Our ref: 041/SJM/TP/72186-0087-1

Direct Dial: [redacted]
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19 March 2021

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Mr J Coombs
[redacted]
READING
Berkshire
[redacted]

**By email to:** [redacted]

Dear Sir

**Our client: The Chancellor, Masters and Scholars of the University of Cambridge**

We write further to this matter in which we act for the Chancellor, Masters and Scholars of the University of Cambridge.

This letter is our client's letter of claim pursuant to paragraph 3.3 of the Pre-Action Protocol for Media and Communications Claims, and concerns your breaches of the duty of confidence owed by you to our client, as explained below.

**Preliminary Point - Confidentiality**

As a preliminary point our client is aware that you own/operate an active Twitter account and website on which details of the litigation between the University of Cambridge and yourself have previously been published, and where such publication has at times either been misleading or reflected a misunderstanding on your part as to the position within that litigation. In circumstances where our client is rightly concerned that you might use those mediums to further disseminate the confidential information referred to in this letter, both we and Counsel have advised our client that it might have been appropriate to seek an urgent injunction, in the High Court, preventing further dissemination of that confidential information without notice to you.

Notwithstanding, our client has elected to put you on notice of the potential claim and application for injunctive relief, in the hope that the issues raised in this letter can be resolved without recourse to the Court. In light of the approach being taken by our client, we trust that you will not seek to commit further breaches of confidence in response to this letter.
Should you do so, our client will have no option other than to seek immediate injunctive relief on an urgent basis and seek its costs of so doing from you on an indemnity basis.[1]

[1] Under Civil Procedure Rules, rule 44.3. The indemnity basis means that costs will be assessed in favour of the receiving party rather than the paying party.

## Background

As you are aware, in June 2019 our client purchased the business and assets of the Centre for Evaluation & Monitoring ("CEM") from the University of Durham. CEM is a provider of assessments and monitoring systems, including (amongst others) eleven plus entrance tests for selective grammar schools.

As at the date our client purchased CEM, you had for some time been involved in proceedings against the Information Commissioner and the University of Durham before the First Tier Tribunal (Information Rights) with reference EA/2017/0166A in respect of the following Freedom of Information request made by you on 6 October 2016:

> "*Please could you provide test marks for the 11+ tests set by The University of Durham's Centre for Evaluation and Monitoring (CEM) in the Autumns of 2014, 2015 and 2016. For each candidate I would like to request the following information*
>
> *1. School or consortium. (I understand from the Schools Adjudicator that different groups of applicants are 'locally standardised' so the reason for requesting this information is to identify which results have been standardised as a group.)*
>
> *2. For each of the sub-tests set (numeracy, verbal reasoning and nonreasoning)*
>
> *I would like to request*
>
> *a. The raw test scores for each test before any age weighting is added*
> *b. The candidate's birth month (or age in months if this is how it is recorded)*
> *c. The raw score for each test with age weighting added, (or the amount of age weighting if this is how it is recorded)*
> *d. The final standardised scores*
> *e. The mean and standard deviation values used to calculate the standard scores.*
>
> *Please could you provide the test marks in CSV or Excel spreadsheet format.*
>
> *Secondly please could you provide details of the overall income CEM have received for setting these tests in 2014/15/16."*

The proceedings before the Tribunal concerned your request for the raw scores for each test.

Following its purchase of CEM, our client was substituted as the second respondent in place of the University of Durham. Our client (and the ICO) argued before the Tribunal that the information was exempt from disclosure pursuant to the exemption in section 43(2) of the Freedom of Information Act, namely that such disclosure would cause our client commercial harm.

Your appeal against the Information Commissioner's Decision Notice was heard on 4 March 2020. On 13 May 2020, judgment was handed down dismissing your appeal. The judgment of the First Tier Tribunal states, *inter alia*:

> *"47. We are satisfied that the truthfulness or otherwise of this claim is not a matter we have to decide. We are satisfied that publishing the information would assist those who wanted to learn more about the structure of the tests, in order to focus preparation as a means of maximizing potential marks, and this would reduce the 'tutor resistance' of the tests themselves."*
>
> *"48… We find that publication of the raw data would remove the USP of CEM's tests already given. In addition, if the data were published, students could be tutored to prepare for tests without CEM obtaining their competitors financial benefit of obtaining revenue from publishing past tests and practice papers. As a consequence, CEM would need to either to change their business model or rewrite the tests".*

On 9 February 2021, the Upper Tribunal dismissed your application for permission to appeal the decision of the First Tier Tribunal.

In light of the above, as at 13 May 2020 you were aware that:

- Our client's unique selling point is that its eleven plus tests are marketed as being resistant to tutoring. As part of maintaining this tutor resistance, information concerning the tests (importantly for the purposes of this letter the raw scores attained by candidates) is kept confidential and not disclosed.

- Our client considered that the disclosure of raw marks in respect of its eleven plus tests would be harmful to its commercial interests, in that such disclosure would undermine the tutor resistant nature of the tests.

- The First Tier Tribunal agreed with our client's assessment of the impact of such disclosure on its commercial interests, and further held that the public interest militated against disclosing the information.

In addition to the requests forming the subject matter of the litigation before the First Tier Tribunal, you have made a number of requests for information of our client and the schools/consortia/authorities who use our client's tests. Indeed, your approach to these requests is evidenced by a post on your website (trak.org.uk) under the heading "Proprietary Standardisation", in which you state, *inter alia*:

> *"Yesterday, (20 Feb 2021) Upper Tribunal Judge Jacobs refused me permission to appeal the decision of the lower court in connection with my request for the raw 11+ test marks – information I first requested from CEM in October 2014.*
>
> *I'm undeterred.*
>
> *The Information Commissioners decision notice, FS50894563 relating to how much public money is spent on the 11+, argues that the grammar schools, rather than test provider are accountable for disclosing this. Reasoning that the same extends to being transparent about "standardisation", my strategy switched to asking the grammars for this information last summer."*

Indeed, in the late afternoon of 25 February 2021, it came to our client's attention that on 14 March 2020, you made the following Freedom of Information Act request of Dover School:

> *"Dear Dover Grammar School for Boys,*
>
> *I understand that your school provides an alternative entrance test to the one provided by Kent County Council and applicants can take either one of these tests or both. I would like to request the *anonymised* test scores from tests taken in 2017, 2018 & 2019 (for entry in 2018 – 2020) for each applicant to your school showing:*
> *1. Kent test English*
> *2. Kent test maths*
> *3. Kent test reasoning*
> *4. Kent test total score*
> *5. Your own test English*
> *6. Your own test maths*
> *7. Your own test reasoning*
> *8. Your own test total score*
>
> *Where applicants have been entered into both tests all 8 fields should be available. Where applicants have only taken the Kent test, fields 5-8 will be empty. Where applicants have only taken your own test, fields 1-4 will be empty. Please provide this information in either Excel, CSV or ODS format.*
>
> *For your own tests please also provide*
> *1. The qualifying score for each year.*
> *2. Name of the test provider (for each year if there have been any changes)*
> *3. The test/retest reliability figures for each 'subtest'*; English/maths/Reasoning, (for each year if there have been any changes)*
>
> **You may need to request reliability figures from your test provider, although all reputable test providers should be able to provide reliability figures for their tests. See the International Test Commission, guidelines [1]https://www.intestcom.org/files/guidelin..., §2.2.6.*
>
> *Best wishes*
> *James Coombs"*

On 16 September 2020, Dover School responded to your request by providing you with a spreadsheet entitled "FOI JC 14 03 2020 MASTER" containing the dates of birth of the candidates, their raw scores, their standardised scores and their age weighted scores. As set out below, our client's position is that Dover School has erred in providing this information to you, in that it has not correctly applied the exemption in section 43(2) of the Freedom of Information Act concerning that request, and has otherwise failed to abide by the duties of confidence it owes to our client concerning the disclosed information.

On 11 October 2020, you published a copy of the spreadsheet on your website, as well as an analysis of the data under the heading "Standard Age Scores" (https://trak.org.uk/standardised-age-scores/). For the reasons given in this letter, our client considers the publication of this information to be a breach of confidence. Further and/or in the alternative, our client considers the continued publication of this information on your website to be a breach of confidence. As set out below, our client's position is that these breaches entitle it to *inter alia* damages and/or injunctive relief requiring the information to be removed from your website and restraining further disclosure.

To clarify, the information disclosed to you by Dover School concerns our client's electronic CEM Select Assessment, whereas your appeal before the FTT concerned our client's paper based eleven plus assessments. We do not consider that this difference would have been apparent to you as at the date of the request, and in any event the disclosure of any raw scores (regardless of whether those scores relate to our client's paper based or electronic assessments) would cause our client commercial harm, namely:

- CEM works hard to ensure that all of its eleven plus tests are as resistant to tutoring as possible, and it markets its tests on that basis.

- Disclosure of the raw scores would make it materially easier for future examinees to "game" the eleven plus test, and devise tutoring strategies for the same, and thereby undermine CEM's competitive advantage.

In addition to the above disclosure from Dover School, we note that you continue make requests of the individual schools/consortia for the scores of candidates sitting the eleven plus tests. We note that some schools have, in error, made limited disclosure of scores to you (for example Harvey Grammar School) albeit it is not immediately clear that you have subsequently published that data. Notwithstanding, and for the avoidance of all doubt, you are not authorised to hold the raw scores and age weightings arising out of any eleven plus examination, and our client is communicating this to its customers to ensure that no further disclosures are made to you in error under the Freedom of Information Act. To be clear, our client does not purport to prevent you from making such requests, albeit it reserves its right to seek to be added as a respondent to any further proceedings before the First Tier Tribunal and/or separately make representations to the Information Commissioner concerning its commercial interests.

## The Assessment Process

In the case of electronic assessments such as those used by Dover School, when the test has been completed a data package (including the raw scores) is uploaded by the school to CEM via a secure website. The raw scores are then standardised and weighted and returned to the schools in the form of a report. As you are aware, Dover School has disclosed a copy of that report to you.

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## The Law of Confidence

It is well established that information will be protected by the equitable doctrine of confidentiality if it meets the three limb test in *Coco v AN Clark (Engineers) Limited*, [1968] F.S.R 415, namely that:

- The information must have the necessary quality of confidence.
- The information must have been imparted in circumstances importing an obligation of confidence.
- There must be an unauthorised use of the information to the detriment of the rights holder.

### The Necessary Quality of Confidence

In order to have the necessary quality of confidence, the information should be such that "it must not be something that is public property and public knowledge" (per *Saltman Engineering Co Ltd v Campbell Engineering Co Limited*, (1948) 65 R.P.C 203). In applying that analysis to this case:

- As set out above, our client markets its tests on the basis that they are resistant to tutoring. As you are aware from the litigation between the parties in the First Tier Tribunal, in order to ensure that the tests are as resistant to tutoring as possible, our client does not routinely publish information about its tests. We refer you again to paragraph 47 of the judgment of Judge Macmillan, which states that the disclosure of raw scores *"would reduce the 'tutor resistance' of the tests themselves"*.

- It follows that, aside from the publication to you by Dover School and the subsequent publication on your website, the raw scores are not public property or public knowledge. On the contrary, the disclosure of the information runs contrary to our client's approach to assessment. Indeed, in the case of paper testing our client has spent considerable sums of money in responding to Tribunal proceedings brought by you in order to prevent such disclosure.

- Although there has now been a limited disclosure by you of the Dover Boys School data, on the basis of the information available to us we do not consider that such disclosure is sufficient to deprive it of its quality of confidence. For judicial recognition of this principle, we refer you to the judgment of the House of Lords in *Attorney-General v Observer Ltd.* [1990] 1 AC 109, in which Sir John Donaldson MR stated:

> *As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality: O. Mustad & Son v. Dosen (Note) [1964] 1 W.L.R. 109. However, this will not necessarily be the case if the information has previously only been disclosed to a limited part of that public. It is a question of degree: Franchi v. Franchi [1967] R.P.C. 149 , 152-153, per Cross J*

- For a more recent application of this principle in respect of CEM's eleven plus tests, we refer you to the decision of Newey J at paragraph 31 in *Warwickshire County Council v Amit Matalia*, [2015] 2 WLUK 919, as upheld by the Court of Appeal in *Amit Matalia v Warwickshire County Council*, [2017] EWCA Civ 991.

**The Information Must be Imparted in Circumstances Importing an Obligation of Confidence**

As to the second limb of the test in *Coco v Clark*, an obligation of confidence may arise in different scenarios, including where the party receiving the information appreciates, without having to be informed of the fact, that the information is confidential:

> *"But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers - where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by."* (*Attorney General v Observer Ltd*.)

This analysis by Lord Goff in the *Attorney General* case was applied to CEM's 11+ tests in the circumstances of the *Matalia* litigation.

In addition to the above, it is trite law that the equitable doctrine of confidence can be enforced against a third party who had no knowledge that the information was confidential, but has subsequently be alerted to that fact. For judicial recognition of this, we refer you to the decision of the Supreme Court in *Vestergaard Frandsen A/S and others v Bestnet Europe Limited and others*, [2013] UKSC 31, in which Lord Neuberger stated:

> *"25. Liability for breach of confidence is not, of course, limited to such classic cases. Thus, depending on the other facts of the case, a defendant who learns of a trade secret in circumstances where she reasonably does not appreciate that it is confidential, may nonetheless be liable to respect its confidentiality from the moment she is told, or otherwise appreciates, that it is in fact confidential. From that moment, it can be said that her conscience is affected by a way which should be recognised by equity".*

Further, there is recent Court of Appeal authority confirming that an obligation of confidentiality will arise in circumstances where a reasonable person would have made enquiries as to whether or not the information is confidential, but fails to do so. Concerning this, we refer you to *Travel Counsellors Limited v Trailfinders Limited*, [2021] EWCA Civ 38, in which Lord Justice Arnold stated at paragraph 28:

> *"Accordingly, in my judgment, if the circumstances are such as to bring it to the notice of a reasonable person in the position of the recipient that the information, or some of it, may be confidential to another, then the reasonable person's response may be to make enquiries. Whether the reasonable person would make enquiries, and if so*

> *what enquiries, is inevitably context- and fact-dependent. If the reasonable person would make enquiries, but the recipient abstains from doing do, then an obligation of confidentiality will arise".*

In applying the above judicial analysis to the circumstances of this case:

- First, our client's position is that, by virtue of the litigation in the First Tier Tribunal, you are (or ought to have been) aware that the information disclosed to you by Dover Boys School in error is commercially sensitive and confidential.

- Further and/or in the alternative, you were aware from the First Tier Tribunal litigation that the information may have been commercially sensitive and confidential to our client. In those circumstances, we submit that a reasonable person in your position would have made enquiries of our client as to whether the information was considered to be confidential. In accordance with the judgment of the Court of Appeal in *Trailfinders*, your failure to make any enquiries of our client gives rise to an obligation of confidentiality to our client.

- Further and/or in the further alternative, to the extent (which, for the reasons given above, is not admitted) you were reasonably unaware that the information was confidential, then you are now aware that our client considers that the information is confidential and commercially sensitive, and as a consequence the information should be removed from your website forthwith.

In respect of the first bullet point above, that you believed at the time of publication that the information you were disclosing in your article entitled "Standard Age Scores" was confidential and of a nature that our client considered would cause commercial harm, is further evidenced by your article entitled "Proprietary Standardisation", in which you state:

> *"In past rulings, the Information Commissioner has concluded that if the raw marks were disclosed, commercial prejudice* ***would*** *occur. In September 2020 Dover Boys School disclosed the date of birth, raw and standardised scores from three years of tests provided by CEM. I used the data to write an article explaining exactly how it works. The hypothetical argument that prejudice* ***would*** *occur is unsustainable now that disclosure* ***has*** *happened and commercial harm* ***has not*** *happened!"*

Contrary to what you say, our client's position is that the continued publication of the information on your website will cause our client commercial harm, and it must be removed forthwith.

Unauthorised Use of the Information to the Detriment of the Rights Holder

In light of the above, the third limb of the test in *Coco v Clark* is plainly satisfied. The publication of the information on your website, and your continued holding of any confidential information belonging to our client is plainly unauthorised and, for the reasons given by the First Tier Tribunal, detrimental to our client.

## Loss and Damage

If proceedings become necessary (which may be issued and served without further notice to you), the remedies available to our client include an injunction, delivery up or (at our client's option) destruction of all goods produced using any part of the confidential information and all materials in your possession, custody or control which contain any of the confidential information, damages or an account of profits, legal costs and interest. In the meantime, our client reserves all its rights in this matter.

Indeed, should proceedings become necessary, we have advised our client that it should immediately seek an injunction prohibiting the disclosure of the information and requiring any and all references to the information to be removed from the internet by you pending trial.

## Next Steps

As stated above, whilst the continued misuse of our client's confidential information cannot continue, our client is hopeful that this matter can be resolved without recourse to the Court. To that end, we have attached an undertaking for your signature. On the basis that you agree to the terms set out therein and perform the actions provided, our client will not be required to seek injunctive relief against you arising out of the disclosure

If you do not agree to the signed undertaking by 5pm on 24 March 2021 and perform the steps set out therein within the timescales identified, we will advise our client of its right to issue proceedings and to seek injunctive relief against you on an urgent basis.

We strongly suggest that you urgently take independent legal advice on the contents of this letter.

Yours faithfully

Hewitsons LLP

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Enc.

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