

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2020

Public Authority: The Council of the University of Cambridge
Address: University Offices
The Old Schools
Trinity Lane
Cambridge CB2 1TN

Decision (including any steps ordered)

1. The complainant has requested contract values and related information about its 11-plus testing from the Centre for Evaluation and Monitoring ("CEM") of the University of Cambridge (the "university"). The university withheld the requested information under section 43(2) of the FOIA as it considered release to be commercially prejudicial.
2. The Commissioner's decision is that the university has appropriately cited section 43(2) to withhold this information.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 10 October 2019 the complainant made the following request for information under the FOIA:

*"I am instructed that the Centre for Evaluation and Monitoring (CEM) has been transferred from Durham University to yourselves. I am looking for an update on income figures provided by Durham University for the 2016 tests (2017 entry) available here:
[link provided]"*

Please provide a breakdown of income received from the 11-plus testing for tests set by Cambridge Assessment/CEM in September 2019 to include

- 1. Consortium or client name*
- 2. School name*
- 3. Contract value*
- 4. Number of candidates sitting the test*

Please provide this as an Excel or ODS spreadsheet."

5. The university responded on 6 November 2019 and refused to provide the requested information, citing the following - section 43(2)(commercial interests).
6. The complainant made a review request on 16 November 2019.
7. The university provided a review on 29 November 2019 and maintained its previous decision that disclosing the information would undermine its commercial position and its relations with its customers. The public authority also responded to the complainant's view that the release of a previous dataset by a different authority to a different requester did not oblige it to do the same.

Background

8. The Centre for Evaluation and Monitoring, known as "CEM" was formerly owned by Durham University. It is now jointly owned by Cambridge Assessment and Cambridge University Press. CEM is described on its website as "*one of the largest and longest established providers of formative assessments for children of all ages, from early years to post 16.*"¹
9. The Commissioner has been informed that, Cambridge Assessment which is the global examinations business of the university and sits within it as a legal entity, is operationally separate with regard to FOI matters. Although the Commissioner was provided with responses by Cambridge Assessment for the purposes of this decision notice the public authority is formally the Council of the University of Cambridge, referred to as the "university".

¹ <https://www.cem.org/about-us>

Scope of the case

10. The complainant contacted the Commissioner on 30 November 2019 to complain about the way his request for information had been handled. He argued that the information had previously been released and that it was in the public interest to provide information that could be presented as evidence in a legal context.
11. The Commissioner considers that the scope of this case is whether the university was entitled to withhold this information as commercially confidential under section 43(2).

Reasons for decision

12. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
13. The Commissioner has defined the meaning of the term "commercial interests" in her guidance on the application of section 43 as follows:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity"²

Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.

14. The exemption is subject to the public interest test which means that, even if the Commissioner considers the exemption to be engaged, she needs to assess whether it is in the public interest to release the information.
15. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.

² <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

- Secondly, 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. Any prejudice that results must also be real, actual or of substance.
 - Thirdly, there is a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice or there is a real and significant risk of the prejudice.
16. The Commissioner has had sight of the withheld information. It consists of a table showing the consortium, schools, pupil numbers and income received from the 11-plus testing for 2019. The university says that this information is the income and contract values received from CEM's 11-plus sitting in September 2019.
 17. The Commissioner accepts that the actual harm relates to the university's commercial interests.
 18. The public authority explains that CEM is, in effect, a commercial operation that sells its products in order to maintain and improve the services that it can offer to its customers. CEM likens itself to a university spin-off company which it describes as of fundamental importance because it does not operate like a conventional public authority.
 19. The university makes the case for a causal relationship or a clear link between the disclosure of this information and a prejudice to its commercial interests by stating that CEM's commercial position would be undermined by releasing information beneficial to its competitors and that disclosure might also undermine relations with some customers if it disclosed the value of confidential commercial contracts which amounts to information on how they spend their money.
 20. CEM operates in a market with just one major competitor and, if the value of the contract was in the public domain, then a competitor could use this information to help its bid for tenders and to target specific customers.
 21. Finally, the Commissioner needs to establish whether the level of likelihood of prejudice that is being relied on by the university is met.
 22. The term "would...prejudice" means that prejudice is more probable than not to occur (ie a more than a 50 per cent chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).

23. To meet the threshold of “would be likely to prejudice” is a lower threshold. This means that there must be more than a hypothetical or remote possibility of prejudice occurring. There must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50 per cent.
24. The university is claiming the higher threshold in terms of the prejudice to its commercial interests. Disclosing this information would result in competitors being able to use the disclosure to bid for tenders. Additionally, the university’s main competitor is not subject to the FOIA and therefore not obliged to release commercially confidential information.
25. However, the complainant contends that there is no reason for the university to withhold the information pertaining to questions one, two and four of his request under this exemption.
26. The Commissioner finds that the disclosure of the withheld information would result in prejudice to the university’s commercial interests, and that there is more than a 50 per cent chance of that occurring. Although the university has not commented on each separate item of the request, each item reveals information about the university’s client base and the numbers of pupils concerned even without the contract value. The Commissioner therefore finds that the exemption at section 43(2) is engaged.
27. Although the Commissioner accepts that the exemption is engaged, she needs to consider whether it is in the public interest to withhold the requested information. It may be in the public interest to disclose the requested information, even if it does prejudice the university’s commercial interests.

Public interest test

28. Section 43(2) is a qualified exemption. The Commissioner has undertaken a public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

29. The university suggests that transparency and accountability in knowing how public money is spent is in the public interest. It agreed at review that there should be accountability for how state funded schools spend public money but not that it should disclose this information.
30. The complainant makes the following public interest arguments in favour of disclosing the information:

- That Durham University had previously released this information as a dataset in 2017. Consequently, the information should continue to be released as a dataset.
- That exaggerated claims had been made previously to the Commissioner regarding CEM's annual income. His view is that the courts had also been misled and that EA/2015/0226³ records CEM's income as £1 million whereas the figure that was later released was far lower. The complainant suggests that misleading the Commissioner and the courts is not in the public interest.
- That this same case had also recorded the observation that the majority of the Tribunal in EA/2015/0226 had taken into account that, "*There is a clear public interest in knowing how £1 million of public funds is being used.*" (p.23)
- That he required the information as evidence but that his request had been resisted. Consequently, it was not accessible to the judiciary in order to carry out their functions which is not in the public interest.
- There was no practical benefit to withholding the information because a competitor trying to establish the value of any existing contract could simply request this directly from 'client' schools who are also subject to the FOIA. However, it is not practical for a member of the public to try and ascertain CEM's total income from each school (over 5,000 secondary schools, in his estimation).
- That it was in the public interest that the law should apply to the university even if CEM is operating as a commercial organisation, having been purchased from Durham University.

Public interest arguments in favour of maintaining the exemption

31. The university argues that CEM funds itself by selling its products and services and is not supported directly by public money eg grants from government departments.
32. Furthermore, the public authority states that it is in the public interest to have different options in the market. The university highlights the uniqueness of this particular market where its main competitor is not subject to the FOIA and could use CEM's financial information to bid for

³ <http://informationrights.decisions.tribunals.gov.uk//Public/search.aspx>

contracts and target particular customers without having to disclose corresponding details. This could potentially deter future investment and lead to a reduction in market competition with the possibility of being forced to contract with just one provider.

33. For these reasons, the university argues that it is not in the public interest to disclose the requested information.

Balance of the public interest arguments

34. Firstly, the Commissioner does not consider the argument that it is in the public interest to release the requested information under the FOIA for legal purposes to be persuasive, because the courts are not reliant on FOIA disclosures to reach decisions and have their own rules on disclosure.
35. Neither does the Commissioner accept the complainant's argument that because a previous public authority released a dataset containing the requested information, the university has to continue to publish the dataset. Having determined that it was not appropriate to do so as it would be commercially prejudicial and not in the public interest, the decision was taken not to release the requested information.
36. The request is for the income derived from the eleven-plus testing and other details about the source of that income. The Commissioner agrees with the public authority that it is for the schools or local authorities concerned to justify how they spend public money rather than CEM who is the service provider. The disclosure of the requested information in a limited market for such services and where its primary competitor is not subject to the FOIA, would provide commercially confidential information and undermine the university's own position and potentially its relationship with its customers. This would not be in the public interest.
37. In the absence of any compelling public interest arguments for disclosure being put forward, the Commissioner finds that the disclosure of the requested information would be commercially prejudicial to the university and that it was correct to withhold the information by virtue of section 43(2).

Other matters

38. The complainant asked the Commissioner to investigate whether it was appropriate that the internal review was conducted by the same individual as had provided the original refusal. Whilst reaching no conclusions in this case, she would remind any public authority that, *"It is best practice, wherever possible, for the internal review to be*

undertaken by someone other than the person who took the original decision.”

39. The Commissioner recommends that the university reviews its processes in line with her guidance⁴, along with the Section 45 Code of Practice⁵ regarding the handling of information requests.

⁴ <https://ico.org.uk/media/1624144/section-45-code-of-practice-request-handling-foia.pdf>

⁵

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

40. 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

41. 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.
42. 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

**Pamela Clements
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