

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2020

Public Authority: University Council
Address: Durham University
The Palatine Centre
Stockton Road
Durham
DH1 3LE

Decision (including any steps ordered)

1. The complainant has requested information relating to the 11+ tests first used in Warwickshire and Birmingham in September 2015 and September 2016. These tests were written by the Centre for Evaluation and Monitoring (CEM), which was part of Durham University at the time of the request. The complainant also requested information relating to a claim that CEM had asserted to the ICO in Appeal EA/2015/0226 that its 11+ testing is 'tutor proof', and the evidence to support this assertion.
2. The University Council of Durham University (Durham University) provided some of the requested information but has explained that it does not hold information in relation to the request for evidence that its 11+ testing is 'tutor proof'. Durham University also refused to provide some of the requested information under section 43(2) (commercial interests) of the FOIA.
3. The Commissioner's decision is that, on the balance of probabilities, Durham University does not hold the information requested in relation to the request for evidence that its 11+ testing is 'tutor proof'.
4. The Commissioner has also decided that section 43(2) was correctly applied to the withheld information and the public interest in maintaining the exemption outweighs the public interest in disclosure.
5. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

6. On 24 October 2018, the complainant wrote to Durham University and requested information in the following terms:

"I am making a request for CEM to release a copy of the tests first used in Sept 2015 and Sep 2016 11+ test used in Warwickshire and Birmingham.

These tests are no longer used, and it is in the public interest to determine whether what was published on elevenplusexams.co.uk was contained in the tests as the tests is repeatedly reused for up to two years in Warwickshire.

I am happy to view the tests in controlled conditions and sign a non-disclosure agreement, bar use in legal proceedings and to appointed legal advisors.

If this is not acceptable, consider this as a FOIA request, which I will take the the First Tier Tribunal should you refuse to answer.

Please also confirm under the FOIA whether CEM in fact did claim to the ICO in Appeal EA/2015/0226

CEM asserts that one of the benefits of its 11+ testing is that it is 'tutor proof', or more 'tutor proof' than the alternatives. That is to say that it is harder for pupils to be coached to perform well in its tests simply by approaching the test in a certain way. The claimed result is that the test is a better predictor of natural ability and the advantage gained by children in families that can afford private tuition is reduced.

Also confirm under the FOIA

- a. *What evidence CEM has that the tes0ng is tutor proof or more tutor proof than alterna0ves.*
- b. *What evidence there is that the test is a better predictor of natural ability.*
- c. *What evidence is there the test is harder for pupils to be coached to perform well.*

My understanding the responses during 2015 were none - information not held. CEM simply try to do a) and b) with no evidence or testing to prove this is the case.

Has this since changed?

The facts are CEM tests are the easiest to prepare and have resulted in an explosion of tuition."

7. Durham University responded on 21 November 2018. It refused to provide a copy of the tests, citing section 43(2) of the FOIA as its basis for doing so. Durham University confirmed to the complainant that it did not assert to the ICO in appeal EA/2015/0226 that its 11+ testing is 'tutor proof', or more 'tutor proof' than the alternatives. To support this position Durham University quoted directly from its submissions as follows:

"So far as paragraph 22 of the Appellant's submissions are concerned, the Second Respondent has never claimed that the entrance tests it produces are 'tutor-proof'.

With reference to paragraph 66, the Second Respondent repeats as above, there have never been claims that the tests produced by the Centre for Evaluation and Monitoring ('CEM') are 'tutor proof'. There is no 'profit from false claims' on the part of the Second Respondent."

Durham University denied holding information relating to parts a), b) and c) of the request for information.

8. The complainant requested an internal review on 21 November 2018. Following an internal review, Durham University wrote to the complainant on 19 December 2018 maintaining its original position.

Scope of the case

9. The complainant contacted the Commissioner on 12 January 2019 to complain about the way his request for information had been handled.
10. The Commissioner initially wrote to Durham University on 12 June 2019 asking it to revisit the request for information and provide its arguments in support of its position.
11. Durham University responded to the Commissioner on 27 June 2019. It stated that CEM was previously part of Durham University but was acquired by the University of Cambridge on 7 June 2019, which now holds the information relating to CEM. It stated that Durham University no longer holds any information in relation to CEM services and advised the Commissioner to direct her query in relation to this matter to the University of Cambridge.
12. Despite the fact that CEM had been transferred to the University of Cambridge, the request had been made to Durham University and

therefore the responsibility for dealing with that request and any subsequent complaint remained with Durham University. In such circumstances the Commissioner considered it possible that there would have been contractual arrangements in place to ensure Durham University was able to meet any outstanding legal obligations it may have had in respect of CEM following its transfer. Therefore, the Commissioner responded to Durham University on 12 July 2019, asking whether it had an arrangement in place with the University of Cambridge to deal with any legal obligations during a hand over period, and if so, to provide details of those arrangements.

13. Durham University responded to the Commissioner on 24 July 2019, advising that it was unsure as to the meaning of "a hand over period".
14. The Commissioner responded to Durham University on 12 August 2019 and asked if Durham University had an agreement in place with the University of Cambridge allowing it access to the information relating to the CEM services, in order to allow Durham University to support its response to the Commissioner's investigation into whether it had complied with the FOIA in this case.
15. Durham University responded on 2 September 2019 confirming that it did have such an agreement in place with the University of Cambridge.
16. The Commissioner wrote to Durham University on 5 September 2019 asking it to revisit the request for information and provide its arguments in support of its position.
17. Durham University provided the Commissioner with its submission in support of its position on 15 October 2019. However, some of the arguments Durham University had provided in support of the application of section 43 were in relation to the prejudice of the commercial interests of the University of Cambridge.
18. The Commissioner therefore wrote to Durham University on 31 October 2019 and asked it to confirm which, if any, of the arguments that it had provided in relation to the University of Cambridge also applied to Durham University at the time of the request.
19. Durham University responded to the Commissioner on 7 November 2019 and confirmed that the arguments regarding commercial interests would have applied to Durham University at the time of the request, and they now applied to the University of Cambridge.
20. The Commissioner considers the scope of this case is to determine whether Durham University is correct when it says that it does not hold information falling within the scope of parts a), b) and c) of the request for information. The Commissioner will also consider whether Durham

University was entitled to rely on section 43(2) of the FOIA as a basis for refusing to provide a copy of the tests.

Reasons for decision

Section 1 – general right of access

21. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to; (a) be informed whether the authority holds the information and; (b) if the information is held, to have that information communicated to them.
22. In scenarios where there is some dispute between the information the public authority claims to hold, and the information that a complainant believes might be held, the Commissioner – in accordance with a number of First-Tier Tribunal decisions – applies the civil standard of the balance of probabilities.
23. In this case the dispute is over what information is held in relation to a claim that CEM had asserted to the ICO that its 11+ testing is 'tutor proof', and the evidence to support this assertion. The Commissioner understands this claim to relate to submissions made to the Commissioner in relation to decision notice FS50566015, which was subsequently subject to the appeal case EA/2015/0226.
24. Durham University stated in its submissions to the Commissioner that CEM have shown that such a claim was not made and therefore no information relating to this claim could reasonably be found.
25. The complainant has not provided the Commissioner with any evidence to demonstrate that CEM has made such a claim.
26. However, the Commissioner notes that the claim referred to in the complainant's request for information is quoted directly from the footnote in paragraph 9 of the First-Tier Tribunal Decision¹.
27. The Commissioner also notes in Durham University's submission in relation to the decision notice FS50566015² which was the subject of the

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1785/018%20250416%20Coombs%20judgement%20final.pdf>

appeal case EA/2015/0226, that Durham University has used more measured language about the use of CEM 11+ entry tests by tutors. For example, in paragraph 16 of the decision notice for FS50566015, it states that Durham University "*considers that it is a unique selling point (USP) of the CEM 11+ entry tests that they are designed to be more resistant to coaching influences and question spotting.*"

28. It is not clear where the wording 'tutor-proof' originated from. However, the Commissioner considers that stating that 11+ entry test are 'tutor proof' is quite powerful wording to promote the test to schools. The use of this phrase would suggest that the test has an extremely high level of resistance (or complete resistance) to being undermined by tutoring. The Commissioner does not consider that Durham University would use this term unless it felt able to justify it. Any misuse of the term could be criticised for overselling the robustness of the tests, which would reflect on the integrity of the party using that term. It is therefore not a term that the Commissioner would attribute to Durham University lightly (i.e. without being satisfied that Durham University does consider the test to be 'tutor-proof').
29. In this case, Durham University has stated that it did not make a claim that 11+ testing is 'tutor proof', or more 'tutor proof' than the alternatives. It has used more measured language in the previous ICO case, and the Appeal referred to in the request for information on this case. The Commissioner has not been provided with any evidence to show that Durham University has made such a claim and has not been able to establish where the wording 'tutor-proof' originated from.
30. The Commissioner is therefore satisfied that Durham University did not claim that its tests were 'tutor proof'.
31. In view of the fact that the Commissioner is satisfied that Durham University did not make such a claim, it would therefore follow that Durham University does not hold any evidence in support of the claim that the 11+ testing is 'tutor proof'.
32. With regards to parts b) (evidence that the test is a better predictor of natural ability), and c) (evidence that the test is harder to be coached to perform well in) of the request, this is the 'claimed result' of the 11+ test being 'tutor proof'. As explained above, the Commissioner is

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

satisfied that Durham University did not make the claim that the test was 'tutor proof'. It would therefore follow that Durham University would not hold evidence to support a 'claimed result' of the tests being 'tutor proof'.

33. The Commissioner is therefore satisfied that, on the balance of probabilities, Durham University does not hold any relevant information in relation to parts a), b) and c) of the complainant's request for information.

Section 43 – prejudice to commercial interests

34. 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).
35. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the commercial interests;
 - 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 to those commercial interests; and
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.
36. The Commissioner's guidance explains that 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. In this case, the withheld information relates to the selling of 11+ tests. The Commissioner is satisfied that the withheld information relates to a commercial service.
37. Durham University has stated that the disclosure of the tests would have been likely to prejudice its own commercial interests at the time of the request.
38. It is therefore necessary to consider whether Durham University has demonstrated that disclosing the withheld information would have caused its own commercial interests to be prejudiced.

39. Durham University has explained that CEM holds a copy of past papers for their records, and regardless of the age of the examination papers it continues to consider their content commercially sensitive. It went on to explain that the approach to developing the tests can include a mixture of new and re-used items. Therefore, the intellectual property used in the past papers remains commercially valuable to it as it can be used again in future papers.
40. Durham University has highlighted in its submission that the University of Cambridge is still using the requested tests. Therefore, if the requested tests were disclosed it would prevent the University of Cambridge from re-using the test items, thereby undermining the significant financial investment that it made in acquiring the tests from Durham University in June last year.
41. Durham University has stated that the disclosure of the requested tests would also enable competitors to emulate the approach taken towards such testing. Durham University accepts that it is always possible that some pupils may recall and make individual questions public. Durham University has stated that if the test as a whole were to be made public, this would give away a significant amount of information about the level of difficulty of the test, the format of the test and more generally the approach taken towards this type of test. Given these circumstances, disclosure of the requested information would have been likely to have had a prejudicial effect on the commercial interests of Durham University.
42. The Commissioner has considered the arguments put forward by Durham University and is satisfied that section 43 of the FOIA is engaged in this case. She has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest arguments in favour of disclosure

43. Durham University notes that there will always be some public interest in disclosing information which would promote openness by facilitating the accountability and transparency in the spending of public money.
44. Durham University recognises that the release of the withheld information would allow individuals to better understand the 11+ tests.
45. From his submissions, it appears that the complainant believes there to be an unfairness in the 11+ testing system. In particular, he asserts that because candidates can recall questions from the tests, this information can then be used by subsequent candidates to gain an unfair advantage (for example, by this information being passed to

tutors who can then use it to prepare candidates for the test). He therefore believes that CEM's re-use of questions, and the fact that the tests are sold as being re-useable, is wrong.

46. From his submissions to the Commissioner, the complainant has indicated that he believes CEM to have been dishonest when providing information about its 11+ tests to the high court, and in the fact that it sells the tests as being suitable for re-use when he believes that they are not. The complainant believes that releasing the tests will expose this dishonesty, and that *"...it is in the public interest to expose the lies"*.

Public interest arguments in favour of maintaining the exemption

47. Durham University has stated that there is a public interest in the market for the development and delivery of the requested test not being distorted through its ability to compete being damaged.
48. Durham University has stated that the public interest is not served by disclosing academic tests, the value of which is dependent on them being kept secret.
49. Durham University has stated that the release of information relating to test format and administration would be likely to have a prejudicial effect upon the commercial value of the assessment, as it could weaken the effectiveness of its testing model, and jeopardise the security of test material.
50. Durham University stated that the disclosure would potentially deter Universities from making future investments in tests of a similar nature, therefore potentially undermining the public interest in there being a choice of such tests in the marketplace.
51. Durham University has stated that it was not in receipt of or using public money for the purposes of developing and delivering the 11+ test to schools. These activities are funded solely through the sale of the tests to schools.

Balance of public interest arguments

52. The Commissioner has considered both the factors in favour of disclosure and those in favour of maintaining the exemption and she fully acknowledges the general public interest in transparency and accountability. Additionally, in this case, disclosing the information would give a better insight into the 11+ tests.
53. Balanced against this, the Commissioner considers that, at the time of the request, there would have been a significant public interest in

ensuring that the commercial interests of Durham University were not prejudiced. This would not only have been to ensure that its ability to engage in commercial activities resulting in the public funds that could potentially be lost from the sale of 11+ tests was not undermined, but also in ensuring that competitors were not able to match the approach taken towards such testing and therefore potentially undermine the public interest in there being a choice of such tests in the marketplace.

54. The complainant is concerned that Durham University has misrepresented the qualities of the tests produced by CEM and believes that in doing so, it behaved dishonestly. There is clearly a significant public interest in disclosing information that would reveal wrongdoing by a public authority. However, the Commissioner has accepted that Durham University did not use the phrase 'tutor proof' to describe its tests and therefore there is nothing to suggest Durham University did act inappropriately.
55. The Commissioner recognises that there is a public interest in disclosing information that would allow the public to take a more informed view of whether candidates could gain an unfair advantage in the tests through being coached. However, in the absence of clear evidence that there are credible concerns over the fairness of these tests, that public interest is limited.
56. The Commissioner therefore finds that section 43(2) has been properly engaged and that in all the circumstances of the case, the public interest test favours maintaining the exemption.

Right of appeal

57. 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

58. 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.
59. 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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