious allegation that late sitters are already being coached and that students are passing information on either to late sitters or other parties and that the application system is therefore unfair. She also notes that this point has recently been considered by the Office of the Schools Adjudicator.⁶ The Office of the Schools Adjudicator found that the application process was not being routinely prejudiced by the use of the same examination for later sitters – the issue of applicants passing information to later sitters was considered in that case.
34. Given the findings of the Office of the Schools Adjudicator, the Commissioner has not seen evidence of a strong public interest in disclosure in order to "level the playing field", as it were, so that any imbalance in the application process is righted.
35. That said, the Commissioner would observe it would be somewhat disingenuous to argue that there is currently no private coaching of grammar school applicants in anticipation of examinations for a grammar school place. Broadly relevant practice papers and similar materials are available for sale from a number of different companies. Low-income families would not readily be able to purchase such costly materials. Arguably, making the requested information available free online through FOIA disclosure would make it easier for low-income families to access such material to assist family members who were applicants without incurring prohibitive costs.
36. However, formalising the focus on personal coaching as a necessary part of the application process by routinely making papers available after each exam could distort an ostensibly merit-based process. The Commissioner accepts that resolving any such distortion could involve additional demands on the public purse such as those suggested by LB Bexley. Such unanticipated distortion of the application process and subsequent demand on the public purse to resolve it is contrary to the

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731120/ADA3349_Alcester_Grammar_School_Warwickshire_27_July_2018.pdf para

18 ff

public interest. While there may be some positive results such as greater transparency generally, the likely negative impact on the public purse carries particular weight in the balance of public interest.

37. Turning focus on the likely commercially prejudicial outcome for CEM as asserted by LB Bexley, the Commissioner agrees that undermining CEM's business model through disclosure is contrary to the public interest (it produces examination papers and sells them as part of its service). As already noted above, there is a public interest in informing the debate around approaches to secondary education. However, this debate would not be greatly served by disclosure in this case. Given the likely negative effect this would have on one of LB Bexley's contractors' and to a lesser extent to LB Bexley's own commercial interests, the Commissioner thinks that the public interest in maintaining the exemption outweighs the public interest in disclosure in the circumstances of this case.
38. For the reasons outlined above, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure. In reaching this view, she has given particular weight to the likely negative cost to the public purse for which there is insufficient countervailing public benefit.

Right of appeal

39. 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

40. 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.
41. 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

Jonathan Slee
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