

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2021

Public Authority: The Buckinghamshire Grammar Schools
Address: Aylesbury Grammar School
Walton Road
Aylesbury
Buckinghamshire
HP21 7R

Decision (including any steps ordered)

1. The complainant requested data on school admissions. The Buckinghamshire Grammar Schools ("TBGS") provided some information but relied on section 22 of the FOIA (intended for future publication) to withhold the remainder.
2. The Commissioner's decision is that the withheld information engages section 22 of the FOIA and that public interest favours maintaining the exemption. The Commissioner also notes that TBGS did not issue a refusal notice within 20 working days and therefore breached section 17 of the FOIA.
3. The Commissioner does not require further steps.

Background

4. TBGS administers Secondary Transfer Tests (also known as the "11 plus" tests) on behalf of a number of grammar schools in the county of Buckinghamshire.

Request and response

5. On 5 February 2021 the complainant requested information of the following description:

"[1] Please provide me with the SST results for the test taken in 2019 for the 2020 entry. Please provide the information on an Excel file format that includes the following column headings as you have provided in the past.

- *Count*
- *Feeder primary school area*
- *Feeder primary school*
- *Home LA*
- *STTS*
- *Grammar school required?*
- *Weighted standardised Maths score*
- *Weighted standardised Non-verbal score*
- *Weighted standardised Verbal score*

"[2] Please provide the same information for the test taken in 2020 for the 2021 entry. If you are not able to provide the full data until the later, please provide me with preliminary results showing the following data:

- *Count*
- *Feeder primary school area*
- *Feeder primary school*
- *Home LA*
- *Number tested*
- *Number passed"*

6. On 4 March 2021, TBGS responded. It provided all the information in respect of element [1] and some of the information within the scope of element [2].
7. The complainant contacted TBGS on 7 March 2021 to point out that not all the information that he requested had been provided. TBGS responded on 8 March 2021. It accepted that it held more information, but it now stated that section 22 applied to that information.
8. The complainant requested an internal review on 10 March 2021. TGBS sent you the outcome of its internal review on 30 March 2021. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 6 April 2021 to complain about the way his request for information had been handled.
10. On 15 September 2021, the Commissioner wrote to the complainant to set out her initial view of his complaint. She noted that TBGS had a set timetable for publishing the information in question and had published previous versions of the data. She noted that no compelling argument had been provided either as to why it was unreasonable for TBGS not to publish the information earlier, or as to the public interest in early publication of the information and that she considered it likely that TBGS would be entitled to rely on the exemption.
11. The complainant did not accept the Commissioner's initial view and asked for a decision notice. His arguments as to why the information should be disclosed are considered below. He also asked the Commissioner to determine whether TBGS publication schedule was fit for purpose.
12. It is not the Commissioner to determine when a public should proactively publish information. That is a matter for the public authority to determine. The Commissioner can only look at whether TBGS dealt with the request in accordance with the FOIA
13. The Commissioner considers that the scope of her investigation is to determine whether TBGS is entitled to rely on section 22 of the FOIA.

Reasons for decision

14. Section 22(1) of the FOIA states that:

Information is exempt information if—

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
- (b) the information was already held with a view to such publication at the time when the request for information was made, and*
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).*

15. In order for the exemption to be engaged, the public authority does not need to have a fixed date for publication, it need only have a settled intent, at the time of the request, to publish the requested information at some point in the future or after other pieces of work have been progressed or completed.
16. It is clear from TBGS' website that it does regularly publish datasets relating to school allocations with aggregated provisional datasets published in the Autumn and Spring immediately following the test – with more detailed data becoming available the following Autumn.
17. The Commissioner noted in her initial view that the record of publication indicated an intent to publish the dataset the complainant had requested and the complainant did not dispute this. TBGS confirmed in its submission that it intended to publish the data, but admitted that it was unlikely to be available until November because of the effects of the pandemic over the previous 18 months.
18. The Commissioner is therefore satisfied that, at the point the request was made, TBGS had (and still has) a settled intent to publish the information in question.

The complainant's position

19. In explaining why he disagreed with the Commissioner's view, the complainant explained that it was both unreasonable to delay publication and that the public interest should favour disclosure:

"To ensure that the above objective is achieved, it is both reasonable and fair that the feeder school SST results should be published prior to the STT review and appeal cut off dates. Publication before these dates would allow parents if they wish to make any relevant complaints or challenges when mitigation would be possible. The TBGS policy of delaying the feeder school results until after the affected cohort have started secondary school is not reasonable, as it denies parents the opportunity of understand the full facts surrounding their children's' results.

"A major concern of Bucks parents is the number of out-of-county pupils who take up many of the grammar school places. This has been an issue since the 1988 Education Reform Act that permitted parents to apply for schools outside their own LEA areas.

"The TBGS STT pass mark of 121 is not a fixed value. The pass mark is standardised each year according to the performance of that year's cohort. The out-of-county pupils, including the TBGS out-of-county partner schools, consistently achieve higher average STT scores than Bucks pupils, this raises the pass mark required for

a 121 score therefore denying many Bucks students achieving the 121 pass mark required for a grammar school place.

"Parents in Bucks are understandably concerned about the reduced chances of a grammar school offer and should have the relevant information about the STT outcomes at the relevant time.

"In summary, I believe that the current timetable used by TBGS to publish the STT information is not reasonable and there is public interest in publishing the information concurrently when the STT results are available to the STT candidates."

20. The complainant also drew attention to TBGS' timetable for submitting appeals – noting that its timetable would mean that appeals would need to be submitted before the detailed data became available and that parents may wish to have regard to this data in preparation for an appeal.

TBGS' position

21. TBGS explained that it published a considerable amount of data online about its tests. It noted that until pupils had taken up their places the allocation data was "fluid."
22. TBGS explained that it has previously published a single dataset, but that it had decided that this presented a risk to identifying individual pupils and so changed its practice and now only published the pupil-level data once the process was complete.
23. In relation to the difference between the datasets, TBGS explained that between three and four hundred pupils could be added to the dataset between the provisional and final results:

"The pupil level data is published in the Autumn a year after testing because the data needed to generate the analysis is incomplete until after the start of the Autumn term. A lot of children take the Buckinghamshire Secondary Transfer Test but the data is fluid until the end of the process. This is for a variety of reasons:

- some children (particularly from outside Buckinghamshire) withdraw from the process*
- some children are tested outside of the main testing period, e.g. because they move to the area*
- some children are qualified for grammar school via the Selection Review Panels which usually take place in December and early January*

- *some children gain places at grammar school following the Independent Appeal process which takes place in the Summer term.*

"The pupil level data is therefore generated at the point it is final."

24. Finally, in respect of the complainant's argument about parents needing data for the appeals process, TBGS noted that:

"It is not clear to TBGS why or how the information requested would assist parents when considering appeals. The Selection Review Panel process looks solely at whether an individual child that did not qualify for a place nevertheless meets the required standard for a grammar school education. Statistical analysis of existing results does not affect this process.

"For the independent appeals process, parents are provided with all the necessary information relating to their appeal and can request further information if it is helpful. Again though, the purpose of the appeals process is to determine whether an individual child should be offered a place at a particular school, and it is unlikely that statistical analysis would be relevant to this."

The Commissioner's view

25. Having considered both parties' submissions, the Commissioner does not consider it unreasonable for TBGS to withhold the requested data until its publication deadline.
26. The complainant has explained that he only wants part of this data, but it is reasonable for TBGS to delay publication of that data until such times as it can publish the full dataset.
27. The Commissioner notes that TBGS publishes some location-specific data soon after the test process is complete. If parents have concerns about out-of-area candidates, this data will be available to them already if they wish to raise the matter in an appeal. It is not clear what advantage having access to the pupil-level data would bring – given that each pupil will already have received their own results.
28. The Commissioner accepts that it is reasonable for TBGS to publish its full dataset once it is finalised. She is therefore satisfied that section 22 is engaged.

Public interest test

29. Even if it a public authority does intend to publish information at a later date, it must still disclose that information immediately unless the balance of the public interest favours maintaining the exemption.
30. The complainant did not make separate public interest arguments, but the Commissioner considers that the arguments already cited apply equally to the public interest test and she has considered them afresh.
31. In explaining why the balance of the public interest should favour disclosure, TBGS argued that there was a strong public interest in allowing it to publish complete and accurate information – as opposed to requiring it to disclose incomplete information which could present a misleading picture.
32. TBGS noted some of the arguments that the complainant had raised, but noted that these reflected the public interest in publishing data at all, not in publishing it sooner.
33. Having reviewed the matter, the Commissioner considers that the balance of the public interest favours maintaining the exemption.
34. The judgment to be made here is not about whether there is a strong public interest in publishing the data at all – it is clear that there is – but about whether there is a significant public interest in publishing a snapshot of the information – some eight months or so before the data is finalised. Any public interest relating to the effects of Covid-19 will be met by the eventual publication of the dataset.
35. The Commissioner is not persuaded that there is any compelling public interest reason for TBGS to publish a dataset before that dataset has been completed and finalised. Requiring TBGS to disclose the information under FOIA would risk presenting a misleading picture of the allocation process with little additional public benefit realised.
36. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption.

Procedural Matters

37. Section 17 of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:
 - (1) *within the time for complying with section 1(1), give the applicant a notice which—*

- (a) states that fact,*
 - (b) specifies the exemption in question, and*
 - (c) states (if that would not otherwise be apparent) why the exemption applies.*
 - (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—*
 - (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or*
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*
 - (7) A notice under subsection (1), (3) or (5) must—*
 - (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and*
 - (b) contain particulars of the right conferred by section 50.*
38. Whilst the Commissioner notes that TBGS did disclose the non-exempt information it held within 20 working days, it did not inform the complainant that it was relying on section 22 to withhold information until 8 March 2021 – which was the 21st working day after the date of receipt.
39. Furthermore, the Commissioner notes that the eventual refusal notice TBGS issued did not contain details of any public interest test it had carried out, did not inform the complainant of any internal review process it offered and did not make him aware of his right to complain to the Commissioner.
40. The Commissioner therefore finds that TBGS breached section 17 of the FOIA in its handling of the request.

Right of appeal

41. 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

42. 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.
43. 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

Roger Cawthorne
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