

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 August 2022

Public Authority: **Lincolnshire Consortium of Grammar Schools on behalf of:**
Boston Grammar School
Boston High School
Bourne Grammar School
Carre's Grammar School
Kesteven and Grantham Girls' School
Kesteven and Sleaford High School Selective Academy
King Edward VI Grammar School
King Edward VI Academy
Queen Elizabeth's Grammar School, Alford
Queen Elizabeth's Grammar School, Horncastle
Queen Elizabeth's High School
Skegness Grammar School
Spalding Grammar School
Spalding High School
The King's School Grantham

Address: **Queen Elizabeth's High School**
Morton Terrace
Gainsborough
Lincolnshire
DN21 2ST

The Commissioner notes that a Consortium of Grammar Schools itself is not for the purposes of FOIA a public authority. Rather, each School within the Consortium is a public authority themselves and has a duty to reply to a request in accordance with section 1 of FOIA. However, the Commissioner acknowledges that when an applicant makes a freedom of information request to a body such as this Consortium it is reasonable to expect that the Consortium will act as the single point of contact and process the request on the School's behalf. For the purposes of this decision notice all references to the Consortium should be regarded as referring to the public authorities.

Decision (including any steps ordered)

1. The complainant has requested raw and standardised test scores, plus dates of birth and pupil funding entitlements for the 11+ test sat in schools in the Lincolnshire Consortium of Grammar Schools in 2019. The Consortium refused to provide the information on the basis of section 43(2) of the FOIA, and sought to rely on section 40(2) as an alternative to withhold the date of birth and entitlement to pupil premium funding.
2. The Commissioner's decision is that the Consortium has correctly applied the section 43(2) exemption to the requested information and the public interest favours withholding the information. He has therefore not gone on to consider the section 40(2) exemption in this case.

Request and response

3. On 30 October 2020 the complainant made a request to the Consortium for information in the following terms:

"Please provide anonymised data for tests taken in 2019 for entry to grammar schools this September (2020). For each candidate who sat the test please include the following

- Date of birth*
- Verbal reasoning raw score
- Verbal reasoning standardised
- Non verbal reasoning raw score
- Non verbal reasoning standardised
- Total age weighted score
- Entitlement to Pupil premium funding (if this is captured)

Please could you also explain what data is returned by the test provider (to avoid requests like, "Pupil Premium funding if captured")

*I understand the tests are taken by children applying to fifteen schools so would estimate (500 applicants per school) seven eight thousand results in total with approximately 20 children sharing each date of birth. If you are concerned that this information should be withheld under s.40(2) because it would contravene any of the data protection principles in the 2018 Data Protection Act, please explain why this is the case and consider instead rounding all values to the nearest week."

4. The Consortium responded on 26 November 2020 refusing the request on the basis of section 43(2) of the FOIA. The complainant asked for an internal review of this decision on 27 November 2020. The complainant provided detailed arguments to support his view that the exemption had been incorrectly applied.
5. The Consortium conducted an internal review and provided the outcome of its internal review on 7 January 2021. It upheld its decision to refuse the request under section 43(2) and added some more detail to this.

Scope of the case

6. The complainant contacted the Commissioner on 15 January 2021 to complain about the way their request for information had been handled.
7. During the course of the Commissioner's investigation, the Consortium amended its position and stated that it was still relying on section 43(2) but considered that for the date of birth and entitlement to pupil premium funding the Consortium considered this would not, on its own, engage section 43(2) so was now also being withheld under section 40(2).
8. The Commissioner considers the scope of his investigation to be to determine if the Consortium has correctly withheld the information requested on the basis of section 43(2) of the FOIA, if the Commissioner finds that section 43(2) has not been correctly applied he will go on to consider whether section 40(2) is engaged in relation to the dates of birth and entitlement to premium funding.

Reasons for decision

Section 43(2) – prejudice to commercial interests

9. Section 43(2) of the FOIA states that:

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).

10. In its submissions to the Commissioner the Consortium has argued that disclosure of exam scores as a complete data set would be likely to prejudice the commercial interests of GL Assessment Limited (GLA): the provider of the 11+ tests and scoring.

11. The Consortium referred to a previous decision of the Commissioner (FS50566015) in which Durham University was subject to a similar request in relation to the 11+ tests it supplied through a different provider (CEM). This case was appealed to the Information Tribunal¹ and the Commissioner's decision that there was likely to be commercial prejudice to CEM if the information was disclosed was upheld.
12. The Commissioner recognises that he is not bound to follow decisions of the First Tier Tribunal (except in respect of the particular appeal of which that decision disposes). Nevertheless, he would be unwise to disregard such a decision completely unless there was good reason to do so. The Commissioner has since detailed the Tribunal decision in other decision notices, mainly IC-98301-K8M7 and IC-66341-W6B3, and does not intend to go into significant detail here as the arguments are broadly applicable in this case.
13. In this case, as in others, GLA has informed the Consortium that release of the exam scores as a dataset would allow a person to reverse engineer its unique, proprietary marking and standardising scoring method. GLA argues that its method of calculating scores is strictly confidential and part of its core intellectual property, it is key to its business model and it has financially invested in the creation, development and protection of the intellectual property.
14. The complainant does not consider that the information in question can be described as GLAs 'intellectual property' and the Commissioner does not intend to debate this point extensively here as what is clear is that the information does relate to a commercial interest i.e. GLAs ability to participate competitively in a commercial activity. The information is specific to GLA and is used to construct and administer tests and the Commissioner considers this does relate to a commercial interest.
15. GLA considers that disclosing the requested information would undermine the financial investment made by GLA and would also give competitors an unfair commercial advantage by giving them access to GLAs intellectual property.
16. It is argued that as the 11+ exams are competitive there is a strong incentive for parents to seek exam tutoring and if GLAs standardisation method is reverse engineered there is a concern that this information could be used by tutors to ascertain which papers or sections of the exams to give more focus to when preparing students to take the exam. This is because the standardisation methodology gives different weightings to different elements of the exam. GLA considers this

¹ [Coombs, James EA.2017.0166 \(21.08.18\).pdf \(tribunals.gov.uk\)](#)

information would be particularly advantageous to tutoring organisations and create an unfair advantage to those students whose parents can afford to have been given targeted tutoring. This in turn would undermine one of the key aims of grammar schools, in giving access to pupils regardless of background.

17. GLA states it is one of only a very limited number of 11+ entry exam providers nationally and disclosing the requested information would make GLAs assessments less commercially attractive to customers by undermining the integrity and fairness of the exams. GLA considers if it would be hindered in its ability to compete with competitors whose marking and standardised scoring methods remain confidential.
18. It is further argued that GLAs competitors could draw insights from GLAs methodology to improve, or create competitive comparisons with their own exam products which would be likely to further prejudice GLAs commercial interests.
19. The Commissioner considers that even though GLA publishes practice papers at cost this does not make the tests entirely able to be tutored to pass. GLA has previously argued that it expends a lot of effort trying to preserve the integrity of its tests by carefully guarding the contents of tests and how they are constructed and assessed. A large part of the reason for this is to try and keep the tests as tutor-proof as possible. It argued that a tutor's job is made far easier the more information that is released on how tests are constructed and assessed. If the requested information was disclosed, it would allow a tutor to try and work out the standardisation method, which would allow more targeted tutoring.
20. In the Tribunal case it was argued that if the data were published students could be tutored to prepare for tests without CEM obtaining their competitor's financial benefit of obtaining revenue from publishing past tests and practice papers. Evidence was also provided to show that CEM had bid to provide a high quality test but lost out to a competitor who provided a lower bid for a less tutor-proof test. The Tribunal considered this evidence that publishing the information would risk the quality of CEM's tests and thus damage its commercial interests.
21. In another more recent decision notice (IC-98301-K8M7) it was argued that the Tribunal decision was not relevant to that request as subsequent events and disclosures had weakened CEM's claims that their tests were resistant to tutoring. This decision of the Commissioner dismissed this argument.
22. The complainant has argued that these previous decision are not of relevance here as CEM have a unique selling point in that its customers perceive its test to be 'tutor-resistant'. This is not the case for GLA who

do provide past papers for a fee. The Commissioner, as already mentioned, does accept that the availability of previous papers and questions does not necessarily mean that an exam can be tutored to pass but that revealing information about the methodology could lead motivated individuals to better understand how exams are constructed and assessed.

23. The Commissioner's view is that the Tribunal decisions relating to CEM can be drawn from and are relevant to some extent in this case. As these cases concluded that CEMs commercial interests would be likely to be harmed by disclosure the Commissioner considers the same can be said for the information in this case relating to GLAs information. Given that similar information on GLAs competitors is not in the public domain the Commissioner accepts that ordering disclosure of this information would put GLA, or any other provider of the 11+ in a similar situation, at a competitive disadvantage in future bids.
24. The Commissioner therefore concludes that section 43(2) of the FOIA is engaged.

Public interest test

25. Information which would be likely to prejudice the commercial interests of any party must still be disclosed under the FOIA unless the balance of the public interest favours maintaining the exemption.
26. Given that the Commissioner accepts that disclosure would be likely to result in commercial prejudice, there will always be some inherent public interest in preventing this prejudice from occurring. However, the weight to be given to this public interest will vary depending on the likelihood and severity of the prejudice.
27. The complainant argues there is a strong public interest in transparency, particularly in the 11+ process. The complainant also points to the Commissioner's guidance on the public interest test² that states there is a public interest in disclosure where there is a suspicion of wrongdoing. The complainant is of the view that test marks are withheld to avoid disclosing any changes in the level of difficulty in passing the test. They provided links to documents and employment tribunal decisions that they considered demonstrated that CEM altered their 'standardisation' to pass 7.5% more children. The complainant acknowledges it open to debate whether passing more children is a significant change in the selection process but regardless having full sight of information on the scoring would allow for debate on this.

² [the public interest test.pdf \(ico.org.uk\)](https://ico.org.uk/public-interest-test.pdf)

28. The complainant has also pointed out that each of the grammar schools in the Consortium costs approximately £5m to run each year. As there is a widespread belief that these grammar schools provide a superior level of public funded education compared to secondary modern schools the public interest lies in understanding the process by which these schools determine which pupils they admit.
29. The complainant further argues that in the past, similar datasets have been disclosed revealing mistakes in the processing. Disclosure would enable an additional 7,500 sets of parents and carers to scrutinise the results of those calculations. They would immediately pick up on any mistake that had a negative impact on an individual data subject if that subject was their own child.
30. The Commissioner accepts, as the Tribunal has, that there is an important public interest in an external, objective assessment of the quality of the 11+ tests. However, the Tribunal reasoned:

55. ... we are not convinced that this would be furthered by the release of this information.

56. We note that less information is made publicly available about the 11+ test than some other public exams. However, having considered the closed material, we have seen nothing that gave rise to a concern that the practices of CEM are in any way questionable, or suggestive of malpractice, or of inherent unreliability in the processes followed.

57. We agree that, as a matter of law, parents should be able to understand school admissions procedures. We find that schools admissions procedures are always public, since all schools publish admissions criteria and other relevant information is made available by the Department for Education.

59. We do not agree ... that an apparent gradual increase in the prior attainment of students going to grammar school was a matter of significant public interest with regard to this disputed information

60. We have considered whether there is a public interest in understanding the precision of the processes CEM applies in relation to the age standardisation process. We concluded that a high level of precision in this context did not necessarily give rise to an important public interest...

61. We have considered the public interests in favour of the information being withheld. We note that [name redacted]'s request was for all of the raw data for a period of 3 years (subsequently restricted to data for 2016 only). We find that such a large volume

of data is more likely to undermine commercial competitiveness of CEM.

65. We accept that transparency is a value built into FOIA, but note that this must be subject to the outcome of the balance of public interests for and against disclosure.

31. The more recent of the Commissioner's decision notices discussed the argument that the public interest debate had moved on since the Tribunal decision and concluded that events since 2017 had not materially altered the balance of the public interest set out in the Tribunal decision and the Commissioner therefore adopted this reasoning as his own. This view was supported in another decision notice (IC-98301-K8M7) which dealt with a request for raw and standardised results for tests taken in 2019.
32. As in these decisions, the Commissioner again finds there is a strong public interest in ensuring the Consortium is accountable for the way it spends public money and that any academic selection process can be understood by those involved in it, but there is a stronger public interest in allowing GLA to protect its commercial interests and administer a fair test.
33. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption in relation to the dataset. The Commissioner has therefore not gone on to consider the application of section 40(2).

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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

Jill Hulley
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