

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 31 July 2023

**Public Authority:** Kent County Council

**Address:** Sessions House  
County Hall  
Maidstone  
Kent  
ME14 1XQ

#### **Decision (including any steps ordered)**

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1. The complainant requested various information relating to the 'Kent test' results for 2022. Kent County Council (the Council) provided some information in response to the request but applied section 40(2) of FOIA (personal data) to withhold the rest.
2. The Commissioner's decision is that the exception at section 40(2) of FOIA is not engaged as the withheld information does not comprise personal data.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - The Council must disclose the information withheld under section 40(2) of the FOIA.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. The whole of the complainant's request consisted of nine questions. However, within their complaint to the Commissioner they have only raised concerns about the response to questions one to three, therefore only these questions are listed below.
6. On 21 October 2022, the complainant wrote to the Council and requested information in the following terms:

"With reference to KCC's page on the Kent Tests - ('the Kent test page') - and in particular the section 'What your score means' and KCC's 2022 "Kent Test scores report" ('the report'), I pose the following questions.

Please note that for each of these questions, I do not need to know any individual, identifiable or personal details whatsoever; I am just look for generally information and figures, which can in no way identify individuals, schools or local districts/authorities:

1. With reference to the report, exactly how many children ['X' number] were 'assessed as suitable for grammar', who scored 322 or below in the Kent test?
  2. How many of X failed to meet the pass rate of 108 in: 1; 2; or all 3 of the three subjects (Maths, English and Reasoning)? Please set out figures for 1, 2 and 3 separately.
  3. How many children scored 98 or below in English and were 'assessed as suitable for grammar?'"
7. The Council responded on 9 November 2022, citing section 40(2) of FOIA (personal information) to withhold the information from questions one to three but provided information in response to the other questions.
  8. Following an internal review the Council wrote to the complainant on 9 January 2023, stating that it upheld its original response.

## Scope of the case

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9. On 16 March 2023, the complainant contacted the Commissioner to complain about the application of section 40(2) of FOIA to questions one to three of the request.
10. The following analysis covers whether section 40(2) was cited correctly.

## Reasons for decision

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### Section 40(2) – third party personal data

11. This reasoning covers whether the Council is entitled to rely on section 40(2) (Personal information) of FOIA to refuse to provide the requested information from questions one to three.
12. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester, and where the disclosure of that personal data would be in breach of any of the data protection principles.
13. Section 3(2) of the Data Protection Act 2018 defines personal data as:  
  
    "any information relating to an identified or identifiable living individual."

### The Council's Position

14. The Council pro-actively publishes results for overall scores achieved by pupils for their 'Kent test' results. The Council has confirmed that it is possible that a single pupil, over all the schools included, could be the only one to achieve a particular score.
15. It is therefore possible that, if the Council published individual scores, a single pupil could be identified, even if this was only by family members who may already know the information.
16. Given this, the Council anonymises its published data, grouping it into general categories of male/female and mainstream/other schools. Any score which is obtained by five or fewer pupils is shown as '5 or less' within the results.
17. The Council have applied the same argument to the withheld information in this case, stating that disclosing the information could potentially lead to identification of specific pupils.
18. They also cited the possibility that pupils could be identified by the submission of overlapping requests for 'Kent test' results. However, despite being given the opportunity to provide further information on this point, no examples of such overlapping requests were provided to the Commissioner for consideration.

## **The Commissioner's Decision**

19. The Commissioner has to make a decision based on information available and, despite being given the opportunity to provide further information in relation to overlapping requests, no details of such requests were provided by the Council for consideration.
20. Therefore, having considered the withheld information, the Commissioner is not persuaded that individuals would be identifiable.
21. It is the Commissioner's decision that the withheld information is not personal data and that the Council were not entitled to withhold the information under section 40(2) of FOIA.
22. The Council must now disclose the withheld information.

## Right of appeal

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

24. 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.
25. 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 .....**

**Ben Tomes**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**