

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 December 2020

Public Authority: The Buckinghamshire Grammar Schools

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

Decision (including any steps ordered)

1. 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 five parts of the request and that four 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.
2. The Commissioner's decision is as follows:
 - The information that 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

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

9. On 2 October 2019 the complainant wrote to TBGS and requested information in the following terms:

"In order to give parents reassurance that the proposed solution is fair and just to all children, and to provide maximum transparency around the statistical analysis that has been undertaken, I would be very grateful if you could respond to the following questions:

1. How many questions were in the verbal reasoning section of the verbal skills paper?

2. What statistical analysis has been undertaken on the effects of the errors in Qu 10, to children's performance in Qus 11 and 12?

3. What statistical analysis have TBGS requested or been provided with from GLA regarding:

a. The test-retest reliability of GLA's verbal skills paper when it is set correctly.

b. The test-retest reliability of this year's verbal skills paper with 6 questions removed and 2 questions awarded equally.

c. The test-retest reliability of the verbal reasoning sections only of the verbal skills paper with 6 questions removed and 2 questions awarded equally.

4. What analysis TBGS have requested or been provided with regarding the relative disadvantage of removing 6 questions and awarding 2 questions equally in the verbal reasoning section, to a) higher and lower ability children, b) children who perform relatively better in the verbal reasoning section than in the English section of the verbal skills paper, c) children who perform relatively better in the verbal skills paper than in the non-verbal skills/maths paper?

5. How many questions were in the English section of the verbal skills paper?

6. What statistical analysis has been done on the effects of all three errors to children's performance in the English section of the verbal skills paper?

7. What statistical analysis has been done on the effects of all three errors to children's performance in the second paper (non-verbal skills and maths)?

8. a. Whether the standardisation method which determines where the 121 qualification threshold falls, is in any way different this year to last year to allow for a likely increase in reviews and appeals?

b. If yes, how has the method been changed?

c. If yes, will it result in fewer children than last year being deemed 'qualified' as a result of their 11-plus test performance alone?"

10. TBGS responded on 3 November 2019. It refused parts 1 to 7 of the request under section 41(1) of the FOIA and said that elements of the information requested in these parts was also exempt information under section 43(2) of the FOIA. TBGS provided some general information relevant to parts 1 and 5 and directed the complainant to where general information relevant to parts 2, 3, 4, 6 and 7 is published.
11. TBGS provided a response to part 8 of the request.
12. The complainant requested an internal review on 4 November 2019, raising eight points. Point 2 concerned parts 2, 3, 4, 6 and 7 of the request and TBGS' reliance on section 41 and/or section 43. Point 3 likewise concerned parts 1 and 5 and TBGS' reliance on the above two exemptions. Point 8 again concerned part 3 of the request and TBGS' application of section 41 and/or section 43.
13. TBGS provided an internal review on 16 December 2019. It addressed the complainant's eight points. With regard to point 2 TBGS advised that it does not hold information within the scope of part 2, part 3, part 4(a), part 4(c) or part 7 of the request. TBGS maintained its position that part 4(b) and part 6 of the request is exempt information under section 41(1) of the FOIA.
14. With regard to point 3, TBGS provided a reasoning for its reliance on section 43(2) with regard to parts of the request and confirmed that it considered that the public interest favours maintaining this exemption.
15. TBGS' response to point 7 of the complainant's request for an internal review also addressed part 8. In point 7, TBGS confirmed that it is relying on section 41(1) with regard to parts 2, 3, 4, 6 and 7 (as it had numbered these parts in its internal review). TBGS also confirmed that it is relying on section 43(2) with regard to parts of the request and that it had addressed that at point three.

16. The above correspondence is somewhat confusing and in correspondence to the Commissioner of 11 November 2020, the complainant noted what appeared to be inconsistencies in TBGS's correspondence with her. For example, TBGS advised both that it does not hold information relevant to part 7 of the request and that it was applying section 41 to part 7 – TBGS cannot apply an exemption to information it does not hold.
17. In its submission to the Commissioner however, TBGS has helpfully summarised its final position with regard to the parts of the complainant's request, as follows:
 - Parts 2, 3, 4(a), 4(c) and 7 – information not held
 - Part 8 – addressed in response of 3 November 2019
 - Parts 1, 4(b), 5 and 6 – information withheld under section 41 and section 43

Scope of the case

18. The complainant contacted the Commissioner on 20 December 2019 to complain about the way her request for information had been handled.
19. With confirmation of TBGS' final position and having confirmed the scope of the complaint with the complainant, the Commissioner's investigation has focussed on whether TBGS can refuse parts 1, 4(b) 5 and 6 of the request 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

Section 41 – information provided in confidence

20. 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.
21. TBGS has applied section 41(1) to parts 1, 4(b), 5 and 6 of the request. These are requests for the following information:

- 1: The number of questions in the verbal reasoning section of the Verbal Skills paper
- 4(b): Any analysis TBGS requested or was provided with regarding the relative disadvantage of removing six questions and awarding two questions equally in the verbal reasoning section, to children who perform relatively better in the verbal reasoning section than in the English section of the Verbal Skills paper
- 5: The number of questions in the English section of the Verbal Skills paper
- 6: Any statistical analysis on the effects of all three errors to children's performance in the English section of the Verbal Skills paper

Was the information obtained from another person?

22. With regard to parts 4(b) and 6 of the request, in its submission to the Commissioner TBGS has confirmed that the only information it holds that is relevant to those parts is the PowerPoint presentation that GL Assessment provided to it. TBGS has provided the Commissioner with a copy of this presentation. 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.
23. With regard to parts 1 and 5, TBGS has confirmed that GL Assessment also provided it with the information requested in these parts. It has provided the Commissioner with a copy of this information, which is held in two Verbal Skills answer sheet documents. The Commissioner is satisfied that TBGS obtained this information from another person – GL Assessment – and that the condition under section 41(1)(a) has again been met.
24. The Commissioner has gone on to consider the condition under section 41(1)(b).

Would disclosure constitute an actionable breach of confidence?

25. 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.
26. **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.
 27. 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. The complainant considers that the number of questions in particular parts of the test cannot be categorised as relating to the test's 'construction'. The Commissioner disagrees; in her view the number of questions that comprise the elements of a test is fundamental to the test's construction.
 28. 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. In her correspondence to the Commissioner of 11 November 2020, the complainant has argued that it cannot be the case that the information requested in parts 1 and 5 is not otherwise accessible as "over 10,000 children each year" know the answer to both those parts.
 29. The information being considered is a PowerPoint presentation and the number of questions in two parts of one of the test papers. With regard to the presentation, the Commissioner is satisfied that this is not otherwise accessible: GL Assessment provided the presentation solely to TBGS. With regard to the numbers of questions, the Commissioner must consider the number of questions associated with this test specifically. It is true that a certain number of children, in particular circumstances, sat the test and so saw the paper and the number of questions in that paper. However, the Commissioner does not consider that that information could therefore be considered to be in the public domain. This is because the information was not realistically accessible to the general public at the time of the request; the test was still a 'live' matter at the time of the request and continued to be so until the end of September 2020. The number of questions in particular parts of the test paper would therefore not be in the public domain. In addition, confidential information that was only disseminated to a limited number of recipients – such as the children in this case – can retain its quality of confidence, provided that none of the recipients subsequently released the information into the public domain themselves. The Commissioner is not aware that this happened here.
 30. 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 and number of questions in 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 neither the number of questions requested in this case nor the PowerPoint presentation are in the public domain.

31. Having considered the matter, the Commissioner is satisfied that the requested 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 25.
32. **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).
33. The first of these is relevant here. TBGS has provided the Commissioner with a copy of a confidentially 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.
34. 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 number of test questions in each section.
35. 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 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.

36. **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.
37. 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. The Commissioner notes that, in the complainant's correspondence to her, the complainant has argued that the only detriment that could be claimed, by providing responses to her questions, would be damage to GL Assessment's reputation. The complainant has therefore appeared to acknowledge that disclosing the information would have a detrimental effect on the confider.
- Is there a public interest defence for disclosure?*
38. 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).
39. 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
40. The complainant made substantially similar arguments in her request for an internal review and in her correspondence to the Commissioner.
41. 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 and number of 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.
42. 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.
 43. 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.
 44. 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 considers that was sufficient and that TBGS would therefore not have a public interest defence for breaching its duty of confidence.
 45. 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.
 46. 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

47. 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

48. 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.
49. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF