



Neutral Citation number: [2023] UKFTT 880 (GRC)

**Case Reference: EA/2021/0346**

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Heard : Determined on the papers**

**Heard on: 12 July 2023  
Decision given on: 19 October 2023**

**Before**

**TRIBUNAL JUDGE JACQUELINE FINDLAY  
TRIBUNAL MEMBER PAUL TAYLOR  
TRIBUNAL MEMBER EMMA YATES**

**Between**

**DEREK BERRY**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

## **Decision**

1. The appeal is dismissed.

## **REASONS**

### **Background and Request**

2. This appeal is brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) against the Commissioner’s Decision Notice dated 21 October 2021 (“the DN”) with reference IC-98459-F4T0 which is a matter of public record.
3. The parties opted for a paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within Rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009, as amended (“the Rules”).

4. In reaching its decision the Tribunal took into account all the evidence before it in the open bundle of 155 pages (A1 to E152) and made findings on the balance of probabilities.
5. The Commissioner applied for the appeal to be struck out on the grounds that there was no reasonable prospect of success under Rule 8(3)(c) of the Rules. The appeal was struck out on 9 March 2022 by a Registrar. The Appellant requested a reconsideration of the decision and a decision was made on 9 March 2022 to set aside the Registrar's decision and refuse the application to strike out the appeal.
6. The full details of the background to this appeal, the Appellant's request for information and the Commissioner's decision are set out in the DN.
7. On 05 February 2021, the Appellant made a FOIA request to The Buckingham Grammar Schools ('TBGS') in the following terms:

*"[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"*

8. On 04 March 2021, TBGS responded and provided all the information to part [1] and some of the information in scope of part [2].
9. The Appellant contacted TBGS on 07 March 2021 explaining that not all the requested information had been disclosed.
10. TBGS responded on 08 March 2021 confirming not all the information requested had been disclosed and sought to rely on section 22 of the FOIA in relation to the undisclosed information.

11. On 10 March 2021, the Appellant requested TBGS conduct an internal review.
12. TGBS sent an outcome of the internal review to the Appellant on 30 March 2021 upholding its position.
13. On 06 April 2021, the Appellant made a complaint to the Commissioner about the way his request had been handled by TBGS. The complaint was assigned the Commissioner's reference IC-98459-F4T0.
14. On 15 September 2021 (D95 to D98) the Commissioner notified the Appellant of the initial view. The Commissioner noted that TBGS had a set timetable for publishing the information in question and had published previous versions of the data. The Commissioner could see no compelling public interest factors which would justify bringing forward the date of publication, the publication timetable appeared reasonable and it was likely that TBGS would be entitled to rely on the exemption.
15. The Appellant did not accept the Commissioner's initial view and asked for a decision notice. He asked the Commissioner to determine whether TBGS publication schedule was fit for purpose.

### **The Decision Notice**

16. On 21 October 2021 the Commissioner issued the DN finding that that the TBGS had provided some information but had relied on section 22 FOIA to withhold the remainder.
17. The Commissioner found that the withheld information engaged section 22 of the FOIA and that public interest favoured maintaining the exemption.
18. The Commissioner noted that TBGS did not issue a refusal notice within 20 working days and therefore breached section 17 of the FOIA.
19. The view of the Commissioner is that it is not for the Commissioner to determine when a public authority 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.
20. On 23 November 2021, the appellant appealed the Commissioner's DN.

### **Legal Framework**

21. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information under section 1(1)(a) of the FOIA and to have that information communicated to him if the public authority holds it under section 1(1)(b) of the FOIA.
22. When determining whether or not the information is held the Commissioner and Tribunal should apply the normal civil standard of proof, on the balance of probabilities.

23. The relevant provision of 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).

24. Section 22 does not provide an absolute exemption. If the exemption applies consideration must be given to whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

25. The powers of the Tribunal in determining this appeal are set out in section 58 of the FOIA as follows:

(1) if on an appeal under section 57 the Tribunal considers-

- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

26. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made.

### **Grounds of Appeal**

27. The Appellant submits that it is unreasonable for TBGS not to publish the requested information as soon as possible. The Appellant submits that his request has been misunderstood.

28. There is a public interest argument for the requested information to be published as soon as possible. By withholding important information there is a significant impact on children's future education outcomes. The Appellant's argument is that the Secondary Transfer Test ("STT") results should be published in the October/November time frame as soon as possible after the test results are disclosed to the candidates in order to determine the validity of the test. The Appellant argued

that full disclosure of the results would allow the local community to obtain the information necessary to ask questions about whether the test was fair, consistent and objective for all candidates.

29. The Appellant argued that the test results information from previous years raises some questions about the variation of the results among different communities in the county. His argument is that by withholding information families are prevented from accessing important information that has an impact on their children's future education outcomes. The Appellant's argument is that early publication would allow parents to make relevant complaints or challenges when mitigation would be possible.
30. The Appellant argues that the feeder school analysis of the test results is important information that should be available to parents, pupils, school staff and other interested parties as a means of determining the validity of the test. The full early disclosure of the results would allow the local community to obtain the information necessary to ask questions about whether the test is fair, consistent and objective for all candidates.
31. The Appellant argues that he seeks disclosure of the scores obtained by pupils taking the STT at the various feeder schools for the grammar schools operated by the public authority in Buckinghamshire because the 'pass mark' each year is not static, instead changing each year according to the scores achieved by the entire cohort.
32. The Appellant argues that the disparity between the scores obtained at different feeder schools could enable parents to challenge the scores as a means of selection. A parent might wish to do so in an appeal concerning an individual child, or there might be more of a more systemic challenge.
33. The Appellant argues that 'out of county' schools, including 'partner schools' of the public authority, achieve better scores. While the data sought would be published eventually this would come after the deadline for appeals had passed and, indeed, after the pupils in question had already started secondary education. Publication would be too late.
34. The Appellant seeks an order that the TBGS be ordered to publish the full results of the STT as soon as possible after the candidates have been informed of their individual results.

### **The Commissioner's Response**

35. The Commissioner submits that the correct decision was made and section 22 of the FOIA was engaged.
36. The information is published routinely and the requested information has now been published. Any analysis that parents might wish to conduct is possible on the basis of the information from previous years.

37. The information that was available at the time of the request was provided to the Appellant. TBGS stated that it was not clear how the information requested would assist parents when considering making an appeal.
38. The Selection Review Panel process looks only at whether a child that did not qualify for a place nevertheless meets the required standard for a grammar school education. Any statistical analysis of existing results does not affect this process.
39. Parents are provided with necessary information relating to their appeal and can request further information if it is helpful. The purpose of the appeals process is to determine whether a child should be offered a place at a particular school and it is not likely that statistical analysis would be relevant to this.
40. In relation to the public interests argument the Appellant's arguments are valid with regard to the point that the data should be published but it is not a persuasive argument that the data should be published at the time of the request.
41. The TBGS has a timetable for publication and the earlier publication of partial information could present a misleading picture and could risk identifying individual.
42. The Commissioner considers it reasonable for TBGS to withhold the requested data until its publication deadline. It is reasonable for TBGS to delay publication of the information until such time as it can publish the full dataset. The TBGS publishes some location-specific data soon after the tests 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. As each pupil will have received their own results there is no advantage to having access to the pupil-level data.
43. The Commissioner correctly concluded that the TBGS had a settled intention to publish the requested information and it was not unreasonable for TBGS to withhold the requested data until its publication deadline and until it can publish the full dataset once it is finalised.
44. The decision of the Commissioner in relation to the public interest balance is correct and is in favour of maintaining the exemption. The Commissioner noted that there were valid arguments as to why the data would be published but there was no convincing argument as to why the raw data needed to be published at the time of the request. The Commissioner accepted the explanation from TBGS that earlier publication of partial information could be damaging and could present a misleading picture and risk identifying individual pupils.
45. The Commissioner submitted that the decision in respect of the public interest balance was correct and that the balance fell in favour of maintaining the exemption.

## **Conclusions**

46. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal applied the legislation and case law as set out above.

47. In order for the exemption in section 22(1) to be engaged a 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 progressed or been completed.
48. The Tribunal found that at the point the request was made the TBGS had a settled intent to publish the information requested. The TBGS does regularly publish datasets relating to school allocations with aggregated provisional datasets published in Autumn and Spring immediately following the test with more detailed data becoming available the following Autumn.
49. The Appellant does not dispute the fact that the TBGS had a settled intention to publish the information requested.
50. The Tribunal found that it is reasonable in all the circumstances that the information should be withheld from disclosure until the date set by TBGS. This was usually in Autumn and Spring immediately following the test with more detailed data being published the following Autumn. At the time of the Request the settled intent was to publish the information in November because of the effects of the Pandemic.
51. The Tribunal found that until pupils had taken up their places the allocation data was fluid and, therefore, publishing incomplete information would be misleading as the information may be incorrect. This could not be reasonable or in the public interest.
52. The Tribunal found that between three and four hundred pupils could be added to the dataset between the provisional and final results.
53. The Tribunal found that there was no prejudice to parents and pupils by the TBGS withholding the requested information until its publication deadline.
54. The Tribunal found that parents would be able to appeal when their children received their own results and would receive some location-specific data soon after the test process was completed. The Tribunal found that it would not assist parents to formulate appeals on the basis of incomplete or misleading information.
55. The Tribunal found that it was not reasonable to publish a single dataset as this might risk the identification of an individual pupil.
56. For the above reasons the Tribunal found that on the balance of probabilities the TBGS was entitled to rely on section 22(1) of the FOIA.
57. The Tribunal found that the balance of public interests favoured maintaining the exemption.
58. In reaching this decision the Tribunal found that the public interest is served by having complete and accurate information published and the public interest is not served by having incomplete and misleading information published.
59. The Tribunal found that the public interest in early disclosure is outweighed by the importance of publishing correct, accurate and full information.

60. The Tribunal found that the TBGS did disclose the non-exempt information it held within 20 working days but did not inform the Appellant that it was relying on section 22 to withhold information until the 21<sup>st</sup> working day after receipt.
61. The refusal notice issued by TBGS did not contain details of any public Interest test it had carried out and did not inform the Appellant of any internal review process it offered and did not make him aware of his right to complain to the Commissioner. The Commissioner was correct to find that TBGS breached section 17 of the FOIA in its handling of the request.
62. The Tribunal found no error in the Commissioner's reasoning within the DN and the Response to the grounds of appeal or any flaws in the exercise of his discretion of the Public Interest test. The Tribunal accepts and adopts the same herein. On careful examination the Tribunal are convinced that the outcome of the DN should stand save as set out below.
63. The Tribunal found that the DN ought properly to have been addressed to:

The Buckinghamshire Grammar Schools on behalf of:

Aylesbury Grammar School  
Aylesbury High School  
Beaconsfield High School  
Burnham Grammar School  
Chesham Grammar School  
Dr Challoner's Grammar School  
Dr Challoner's High School  
John Hampden Grammar School  
Royal Grammar School  
Royal Latin School  
Sir Henry Floyd Grammar School  
Sir William Borlase Grammar School  
Wycombe High School

Signed: Judge J Findlay

Date: 9 October 2023