NCN: [2023] UKFTT 00264 (GRC)
Case Reference: **EA/2021/0127**

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: Remote video hearing

Heard on: 29 November 2021, 30 November 2021, & 1 December 2021
Decision given on: 7 March 2023

Before

TRIBUNAL JUDGE LYNN GRIFFIN
TRIBUNAL MEMBER ROGER CREEDON
TRIBUNAL MEMBER EMMA YATES

Between

JAMES COOMBS

Appellant

and

1) INFORMATION COMMISSIONER

2) **THE UNIVERSITY OF CAMBRIDGE**

Respondents

Representation:
For the Appellant: in person
For the First Respondent: did not attend and was not represented
For the Second Respondent: Azeem Suterwalla, counsel instructed by HCR Hewitsons

Decision: The appeal is Dismissed

REASONS

The Factual Background

1. In October 2016, the appellant made a FOIA request to the University of Durham for the Centre for Evaluation and Monitoring's ('CEM') raw and standardised 11-plus test results for tests taken in autumn 2016. The FOIA request included a request for the raw test scores for 2014, 2015 and 2016. This is not the request in issue in this case.

2. Following a complaint to the Commissioner concerning Durham University's response to the request, the Commissioner concluded, in her decision notice reference FS50661288, that the raw scores were exempt under s.43(2) FOIA and that the balance of the public interest favoured maintaining the exemption. This is not the decision notice the subject of this appeal.

3. Decision notice reference FS50661288 was appealed to the Tribunal and the decision was upheld in Coombs v Information Commissioner, reference EA/2017/0166. The Tribunal's initial decision (known as Coombs No. 1) was set aside by the Upper Tribunal and remitted for re-hearing. That re-hearing took place on 4 March 2020.

4. In Coombs No. 2 the University of Cambridge was substituted for Durham University as the Second Respondent because Durham University had sold CEM to the University of Cambridge (the University).

5. Dismissing the appeal, in Coombs No. 2, the Tribunal concluded, inter alia, that

    a. On the evidence before the Tribunal, the withheld information was commercially sensitive at the date of the request and that the section 43(2) exemption is engaged; and
    b. On balance, "the public intertest in withholding the information pursuant to the exemption in section 43(2) outweighs the public interest in disclosing the information".

6. In Coombs No. 2 the tribunal held

    a. The 11+ tests had been marketed to customers (i.e. schools) as being "tutor resistant".
    b. Schools accepted that claim.
    c. Putting the withheld information together with other publicly available information would potentially reveal test content. Publishing the withheld information would undermine the efficacy of CEM's claim that its tests are "tutor resistant".
    d. The publication of the raw data sought by the Appellant would remove the unique selling point ("USP") of CEM's tests. In addition, if data were published, students could be tutored to prepare for tests without CEM obtaining the competitor's financial benefit of obtaining revenue from publishing past tests and practice papers. As a consequence CEM would need to either change their business model or rewrite their tests.
    e. In all the circumstances s.43(2) FOIA was engaged and that prejudice to CEM's commercial interests was likely to occur if the information was published.

f. In respect of the public interest, whilst there was a significant public interest in openness and transparency about the allocation of school places, there was already a high degree of transparency about the process. Whilst there was an important public interest in an external, objective assessment of the quality of 11+ tests the Tribunal was not convinced this would be furthered by the release of the information. It was noted "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."
g. There was nothing that gave rise to a concern that the practices of CEM were in any way questionable, or suggestive of malpractice, or of inherent unreliability in the processes followed.
h. There was a weighty public interest in supporting commercial enterprises by a public authority, including where the authority had a USP which it believed to be in the public interest for a wider policy reason.

7. That decision of the First Tier Tribunal was promulgated on 13 May 2020 and thereafter unsuccessfully appealed by the appellant to the Upper Tribunal who concluded in refusing a renewed application for permission to appeal that there was no error of law in First Tier Tribunal decision in Coombs No. 2.

8. On 6 March 2020, two days after the First Tier Tribunal hearing in Coombs No. 2, the Appellant wrote to the University, stating that he had "some information requests arising from the Tribunal proceedings Coombs v Information Commissioner and Cambridge University EA/2017/0166". This is the FOIA request that we are concerned with in this case.

9. There were two requests as follows

"I would like to submit a new request for the raw and 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.

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."

10. The University responded to the request on 3 April 2020. It broke down the requested information into 3 parts.

    a. Raw test results for 2016, 2017, 2018 and 2019; part 1 of the first request above

    b. Standardised test results for 2016, 2017, 2018 and 2019; part 2 of the first request above

    c. Questions concerning the vetting of requests for personal data held by the University of Cambridge (Cambridge) for research purposes; the second request above.

11. As regards first category, the raw test results for 2016, 2017, 2018 and 2019, they confirmed that this information was held by them but asserted that the information is exempt under s.43(2) FOIA because disclosure would harm the University's commercial interests and that they considered that the commercial harm to Cambridge would not be outweighed by the public interest for the reasons set out in their response.

12. The second category of information, the standardised test results for the same years were provided to Mr Coombs.

13. The University responded that third category of information was not held by them.

14. The appellant was not satisfied with the response and so requested an internal review in which he disputed the response to the first category, raw test results. The University replied on 26 May 2020 maintaining its position as regards the raw test results.

15. Still dissatisfied the appellant made a complaint to the Information Commissioner on 15 June 2020. He took issue with the application of s.43(2) FOIA to the raw test results and suggested that the University did in fact hold the information in the third category (his second request) because he said that evidence given to the Tribunal in March 2020 suggested that policy documents were held.

16. On 30 April 2021 the Information Commissioner issued her decision notice reference IC-43475-K7F4 in which she decided

    a. On the balance of probabilities, the University does not hold the information the appellant had requested about researchers and complied with section 1(1)(a) in respect of this part of the request.

    b. The raw 11-plus test result data that the appellant had requested is exempt information under section 43(2) of the FOIA and the balance of the public interest favours maintaining this exemption.

17. The Commissioner did not require the University to take any remedial steps.

18. The Commissioner decided, inter alia

    a. The appellant's request was essentially for the same information he had requested in October 2016;

    b. The University's position on part [c] of the Request was that it had decided not to make personal data from the NPD available to researchers. It had therefore not prepared the kinds of documents referred to in part [c]. The Commissioner had no reason to dispute that and was satisfied that the information requested in part [c] was not held by Cambridge University;

    c. The Commissioner was satisfied that the s.43(2) FOIA was engaged, that there was a causal relationship between releasing the withheld information and prejudice to Cambridge University's commercial interests, and that prejudice would be likely to occur. The Commissioner's reasoning for these conclusions was similar to that provided by the Tribunal in Coombs No.2;

    d. The Commissioner continued to accept that CEM's tests have a USP that provides a commercial advantage; and

    e. On the public interest test, the Commissioner was guided by her decisions in previous cases that involved requests for very similar information. She was not persuaded that there had been any change in circumstances that would shift the public interest balance or lead her to vary her previous findings.

The submissions of the parties in this appeal

19. The appellant lodged his notice of appeal with the tribunal on 16 May 2021, his grounds were that the Information Commissioner had erred in law by failing to consider binding decisions in DWP v Information Commissioner & Zola [2016] EWCA Civ 758 and APPGER v Information Commissioner & FCO [2015] UKUT 0377 AAC thereby failing to consider relevant arguments concerning the balance of the public interests that he had drawn to their attention in his correspondence. The appellant also raised whether the exemption in s43(2) FOIA could apply to a dataset as defined in that Act. He did not appeal against the finding that the University did not hold information within the scope of his second request (the third category identified by the University).

20. The grounds of appeal can be summarised as follows

    a. Instead of investigating the facts afresh, the Information Commissioner based her decision on Coombs No. 2. She failed to consider events which had changed since the information request in Coombs No. 2, namely

i. research published by the Education Policy Institute; and
ii. an article in "Schools Week" stating that Durham had been 'sacked' by The Buckinghamshire Grammar Schools Consortium ("TBGS").

b. In Coombs No. 2, CEM argued that disclosure of the requested dataset would lead to commercial prejudice. However, in September 2020, six months after the hearing, another public authority published such a dataset. Details of how the "standardisation" process in relation to scores works has therefore already been placed in the public domain.

c. The disclosure referred to in b above demonstrates that CEM made errors in processing personal data and calculating the standardised scores used to determine which children are admitted to grammar schools.

d. GDPR Art. 5(1)(a) requires that processing of personal data be lawful, fair and transparent. This applies to the data sets from 2018-2020 which formed part of the Appellant's request.

e. Evidence given to the Employment Tribunal – Stothard v University of Durham (case 25000306/2019), shows that CEM and Buckinghamshire grammar schools acted unlawfully in seeking to lower the pass marks for 11+ tests, to pass more candidates.

f. The Information Commissioner erred in law in failing to consider these public interest arguments after these had been drawn to her attention.

21. The Information Commissioner responded to the appeal on 15 June 2021. In that response she maintained the position she had taken in her decision notice. It was submitted that the decision notice was not in error of law because

    a. There had been no failure to consider whether there was a causal relationship between disclosure of the requested information and the prejudice claimed, see paragraphs 25 and 30 of the decision notice.

    b. It was reasonable for the Commissioner to consider the factors considered in EA/2017/0166 as they remained valid at the time of the response to the request in this appeal.

    c. The events referred to in the grounds of appeal do not cast doubt on her reasoning on the engagement of the exemption nor on the public interest balance.

    d. The Commissioner had considered the public interest test at the time of the response to the request. The alleged changes of circumstances relied upon by the appellant would not, in any event, tip the balance of the public interest in favour of disclosure.

e. There is an important public interest in an external, objective assessment of the quality of 11+ tests, however this would not be furthered by the release of this information.

f. Processing of data can be transparent without being disclosed to the public in whole as a response to a FOIA request.

22. Having been joined as a second respondent, the University responded to the appeal on 13 July 2021 resisting the appeal and supporting the reasoning given by the Information Commissioner in her decision notice. In addition the University applied for the appeal to be struck out under Rule 8(3)(c) of the FTT (GRC) Rules 2020 on the basis that the Appellant's grounds of appeal had no reasonable prospect of success. On 2 August 2021 Judge Griffin refused that application.

23. In its response to the appeal the University raised the issue of whether the request was vexatious as a preliminary point. At the heart of its submissions was the assertion that the appellant's appeal really amounted to nothing more than an attempt to re-run public interest arguments, which have already been rejected by both the Information Commissioner and the Tribunal.

24. The grounds on which the University resists the appeal may be summarised as follows

a. The information request is vexatious because

i. it is in essence, a re-run of his earlier request of October 2016 and there is no merit in his claim that circumstances have changed

ii. Given that the same request has been made, and has already been adjudicated upon and rejected by the Tribunal in the same circumstances it is manifestly unreasonable to expect the University to deal with the same request again

iii. The request is of no real value or substance given that the same/similar request has been comprehensively dealt with.

b. The Commissioner did not simply adopt the reasoning in Coombs No.2 and in any event it would have been perverse to ignore that decision.

c. There has been no change of circumstances as the appellant relied upon the same research published by the Education Policy Institute and the same article in Schools Week in Coombs No.2 and they are referred to in the decision of the tribunal. Furthermore the appellant's submissions about the impact of or inferences to be drawn from the research/article are incorrect.

d. CEM has not used the term "tutor proof" and the Tribunal in Coombs No.1 did not decide, as the appellant submits, that they had so claimed.

e. The disclosure of raw scores by another public authority was unauthorised and made without CEM's knowledge or permission. That information is not readily available to the public. It is not accepted that any errors in processing personal data and the calculation of standardised scores can be discerned from the information that was disclosed by the other public authority.

f. The appellant's contention that the effect of Art. 5(1) GDPR is to nullify FOIA or supersede it is unsupported with authority in support of what is a novel and bold proposition.

g. The decision of the Employment Tribunal in Stothard v Durham University does not establish what the appellant claims it does. There is nothing in the Stothard judgment which includes a finding that CEM behaved in any way unlawfully in respect of the manner in which it sets its assessments.

h. The Tribunal will be considering the matter de novo and the appellant's complaint that the Information Commissioner did not properly take account of various matters adds nothing to the appeal.

25. The appellant replied to the responses stating that he had not yet served all his evidence that he said would be relevant to the engagement of the exemption in s.43(2) and the public interest balance. He submitted this evidence would show

a. That the finding by the tribunal in Coombs No. 2 that "the exemption was engaged because CEM's tests were more expensive than that those of its competitor" GLA, was susceptible to challenge based on the comparative amounts TBGS paid to CEM and GLA.

b. The second respondent's arguments are "disingenuous" and designed to prevent any comparison of the underlying raw pass marks needed to qualify, either between different schools or over time.

c. The findings of the Employment Tribunal are relevant to establish the "covert" lowering of the undisclosed raw pass mark, thereby admitting more children to the grammar school system. This would reduce the income of neighbouring, non-grammar schools who were funded on a per capita basis. He submits that the process is contrary to admissions law. The appellant suggests that it is a desire "to avoid being held to account" is the real reason CEM does not want to disclose the information requested of them.

d. He was entitled, following APPGER (supra) to make a further request for information. As to the assessment of the public interest this should be assessed in 2020 rather than in 2016, the date of the earlier request.

e. First Tier decisions do not bind future First Tier tribunals.

f. The incorporation of the GDPR in May 2018 is a relevant change of circumstance. A reading of Art.5(1) means that the way CEM processes the data is contrary to that legislation. This raises a new public interest to be considered.

g. His request is not vexatious and his personal motivation is "to promote a fair and egalitarian education for all children". He wishes to make this the topic of a PhD. He was responsible for 4 of the 30 items of correspondence relied upon by Ms Bailey on behalf of the University but disputed the characterisation of those items/inferences drawn by the witness. That was 4 requests in 2 and a half years. Requests made to other authorities are irrelevant.

h. There is a distinction between commercial and financial interests. There is no evidence of any new business gained by CEM. He submits there is no evidence of a USP and tutors would not benefit from release of the raw scores and are only interested in the questions.

i. It is important to acknowledge that the request is for data and not for question papers.

j. There is no causal link between the disclosure requested and any prejudice to commercial interests.

k. There is no likelihood of prejudice occurring as there is no causal link.

l. As to the public interest, there is a public interest in disclosure of information where there is suspicion of wrongdoing. He relies on two types of wrongdoing

    i. The appellant suggests that the lowering of qualifying scores by running a second test during the pandemic places children under unnecessary stress and an increased risk to public health.

    ii. He suggests that the way the data is processed is contrary to GDPR and thus disclosure is required in order to make that processing transparent and thus lawful as well as to enable the identification of processing errors

The issues

26. This case is not about whether the law on schools admissions has been followed nor about whether selective education is a "good thing", neither of those matters are within the province of this tribunal to determine. It is an appeal against the decision of the Information Commissioner in a Freedom of Information Act case

27. The first issue is whether the exemption in s.43(2) FOIA is engaged. Whether the disclosure of the requested information would be likely to prejudice the commercial interests of the Second Respondent.

28. The second issue is whether the public interest in maintaining the exemption in s.43(2) FOIA outweighs the public interest in disclosure.

The hearing

29. The hearing took place by remote video platform. We decided it was fair and just to proceed in this way. No communication difficulties were brought to our attention that adversely impacted the ability of any party or the tribunal to participate in the process.

30. I apologise to the parties for the time it has taken to reduce our decision to writing and for it to be promulgated.

31. There is no CLOSED decision in this case as this OPEN decision sets out our reasoning fully without reference to any CLOSED evidence or submissions.

The evidence

32. The Tribunal received an OPEN bundle of 910 pages including the index. We also considered a CLOSED Bundle. We received bundles of authorities which included not only case law from the Courts and Tribunals but also decisions of the Office of the Schools Adjudicator. Witness statements were received and considered from the appellant, together with that of Mr Parker for the appellant and 2 statements from Ms Bailey for the second respondent.

33. The appellant Mr Coombs confirmed the contents of his witness statement and in answer to questions told us that in his view the research suggested that selective education brought no benefits and created division in society. He was not saying that grammar schools were wrong but that there was a need for further information so that there could be an open debate. He said there were problems with testing like the 11+. He said it was easy for those with means to pay for tutors and thus gain a better class of education. He felt that the system should revert to the point when it was the local authority who decided who to admit to schools and not the schools themselves, his concern was about the schools running their own administration. He accepted that it was overseen by the Office of the Schools Adjudicator and all approved by law, such that the schools were not necessarily breaking the law, but that there was a need for more information.

34. The appellant said he wanted to do research on those who have passed and those who have failed by a narrow margin but in his view the data was not being made available to him in order to do that. He could not go to the Office of the Schools Adjudicator unless the information was made available. He had only had access via the disclosure by another public authority. In his experience the standard response of public authorities was that disclosure would harm commercial interests. He was concerned that the non-disclosure of the raw scores meant that any evidence that children are getting brighter was hidden, if disclosed (like in Buckinghamshire) people would know what was happening. He said that

whether or not there was a conspiracy to manipulate test results was a matter for the tribunal. In his view the rationale that the information would benefit tutors was nonsense, as far as he was concerned there was disreputable conduct going on which, in his view, was contrary to schools admissions law but he accepted that was a matter for the Office of the Schools Adjudicator.

35. The appellant's position was that the information needed to be open and transparent so that it can be determined whether the schools are complying. The places at the schools are based on performance in the test, he said he suspected there was illegality in the way test scores were "manipulated" to a set quota. With the raw test scores he would be able to "prove" that admissions law had been broken and the only reasons he did not have the evidence is because it was not being provided by the University (CEM). His suspicions were based on an email he had seen, in the context of the employment proceedings brought by Dr Stothard, that showed an increase in the number of children passing the exam and his view was that the standardisation parameters were modified to admit more children. He could not see any reasons why the raw scores should not be disclosed.

36. After Coombs No.2 he did not wait before making another request as he felt he needed to make a fresh request as he knew the decision could go either way and he had felt that there was evidence that the tribunal in that case may not have considered relevant to their decision. He did not accept the marketing of the tests as tutor resistant was valid and so it was wrong that a public authority could avoid be held to account on the basis of such marketing.

37. The unauthorised material had been in the public domain for 6 months and he had not seen any commercial prejudice. He had taken down the information after being written to by the University's solicitors who were taking it seriously and said they would otherwise apply for an injunction. He did not think many people had seen the information.

38. Mr Parker confirmed his witness statement and was asked questions. He accepted that the Office of the Schools Adjudicator performs an important function and considers cases carefully. He was a member of Comprehensive Future which campaigns for the advantages of comprehensive education and had been approached by the appellant with questions about the technicalities of the case. He had approached it as if he had been commissioned to do so as a piece of advice for the appellant. Mr Parker was a former Director of Education at London Borough of Ealing and had worked at the Office of the Schools Adjudicator, where he had made rulings on admissions. He runs a consultancy that is hired to give technical advice and support in relation to schools administration and organisation. He said he was qualified to give his opinion on the issues Mr Coombs had raised with him about what information was required to determine the issue and whether in certain circumstances there would be a breach of the schools admissions code but he did not provide it as an expert witness only as a favour. He said he had no conflict in giving evidence, that he was not being paid. He believed that where selective education existed it should be transparent and in his view convert selection exists in schools that purport to be comprehensive but are not. His understanding of the facts had been provided by the documents given to him by Mr

Coombs. He said that in his opinion as a former adjudicator the duty of schools to address concerns required disclosure of the information in the interests of fairness and transparency. In his opinion if a suspicion of wrongdoing is raised it needed to be scrutinised. He was not a lawyer. He used to work for a competitor of CEM. Although he felt the Employment Tribunal case in Stothard had set alarm bells ringing, about his concerns, he had not read the judgement. He felt that they had not made any findings about manipulations as they did not want to go outside their jurisdiction. He did not accept that he was not independent. He said that anyone had a right to challenge an admissions authority [CEM not an admissions authority] on their process. He felt that Mr Coombs was "bravely" taking on the task of going behind the published material, as the Office of the Schools Adjudicator could have done, to save them the trouble. Taken to a number of decisions by that organisation Mr Parker explained that it was not an adversarial process and that information could be called for by the adjudicator. He did not know if there was an issue with the marking scheme as he had not looked at the construction of the tests.

39. In OPEN evidence Mrs Bailey adopted her witness statement and was asked questions. She explained the assessment had been developed to avoid a formulaic pattern and that there was security around the content and weighting, there were no practice packs. A competitor did provide material to facilitate tutoring. The University's tests minimised the impact of tutoring and they did not endorse practice materials or publish past papers. Where they lost out on contracts it was generally on price however it was not possible to draw any inference about Buckinghamshire due to the dates of the contracts being 10 years apart. It was her understanding from her customers that CEM was chosen by them because past papers were not disclosed, this is relevant in her opinion to the importance of the reduction of the impact of tutoring. She did not accept that disclosure of the raw scores would not be of benefit to tutors. The disclosure of raw scores would make it possible to work out the test content from the type of sections used and the weighting of those sections. CEM had chosen not to tender for the opportunity in Buckinghamshire and so it was not correct to say they had been "ditched" as suggested in the Schools Week article. CEM's role was to work with the schools in order that they could fill the number of places available. The pass mark is set by the customer and CEM's process does not change, the children are ranked in order of ability. In dealing with the appellant's requests she had come to believe that he was acting with another requestor as she felt that was the only way that other requestor could have known about certain facts but if she had overlooked the fact that the requests and information were in the public domain she was prepared to accept that there had been no intention to mislead. Requests for information were dealt with by a small team at CEM within the business unit. Multiple requests for the same information take up a lot of time and it feels like hard work and to CEM it feels vexatious.

40. The appellant was asked to indicate what matters he would request the tribunal to explore in CLOSED session. He submitted that the main topic was the causal link between the disclosure of raw test scores and the disclosure of test content, structure or development. A gist of the CLOSED session was provided to the appellant.

Submissions at the hearing

41. Skeleton arguments had been submitted in advance of the hearing which amplified the arguments made in the appeal documents.

42. In oral submissions the second respondent added as follows

    a. Nothing has changed since the decisions in Coombs No.2

    b. The evidence of Mrs Bailey demonstrates that CEM has a USP. It is different from its primary competitor who markets past papers. Nothing has been said to undermine this point. CEM's services are generally more expensive than its competitors

    c. There is no reason to disbelieve the evidence of Mrs Bailey whether given in OPEN or CLOSED sessions. Release of the raw scores would have an impact on the structure and development of tests. This would undermine the claim that the tests are resistant to tutoring.

    d. As to the public interest test there is no suspicion of wrongdoing and no explanation of how disclosure would shine a light on this in any event. The material relied upon makes it plain there is no conspiracy or wrongful behaviour. The appellant seeks to rely on decisions of the Office of the Schools Adjudicator and the Employment Tribunal in a way that is contrary to what those decisions say. The real complaint is about transparency. Any complaint about a lack of transparency would have to be made to the Office of the Schools Adjudicator.

    e. There is no evidence of any local concerns being raised by parents or otherwise.

    f. The tribunal should not place weight on the evidence of Mr Parker as his personal views mean he is unlikely to be neutral and had a preconceived agenda. In any event his evidence can be encapsulated into his last paragraph to the effect that of the appellant's suspicions are correct this may be contrary to the admissions code and the Office of the Schools Adjudicator would seek to investigate. This would not advance the appellant's case before this tribunal.

    g. The appellant was entrenched in his viewpoint and unwilling to consider the possibility that the evidence he relied on did not show any wrongdoing. He appeared to accept, in the questions he asked in re-examination, that disclosure would affect the operation of the marking scheme.

    h. This was the fourth occasion on which the Tribunal had been asked to rule on the disclosure of the raw scores. The repeated requests were placing an intolerable burden on limited staff. The second respondent asked the tribunal to consider the burden on the public authority, the motive of requestor and the value or serious purpose of the request.

There was an issue about whether the appellant genuinely felt that there was wrongdoing or was using this as an excuse to try and obtain that which he has been previously denied. Even if it is a genuine belief there is a fear that further requests will be made given that this request was made before the last tribunal was concluded. His unwillingness to wait demonstrates his true motivation which is either not genuine or irrational. There is no evidence of wrongdoing.

43. In his closing submissions Mr Coombs added the following to his detailed written submissions

a. He was not asking the tribunal to judge whether selective education was lawful but to disclose the information to determine that question

b. The Office of the Schools adjudicator only deals with present and future arrangements; that is not hypothetical complaints.

c. Coombs No.2 did not address the lacuna that was identified by the Upper Tribunal in Coombs No.1

d. There is no evidence to show that the tests are more expensive or that schools choose them because of their tutor resistance. The reduction of the effects of tutoring is a worthy aim but they want content not the processing of data. He is supposed to take on trust that disclosure would affect the structure and development of the tests.

e. He needs the information to take the issue of wrongdoing to other forums. It makes no difference whether the wrongdoing is suspected of the respondent or by another organisation.

f. The removal by him from the internet of the unauthorised disclosure of raw scores by another public authority does not amount to a removal from the public domain. He cannot unlearn what he has seen.

g. There is a public interest in
    i. local schools being made aware of changes on admissions processes,
    ii. public authorities acting in accordance with GDPR and disclosure will allow this to be validated
    iii. the release of data that is collected using public funding
    iv. social benefits which should be valued more highly than financial benefits
    v. the issue of vexatiousness has been raised late and to distract from the real issues.
    vi. he would not conspire with other requestors to get past papers as that would defeat what he was trying to achieve.

The legal framework

44. Pursuant to section 1(1) FOIA a person who has made a request to a 'public authority' for information is, subject to other provisions of the Act, entitled to be informed in writing whether it holds the information requested (section 1(1)(a)) and if it is held, to have that information communicated to him (section 1(1)(b)).

45. The duty contained in section 1 is subject to s. 2 FOIA which provides that the duty under s. 1 does not apply to "exempt information" if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (s. 2(2)(b) FOIA).

46. FOIA provides for two types of exemption from the duty in section 1; absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempted from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information this is called the public interest test contained in section 2(2) FOIA.

47. Section 43 (2) FOIA is a qualified exemption, it states

"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)"

48. Thus it is necessary to first consider whether the exemption is engaged and then to go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

49. When considering whether disclosure would, or would be likely to prejudice the commercial interests of any person it is necessary for the Tribunal to consider three things

    a. To identify the applicable interests within section 43(2). The term "commercial interest" relates to a person's ability to participate competitively in a commercial activity. It receives a broad interpretation, which will depend largely on the particular context;

    b. There must be some causal relationship that exists between the potential disclosure and the prejudice and the prejudice must be real, actual or of substance. Some commercial disadvantage is sufficient to satisfy this aspect.

    c. The likelihood or occurrence of prejudice. In order to conclude that disclosure would be likely to prejudice a person's commercial interests there must be a real and significant risk of prejudice, not simply a hypothetical or remote possibility. However, it is not necessary to conclude that the occurrence of prejudice is "more likely than not".

See further Hogan v Information Commissioner [2011] 1 Info LR 588 as approved by the Court of Appeal in DWP v IC & Zola [2016] EWCA Civ 758 ('Zola') and Department for Work and Pensions v Information Commissioner and another [2016] EWCA Civ 758.

50. If the exemption is engaged then the tribunal will consider the public interest balancing exercise. The correct approach to the public interest balancing exercise was set out by the Upper Tribunal in APPGER v Information Commissioner & FCO [2013] UKUT 0560 (AAC) which was cited with approval by the Court of Appeal in Department for Health v Information Commissioner [2017] EWCA Civ 374; [2017] 1 WLR 3330, by Sir Terence Etherton MR at paragraph 43

"when assessing competing public interests under the [2000 Act] the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification, proof, explanation and examination of both (a) the harm or prejudice, and (b) benefits that the proposed disclosure of the relevant material in respect of which the exemption is claimed would (or would be likely to or may) cause or promote."

51. There is a public interest inherent in prejudice-based exemptions, such as s. 43(2) FOIA. The fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test. In Carolyne Willow v The Information Commissioner and Ministry of Justice [2017] EWCA Civ 1876 the Court of Appeal noted in the context of the exemption within 31(1)(f) FOIA (another prejudice based exemption) that

"*The features which justify the engagement of s. 31(1)(f) are equally relevant to the potential prejudice which falls on one side of the balance and, without being conclusive, may make it more difficult (but not necessarily impossible) to say that the countervailing arguments to disclosure are non-existent or so diaphanous that a decision to uphold the decision of the Information Commissioner is perverse, irrational or unreasonable."*

52. Section 11(1A) FOIA provides that

'(1A) Where –

(a) An applicant makes a request for information to a public authority in respect of information that is, or forms part of, a dataset held by the public authority, and

(b) On making the request for information, the applicant expresses a preference for communication by means of the provision to the applicant of a copy of the information in electronic form,

The public authority must, so far as reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use.

53. The term "dataset" is defined in section 11(5) FOIA as follows

"…information comprising a collection of information held in electronic form where all or most of the information in the collection—
(a) has been obtained or recorded for the purpose of providing a public authority with information in connection with the provision of a service by the authority or the carrying out of any other function of the authority,
(b) is factual information which—
(i) is not the product of analysis or interpretation other than calculation, and
(ii) is not an official statistic (within the meaning given by section 6(1) of the Statistics and Registration Service Act 2007), and
(c) remains presented in a way that (except for the purpose of forming part of the collection) has not been organised, adapted or otherwise materially altered since it was obtained or recorded.

54. Section 14 FOIA deals with vexatious or repeated requests, by subsection 1 of section 14 a public authority is not obliged to comply with a request for information if the request is vexatious, nor by virtue of subsection 2 is the public authority required to deal with requests that are identical or substantially similar to request previously made by the same person unless a reasonable interval has elapsed. It is important to note that it is nature of the request and not the requestor that must be considered under section 14 FOIA.

55. In Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC). The Upper Tribunal held that the term "vexatious" is to be given its ordinary, natural meaning and takes its meaning and "flavour" from its context. Thus, a FOIA request will be vexatious where it is a manifestly unjustified, inappropriate and improper use of the FOIA procedure, see paragraphs 28 and 43 of the judgment.

56. A holistic and broad approach should be taken in determining whether a request is vexatious or not. The factors relevant in considering whether an information request is manifestly unjustified, inappropriate and improper, include

    a. the burden on the public authority and its staff,
    b. the motive of the requester,
    c. the value or serious purpose of the request, and
    d. any harassment or distress of and to staff.

57. The Information Commissioner's guidance on this point suggest that there may be a number of indicators that demonstrate that a request is vexatious. These include: the burden on the authority in meeting the request; unreasonable persistence by the requester; unfounded accusations; frequent or overlapping requests; the involvement of a disproportionate effort; no obvious intent by the requester to obtain the information; and the request being frivolous,

in that the subject matter is extremely trivial and the request appears to lack any serious purpose.

58. A public authority is not limited on appeal to relying upon the exemption stated at the time of refusing the information request, see Birkett v DEFRA [2011] EWCA Civ 1606).

Analysis and Conclusions

59. We have decided that the heart of this case is the resolution of the issues under section 43 FOIA and the balance of the public interest. Although the second respondent was entitled to ask us to consider the issue of whether the request was vexatious in order to do justice in the appeal we will consider the application of section 14 only after considering the engagement of s.43 and the public interest balancing test.

60. In this case, the Appellant, did not *in his request* express "a preference for communication… of a copy in electronic form". As such s.11(1A) does not apply in this case even if the information requested were to be defined as a dataset. We note that the Commissioner made no decision concerning the application of s.11 FOIA in her decision notice. Thus it is arguable that it would not be in the jurisdiction of the Tribunal to consider whether the withheld information falling within the scope of the request constitutes a dataset. However, we need not consider this aspect in any event as we find as a fact that the appellant did not express his preference within his request which is the subject of this appeal. In any event a dataset is information and will be subject to the same statutory regime as information recorded in another medium.

61. We accept that there is a distinction between commercial and purely financial interests. The University does have a USP and although they have never described their 11+ examinations as tutor proof they are designed to be tutor resistant. Coombs No.1 did not decide that the University had claimed their papers were tutor proof. The aim is to give all children an equal chance rather than those children who have the ability to receive tutoring having an advantage.

62. The evidence of Mrs Bailey, which we accept, demonstrates that CEM has a USP and that this is different from its primary competitor who markets past papers that can be undertaken with a view to teaching children the type of skills and knowledge they will need to pass the 11+ examinations set by those competitor organisations. There is no evidence that undermines this point. CEM's services are generally more expensive than its competitors; in part because its income is not supplemented by the sale of materials that can be used by tutors or parents.

63. We accept the evidence of Mrs Bailey given in OPEN and CLOSED sessions. Release of the raw scores would have an impact on the structure and development of tests. This would undermine the claim that the tests are resistant to tutoring. There is a causal relationship between the potential disclosure and that prejudice which we conclude is a real one.

64. The appellant suggested that tutors would not benefit from release of the raw scores and are only interested in the questions but this fails to recognise that all information about how an examination is marked will assist a tutor in the design of lessons to assist their students to pass; for example how each part of a paper is marked, or which areas to focus upon. The disclosure of the requested information would affect the operation of the marking scheme. The USP is a commercial interest that would be likely to be prejudiced by the disclosure of the information requested. There is a real and significant risk of such prejudice occurring were the information to be released.

65. We have concluded that the exemption in s.43(2) FOIA is engaged.

66. This Tribunal considers matters for itself and may review any facts contained in the decision notice. Any flaws in the Information Commissioner's investigation are cured by this rehearing. However, we do not accept the suggestion that the Information Commissioner's investigation in this case was flawed. It would have been wholly wrong to have ignored the previous decisions of this tribunal, in particular Coombs No. 2. There was no failure to consider whether there was a causal relationship between disclosure of the requested information and the prejudice claimed, see paragraphs 25 and 30 of the decision notice.

67. The assessment of the competing public interests is to be performed as it is at the time of the response to the request. We are not bound by any previous decision of the First Tier Tribunal and must assess this balance for ourselves, which we have done. We have concluded that the public interest in maintaining the exemption in s.43(2) FOIA outweighs the public interest in disclosure.

68. There is an important public interest in an external, objective assessment of the quality of 11+ tests, however this would not be furthered by the release of the information requested.

69. We conclude that it was reasonable for the Commissioner to consider the factors considered in EA/2017/0166 as they remained valid at the time of the response to the request in this appeal. There had been no change of circumstances as advocated for by the appellant before this request was made. Both the research published by the Education Policy Institute and an article in "Schools Week" about the relationship between Durham and TBGS were considered by the tribunal in Coombs No.2 and referred to in the decision of the tribunal in that case. In any event we reject the interpretation of the appellant that Durham was "sacked" and prefer the evidence of Mrs Bailey who told us that they withdrew from the process. In any event whatever happened it was not a change of circumstance that altered the balance of the public interests.

70. There is a pubic interest in local schools being made aware of changes on admissions processes, but this would not be advanced by the release of the requested information which says nothing about those processes.

71. The appellant invited us to say that social benefits should be valued more highly than financial or commercial benefits but to do so would require us to step into the shoes of the

legislator to determine what is the appropriate social policy is in relation to this aspect of education. That is not the function of this Tribunal which the appellant recognised in his submission that he was not asking the tribunal to judge whether selective education was lawful but to disclose the information which he hoped would be used to determine that question. There is a public interest in debate about the issues Mr Coombs feels so strongly about, but the potential advantage to that debate of the release of this information is outweighed by the damage to the commercial interests of the second respondent.

72. We give little weight to the release of raw scores by another public authority. It was released in error and without CEM's knowledge or permission. It was not the same data as requested by Mr Coombs in this case. Each request must be approached on its own merits. We find that although Mr Coombs took down the material he did so having been in receipt of a solicitor's letter and thus it is not properly characterised as a voluntary removal, nor is it right to say that details of the standardisation process is in the public domain; it is not readily available. This request is of another public authority for different information.

73. As to the decision of the Employment Tribunal in the case of Dr Stothard (case 25000306/2019). This decision is not binding upon us either as to law or as to fact albeit we have, according to the doctrine of judicial comity had regard to how it could be of relevance or assistance to either party in this case. Mr Parker had not read the decision and so we place no weight on his interpretation of what it said or the impact of the case. Having considered the appellant's submissions about the case and having read the judgement for ourselves, we have concluded that Mr Coombs has misread or misunderstood the decision of the Employment Tribunal. That tribunal was not considering whether commercial interests would be adversely affect by the release of the information in issue in this case nor the balance of the public interest as required by FOIA. It is not for us to reassess the evidence given in that case.

74. Mr Coombs firmly believes that the same standard of education should be available to every child; it is not the function of this tribunal to determine whether he is correct in his view, even if it were disputed. He disapproves of selective schools and we have concluded that his point of view has impacted on his submissions about the issues. In assessing the documentation he has had access to he has interpreted it as being consistent with his point of view. We must consider the evidence independently to assess whether there is any suspicion of wrongdoing.

75. The appellant's suspicion is that there is wrongdoing in the allocation of marks and this would be revealed by the release of the raw data. However, that is simply his interpretation of the facts. We have considered all the evidence and we have concluded that there is no reasonable suspicion of any misconduct on the part of the second respondent, or as alleged, because there is no other evidence that is consistent with the appellant's interpretation save the evidence of Mr Parker which is not independent of the appellant. There is nothing in this case, or in the Employment Tribunal case of Stothard, that gives substance to the allegation. There is nothing in the Stothard judgment which includes a finding that CEM behaved in any way unlawfully in respect of the manner in which it sets its assessments. We reject the

appellant's suggestion that the University's arguments are "disingenuous" in an attempt to prevent comparison of data between schools or over time in order not to be held to account. We found Mrs Bailey to be a truthful and measured witness whose evidence we accept.

76. The appellant suggested at the hearing that the lowering of qualifying scores by running a second test during the pandemic placed children under unnecessary stress and created an increased risk to public health. This was relied upon by him as evidence of wrongdoing that weighed in favour of disclosure. We take the view that this submission is unsubstantiated and we reject it.

77. FOIA is all about information held by public authorities. The processing and storage of that data will, at least in part, be funded by public sector money. The appellant's point that disclosure should be ordered as it is information paid for by public money carries no weight in the balance of public interests. If it were to be otherwise, all information held by public authorities would be disclosable on that basis. That is not the statutory scheme set out in FOIA.

78. We accept that, in general, transparency is a positive thing for all public authorities to strive for but the existence of the statutory regime provided for in FOIA shows that that it is not the only factor to consider and will not always be the pre-eminent consideration when considering whether the public interest requires the maintenance of the exemption from the duty of disclosure. Transparency is not a trump card in the balance of the public interests.

79. The appellant's submissions about the application of Art.5(1)(a) of the GDPR are misconceived. This case is not about whether the processing of the data requested complies with the data processing principles but whether the information should be disclosed to the world under FOIA. The submission that the processing does not comply with Art.5(1)(a) is unsupported by authority; we reject the submission. GDPR does not require all processing to be completed in the public domain. Processing of data can be transparent without being disclosed to the public in whole as a response to a FOIA request.

80. There would be no benefit to the parents of children at the grammar schools in this information being disclosed. We have not been told about the interests of any parents groups of prospective parents of children who may be taking the 11+ nor about parents whose children did not pass but in any event we have concluded that their interests would not be advanced by the provision of the raw data. The group that we have received evidence about is a campaign group whose agenda is anti selective education. The interests of a campaign group to scrutinise the raw scores to satisfy themselves that their suspicions are correct do not outweigh the legitimate commercial interest of the second respondent University.

81. The decisions of the Office of the Schools Adjudicator do not assist us on the issues in this case. The appellant seeks to rely on decisions of the Office of the Schools Adjudicator and the Employment Tribunal in a way that is contrary to what those decisions say. His real complaint is about the lack of transparency in the 11+ process and such a complaint would have to be made to the Office of the Schools Adjudicator. Even if the appellant is correct in

his views about the process being contrary to the admissions code this would be a matter for the Office of the Schools Adjudicator. Just because that office will only accept complaints about present and future arrangements does not change the position that complaints about process are to be made to them. If the appellant wishes to take his allegations of wrongdoing to other forums he can do so; his submission that he needs the requested information to do so is based on his assumption that it will prove some form of wrongdoing but there is no evidence of such behaviour before us.

82. For all these reasons we conclude that

    a. the exemption in s.43(2) FOIA is engaged. We conclude that the disclosure of the requested information would be likely to prejudice the commercial interests of the Second Respondent.
    b. the public interest in maintaining the exemption in s.43(2) FOIA outweighs the public interest in disclosure.

83. As to section 14 FOIA and the issue of vexatiousness, in the light of our decision above we need not make a formal determination on this issue but we would indicate that we found Mrs Bailey to be an accurate witness in her descriptions of the burden and distress caused by multiple requests upon her small team. It matters not that those requests are repeated requests or supplemental questions, this all feeds into the level of effort that has to be deployed to deal with them. This effort is amplified by the fact that schools that are in receipt of requests from this requestor or others will also turn to the second respondent for help or for their point of view; it is all part of the burden which has caused Mrs Bailey and her team distress. We make no finding about whether that burden is unwarranted. In our view this appellant has not colluded with any other requestor, he has his own strongly held views which are not the same as others who have made repeated requests for information from the University.

84. Mr Coombs told us that if his appeal were to be unsuccessful that he would not make any further requests for this same information. He was entitled to make the request at issue in this case but the public authority will assess any future requests in the light of the circumstances at that time.

Signed Judge Lynn Griffin Date: 7 March 2023