

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 2013

Public Authority: The Office of Qualifications and Examination
Regulation

Address: Spring Place
Coventry Business Park
Herald Avenue
Coventry
CV5 6UB

Decision (including any steps ordered)

1. The complainant requested information on the identity of schools referred to in a report by the Office of Qualifications and Examinations Regulation (Ofqual) regarding GCSE English in 2012. Ofqual initially withheld this information under section 43(2) of the FOIA but later stated that it was not held.
2. The Commissioner's decision is that Ofqual has breached sections 1(1)(a) and 10(1) of the FOIA.
3. The Commissioner does not require Ofqual to take any steps to ensure compliance with the legislation.

Request and response

4. On 5 November 2012 the complainant wrote to Ofqual and requested information in the following terms:
"I am sending this request under the Freedom of Information Act to ask for the following information:

a) all information held relating to the identities of the schools named A - E in para 6.45 of your recent report at

<http://www.ofqual.gov.uk/files/2012-11-02-gcse-english-final-report-and-appendices.pdf>¹

b) all information held relating to the identities of institutions where marks for GCSE controlled assessments have been adjusted downwards by an exam board following moderation since 1 Jan 2010; and for each institution so identified, the full details of the results of the moderation process on the level of marks for each subject on each occasion where this has happened

If b) is too wide-reaching to be answered within the cost limit, please call me to discuss the possibilities for a narrower, more feasible request."

5. Ofqual responded on 29 November 2012. It stated that with regard to question a), it held the requested information but was withholding it under the exemption in section 43(2) of the FOIA as it believed disclosure would be likely to prejudice the commercial interests of the schools referenced in the report as well as the neighbouring ones. Ofqual then went on to consider the public interest which it concluded was balanced in favour of maintaining the exemption. With regard to question b), Ofqual stated that it did not hold any recorded information. It pointed out that it was the regulator of qualifications and examinations and regulated Awarding Organisation which created, marked and awarded qualifications. As part of this work it said that it looked at the processes that Awarding Organisation had in place to monitor the effectiveness of their moderation processes. However, it added that it did not hold detailed information on the outcome of these processes.
6. On 29 November 2012 the complainant requested an internal review of Ofqual's response to question a) of his request.
7. Following an internal review Ofqual wrote to the complainant on 7 May 2013 stating that it was upholding its original decision to apply the exemption under section 43(2) of the FOIA to the information held in question a) of his request.

¹ <http://www.ofqual.gov.uk/files/2012-11-02-gcse-english-final-report-and-appendices.pdf>

Scope of the case

8. The complainant contacted the Commissioner on 8 May and 17 October 2013 to complain about the way his request for information had been handled. Initially, he disputed Ofqual's application of section 43(2) of the FOIA. Subsequently, when it became apparent that Ofqual did not hold the requested information, he complained about its delay in advising him of this fact.
9. The complainant has informed the Commissioner that he may restrict the scope of his investigation to Ofqual's response to question a) of his request dated 5 November 2012. In particular, its delay in advising him that, contrary to its earlier statements, the information he requested was in fact not held in a recorded format.

Chronology

10. The Commissioner contacted Ofqual on 21 August 2013 by telephone to firstly enquire whether it still wished to rely on the exemption in section 43(2) of the FOIA and secondly, if it did, whether it had approached any or all of the schools whose commercial interests it said would be likely to be prejudiced by disclosure of the requested information.
11. On 21 August 2013 Ofqual confirmed to the Commissioner that it still wished to rely on section 43(2) of the FOIA but stated that it had not approached any of the schools concerned to obtain their views as to how disclosure would be likely to affect their commercial interests.
12. On 12 September 2013 the Commissioner wrote to Ofqual requesting a copy of the withheld information (in confidence) together with clarification as to whether the 5 schools referred to in the report and the neighbouring ones were State funded as opposed to private.
13. In the absence of a response the Commissioner wrote to Ofqual again on 23 September and 9 October 2013.
14. On 11 October 2013 Ofqual wrote to the Commissioner and stated that it did not actually hold the requested information. It explained that the data referred to in its report² was in fact an extract from a report

² <http://www.ofqual.gov.uk/files/2012-11-02-gcse-english-final-report-and-appendices.pdf>

compiled by AQA³. Ofqual said that when it responded to the complainant it believed that it held the underlying information, including the school names. However, following further investigations it said it was clear that this was not the case.

15. Ofqual has acknowledged to the Commissioner that, in this particular case, its practices in responding to the complainant's request for information were not as tight as it would have wished. It added that processes had now been put in place for all information requested to be provided to the Freedom of Information manager before any decision as to whether it might be exempt from disclosure was taken in order to be certain that it was in fact held in a recorded format.
16. On 14 October 2013 the Commissioner made the complainant aware of Ofqual's statement that it did not hold the requested information.
17. On 18 October 2013 the complainant informed the Commissioner that although he accepted that, contrary to its earlier statements, Ofqual did not hold the requested information, based on a balance of probabilities test⁴, he said he wanted a Decision Notice to reflect the procedural breaches of the FOIA.

Reasons for decision

Section (1)(a) of the FOIA

18. Section 1(1)(a) of the FOIA states that 'any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request'.

Section 10(1) of the FOIA

³ <http://www.ofqual.gov.uk/files/2012-11-02-gcse-english-final-report-annex-a-aqa-report.pdf>

⁴ This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

19. The Section 10(1) of the FOIA states that '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'.
20. In this case, it was not until the Commissioner started his investigation that Ofqual confirmed on 11 October 2013 that, contrary to its earlier statements to the complainant, it did not hold the information requested on 5 November 2012.
21. By initially failing to confirm in writing that it did not hold the requested information and by taking in excess of 11 months from the date of the complainant's request to inform the complainant of this fact, Ofqual breached sections 1(1)(a) and 10(1) of the FOIA.

Right of appeal

22. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

23. 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.
24. 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

Rachael Cragg
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Wycliffe House
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