

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2018

Public Authority: The Consortium of Selective Schools in Essex
Address: PO Box 3087
Chelmsford
CM1 3SY

Decision (including any steps ordered)

1. The complainant has requested information about selection tests. The Consortium of Selective Schools in Essex (CSSE) released aggregated data but has refused to release the specific information the complainant has requested. It considers that to do so would release the personal data of third persons and that therefore the requested information is exempt information under section 40(2) of the FOIA.
2. The Commissioner's decision is follows:
 - The requested information is not personal data and does not engage the section 40(2) exemption.
 - CSSE breached section 17(1) as it did not issue the complainant with an adequate refusal notice.
3. The Commissioner requires CSSE to take the following steps to ensure compliance with the legislation:
 - Release to the complainant the information he has requested.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 21 February 2018 the complainant wrote to CSSE and requested information in the following terms:

"I'm conducting research into selection tests and would like to request information regarding the latest tests set by CSSE last Autumn. Please could you provide per applicant

- 1) raw scores for each test*
- 2) birth month and*
- 3) gender*

I'd also like to know what subjects are tested (which will be clear from #1 above) but also what weighting is given to each individual test.

Please could you provide this information in a format suitable to enable further analysis (Excel or CSV)?"

6. CSSE responded on 6 March 2018. It released a spreadsheet showing raw test scores, sorted by birth month and gender – these scores had been aggregated. CSSE addressed the complainant's query about subjects and weighting.
7. On 6 March 2018 the complainant wrote to CSSE to confirm that he was seeking individual scores per applicant and not aggregated data. CSSE responded on 6 March 2018 and confirmed that releasing individual scores is restricted by the Data Protection Act.
8. The complainant requested an internal review on 6 March and drew the CCSE's attention to a previous decision by the First Tier Tribunal (Information Rights)(FTT)¹. That decision upheld a decision by the Commissioner that Reading School's entrance test results had been sufficiently anonymised that it did not constitute personal data.

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1263/Governing%20Bo dy%20of%20Reading%20School%20EA-2013-0257%20.pdf>

9. CCSE provided a review on 7 March 2018 and confirmed that it was unable to provide individual scores. CSSE did not confirm which FOIA exemption it was relying on to withhold the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 7 March 2018 to complain about the way his request for information had been handled.
11. The Commissioner's investigation has focussed on whether CSSE can withhold the disputed information under section 40(2) of the FOIA. She has also considered CSSE's refusal notice.

Reasons for decision

Section 40 – personal data

12. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and the conditions under either section 40(3) or 40(4) are also satisfied. The Commissioner has therefore first considered whether the information in question can be categorised as personal data.

Is the information the personal data of third persons?

13. The Data Protection Act 1998 (DPA), which was still in force at the time of CSSE's response to the complainant, says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.
14. Information will 'relate to' a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
15. The Commissioner is satisfied that the disputed information 'relates to' specific individuals. It is linked to candidates and has been used to inform decisions affecting them ie whether or not they were offered places at particular schools.
16. The Commissioner has next considered whether the withheld information identifies any individual. The Commissioner notes that the requested information is for raw scores of each test, birth month and gender for each candidate.

17. The information to be disclosed will not be classed as personal data if it is effectively anonymised and therefore the section 40(2) FOIA exemption will not apply. This approach was confirmed in the High Court judgment *Department of Health, R (on the application of) v Information Commissioner*.
18. The Commissioner issued a Data Protection Code of Practice on anonymisation in 2012² and she has drawn upon it when making her decision in this case. She has applied the test of whether it is reasonably likely that an individual data subject can be identified – from the data and other information.
19. CSSE has provided the Commissioner with a spreadsheet for 2017 containing the gender, month of birth and English and Maths results prior to aggregation for approximately 6,000 candidates. CSSE says that this spreadsheet has been extracted from a fuller database that includes, in addition to personal identification information (ie the candidate's name), the following fields for each candidate: test date (there are two distinct sittings), gender, home postcode, date of birth, English score, Maths score, some subsidiary calculations, test centre (the secondary school where the tests were taken) and primary school name. CSSE has given the Commissioner the following example for the fictional candidate 'Sam Sample-Candidata':

Test Date	Gender	Postcode	DoB	English	Maths	Test Centre	School Name
23/09/2017	F	CM5 2QO	19/03/2007	41	55	Colchester County High School	St Xavier's School

20. CSSE has told the Commissioner that it receives substantial number of data requests every year; most of which are answered with reference to the data it collects and issues in a number of public reports/releases. For reasons associated with the performance of individual primary schools, CSSE is sometimes additionally asked for test results grouped by primary school – although this might only be at pass/fail level. For reasons associated with political pressures to admit as many local candidates as possible, CSSE says that it is often asked for data on test

² <https://ico.org.uk/media/1061/anonymisation-code.pdf>

performance by postcode. This is usually provided at the supra-level ie aggregated for 'CM5' for example.

21. CSSE has imagined that it received the following three FOI requests and responded to each one with disaggregated data:
- Maths test scores for candidates from individual primary schools in the Chelmsford area – *the list for St Xaviers's would include Sam's 55, above, and perhaps eight others for that primary school;*
 - Maths test scores of candidates resident in postcode CM5 – *the list would include Sam's 55 amongst the fifteen resident in that postcode;*
 - Maths test scores by gender and month of birth – *the females/March list would include the 55 as one of the highest scores in a list of about 200.*
22. CSSE has noted that Sam is the only girl, born in March, resident in CM5 who attends St Xavier's. 55 is the only score that appears on all three extracted disaggregated lists. Sam's estranged father, Mr Sample, can now deduce her test result from the publicly available data; contrary to CSSE's duty to protect individual exam results from being released and contrary to the court order that denied Mr Sample access to school records for his daughter. CSEE accepts that the above example is somewhat fanciful but considers that it illustrates its concerns.
23. In this case, the complainant has requested only raw scores for each test, birth month and gender information, ie:

Candidate	Raw score – English	Raw score – Maths	Birth month	Gender
1	64	61	Dec	F
2	27	34	Jul	F
3	58	60	Mar	M
4	54	58	Sep	F
5...	49	52	Feb	M
...6000	57	59	Jan	F

24. The complainant has not requested all the categories of information given in CSSE's example above. Given the volume of candidates concerned – approximately 6,000 – and the limited categories of

information that the complainant has requested, the Commissioner is not persuaded that releasing this information could result in specific individuals or their test scores being identified.

25. The Commissioner accepts that CSSE needs to be cautious in matters concerning information that may be personal data. However, having considered CSSE's arguments she finds that the reasonably likely test is not met ie she does not consider it reasonably likely that any specific individual or their test scores could be identified if the information in question were to be placed in the public domain.
26. The Commissioner has therefore concluded that the withheld information is not personal data and does not engage the section 40(2) exemption. Because she has found the information is not personal data, it has not been necessary to consider the conditions under section 40(3) or 40(4).

Section 17 – refusing a request

27. Section 17(1) says that if a public authority is relying on an exemption in Part II of the FOIA to either withhold information it holds, or to refuse to confirm or deny it holds relevant information, it should issue the applicant with an appropriate refusal notice within the timescale for complying with section 1(1).
28. The Commissioner has published guidance on writing a refusal notice³. The guidance explains that a refusal notice will need to state the section of FOIA being relied upon and in most instances explain the reasons for its decision. The explanation should be detailed enough to give the requester a real understanding of why the public authority has chosen not to release particular information.
29. Although CSSE referred to personal data matters in its correspondence to the complainant, it did not refer to section 40(2) of the FOIA specifically. The Commissioner therefore finds that CSSE breached section 17(1) as its refusal notice was not adequate.

³ https://ico.org.uk/media/for-organisations/documents/1211/refusing_a_request_writing_a_refusal_notice_foi.pdf

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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