Appeal Number: EA/2020/0310

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights
Between:

JAMES COOMBS

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

THE BUCKINGHAMSHIRE GRAMMAR SCHOOLS

Second Respondent:

Date and type of Hearing on GRC - CVP:
(17th August 2021, and 8th & 21st February 2022)

Panel: Brian Kennedy QC, Paul Taylor and Naomi Matthews.

Representation:

For the Appellant: James Coombs as a Litigant in person

For the First Respondent: Not represented.

For the Second Respondent: Felicity McMahon of Counsel.

Result: The appeal is dismissed.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“the DN”) dated 22 September 2020 (reference IC-47086-D9P3), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 17th August 2021, and 8th and 21st February 2022.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the DN and not repeated here, other than to state that, the appeal concerns the question of whether the Commissioner was correct to determine that The Buckinghamshire Grammar Schools (“TBGS”) correctly applied section 41 and 43(1) or (2) FOIA to the withheld information and if TBGS hold the information under section 1(1)(a) FOIA.

Chronology:

1 October 2019	GL Assessment Limited (“GLAL”) and TBGS wrote to the parents of the children who sat the Secondary Transfer Test (“the Test”) on 12 September 2019 explaining what steps had been taken in the marking of the test to account for the errors.
13 October 2019	The Appellant wrote to TBGS and requested a copy of the “Detailed statistical analysis” referred to in the letter dated

	1 October 2019. Further, the Appellant requested specific information if not included in the report.
12 November 2019	TBGS responded. TBGS refused to disclose the information requested at parts 1, 2, 3 and 4b of the request under section 41 and 43 FOIA. TBGS disclosed the information requested at 4a.
18 November 2019	The Appellant requested an internal review.
16 December 2019	TBGS upheld its original decision and sent the outcome of its internal review to the Appellant.

The Applicable Law:

[4] S1 (1) FOIA – Provides that -

(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.

Part II of FOIA provides a number of exemptions to the requirements of s1(1).

S2 FOIA provides that, depending on the relevant provision, these exemptions can be either absolute or subject to a public interest balancing test which requires the public authority to determine whether the public interest in maintaining a certain exemption outweighs the public interest in the disclosure of the information in question.

S41 FOIA provides such an exemption in respect of information provided in confidence whereas S 43 provides an exemption ion relation to commercial interests.

S41 (1) FOIA provides that –

"Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority) and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence by that other person."

[5] For disclosure of information to be actionable as a breach of confidence at common law, as required by S41(1)(b), The three requirements must be satisfied (see Coco v A N Clark (Engineers) Ltd. [1969] RPC 412 , 46.)

The three requirements set are;

(a) the information must have the necessary quality of confidence;

(b) it must be imparted in circumstances importing an obligation of confidence; and

(c) disclosure would be an unauthorised use of the information to the detriment of the confider.

[6] Information has the necessary quality of confidence where it is not public knowledge and is of such nature that a reasonable person would regard it as confidential which, in particular, requires it to be more than trivial.

[7] The exemption provided by S41 FOIA is an absolute exemption (by virtue of S2(3)(g) FOIA,) meaning that if it applies there is no requirement to go on to consider whether disclosure would nevertheless be in the public interest. However, disclosure of confidential information where there is an overriding public interest in its disclosure is a defence to an action for breach of confidentiality. (see Evans v IC and DBIS [2012] UKUT 313 (AAC) at [38].)

Commercial Interests:

[8] S 43(1) and (2) FOIA provide that; -

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

(2) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (Including the public authority holding it)."*

[9] These are not absolute exemptions and therefore are subject to a public interest balancing test.

Commissioner's Decision Notice:

[10] Having considered the withheld information and TBGS's submissions in the course of her investigation, the Commissioner found that the information was correctly withheld under s41 FOIA in that,

(a) The Commissioner was satisfied that the withheld information was provided to TBGS by a third party, namely GLAL who were the test providers and comprised of detailed statistical analysis in the form of an interim data analysis conducted by GLAL and presented to TBGS in the form of a PowerPoint presentation, and information about the nature of the subtests, in particular the question types used in each component and the number of each. (DN para. 11).

(b) The information was provided to TBGS by another person, namely in each case by GLAL: (DN paras 13- 14.)

(c) The information had the necessary quality of confidence. In this case the Commissioner accepted TBGS's explanation that the information was worthy of protection as it pertains to the construction of the test and GLAL expends a lot of effort and expense trying to preserve the integrity of its tests, which is why details of the construction of the test are not otherwise accessible (DN Paras 17 – 19)

(d) The information had been provided to TBGS under an obligation of confidence, imposed in the case of the statistical analysis by a specific confidentiality agreement letter dated 24 September 2019 (provided to the Commissioner), and more generally in relation to the test by the underlying agreement between TBGS and GLAL governing the test: (DN paras. 22 – 24).

(e) The information would cause detriment to GLAL In this respect, the Commissioner accepted TGBS's submissions that the information was core to GLAL's intellectual property as a test provider and commercially

sensitive as it would be of advantage to a competitor 'and also that its disclosure could undermine the integrity of the test by making it more susceptible to targeted tutoring. In the course of her investigation the Commissioner had challenged these submissions, in particular, with respect to test preparation materials commercially made available by GLAL but was satisfied that these materials were too general in nature to have the same detrimental effect that disclosure of the withheld information was likely to have. (DN para. 25 – 32).

(f) There was no overriding public interest in the disclosure of the information that would provide a defence to an action for breach of confidence. In particular, although the Commissioner acknowledged that there is a public interest in openness and accountability surrounding 11 plus testing, the Commissioner considered that strong grounds would be needed to override the wider public interest in preserving the principle of confidentiality, and the trust between confider and confidant, and that these were not present in this case. (DN paras. 34 – 38).

(g) As a result, a disclosure of the information would have been a breach of confidence actionable by GLAL as the original confider of the information and S41 FOIA was correctly applied.

[11] As the Commissioner found S41 FOIA to be engaged regarding all of the withheld information it has been applied to, she did not go on to consider the application of S43(2) FOIA (DN paras. 42 – 43).

The Appellants' Grounds of Appeal:

[12] The Appellant in his Grounds of Appeal dated 24 October 2020, disputes the Commissioner's findings and explains that his request was "primarily aimed at disclosure of a statistician's report" which was "commissioned by the test provider". The Appellant asked for the number of questions in the test. He stated that "it is common knowledge (10,000 children sat the test) that there were originally 19 questions in the test. The error effectively reduced these to 11". The Appellant relied on S v ICO and the General Register Office [2007] EA2006/0030 to contend that official confirmation is required by TGBS.

[13] The Appellant claims that the Commissioner failed to have regard to s.3(2)(b) FOIA and that as the purpose of the statistician's report was to determine whether any child was unfairly disadvantaged by the errors of GLAL, it is clear that the information is held on behalf on the authority. The Appellant refers the Tribunal to University of Newcastle upon Tyne v Information Commissioner and BUAV [2011] UKUT 185 (AAC) (11 May 2011).

The Commissioner's Response:

[14] The Commissioner's position, having considered the arguments advanced by the Appellant, remains unaltered. The Commissioner repeats the reasons set out in the DN that the exemption in s.41 FOIA was correctly applied and that some of the information requested was not held for the purposes of s1(1) FOIA.

[15] The Commissioner further contends that;

i) While the Number of questions was public knowledge to a limited number of members of the public, the Commissioner reminds the Appellant that dissemination of the information to a limited number of people does not stop the information from being considered to be confidential. Moreover, if the requested information was indeed publicly available, such that it was not of a confidential nature the information may well be exempt from disclosure under s.21(1) FOIA as otherwise accessible. In response to the Appellants' reference to S v ICO and the General Register Office [2007] EA2006/0030, the Commissioner highlights that if the information was known to an applicant independently, the information had not necessarily lost its quality of confidence and that disclosure by the relevant public authority was in that respect of another quality than knowledge based on individual recollection.

ii) Application of s.3(2)(b) – information held on behalf of a public authority
In response to the Appellant's allegation that any statistician's report was '*very clearly'* (or indeed at all) held by GLAL on behalf of TBGS by virtue of

s.3(2)(b) FOIA, the Commissioner adopts the Tribunal findings in Chagos Refugees Group v ICO and FCO, EA/2011/0300, FTT, whereby, it is not a normal incident of the performance of such a contract that the party providing the service is obliged to share with the contracting party any information it generates in the performance of its contractual obligations Information acquired or generated by a person with whom a public authority contracts therefore will not, in the absence of some special contractual provision, be held on behalf of' the public authority.

Further, whilst the Appellant relies on the Tribunal's decision in University of Newcastle upon Tyne v Information Commissioner and BUAV [2011] UKUT 185 (AAC) (11 May 2011), the Commissioner highlights that the facts of this decision were notably different from the present case. The Commissioner makes specific reference to paragraph [30] of that decision which states as follows:

> "*In the light of the findings of fact that it had made, the tribunal was entirely justified in reaching the conclusion that it did in paragraphs [54] and [55] of its reasons (see paragraph 26 above). I accept that the tribunal did not make any specific findings to the effect that the University held the information in question through the two project licence holders, Professors Thiele and Young. It did, however, make a clear finding of fact that Professor Flecknell, the NVS, held the licences, and that he held them on behalf of the Registrar, Dr Hogan, and that both of them were acting under their contracts of employment. In doing so the tribunal plainly took the view that the University's governing body held the information through the Registrar. As Mr Thomas argued, and the tribunal recognised ([55]), that was a straightforward application of the rules of attribution of knowledge to a corporate body ("In general, an employer is deemed to have notice of anything of which any of his employees obtains knowledge in the course of his employment": per Arden L.J. in Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd & Ors [2007] EWCA Civ 197 at paragraph 49).*"

iii) Application of the exemption protecting commercial interests. The Commissioner did not assess the application of the exemption in s.43(2) FOIA in her decision, as she found that the exemption in s.41 had been correctly applied. Nevertheless, the Commissioner agrees with TBGS's decisions to argue that the information, in so far as it pertained to the construction of the Test, would also benefit from the exemption in s.43(2) FOIA dealing with prejudice to commercial interests.

For the reasons given above and in the DN, the Commissioner considers that she has correctly determined the Appellant's complaint and invites the Tribunal to dismiss the appeal and uphold the DN.

Appellant's Reply to the Commissioner's Response:

[16] The Appellant challenges the response of the Commissioner. The Appellant contended that for the law under s.41 to be engaged, the information must have been obtained from another person. Further that the third party (TBGS) already held the information under s3(2)(b) and the exemption was not therefore engaged.

[17] In response to the Commissioner's contentions concerning section 41 FOIA, the Appellant adopts Judge Megarry's ruling in Coco v A N Clark (Engineer's) Ltd [1969] RPC 41, [1968] FSR 415, (1968) 1A IPR 587 England and Wales, the Appellant accuses the Commissioner of adopting "her own guidance out of context in a way intentionally designed to distort its meaning". The Appellant asserts that the Commissioner rejected his complaint at the outset rather than assessing it objectively, fairly and without prejudice.

[18] In relation to the public interest the Appellant refers the Tribunal to Buckinghamshire Grammar Schools v Information Commissioner, EA/2017/0169. The Appellant contends that TBGS's decision has the potential to alter the educational paths of 10,000 children over the next five years.

[19] The Appellant states that the public authority in this instance acted in an unforgivable manner and that TBGS embarked on a campaign of wilfully misleading

the public by providing false evidence to various panels and failing to disclose any of the information which formed the basis of their claims. The Appellant invites the Tribunal to find that the Commissioner failed to consider his complaint in an objective and unprejudiced way.

Second Respondent's Response:

[20] TBGS argues it does not hold the Statistician's Report or any analysis done by GL – s.3(2) FOIA. TBGS reiterate that they do not hold the Statistician's Report, nor have they ever had sight of a copy of it. Further, that it is not held by GLAL on behalf of TBGS' TBGS have no right to obtain a copy of the Statistician's report as it was created for, and is held by, GLAL on its own behalf. TBGS adopts the ICO's position outlined at para 37 ICO Response. TBGS argue the position is as follows;

> *"The Appellant refers to the decision by the Upper Tribunal in University of Newcastle upon Tyne v Information Commissioner and BUAV [2011] UKUT 185 (AAC) in which the Upper Tribunal endorsed the First-tier Tribunal's formulation that the effect of s.(3)(2)(b) FOIA is that "the authority 'holds' information in the relevant sense even when physically someone else holds it on the authority's behalf". The facts of the decision were also notably different from the present case. It concerned a request for information contained in certain licences which the university argued were held by individuals and not the university. The First-tier Tribunal rejected this argument and found, with the Upper Tribunal agreeing, that the licenses were held by a professor in the university and that he held them on behalf of the university's registrar, and that both men were acting under their contracts of employment. In those circumstances, the Tribunal took the perhaps unsurprising view that the university's governing body held the information in the licenses through the Registrar (see decision at [30])."*

[21] TBGS contend that if the Tribunal finds that GLAL did hold the Statistician's Report on behalf of TBGS, it was subject to strict obligations of confidentiality, actionable by GLAL, on the same terms as the PowerPoint. The reasons for confidentiality would apply, if anything even more strongly, to the Statistician's Report or any GLAL statistical analysis. Therefore, it is exempt from disclosure under s.41

FOIA. The Commercial Interests under s.43 FOIA would apply accordingly with regards to the same.

The PowerPoint presentation:

[22] As the Appellant accepts that he did not request disclosure of the Power Point at paragraph 39 of his reply to the ICO's Response; the Tribunal need not consider the Power Point, as it is not subject of his complaint. However, TBGS submit if the Tribunal were required to consider this request, the Power Point presentation is exempt from disclosure under both s.41 and s.43 FOIA.

The number of questions:

[23] In response to the Appellant's assertion that the information is in the public domain, TBGS adopt the reasoning of the Commissioner and agrees with the Commissioner's analysis of S v ICO and the General Register Office [2007] EA2006/0030 outlined at paragraph 29 of the Commissioner's Response. Paragraph 29 is as follows;

> *"The Appellant refers in this context to the then Information Tribunal's decision in S v ICO and the General Register Office [2007] EA2006/0030 apparently for the proposition that there would still be value in having the information disclosed by TBGS even if it was commonly known. However, the Tribunal in that case was in fact making the point that even if the information was known to an applicant independently, the information had not necessarily lost its quality of confidence, and that disclosure by the relevant public authority was in that respect of another quality than knowledge based on individual recollection. The Commissioner considers that this lends further support to her view that it is unlikely that the information in the present case had lost its confidential character."*

[24] TBGS further contend that:

i) Quality of confidence:

As the information is not trivial and GLAL has worked to keep the information confidential, TBGS submit that the information is subject to strict obligations of confidentiality.

ii) Was the material imparted in circumstance imposing an obligation of confidence? The contract between TBGS and GLAL sets out obligations of confidence. Schools, test centres and staff also agree to maintain confidentiality. Schools that administer the tests are required to store test materials securely both before and after testing, and then to return all the materials to GLAL after testing. Furthermore, TBGS highlight the detriment to GLAL if this confidentiality agreement were to be breached.

iii) Detriment - TBGS reiterate that if the information were to be disclosed, it would damage the integrity of the test and benefit GLAL's competitors.

iv) Public Interest - It is the submission of TBGS that any public interest in disclosure does not outweigh the public interest in non-disclosure, or the interests of GLAL.

[25] TBGS invites the Tribunal to dismiss the appeal and uphold the DN.

Appellant's Reply to the Second Respondent's Response:

[26] The Appellant asks the Tribunal to determine which of the two accounts provided by TBGS on the existence of the information are true. Notwithstanding the above, the Appellant maintains that the information is held by TBGS. In relation to consideration of Governing Body of Reading School v Information Commissioner EA/2013/0227, in their determination of the usefulness of the requested information to tutors.

[27] The Appellant accuses TBGS of being in breach of their legal obligations as a data controller by failing to be transparent on how the personal data was processed. The Appellant refers to Article 5 (1)(a) GDPR to highlight how TBGS would not withstand any proper independent scrutiny". The Appellant submits that the disclosure of the statistical analysis would allow the public to determine whether or not the test taken in 2019 was fair.

[28] The FOIA will favour the disclosure of information unless there is a valid reason for withholding it. The evidential burden in this case lies with the Commissioner and TBGS to prove that the information requested was not ‘held’ or in the alternative is exempt under FOIA and it is in the public interest that this information be withheld. The Appellant alleges that TBGS systematically withheld any information in order to prevent the public from holding them accountable for their unfair and unlawful decision-making.

[29] The Tribunal need not determine if the solution provided by TBGS was fair unless the greater public interest lies in revealing a conspiracy to cover up the mistake, which subsequently breaches GDPR. The Appellant requests that the Tribunal allow independent members of the general public to determine for themselves whether or not the tests taken in 2019 were fair.

Second Respondent’s Submissions:

[30] The questions for the Tribunal are:

1. what the information sought is;
2. whether TBGS holds the information sought, and
3. whether either or both of the exemptions claimed apply to the information.

[31] TBGS invites the Tribunal to resolve the question of whether TBGS “holds” the statistician’s report. TBGS submit that they do not hold any statistician’s report created by GLAL or the independent statistician, or any other statistical analysis done by GLAL Assessment. Further, GLAL does not hold any statistical analysis it carried out on behalf of TBGS. TBGS rely on Chagos Refugees Group v ICO and FCO, EA/2011/0300, FTT, 4 September 2012 and Dransfield v ICO (FTT) Case No. EA/2010/0152, 30 March 2011 in respect of the same. In the event that the Tribunal decides that TBGS holds such material s.41 and s.43 FOIA applies.

[32] The Tribunal is invited to decide that the Power Point is not the subject of the appeal and therefore its disclosure is not required. In any event, TBGS asks the

Tribunal to decide upon the applicability of the exemptions at s.41 and 43 FOIA, which TBGS submits exempts it from disclosure.

[33] The assertion that TBGS are involved in a “cover-up” is simply false. The reasons why the information has been withheld have been clearly set out. TBGS does not hold any statistical analysis other than the Power Point presentation. Both the Power Point and the number of questions are exempt from disclosure under s.41 and/or s.43 FOIA. On these grounds, the Tribunal is respectfully invited to refuse the appeal.

Case Management Directions:

[34] The Tribunal Panel on 17 August 2021, conducted a Directions Hearing outlining the proposed way forward. The parties were required to provide their proposed directions to the Judge by 17 September 2021. TBGS were to respond a week and a half thereafter on 29 September 2021.

[35] Further witness evidence and any documentation to be relied upon was to be provided 4 weeks from the Directions Order on 18 October 2021. Further, Parties were to provide availability 5 weeks from the Directions Order, 25 October 2021.

[36] Supplemental electronic bundles were to be provided by TBGS, 6 weeks after the Directions Order. Skeleton arguments were to be provided 7 days in advance of the hearing. The hearing of this case was listed for two days.

[37] The Tribunal sought clarity on the following issues in advance of the hearing:

1. Are TBGS a public authority for the purposes of FOIA?

   The Tribunal directed that TBGS confirm in writing if for the purposes of this appeal they are a public authority. Further, that they clarify this point within their updated skeleton argument.

2. Is the statistical analysis provided by GLAL held by TBGS?

As per the authority of University of Newcastle upon Tyne v Information Commissioner and BUAV [2011] UKUT 185 (AAC) (11 May 2011), on consideration of whether GLAL are in fact holding the report the following factors must be considered: the capacity in which they hold it; any statutory, regulatory or legal obligations arising in respect of this information; the level of control and the terms stipulated in the contract concerning the information. The Tribunal directed that TBGS clarify the interpretation section of the contract at F433 of the open bundle concerning 'analysis and reports'. Furthermore, TBGS were required to detail the nature of the instruction referred to in the witness statement of Sue Walton.

3. Does the confidentiality exemption found at s 41 FOIA apply?

The contract subject to these proceedings is of relevance in determining whether an alleged breach of confidence is actionable per Coco v A N Clark (Engineers) Ltd [1968] FSR 415. The information must have the necessary quality of confidence, have been imparted in circumstances importing an obligation of confidence, and there must have been an unauthorised use of that information causing a detriment. TGBS were required to consider the contract and update the Tribunal on the purpose of the confidentiality letter and if they believed this to amount to a variation of the contract.

4. The independence of the statistician

The Appellant contends that the objective independent expert, having worked for the company taken over by GLAL for 25 years, is not independent and a conflict of interests arises. The Tribunal requested that the witness comment on this contention and outline what information was divulged in this instance. In relation to the witness statement of David Hilton, the Tribunal sought a detailed explanation of his employment with GLAL and any knowledge he may have held concerning the issues that arose.

[38] The Second Respondent has helpfully formally confirmed to the Tribunal, TBGS is a company set up by the grammar schools of Buckinghamshire, and accept it is a public authority subject to FOIA for the purposes of this appeal only.

Appellant's Further Submissions:

[39] In response to the Tribunal's direction dated the 31st of August 2021, the Appellant submitted an updated skeleton argument. The Appellant provided an Illustration, which detailed the potential exemptions from Section II of FOIA, which could be applied to the requested information.

[40] The Appellant asserted that the "responsibility for demonstrating that one or more exemptions apply falls to the public authority whilst responsibility for drawing attention to public interest factors which favour disclosure lies with the Appellant. The Appellant relies on *Hogan and Oxford City Council v ICO* [2006] EA/2005/0026.

[41] The Appellant submitted a twofold argument in favour of disclosure. Firstly, that the Tribunal should consider the 'suspicion of wrongdoing' by TBGS, and secondly that the 'full picture', is presented to encompass the actions of GLAL. The Appellant provided a summary of factual considerations for the Tribunal in advance of the hearing to determine if the Tribunal find that the public interest lies in withholding the requested information. The Appellant asks the Tribunal to consider if the information can be disclosed with redactions.

[42] In relation to section 41 FOIA, the Appellant stated that for section 41 to be engaged, information needs_to have been obtained. Further, that "*disclosure of the information to the public* (otherwise than under this Act*) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*"

[43] The Appellant stated that as 10,000 sit the test every year, if the information was of any benefit, it would be trivial. The Appellant argued that TBGS signed the Non-Disclosure Agreement in order to avoid disclosing the information.

[44] The Appellant referred to the ruling in *Coco v A N Clark* [1969] R.P.C. 41 to outline the test concerning an actionable breach of confidence:

> "*However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negate any duty of holding it confidential.*"

[45] Turning to section 43(1) FOIA the Appellant reiterated the Tribunal's decision in *Governing Body of Reading School v Information Commissioner* EA/2013/0227. The Appellant argued that disclosing the number of questions would reveal the proportion of questions removed and undermine TBGS's narrative that reliability remained unchanged.

[46] The Appellant, in considering section 43(2) FOIA referred to Department for Work And Pensions v The Information Commissioner & Anor [2016] EWCA Civ 758 (27 July 2016) in which the Court of Appeal adopted the FTT's approach in *Hogan and Oxford City Council v ICO* [2006] EA/2005/0026. The Appellant contended that the assertion that the disclosure of the withheld information would result in GLAL having to develop a new test is not made out.

[47] The Appellant scrutinised the second witness statement by Ms Walton and her assessment of the National Schools Admissions Code. The Appellant argued that no one knew how each child was impacted or how long it took to contact the schools involved.

[48] The Appellant referred to the Commissioner's guidance on the public interest test to state that TBGS have previously withheld information to avoid being held accountable. The Appellant outlined that the objectives of the School Admissions Code are that admissions to publicly funded school are fair, clear and objective. Therefore he argues, the Commissioner's guidance on the public interest also includes an interest in disclosure where there is a suspicion of wrongdoing. The Appellant averred that unless TBGS take their responsibilities under FOIA seriously, they are

also in breach of admissions law. The Appellant contended that the public cannot satisfy themselves that the process of admissions undertaken by TBGS for entry in 2020 was fair or objective whilst TBGS continue to refuse to disclose the withheld information in which they claim a fair process can be generated.

Second Respondent's Further Submissions:

[49] The Second Respondent maintained that they do not hold the detailed statistical analysis, nor have they seen a copy of it. Further, that GLAL does not hold the detailed statistical analysis on behalf of TBGS pursuant to section 3(2)(b) FOIA. In relation to the contractual position, both the Second Respondent and GLAL understood the detailed statistical analysis and the Power Point summary thereof to be outside what was envisaged by the general contractual agreement, hence the separate confidentiality letter. Further, that the general contractual agreement does not include provision for certain reports/analysis to be undertaken by GLAL and provided to TBGS, which are included within the definition.

[50] The Second Respondent referred to the section 41 FOIA exemption and the test outlined in *Coco v A N Clark* [1969] R.P.C. 41 which must be met for an actionable breach. The Second Respondent referred to the questions included within the PowerPoint. The PowerPoint contains details of the constructions and make-up of the tests. None of the information is publicly accessible, the tests produced for TBGS are bespoke and contrary to the Appellant's assertion, the number of questions is not already in the public domain. The Second Respondent argued that it would be apparent to any individual dealing with the information that the information is confidential.

[51] In relation to confidentiality, TBGS were required to sign a specific confidentiality letter and confidentiality is also emphasised in the general contractual agreement. Children are told not to discuss the test and further the evidence of both Mr Hilton and Ms Walton is that the information was considered highly confidential. In line with *Jackley v Information Commissioner* EA/2016/0082, the disclosure of the information would be unfair and detrimental to GLAL, as their competitors do not have this commercially sensitive information.

[52] The Second Respondent contended that there is an important public interest in maintaining the integrity and fairness of the test and ensuring so far as possible that children who can access private tutoring are not at an advantage. Furthermore, the Second Respondent reiterated *Jackley v Information Commissioner* EA/2016/0082, to argue that there is a particular public interest in maintaining commercial confidences where future public tenders may be prejudiced by release of the confidential information.

[53] The Second Respondent highlighted that the general contractual agreement between the Second Respondent and GLAL governs the position in respect of the PowerPoint and FOIA, stating that disclosure under FOIA shall not constitute a breach of the agreement, however, this is not relevant to the assessment under section 41 FOIA.

[54] The Second Respondent stated in order to determine whether the section 43 FOIA applies, the steps laid out in *Hogan and Oxford City Council v ICO* [2006] EA/2005/0026 must be applied. The Second Respondent claimed, with reference to the witness statement of Mr Hilton, that the information constitutes trade secrets of GL Assessment. The commercial value of the information is apparent in the detriment and damage to commercial interests that its disclosure would cause, as well as the effort GLAL goes to in order to ensure it is kept secret.

[55] The Second Respondent replies to the steps laid out in *Hogan and Oxford City Council v ICO* [2006] EA/2005/0026 as follows;

1. What are the applicable interests?
    a. The applicable commercial interests are those of GLAL and TBGS.
2. The nature of the prejudice.
    a. The provision of commercial advantages to its competitors and the loss of confidentiality in its core intellectual property into which it has invested a great deal causing GLAL to unnecessarily reinvest. There is a possibility that the tests would need to change

in order to maintain their integrity and fairness. There would be a reduced choice in the market which could cause an increase in its susceptibility to tutoring.

3. The likelihood of the prejudice occurring.
    a. Prejudice is highly likely to occur as GLAL operates in a small but highly competitive market with one main competitor. The efforts made by GLAL to ensure information remains confidential is testament to its commercial importance. Given the importance it is highly likely that the disclosure would cause prejudice to GLAL. The Second Respondent stated that companies are unlikely to deal with them if they believe their commercially sensitive information will be disclosed.
4. Does the public interest in maintaining the exemption outweigh that in disclosure?
    a. The public interest in maintaining the exemption outweighs that in disclosure, in particular those relating to ensuring that the severe commercial prejudice that would or would likely be caused to both GLAL and TBGS is prevented; and maintaining the integrity and fairness of the test for Buckinghamshire children.

Witness Statement of James Coombs:

[56] James Coombs of Buckingham University, (who is the Appellant herein), provided a witness statement for the purposes of the appeal. Mr Coombs stated that on 1 October 2019, TBGS and their test provider GLAL wrote to the 10,000 parents and carers of the children who sat the test. GLAL wrote to the parents and carers on the same day. Mr Coombs stated that it is not possible for any statistical analysis, no matter how detailed to ensure fairness for individual children. It is clear that the Commissioner is concerned with the disclosure of the number of questions. As GLAL publish the reliability of their Verbal Reasoning test, the information the Commissioner raised concern over its availability to the public. Mr Coombs stated that the letter sent to parents should not have been included in his submission dated 4 January 2021.

[57] Mr Coombs contended that as GLAL publish the technical details of their Verbal Reasoning test; this explains that the test's reliability is dependent on its administration being consistent and controlled. Mr Coombs referred to a publication of Professor Dylan Wiliam, (professor of Educational Assessment at the UCL Institute of Education), entitled: "*reliability, validity and all that jazz*". Mr Coombs argued that the statement made by the Second Respondent and GLAL that the reliability had not been impacted as a result of removing the questions is false. Mr Coombs raised the issue that the Second Respondent had refused to disclose what measure of reliability they had used in their public announcement, but two measures were used: test/retest reliability; and internal consistency. Mr Coombs raised that the letter from the independent statistician explains that GLAL undertook Differential Item functioning analysis and found no statistical evidence that the outcome was unfair. Mr Coombs averred that their trusted retained expert either does not understand the correct application of Differential Item Functioning or was happy to help cover up the extent of their mistake.

Witness Statement of David Hilton:

[58] David Hilton is the Head of Admissions Testing at GLAL. Mr Hilton provided a timeline in relation to the issue at the centre of this appeal. Mr Hilton stated, in relation to the integrity and fairness of the test, that the reliability figures are strongly affected by the number of items in any given test, so if the information was in the public domain, this information could also be used by tutors, to predict the number of items in a test.

[59] Mr Hilton claimed that GLAL do not routinely release specific reliability information about GLAL's tests nor does its competitors. If GLAL were required to release this information and their competitors were not, it would leave them at a disadvantage. The information, when combined with other information in the PowerPoint gives competitors additional insights into GLALs product.

[60] According to Mr Hilton, the proposed solution was to credit two marks for the erroneous questions, and also to discount the last six questions from the Verbal Reasoning section for scoring and the standardisation. Mr Hilton understood that the

Second Respondent denied the Appellant's request on the basis of exemptions 41 and 43 FOIA and this was upheld by the Commissioner on 22 September 2020.

[61] Mr Hilton contended that GLAL had a genuine interest in keeping the contents of the PowerPoint presentation and details about the test itself i.e. the nature and the number of questions confidential to maintain the integrity and fairness of the test, the core intellectual property and the commercially sensitive information.

Witness Statement of Sue Walton:

[62] Sue Walton is a consultant employed by The Buckinghamshire Grammar Schools, the Second Respondent in this claim. Her role is to manage the two contracts the Second Respondent has in place for secondary transfer testing.

[63] Ms Walton outlined the current contractual arrangements and the requested information subject to appeal. Ms Walton provided a timeline of her involvement in the test taken on 12 September 2019.

[64] Ms Walton stated that as the schools in Buckinghamshire are heavily oversubscribed, a significant tutoring industry has grown up as parents go to enormous lengths to get places at Buckinghamshire schools. Primary schools and partner schools that administer the tests are explicitly asked not to coach or tutor their pupils for the test. Parents are allowed to access free materials on the GLAL website to help their children practise but these materials are not the same as the Buckinghamshire tests in structure or level of difficulty.

[65] Ms Walton averred that tutors try to tailor their approach to what may be in the test to benefit the children that are being tutored. However, the test must be fair to all children and children from poorer families should not be disadvantaged. Therefore, it is crucial that information relating to the construction and content of the test are kept confidential to minimise any advantage of tutoring. All involved in the test, including children, are told not to discuss the test. The witness gave evidence on the number of questions, apart from the necessity not disclose this, she indicated that it would be

difficult to assess as the numbers were not sequential and often include subsections which are also numbered.

[66] The Buckinghamshire Secondary Transfer Test is bespoke and constructed to meet the Second Respondent's requirements. The only information in the public domain is that provided on the TGBS and Buckinghamshire Council websites. The number of questions in each paper and section is not published. Ms Walton refuted the claims that this information is known as evidenced by the inaccurate numbers of questions claimed to be in the test: "*The Second Respondent maintains that the contested information is not subject to disclosure under FOIA because disclosure would provide details about how the test is constructed, including the number of questions. She avers that; "This could undermine the integrity of the test as well as assist and further encourage tutoring."* Ms Walton stated that releasing the information would impact negatively on GLAL as it would give commercially confidential information to GLAL's competitors which will not benefit the market and is likely to restrict choice of available suppliers even more.

The Appeal hearing:

[67] The Tribunal sat for the full hearing of this appeal on 8 February 2022. At the outset we dealt with a late request from the Appellant for evidence to rebut the impression that the Second Respondent implies that parents unanimously supported their decision making. The Second Respondent has objected to late evidence at this stage. The Tribunal raised this issue at the outset and the parties sensibly agreed that there were parents on both sides of this divide and that this was now accepted and the Tribunal need not take any further time on the point raised. This was agreed and noted by all parties present.

[68] The appellant outlined his position arising from an error in two questions of an 11 plus exam in 2019, which were not possible to answer. Rather than set a re-sit exam for the pupils, he maintains that the Second Respondent decided to introduce an unfair and less satisfactory or suitable solution, and the withheld information that underpins their decision should be disclosed in the public interest.

[69] Sue Walton who is a consultant employed by TBGS gave evidence and adopted her statement of 20 October 2021 (L758 OB) wherein she gave a detailed account of the contractual arrangement between TBGS and GLAL, dated 27 March 2017, the error and the proposed solution prepared by their statisticians in summary form in the Power Point presentation. This, she explained had to be independently verified and it was agreed that a suitable independent expert would undertake this task and that expert was agreed upon after careful selection, engaged and instructed. He subsequently verified the proposed solution and outcomes. In her evidence she confirmed, the test error was GLAL's mistake and they needed to fix it. GLAL undertook the work it needed to do internally to find a solution in relation to the error that it had made. The proposed solution was then externally verified by the selected independent and objective expert as retained by GLAL. The proposed solution, and a summary of how it was arrived at, in the form of the Power Point were presented to TBGS. The information contained therein was understood by all to be outside of what TBGS would normally be shown by GLAL and otherwise confidential to GLAL. It was therefore the subject of the specific confidentiality letter [D198]. The detailed statistical analysis is very different to the types of research and reports envisaged by the contract and/or which are routinely provided to TBGS. Ms Walton confirmed that TBGS insisted this confirmation be put in writing. This was because they knew it would be required, as part of the evidence Grammar schools would need. Ms Walton also confirmed that under the terms of the agreement TGBS does not have a right to request or see a copy of the internal analyses undertaken by GLAL nor reports prepared by independent statisticians. While TBGS could make a request, GLAL has no obligation to release such information. (See para 25 and beyond of the witness statement for the detail and purpose of the contract TBGS had with GLAL). Under cross-examination by the Appellant this witness made the position of TBGS very clear and in particular explained why the additional protection in the letter of confidentiality to be signed, was felt necessary. This Ms Walton explained was understood to be necessary because of the importance of the specific confidentiality required by GLAL to ensure there would not be any disclosure of their commercially sensitive information.

[70] Ms Walton gave a graphic account of the enormous pressure caused by the two erroneous questions in the test paper in question and the urgent need for the release of results as soon as possible. Clearly all concerned were aware of the distress caused

by the errors in the Test, but the issue was how best to achieve a fair outcome. Ms Walton explained that they had not ruled out the need for re-testing and provision for this course was in vogue, but the aim was to cause the least possible distress on children, parents and schools. Their preference was to look for a sound statistical solution, which could be verified by a suitable external independent and trusted expert and the selection of such an expert, made on recommendation, fitted the requirement in this regard. Ms Walton gave a detailed explanation as to how HR had thoroughly checked the selected expert's credentials and his independence. Ms Walton continued to explain why the withheld information should be withheld, including that it was commercially sensitive - because the detail would give Tutors an advantage and their clients would benefit from this unfair advantage. Ms Walton further explained why there was no conflict between the legal issues and the need to meet urgent timelines. Ms Walton averred there was no conflict at all; - they were under a duty to meet both – there had to be exceptional reasons and in this case it was obvious there were exceptional reasons for the need to provide a solution. This they did in the most-fair way possible. She confirmed that in her time the number of questions had always been kept from the wider public knowledge and for good reasons (as it would greatly assist private tutors and give their client pupils an unfair advantage). While she admitted some pupils and parents have assessed the number of questions (often incorrectly), she confirmed that pupils were asked not to disclose this information and in any event the numbers concerned in this regard were limited.

[71] Ms Walton indicated that TBGS, in the exceptional circumstances, considered the best interests of the pupils, parents and schools involved being paramount. They were, inundated with letters of concern and complaints in the aftermath of the Test. They considered carefully all options and ultimately, in her view, reached the best possible solution. Her evidence was that the results were proven to be overall satisfactory and within the predictions given. Ms Walton confirmed in the most robust terms that the final outcome of the chosen solution was that the messages of concern and complaints ceased. (She expanded on this evidence in the closed session.)

[72] David Hilton, who is the Head of Admissions Testing at GLAL gave evidence and adopted his statement of evidence of 1 March 2021 (H483 Open Bundle) and 20 October 2021 (L746 OB). Mr Hilton was employed with GLAL at the point when the

relevant contract with the Second Respondent was agreed. While not a statistician in his own right he was well versed on the pertinent issues and satisfied with the scrutiny applied by the expert statisticians involved. He too confirmed the need to enforce the keeping of the number of questions from the Public Domain as the statisticians confirmed, those concerned could, by means of reverse engineering provide commercially sensitive information. This would provide an unfair advantage to private Tutors. He confirmed that they did release confirmation of the reliability of their assessment without identifying the questions removed or any other such sensitive information for the same reason. His explanation was that if any mean or standard deviation of relevant detailed material that was under consideration was released it would be harmful. Therefore this is something GLAL, or their competitors, would not release, as it would create a commercial disadvantage. His evidence, (which is on the record of this hearing), went on in significant detail to identify the importance of the need for the additional undertaking in the letter requested by them from the TBGS. Release of, or any *"leak*" of the withheld information (including *"completion rates etc.")* would result in GLAL taking legal action, because such a disclosure could and would not be in the public interest. Mr Hilton confirmed in evidence, the information that was used in carrying out the detailed statistical analysis was not information that identified any individual pupil. Therefore it was not personal data, as defined by Article 4(1) GDPR as "information relating to an identified or identifiable natural person". Rather information as to groups of students was used. As this was not personal data of pupils TBGS had no rights over it as a data controller. Mr Hilton told the Tribunal that whilst there is additional detail in the statistical analysis, the pertinent information is summarised in the Power Point. (He expanded further on this in his evidence in the closed session.)

[73] The evidence of Ms Walton and Mr Hilton was clearly that the information is not, in fact, publicly known. It is not circulating on forums, where estimates as to the number of questions are not correct, either overall or for each section. As was explained in their evidence, the questions on the test are not numbered consecutively. The evidence before us was that 10 year old pupils would be unlikely to be able add them up or remember a series of numbers under stressful, time-pressured, exam-conditions. Mr Coombs disagrees and refers to the Tribunal decision in Reading School v IC [EA/2013/0257] to counter the evidence of Ms Walton and Mr Hilton in this

regard. The Tribunal are not bound by this decision and consider each case on its merits and the facts in evidence before it. (Mr Coombs in evidence admitted that he does not know the number. In his Appellant's Notice he had referred to it being "common knowledge" that there were 19 questions, in more recent submissions that number has increased. He now appears to accept that it is not publicly known).

[74] The witnesses clearly established that information was imparted to TBGS in circumstances of confidence. The confidentiality letter could not have been clearer [D198]. The underlying contract, to the extent that it applies, also points in the same direction. There was a clear understanding between GLAL and TBGS that the material was confidential, as the evidence has shown. This was not only because it was explicitly spelt out in the confidentiality letter, but also because they understood why it was confidential: this was material not generally shared with TBGS and which included GLAL's commercially confidential information. Ms Walton gave evidence that this was discussed and understood at the time, and that TBGS had no qualms about signing the confidentiality letter in the circumstances. She was clear that TBGS understood that if the material was shared GLAL would take legal action.

[75] Mr Hilton explained that if the disputed information were made public competitors would be able to use it to their advantage; it would enable them to understand how GLAL's tests work, and what works well about them. Therefore they may be able to copy or use this information in their own products. They would be able to reverse engineer the tests, creating tests to compete with GL's, without putting in the investment that GLAL have to create their tests. GLAL know roughly how long a test should be to have reliability of the level that is accepted as good (above 0.8), while remaining suitable and not an endurance test for children. Again, this is part of GLAL's intellectual property and commercially valuable. GLAL would be required to reveal its commercially sensitive information when its competitors are not, this would be unfair and detrimental.

Closed Session:

[76] The Tribunal went into closed session to discuss the withheld information and issues arising in more detail. When the open session resumed, counsel for the Second Respondent provided the Appellant with a comprehensive and accurate summary of

the matters covered to the Appellant and the Open session of the appeal hearing continued.

Appellant's Closing Submissions

[77] The Appellant outlined what he believed to be the agreed and disputed facts before the Tribunal in this case. The Appellant stated that the Second Respondent's case turns on two points. *"Firstly, whether the tutors would benefit from disclosure. Secondly, whether competitors could use the information to create their own practice material"*.

[78] The Appellant referred to the evidence of Mr Hilton and his assertion that some children fail to complete the test. The Appellant contended that his evidence is contrary to the evidence of Ms Walton, who stated that the children referred to were incapable of recalling how many questions were in the test. In relation to the disclosure of test reliability, the Appellant stated that if knowing the number of questions was to benefit the tutors, they could simply ask a candidate. The Appellant requested that the evidence of Mr Hilton be disregarded.

[79] The Appellant stated that tutors seek the types of questions used. Further, the content of each of the Second Respondent's tests is entirely new and that Mr Hilton is not capable of commentating on the statistical facts in this case. Turning to the overall reliability, the Appellant contended that as the School Admissions Code requires a fair process, it is disingenuous of the Second Respondent to tell parents that the overall reliability was not impacted is this instance.

[80] The Appellant referred to Article 4(1) GDPR and Article 4(4) GDPR to argue that the Tribunal should conclude that the information possessed by GLAL constituted the personal data of the examinees. The Appellant argued that for section 41 FOIA to be engaged information must be obtained by the public authority from another person. The Appellant relied upon *University of Newcastle upon Tyne v Information Commissioner and BUAV* [2011] UKUT 185 (AAC) at paragraph [47] and Judge Megarry's ruling in Coco v A N Clark (Engineer's) Ltd [1969] RPC 41, [1968] FSR 415,

(1968) 1A IPR 587 England and Wales, to aver that the Tribunal should reject the Second Respondent's argument against the disclosure of the requested information.

[81] The Appellant refuted the Second Respondent's argument concerning Trade Secrets. The Appellant citied section 43(1) and 43(2) FOIA and asked the Tribunal to consider the Court of Appeal decision in Department for Work And Pensions v The Information Commissioner & Anor [2016] EWCA Civ 758 whereby the court adopted the First Tier Tribunal's decision in *Hogan and Oxford City Council v ICO* [2006] EA/2005/0026. The Appellant contended that the exemption under section 43 FOIA is not engaged in this instance.

[82] The Appellant argued that the Second Respondent is in breach of Section 1.32(c) and Section 14 of the School Admissions Code. The Appellant echoed the concluding remarks of Judge Hughes in *Buckinghamshire Grammar Schools v Information Commission & the University of Cambridge* EA/2017/0169 to argue that the public interest favours disclosure in this case.

Second Respondent's Closing Submission's

[83] The Second Respondent stated that the Tribunal must decide 1) whether the Second Respondent "holds" the detailed statistical analysis for the purposes of FOIA and 2) whether the claimed exemptions apply to the information. The Second Respondent stated that it does not hold any "detailed statistical analysis" and GLAL does not hold any such detailed statistical analysis on behalf of the Second Respondent, rather it holds it on its own behalf. The Second Respondent relied upon the evidence of Mr Hilton and Ms Walton to show that the information in question was outside of the norm of what GL Assessment provides to the Second Respondent. GLAL are experts in the field, who were contracted to provide tests. Whilst the detailed statistical analysis was created during the course of the performance of that contract with the Second Respondent, it was not held for the Second Respondent. Therefore, in line with the decisions in Chagos Refugees Group v ICO and FCO, EA/2011/0300, FTT, 4 September 2012 and Dransfield v ICO (FTT) Case No. EA/2010/0152, 30 March 2011, the Tribunal were invited to find that the Second Respondent does not hold the detailed statistical analysis for the purposes of FOIA. Further, if the Tribunal

were to find to the contrary it will need to consider the exemptions in relation to both the PowerPoint and the detailed statistical analysis.

[84] The Second Respondent repeated, and adopted the submissions from their skeleton argument in relation to exemptions claimed for the disputed information. The Second Respondent claimed section 41, section 43(1) and section 43(2) FOIA in relation to exemptions to be applied to the disputed information. The Second Respondent argued that the public interest balancing test applies to the additional citied exemptions and that the public interest in maintaining the exemption outweighs that in favour of disclosure. Further, the Second Respondent contended that the legal test regarding Trade Secrets under Section 43(1) does not appear to be in dispute and that the evidence has shown that the legal test has been met. The Second Respondent invited the Tribunal to dismiss the appeal on the grounds that the Second Respondent does not hold the detailed statistical analysis and/or such information as it does hold that is within the scope of the Appellant's request is exempt from disclosure pursuant to section 41 and/or section 43 FOIA.

Conclusion:

[85] The Tribunal wish to thank all parties, for their respectful diligence throughout the conduct of this appeal. We further wish to thank the witnesses who have provided important evidence. We found Mr Hilton and Ms Walton competent, credible and reliable witnesses, who provided compelling and robust evidence. Both witnesses were not only well versed in the issues that had to be addressed, they presented as members of conscientious teams. Both witnesses were clear that the information in question was outside of the norm of what GLAL provides to TBGS, and so it is not "test materials" as defined in the contract.

[86] Like the Commissioner we had the advantage of access to the withheld material and the detailed background material that cannot be shared, as it would defeat the purpose of the application of the exemptions. We had the additional advantage of the witnesses' evidence both in open and closed parts of the hearing, We have concluded as follows.

[87] The Appellant provided no evidence to support his assertion that the Commissioner rejected his complaint at the outset rather than assessing it objectively, fairly and without prejudice. Similarly, the Appellant failed to provide evidence to support his allegation that the Commissioner failed to consider his complaint in an objective and unprejudiced way.

[88] The Appellant failed to produce evidence to support his contention that TBGS's decision did in fact alter the educational paths of 10,000 children over the next five years. On the contrary the evidence of Ms Walton identified the satisfactory outcome of the decisions made by TBGS in the aftermath of the impugned Test, which she explained left the majority of parents and pupils satisfied with the ultimate outcome as was evidenced by the cessation of messages of concern and distress. Furthermore the evidence from Ms Walton indicated that provision had been made for pupils who had been affected by the error.

[89] The Appellant claims that the Commissioner failed to have regard to s3(2)(b) FOIA and that as the purpose of the statistician's report was to determine whether pupils were unfairly disadvantaged by the errors of GLAL, it is clear, he argued, that the information is held on behalf on the authority. We however find that the evidence given on behalf of TBGS demonstrates there were exceptional circumstances in which they had to consider options to ensure any unfair disadvantage that may have occurred through the Test was eradicated and the evidence post the actions taken by TBGS demonstrates that this was achieved by the best possible means in all the circumstances.

[90] We find no evidence to support the Appellant's assertion that TBGS acted in an unforgivable manner or that TBGS embarked on a campaign of wilfully misleading the public by providing false evidence to various panels and failing to disclose any of the information which formed the basis of their claims.

[91] On the evidence before us we accept the Commissioner's reasoning as set out succinctly in paragraphs [10], [11], [14] and [15] above. We find no error of law in the reasoning or findings therein. Although we accept there may be argument about the terms of the contract covering a cause of action in the event of breach of

confidentiality, we find the letter dated 24 September 2019 was, by mutual consent, instrumental in establishing an obligation of confidentiality in the statistical analysis undertaken by GL Assessment and further we find that GLAL did not hold that information on behalf of TBGS.

[92] s41 is an absolute exemption, and there is no public interest test, but in any event and in relation to any exemption under s41, the evidence before us demonstrates that there are no public interest factors that outweigh the public interest in maintaining confidences. Indeed Ms Walton's evidence demonstrated a high level of transparency and that the the Dept. of Education had been kept fully informed and approved the solution put forward by GLAL and ratified by the independent objective expert. (also see [97] to [100] below).

[93] On the evidence we accept the Second Respondent's submissions that TBGS do not hold the Statistician's Report or any analysis done by GLAL– s.3(2) FOIA. TBGS have reiterated that they do not hold, and have no right to hold the Statistician's Report. Nor have they ever had sight of a copy of it and further, that it is not held by GL Assessment on behalf of TBGS. On the evidence before us we accept this to be so.

[94] On the evidence we accept the submissions that TBGS have no right to obtain a copy of the Statistician's report as it was created for, and is held by, GLAL on its own behalf.

[95] We find no evidence to support the Appellant's submissions of; *"the 'suspicion of wrongdoing'* by *TBGS*".

[96] On the evidence, we further accept the submission made on behalf of TBGS in that:

i) On - Quality of confidence: As the information is not trivial and GLAL has taken steps to keep the information confidential, including the issuing of a specific confidentiality agreement. TBGS submit and we accept that the information is subject to strict obligations of confidentiality.

ii) The material was imparted in circumstances imposing an obligation of confidence. The contract between TBGS and GLAL sets out obligations of confidence. Schools, test centres and staff agreed to maintain confidentiality. Schools administering the tests were required to store test materials securely both before and after testing and then to return all the materials to GLAL after testing. Furthermore, TBGS highlight the detriment to GL Assessment if this confidentiality agreement were to be breached.

iii) Detriment – The Tribunal accept and agree that if the information were to be disclosed, it would damage the integrity of the test and benefit GLAL's competitors.

[97] Clearly there is a general public interest in scrutiny of the administration of entrance tests. We also agree that there is a public interest in knowing how pupils who sat the test were affected by errors in it. However, as the Appellant has argued "*that no one knew how each child was impacted or how long it took to contact the schools involved"* – it is therefore difficult to assess what weight might be given to this in the Public Interest test. The evidence of Ms Walton suggests there was overall satisfaction with the final outcome, suggesting little weight, if any, in disclosure. We accept this on the evidence before us. In any event we must consider the overbearing weight to be given to the significant edge to those pupils receiving private tuition, were the withheld information to provide private tutors with such an unfair advantage as has been so clearly identified by the witness's at this hearing. We unreservedly accept this evidence, which, in any event has not been challenged.

[98] We reject the Appellant's suggestion that TBGS may not have taken their responsibilities under FOIA seriously. Clearly from the evidence we have heard, this was given careful consideration by all concerned. We do not comment on whether TBGS are in breach of school admissions law, as this is outside our jurisdiction. We can however, take into account any impact that non-disclosure has had on whether the public can satisfy themselves that the process of admissions undertaken by TBGS for entry in 2020 was fair or objective. In our opinion, the steps taken by TBGS and GL Assessment Ltd to inform and reassure parents, in combination with the letter by the expert engaged, were sufficient to satisfy public interest without breaching confidentiality or risking prejudice to commercial interests.

[99] As argued by TBGS, there is an important general public interest in maintaining the integrity and fairness of the test and ensuring, so far as possible, that pupils who can access private tutoring are not at an advantage over those that cannot. We accept the evidence in this regard.

[100] In terms of the FOIA generally, and as the Commissioner acknowledged, there is a public interest in openness and accountability surrounding 11 plus testing. However, there is also a wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. As decisions taken by the Courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, in relation to matters such as misconduct, illegality or gross immorality for example. This is not a case where such matters as outlined above arise however. The Tribunal finds that the balance in this case clearly favours non-disclosure.

Section 43.

[101] We accept the evidence given by Mr Hilton on behalf of the Second Respondent that the withheld information, including that within the PowerPoint, is in fact commercially sensitive information that constitutes a trade secret because if it were released it would, or would be likely to put them at a competitive disadvantage. We accept the Second Respondent's closing submissions in this regard (summarised below). We agree that there is public interest in ensuring that unwarranted commercial prejudice that would or would likely be caused to both GLAL and TBGS is prevented. We therefore find that countervailing interests in non-disclosure for the reasons already indicated above outweigh the factors in favour of disclosure.

[102] We agree that the legal test regarding Trade Secrets under Section 43(1) (as suggested by the Second Respondent) does not appear to be in dispute and we find the evidence has shown that the legal test has been met. On the evidence before us, we accept the closing submissions made in support of the application of the Section 43 exemption as follows;

“Section 43(1) - Trade Secrets

a. The information remains secret to the necessary extent, for the reasons set out above. The evidence has shown that it is not generally accessible.

b. The information has commercial value because it is secret for the reasons set out above explaining the detriment to GL if it were disclosed. Mr Hilton gave evidence that the information is considered part of GL’s core intellectual property and is valuable to it (and would be valuable to competitors).

c The information has been subject to reasonable steps under the circumstances to keep it secret. The words “under the circumstances” are important here. Plainly the information relating to number of questions etc. has been shown to the pupils who took the test – this is necessary for the test to be performed. However, the confidentiality of the test is made clear to pupils, action would be taken by GL if information were disclosed, and when disclosing to TBGS GL ensured that the confidentiality of the information was very clear, as set out above.

Section 43(2) – Commercial Interests

Following the steps in Hogan [K576]: The commercial interests in play are both those of GL and those of TBGS. The disclosure of the information would or would be likely to cause prejudice to GL’s commercial interests:

a. The provision of commercial advantages to its competitors, in a small but highly competitive market (as set out above);

b. The loss of confidentiality in its core intellectual property into which it has invested a great deal;

c. The likely need for GL to invest further when it would not otherwise have to counter its competitors’ commercial advantage and maintain the integrity and fairness of its tests, to ensure its tests remain commercially attractive.

The disclosure of the information would or would be likely to cause prejudice to TBGS’ commercial interests:

a. Reduced choice in the market because:

i. Test providers would not wish to bid for the TBGS tender because of the risk of their commercially sensitive confidential information being disclosed pursuant to FOIA: Jackley [M758].

ii. There being less or distorted competition in the market from which TBGS must select its supplier as a result of the effects of the commercial advantage given to GL's competitors;

b. Possible need to change the tests to maintain their integrity and fairness;

c. The risks of unfairness in the test, and an increase in its susceptibility to tutoring."

[103] Turning to the overall reliability, the Appellant contended that the School Admissions Code requires a fair process and there has been no transparency in this regard, which would allow parents to make their own assessment. We can find no evidence that the procedures adopted by the Second Respondent; in the exceptional circumstances they had encountered, to be unfair.. On the contrary the evidence before us demonstrates that the Second Respondents took all possible and practical steps to achieve the fairest outcome available to them. We accept the argument that it probably would have been more unfair and caused much greater distress and upset to all concerned to require the pupils to re-sit another test. This in any event is not determinative in the factual matrix pertaining as set out above.

[104] In relation to the Appellant's request that the disputed information be redacted, we find that in any event, such redaction as would be required would render the information meaningless and potentially misleading.

[105] The authorities cited by the Appellant, where relevant, are to be distinguished on the facts of each case, as the Respondent has clearly argued.

[106] Accordingly and for the reasons set out above we find there was no error of Law in the DN, nor any flaw in the use of discretion by the Commissioner in the balance of the Public Interest Test, or otherwise, and we further for the above reasons, find the withheld information exempt from disclosure under both s.41 and s.43 FOIA, and must dismiss the appeal.

Brian Kennedy QC 22 February 2022.

Promulgated 25 February 2022
Re Promulgated 10 March 2022