06 August 2019

Meg Hillier MP,
Public Accounts Committee,
House of Commons,
London,
SW1A 0AA

By email

On 10 July, we provided evidence to your Committee’s inquiry into English language tests for overseas students. During the session, we committed to write to you to provide further information on a number of matters.

Origins of English Language Testing in relation to applications to the Home Office in 2007 and the award of the licences to English Language Test Providers in 2011

In 2007, the then Border and Immigration Agency (BIA) Points Based System Operational Policy Team conducted an exercise to identify English language tests to be included in the launch of Tier 1 (the route for highly skilled individuals) of the Points Based System the following year. This initial exercise was not run as a procurement project and there were no contractual agreements between the parties.

Instead, the Operational Policy Team published a document setting out the required criteria on the BIA website which invited organisations to submit their tests for consideration. BIA also wrote directly to a number of known English language test providers to invite them to do the same. Requirements included some security measures to prevent deception during test sittings, prevent fraud and the provision of a system to verify test results.

51 different tests were submitted for consideration and, following assessment against the criteria, 19 were listed as being accepted by the Home Office in the initial Tier 1 guidance document published in February 2008. Educational Testing Services (ETS) were one of the English language test providers listed.

The same list was used for employment routes (Tiers 2 and 5 of the Points Based System) from November 2008, student applicants (Tier 4 of the Points Based System) from March 2010 and for marriage and partnership routes from autumn 2010.

In 2010 a commercial procurement was conducted in order to create a formal arrangement between English language test providers and the Home Office. The
then UK Border Agency (UKBA) opened a competition in December 2010. 19 applications were received; of which five, including ETS, were successful.

A submission dated 21 March 2011 to the then Minister of State for Immigration and copied to the then Home Secretary outlined the new arrangements and sought approval for the new list of providers of English Language testing for the Points Based System routes and for spouses and partners. Following approval, the licence agreements with the test providers, including ETS, were signed by a UKBA official at Assistant Director level.

The terms and conditions of the licence with ETS (ETS Global BV) were standard and replicated across all suppliers, and the penalty for a proven fundamental breach of the licence would have been termination of the licence. ETS’s licence was suspended in February 2014 when the Home Office became aware of the abuse of the ETS TOEIC tests. The suspension was not lifted and the licence was allowed to expire on 5 April 2014.

You requested information on profit made by ETS. It is not possible for us to say what profit ETS made from providing the tests as they alone would hold that information. As we have previously outlined to the Home Affairs Committee, there was no contract with a specific value, but a licence where ETS offered tests that could be used for applications to the Home Office or elsewhere.

**Sponsor Licences Revoked in 2011, 2012 and 2013**

Prior to the abuse of the ETS TOEIC tests being reported by Panorama in 2014, 700 Tier 4 sponsors (educational establishments licenced by the Home Office to educate overseas students) had their licence revoked and were removed from the sponsor register for failing to comply with the requirements of being a Home Office licenced sponsor.

As such, none of the licences revoked in 2011, 2012 or 2013 were revoked due to issues related to ETS testing.

The investigations into sponsors from February 2014 onward (as part of Operation Firewall) were driven by students matched to invalid ETS certificates. Around 400 sponsors were linked via Home Office data matching. Again, where sponsors had their licences revoked, this action was taken because of their failure to comply with the requirements of being a Home Office licenced sponsor.

**Intelligence Received from ETS**

You requested more information on intelligence given to the Home Office by ETS on suspected fraud taking place before 2014.

In May 2012, ETS provided information about ETS Teaching of English as a Foreign Language (TOEFL) tests being delivered in Pakistan. As a consequence of their investigations, ETS withdrew the results of 324 individuals who had taken tests in Pakistan. Shortly afterwards, ETS informed the Home Office that they had closed eight testing centres in the UK due to anomalies in speaking, and had withdrawn the results for 446 individuals whose tests were linked to those centres.
Action was taken at this time to identify and remove those migrants who had entered the UK using these certificates.

Home Office caseworkers also identified concerns with ETS testing during 2013. These concerns had all been passed to ETS UK ahead of the broadcast of the Panorama programme, but no action had been taken by ETS by the time the programme was broadcast.

**Resources Allocated to Gold Command and Overall Costs**

In relation to your questions relating to the cost of the Department’s response to this issue, a Gold Command structure was put in place in February 2014 to lead the Home Office’s response to the ETS investigation.

The Gold Command response had four key elements:

1. Pursuing those who had orchestrated the fraud for criminal prosecution. This was led by the Crime and Financial Investigations team (CFI) in Immigration Enforcement.

2. Taking action in cases where individuals’ tests had been declared “invalid” or “questionable”. This was led by UK Visas and Immigration (UKVI).

3. Linking the applicants through to their associated Tier 4 sponsors to establish whether or not the sponsors had fulfilled their duties when recruiting these students. This was led by the Sponsor Management Unit in UKVI.

4. Putting in place new arrangements for Secure English Language Testing.

The estimated cost of the Gold Command response was just over £700,000. These costs were tracked by recording the hours spent on ETS work by staff attached to the command.

Costs in relation to other areas involved were tracked but this was only for a limited time and, as stated in evidence, no new cost codes or accounting structures were created as it was judged disproportionate to do so given higher priorities. It is not therefore possible to provide more detail.

**Chain of Custody Issues and Evidence from Mr Nick Armstrong**

We have now had the opportunity to review the written evidence submitted to the Committee by Mr Armstrong.

A number of points raised by Mr Armstrong relate to the state of the evidence, particularly in the linked cases of MA (2016), Mohibullah (2016) and Saha (2017).

Mr Armstrong focusses on the IT evidence and questions the integrity of the electronic data (an issue frequently referred to as the “chain of custody”). He refers to the experts instructed in the three linked cases. During litigation in 2016, various alternative methods of fraud were put forward including:
1. Use of remote control software: the candidate might sit at a terminal in a test room, but control was being exercised in another room by a proxy.

2. Misleading data input by test centre staff and/or associates: the computer systems work faultlessly but on fraudulent data.

3. Misleading data being the result of clumsiness by staff, not deliberate action: this could be at any point from test taking right through to transmission of data to the Home Office.

4. File manipulation – where computer records are changed by direct intervention by test centre staff and/or associates.

In April 2016, the Home Office commissioned an expert report during this litigation from Kroll Ontrack, a leading data audit firm. This looked at whether a genuine test-taker could take a test honestly and yet, without their knowledge, recordings of that test could include someone else’s voice.

The author of the Kroll Ontrack report was unable to exclude completely the theoretical possibility of other methods of fraud, and he agreed (in a joint report with other experts) that various pieces of information that would have allowed him to cross-check data had not been available to him.

Nonetheless, the Kroll Ontrack report concluded that there was no actual evidence that other methods of fraud took place and said that these were “purely speculative ideas”. The report went on to conclude that ‘without a highly computer literate person being involved, it is unlikely that the TOEIC system would attribute a genuine test-taker’s recording to a different candidate or that a genuine test taker’s recording would be submitted by multiple candidates.’

It remains the case that evidence from a range of sources points to the fact that those organising the fraud in test centres used proxies to take tests on behalf of other people. This was the method seen on the Panorama programme and, in debriefing reports from 2014, various individuals confirmed that imposters had taken tests for them.

Furthermore, the findings of the criminal investigations into the organisers of this abuse support this. No evidence has been found of any of the alternative, more complex methods while considerable direct evidence has been uncovered of the use of proxies.

For example, five people received criminal convictions at Burnley Crown Court of conspiracy to commit fraud, centred around TOEIC abuse in three separate test centres in the Manchester area. As part of the investigations into these colleges, ‘pilot lists’ (with name of proxies) were recovered from the home addresses of the organisers along with messages contained on mobile telephones with instructions for these. The Counsel for the defence in this trial sought to make much of the “chain of custody” issues and representatives from ETS were called to give evidence on these points. Nonetheless the jury were satisfied to a criminal standard of the organisers’ guilt.
Finally, it is important to note that both the Upper Tribunal and the Court of Appeal have held that the evidence relied upon by the Secretary of State in the cases of Qadir (2016) and Shehzad (2016) is sufficient to discharge the initial burden of demonstrating that an individual has cheated and shifts the burden to the individual concerned to satisfy the Court or Tribunal that there is an innocent explanation and the precedent set in these cases remain.

**Location of Data Storage and Legal Advice**

You asked about the implications of data being stored by ETS in America and the legal advice received by the Home Office on this issue.

ETS in America had responsibility for marking the speaking and writing part of the TOEIC. While the test centres administered the tests in the UK, at the end of a test session they were returned to the US to mark and produce the test score. Results were then passed back to the relevant test centre in the UK.

Once recordings were transmitted back to ETS in America, the Home Office understands they were stored securely on servers in its data centres, typically for 999 days. ETS has made these recordings available to people who have asked for them.

The Department took legal advice on the ETS issue throughout 2014, and all advice to Ministers during this period was also subject to legal advice, but the Department did not specifically request advice in relation to test-taker data being held in a foreign jurisdiction.

Assurance on how ETS analysed tests and the integrity of that data was conducted during the delegation visit to ETS in June 2014 and by commissioning the expert reports of Professor French and Kroll Ontrack.

**Legal Challenge Against ETS and Recovery of Costs**

You requested further information on the legal challenge against ETS to recover costs.

When looking to bring an action against ETS Global BV, the Home Office compiled a breakdown of costs incurred across various parts of the department, recognising that the amount was approximate as detailed time records had not been kept, other than for an initial period.

Also, at the time, the UK branch of ETS Global BV had closed following the exposure of fraud. The Department were advised that ETS-US could not be held liable as there was no contractual or other relationship with the US parent. The Home Office therefore sought to take action against the Dutch company, ETS Global BV, of which the UK branch had formerly been part of.

The legal advice received suggested that the Home Office had a ‘strong case’ against ETS Global BV and the Immigration Minister at the time agreed on 10 March 2017 to initiate proceedings against ETS Global BV. The advice to
Ministers was clear about the risks of pursuing litigation (both legal and financial) meaning that a negotiated settlement was likely to be the best outcome.

GLD strongly advised accepting the sum of £1.6m rather than entering into costly and lengthy proceedings which were only likely to exhaust ETS Global BV’s financial assets. This also kept the Department’s spend on legal advice to several thousand pounds rather than hundreds of thousands and so represented the best value for the taxpayer.

**Home Office records relating to individuals who have cleared their name in court.**

In all allowed appeals (including ETS) which are not challenged further, the Specialist Appeals Team sign off the appeal with a recommendation for the grant of leave and the reasons why the appeal was allowed. This is then recorded on the individual’s electronic case file and any caseworker looking at the case at a future date should have regard to this information which records that ETS deception was not found and why it has not been challenged.

The fact that an individual was previously refused due to allegations they cheated in an ETS test should not be used against the applicant in any future interactions with the Home Office.

1. As the former Home Secretary set out in his Written Ministerial Statement of 23 July, we are making immediate changes to our guidance to caseworkers on ETS and continue to look at other options, including whether there is a need for those who feel they have been wronged to be able to ask for their case to be reviewed.

2. We hope this letter provides the Committee with the information it was seeking. We will ensure that our new Ministerial team are updated on this issue as part of their orientation with the Department.

Yours sincerely,

Sir Philip Rutnam
Permanent Secretary