

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2022

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested raw and standardised test scores for the 11+ Kent test in 2017 – 2019. The Council initially refused the request under section 40(2) of the FOIA, later also seeking to rely on section 43(2).
2. The Commissioner's decision is that the Council 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 17 September 2020 the complainant made a request to the Council for information in the following terms:

"Under the terms of the Freedom of Information Act, I would therefore like to request the anonymised raw and standardised results of children taking the Kent test in 2017, 2018, 2019 to include the UPN in electronic format (CSV, Excel or ODS). If KCC would prefer to provide this information under a legally binding non-disclosure agreement I would consider that a perfectly acceptable alternative, as long as this can be achieved within 20 working days.

Please also advise what information the schools pass from their "Shepway test" to the LA to facilitate the administration of the admissions policies implemented by the schools."

4. The Council responded on 15 October 2020. The Council provided a link to the report of Kent test scores but stated that any further breakdown of scores to the level of individual schools, lists of schools or groups of schools by area would not be provided as the Council considered it could lead to the identification of children in breach of the Data Protection Act 2018 (DPA). The Council therefore considered the information exempt under section 40(2) of the FOIA. Regarding the second part of the request, the Council explained that the information it receives from schools in relation to the 'Shepway test' is the results of the test i.e. whether a child is suitable or not, and core details such as name, date of birth and school.
5. The complainant requested an internal review on 15 October 2020. He acknowledged the information provided in response to the second part of the request but expressed his dissatisfaction with the response to the first part of the request. In particular he took issue with the Council's suggestion that numbers less than five should be redacted without further rationale to explain this. The complainant also pointed to a decision of the Information Tribunal in EA/2013/0227 in which it was found that section 40(2) could not be applied to raw and standardised 11+ test results if they were suitably anonymised. The complainant did acknowledge that in this case he had asked for the Unique Pupil Number (UPN) to be added to the raw and standardised results and that this would be likely to be classed as pseudo-anonymised data as defined in Article 4(5) of the General Data Protection Regulation (GDPR). The complainant did not consider this would be a barrier to disclosure but did, nonetheless, withdraw his request for the UPN to be included in the data.
6. The complainant further clarified that his request for 'anonymised raw and standardised results of children taking the Kent test in 2017, 2018, 2019' referred to the marks obtained in Verbal Reasoning, Maths and Non-Verbal Reasoning tests. 'Raw' marks referred to the number of questions correctly answered and the 'standardised' results were those used to determine admissions after they had been age standardised.
7. The Council conducted an internal review and responded on 22 October 2020. The Council explained that it had previously disclosed information broken down to school level which had led to a parent identifying their child. The Council therefore reconsidered the publication of this data and made the decision that, to comply with its obligations under the DPA and the GDPR it would no longer publish routinely, and specifically in this case it had determined the information could enable the identification of

individual students and breach Article 5(1) of the GDPR. The Council therefore concluded the information had been correctly withheld under section 40(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 24 October 2020 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the Council, on reflection, also sought to rely on the section 43(2) exemption to withhold the information.
10. The Commissioner considers the scope of his investigation to be to determine if the Council has correctly withheld the information requested in the first part of the request on the basis of either section 40(2) or section 43(2) of the FOIA.

Reasons for decision

Section 43(2) – prejudice to commercial interests

11. 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).

12. In its submissions to the Commissioner the Council has argued that disclosure of the raw and standardised test results would be likely to prejudice the commercial interests of GL Assessment Limited (GLA): the provider of the 11+ tests and scoring. The Council 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.

¹ [EA/2017/0166](#)

13. 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.
14. The Tribunal decision is 15 pages in length and was issued following a full oral hearing. CEM put forward witnesses at that hearing and the appellant had the opportunity to question those witnesses, as well as put forward a considerable amount of evidence of his own.
15. The Tribunal decision covered, in essence, the same data as is being considered although the academic years from which the data was drawn differed. With the benefit of the expert witnesses, the Tribunal decision considered a four-stage test that was suggested by the Commissioner during proceedings. The four stages are all relevant to the present case and are:
 - a) Does CEM market its testing to schools on the basis of the claim of 'tutor resistance'?
 - b) Do schools accept that claim?
 - c) Would disclosure of the requested information undermine the efficacy of that claim?
 - d) If so, would schools be less likely to engage the services of CEM?
16. The Tribunal decision then went on to explain why disclosure of the withheld information would cause prejudice:

41. Have the tests been marketed to customers as being 'tutor resistant'? We find that they have. We found evidence to support this view in CEM's 'Selection Assessment Services' document (RB/1) where a section headed 'Resistance to Tuition' sets out the approach described by Mr Byatt. Mr Byatt also confirmed that subject was also regularly discussed with schools and other potential clients. Although [name redacted] suggests that CEM has used the term 'tutor-proof' to describe the tests, there was no evidence before us of CEM having employed this term.

43. We conclude that the truth or otherwise of CEM's description of the tests as 'tutor resistant' is not relevant to the decision we have been asked to make. We are satisfied that the tests are marketed as such.
17. In this case, GLA has informed the Council that its tests are designed to be as tutor-proof as possible. As such the Tribunal's comments on this

are relevant in this case. The Tribunal next considered if schools accepted the tests were 'tutor resistant' and the expert witnesses highlighted that CEM did not put practice papers or questions in the public domain. The Commissioner notes that GLA does provide practice papers for a cost. This does not undermine the argument that the tests are still, to some extent, tutor-proof. The Tribunal commented as follows:

46. Would publishing the withheld information undermine the efficacy of the claim? All parties accept that publishing 3 years of data would not by itself reveal the test content, or the educational background of individual students and their results. However, we accept the University's submission that putting the withheld information together with other publicly available information would potentially provide information of this nature. The Panel reached this conclusion having considered the closed information. We find that publishing the information would undermine the efficacy of CEM's claim that the tests are 'tutor resistant'.

47. We are satisfied that the truthfulness or otherwise of this claim is not a matter we have to decide. We are satisfied that publishing the information would assist those who wanted to learn more about the structure of the tests, in order to focus preparation as a means of maximising potential marks, and this would reduce the 'tutor resistance' of the tests themselves.

18. The Commissioner considers that even though GLA publishes practice papers at cost this does not make the tests able to be tutored to pass. GLA 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.
19. 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.

20. In another more recent decision notice (IC-98301-K8M7) it was argued that the Tribunal decision was not relevant to the current 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.
21. The Commissioner's view is that the Tribunal decision sets out clearly why disclosure of the withheld information would be likely to harm CEM's commercial interests. He sees no reason why this would not also be the case for GLA's commercial interests or any other provider of the 11+ tests. The Commissioner is not persuaded that he should disagree with the Tribunal's reasoning or his own reasoning from previous decisions as to why the exemption is engaged in relation to the data. The Commissioner therefore concludes that section 43(2) of the FOIA is engaged.

Public interest test

22. 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.
23. 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.
24. The complainant argues there is a strong public interest in transparency, particularly in the 11+ process. The complainant has pointed to a Guardian article² and argued that disclosing the relationship between raw marks in the test and the standardised scores used for admissions would reveal that the process is manipulated to suit the grammar schools needs.
25. The complainant also linked to an article in Schools Week³ that included an open letter to the Secretary of State for Education calling for the 11+ test results to be linked to the National Pupil Database. The final piece of evidence provided by the complainant was a link to the Local

² [Revealed: how grammar schools are expanding – by taking pupils who fail the 11-plus | Grammar schools | The Guardian](#)

³ [11-plus: Link results to pupil data, say academics \(schoolsweek.co.uk\)](#)

Government Transparency Code 2015⁴ which cited Deloitte analysis estimating the economic benefits of public sector information in the UK to be £1.8 billion. The complainant argues the information in question is objectively factual data that has been collected using public money and informed debate on selective education cannot take place when one side is withholding relevant information.

26. The Tribunal decision's consideration of the public interest was detailed and the key points of relevance to this request are reproduced below:

55. We agree that there is an important public interest in an external, objective assessment of the quality of 11+ tests but 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

⁴ [Title \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

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.

27. 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 test taken in 2019.
28. As in these decisions, the Commissioner again finds there is a strong public interest in ensuring the Council 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 intellectual property. There is also a strong public interest in minimising, as much as possible, the advantage that can be gained, in the selection process, from tutoring.
29. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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

Jill Hulley
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