Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**15 October 2021**
Public Authority:	**King Edward VI Academy Trust**
Address:	**Edgbaston Park Road** **Birmingham** **B15 2UD**

Decision (including any steps ordered)

1. The complainant requested raw and standardised test score data. King Edward VI Academy Trust ("the Trust") provided the standardised scores, but withheld the raw scores – relying on section 43(2) of the FOIA (commercial interests) in order to do so.

2. The Commissioner's decision is that the Trust has correctly relied on section 43(2) of the FOIA and that the balance of the public interest favours maintaining this exemption.

3. The Commissioner does not require further steps.

Request and response

4. On 10 October 2020 the complainant requested information of the following description:

> *"Under the FOI Act 2000 I would like to request the anonymised raw and standardised results for tests taken in 2019 (2020 entry). For each candidate who sat the test please provide*
>
> - *Date of Birth*
> - *Verbal Reasoning raw score*
> - *Verbal Reasoning standardised*
> - *Maths raw score*
> - *Maths standardised*
> - *Non Verbal Reasoning raw score*
> - *Non Verbal Reasoning standardised*

- *Total Age weighted score"*

5. On 30 October 2020, the Trust responded. It provided the standardised scores, but refused to provide the raw scores, relying on section 40(2) and 43(2) of the FOIA in order to do so.

6. The complainant requested an internal review on 2 November 2020. The Trust sent the outcome of its internal review on 7 January 2021. It upheld its original position.

7. Following further discussions, the Trust largely withdrew its reliance on section 40(2), but maintained its stance that section 43(2) of the FOIA allowed it to withhold the remaining information.

Scope of the case

8. The complainant contacted the Commissioner on 5 April 2021 to complain about the way his request for information had been handled.

9. On 14 September 2021, the Commissioner wrote to the complainant setting out her initial view of the complaint. Noting a recent Tribunal decision in which a different public authority had successfully relied on section 43(2) of the FOIA to withhold equivalent information, she advised the complainant that she could see no compelling reason to take a different approach to the present request.

10. The complainant disagreed with the initial view and noted that the Commissioner was not bound by law to follow rulings of the First Tier Tribunal. He quoted Upper Tribunal Judge Jacobs in *Liam O'Hanlon v Information Commissioner* [2019] UKUT 34 (AAC) setting out that:

> *"The correct approach is to treat the decisions of the First-tier Tribunal with the respect they are due, no less but no more. What is their due? (a) A decision of that tribunal is, subject to any appeal, binding as between the parties on the issues decided. The Commissioner is under a duty to accept it as such and does. (b) I know from the documents in this case that the Commissioner analyses each case to see what lessons can be learned for the future. That is a proper and valuable practice. (c) The problem comes when the Commissioner treats the First-tier Tribunal's decisions as containing authoritative statements of the law. They do not. Anything that the tribunal says in one case is not binding in any other. If it is wrong, it must not be followed in other cases. If it happens to be right, all to the good, and the same law should be applied in later cases. But it should be applied only because it is the law, not because it was said by the tribunal in a previous case."*

11. The Commissioner considers that the scope of her investigation is to determine whether or not the Trust is entitled to rely on section 43(2) of the FOIA to withhold the requested information.

Background

12. The Trust administers entrance exams on behalf of eight selective schools in the Birmingham area. The exams used are purchased from a provider called the Cambridge Centre for Evaluation and Monitoring (CEM).

13. CEM markets its tests on the basis that they are "tutor-resistant" – that is, that they are designed and administered in such a way as to reduce the advantage any particular pupil might receive from being tutored. This claim is disputed.

14. On 13 May 2020, the First Tier Tribunal issued its decision in *Coombs v Information Commissioner* EA/2017/0166/A ("the Tribunal decision").[1] That appeal sought data directly from CEM (which, at the time the appeal was decided, was owned by the University of Cambridge) for the raw and standardised test scores for the 2014, 2015 and 2016 academic years. The Tribunal accepted that disclosing the data would prejudice CEM's commercial interests and that, although there was substantial public interest in understanding the way in which the selective education system operates, this did not outweigh the public interest in allowing CEM to compete on a commercial basis.

Reasons for decision

15. Section 43(2) of the FOIA states that:

> *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

16. The Trust argued that disclosure of the withheld information would be likely to prejudice the commercial interests of CEM. In doing so, it

[1] https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2651/Coombs%20James%20(EA-2017-0166)%2013.05.20.pdf

argued that the Commissioner should have regard to the Tribunal decision and its assessment of the facts.

17. The Commissioner recognises that she is not bound to follow decisions of the First Tier Tribunal (except in respect of the particular appeal of which that decision disposes). Nevertheless, as Judge Jacobs pointed out, she must treat such decisions with the respect that they are due and, more pointedly, she would be unwise to disregard such a decision completely unless there was good reason to do so.

18. The Tribunal decision is 15 pages in length and was issued following a full oral hearing. CEM put forward witnesses at that hearing and the appellant had the opportunity to question those witnesses, as well as put forward a considerable amount of evidence of his own.

19. The Tribunal decision covered, in essence, the exact same data as is being considered here – the only difference is the academic year from which the data are drawn.

20. With the benefit of the expert witnesses, the Tribunal decision considered a four-stage test that was suggested by the Commissioner during proceedings. The four stages are all relevant to the present case and are:

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

    b) Do schools accept that claim?

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

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

21. The Tribunal decision then went on to explain why disclosure of the withheld information would cause prejudice:

    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.

22. Given the thoroughness with which the Tribunal went about its work in order to reach its decision and the wealth of evidence it was able to draw on, the Commissioner considers that she would need to be presented with compelling reasons to persuade her that the decision was not one whose reasoning she should follow. This is not because she regards the Tribunal decision as an authoritative statement of the law, but because it is a thorough and balanced analysis of the facts presented – facts which re-present themselves in the current case.

23. As well as noting that the Commissioner was not bound in law to follow the Tribunal decision, the complainant also argued that the decision was not relevant to the current request. He argued that subsequent events and disclosures had weakened CEM's claims that their tests were resistant to tutoring. In particular, he pointed to figures indicating an increase in the number of private school pupils passing CEM's tests and the fact that a major purchaser of the tests (The Buckinghamshire Grammar Schools) had ceased to use them.

24. The Trust's submission largely rehearsed the arguments presented at the Tribunal: that resistance to tutoring is a key selling point of CEM's tests and that disclosing both the raw and the standardised scores would allow for reverse-engineering to deduce important information about the

structure of the test. This information would, in turn, reduce the test's resistance to tutoring and, hence, CEM's ability to compete in a commercial environment. Its position was supported by correspondence from CEM in which CEM restated its position that its commercial interests would be likely to be harmed by disclosure of the withheld information.

25. The Commissioner's view is that the Tribunal decision sets out clearly why disclosure of the withheld information would be likely harm CEM's commercial interests. She has considered the submissions of both parties carefully, but is not persuaded that she should depart from the Tribunal's reasoning as to why the exemption is engaged for data of this type and thus adopts its reasoning as her own. She therefore concludes that section 43(2) of the FOIA is engaged.

Public interest test

26. Information which would be likely to prejudice the commercial interests of any party must still be disclosed under the FOIA unless the balance of the public interest favours maintaining the exemption.

27. Given that the Commissioner accepts that disclosure would be likely to result in commercial prejudice, there will always be some inherent public interest in preventing this prejudice from occurring. However, the weight to be given to this public interest will vary depending on the likelihood and severity of the prejudice.

28. The Tribunal decision's consideration of the public interest is reproduced below. The Trust urged the Commissioner to adopt it, the complainant argued that matters had moved on.

> *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.

29. The complainant asked the Commissioner to disregard this assessment of the public interest. He noted that, as the law requires, the Tribunal had assessed the balance of the public interest as it stood on the date that the original request was refused – which, in this case, because of procedural reasons, was around four years prior to the Tribunal decision being promulgated – and the assessment was now out of date.

30. The complainant drew the Commissioner's attention to internal CEM emails that had been used in evidence at an employment tribunal. He argued that these emails demonstrated that CEM had (at the request of The Buckinghamshire Grammar Schools) manipulated the standardisation process for the Buckinghamshire test to the effect that pupils applying from inside the county were more likely to be offered places.

31. The complainant also argued that disclosure was necessary to present "the full picture" about the selection process:

"What I do expect is for the grammar schools and test companies to clearly explain to people who don't have Maths degrees how they process the children's personal data – their date of birth and a couple of hours of multiple choice question papers – to produce

scores calculated to two decimal points which uniquely 'distinguishes' every single child in a cohort of 1000 candidates.

"If they implement an age weighting algorithm that calculates scores based on the candidate's exact day of birth and consequently a child misses out on a place because they were born the wrong side of midnight, they should explain to parents why they operate such a policy. In wanting to shine a light on the murky business of 11+ testing...The simplest way for the schools to present a full picture is for them to disclose the data and 'show me their workings out' to use a phrase they might use themselves."

32. Finally, the complainant drew attention to the passage of the Data Protection Act 2018 and its incorporation into UK law of the General Data Protection Regulation rights – including the right to have personal data processed in fair and transparent manner.

The Commissioner's view

33. Whilst she has considered the complainant's submissions carefully, the Commissioner does not consider that events since 2017 have materially altered the balance of the public interest set out in the Tribunal decision and she adopts the Tribunal's reasoning as her own.

34. In respect of wrongdoing, the Commissioner does not accept the complainant's characterisation of the findings of the employment tribunal. The Tribunal's findings of fact were:

"CEM played no part in the selection of children to whom places at individual schools within TBGS were offered. That selection process was undertaken by those individual schools working with the local education authority, Buckinghamshire County Council."[2]

35. Not only does the Commissioner consider any allegation of "wrongdoing" to amount to nothing more than an accusation, but the complainant has put forward no evidence to suggest any "wrongdoing" in relation to the Trust or schools in Birmingham in general.

36. In respect of providing "the full picture", the Commissioner does not consider that the information in the public domain presents a misleadingly incomplete picture. She is aware that the complainant and

[2] https://assets.publishing.service.gov.uk/media/5f294208d3bf7f1b13f64fdd/Dr_S_Stothard_v_Durham_University_2500306-19_Reserved.pdf

others dispute CEM's claim that its tests are "tutor-resistant" and that disclosing the withheld information would allow anyone with an interest (and the necessary mathematical skills) to test that claim. However, there is a certain circularity to this argument: disclosure would (in theory) allow for the testing of claims of "tutor-resistance" but it would simultaneously undermine that resistance. CEM demonstrated, to the satisfaction of the Tribunal, a key reason why its tests are tutor-resistant is that tutors have insufficient information about the structure of its tests to be able to coach their pupils in a way that offers them an advantage. Disclosure of the withheld information undermines that resistance by making it easier for tutors to understand more about the structure of the test and prepare their pupils accordingly. Not only does that harm CEM's commercial interests, but it also undermines the fairness of the testing system by increasing the advantage afforded to those pupils from wealthier backgrounds, with access to tutoring – which is not in the public interest.

37. Turning finally to the developments in data protection legislation, whilst the Tribunal did not explicitly address issues regarding the processing of personal data, it is evident from the paragraphs quoted above that the Tribunal considered the fairness and transparency of the testing process more generally - yet did not consider this to be a decisive factor in favour of disclosure.

38. More pertinently, the rights conferred by data protection legislation are rights for the individual whose personal data has been, is or will be, processed. There is no additional public interest in disclosure under the FOIA to the world at large, because the data subjects already have rights to query the way their own personal data has been processed and this can be done without disclosure to the world at large.

39. Having weighed the competing arguments, whilst the Commissioner accepts (as the Tribunal did) that there is a strong public interest in ensuring that the Trust is accountable for the way that it spends public money and that any academic selection process can be understood by those involved in it, there is a stronger public interest in allowing CEM to protect its intellectual property. There is also a strong public interest in minimising, as much as possible, the advantage that can be gained, in the selection process, from tutoring.

40. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.

Right of appeal

41. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.

43. 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 .....

Roger Cawthorne
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