

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 September 2020

Public Authority: The Buckinghamshire Grammar Schools (TGBS)
Address: Aylesbury Grammar School
Walton Road, Aylesbury
Buckinghamshire
HP21 7RP

Decision (including any steps ordered)

1. The complainant has requested information relating to errors that occurred with a specific 11+ test. TGBS provided some of the requested information but withheld some information under section 41 and 43(2) FOIA. It confirmed that some information was not held.
2. The Commissioner's decision is that TGBS has correctly applied section 41 and 43(2) FOIA to the withheld information and that TGBS does not hold the information it has confirmed is not held under section 1(1)(a) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 13 October 2019, the complainant wrote to TGBS and requested information in the following terms:

"1. Please provide a copy of the "Detailed statistical analysis" referred to in your letter dated 1 October 2019 (available online https://docs.wixstatic.com/ugd/ab3fe9_38...) so that truly independent members of the public can satisfy for themselves that the issue has been resolved in a fair manner for all children and that the results are indeed robust.

Please also provide the following specific information if it is not included in the report.

2. The number and nature of the 'subtests' making up the overall assessment (eg Verbal Skills, Comprehension, Maths/Numeracy and Non-Verbal Reasoning)
3. For each subtest please provide the number of questions set and reliability when the tests are set and administered without any errors.
4. Specific to the recent errors, for each subtest please provide
 - a. The number of questions removed from the assessment and
 - b. The revised reliability."
5. On 12 November 2019 TGBS responded. It refused to disclose the information requested at parts 1, 2, 3 and 4b of the request under section 41 and 43 FOIA. It disclosed the information requested at 4a.
6. The complainant requested an internal review on 18 November 2019. The
7. TGBS sent the outcome of its internal review on 16 December 2019. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation TGBS disclosed the information requested at 4b. It also confirmed that some of the information requested at part 3 is not held.
10. The Commissioner considers the scope of her investigation to be to determine whether the exemptions contained at section 41 and/or section 43(2) FOIA have been applied correctly to withhold the information requested at parts 1 - 3 of the request. She will also consider whether some of the information requested at part 3 is not held.
11. TGBS has confirmed that the withheld information comprises of an interim data analysis by GL Assessment in the form of a PowerPoint presentation, the question types used in each component and the number of each. It has confirmed that reliability information (part 3) is not held.

Reasons for decision

Section 41

12. Section 41 of FOIA states 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 actionable by that or any other person.”

Was the information obtained from another person?

13. TGBS has explained that detailed statistical analysis (provided by GL Assessment in the form of a PowerPoint presentation), the nature of the subtests and the number of questions set were all provided by GL Assessment as the test provider. It considers that all of the withheld information was therefore provided to it by a third party.

14. The Commissioner is satisfied that the withheld information was provided to TBGS by a third party.

Would disclosure constitute an actionable breach of confidence?

15. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

16. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

17. TGBS has argued that the withheld information is worthy of protection as it pertains to the construction of the Secondary Transfer Test (i.e. the nature and number of questions) and, specifically in connection with the

PowerPoint, contains information regarding the reliability analysis in light of the errors. It went on that GL Assessment 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.

18. The Commissioner does not consider that the information that has been withheld under section 41 FOIA has been put into the public domain and furthermore she does not consider that this information could be seen as trivial based on TGBS's submissions.
19. The information withheld under section 41 FOIA does therefore have the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

20. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
21. TGBS has explained that the withheld information was provided to TBGS subject to explicit obligations of confidence.
22. The PowerPoint presentation was supplied to TBGS by GL Assessment Ltd in confidence and is subject to binding written terms within a specific confidentiality agreement letter dated 24 September 2019 (provided to the Commissioner). In that letter, GL Assessment makes it clear that the information provided is highly confidential and commercially sensitive. TGBS did however clarify that whilst the letter refers to the disclosure of the statistician's report commissioned by GL Assessment Ltd, this was not in fact disclosed to TBGS and therefore is not held. The application of section 41 FOIA is to the PowerPoint described at paragraph 11 above.
23. In addition to the confidentiality letter, TBGS is also subject to binding written terms of confidentiality within the Agreement for Secondary Selection Provision agreement with GL Assessment. The confidentiality clauses prohibit TBGS from disclosing information to the public about the Secondary Transfer Test, which would include the nature of the subtests and the number of questions. The Secondary Transfer Test and answer sheets similarly include explicit notices of their confidential nature.
24. The Commissioner considers that there is a clear and explicit obligation of confidence in relation to the withheld information.

Detriment to the confider

25. TGBS explained that GL Assessment has a genuine interest in keeping the contents confidential for the following reasons:
- GL Assessments test could potentially be more susceptible to targeted tutoring, thus undermining the integrity and fairness of the test and harming GL Assessment's commercial advantage;
 - The PowerPoint presentation includes commercially sensitive information (such as details of the number of questions in each section and the reliability scores) which would be advantageous to a competitor of GL Assessment; and
 - GL Assessments test nature and construction is part of its core intellectual property. It has financially invested in the creation and development of that intellectual property. If this or details of its reliability analysis are made public and hence available to its competitors, this too would similarly cause serious detrimental harm to GL Assessment Limited's commercial advantage.
26. The Commissioner challenged TGBS regarding its arguments relating to detriment to the confider specifically in relation to parts 2 and 3 of the request. In particular its argument that releasing any information about the makeup of the test would make the tests more susceptible to targeted tutoring and that disclosing the nature and construction of the tests would damage GL Assessment's interests.
27. In *Coombs vs IC & the University of Cambridge EA/2017/0166A*, evidence was submitted that GL Assessments has a business model which involves selling past papers. for revision practice. See paragraph 45 of the decision which can be accessed using the following link:
- [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2651/Coombs%20James%20\(EA-2017-0166\)%2013.05.20.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2651/Coombs%20James%20(EA-2017-0166)%2013.05.20.pdf)
28. The Commissioner queried whether if GL Assessments sell past papers as revision material a lot of the arguments regarding disclosure of information about the makeup, nature and construction of the tests would fall away as this could be obtained from past papers sold as revision material.
29. TGBS explained that GL Assessment Limited's test content (together with the number of questions in each section) is bespoke to the Buckinghamshire test and is part of its core intellectual property. If this is made public and hence available to its competitors, this would diminish their ability to compete in the marketplace because competitors

would have access to information about GL Assessments' tests which GL Assessment would not have about theirs.

30. It went on that GL Assessment make freely available familiarisation materials on their website. They also sell 11+ practice papers however those papers are not 'past papers'. Additionally they are designed as single subject tests rather than the combined content ('verbal skills' and 'non-verbal and mathematical skills') that feature in the test papers produced for TBGS.
31. The structure and number of questions in the TBGS test is also specific to Buckinghamshire and cannot be deduced from the GL Assessment material on sale and on their website and furthermore the range of question types that is used in the test GL Assessment produces for TBGS is far greater and the level of difficulty different to that in the commercially available papers.
32. Based upon TGBS's submissions the Commissioner is satisfied that disclosure would cause detriment to the confider, GL Assessments.

Is there a public interest defence for disclosure?

33. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether TBGS could successfully rely on such a public interest defence to an action for breach of confidence in this case.
34. The Commissioner acknowledges that there is a public interest in openness and accountability surrounding 11+ testing but the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant.
35. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns

misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.

36. TGBS acknowledged that there is a public interest in the parents and children affected by the test errors, as well as the general public, being given details of the statistical analysis undertaken in respect of the test errors in order to:
- understand and critically analyse the rationale behind the corrective measures undertaken, and specifically challenge those measures;
 - satisfy themselves that the 2020 entry Secondary Transfer Test results were fair and reliable; and be re-assured and have confidence in future Secondary Transfer Tests.
 - Information in relation to the nature and number of questions in each section of the test would allow children to better prepare to undertake future tests.

Whilst TGBS greatly appreciate the distress and concern experienced as a result of the errors in September, it considers that such a public interest defence is likely to fail after having regard to the wider public interest in preserving the principle of confidentiality; and the impact of disclosure on the interests of the confider.

37. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant; and that TGBS would not have a public interest defence for breaching its duty of confidence.
38. Having considered all the circumstances of this case, and the information withheld under section 41 of the FOIA, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
39. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.
40. As the Commissioner has found section 41 of the FOIA to be engaged regarding all of the withheld information it has been applied to, she has not gone on to consider the application of section 43(2) FOIA.

Section 1(1)(a)

41. Section 1(1)(a) of FOIA states that, "Any person making a request for information to a public authority is entitled – to be informed in writing by the public authority whether it holds information of the description specified in the request". Section 1(1)(b) of FOIA states that, "If that is the case, to have that information communicated to him".
42. During the course of the Commissioner's investigation TGBS explained that with regard to reliability, TBGS is not routinely provided with reliability data for the three test components (verbal skills, non-verbal skills and mathematics). It therefore revised its position and confirmed that it does not hold this information.
43. As TGBS is not routinely provided with reliability data for the three test components, on the balance of probabilities the Commissioner is satisfied that this information is not held under section 1(1)(a) FOIA.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

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

Signed.....

Gemma Garvey
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