

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 18 May 2009

**Public Authority:** Buckinghamshire County Council  
**Address:** County Hall  
Walton Street  
Aylesbury  
Buckinghamshire  
HP20 1UU

### Summary

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The complainants requested data and studies/reports/analyses about the operation of the 11+ system in Buckinghamshire schools. The Council provided some information but refused to provide raw data on the grounds that it was third party personal information, the release of which would contravene the Data Protection Act (section 40(2)). It also provided some reports/analyses, but failed to confirm or deny whether or not it held any other similar information. The Commissioner decided that the Council was not entitled to rely on section 40(2) to withhold the requested data, where there were more than 5 pupils taking the 11+ test at the school. He also found that the Council did not hold any other studies/reports/analyses which fell within the terms of the information request. However, he found that the Council had committed a number of procedural errors, and was in breach of sections 1(1)(a), and 10(1), of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision. A related complaint is being dealt with under case reference FS50165274.

### The Request

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2. On 5 January 2007 the complainants made the following request for information to Buckinghamshire County Council ('the Council'):

"I would like to make a request for information related to last years 11+ tests (2006) i.e. current year 6. The information I require includes a school by school breakdown showing

- Name of School
- Type of School – Independent or State
- Number of pupils taking the test
- Distribution of marks obtained
- Number of children opting out of the test
- Order of Suitability data.

Please note I am requesting the raw data in electronic form in order to perform analysis and correlations etc. "

3. Also on 5 January 2007, the complainants also requested studies, reports and statistical analyses concerning any aspect of 11+ results, appeals etc, which had either been prepared by the Council, or made available to the Council from some other party.

#### **Raw Data**

4. In its response of 29 January 2007 the Council sought clarification of the information sought by the complainants. As regards the raw data requested, it explained that, as the complainants were aware from previous data it had provided to them, where the Council felt there was a risk of identifying an individual child it would not provide information. It would therefore not provide precise data where numbers would be less than 5.
5. The Council also explained that it did not hold the 'independent / state' field as requested and the information could not be provided in this form, any data set, it explained would reflect its standard way of reporting schools on a district basis or as 'Partner' schools and 'Out area' schools – each of which is a mix of independent and maintained schools. The Council also asked the complainants to clarify what was meant by 'distribution of marks obtained' as the base data is held on a child by child basis and this has to be amalgamated to a school-by-school basis before providing to anyone. The Council explained that each tested child has a specific score and information could be provided on the scores achieved in a school as a frequency table, but if you break down the data in this way it has to be adjusted to indicate less than five rather than the specific figure. The Council further stated that amalgamating the marks into bands would require the manipulation of the raw data and would take officer time.
6. The Council also sought clarification as to what was meant by 'order of suitability data' stating that there are three items of information to which this might relate (a) the head teachers academic recommendation, (b) attitude to work and (c) the order of suitability placement.
7. The Council went on to explain the testing was not then complete, and that it continued to test children until late August. It said that it was not the Council's practice to provide summary data part way through an admissions round, and a

standard set of data, which it offered to provide to the complainants would be produced in early September once the testing was completed. This data would contain the number of children by gender in Buckinghamshire maintained primary schools who (i) Registered to take the 11+ test, (ii) withdrew from the 11+ test, (iii) qualified for a grammar school place by achieving a VRTS score of 121 or more and (iv) qualified for a grammar school place through a successful appeal. The Council said that it was relying on the exemption in section 22 of the Act ('Information intended for future publication') to withhold this information.

### Modified request

8. On 3 February 2007 the complainants acknowledged that the Council stored data on a child by child basis rather than school by school basis. In light of this they modified their request for the raw data, asking:

“the data requested is, for each 11+ test taken,

School, VRTS Score, Order of Suitability Rank, Attitude to work, Academic Recommendation”

The complainant's also asked the Council to clarify exactly what data would be published in September and whether this data would be on a school by school basis or results by area.

9. On 13 February 2007 the Council acknowledged the information request, saying that the 20 working day clock stops when a public authority seeks clarification of a request.
10. On 26 February 2007 the Council responded, confirming that it held the data in the modified data request, but it declined to provide the information. The Council said that the information was available in raw form and clearly identified individual children, which it was not obliged to release under section 40(2) of the Act, in that it was the personal information of third parties. It said that, under its duty to advise and assist, it had considered whether the information could be anonymised. The Council concluded that because of the level of detail being requested it would involve a great deal of work to anonymise the data and it was not obliged to do so as this would involve creating or preparing information. The Council cited a decision of the Commissioner in support of this approach (ref: FS50093734). It further said that, even if the names of the children could be easily removed, information in the detail sought would still be personal information covered by section 40(2). The Council relied on a decision of the Scottish Information Commissioner (ref: 021/2005) which made it clear that, where small numbers are involved and individuals could be identified, data must not be released in raw data format. It said, however, that that decision had stated that an attempt should be made to release information at a higher level of aggregation, and that is what would be published in September. The Council clarified that the information due to be published in September was on a school by school basis subject to the less than five provision it had already made the complainant aware of.

11. On 1 March 2007 the complainants asked the Council whether its reply of 26 February 2007 was the official review of its decision, disputing its conclusions that section 40(2) applied to the data that they sought, saying that they had not asked for children's names, and the relevance of the Scottish Information Commissioner's decision and the decision in FS50093734 to their information request. They said that they believed that there was no significant risk of identifying any children, and that the information due to be released in September was not the data they had requested.
12. On 13 March 2007 the Council acknowledged the comments made in the email of 1 March, and said that it had been passed on to the Council's complaints team for resolution. The Council did not respond further.
13. On 25 September 2007 the Council provided the complainants with the standard set of data mentioned in its letter of 29 January 2007 (see paragraph 4 above).

#### **Studies/Reports/analyses etc**

14. As to the requests for studies, reports or statistical analyses etc, on 29 January 2007 the Council said that this was a very broad open-ended request, and the complainants needed to be more specific before it could respond. The Council nevertheless provided a web link that it hoped would be helpful.
15. On 1 February 2007 the complainants responded saying that they understood the Council to mean that there were too many studies to be able to pinpoint something suitable, and asked, if that were the case, for the Council to provide the categories, and they would try to make a more specific request. They said that the link provided by the Council did not relate to 11 + results.
16. On 5 February 2007 the complainants again contacted the Council, saying that what they required were: the most recent reports relating to analysis of 11+ data; and quantitative (e.g. statistical) as well as qualitative analysis of 11+ data, including results from appeals. The complainants asked for assistance in narrowing down their request, if this was still too broad.
17. On 26 February 2007 the Council said the information to be published in September **is** the major analysis of the data, but it referred the complainants to a number of websites that contained other reports that were available.
18. On 1 March 2007 the complainants reminded the Council that their request referred to reports/analyses that already existed; the data to be released in September was not the analysis of data that had been requested. They said that the websites were links to minutes of meetings, not analyses. They contended that 'somebody must be looking at the data and reporting on what's working and what isn't' and asked the Council whether or not it had such information.
19. On 13 March 2007 the Council said that the links it had previously sent included sub-links to reports/analyses. It also provided the analysis of the 2006 intake (plus 2004 and 2005 for comparison) and Local Authority Admissions Offers 2007.

20. On 14 March 2007 the complainants said that the data in the form of spreadsheets now provided was not an analysis; that this type of raw data had been requested separately, but the interpretation of that data with statistical correlations and qualitative analyses is what they were seeking, together with conclusions and recommendations. They asked, as examples; whether different categories of children were more successful at 11+ than others ('categories' meaning where the child lives, ethnic background, sex, type of school etc); if there was a correlation between 11+ score and GCSE achievement; whether success at appeals correlated to Heads' recommendations or the actual score achieved.
21. The Council responded on 10 April 2007, maintaining that the information it had provided was reports and analyses. It explained that it did not have the resources available to scrutinise the data, do annual checks on Head teachers' recommendations etc as the complainants believed. It could, and did, do ad-hoc searches for particular information in response to specific questions from parents. It advised the complainants to submit specific questions and provided a link to the Schools Admission Forum. The Council responded to the examples given by the complainant. As regards the correlation information sought, it said that the last time it did any work on matching VR11+ scores was back in 2005 "using 1997 VR scores matched against 2002 GCSE outcomes. The correlation between VR11+ and GCSE capped Points score was 0.77". The Council said that the guidance on the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 states that "the right to access information needs to be balanced by the need of public authorities to continue to carry out their other duties". It said that, accordingly, it reserved the right to refuse future requests where: "1) the time taken on a request, and aggregated previous requests on the same or a similar manner takes longer than 18 hours (the appropriate limit); 2) the request is a repeated request or covers ground previously responded to; 3) the request serves no serious purpose or value (taking note of a recent Local Government Ombudsman (LGO) decision)".
22. On 11 April 2007 the complainants said that the links were to minutes of meetings and not reports/analysis and that it was most unhelpful to provide them. They asked for an explanation of what was meant by "The correlation between VR and GCSE capped points score was 0.77", and where was the report from which the correlation information had been taken, which was what they had requested. They said that providing them with information that they had not requested did not count towards the 18 hours. Regarding their request to know if different categories of children were more successful at 11+ than others, they asked the Council to confirm or deny if any reports or analyses existed, and if so to provide them.
23. The Council responded on 13 April 2007. It said that it had on more than one occasion sought to clarify the complainants' requests; that when the complainants had specified exactly what was required, it had responded; "vague requests for unspecified reports/analyses are not acceptable". Amongst other things, the Council also said that it had already provided them with information about trends and patterns in the 11 + results; it explained the figure of .77, and said that the

complainant had not asked for the report from which the correlation had come. It said that it had already provided detailed information about comparative performance at 11+ of boys and girls, and of children from ethnic minorities, and reproduced the links. It said that it had provided the complainants with a detailed school by school analysis of results for 2006 admissions (which it reattached), which includes a breakdown by area, and it would provide the figures for 2007 by the end of September 2007.

24. On 17 April 2007 the complainants again asked the Council for confirmation that (other than the report on correlations that it was still awaiting, and an analysis based on ethnic grounds that the Council had already provided) no further such reports, (i.e. any study or scrutiny of 11+ results that provides an understanding of what works well and what does not) existed. The complainants also asked the Council to clarify which was the information about trends or patterns in the 11+ results that the Council said it had provided, as they were unable to find it.
25. On 2 May 2007 the Council said that it had fulfilled its obligations under the Act (having taken well beyond 18 hours in responding so far); the correlation data was calculated by data analysts in response to a request by the Head of Service and had not been reported to any formal or official body. The Council said it had sent the complainants tables in which data had been selected from data it held on some 8500 pupils presented in an accessible form, and this the Council regarded as analysis.)

## The Investigation

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### Scope of the case

26. As to the request for 11+ data, on 30 April 2007 the complainants contacted the Commissioner to complain that the Council had not responded to their review request of 1 March 2007. On 21 May 2007 the Commissioner prompted the Council, but the complainants wrote to the Commissioner on 27 June 2007 complaining that the Council had still not replied.
27. As to the request for studies, reports, analyses, etc, on 4 July 2007 the Council's Complaints Officer replied to the complainants' complaint of 25 May 2007, without specifically commenting on the points raised by the complainants. On 7 July 2007 the complainants wrote to the Commissioner expressing dissatisfaction with the Council's response, and asking the Commissioner to look into the matters raised in the 25 May complaint.
28. In addition to the way in which the Council has handled the complainants' information requests, the Commissioner considers that the following issues are within scope:

As regards the raw data requested:

- (i) the Council's application of section 40(2).



As regards the request for studies, reports and analyses:

- (i) the Council's failure to provide the complainants with a piece of information that had actually been identified and requested (this relates to the complainants' request for the report containing the correlation data mentioned in the Councils' response of 10 April 2007);
  - (ii) its failure to clarify the information about trends and patterns in the 11+ results that it said it had provided to the complainants but the complainants are unable to trace; and
  - (iii) its failure to confirm or deny the existence of other relevant reports.
29. The complainants have also raised the issue of the Council's failure to reply to their email of 1 March 2007, which equates to a request to the Council to review its refusal of 26 February 2007 in relation to their modified information request of 5 February 2007 (paragraph 14 above). A public authority is not required by the Act to carry out an internal review. Rather, the only statutory requirement in relation to such a review is set out in section 17(7)(a), which provides that a refusal notice issued under sections 17(1), (3) and (5) must contain details of any procedures 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. This issue is addressed in the 'Other Matters' section of this Notice.

## Chronology

30. On 4 December 2008 the Commissioner contacted the complainants setting out the issues that fell within the scope of the investigation. Also on that date, the Commissioner contacted the Council, seeking its relevant papers and comments.
31. In relation to the request for raw data, the Commissioner asked whether the Council had responded to the complainant's review request of 1 March 2007. The Commissioner also asked the Council for a sample of the information to which it had applied the exemption in section 40(2).
32. As to the requests for studies, reports or statistical analyses, the Commissioner asked the Council whether it was prepared to release to the complainant the report from which the correlation data came; what information it had provided to the complainants about trends and patterns in the 11+ results, and when it was sent; for confirmation or denial that there were any further reports that would fall within the complainants' information requests; if it was relying on the Fees regulations to refuse information, the Commissioner would need to see details of the processes and costs for locating and retrieving the information. The Commissioner also asked to see the correlation data mentioned in the Council's email of 2 May 2007.
33. On 8 December 2008 the Council replied. It had not considered the complainants' email of 1 March 2007 to be a review request, and had not treated it as such (see 'Other Matters' below). It provided the Commissioner with an example of the type of information to which it believed the exemption in section 40(2) applied.

34. As to the correlation data, the Council said that the Commissioner had misinterpreted the comment, that the correlation data was calculated by data analysts in response to a request by the Head of Service and had not been reported to any formal or official body, as meaning that there is an 'unofficial' report based on this work. The Council said that this is not the case; it was not 'reported' at all. It did not need to be, as the figure was self-explanatory to the Head of Service. The Council provided a copy of the information that it had sent to the complainants on 13 March 2007 and 13 April 2007 which it believed had illustrated trends and patterns. As to whether or not the Council held any further studies/reports/analyses of the type sought by the complainants, the Council said that, in the absence of a specific query/question from the complainants, it was not possible to confirm or deny whether it held an unspecified report. The Council said that it had not technically refused a request under the section 12 provisions (the link to the Fees Regulations) and thus did not intend to provide detailed costings.

## Analysis

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35. The full text of the relevant legislation can be found in the Legal Annex to this Decision Notice. However, the salient points are set out below.

## Findings of Fact

36. The raw data being withheld by the council under section 40(2) is, for each 11+ test taken the school, VTRS Score, Order of Suitability Rank, Attitude to work, Academic Recommendation.
37. The Council published, in September 2007, statistics of the number of children by gender in Buckinghamshire schools who (i) registered to take the 11+ tests, (ii) withdrew from the 11+ test, (iii) qualified for a grammar school place by achieving a VTRS score of 121 or more, and (iv) qualified for a grammar school place through a successful appeal.

## Procedural matters

### **Section 1(1) and (6)(General right of access) and Section 10(1)(Time for compliance with request) and Section 17(1) (Refusal of request)**

38. Section 1(1) of the Act provides that any person making a request for information to a public authority is entitled to (a) be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him. The duty of a public authority to comply with subsection 1(1)(a) is referred to as "the duty to confirm or deny" (section 1(6) of the Act).
39. Under section 10(1), a public authority must inform a person making a request for information whether it holds the information requested, and communicate that



information to the applicant, no later than the twentieth working day following the date of receipt.

40. Under section 17(1) of the Act, a public authority that is to any extent relying on a claim that any information is exempt information must, within the time limit set out in section 10(1), give the applicant a notice that states that fact, specifies the exemption in question, and states (if not otherwise apparent) why the exemption applies. Under section 17(7), a notice under subsection (1) must contain details of a public authority's complaints procedure (where there is one) and particulars of the right to complain to the Commissioner.
41. With regard to the request for 11+ data, the complainants first sought information on 5 January 2007. On 29 January 2007 the Council sought clarification. On 5 February 2007 the complainants provided a modified request, to which the Council responded on 26 February 2007, declining to provide the information, citing the exemption in section 40(2) of the Act. The Commissioner considers that, since the Council responded to the modified information request within twenty working days, provided details of the Council's complaints procedure and the right to complain to the Commissioner, it has not breached sections 1(1), 10(1) and 17(1) and (7) of the Act

### **Studies / analyses / reports**

42. As to the request for the report from which the correlation data came, from the Council's response to the Commissioner it appears that the data in question did not derive from a report. The data already provided to the complainant in the Council's email of 10 April 2007 was requested by the Head of Service and there was no such report. The Council said that there did not need to be, as the data was self-explanatory to the Head of Service who had commissioned it. The Commissioner accepts that there is no report containing correlation data but the Council was in breach of sections 1(1)(a) and 10(1) in failing to notify the complainants categorically of that fact within 20 working days.
43. On a number of occasions the complainants have asked the Council to confirm that, other than the information it has provided to them, there are no studies/reports/analyses of the type that they seek (such as any study or scrutiny of 11+ results that provides an understanding of what works well and what does not). In correspondence with the Commissioner, the Council said that it could not see how it could reasonably confirm or deny whether it held unspecified/unknown reports. It had attempted on several occasions to seek clarification on what the complainants wanted, and where clarification was received it had responded with information or confirmation that it did not hold information.
44. At the heart of this aspect of the complaint lies a disagreement as to what is meant by 'analysis'. The Council has provided the complainants with information that it believes to fall within that category, much of which is statistical analysis rather than report-based analysis which is what the complainants appear to be seeking. An example of this is the information provided to the complainants by the Council on 13 March 2007 and 13 April 2007 (described as 'analysis of pupils taking the 11+ test in order to transfer to Bucks maintained secondary schools' in

a certain period) which it regards as illustrating trends and patterns, but the complainants do not. The Commissioner accepts that this information has been provided to the complainants.

45. The Commissioner notes that, in its email of 10 April 2007, the Council told the complainants that it did not have the resources available to scrutinise data, do annual checks on Head teachers' recommendations etc. as the complainants believed; it could, and did, do ad-hoc searches for particular information in response to specific questions from parents. It told the Commissioner that, while information was held on its database for the purposes of the Act, it was not held in 'report' format; it was only when the Council received specific questions that it could confirm or deny whether it held the information. Having considered the Councils' comments, the Commissioner finds that, on balance of probability, the Council does not hold any further studies/reports/analyses of the type sought by the complainants. The Council is, however, in breach of sections 1(1)(a) and 10(1) in failing to either confirm or deny that it held the information within twenty working days of receipt of the information request.

### **Section 16 – Duty to provide advice and assistance**

46. Under section 16(1) a public authority has a duty to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who have made information requests from it. The complainants contend that the Council has not complied with that obligation in relation to their request for studies/reports/analyses, in that it would only provide information if they specified exactly what was wanted - stating that "vague" requests were not acceptable; would not offer the complainants any subcategories to allow them to refine the request; and although the complainants had stated several times what they meant by the term 'analysis', the Council it seemed to regard this an invalid request because this was not the way the Council used the term,
47. The Commissioner has seen that, on a number of occasions since they first sought that information, the complainants have asked for the Council's advice as to precisely what information it held that would fall within the scope of their information request. The Council, for its part, has, on a number of occasions, asked the complainants to clarify the precise nature of the information sought, and has provided a number of weblinks and other information that it believed would be of help to the complainants. It is clear from the nature of the correspondence exchanged that the position of each side has become entrenched, caused in part by the complainants' inability to make a focussed information request because they did not know what reports etc. the Council hold, and the Council's inability to provide information where the request made was too broad.
48. While the Commissioner has some sympathy with what the complainants appear to see as the Council's provision of information that they did not seek, the Commissioner considers that this was an attempt on the part of the Council to be of assistance to the complainants. Indeed, the weblinks provided by the Council in its email of 26 February 2007 do lead to papers referring to grammar school admissions and allocations, and the report on 11+ performance and ethnicity

mentioned in paragraph 21 above, which would appear to have relevance to the information request. Section 16(1) only requires a public authority to provide advice and assistance so far as it would be reasonable to expect it to do so. On balance of probabilities, the Commissioner considers that the Council has complied with that requirement in relation to the complainants' requests for studies/ reports and analyses.

## Exemption

### Section 40(2) - Raw Data

49. As regards the data requested on 3 February 2007 (for each child taking the 11+ test: School, VRTS score, Order of Suitability Rank, Attitude to work, and Academic Recommendation), the complainants have said that they are not seeking the names of pupils (paragraph 9), but dispute the Council's refusal to provide the remaining information requested on the grounds that it is the personal information of the pupils and is covered by section 40(2) of the Act. The Council cited a decision of the Scottish Information Commissioner (ref: 021/2005) in support of its conclusions.
50. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act ('the DPA').
51. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines 'personal data' as:
- “...data which relate to a living individual who can be identified
- a) from those data, or
  - b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
- and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual”.
52. It is clear that information relating to 11+ tests, such as school, VRTS score, Order of Suitability rank, Attitude to Work, and Academic Recommendation, if linked to identifiable individuals, are personal data under the terms of the DPA. The question to be determined is whether a living individual can be identified from that data. The Commissioner notes that the data requested (if anonymised) would consist of:
- Child 1 (or 2,3,4 etc), name of school, VRTS score, attitude to work and Academic Recommendation.
53. Decisions of the Scottish Information Commissioner are not binding on the Information Commissioner, but are of evidential value. In the particular case cited

by the Council (decision 021/2005) the complainant had sought information relating to incidences of childhood leukaemia, but the public authority had suppressed cells in tables containing less than 5 cases. In that case the Scottish Information Commissioner concluded that in small geographical areas the residents will know more about each other. In the particular case in question he considered it likely that an individual may be aware that a child has cancer but not know the specific diagnosis; the disclosure of the data could lead to a confirmation of a particular diagnosis. He concluded that a living individual could be identified from the data, and it was therefore 'personal data' as defined by the DPA.

54. The Commissioner considers that truly anonymised data is not personal data and thus there is no need to consider the application of the data protection principles to its disclosure. The Commissioner considers that even where the data controller holds additional 'identifying' information, this does not prevent them from anonymising information to the extent that it would not be possible for anyone else to identify any living individual either from that information alone or from the information taken together with other information available to them. The test of whether information is truly anonymised is whether a member of the public could reasonably identify the individuals by cross-referencing the data with information or knowledge already available to them. This approach is supported by paragraphs 24 and 25 of Lord Hope's judgement in the House of Lords' case of the Common Services Agency v Scottish Information Commissioner (2008) UKHL 47,

"..Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection."

55. The Commissioner has considered the information requested in this case and does not believe that, where the number of children who had taken the 11+ at a school is greater than 5, the Council have provided any evidence that there is a reasonable risk of the child being identified. The Council have simply stated that there is a risk. The Commissioner considers that if the information were to be disclosed and there were more than five children at the school taking the test that it would be highly unlikely that an individual could use the information to identify the child. The Commissioner considers that for this information section 40(2) is not engaged as the information requested is not personal data.
56. However, the Commissioner considers that where the number of children who had taken the 11+ test at a school is less than five, then disclosure of the requested information might reasonably be expected, in at least some cases, to enable the identification of an individual child. The level of detail requested when there are five or less children at the school is such that it is reasonable to conclude that there is a significant chance that a person could identify one or more of the children in question.

57. The Commissioner has therefore gone on to consider if disclosure of the information would breach the requirements of the first data protection principle. The first data protection principle has two components:
1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
  2. at least one of the conditions in DPA Schedule 2 is met.
58. In considering whether the disclosure of the information would be fair the Commissioner considers that among the factors to be taken into account are the questions of whether:
- the disclosure would cause unnecessary or unjustified distress or damage to the person to whom the information related;
  - the third party would expect that his or her information might be disclosed to others;
  - the third party had been led to believe that his or her information would be kept secret;
  - the third party had expressly refused consent to disclosure of the information.
59. The Commissioner considers that pupils would not expect the information sought by the complainants to be placed in the public domain, where it could lead to their identification. He also considers that disclosure, where they could be identified could cause them unnecessary distress. The Commissioner considers that the individual children would have a reasonable expectation that their 11+ scores would not be made public and that unlike some other tests such as GCSE's, they would have been led to believe that their individual scores and suitability marks would remain private.
60. He is therefore satisfied that disclosure, of each 11+ test taken, with details of the school; VRTS score; Order of Suitability rank; Attitude to work and Academic Recommendation where there are 5 or less pupils at the school taking the 11+ test would entail a breach of the first data protection principle. He therefore concludes that the exemption in section 40(2) is engaged, and the information should not be released.

## The Decision

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61. The Commissioner's decision is that the Council acted in accordance with the Act in:
- 1) complying with the duty to provide and assist the complainants (section 16(1));
  - 2) complying with sections 1(1), 10(1), 17(1) and (7) in issuing a refusal notice in relation to the request for 11+ data.

- 3) correctly applied section 40(2) to the raw data requested on 3 February 2007 where there are 5 or less pupils taking the 11+ test at the school
62. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- 1) the Council breached the requirements of sections 1(1)(a) and 10(1), in failing to notify the complainants that it did not hold a report containing the requests studies, reports or analysis;
  - 2) the Council also breached the requirements of sections 1(1) (a) and 10(1) , in failing to notify the complainants as to whether or not it held any other studies/reports/analyses relevant to their information request.
  - 3) the Council incorrectly withheld the raw data requested by the complainants on 3 February 2007 under the exemption in section 40(2), where there are more than 5 pupils taking the 11+ test at the school;

### Steps Required

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63. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.
- Disclose to the complainant the data requested on 3 February 2007 where there are more than 5 pupils taking the 11+ test at the school, withheld under section 40(2).

### Other matters

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64. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following issue.
65. As explained in paragraph 28 above, a public authority is not required by the Act to carry out an internal review. However, Part VI of the section 45 Code of Practice (the "section 45 code") makes it a desirable practice for public authorities to have in place a procedure for dealing with complaints about its handling of requests for information. Paragraph 40 of the Code stipulates that where (as in this case), the complaint concerns a request for information under the general rights of access, a review should be undertaken by someone senior to the person who took the original decision, where this is reasonable practicable. It goes on to say that the public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint.
66. It is clear from the Council's response to the Commissioner that a complaints procedure exists within the Council. Its failure to invoke that procedure following the complainants' email of 1 March 2007, which should have been regarded as a



review request, ,even after the Commissioner's staff prompted it to do so (see paragraph 26 above) is a matter of some concern..

67. The Commissioner expects that complaints which relate to the Council's handling of requests for information will, in future, be handled in accordance with the recommendations of the section 45 code. The Commissioner would also wish to direct the Council to his own guidance (published on 16 February 2009) which provides further recommendations for good practice in relation to internal reviews.
68. Although the Council have not sought to rely on section 12 or 14 they did make references to these sections of the act (see paragraphs 19-22) implicitly raising them with the complainant. The Commissioner considers that the Council should only reference arguments which are relevant to the exemptions being claimed.

## Right of Appeal

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69. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 18th day of May 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### General Right of Access

**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

### Time for Compliance

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### Duty to provide Advice and Assistance

**Section 16(1)** provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

### Refusal of Request

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, 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.”

**Section 17(5)** provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

**Section 17(7)** provides that –

“A notice under section (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.”

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

**Section 40(6)** provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.