

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 November 2020

**Public Authority:** The Buckinghamshire Grammar Schools

**Address:** Aylesbury Grammar School  
Walton Road  
Aylesbury  
Buckinghamshire  
HP21 7RP

### Decision (including any steps ordered)

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1. In a series of requests, the complainant has requested information about a Secondary Transfer Test. The position of The Buckinghamshire Grammar Schools ('TBGS') is that it does not hold information relevant to some parts of the requests and that other parts are exempt from disclosure under section 41(1) (information provided in confidence) and/or section 43(2) (commercial interests) with the public interest favouring maintaining the section 43 exemption. The complainant disputes TBGS' reliance on section 41 and/or 43 with regard to part 5 of the request submitted on 21 September 2019 and part 9 of the request submitted on 5 October 2019.
2. The Commissioner's decision is as follows:
  - The information requested in parts 5 and 9 of the above request, that the TBGS holds and is withholding, is information provided in confidence and is therefore exempt from disclosure under section 41(1) of the FOIA.
3. The Commissioner does not require TBGS to take any remedial steps.

## Background

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4. In its submission to the Commissioner, TBGS has provided the following background to the request. Buckinghamshire is a selective authority with children attending either a grammar school or an upper school when they move on from primary to secondary school. The thirteen grammar schools set up a company, The Buckinghamshire Grammar Schools (TBGS), to run a combined Secondary Transfer Test process so that all children wishing to attend a Buckinghamshire grammar school can take the same test. TBGS contracts two organisations to assist with this. Buckinghamshire Council is contracted to handle test administration services. GL Assessment Ltd is contracted to produce and mark the Secondary Transfer Test and associated materials.
5. The 2020 entry test was taken by children on 12 September 2019. Children attending Buckinghamshire primary schools sat the test in their own schools. Other children (mostly from outside of Buckinghamshire) took the test at one of the Buckinghamshire grammar schools or at another central testing location. The test comprised two papers – Verbal Skills (paper A) and Non-verbal and Mathematical Skills (paper B). Paper A was taken first with Paper B taken after a short break. Early on the morning of the test, Buckinghamshire Council began to receive calls from schools saying there were errors in the Verbal Skills paper. This proved to be correct with the answers for two questions in the Verbal Reasoning section on the answer sheet not matching those in the question paper. There was also an error in the answers for one of the example questions in the English section of the same paper.
6. TBGS requested an urgent and robust solution to the issue as it was very aware of the concern and anxiety the errors had caused children and parents. GL Assessment undertook detailed analysis and proposed a solution to TBGS which was to award all children a mark for each of the two affected questions in the Verbal Reasoning section and to also remove the final six questions at the end of that section from the scoring and standardisation.
7. An interim data analysis was provided to TBGS as a PowerPoint presentation. GL Assessment also provided TBGS with a letter from an external expert verifying the approach. Receiving the interim data analysis and the expert's letter was dependant on TBGS signing a confidentiality agreement forbidding release to any third party, as this was sensitive commercial information.
8. TBGS says that although the majority of children took the test in September 2019 it should be noted that the test remained 'live' and continued to be used to assess children moving into the county until the

end of September 2020. Irrespective of any confidentiality and commercial interest points raised in its submission to the Commissioner, TBGS says that releasing details about the test could have given unfair advantages to children who were yet to sit the test.

## Request and response

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9. On 21 September 2019 the complainant wrote to TBGS and requested information in the following terms:

*"I would be very grateful if you could provide the time and details of communication by which TBGS were informed there were errors in the 2019 secondary transfer test.*

*I would be very grateful if , for each testing centre, you could provide me with the following information regarding the 2019 secondary transfer test:*

*i) The time at which the centre was notified that two questions in the Verbal Skills paper could not be answered correctly as the options on the answer sheet did not reflect those in the question paper*

*ii) The instructions given to each testing centre*

*iii) The time at which the testing centre acknowledged receipt of your instructions.*

*iv) The time or times when pupils started the secondary transfer test in each testing centre.*

*By testing centre, I mean any venue at which pupils sat the secondary transfer test.*

*In addition, I would be most grateful if you could supply any report, analysis or correspondence you have sent to, or received from, GL Assessment in regards of the test errors and their impact, and any remedial measures considered. This would include any statistical analysis of the impact of the errors on test outcomes conducted by GL Assessment. I would also like you to supply any underlying data that was used or made available to GL Assessment in or for their analysis.*

*I would also be grateful if you could provide minutes or records of all meetings you have held with GL Assessment since 12th September 2019, and any associated correspondence.*

*Finally, I request the names of any independent bodies contacted in relation to the errors in the secondary transfer test, for example*

*requesting independent verification of any analysis/conclusions etc conducted in-house by GL Assessment staff. This would include any independent bodies who blanked you/GLA or refused to provide such services."*

10. TBGS responded on 17 October 2019. It listed the complainant's questions as follows:

- 1. The time at which each testing centre was notified that two questions in the Verbal Skills paper could not be answered correctly as the options on the answer sheet did not reflect those in the question paper*
- 2. The instructions given to each testing centre*
- 3. The time at which each testing centre acknowledged receipt of your instructions*
- 4. The time or times when pupils started the secondary transfer test in each testing centre*
- 5. Copies of any report, analysis or correspondence (including any statistical analysis or underlying data used in any such analysis) we have sent to, or received from, GL Assessment in regards of the test errors and their impact, and any remedial measures considered*
- 6. Minutes or records of all meetings you have held with GL Assessment since 12th September 2019, and any associated correspondence*
- 7. Names of any independent bodies contacted in relation to the errors in the secondary transfer test.*

11. TBGS noted the complainant had submitted a further request on 5 October 2019 as follows:

- 8. The total time each candidate devoted to answering the remaining VR questions, which are to contribute towards their final STT score*
- 9. The analysis that allowed the independent statistician to conclude that the post hoc reengineering of the VR section of the transfer test is fair for all candidates*

12. TBGS provided a response to questions 1 and 2. It advised that it does not hold information relevant to questions 3, 4 and 8. TBGS relied on section 41 and section 43 of the FOIA to withhold the information requested in questions 5, 6 and 7. TBGS directed the complainant to where information relevant to question 9 is published.

13. The complainant requested an internal review on 28 October 2019 in respect of questions 5 and 9 (as numbered in TBGS's email of 17 October 2019). He also submitted further requests for information as follows:

*"1. information/explanation of the impact of the errors on the reliability and validity of the standardised test scores.*

*2. information/explanation of the reliability measurement(s) used.*

*3. the actual values for each section of the tests (not just VR and English), the method used to calculate these reliabilities, the factors included, and any assumptions/approximations involved. For example, is this figure just a measure of internal consistency, or does it include an estimate of occasion (test-retest) error?*

*4. the reliability close to the cut-off score, in the approximate range STTS 115 – 125 and the underlying data on which these calculations are based.*

*5. explanation of how the independent statistician was able to conclude that the outcome of the test, without the last six questions, was still fair for all children."*

14. TBGS provided an internal review on 16 December 2019. It confirmed it was relying on section 41 with regards to questions 5 and 9. It described the information that it was withholding that is relevant to these parts as: details of a statistician's report, "other information" provided by GL Assessment, and correspondence. TBGS did not refer to the section 43 exemption.
15. TBGS refused the requests the complainant submitted on 28 October 2019 under section 41 of the FOIA.

### **Scope of the case**

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16. The complainant contacted the Commissioner on 21 December 2019 to complain about the way his request for information had been handled.
17. The Commissioner has confirmed the scope of the complaint with the complainant, which is focussed on part 5 of the request submitted on 21 September 2019 and part 9, submitted on 5 October 2019. Her investigation has focussed on whether TBGS can refuse these parts under section 41(1) of the FOIA and/or section 43(2) and, if necessary, the balance of the public interest associated with the latter exemption.

## Reasons for decision

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### Section 41 – information provided in confidence

18. Section 41(1) provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.
19. TBGS has applied section 41(1) to part 5 of the request submitted on 21 September 2019 and part 9 submitted on 5 October 2019. These are requests for the following information:
  - 5: Copies of any report, analysis or correspondence (including any statistical analysis or underlying data used in any such analysis) TBGS had sent to, or received from, GL Assessment about the test errors and their impact, and any remedial measures considered
  - 9: The analysis that allowed the independent statistician to conclude that the post hoc reengineering of the verbal reasoning section of the transfer test was fair for all candidates
20. In its submission to the Commissioner TBGS has confirmed that the information it holds that is relevant to part 5 is email correspondence with GL Assessment and the PowerPoint presentation. TBGS describes the email correspondence as concerning the logistics for a meeting that was held on 20 September [2019] which TBGS says includes some details about the analysis that GL Assessment was carrying out. The information TBGS holds that is relevant to part 9 is again the PowerPoint presentation. The Commissioner notes the information TBGS said it held in its internal review response but, in its submission to her, TBGS confirmed that, apart from the correspondence and presentation, it does not hold any other relevant document or analysis, including the report from the statistician.
21. TBGS has provided the Commissioner with a copy of the presentation and the email correspondence. The email correspondence is short, comprising three emails sent over one day. Its focus is, as TBGS has said, the logistics of a meeting. However, the Commissioner accepts that this exchange broadly falls within the scope of part 5 of the request as there is brief reference to particular activities GL Assessment was undertaking with regard to the test.
22. In correspondence to the Commissioner on 12 November 2020 the complainant disputed that TBGS can be said to hold information relevant to part 9 of his request. This is because he considers it is not possible

for a statistician to determine whether reengineering the test in question was fair for **all** candidates. The complainant argues that statistics can only deal with distributions and probabilities, not individual outcomes. That may or may not be the case. TBGS has considered what information it holds that falls within the scope of part 9 of the request and has identified the PowerPoint presentation. The Commissioner is satisfied with that approach.

*Was the information obtained from another person?*

23. It is clear that the presentation was produced by GL Assessment; TBGS obtained this presentation from GL Assessment, ie another person, and therefore the condition under section 41(1)(a) has been met in respect of the presentation.
24. Turning to the email correspondence, part of that correspondence is clearly information obtained by another person: the side of the correspondence that is from GL Assessment to TBGS. However, part of this information was generated by TBGS; it is the side of the correspondence from TBGS to GL Assessment. It could therefore be thought that TBGS did not obtain that particular information from another person.
25. However, in her published guidance on section 41, the Commissioner advises that an authority must consider whether disclosing the information it created would reveal the content of the information it obtained from the other person. If it would, then the exemption may also cover the material it generated itself.
26. TBGS's correspondence to GL Assessment responds to matters broadly associated with the test errors. As such TBGS's correspondence can also be considered to constitute a record of information provided to it by GL Assessment – its comments in the correspondence are very specific to the information it received from GL Assessment. If only TBGS's side of the correspondence was to be released, it would nonetheless be apparent what the matters were that TBGS discussed with GL Assessment. As such, the Commissioner considers that the email correspondence also engages section 41(1)(a). The information that comprises email correspondence from TBGS to GL Assessment was obtained by TBGS from another person. The Commissioner has gone on to consider the condition under section 41(1)(b).

*Would disclosure constitute an actionable breach of confidence?*

27. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers 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.
28. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
29. The Commissioner is satisfied that all the information being withheld is more than trivial as it concerns the construction of a grammar school entry test.
30. Regarding the information's accessibility, in its submission TBGS has said that GL Assessment has expended a lot of effort and expense trying to preserve the integrity of its tests which is why details of the construction of the test in question are not otherwise accessible.
31. The information being considered is a PowerPoint presentation and email correspondence. With regard to the presentation, the Commissioner is satisfied that this is not otherwise accessible: GL Assessment provided the presentation solely to TBGS. Similarly, the correspondence was between TBGS (and the head teacher at a school in the TBGS company) and GL Assessment only.
32. In its submission, TBGS has discussed the practice and familiarisation materials that GL Assessment makes available on its website. TBGS has noted that the 11+ practice papers that GL Assessment sells are not past papers. In addition, they are designed as single subject tests rather than combined content ('verbal skills' and 'non-verbal and mathematical skills') that feature in the test papers produced for TBGS. The structure of GL Assessment's test for TBGS is also specific to Buckinghamshire and cannot be deduced from the GL Assessment material on sale and on its website. Furthermore, the range of questions that is used in GL Assessment's test for TBGS is far greater and the level of difficulty differs to that in the commercially available papers. As such, TBGS considers that the availability of practice papers



does not invalidate the argument that information about the test's construction in the PowerPoint presentation is in the public domain.

33. Having considered the matter, the Commissioner is satisfied that the withheld information has the necessary quality of confidence; it is not trivial information and is not otherwise accessible. She has gone on to consider the second limb of the test at paragraph 27.
34. **Circumstances importing an obligation of confidence:** This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).
35. Both of these is relevant here. TBGS has provided the Commissioner with a copy of a confidentiality agreement letter it received from GL Assessment and confirmed that it is subject to the binding written terms in that letter. In the letter GL Assessment makes it clear that the information provided – the PowerPoint presentation - is highly confidential and commercially sensitive.
36. TBGS has told the Commissioner that it is also subject to binding written terms of confidentiality within the Agreement for Secondary Selection Provision agreement with GL Assessment. It has also provided the Commissioner with a copy of that agreement. The confidentiality clauses in that agreement prohibit TBGS from disclosing information to the public about the Secondary Transfer test, which would include the email correspondence.
37. The Commissioner also considers that, in the circumstances, GL Assessment would have an implicit expectation that its correspondence with TBGS, which broadly concerns the test errors, would not be made public.
38. The Commissioner has considered TBGS's position. She is satisfied that the other person – GL Assessment – would expect that the information they provided to TBGS – both the presentation and the email correspondence – would remain private and confidential and would not be disclosed to the general public in response to a FOI request. She is therefore satisfied that the information being withheld was imparted in circumstances which give rise to a duty of confidence.

39. **Detriment to the confider:** TBGS has argued that disclosure would have a detrimental effect on GL Assessment's commercial interests, in the following ways:

- GL Assessment's test for TBGS could potentially be more susceptible to targeted tutoring. This would undermine the integrity and fairness of the test and harm 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 GL Assessment's competitors
- The nature and construction of the test for TBGS is part of GL Assessment's 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 so available to its competitors, this too would cause serious detrimental harm to GL Assessment's commercial advantage.

The Commissioner is satisfied that disclosure would have a detrimental impact on the confider in this case – GL Assessment. This is because GL Assessment would incur financial and reputational loss.

*Is there a public interest defence for disclosure?*

40. As has been noted, section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).
41. TBGS has stated in its submission that it greatly appreciates the distress and concern experienced as a result of the errors in September 2019. It acknowledges that there is a public interest in disclosing the information as it would help parents and children:
- understand and critically analyse the rationale behind the corrective measures undertaken
  - 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

42. However, as well as GL Assessment's interests, in TBGS's view there is greater wider public interest in this case in maintaining the duty of confidence, for the following reasons:
- Disclosure would undermine the relationship of trust between TBGS and GL Assessment. GL Assessment is one of a very limited number of Secondary Transfer Test providers so disclosure of its confidential information would adversely affect TBGS's relationship with GL Assessment and hinder its ability to use this provider in the future. This would not be in the public interest as it would lead to TBGS having a significantly smaller selection of providers from which to judge cost, value for money and credibility.
  - Disclosure could discourage other providers of Secondary Transfer Tests from supplying to TBGS if there is not a degree of certainty in providing confidential information to TBGS. This is especially so given the nature of the requested information and the commercial sensitivity around it. Disclosure would make it more difficult for the TBGS schools to carry out their functions as educational providers.
  - Disclosure of information in relation to the Secondary Transfer Test itself (i.e. the nature of the questions) could undermine the integrity and fairness of the test by making it more susceptible to targeted tutoring. There is a legitimate concern that this information could be used to ascertain which areas of the test to give more focus to when preparing children to take future tests. This would be particularly advantageous for 11+ tutoring organisations, and those parents who can afford to engage those tutors.
  - Disclosure could create a precedent for requests for disclosure of other confidential, proprietary information regarding the Secondary Transfer Test. This could adversely affect grammar schools nationwide.
  - Disclosing the test information could give an unfair advantage to late testers over those who took the test in September 2020.
43. 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.
44. The Commissioner notes 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. 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.

45. Having considered the arguments on both sides, the Commissioner has decided that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant. TBGS and GL Assessment took steps to mitigate the impact of the errors in the test paper and communicated with parents about the matter. The Commissioner acknowledges the concerns that the complainant has about the fairness of GL Assessment's solution to the test errors. However, she considers that the steps TBGS took were sufficient and that TBGS would therefore not have a public interest defence for breaching its duty of confidence.
46. The Commissioner has considered all the circumstances of this case and the information being withheld under section 41(1) of the FOIA. She has concluded that there is stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore, the Commissioner's decision is that TBGS correctly withheld the information under section 41(1) of the FOIA.
47. As the Commissioner has found that section 41(1) of the FOIA is engaged regarding all the withheld information it has been applied to, it has not been necessary to consider TBGS's application of section 43(2) to that information.

## Right of appeal

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48. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. 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.
50. 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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