

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2021

Public Authority: The Council of the University of Cambridge
Address: Trinity Lane
Cambridge
CB2 1TN

Decision (including any steps ordered)

1. The complainant has requested information on FOIA requests received relating to 11+ tests used in Buckinghamshire, Birmingham, Warwickshire and any other area using the tests for a period of five years. The University of Cambridge refused the request as vexatious under section 14(1) of the FOIA and section 12(1) due to the cost of compliance.
2. The Commissioner's decision is that the University has correctly categorised the request as vexatious and was entitled to rely on section 14(1) of the FOIA to refuse it.

Request and response

3. On 5 March 2020 the complainant made a request to the University in the following terms:

"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 ever 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."

4. The University responded on 2 April 2020 stating that it held some of the requested information but considered it exempt under section 12 and section 14 of the FOIA.
5. The complainant requested an internal review on the same date. He explained his reasons for requesting the information which he considered clearly showed the request was not vexatious. The complainant also challenged the cost estimate given for section 12 but did state he would be willing to reduce the request to just the Buckinghamshire schools.
6. The University completed an internal review and provided the outcome on 29 April 2020. It upheld its decision to refuse the request under section 12 and section 14, adding that even a refined request would exceed the cost estimate.

Scope of the case

7. The complainant contacted the Commissioner following the lack of internal review to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the University has correctly refused to comply with the request under either section 12 or section 14 of the FOIA.

Reasons for decision

Section 14 – vexatious requests

9. Section 1(1) of the FOIA states that:

"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.

10. Section 14 of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."

11. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure." The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.
12. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
13. *Dransfield* also considered four broad issues:
 - The burden imposed by the request (on the public authority and its staff);
 - The motive of the requester;
 - The value or serious purpose of the request; and
 - Harassment or distress of and to staff.
14. It explained that these considerations were not meant to be exhaustive and also explained the importance of "adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealing, the lack of proportionality that typically characterises vexatious requests."
15. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean it must be vexatious.
16. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: *"The context and history in which a request is made will often be a major factor in determining*

¹ [dealing-with-vexatious-requests.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-the-data-protection-act-2018/dealing-with-vexatious-requests)

whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies.”

17. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.

The complainant's position

18. The complainant is of the view the information is in the wider public interest as it is needed to determine the facts. The complainant states his understanding that a witness told the First-Tier Tribunal (FTT) that the Centre of Evaluation and Monitoring (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 and it was taking too much time and resources so was not economically viable. Therefore the information or statistics to support this must be available.
19. The complainant also points to this case being reported in the press as demonstrating there is a wider public interest in this information.

The University's position

20. In explaining its position the University provided the Commissioner with some background to the request. It stated that it acquired the CEM business from Durham University in June 2019. The CEM business is involved in the development and delivery of 11+ tests to schools within the UK with its main competitor being GL. CEM does not sell practice materials or revisions guides whereas GL does; CEM instead generates revenue from the sale of CEM 11+ tests in the UK.
21. The University has explained the complainant was a party to three sets of proceedings initiated by the previous owner of the CEM business, the University of Durham ("Durham"). The complainant had registered domain names that included the CEM name and Durham's complaints about this were upheld on the grounds that such registrations were registered in bad faith.
22. The complainant published what he claimed were the questions in the 2013 CEM 11+ test being run by Warwickshire County Council under a contract with CEM. These were questions disclosed to the complainant by candidates who had sat the test and as the Council sat tests on different days for different school areas the Council required the complainant to remove the material; but he did not do so.
23. The Court of Appeal upheld a permanent injunction prohibiting the complainant from publishing or disclosing the contents of the CEM 11+ tests used by the Council and taken by candidates in the years 2013 to 2015.

24. The University has explained there are currently two requests before the FTT from the complainant – although neither of these requests were made to the University it considers they are relevant to the background in this case. These proceedings concern the issue of 'late sitters' i.e. pupils who take the CEM 11+ tests after the main sitting date for a variety of reasons determined by schools, including the pupil's illness or move to a different area. The complainant raised objections against late sittings on the main ground that because pupils can with their unaided memory pass information about test questions on to pupils sitting the test late, the test is not an accurate reflection of test takers ability in breach of the Schools Admission Code. In all three cases, the adjudicator took the same view that that there was minimal risk of information being passed on to late sitters such that their score would be affected.
25. The University has also stated that this request was one of a long series of requests and interactions that began between the requester and Durham and continued with requests and interactions with the University. These interactions date back to 2013, albeit with Durham initially. The University argues that the frequency of the complainant's requests together with the litigation associated with them is placing a significant strain on its resources.
26. In terms of the genuine purpose to the request; the University's view is that the requests are designed to undermine CEMs business. The University further notes that the complainant sells practice materials for the 11+ tests and thus if CEMs business is undermined then GL acquire a bigger market share and there will be more demand for practice materials as GL publishes past papers for the 11+ tests.
27. The University further points out that the complainant has been unsuccessful in several areas of appeal relating to CEM, including in injunction proceedings and in his appeals to the Commissioner.
28. Turning to the volume of requests and correspondence from the complainant; the University states it has received at least seven requests since it purchased the CEM business in 2019. Regardless of the number the University is equally as concerned that the requests are used as a means to attempt to open up other fronts for potential litigation.
29. Turning to the request that is the subject of this notice; the University considers it is regarding the number of FOIA requests received in relation to the same version of the CEM 11+ test used in different parts of the country over a five year period. It argues that, as with many previous requests, the request concerns CEM 11+ content. The request refers to schools in Birmingham and Warwickshire using the same CEM 11+ tests as schools in Buckinghamshire. The CEM 11+ tests used in

Birmingham and Warwickshire have been the subject of a number of previous FOI requests to both the University and to Durham, as well as the injunction proceedings involving Warwickshire County Council. In one of the cases with the FTT the complainant is seeking copies of the CEM 11+ test used in Birmingham and Warwickshire in 2015 and 2016.

30. The relevance of this, the University states, is that the subject matter of this request is related to that of the ongoing proceedings, as well as previous FOI requests and thus reinforces the vexatious nature of the request.
31. In conclusion, the University strongly believes that responding to this information request, when taken into context with the history of requests and correspondence and the litigation these requests have generated, would place an unreasonable burden on the University. The requests are distracting to staff who normally spend time working with and supporting schools who buy CEMs tests. The litigation context in which the requests have to be handled places an added burden on staff who have to ensure that they are aware of and tracking the progress of such litigation. The University states the request is part of a pattern of unreasonable requests and actions which renders it vexatious.

The Commissioner's view

32. The Commissioner considers that, when set in context, the request was vexatious. In summary, the Commissioner's view is that the nature and level of correspondence has reached a level which is disproportionate to the value of the request and has become unduly burdensome on the University. The Commissioner considers that although the complainant may have set out with genuine purpose and there is clearly still purpose to him in making these requests, the requests have drifted to the point of vexatiousness due to their persistent and burdensome nature.
33. As the Dranfield judgement points out, a request which appears simple and benign on its face may still be considered vexatious when it is considered in its broader context. A public authority is not required to consider every request in isolation.
34. Whilst the complainant does not consider that any information requests submitted to other public authorities i.e. Durham, should be taken into account when determining if a request to the University is vexatious, the Commissioner does consider this background and context to be relevant in building a picture showing how the requests have reached this point.
35. That being said, looking solely at the requests submitted to the University it is apparent that there were seven information requests made between 15 August 2019 and 15 April 2020. The University has stated some of these requests had overlapped with previous enquiries. In the Commissioner's view, overlapping requests and correspondence

can be an indication that the requests are veering towards 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.

36. The University had raised the issue of the complainant stating he will appeal to the FTT even before the final response is sent. The Commissioner does not consider this in itself to be a characteristic of a vexatious request although again it does suggest that any response is unlikely to be the end of the matter and will only lead to further requests or appeals. The complainant has suggested that previous responses have been obstructive and false or misleading and he has therefore had to appeal the outcome to demonstrate this.
37. Having reviewed the correspondence, the Commissioner is satisfied that, 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, often overlapping and causing a burden on the public authority.
38. The Commissioner also accepts that, whilst the University appears to be quite a large institution, the majority of the burden of dealing with the frequent correspondence is likely to have fallen upon a relatively small number of individuals. The resources that would have needed to be diverted to this task were, the Commissioner accepts, burdensome.
39. The complainant argues there is a legitimate reason for the request – to establish if the statement given in the FTT hearing that CEM did not re-tender for the Buckinghamshire 11+ as it received more FOIA requests than other areas using excessive resources, can be supported by factual information.
40. As already stated, on face value this may seem like a benign request but taken into context it is clear that this is part of a pattern of requests beginning with those made to Durham and continuing with the University designed to illicit information to further the complainant's personal issues against CEM. Whilst the Commissioner acknowledges there is some wider interest in the 11+ tests she does not consider that in the case of this request the genuine purpose and value to this request, as limited as it may be, is proportionate to the time and burden that would be imposed on the University if it complied with the request.
41. The University had also looked to refuse the request on the ground of cost (section 12) as the requested information was held across several spreadsheets with hundreds of rows of information which would require further interrogation and cross-referencing to extract relevant

information. The University had initially estimated this would require around 43 hours of work and that narrowing the request to just information for Buckinghamshire (as the complainant had suggested) would not significantly reduce this time.

42. The Commissioner has not investigated this argument in detail and it is not clear whether the request could have been answered within the cost limit although and in any event she does not consider the breadth of the request would be sufficient alone to render the request vexatious . Nevertheless the Commissioner does consider that 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 complainant's correspondence.
43. This taken into account with the volume, persistence and ongoing and overlapping nature of the complainant's correspondence leads the Commissioner to conclude that the request was vexatious and the University was entitled to rely on section 14(1) of the FOIA to refuse it.

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Jill Hulley
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