**EA/2017/0166**

**JAMES COOMBS**

**Appellant**

and

**THE INFORMATION COMMISSIONER**

**First Respondent**

**UNIVERSITY OF DURHAM**

**Second Respondent**

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**DECISION**

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**Before:**

Brian Kennedy QC

Mr David Wilkinson

Mr Michael Jones

**Introduction:**

**[1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice dated 20 July 2017 (reference FS50661288) which is a matter of public record.

**[2]** The Tribunal sat to consider this appeal on 25th January 2018. We apologise for the delay in promulgation due to unforeseen circumstances.

**Factual Background to this Appeal:**

**[3]** Full details of the background to this appeal, Mr Coombs' request for information and the Commissioner's decision are set out in the Decision Notice ("DN") and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Durham University ("the University") was correct to rely on s43(2) in the context of details of 11+ exam results.

**Chronology:**

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| 6 Oct 2016 | Appellant's request for test marks and details for 11+ exams set by the University |
| 27 Oct 2016 | University confirms it holds requested information; withholds some citing s43 (2) (commercial interests) and advises that the rest of the request exceeds s12 cost limits<br>Appellant requests review refines request to tests taken in Autumn 2016 |
| 19 Dec 2016 | University review maintains reliance on s43 (2) as before |
| 3 Jan 2017 | Appellant complains to the Commissioner |
| 20 July 2017 | Commissioner's Decision Notice rejecting Appellant's complaint |
| 3 Aug 2017 | Appellant appeals to the FTT |

**Relevant Legislation:**

***s43 Commercial interests.***

(1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

**Commissioners Decision Notice:**

**[4]** For a prejudice-based exemption to apply, the Commissioner considered that three criteria must be met:

i. The actual harm alleged to occur or be likely to occur must relate to the applicable interests within the exemption;

ii. Demonstrable causal relationship between disclose of the material and the relevant real, actual or substantial prejudice; and

iii. The level of likelihood relied upon must be demonstrated (to more than just a hypothetical possibility).

**[5]** The University explained that it is one of two main commercial providers in the UK of 11+ testing. The Commissioner accepted that this relates to a commercial service. The University claimed that disclosure would prejudice its commercial interests by undermining its unique selling point. The tests are designed and marketed as being more resistant to tutoring, and disclosure of raw scores would enable competitors and tutors to understand the University's methodology and 'reverse engineer' the data to better coach students for the test. The Commissioner was satisfied that there was a logical link between disclosure and a 'real and significant' risk of prejudice occasioning.

**[6]** The Commissioner cited two previous decisions (FS50566015 and FS50553969) and a ruling of the First Tier Tribunal (James Coombs v Information Commissioner [EA/2015/0226]). The Appellant argued that matters had evolved sufficiently since 2015 to justify disclosure now, a point with which the Commissioner disagreed.

**[7]** The Appellant stated that public interest favoured disclosure, as it was the 'only way' the public can understand differences in the levels of difficulty needed to gain a place at different selective schools. He said that what constitutes "grammar school standard" appeared to be rising and that disclosure would inform public debate on education policy. The Appellant saw this as particularly important as grammar schools are publicly funded, and understanding their selection process is central to the debate, especially at a time when the Government was recommending an expansion in selective education.

**[8]** The University argued that the public interest lay in withholding the information, as disclosure would undo the efforts made to ensure the test focuses on the students' underlying intellectual ability and reduce the ability of affluent families to pay for a competitive advantage through coaching. Also, the University's main competitors in this field are not public bodies and therefore not subject to FOIA. As there is a public policy decision to encourage the University to engage in commercial activity, the release of its intellectual property into the public domain is 'unfair and anti-competitive'.

**[9]** The Commissioner accepted the University's arguments, noting that the prejudice to the University's commercial interests would ultimately impair its ability to perform its core functions and deprive the public purse of funds.

**Grounds of Appeal:**

**[10]** The Appellant pointed out that the FTT ruling in his previous complaint was not a unanimous decision by the panel, and rejected the Commissioner's conclusion that there was no new evidence of substance to be considered. The Appellant clarified that he was not seeking the questions and answers in the tests, but rather the marks in their raw form. He criticised the methods of standardisation used by test companies as being 'an oxymoron'.

**[11]** He denied that the University's status as a public body exposed it to greater disadvantage from FOIA than its FOIA-exempt competitors; conversely, he stated that the equivalent information from their main competitor is available upon request from the requesting admissions authorities. He gave the example that in May 2017 North Yorkshire County Council provided the relevant information regarding two schools within ten working days, seemingly without considering any prejudice to commercial interests.

**[12]** These interests were predicated upon the concept of the tests as being 'tutor-proof', and the Appellant had not had sight of the evidence relied upon in the confidential communications to the Commissioner. The Appellant provided evidence to the effect that it had been claimed in the press that the University's test was more susceptible to tutoring/coaching, and that the director of the unit within the University tasked with designing these tests was distancing himself from this 'tutor-proof' claim. He claimed that the University had lost one fifth of their revenue from such tests given what he described as 'conclusive evidence in the public domain' that this tutor-proofing claim was false and seen to be false. Therefore, he argued, there was no prejudice to the University's commercial interest as there was no harm actually or likely to be caused.

**Commissioners Response:**

**[13]** The Commissioner refuted any imputation that she had not considered the particular facts of this request, and provided the confidential communications to the Tribunal as part of the Closed Bundle of Evidence. It was after the consideration of all these facts that she concluded this request was substantially the same as the previous cases, and even arguably stronger in this instance as the Appellant was requesting a more broad database. The fact

that there was a dissenting panel member in the Appellant's previous FTT case was dealt with by Edward Jacobs J in refusing permission to appeal to the Upper Tribunal when he stated: "*the fact that the president judge took a different view on both engagement and the public interest does not indicate that the majority were not entitled to take the view they did*".

**[14]** The 'changing circumstances' claimed by the Appellant were the voluntary disclosure of test data from the University's competitor, and the media articles disputing any claims of 'tutor-proofing' of the tests. The Commissioner considered that release of data by competitors could reinforce the need for confidentiality by the University in order to protect its unique selling point (USP). Furthermore, the data was not released by the test provider themselves, but by a local authority with no evidence that it was sanctioned by the test provider. The media articles take the Tribunal no further, with no expert evidence adduced as to the validity of the USP, and no data regarding consumer perception of the tests in question.

**Appellants Submissions on the Exemption:**

**[15]** Initially, the Appellant rejected the assertion that there was a commercial interest to be prejudiced. He explained that all test companies use a process of 'age weighting' i.e. adjusting raw test scores to compensate for the different birth months having an effect on outcomes. He argues that release of this data is necessary to allow the public to understand precisely how and why this weighting exercise is undertaken.

**[16]** He repeated his claims that the University's USP is flawed, providing further citations of media reports and evidence to Parliamentary Select Committees. Indeed, he notes that it would be negligent for a test provider *not* to attempt to minimise the effects of tutoring. He pointed out that the University itself was resiling from the position it took in 2015 (that the tests were tutor proof, or more tutor proof than its competitors'). Disclosure of raw and standardised results from previous years would not benefit tutors; it was claimed, because there is no fixed 'pass rate' independent of rankings among test participants. The Appellant cited the Tribunal's decision in *Reading School v ICO* (EA/2013/0227), where a suggestion that a pass rate could be calculated was rejected, and the suggestion of unfairly advantaging tutors dismissed.

**[17]** The burden of proof is on the authority to explain how disclosure would be likely to prejudice the authority's commercial interests. A 'confidential' explanation was provided to

the Commissioner as to how tutors could potentially reverse engineer raw data, but the Appellant argued that the University could just as easily have provided a *general* explanation as to how raw marks could benefit teachers. By keeping the reasoning secret, the Appellant states that the University is preventing him participating fully in the proceedings. The Appellant was of the view that the Commissioner failed adequately to test the assertions made in the USP, and did not consider the changes that have occurred since the FTT last considered the issue of whether to release raw marks from 11+ tests.

**[18]** When considering the feared commercial impact, the Appellant states that it has already occurred, but as a result of loss of confidence in the University's testing regime rather than the release of any data. There was only one public authority that made the assertion that it chose to use the University's test specifically for the claimed tutor-proof tests. That public authority, after three years of 'field-testing' the exams on the children of that authority, declined to continue using the University's tests. This also feeds back to the Appellant's claim that the Commissioner failed to question or test the validity of the claim in the USP. The Appellant asserts that as a result of negative publicity around the University's test, there is "no way that their main competitor...would want to emulate such an unsuccessful strategy".

**[19]** Following the oral hearing, the Appellant conceded that "the claimed commercial success is based on perception rather than being evidence based" and it was therefore not necessary for this stage of consideration to determine whether tutors would benefit from the information. He therefore requested that the Tribunal focus on the public interest in releasing the requested information.

**Commissioner's Skeleton Argument:**

**[20] T**he Commissioner asserted that it was for neither her nor the Tribunal to look behind the University's assertion that it has achieved considerable commercial success as a result of its USP, or to interrogate the commercial validity of this USP. The majority decision in the previous *Coombs* case held that it was unnecessary for the University to establish that its USP was true. She denied that she had ignored the facts of the present case, rather stating that she had assimilated them with the current issues and determined that there was no substantive difference.

**[21]** The disclosure of similar data by a competitor of the University is of no relevance, in the Commissioner's submission, as it is no indicator of the actual or likely impact of the particular circumstances of the University's method. The Commissioner saw circumstances in which disclosure by a competitor may reinforce the need for confidentiality so that it could further differentiate itself from its competitors. The Appellant provided no probative evidence that the

USP does not exist, that customers have complained or have no confidence in the USP, and the Appellant had not been granted permission to act as an expert in his own case. Furthermore, the University had denied the Appellant's characterisation of its dealings with The Buckingham Grammar Schools (TBGS), denying that it had lost the contract because its tests were not tutor-proof. It claimed instead that it had decided not to tender for the same contract.

**Appellants Submissions on the Public Interest:**

**[22]** It is clearly in the public interest to develop an admissions test, which removes the advantages of tutoring, but the Appellant likens this to the public interest to find a cure for all cancers or an unlimited source of free energy. The onus is on the University to establish that this objective is actually feasible, and that releasing the requested information would frustrate this. Neither the Commissioner nor the University, he argues, have provided any arguments to support the contention that in order to counteract the effects of tutoring there needs to be uncertainty over the exact method of setting and scoring tests.

**[23]** The idea of tutor-proofing tests is described by both the University and the Commissioner as the University's USP. None of the University's main competitors make this claim. In the Appellant's previous request, the minority judgment of the Tribunal expressed great surprise that the University did not request to be joined as a party and failed to send a representative to the hearing "who could deal with the incomprehensibility" of their explanation. The majority dismissed the validity of the USP as irrelevant, but in the Appellant's contention if a reason to withhold information is based on a falsehood, it is no reason at all.

**[24]** The University is correct in stating that its main competitor is not subject to FOIA, as it is a private company. However, the Appellant disputed that disclosure would give the competitor an unfair commercial advantage. Government's advice on patenting specifically excludes mathematical models as something, which can be patented. The University had not explained exactly how the numerical data or the mathematical methods they use to process these data as part of the execution of publicly funded public functions constitutes their Intellectual Properly. He also provided a timeline charting the inception of claims that the University's tests were tutor-proof in 2014 through to admissions in 2017 that that they could not be.

**[25]** Withholding raw marks enables schools to alter the absolute level of attainment required. Raising the standard can covertly lead to improved GCSE results that policy-makers and parents incorrectly attribute to the school. It prevents any comparisons between

required attainment levels in different schools, and so prevents appropriate and necessary scrutiny of the testing regime. When discussing lowering the so-called 'grammar school standard': "*In times of decreasing demand for school places, grammar school standard is automatically lowered to ensure grammar schools remain full and therefore fully funded at the expense of neighbouring schools with comprehensive intakes which those children would otherwise have attended. These schools are not even aware that changes are being made which effects them.*"

**[26]** The Appellant described his motivations as lying in his intention to undertake a PhD in exploring why grammar schools, are disproportionately, attended by middle class children. His hypothesis is that the intensive tutoring received by some children for the 11+ also artificially boosts their KS2 SATs, making it possible to measure the effects that tutoring has on "distorting access to publicly funded education". The Appellant believes that the reason for the 11+ test to be conducted in such secrecy is "because the test represents a major weakness in the selective education system" and schools do not want independent research to be critical of them.

**[27]** This lack of transparency stands in stark contrast to the 2014 Schools Admissions Code ("The Code"), which sets out the statutory framework under which schools must operate. The Code says, "*In drawing up their admission arrangements, admission authorities **must** ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective. Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated*". GCSE examiners provide marking schemes and fully disclose raw marks and methods, and there is no valid reason not to extend this to 11+ tests. The House of Commons itself has decried the lack of independent studies into the fairness of grammar school admissions.

**[28]** Transparency would also help to prevent errors in the admissions process. The Appellant provided examples of past instances were children were erroneously denied places at schools because of errors in standardisation.

**The Universities Response to the Appellants Submissions on the Public Interest Test:**

**[29]** The University emphasised that the Tribunal was not the correct forum through which to explore the benefits and pitfalls of selective education and the University's ability to provide

tests. It denied that at any stage it had claimed its entrance tests were 'tutor-proof', and so denied that it was profiting from false claims.

**[30]** Nevertheless, the University stated that its method of ensuring fairness requires maintaining uncertainty as to the method of setting and scoring the tests. The structure of the test is not published, and the University "*maintains a proprietary approach to test development and construction*". Past papers are not made available nor are practice materials sold to the public. This is done in an effort to "*reduce the advantage that more affluent parents can obtain for their children by paying for private tuition*". The University feared that tutors would be able to reverse-engineer raw scores and the test format in order to allow their tutees to focus on specific areas of the test and pass on that basis rather than taking the whole test 'at face value'. Explanations of how this could be done were provided to the Tribunal in a closed bundle.

**[31]** Releasing the information would make future tests more expensive by increasing costs for the University whilst simultaneously de-valuing the bank of test content it holds for re-use in future commercial opportunities. Releasing information revealing a test difficulty would mean that the University would have to recruit additional staff to develop entirely new content each year. Tests currently under development would need to be reviewed to remove re-used content. The additional costs would result in an operating deficit and force future prices to rise. If this were to continue, the University advised that it would be priced out of the market.

**Appellants Further Submissions:**

**[32]** The University accepted that the pass mark is fluid year-on-year, and so even if tutors were able to work out the raw pass-mark from a previous year, it would be of no benefit to them for subsequent years.

**[33]** Conversely, the Appellant raised the concerns that, as the marks approach the pass/fail boundary, their chance statistically of being misallocated approaches 50%. Without releasing raw marks, it is impossible for those children wrongly denied places to challenge this. He also cast doubt upon the scores that the University claim to be able to derive from its test: "*Each individual sub-test (Maths, Reasoning and Non-verbal Reasoning) has 4,000 different scores. Extracting thousands of uniquely different three-digit scores from a half hour of multiple choice questions really is on a par with conjuring up a coach and four out of a pumpkin and some mice."*

**[34]** The new argument put forward by the University regarding the necessity to rewrite the test questions is seen by the Appellant as conflating test difficulty with test content. He claims that it is common practice for test providers to use a bank of questions, and the way that they are marked is "completely unrelated". The risk that schools will choose other test providers is not sufficient to dislodge the public interest in ensuring that large sums of public money are not being spent in a way that is actually inimical to the interests of the children it is designed to help.

**[35]** The Appellant took great issue with the University's assertion that it has never described its tests as tutor-proof. He drew the Tribunal's attention to the judgment in his previous request, which stated baldly *"[The University] asserts that one of the benefits of its 11+ testing is that it is 'tutor-proof'"*. He contrasted this approach with the approach of the main competitor, which publishes past papers to assist children who cannot afford tutors.

**Conclusions:**

**[36]** The Tribunal has considered all the evidence and the submissions made by the parties in this appeal. We are satisfied that the DN was reached after careful consideration of the facts as presented by the University including the closed information. **T**he Commissioner has further asserted that it was for neither her nor the Tribunal to look behind the University's assertion that it has achieved considerable commercial success as a result of its USP, or to interrogate the commercial validity of this USP. She denied that she had ignored the facts of the present case, rather stating that she had assimilated them with the current issues and determined that there was no substantive difference between this and earlier appeals. We have no sound reason to reject these assertions and accept and adopt the Commissioners' reasoning. We do not accept that there is a proven error on the facts or in the Law in the DN.

**[37]** This Tribunal joined the Public Authority, the University, as a co-respondent and they have emphasised that the Tribunal was not the correct forum through which to explore the benefits and pitfalls of selective education and the University's ability to provide tests. Having heard all the evidence we do not doubt the University's reasoning or bona fides in this regard and accept this submission.

**[38]** The University has stated to this Tribunal that*: " its method of ensuring fairness requires maintaining uncertainty as to the method of setting and scoring the tests"*. The structure of the test, they maintain, is not published, and the University "*maintains a proprietary approach*

*to test development and construction*". They explain; *"that past papers are not made available nor are practice materials sold to the public*". This, they say, is done in an effort to "*reduce the advantage that more affluent parents can obtain for their children by paying for private tuition*". The University have explained to us that they "*feared that tutors would be able to reverse-engineer raw scores and the test format in order to allow their tutees to focus on specific areas of the test and pass on that basis rather than taking the whole test 'at face value*". Explanations of how this could be done were provided to the Tribunal in a closed bundle. The Appellant disagrees but we are not persuaded that it is for us to determine the issues on the arguments on the merits of his criticisms.

**[39]** The University also pointed to the fact that Centre for Evaluation and Monitoring (CEM's) main competitors are not subject to FOIA. It argued that there is a public policy decision that permits and encourages the University to engage in commercial activities and that the release of its intellectual property into the public domain would undermine its competitive position which would not be the same for organisations not subject to FOIA. It said that this was unfair and anti-competitive.

**[40]** Finally, it said by the University that the income from CEM was an important revenue stream for the University and that a reduction in this revenue stream would impact the public purse.

**[41]** The Tribunal accept the assertions made by the University and in the circumstances and on the evidence before us we have come to the view that the section 43(2) exemption is engaged and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

**[42]** Accordingly we dismiss the appeal.

**Brian Kennedy QC** **Date:** 21 August 2018

**First Tier Tribunal Judge** **Date Promulgated**: 22 August 2018