First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2021/0075

Heard remotely by video conference
On 25 February 2022

Before

JUDGE HAZEL OLIVER
ANNE CHAFER
KATE GRIMLEY EVANS

Between

AMIT MATALIA

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

UNIVERSITY OF CAMBRIDGE

Second Respondent

Appearances:

Appellant – in person
First Respondent – did not attend
Second Respondent – Azeem Suterwalla, counsel

Determined at a remote hearing via video (Cloud Video Platform) on 25 February 2022.

DECISION

The appeal is dismissed.

REASONS

Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 10 March 2021 (IC-39470-K8N4, the "Decision Notice). The appeal relates to the application of the Freedom of Information Act 2000 ("FOIA"). It concerns information requested from the Second Respondent, the University of Cambridge (the "University"), about information on FOIA requests received relating to 11+ tests.

3. The Centre for Evaluation and Monitoring (CEM) is a provider of 11+ tests. CEM develops and delivers 11+ tests to schools across the UK. The University acquired the CEM business from Durham University ("Durham") in June 2019. The appellant was involved in various legal disputes with the previous owner of CEM, and he has made a number of other FOIA requests to both Durham and the University.

4. On 5 March 2020, the appellant wrote to the University and requested the following information (the "Request"):

> *"Please inform me how many FOIA requests were received that related to CEM tests used in Buckinghamshire, totalled for each year, during the 5 years that CEM supplied 11+ selective tests to Buckinghamshire grammar schools.*
>
> *Please also provide for the same time period for the Birmingham/Warwickshire consortium and every group using the same tests.*
>
> *I want research the number of FOIA requests received in the Buckinghamshire tests compared to other consortia sharing the same tests."*

5. The background to the Request is the appellant's view that the information is in the wider public interest. The appellant says that a witness told the First-Tier Tribunal (FTT) in another case that CEM did not re-bid for the contract to supply Buckinghamshire schools with an 11+ exam as it was receiving too many FOIA requests compared to other regions.

6. The University responded to the Request on 2 April 2020 stating that it held some of the requested information but considered it exempt under section 12 (cost of compliance) and section 14 (vexatiousness) of FOIA.

7. The appellant requested an internal review on the same date, and said he would be willing to reduce his request to just Buckinghamshire schools. The University responded on 29 April 2020 and upheld its decision to refuse the request under sections 12 and 14, adding that even a refined request would exceed the cost estimate.

8. The appellant complained to the Commissioner on 29 April 2020. The Commissioner decided that the Request was vexatious and the University was entitled to refuse to respond to

the Request under section 14 FOIA. The nature and level of correspondence had reached a level which is disproportionate to the value of the Request and has become unduly burdensome on the University:

a. The background and context of previous requests to Durham was relevant in building a picture showing how requests have reached this point.
b. There were seven information requests made to the University between 15 August 2019 and 15 April 2020, some of which overlapped with previous enquiries – this can indicate vexatiousness as it suggests that the response is unlikely to be satisfactory and will only generate further correspondence and requests and does not provide the public authority with the time to respond before having to deal with new correspondence.
c. The appellant has stated he will appeal before the final decision is sent, which is not in itself a characteristic of a vexatious request but does suggest that any response is unlikely to be the end of the matter.
d. The tone of the correspondence is one of a person who feels that they are not getting the level of service they require - this does not cross the boundary into vexatiousness but there are indications that responding to one request will generate more requests and correspondence.
e. The majority of the burden of dealing with the frequent correspondence is likely to have fallen upon a relatively small number of individuals, and the resources that would have needed to be diverted to this task were burdensome.
f. The appellant says there is a legitimate reason for the Request, but this is part of a pattern of requests (beginning with those made to Durham and continuing with the University) designed to obtain information to further the appellant's personal issues against CEM. Although there is some wider interest in the 11+ tests, this is not proportionate to the time and burden that would be imposed on the University if it complied with the Request.
g. The Commissioner did not investigate the costs issue in detail, but the extensive nature of the Request and the time the University suggests it would take to locate and extract relevant information would have added to the burden caused by the Request.

The Appeal and Responses

9. The appellant appealed on 12 March 2021. In relation to vexatiousness his grounds of appeal are:

a. Both he and another person have made the same request to Durham, which did not consider it vexatious and did not consider any other (numerous) requests about CEM to be vexatious. The Commissioner could not rule the request to be vexatious as another public authority did not come to that conclusion on an identical request. The University is viewing him as vexatious, not the Request.
b. The University wants to hide the fact that the CEM operations manager lied to or misled the FTT. This is the only point he wants to determine.
c. He had no choice but to make it clear that he will appeal refusals to the FTT at the onset, as the University's stance is that all his requests are vexatious and they will not respond to them. He has not made any posts or statements to the press.
d. Asking for the data in different years is not an overlap as the schools using and sharing tests can change, and do change.

e. The University is making fake claims of distress.
f. The University is discriminating against him.
g. The ICO dealt with the matter incompetently and was biased.

10. The Commissioner's response maintains that the Decision Notice was correct.

a. The appellant's argument that the Commissioner could not find the Request was vexatious because Durham did not regard it as vexatious is wrong –
   i. Previous Tribunal, Commissioner and public authority decisions are not binding precedents.
   ii. Public authorities can choose to disclose information even if a request is vexatious.
   iii. The Request is vexatious because of the context and background of the correspondence between the appellant and the University, and this is different from the context and background for Durham.
   iv. The Request itself was vexatious it was part of a large volume of persistent correspondence from the appellant that is overlapping and repetitive, and which imposes a burden on the University that is disproportionate to the limited public interest in the information.

b. The fact the appellant mentioned appealing to the FTT, and the issue of distress caused by the Request, are not determinative of vexatiousness – this was assessed on the basis of a complete assessment of the circumstances, and the core issue is that the requests have drifted to the point of vexatiousness due to their persistent and burdensome nature.

c. There is some public interest in the information, but there is no evidence that a University employee lied during a previous FTT hearing – what constitutes too many FOIA requests, and whether this takes too much time and is not economically viable, cannot be objectively shown to be true or false. The appellant also appears to have obtained the information from Durham, which reduces the public interest in this Request.

d. The allegations about the Commissioner's investigation process and alleged bias are both unfounded and irrelevant – the issue for the Tribunal is whether the University can rely on section 14 FOIA.

11. The University was joined as a party to the proceedings by a Directions dated 15 April 2021. The University's response covers the following points:

a. The current Request is one of a long series of requests and interactions that began between the appellant and Durham and with the University, dating back to 2013. The frequency of the appellant's requests together with the litigation associated with them is placing a significant strain on its resources. It also appears that the motive behind the frequent and overlapping requests is to attack the integrity of CEM's tests and undermine its operational ability. The University was entitled to reach its own view on whether the Request was vexatious.

b. The appellant has put forward no evidence to establish that the University racially discriminated against the appellant and/or acted dishonestly.

c. The University takes the view that the appellant saying he will appeal to the FTT before a response has been sent is an indicator of vexatiousness, the refusal was not based on posts or statements to the press and this was not relied on by the Commissioner, and it is not necessary for distress to be established for a request to be vexatious.

d. The individual named by the appellant did not lie to the FTT, and in any event the information requested would not show whether he had lied.

e. Overall, the history of the appellant's constant information requests, which are frequent and overlapping, the motive behind these requests, which appears to be to attack the integrity of CEM's 11+ tests, and the fundamental lack of value behind the request at issue in this appeal, mean that the Request was vexatious.

12. The appellant submitted replies to both the Commissioner and the University. We have taken these replies into account, and relevant points are considered in the discussion below.

Applicable law

13. The relevant provisions of FOIA are as follows.

> *1* ***General right of access to information held by public authorities.***
> *(1) Any person making a request for information to a public authority is entitled—*
> *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
> *(b) if that is the case, to have that information communicated to him.*
> ……
> ***14*** ***Vexatious or repeated requests.***
> *(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*

14. There is no further guidance on the meaning of "vexatious" in the legislation. The leading guidance is contained in the Upper Tribunal ("UT") decision in ***Information Commissioner v Dransfield*** [2012] UKUT 440 (AAC), as upheld and clarified in the Court of Appeal ("CA") in ***Dransfield v Information Commissioner and another & Craven v Information Commissioner and another*** [2015] EWCA Civ 454 (CA).

15. As noted by Arden LJ in her judgment in the CA in ***Dransfield***, the hurdle of showing a request is vexatious is a high one: "…*the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.*" (para 68).

16. Judge Wikeley's decision in the UT ***Dransfield*** sets out more detailed guidance that was not challenged in the CA. The ultimate question is, "*is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?*" (para 43). It is important

to adopt a "*holistic and broad*" approach, emphasising "*manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests*." (para 45). Arden LJ in the CA also emphasised that a "*rounded approach*" is required (para 69), and all evidence which may shed light on whether a request is vexatious should be considered.

17. The UT set out four non-exhaustive broad issues which can be helpful in assessing whether a request is vexatious:

a. **The burden imposed on the public authority by the request.** This may be inextricably linked with the previous course of dealings between the parties. *"…the context and history of the previous request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor*." (para 29).

b. **The motive of the requester.** Although FOIA is motive-blind, "*what may seem like an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority*." (para 34).

c. **The value or serious purpose.** Lack of objective value cannot provide a basis for refusal on its own, but is part of the balancing exercise – "*does the request have a value or serious purpose in terms of the objective public interest in the information sought?*" (para 38).

d. **Any harassment of, or distress caused to, the public authority's staff.** This is not necessary in order for a request to be vexatious, but "*vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive*." (para 39).

18. Overall, the purpose of section 14 is to "*protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*" (UT para 10), subject always to the high standard of vexatiousness being met.

Issues and evidence

19. The issue dealt with at the hearing is - was the University entitled to refuse to respond to the Request on the grounds it was vexatious? We confirmed with the parties at the start of the hearing that the listing did not allow sufficient time to deal with the issue of costs, and if the Request was found not to be vexatious we would hold a further hearing on this point.

20. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

a. An agreed bundle of open documents.
b. A redacted witness statement from Katharine Bailey, Director of Policy and Business Development at CEM.

c. A closed bundle of documents containing an unredacted version of Ms Bailey's witness statement.
d. Written submissions from the appellant and the University.
e. Oral submissions from the appellant and the University at the hearing.

Applications to add additional evidence

21. The University applied to add an additional bundle of 79 pages to the evidence. This bundle was only provided to the appellant and the Tribunal one day before the hearing. After hearing submissions from both parties, we gave permission to add one document only (a refusal of permission to appeal) as the appellant had already seen this document. We excluded the other documents as they were either duplicates or items that had not previously been seen by the appellant, and it would not be fair to admit them at this late stage in the proceedings.

22. The appellant made an application on 21 March 2022 to adduce various additional documents by way of evidence. This was on the grounds that the documents were either not before the Tribunal at the hearing or were not available at the time of the hearing, and had been provided to demonstrate that Ms Bailey had given dishonest witness evidence. The documents had already been sent to the tribunal with various submissions about credibility of witness evidence. This application is refused. It would be unusual to allow parties to produce additional evidence after a hearing has been concluded. The documents are not relevant to the issues in this case. We have considered the appellant's allegations about credibility of witness evidence in paragraphs 33 to 39 below. We do not consider it necessary to admit these additional documents in evidence or consider them in any detail in order to deal with these allegations. The evidence would not have a significant (or indeed any) impact on the outcome of the proceedings, and it is in accordance with the overriding objective to refuse the application.

Discussion and Conclusions

23. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law or whether she should have exercised her discretion differently. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

Factual background

24. CEM produces 11+ papers that are used by selective English Grammar Schools to assess the ability of candidates. There is one other main commercial provider of these tests, GL Assessment Limited. Ms Bailey explains in her witness statement that the aim of CEM's papers is to demonstrate the academic potential of candidates, and minimise the impact of tutoring and excessive preparation. CEM also does not release past papers to the public, or sell practice materials or tutor guides – apart from a familiarisation guide for students. This is to try and increase fair access to grammar schools, and minimise any advantage for students whose parents can afford to pay for private tuition or other forms of preparation. It is also in the commercial interest of both CEM and the University to ensure the tests are as resistant to tutoring as possible, as easier tutoring would undermine the assessments in the eyes of customers and parents.

25. The appellant owns a company, Alpha-Tek Associates Limited. The website for this company advertises and links to the website 11plus.eu, which sells practice materials for the 11+ tests provided by CEM and other providers. The Alpha-Tek website also links to the website cem11plus.com, describing this as "*The CEM 11+™ site includes advice on how to prepare for 11plus exams and material suitable for preparation for 11+ tests. This site includes 11+ tests in regions that have adopted tests set by the Centre for Evaluation and Monitoring® at the University of Cambridge® as well as GL Assessment/NFER®.*"

26. The appellant has a long history of FOIA requests and other legal disputes relating to 11+ tests and CEM. It appears that the issues began when the appellant asked Warwickshire County Council ("WCC") why they used the same tests repeatedly and whether this was unfair as children could remember the content of the test and pass it on to others. There was a dispute with WCC about the treatment of the appellant's son. In 2013 there was a domain name dispute with Durham. There have been two injunctions against the appellant in proceedings brought by WCC relating to breaches of confidence in respect of the CEM 11+ exam, in 2015 and 2018. The appellant alleges that false evidence was given during these proceedings. The appellant makes regular complaints to the Office of the Schools Adjudicator ("OSA") about 11+ exams – he confirmed in his closing submissions that he makes 15-20 objections every year. The appellant said at the hearing that he has made many FOIA requests to Durham (many more than are included or referred to in the open bundle).

27. We have seen a table of FOIA requests made by the appellant to Durham and the University relating to CEM 11+ tests from 2018 onwards. This shows 10 requests prior to June 2019 (when the University acquired CEM). These cover a range of topics all relating to CEM's 11+ tests - new and lost clients; who shares the tests; copyright and licencing; reuse of tests, collation of test content and posting of content; racial profiling; disclosure of tests; tutor-proofing and coaching; late sitting; and how tests are created. Some topics are repeated in more than one request.

28. There were six requests to Cambridge before the current Request. These related to:

a. The purchase by the University and whether it is subject to FOIA (15/8/19).
b. Reuse of tests, evidence about later sitters and reuse of tests, use of injunctions, whether adults or children would be sued for disclosing test content, whether they allow WCC to sue for breach of confidence, evidence of resistance to tuition, and ownership of the CEM trademark (20/8/19).
c. 25 questions to confirm if tests for Birmingham and Warwickshire contained certain words or topics (11/9/19).
d. Schools sharing tests, new and lost clients, copyright ownership, use for late sittings, recall of content by children, information and evidence about test resistance to preparation, collation of test content (26/12/19).
e. Which schools use and share 2020 tests (14/2/20).
f. Whether test papers falsely and dishonestly stated copyright was owned by CEM, Durham and/or Cambridge University, or whether they stated honestly it was owned by Bexley Council (17/2/20).

29. A further request was sent on 19 January 2021, asking about which schools share tests, new and lost clients, and whether CEM has a contract with Bexley County Council for 2021 testing and who owns the copyright. This was after the current Request.

30. The University has referred to four other appeals to this Tribunal involving the appellant and the University – EA/2020/0047 (includes Durham); EA/2020/0106 (includes the London Borough of Bexley); EA/2021/0023; and EA/2021/0075. We are aware of one further appeal in EA/2021/0302.

31. This Request arises from the First-Tier Tribunal hearing in *James Coombs v (1) Information Commissioner and (2) University of Cambridge*, EA/2017/0166 ("Coombs"). It was alleged in this case that CEM had been sacked from its contract to provide 11+ tests to the Buckinghamshire group of schools. Mr Robert Byatt gave evidence on behalf of CEM during this hearing. In oral evidence at this hearing, he said that CEM decided not to re-bid for this contract due to the number of FOIA requests they received. Ms Bailey provided an extract from Mr Byatt's written witness statement on this point, which says, "*CEM took the decision not to re-bid for the Buckinghamshire Group contract on the basis that it was a contract that monopolised a lot of CEM's resources and that those resources could be better deployed elsewhere. That is to say, the Buckinghamshire Group contract was the subject of a large number of Subject Access Requests and Freedom of Information Act Requests and CEM did not have the capacity to deal with those requests given the expected value of the contract."*

32. The appellant says that Mr Byatt was not telling the truth on this point, and this is what he wants to "fact check" through the current Request.

Credibility of witness evidence

33. Much of the appellant's cross-examination of Ms Bailey was not directly relevant to the issue in this case, but was designed to show she was not a credible witness. Many of his questions covered issues that had been dealt with in other legal proceedings. We allowed some cross-examination that was not directly related to the issues in this case as it related to issues raised in Ms Bailey's witness statement that the appellant did not agree with. The judge reminded the appellant at the start of the hearing that this was not a trial of whether Ms Bailey was a reliable witness or not.

34. The appellant sent new evidence and submissions to the Tribunal after the hearing in emails dated 26 February and 6 March 2022. He says this shows that Ms Bailey provided false information in her evidence and has committed perjury. We gave the respondents an opportunity to comment on these emails, the University provided some submissions, and the appellant sent a reply. We note that the appellant did not apply for permission to provide additional evidence until 21 March 2022. We have refused permission to add additional evidence by way of documents as set out in paragraph 22 above. Nevertheless, due to the seriousness of the allegations made against Ms Bailey, we have considered the submissions made in the emails from the appellant as follows.

35. **Gagging clauses**. The appellant says that Ms Bailey stated in evidence that CEM contracts did not have clauses preventing clients from being critical of CEM (a "gagging" clause). He has provided three contracts which he says contain these clauses and he set out extracts in his emails. These appear to be standard clauses in which either one or both parties agree not to harm the other's reputation or take action leading to unwanted or unfavourable publicity. These contracts were not put to Ms Bailey during the hearing, and were not in the bundle of documents (which contained contracts without these clauses). Ms Bailey was asked about this issue in a single question. The Judge's note of the exchange is: *Question - "Contracts contain a gagging clause, client cannot criticise CEM" – Answer - "Absolutely not"*. The contracts do

not expressly state that clients cannot criticise CEM, and are not called a "gagging clause" – which is the wording of the question put to Ms Bailey. The wording of the contracts themselves was not put to Ms Bailey for her to comment on. We do not find that Ms Bailey gave false evidence on this issue, or that this shows she was an unreliable witness or sought to mislead the Tribunal.

36. **GCSE questions**. The appellant says that Ms Bailey gave evidence that questions were removed from GCSE exams because children were believed to have guessed. He has contacted some exam boards since the hearing and says he has evidence that this is not done for GCSE exams. A question was put to Ms Bailey on this point after the lunch break. The Judge's note of the exchange is: *Question - "Confirm GCSEs remove questions after the test, if not error in question" – Answer – "I believe might in some cases".* Ms Bailey did not give evidence that this definitely happened for GCSE exams – she said she believed it might happen. Even if the exam boards contacted by the appellant have confirmed this does not happen, Ms Bailey was simply saying what she believed. We do not find that Ms Bailey gave false evidence on this issue, or that this shows she was an unreliable witness or sought to mislead the Tribunal.

37. **Providing services without a contract.** The appellant says that Ms Bailey knew that CEM had provided services without a signed contract and denied this, and he refers to an unsigned contract in 2013. The Tribunal's record of Ms Bailey's evidence is that she said CEM would not supply a test to a client until they had signed the contract, and there had been some confusion in a previous FOIA request in relation to the date of the contract signature and the date of the assessment/test delivery. Ms Bailey's evidence was about CEM's usual practice, and confusion in relation to one particular contract. She was not saying that CEM had never provided a test without a signed contract. Specific examples of unsigned contracts were not put to her, except for questions about a contract in 2013 which Ms Bailey was not involved with. We do not find that Ms Bailey gave false evidence on this issue, or that this shows she was an unreliable witness or sought to mislead the Tribunal.

38. These allegations that Ms Bailey was providing false evidence all arose from questions on topics that were not relevant to the issues the Tribunal has to decide in this case. They all related to other areas of dispute between the appellant and CEM, which have been covered in other proceedings. The Tribunal is very concerned about the appellant's approach towards witness evidence. It is not appropriate for an appellant to put brief and out of context questions to a witness on irrelevant topics, and then provide contradictory evidence after the hearing has been concluded in an attempt to discredit that witness. This is neither fair to the witness nor helpful to the Tribunal.

39. We find that Ms Bailey was a credible witness. The Tribunal's assessment is that she attempted to answer all of the appellant's questions calmly and honestly, despite the irrelevance of many of those questions to the issues in this case.

Section 14 FOIA - Vexatiousness

40. We have considered the four broad issues set out by the UT in ***Dransfield*** in turn, together with the more general guidance on how to assess whether a request is vexatious.

41. **The motive of the requester.** The appellant says that his motive is to fact check the evidence given by Mr Byatt in *Coombs*. The University says that the appellant's motive is some

sort of grudge against CEM, and says that he is constantly seeking to discredit CEM and their witnesses.

42. The University's position is that this Request may not be an overlap with what has been asked before, but it is an overlap with what the appellant is seeking to achieve. They point to the repetitive nature of the appellant's previous requests, which repeat questions about copyright, late sitters, the identity of clients and test content. Having viewed the summary of recent requests since 2018, we agree that questions on the same topic are repeated a number of times. The University says that this is part of a pattern of the appellant not being willing to let matters go, even when they have been adjudicated upon in other court decisions or by the OSA. There is an overall theme of the appellant alleging that CEM is dishonest, disreputable or corrupt, and this Request forms part of that theme.

43. The appellant says it is not right that he is seeking to discredit CEM. He says that this is a separate request, which is not connected with his earlier requests. Where there have been overlapping requests in the past, he says that these were justified. He points to some examples - he was given different responses to a question about copyright ownership (obtaining a correct answer after the fourth request), and different responses to a question about contracts signed with WCC. He also says that questions about clients and test sharing change each year so he has to keep asking. We note that, even if this is right in relation to some of the questions, it is clear that other questions about reuse of tests and late sitters are repetitive. The appellant's written submissions say that the sole purpose of the Request was an attempt to fact check Mr Byatt's claims in the same manner as other statements he made have already been fact checked, and use of FOIA is a legitimate tool to fact check and should not be considered vexatious.

44. Although the appellant says he is not seeking to discredit CEM, this is contradicted by some of his written submissions. These allege that CEM "*freely make and have made false claims to win business*" (para 8), that Buckinghamshire Grammar Schools were "*sold a lie*" (para 7), that they are "*lazy*" by reusing past questions (para 11), that CEM has lost clients because "*the penny had dropped regarding CEM's behaviour and false claims coupled with doubts as to their honesty, integrity, knowledge of test manipulation, and possibly racial discrimination and collusion to pervert the course of justice*" (para 14), and that CEM's client "*believed that CEM was an inherently dishonest organisation, corrupt at its very core, making unsubstantiated claims to win business*." (para 21). We also note the appellant's approach towards questioning Ms Bailey at the hearing, which continued to make allegations about test manipulation and dishonesty.

45. As stated by the UT in ***Dransfield***, what may seem like an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority. Taken in isolation, the Request is a new one on a different (although related) topic. However, we have looked at it in the context of the appellant's dealings with the University, which involved some six previous requests which repeated questions on topics such as late sitters and reuse of tests. This series of questions also overlapped with questions on the same topic asked to Durham since 2018. The appellant says we cannot take questions to a different public authority into account. We disagree. Although Durham is a separate public authority, the common factor is that the questions are directed at CEM's business. The appellant has a history of questioning CEM's approach to 11+ tests and alleging that CEM and its witnesses are dishonest. CEM's business has moved

from Durham to the University, and the same types of questions have continued. This Request is part of the same pattern of behaviour.

46. The appellant says that his motive is "fact checking". But what is the purpose of this checking? We find that the motive behind this appears to be an attempt to discredit Mr Byatt's witness evidence, and so discredit CEM. This underlying motive is shown by the various allegations of dishonesty made against CEM by the appellant in his written submissions. His approach towards the questioning of Ms Bailey at this hearing, coupled with his attempts to show she was an unreliable witness by providing additional evidence after the hearing, are part of the same pattern.

47. **The value or serious purpose of the Request.** The appellant says that his motive is to fact check the evidence given by Mr Byatt in *Coombs*. He says this is a serious purpose - Mr Byatt said that CEM did not tender for a contract due to the number of FOIA requests, and so he is asking for that number to check whether this is correct. He alleges that Mr Byatt lied to cover up the fact that CEM had been sacked by its client.

48. The University says that the answer to the Request would not actually test Mr Byatt's evidence. Mr Byatt's written statement referred to subject access requests as well as FOIA requests. It is also a subjective decision for CEM whether these requests are regarded as too many and so a reason not to re-bid for a contract. The number of FOIA requests will not show whether Mr Byatt's statement was accurate or not. Ms Bailey also gave evidence during cross-examination that this statement is true. The Commissioner also found that the number of requests cannot show whether a lie was told about this – what constitutes too many requests or too much of a burden is not something that can be objectively shown to be true or false, it is a judgment for the University to make.

49. We agree with the Commissioner and the University that the Request does not, in fact, have value or serious purpose. In accordance with Dransfield, we have considered whether the Request has value or serious purpose in terms of the objective public interest in the information sought. We find there is no objective public interest in the information based on the reasons relied on by the appellant. We agree that an answer to the Request would not show whether Mr Byatt had given accurate evidence – his written evidence also referred to data subject access requests, and the question of what amounts to "too many" requests is a subjective question for the University to determine rather than something that can be proved or disproved.

50. **The burden imposed on the public authority by the Request.** The appellant says that this was a simple request that would not take much time to respond to. We agree that, viewed in isolation, this is a relatively simple request. However, as noted in ***Dransfield***, a single request may be inextricably linked with the previous course of dealings between the parties - the number, breadth, pattern and duration of previous requests may be a telling factor.

51. The University says that this Request forms part of a series of wide-ranging and repetitive requests on related subjects. We have discussed this point above in relation to motive. There had been six previous requests to the University on issues relating to the 11+ tests, some of which were repetitive. They were all sent within a period of six months, with the Request following some three weeks later. Ms Bailey gave evidence that responses to FOIA requests are dealt with by a small team, on top of their usual duties. The process has a number of stages. We find that this Request did impose some burden on the University, in the context of

the number of other requests from the appellant that they had already dealt with. We also note that the history of requests from the appellant indicates that answering the current request is unlikely to be the end of the matter.

52. **Any harassment of, or distress caused to, the public authority's staff.** As noted in ***Dransfield***, this is not necessary in order for a request to be vexatious. The appellant says that the University is making fake claims of distress, and his request is polite and does not harass staff.

53. The University says that the situation did lead to distress to staff. Ms Bailey gave some evidence at the hearing on this point. She agreed that the appellant did not insult individuals, but the repeated nature of questions and the appellant's tone of voice did cause distress to her team, particularly more junior members. She referred to a comment in an email to Cambridge Assessment's Corporate Affairs Manager, "*Cambridge may wonder what they have let themselves in for when buying CEM and now realise why Durham dumped it*." Examples of staff being told their replies were "*unhelpful*" and "*designed to annoy*" were given in the University's initial refusal of the Request. In the appellant's request for an internal review, he suggests that distressed staff "*seek counselling as no reasonable person in their role would make such a complaint*" – Ms Bailey found this insulting, and a suggestion that there was something wrong with her staff. Ms Bailey said that she found the appellant's tone and language confrontational, and this was demeaning and upsetting to her team. We also note the appellant says in the internal review request that "*It is a fact, I appeal everything*". We accept that this would cause worry and distress to Ms Bailey's team, knowing that any response that did not provide what the appellant wanted would be appealed to the Commissioner and this Tribunal. The Request in isolation is not distressing, and is put politely. But all of these circumstances combined would create pressure on those dealing with the appellant's FOIA requests and cause them some distress.

54. **Overall assessment**. We have considered the guidance from ***Dransfield*** – in particular whether there is a lack of proportionality, and the importance of protecting the resources of the public authority from being squandered. We have also referred ourselves to Arden LJ's suggested starting point, that there is "*no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public*". As discussed above, we have found that the Request has no value or serious purpose. We also note that the purpose of FOIA is not to enable individuals to pursue constant overlapping requests on related subject matter in support of a personal dispute or ongoing litigation. There comes a point where this becomes a "*manifestly unjustified, inappropriate or improper use of FOIA".* Taking a rounded and holistic approach, we find that the Request has reached that point.

55. **Additional points raised by the appellant.** The following further points were raised by the appellant in his appeal:

a. Durham did not regard the same request as vexatious and has answered it – we do not consider this to be relevant as different public authorities can take different approaches towards answering FOIA requests, there is no requirement to refuse a request for vexatiousness even if a request has reached that threshold, and different public authorities will have a different context and background.

b. The fact the appellant said he would appeal is not an indicator of vexatiousness – we find that this might be relevant if it has the implication that whatever response is provided will not be good enough, and as discussed above we find this is relevant to assessing the distress caused to staff.

c. The appellant rather than the Request has been treated as vexatious – we have analysed the Request in accordance with the relevant law, including in particular the guidance in ***Dransfield***, and have decided that the Request itself is vexatious in the context of the overall dealings between the parties.

d. The Commissioner dealt with the matter incompetently and is biased – the process followed by the Commissioner is not a matter for this Tribunal, and we have made our own assessment on the evidence of whether the University was entitled to refuse the Request under section 14 FOIA.

Allegations of race discrimination

56. The appellant has made allegations of race discrimination against CEM in relation to how it has responded to his requests and enforced an injunction. He says that white/Caucasian individuals have been treated differently in relation to responses to similar requests and enforcement of breach of confidence. This is not a matter on which the Tribunal can make a finding. We do note, however, that a difference in treatment and a difference in race is not sufficient for a finding that there has been a breach of the Equality Act 2010, and we have seen no evidence that race influenced the appellant's treatment in any of his examples of different treatment.

57. We dismiss the appeal for the reasons given above.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 24 March 2022

Promulgation Date: 25 March 2022