

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2024

Public Authority: The Governing Body of King Edward VI Academy Trust Birmingham

Address: Foundation Office
Edgbaston Park Road
Birmingham B15 2UD

Decision (including any steps ordered)

1. The complainant requested information about an 11+ test. King Edward VI Academy Trust ('the Trust') disclosed some information under the data protection legislation. It has denied holding the remaining information for its own purposes but also withheld it under section 43(2) of FOIA, which concerns commercial interests.
2. The Commissioner's decision is that under section 3(2)(a) of FOIA the Trust holds the information to which it applied section 43(2) and correctly applied that exemption to it.
3. It's not necessary for the Trust to take any corrective steps.

Request and response

4. The complainant made the following information request to the Trust on 4 October 2023:
 - "1. 11+ exam schedule – 16th Sept 23, PM session
 2. 11+ exam details (noting number of questions per section and time allocation) – not requesting the exam, just detailed overview

3. 11+ exam invigilator record of when each section started and finished. (This information is available as you noted on your email dated 3rd Oct 23). As per your point 3, the FOIA covers All recorded information held. Includes all recorded information (printed documents, written notes/documents, computer files, letters, emails, photographs and sound or video recording).
4. CCTV recording for 16th Sept, time 15.45-16.45 for [redacted]"
5. The Trust disclosed the CCTV recording requested in part 4 under the data protection legislation. It refused the remaining three parts of the request under section 43(2) of FOIA. The Trust also advised that this information didn't "belong" to the Trust because it belongs to GL Assessment, an assessment provider.

Reasons for decision

6. This reasoning covers whether the Trust holds the information requested in parts 1-3 of the request under FOIA and, if it does, whether it can withhold that information under section 43(2) of FOIA.

Section 3 – public authorities

7. Under section 1(1)(a) of FOIA a public authority must confirm whether it holds information an applicant has requested.
8. Section 3 of FOIA sets out the circumstances in which information is considered to be 'held' for the purposes of FOIA. Section 3(2)(a) states that a public authority holds information if it's held by the authority, "otherwise than on behalf of another person."
9. The Commissioner interprets the phrase "otherwise than on behalf of another person" to mean that a public authority holds information for the purposes of FOIA if it's held to any extent for its own purposes.
10. In correspondence to the Trust the Commissioner asked it to explain whether it held the information for any of its own purposes and directed it to his relevant published guidance on whether information is held for the purposes of FOIA. In its submission the Trust advised only that, "The Trust does not hold the information requested in parts 1-3 of the request for its own purpose. This information is owned by a third party, GL Assessment..."
11. Although a public authority can only apply a FOIA exemption to information it actually holds, the Trust went on to discuss why the information was exempt under section 43(2).

12. In the absence of an adequate explanation from the Trust as to why it doesn't hold, for any of its own purposes, information about a test its own students took, the Commissioner finds that it does hold this information. He's gone on to consider whether the Trust can withhold the information under section 43(2) of FOIA.

Section 43 – commercial interests

13. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
14. The information is an 11+ test schedule on a particular date and time, broad details about the test (number of questions in each section, time allocation for each section) and the associated test invigilator record.
15. The Trust advised the complainant that disclosing the information would "reveal valuable information about the test's structure which would undermine its integrity." In their request for an internal review the complainant said that this reasoning didn't clearly relate to commercial interests, and the Commissioner agrees.
16. In his correspondence to the Trust, the Commissioner asked it to respond to questions relating to commercial matters, specifically. In its submission to him, the Trust has advised that GL Assessment has raised concerns about releasing this information because its commercial rivals would benefit from it.
17. The Trust has gone on to explain that there are several companies that provide practice materials to support preparation for 11+ tests and who claim to offer materials that are specifically targeted to various GL Assessment tests. GL Assessment does not have a relationship with any of these companies. GL Assessment does not endorse their materials, nor has it provided them with any information about the structure or content of the test, including the number of questions in each section. GL Assessment provides limited free familiarisation materials to support children whose parents and caregivers can't afford to pay for tuition, and also offers a practice test. However, these materials are generic in structure – they do not claim to relate to the test model used by any of GL's customers and they do not use the full range of question types that are used in live tests.
18. The Trust says it has assessed the following risks posed to GL Assessment's commercial interests from disclosing the information:
 - 'Reliability' is a measure used in the field of assessment to refer to how effective a test is at accurately assessing whatever it is the test is supposed to be testing. If a test is reliable, it will produce

consistent results. GL Assessment has developed its 11+ tests over many years to ensure they are as reliable as possible. GL Assessment has been in the market for decades and has developed its test over this time. This is costly and takes time. Therefore, GL Assessment does not routinely release specific information about its 11+ tests (including their length and content, which determine their reliability) and nor have its direct competitors released this kind of information about their own tests. This is because releasing this information would give competitors a clear commercial advantage as it would make it possible for them to create and market a test themselves that benefits from the test reliability developed by GL Assessment over a long period of time.

- GL Assessment should be afforded commercial confidentiality of its proprietary intellectual property (ie the contents, structure, and reliability of its tests), and afforded the same benefit of this as other competitors would be so that it is not put at a commercial disadvantage.
 - In addition to the detriment that would be caused to GL Assessment by its competitors and potential competitors being given a commercial advantage, GL Assessment has a genuine interest in keeping details about the tests (ie the nature and number of questions) confidential.
 - Further, GL Assessment's customers (ie schools and local authorities) would not want to engage a test provider whose tests are susceptible to tutoring due to information about the nature and content of the tests becoming public information. This would give an advantage to families with the financial standing to afford tutoring.
19. The Commissioner is satisfied, first, that the harm the University envisages relates to commercial interests; those of GL Assessment.
20. Second the Commissioner accepts that a causal link exists between disclosing the information and commercial prejudice. The information is somewhat generic and, as the complainant has noted, the test in question has now been concluded and the results have been given. However, the Commissioner still considers that disclosing the information would be likely to give GL Assessment's competitors an insight into how it runs its 11+ tests and its competitors could benefit from test reliability that GL Assessment has developed. There are also companies who develop practice materials specific to GL Assessment's tests. Disclosing the information could also give the same insight to those companies. They could refine their practice materials as a result of

that insight, to the extent that the materials erode the robustness of GL Assessment's future tests and makes the tests less attractive to GL Assessment's customers.

21. Finally, in the absence of clarity on whether the Trust considers the envisioned prejudice would happen or would be likely to happen, the Commissioner will accept the lower threshold; that the envisioned prejudice would be likely to happen. The Commissioner's decision is therefore that the Trust was entitled to apply section 43(2) to the withheld information, and he'll go on to consider the associated public interest test.

Public interest test

22. The Trust considers that the information is very niche to a particular test and therefore only a small group of people at the time [of the test] would have gained anything from the information. The Trust says that the only parties that would have gained anything from releasing the information would have been entrance test candidates (which would have compromised the integrity of the entrance test), or GL Assessment's competitors.
23. The Commissioner acknowledges that there's a general public interest in public authorities demonstrating that they're open and transparent. The Commissioner also acknowledges that the information is of interest to the complainant for the reason they gave in their complaint to him. However, he considers that the requested information has very little wider public interest. There's much more public interest in GL Assessment being able to compete fairly with its competitors and in education institutions being able to choose robust tests from a range of strongly performing providers.
24. The Commissioner is therefore satisfied that the public interest favours withholding the information in this case.

Right of appeal

25. 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

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
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