

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13th July 2017

Public Authority: The Buckinghamshire Grammar Schools (TBGS)
Address: Aylesbury Grammar School
Walton Road, Aylesbury
Buckinghamshire
HP21 7RP

Decision (including any steps ordered)

1. The complainant has requested minutes of TBGS meetings from 2013 onwards. TBGS provided some information but redacted some information under sections 36(2)(c), 41(1), 42 and 43(2) FOIA.
2. The Commissioner's decision is that TBGS correctly applied section 41(1) FOIA to some of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - TBGS must disclose all of the information currently withheld under section 36(2)(c) FOIA. It should also disclose paragraphs 1, 3, 4, 6, 9, 11, 13, 16, 18, 20 and 21 of the currently redacted material within Minute G. It should also disclose all redacted material from Minute C.
4. The public authority 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

5. On 9 November 2016 the complainant requested information of the following description:

"I would be very grateful if you could supply minutes of TBGS meetings from 2013 onwards."

6. On 5 December 2016 TBGS responded. It provided the complainant with the information requested but made redactions under sections 36, 41 and 43 FOIA.
7. The complainant requested an internal review on 7 December 2016 as he was dissatisfied with the redactions applied. TBGS sent the outcome of its internal review on 12 December 2016. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 4 January 2017 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation TBGS additionally applied section 42 FOIA.
10. The Commissioner has considered whether TBGS was correct to apply section 36(2)(c), 41, 42 and 43(2) FOIA to the redacted information.
11. There are 12 sets of minutes falling within the scope of the request. TBGS has labelled them 'A' – 'L' going in date order from oldest to most recent:

A – 20/11/13
B – 5/12/13
C – 15/1/14
D – 19/3/14
E – 14/5/14
F – 26/11/14
G – 21/1/15
H – 25/3/15
I – 25/11/15
J – 20/1/16
K – 9/3/16
L - 27/4/16
12. In relation to Minute C, TBGS has indicated that some of the redacted material can be released and therefore it is no longer applying exemptions to this information. This information should therefore be disclosed to the complainant.

Reasons for decision

Section 36(2)(c)

13. Section 36 of the FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

14. TBGS has applied section 36(2)(c) to redactions made to the minutes labelled A, B, D and E.

15. In determining whether the exemption was correctly engaged by TBGS, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

16. TBGS explained that the qualified person is Mr David Hudson, Chairman of TBGS. The qualified person’s opinion was sought and provided in May 2017. The qualified person’s opinion was that section 36(2)(c) was applicable in this case as disclosure would be likely to prejudice the effective conduct of public affairs. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the qualified person’s opinion was also provided to the Commissioner.

17. TGBS did argue that the qualified person’s opinion may not be necessary in this case under section 36(4), as it considers the redacted information

is statistical information. As the qualified person has provided their opinion in this case confirming the application of section 36(2)(c) FOIA to all of the information withheld under this exemption the Commissioner has based her decision upon this and has not considered whether or not any of that information is statistical.

18. TBGS explained that it is a company set up by the thirteen grammar schools in Buckinghamshire to manage the secondary selection (11+) testing in Buckinghamshire. It went on to say that as a result a substantial amount of meeting time is given over to discussion of the test, how it is constructed and the statistics and methodology used to analyse test data and produce results. Section 36(2)(c) has been applied where the information details the methodology of setting the secondary transfer test (STT) qualification pass mark. It said that this information is highly technical and open to misinterpretation by non-specialists and is also subject to change on an annual basis. Additionally, the clarity and depth of the information as presented in the minutes is insufficient for a third party to have a fully rounded understanding of the information. Based on previous and recent experience it is the qualified person's opinion that if this information was released it would be used negatively to undermine the test in Buckinghamshire. If this happened it would cause significant distress and concern to children and their parents.
19. Whilst the qualified person's opinion was not sought or provided until the Commissioner's investigation had commenced, after viewing the contents of the qualified person's opinion the Commissioner is satisfied that it was based upon the circumstances at the time the request was made in November 2016. The Commissioner considers that the withheld information dates back to late 2013 and early 2014 and reflects the methodology of setting the STT qualification mark at that time. As this dates back 2 ½ to 3 years at the time of the request the Commissioner considers that circumstances will have moved on from this time. TBGS has itself explained that it is subject to change on an annual basis. However having said this, as this methodology would need to be updated on an annual basis following late 2013/early 2014, disclosure could have some impact on future year's methodology as it could be said to give some indication of the types of approach that could be taken looking back on how it has been done previously. Based upon this, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore the exemption was correctly engaged.
20. As the Commissioner has decided that the exemption is engaged, she has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

21. TBGS provided the following public interest arguments in favour of disclosure:

- ICO guidance is that when a request for information is received, responding as fully as possible to the request is the favoured approach.
- As public money is being spent, there is a public interest in showing openness and transparency on the matter.
- The STT has a significant impact on the lives of many families.

Public interest arguments in favour of maintaining the exemption

22. TBGS provided the following public interest arguments in favour of maintaining the exemption:

- There is a concern that the release of this information could interfere with the integrity of the test.
- The information would be likely to be misunderstood which could lead to significant anxiety amongst parents and their children.

Balance of the public interest arguments

23. The withheld information contains the methodology behind setting the STT qualification mark. The Commissioner has first considered the arguments in favour of disclosure and accepts that they carry weight in that disclosure would provide transparency and accountability in relation to the spending of public funds and would increase understanding and the reasoning behind the methodology which would have a significant impact upon families within the area who may have had children who undertook the tests back in 2013 and subsequently.

24. Turning now to the case for withholding the information, the arguments for maintaining the exemption focus on the fact that disclosure would be likely to prejudice the integrity of the test and that without technical understanding the withheld information is open to misinterpretation which could cause distress to parents and children involved in the testing process.

25. TBGS's argument that disclosure is likely to undermine the testing process in Buckinghamshire is strongest where the redacted information is still live and being relied upon. In this case, the redacted information dates back to late 2013/early 2014 and whilst the

Commissioner would not conclude that the methodology has absolutely no bearing upon discussions going forward to 2016, TBGS itself has said itself that the methodology is subject to annual change.

26. As circumstances will have moved on since 2013 it is unlikely that the exact same methodology will be used year on year and therefore the methodology relied upon in late 2013/early 2014 is unlikely to be relied upon in its entirety 2 or 3 years later. As acknowledged above that is not to say that it wouldn't give some form of indication as to how the methodology has worked previously and therefore some of this may be relevant in the future but as the impact is less direct given the lapse of time, the weight given to this public interest argument is reduced for this reason.
27. The Commissioner has also considered the argument that the redacted information is likely to be misunderstood which could cause anxiety to parents and children involved in the testing process. Having considered the information withheld under section 36(2)(c) the Commissioner does not consider it to be so complex that the public would have no comprehension of its meaning without technical expertise. Furthermore TBGS is able to provide any further explanation it deems appropriate to aid in understanding and reduce misinterpretation should this information be disclosed.
28. The Commissioner has weighed these arguments and acknowledges there is a strong public interest in disclosure of information which would promote openness and transparency in relation to the spending of public funds. The Commissioner recognises that disclosing any information which sheds light on the process will be in the public interest in this case, particularly for the local population who may have been involved in the testing process in this area.
29. Balanced against that the Commissioner has to accept there is some weight to the argument that disclosure is likely to undermine the testing process in Buckinghamshire. However given the fact that the redacted information dates back to 2013, this significantly reduces the weight attributed to this argument.
30. The Commissioner therefore considers that the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure in this case.

Section 41

31. The section 41 exemption has been applied to redactions in the minutes labelled B-C and F-K. In relation to Minute B there are redactions made under section 36(2)(c) as well as a redaction made under section 41 FOIA to different information within that document.
32. Section 41(1) of the FOIA states that:

"Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and
- b) the disclosure of the information to the public (otherwise that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Was the information obtained from another person?

- 33. In relation to Minutes B, F, I and L TBGS explained that the redactions under section 41 have been applied to information provided by TBGS' test provider, Centre for Evaluation and Monitoring (CEM) at the University of Durham. The information in Minutes B, F, I and L relates to annual reports provided by CEM to TBGS relating to detailed information about the construction and performance of the 11+ tests.
- 34. Upon viewing the redactions made to Minutes B, F, I and L the Commissioner is satisfied that it does constitute information provided to TNGS by CEM. The requirement of section 41(1)(a) is therefore satisfied in relation to the redactions made to these sets of Minutes under this exemption.
- 35. In relation to Minute C TBGS argued that the information relates to a confidential exchange of views between public bodies. The Commissioner considers that the redacted information contains input from representatives of TBGS and does not therefore contain information obtained from a third party. This information should therefore be disclosed to the complainant as it does not engage section 41 and no other exemptions have been applied to this information.
- 36. In relation to Minute G, TBGS explained that the information relates to a confidential exchange of views between public bodies (in this case TBGS, an employee of Buckinghamshire County Council (BCC) and an elected Councillor). The information discussed was communicated in circumstances importing an obligation of confidence so that a frank and open discussion could take place.
- 37. After viewing the redacted information, the Commissioner does not consider that it was all obtained from another person. Of the 24 redacted paragraphs, the Commissioner considers that the following paragraphs contain information obtained from another person:

2, 5, 7, 8, 10, 12, 14, 15, 17, 19, 22, 23 and 24

The Commissioner considers that the other paragraphs contain input from representatives of TBGS and do not therefore contain information obtained from a third party.

38. The redactions to the following paragraphs of Minute G do not therefore engage the section 41 exemption and should be disclosed (no other exemptions have been applied to Minute G):

1, 3, 4, 6, 9, 11, 13, 16, 18, 20 and 21

39. In relation to Minute J, TBGS explained that the information redacted here was provided in confidence by BCC. The information about costs for Bucks New University was previously provided in confidence to BCC but shared with TBGS as it would ultimately be a cost borne by TBGS.

40. Upon viewing the redactions made to Minute J, the Commissioner is satisfied that it does constitute costing information provided to the TBGS by BCC. The requirement of section 41(1)(a) is therefore satisfied in relation to the redactions to Minute J.

41. TBGS explained that the redaction made to Minute K relates to pricing information provided by the retained lawyers to TBGS.

42. Upon viewing the redaction made to Minute K, the Commissioner is satisfied that it does constitute pricing information provided to the TBGS by its retained lawyers. The requirement of section 41(1)(a) is therefore satisfied in relation to the redaction to Minute K.

43. As the Commissioner is satisfied that the requirement of section 41(1)(a) is satisfied in relation to all redactions apart from those specified at paragraphs 35 and 38 above within Minutes C and G, she has gone on to consider the remaining requirements of section 41 FOIA.

Would disclosure constitute an actionable breach of confidence?

44. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider 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.

Does the information have the necessary quality of confidence?

45. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
46. The Commissioner does not consider that the information that has been withheld under section 41 FOIA has been put into the public domain and furthermore she does not consider that this information could be seen as is trivial.
47. The information redacted from the minutes under section 41 FOIA does therefore have the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

48. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
49. In relation to Minutes B, F, I and L TBGS said that the information is clearly marked as confidential and for circulation to TBGS only.
50. In relation to Minute G it said that the information discussed was communicated in circumstances importing an obligation of confidence so that a frank and open discussion could take place.
51. In relation to Minute J, it said that the information about costs for Bucks New University was previously provided in confidence to BCC but shared with TBGS under the same obligation.
52. In relation to Minute K, it explained that the document which contains this information is headed:

STRICTLY CONFIDENTIAL AND LEGALLY PRIVILEGED LEGAL ADVICE

Commercially confidential information - exempt from disclosure pursuant to sections 41, 42 and 43 of the Freedom of Information Act 2000. Our duty of care is to our client named above and any third party should take independent legal advice. The sharing of this advice with any third party may result in the loss of its legally privileged nature.

53. The Commissioner considers that at the very least there was an implicit obligation of confidence when the information was shared given its nature

and the circumstances under which it was provided. In relation to Minute K the obligation of confidence was clearly explicit.

Detriment to the confider

54. In relation to Minutes B, F, I and L TBGS explained that the redacted information is the intellectual property of CEM and they have also made clear to TBGS that releasing it would affect their commercial interests. This has previously been challenged via a complaint made about CEM to the Commissioner. The Commissioner's ruling upheld the application of section 43(2) of the FOIA to this information (see case FS50624975)¹.
55. In relation to Minutes G and J TBGS has said that disclosure would be detrimental to BCC but it has not explained why. However given that some of that information was shared with BCC in confidence which it in turn shared with TBGS the Commissioner can see potential for detriment to be caused to BCC's relationship with other external bodies.
56. In relation to Minute K, TBGS did not explain why it considered any detriment would be caused to the confider (its lawyers). However as the redacted information is subject to legal professional privilege (as shared between professional legal adviser and client) both parties would reasonably expect that this would remain confidential and therefore the detriment that would be caused is the breach of this reasonably held expectation.
57. On this basis the Commissioner is satisfied that disclosure would cause a detriment to the confiders, that is CEM, BCC and TBGS lawyers.

Is there a public interest defence for disclosure?

58. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether TBGS could successfully rely on such a public interest defence to an action for breach of confidence in this case.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624734/fs50624975.pdf>

59. 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.
60. The Commissioner recognises 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. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. 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.
61. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant; and that TBGS would not have a public interest defence for breaching its duty of confidence.
62. Having considered all the circumstances of this case, and the information withheld under section 41 of the FOIA, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
63. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA (apart from the redactions made to Minutes C and G identified at paragraphs 35 and 38 of this Notice).
64. As the Commissioner has found section 41 of the FOIA to be engaged to all information it has been applied to (with the exception of the redactions made to Minutes C and G identified at paragraphs 35 and 38 of this Notice but in relation to which no other exemptions have been applied), she has not gone on to consider the application of section 43(2) or 42 of the FOIA in this case.

Right of appeal

65. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. 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.
67. 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

Gemma Garvey
Senior Case Officer

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