

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 April 2018

Public Authority: UKCAT Consortium Ltd
Address: Medical School
Queens Medical Centre
Nottingham
NG7 2UH

Decision (including any steps ordered)

1. The complainant has requested the technical reports on the aptitude tests UKCAT provides and which are used by various medical schools as part of their admissions process. UKCAT withheld the information under section 43(2), prejudice to commercial interests.
2. The Commissioner's decision is that UKCAT is entitled to withhold some of the information from the reports. This is primarily that information analysing how well the actual test questions (referred to as 'items') performed. However, the Commissioner finds that some of the more general information and the analyses of how examinees performed is not exempt and should be disclosed.
3. Although not cited by the public authority the Commissioner also finds that some of the personal data contained in the reports can be withheld under section 40(2).
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information identified in the confidential annex that accompanies this notice and which will be provided exclusively to the public authority.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 21 August 2017 the complainant wrote to UKCAT and requested information in the following terms:

"Please provide PDF copies of the Technical Reports for the UKCAT issued by Pearson VUE to UKCAT Consortium Limited (for each year from 2005 to 2017). Thank you."

7. UKCAT responded on 22 August 2017. It stated that the information was exempt and cited section 43(1), trade secrets as its basis for withholding the information. However it did not explicitly refer to trade secrets when explaining why that exemption applied, instead it referred simply to the potential for commercial interests being prejudiced. It also referred to the fact that it had previously refused a similar request which he had made for the reports in 2014. However it also went on to provide him with a link to where the executive summaries of most of the reports could be accessed on its website.
8. The complainant requested UKCAT carry out an internal review of that decision the same day. UKCAT declined to conduct such a review. This appears to be on the basis that it considered it had addressed all the relevant issues when dealing with his previous request.
9. In light of the above the Commissioner is satisfied that the complainant has exhausted the public authority's internal review and that his complaint is eligible for investigation.

Scope of the case

10. The complainant contacted the Commissioner on 24 August 2017 to complain about the way his request for information had been handled.
11. As well as providing the Commissioner with the submission he made to the public authority when asking it carry out an internal review he argued that in response to a different complaint in respect of a request made to the University of Oxford the Commissioner had already found there was a public interest in disclosing information about UKCAT.
12. At the outset of the investigation UKCAT clarified that it was seeking to rely on section 43(2), prejudice to commercial interests, rather than section 43(1), trade secrets, to withhold the full versions of the technical reports.

13. The Commissioner considers that the matter to be decided is whether any of the information contained in the technical reports is exempt under section 43(2).
14. The Commissioner will also consider whether any of the information is exempt under section 40(2) on the basis that it is personal data, the disclosure of which would breach the principles of the Data Protection Act 1998 (DPA).
15. It should be noted that the tests provided by UKCAT were first used in 2006. Therefore although the request seeks reports going back to 2005 the Commissioner is satisfied that there is no technical report for 2005. The last test period completed prior to the request being received ran from 1 July 2016 to 4 October 2016. Therefore the final report captured by the request is the one for 2016.

Status of UKCAT as a public authority

16. UKCAT is a registered charity and a company limited by guarantee. The members of the consortium are those UK universities who use the clinical aptitude tests provided by UKCAT as part of their admissions process. Although some foreign universities also use the test, UKCAT has advised the Commissioner that these universities are only 'Associate Members' and do not form part of the actual consortium. The Commissioner therefore understands that UKCAT is wholly owned by UK universities. As such it is a public authority for the purposes of the FOIA under section 6(2)(b), on the basis that it is wholly owned by the wider public sector.

Reasons for decision

Section 43(2) – prejudice to commercial interests

17. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person. This can include the public authority holding the information.
18. The exemption can be engaged on the basis that releasing the information either 'would' prejudice commercial interests or, the lower test, that the disclosure would only 'be likely' to prejudice those interests. In this case UKCAT has argued that disclosing the reports 'would' prejudice both its own commercial interests and those of Pearson VUE, UKCAT's business partner which develops and delivers the aptitude tests on UKCAT's behalf. For the exemption to be engaged on the basis

that the prejudice would occur the Commissioner must be satisfied that it is more probable than not that the prejudice would occur.

19. It is noted that UKCAT are not only concerned about its own commercial interests, but also those of its business partner Pearson VUE. The Commissioner would need to be satisfied that any arguments UKCAT presents about the risk to Pearson VUE's interests are based on the genuine concerns of its business partner before she would be prepared to consider them. In this case it is clear from UKCAT's submission that it is based on consultations with Pearson VUE and that UKCAT has a sound knowledge of its business partner's interests in this matter.
20. The Commissioner will therefore consider whether disclosing the full technical reports would prejudice either UKCAT's or Pearson VUE's commercial interests.
21. When seeking an internal review the complainant argued that there are no commercial interests in the reports. This seems to be based on the complainant's view that UKCAT is the only supplier of the UK Clinical Aptitude Tests, and that there is no other test like it. Whilst it is true that no other company could supply aptitude tests badged as the UKCAT test, UKCAT has advised the Commissioner there are at least two other suppliers of aptitude tests in the UK which are used by the medicine schools and which are alternatives to the UKCAT test. It has also stated there are many others internationally. The Commissioner is satisfied that there is competition between such companies for the tests they supply.
22. It also appears that the complainant believes that as all the members of the UKCAT consortium are public authorities there would not be any commercial interests at stake. The Commissioner has no hesitation in finding that simply being a public authority does not prevent a body having commercial interests. UKCAT's arguments have focussed on the sensitivity of the information on how the actual tests are created. In this case UKCAT has explained that the actual test it uses is designed and administered by a private company (ie Pearson VUE) which was selected following a tendering process. UKCAT has informed the Commissioner how many test companies tendered for the contract in the last two procurement exercises. UKCAT has a commercial interest in ensuring it obtains best value for money through that tendering process and argues that potential suppliers of aptitude tests would be put off submitting bids to the UKCAT if they had concerns that, what they regarded as, commercially sensitive information would be disclosed as a consequence of doing business with UKCAT. The Commissioner accepts that narrowing the field of potential bidders, including perhaps discouraging UKCAT's current business partner, would prejudice UKCAT's commercial interests.

23. Although the Commissioner follows the logic of UKCAT's argument whether the alleged effect would actually occur, or at least whether it's more than probable than not that it would, really depends on whether disclosing the reports would reveal information that is commercially sensitive to Pearson VUE. This is the issue the Commissioner has focussed on.
24. UKCAT has stated that the withheld reports contain information on the general design of the exam, how candidates performed and, importantly, on the statistical characteristics of how specific questions performed. Having viewed the information the Commissioner recognises that each year the tests are evaluated by means of various, sophisticated, statistical analyses to ensure the actual questions being used provide meaningful results ie that the results fairly identify different levels of skills and aptitudes relevant to being a doctor or dentist which will help a school of medicine recruit the best candidates to those professions. New questions and approaches are regularly trialled (ie they form part of the exam, but the scores derived from them are not counted in the candidates' final scores) to determine whether they can be helpfully added to the actual exam in future. Similarly the performance of the existing pool of questions is re-examined. In this way the test is continually being fine-tuned and refreshed with the objective of maintaining its rigour and value.
25. It is this analysis of the test results and the performance of the questions which allow the continual development of the aptitude test which Pearson VUE are concerned about. It is argued that to provide this information on the underlying methods used to build and manage the tests would give Pearson VUE's competitors an understanding of professional tools used to create the test. Amongst other things the reports reveal the criteria for determining what constitutes a valid test question, and the tools used when writing those questions and the psychometric analysis used in particular parts of the test. UKCAT argues that revealing this information would allow Pearson VUE's competitors to shortcut the work that Pearson VUE has undertaken over decades to develop and improve the services it offers. This would undermine its competitive advantage.
26. The Commissioner recognises the complexity of the analyses contained in the reports and accepts it represents the product of many years work. It details how Pearson VUE produces the test and seeks to continually improve it. Even though the actual test questions which much of the analyses relates to are not included in the reports the Commissioner is satisfied it would be of value to Pearson VUE's rivals as it sets out the all-important methodology used when monitoring and refining the performance of such questions. Pearson VUE is described by UCKAT as an industry leader and this being so there will be competitors wishing to learn from the approaches it adopts. For these reasons the

Commissioner finds that the information on the performance of test questions is exempt under section 43(2).

27. The Commissioner is alert to the fact that the request captures information going back to 2006 when the tests were first introduced. She has therefore considered whether information which was eleven years old when the request was made can still be considered commercially sensitive. Having viewed the withheld information she considers that many of the analytical tools used in 2006 were still employed at the time of the request. Furthermore as the reports chart the evolution of the tests, the information contained in earlier reports reveals how the decisions to make any changes to questions were made and why those changes became necessary. It also identifies the different subtests that were trialled to address issues that arose or to simply explore whether the use of alternative subtests could improve the test. Therefore the Commissioner is satisfied that even the older information would assist a rival in developing their own products to compete with those created by Pearson VUE.
28. However the reports also include more general introductions and background to the report, information on how the tests were designed and organised (for example information on the range of elements, or subtests, contained in the exams) and information on how those sitting the tests performed. The Commissioner considers this information is of a different character. From 2008 onwards UKCAT published what it calls executive summaries of the technical reports and even before that some details of the test and the results were published in annual reports. Although UKCAT has argued that the information contained in the annual reports and executive summaries is much higher level than that in the full versions of the technical reports, the Commissioner considers that much of the introductory and background information is very similar. The extent of these similarities is such that the Commissioner finds that to disclose what little additional information is contained in the technical reports on these issues would not be prejudicial. This information does not engage the exemption and should be released.
29. The executive summaries and annual reports also contain information on how well candidates performed in the tests. Although the format of the executive summaries changed slightly over time the information on candidate's performance includes analysis of how different subgroups of the candidate population performed, for example performance by gender, ethnicity, socio-economic group etc. The information is not however as detailed as that in the full technical reports. Nevertheless, the Commissioner is not satisfied the disclosure of this more detailed information would prejudice the commercial interests of Pearson VUE where it mainly relates to operational subtests. This is in part because the information on the candidate performance appears to use more standard methods of statistical analysis. More importantly however the

information does not relate directly to the performance of the actual questions and so reveals less about how the test results feed into the development of future tests. It is also noticeable that when making its arguments UKCAT focussed on the sensitivity of the data on the questions, rather than on the sensitivity of information about the performance of candidates. The Commissioner finds the information on the performance of the candidates does not attract the exemption and should be released. The exception to this is some of the information relating to how candidates performed in the various behavioural/situation judgement tests that were, at the time, only being trialled. The collection of information on these trial subtests was very closely linked with the development of those subtests and therefore is more commercially sensitive.

30. Returning to the information about the performance of the actual test questions, the Commissioner recognises that the annual reports and executive summaries also contain some limited information on this subject. However she is satisfied that the information in the full technical reports is far more detailed and much more revealing of how Pearson VUE analyses the data from the tests to identify those questions which are successfully distinguishing between examinees of differing ability or aptitudes. All this information is then used to develop the tests and ensure that, as far as Pearson VUE and UKCAT are concerned, the process remains fit for purpose. Therefore the Commissioner finds that the presence of the limited information that has already been published does not undermine her conclusion that the detailed analysis of how the actual questions performed contained in the full technical reports is commercially sensitive.

Public Interest test

31. Having found that the information on the performance of the test questions and candidates' performance in subtests being trialled, engages the commercial interest exemption, it is necessary to consider the public interest in maintaining that exemption. In accordance with section 2 of the FOIA, information can only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
32. In its submission to the Commissioner UKCAT recognised that there was a public interest in ensuring appropriate audits of UKCAT and assurances that the test it provides is fit for purpose. However it argues that this public interest is met by its publication of the executive summaries.
33. Although the publication of the summaries partially meets the public interest it does not extinguish the public interest completely. As discussed the full technical reports contain far greater detail of the analyses conducted in respect of the individual questions. The disclosure

of this information would allow greater scrutiny of the methods adopted by Pearson VUE. Even though the complexity of these analyses means that the average person might make little sense of the information, there are experts in the field who would be able to reach a view on the rigour of the approaches adopted by Pearson VUE and therefore identify whether there are any flaws in the test. There is therefore a value in disclosing the information. This is heightened when it is remembered what the ultimate purpose of the test is ie to help select candidates for medical college. Clearly there is a public interest in providing information that would allow those with adequate knowledge to assess whether these tests are an effective means of identifying those most likely to make the best doctors and dentists. There is also a public interest in better understanding whether the tests are fair to the candidates sitting them.

34. When asking UKCAT to carry out an internal review the complainant argued that there were grounds for considering the test was not fit for purpose. However he did not provide information which substantiated this claim when complaining to the Commissioner. Basic internet searches conducted by the Commissioner failed to find evidence that there was any major controversy over the use of the UKCAT test. A number of academic reports have been published, some concerning the role the test plays in the admissions process for different medical schools, and some of those studies suggest greater transparency is required so that potential applicants understand the process better. Other studies consider whether the test does effectively predict how students will perform at medical college, with some of the studies concluding that it is a useful indicator of performance. There are also studies of whether the test discriminates against students from different backgrounds, with some suggesting the test is capable of broadening the range of candidates admitted to medical schools while other studies reach different conclusions. The UKCAT test is also discussed in some student forums, with some supporting the test and others liking the test less.
35. The Commissioner has concluded that although the test does generate some discussion of its fairness and effectiveness this is understandable considering the increasing use of such tests is still a relatively new addition to the admissions policy of medical schools. However the Commissioner can detect no particular controversy around the test or public outcry against its use.
36. The complainant has also argued that UKCAT spends large amounts of public money and that this therefore increases the public interest in there being transparency of the tests it provides and in disclosing information that allows it to be held to account for how it spends that money. From its annual reports it appears that the vast majority of UKCAT's income comes from testing fees. In other words the income is

from those universities who use the test, most of which are UK universities. Therefore at least some of UKCAT's income is derived, indirectly, from the public purse. The Commissioner accepts there is a general public interest in how public funds are spent, and this can be extended to the public interest in considering whether UK universities are obtaining value for money when using the test.

Correction 23 April 2018

Since serving this notice UKCAT Consortium Ltd has advised the Commissioner that the income referred to in its annual reports as being derived from testing fees is paid by candidates who sit the test rather than from universities. The amount of money received directly from UK universities is very limited. The Commissioner ultimately concluded that the weight of the public interest in favour of disclosing this information was less than that in favour of maintaining the exemption. The fact that UKCAT Consortium Ltd receives less public money than initially thought reduces this weight further.

37. The complainant has made a couple of public interest points which relate to the fact that UKCAT is a registered charity. His first point concerns the public money which UKCAT attracts. This has been dealt with above. His second point concerns the basis on which UKCAT obtained its charitable status. If the Commissioner has understood his point correctly, the complainant argues the value of UKCAT's test when selecting students for medical college is based on the premise that it is capable of discerning the 'innate abilities' that make a good doctor or dentist. It appears the complainant does not agree that there are such innate abilities and therefore questions the value of the test and presumably, the very basis on which UKCAT has obtained its charitable status. It is not for the Commissioner to comment on whether such qualities do exist. In so far as there is a public interest in disclosing information which would allow those with the necessary expertise to scrutinise how well designed the test is, this has already been taken into account in paragraph 33 above. The requested information would not in itself reveal how good an individual's test score was at predicting their performance once they got into medical college; from the Commissioner's internet searches it appears various pieces of research are being conducted into this issue. It is not obvious how the disclosure of the requested information would help resolve any debate over whether doctors and dentists had particular 'innate abilities'.
38. Finally the complainant has argued that in a previous decision, the Commissioner ordered Oxford University (case reference FS50508076 – 5 June 2014) to disclose information relating to UKCAT and that this sets a precedent that there is a public interest in disclosing information about them. The Commissioner rejects this argument. The Oxford University case related to its decision to no longer use the UKCAT test

and the disputed information was the personal data withheld from records of that decision making process. The Commissioner finds that comparisons between the two cases cannot be drawn.

39. Having considered the public interest arguments in favour of disclosure the Commissioner finds that there is clear public interest in releasing information that would allow closer scrutiny of how the test was created and the quality of the test. Ultimately the development of UKCAT's test is mainly funded by public money and there is a public interest in better understanding how well that money has been spent. These public interest arguments now need to be weighed against the public interest in withholding the analyses of how the test questions performed.

See correction to paragraph 36 above.

40. UKCAT considers that disclosing the information would jeopardise the test by providing strategically useful information to competitors which in turn would undermine the continued successful running of the test.
41. When considering whether the exemption is engaged the Commissioner has accepted that disclosing the analyses of the questions and performance of candidates in trial subtests, would be used by competitors to gain a competitive advantage over Pearson VUE. There is clearly a public interest in allowing a commercial company to reap the rewards of the investment it has made in developing the necessary expertise to deliver its products. To remove that incentive would stifle the process by which this aptitude test is continually refined and improved. Having looked at the withheld information the Commissioner accepts that the development of the test has taken place over many years, ie since it was first launched in 2006. The investment in this process is therefore substantial and therefore the public interest in protecting that level of investment is very significant.
42. The Commissioner also considers that if UKCAT were to disclose information which undermined Pearson VUE's commercial interests in this way it would damage the relationship between the two organisations. This in turn would undermine UKCAT's commercial interests and disrupt the smooth delivery of the test. Although the complainant appears to consider the test is not capable of measuring any meaningful qualities that would help identify which candidates will make the best future doctors and dentists, the Commissioner notes that many universities now adopt the test as part of their admissions process. It would not be in the public interest to interfere with the use of a tool which many universities obviously consider of value when selecting who to admit to medical school and so who will provide high quality medical care in the future.

43. UKCAT has also argued that as the requested information is very technical there is a real risk that it could be misunderstood by the general public and that any confused public debate generated by such misunderstanding would simply undermine confidence in the test. This, it believes, would be against the public interest. The Commissioner accepts that the average person would have difficulty in fully understanding the technical details of the report, however she does not accept this is a valid argument for maintaining the exemption. To do so would in effect mean that any very detailed or technical information should be withheld in response to a request. The Commissioner considers that there will always be cases where the general public may have to rely on expert commentators to make sense of complex information. The fact this may be the case does not mean there is no public interest in its disclosure.
44. The Commissioner has weighed the public interest in disclosing the information which would allow scrutiny of how well designed the test is and whether its use by UK universities represents value for money against the significant damage disclosure would cause to commercial interests and the disincentive to continually develop and refine such tests that would result. The Commissioner has also had regard for the fact that the use of such tests are now an established part of the admissions policy to many medical schools and the importance of universities being able to use the full range of tools available when selecting who will provide our future healthcare. The Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure. UKCAT is entitled to withhold the information on the performance of the test questions.

Section 40(2) – Personal information

45. Although UKCAT did not cite section 40(2) when refusing the request the Commissioner has noted that some of the technical reports do contain personal data. This information identifies who within Pearson VUE were involved in the preparation of the report. As regulator of the Data Protection Act 1998 (DPA) as well as the FOIA it would not be appropriate for the Commissioner to order the disclosure of personal data if doing so would breach the first principle of the DPA which requires that personal data shall be processed (which includes its disclosure) fairly and lawfully. Where a disclosure would breach the first principle it is exempt under section 40(2).
46. The Commissioner has started by looking at whether disclosing this personal data would be fair. 'Fairness' is a difficult concept to define. It involves consideration of:

- The possible consequences of disclosure to the individual.
- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

47. Where information relates to an individual's professional life its disclosure is more likely to be fair than if it related to their personal life. However regard must still be had for the roles of those individuals in their workplace. Those preparing these reports would be highly qualified individuals but this does not necessarily mean they hold a senior position within the management structure of Pearson VUE. It is also clear that Pearson VUE regard the whole report as being commercially sensitive and each report contains a confidentiality clause. Therefore the Commissioner is satisfied that any individual named in a report would not expect the report to be placed in the public domain. It is more likely that they would expect it to be disclosed only to those who they already have an established working relationship with. The exception to this is where the name of a report's author is also included in the Executive Summary that has already been published.
48. Although it is not clear that the individuals would attract any criticism if they were identified as being the author of a report or contributing to it in some way, neither is it clear that disclosing the names would add anything meaningful to one's understanding, or scrutiny of the report. Indeed the majority of reports contain no personal data. Therefore in light of what would have been the reasonable expectations of the individuals concerned at the time the reports were produced the Commissioner finds that disclosing the personal data (apart from where the individual is already named in the published Executive Summary) would be unfair. It is therefore exempt from disclosure under section 40(2). UKCAT are not required to disclose this information.

Right of appeal

49. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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

Rob Mechan
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