

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2014

Public Authority: Council for the Curriculum Examinations & Assessment

Address: 29 Clarendon Dock
Clarendon Road
Belfast
BT1 3BG

Decision (including any steps ordered)

The complainant has requested information from the Council for the Curriculum Examinations & Assessment ("CCEA") regarding certain GCE Mathematics examination papers. CCEA provided the complainant with some information it held relevant to his request and withheld the remaining information ("the withheld information") which was withheld citing section 43(1) of FOIA as a basis for non-disclosure and section 43(2) in the alternative. The Commissioner's decision is that CCEA has provided the complainant with all information it holds within the scope of his request other than the withheld information, to which section 43(1) does not apply, but section 43(2) does apply. Therefore, the Commissioner requires no steps to be taken.

Request and response

1. On 11 March 2013, the complainant wrote to CCEA and requested the following information:
 1. "I would like to have the question paper production files for 2012 summer GCE Mathematics M1 and M4.
 2. I would also like the documentation for the disposal of the QPPF for the summer 2011 C3, M2 and FP2 GCE Maths and the dates on which enquiries upon results closed for the summer 2011 and 2012 GCE examinations.
 3. I would also like to see any documentation relating to disposal of any records relating to GCE Maths examinations taken in summer

2011 and 2012.

2. CCEA responded on 3 April 2013. It disclosed some information in relation to parts 2 and 3 of the complainant's request, however it withheld information under part 1, citing section 43(1) of FOIA as a basis for non-disclosure. It also stated that it did not hold certain information requested in part 2 of the complainant's request.
3. Following an internal review CCEA wrote to the complainant on 8 May 2013. The reviewer upheld the original decision.

Scope of the case

4. The complainant contacted the Commissioner on 21 June 2013 to complain about the way his request for information had been handled. He specifically stated that he believed CCEA ought to hold more information within the scope of his request and asked the Commissioner to investigate this. He also asked the Commissioner to investigate CCEA's application of section 43(1) of FOIA to the withheld information. The Commissioner has considered both of the above issues in his investigation.

Reasons for decision

Does CCEA hold any further information relevant to the complainant's request?

Section 1

5. Section 1(1) of FOIA states 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.
6. The Commissioner has considered whether CCEA has complied with section 1 of FOIA.
7. On 7 January 2014, the Commissioner asked CCEA the following questions to determine what information it held that was relevant to the scope of the request:

- Was any further recorded information ever held, relevant to the requested information, by CCEA or anyone on behalf of CCEA?
 - If so, what was this information? What was the date of its creation and deletion? Can CCEA provide a record of its deletion/destruction and a copy of CCEA's records management policy in relation to such deletion/destruction? If there is no relevant policy, can CCEA describe the way in which it has handled comparable records of a similar age?
 - Is there a reason why such information (if held or ever held) may be concealed?
 - What steps were taken to determine what recorded information is held relevant to the scope of the request? Please provide a detailed account of the searches that you have conducted to determine this.
 - If the information were held would it be held as manual or electronic records?
 - Is there a business purpose for which the requested information should be held? If so what is this purpose?
 - Are there any statutory requirements upon CCEA to retain the requested information?
 - Is there information held that is similar to that requested and has CCEA given appropriate advice and assistance to the applicant?
8. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency*¹ in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is the test the Commissioner will apply in this case.

¹ EA/2006/0072

9. In discussing the application of the balance of probabilities test, the Tribunal clarified that test required consideration of a number of factors:
- the quality of the public authority's initial analysis of the request;
 - the scope of the search that it decided to make on the basis of that analysis and the thoroughness of the search which was then conducted; and the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light.
10. The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.
11. The Commissioner is also mindful of *Ames v the Information Commissioner and the Cabinet Office*². In this case Mr Ames had requested information relating to the "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the dossier was *"...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what..."* However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not *"...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one..."* Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.
12. On 4 February 2014 CCEA responded to the questions detailed at paragraph 7 above. It explained that the complainant had received all recorded information held by CCEA within the scope of those requests. No relevant recorded information was withheld by CCEA. Destruction certificates document the process of the disposal of the question paper production files, which CCEA considers to be a matter of good practice.
13. CCEA explained to the Commissioner that any relevant information would be held by CCEA in both electronic and hard copy format within CCEA's Business Assurance team. It specified a number of distinct teams which may have held such information, which it had questioned

² EA/2007/0110

in order to ascertain whether they held any information relevant to the complainant's request. It explained that none of the teams held such information.

14. The Commissioner has considered CCEA's explanation of its search procedures and has concluded that these were thorough and that CCEA took all reasonable steps to ascertain what recorded information, if any, it held which was relevant to the complainant's request. CCEA explained to the Commissioner that it had been questioned by the complainant at the First Tier Tribunal in a previous case regarding destruction certificates. CCEA had explained to the complainant and the Tribunal that it did not hold destruction certificates in relation to question paper production files. This failure to hold such certificates was logged as a matter of internal non-compliance and a monitoring exercise subsequently carried out. One of the requirements arising from that exercise was that destruction certificates must be produced in future in relation to all question paper production files. Therefore, CCEA considers that it has provided all advice and assistance to the complainant that it is able to. The Commissioner is satisfied that there was no further information other than the withheld information within the scope of the complainant's request held by CCEA at any time.
15. In reaching a conclusion in this case, the Commissioner has taken into account the responses provided by CCEA to the questions posed by him during the course of his investigation. The Commissioner is also mindful of the Tribunal decisions highlighted at paragraphs 9 and 12 above. The Commissioner considers that on the balance of probabilities CCEA holds no further recorded information relevant to the scope of the complainant's request.

Section 43 – commercial interests

16. CCEA has applied section 43(1) of FOIA to the withheld information. In the alternative, CCEA wishes to rely on section 43(2) of the Act.
17. The Commissioner will first consider whether this exemption is engaged for each element of the remaining information. If he finds that it is, he will then go on to consider the public interest test.

Section 43(1)

18. Section 43(1) of FOIA provides that information is exempt information if it constitutes a trade secret. There is no statutory definition of a "trade secret" but the Commissioner will follow the Information Tribunal's preferred view of the meaning of trade secret as outlined in

the case of *Department of Health v Information Commissioner*³ at paragraph 50. The Tribunal referred to the *Lansing Linde V Kerr [1991] WLR 251, Staughton LJ* Court of Appeal case.

19. The MOJ's guidance on section 43 also refers to the above case and states that it is generally accepted that, for information to constitute a trade secret it must fulfil the following criteria:-
- it must be information used in a trade or business
 - it must be information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
 - the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication
20. CCEA stated that the withheld information is exempt from disclosure and constitutes a trade secret for the following reasons:-
- The question paper production files document the end to end process for an aspect of CCEA's core statutory function as an awarding organisation (formerly known as an Examination Board). This function is to produce question papers and mark schemes for GCSE and GCE A-Level qualifications along with the appropriate stimulus and resource materials. This process has been developed in-house by CCEA staff and contracted-for service personnel. No outside agencies or organisations have had input into the development of this process. The information contained within the files directly relates to highly confidential examination material and access is restricted to employees directly associated with CCEA's Question Paper Production (QPP) team and, for audit purposes, some members of the Business Assurance team. The process is not published on CCEA's website or in any public documentation.
 - CCEA trades in a competitive market for the entries from schools and colleges in Northern Ireland along with four other major awarding organisations. This market is dominated by five suppliers. This means that each supplier's actions can have a significant impact on its competitors' market share. A large percentage of the market is taken up by the leading firms. CCEA is the current market leader in Northern Ireland for GCSE and GCE qualifications with over 70 percent of the market share.

³ EA/200/0018

- Schools and colleges are charged a fee to enter for those examinations and will only enter their candidates with an awarding organisation if that organisation can demonstrate that it produces quality papers resulting in valid and reliable results. CCEA has developed its own processes, which have not been shared with any of its competitors. The strength of those processes ensure that CCEA is able to trade as an approved awarding organisation. Should the withheld information become available to rival awarding organisations, this would provide those rival organisations with an unfair advantage.
21. It is the Commissioner's view that a trade secret implies that the information is more restricted than information which is commercially sensitive. It involves something technical, unique and achieved with a great deal of difficulty and investment. Although the Commissioner notes CCEA's arguments, he is not convinced that the withheld information has the highest level of secrecy which the term 'trade secret' would appear to merit. Therefore he is not satisfied that section 43(1) of FOIA would apply to the withheld information.
 22. CCEA has sought in the alternative to apply section 43(2) of FOIA to the withheld information, therefore the Commissioner has considered the application of that section.

Section 43(2) of FOIA

23. Section 43(2) FOIA provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
24. The Commissioner accepts, from CCEA's representations as outlined above, that the information is commercial in nature and that the relevant commercial interests are those of CCEA. He has therefore gone on to consider whether disclosure of the withheld information would, or would be likely to, prejudice those commercial interests.
25. For the Commissioner to agree that section 43(2) of the Act is engaged, CCEA must first demonstrate that prejudice would or would be likely to occur to the commercial interests of CCEA. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council*⁴ (EA/2005/0030) ('Hogan') the Tribunal stated that:

⁴ EA/2005/0030

"The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

26. When considering the nature of the prejudice, the Tribunal stated in the hearing of Hogan that:
"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated
"real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."
27. As stated above, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner*⁵.. The Tribunal stated that: "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".
53.
28. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.
29. CCEA has not explicitly stated which limb of the prejudice test it considers applies. The Commissioner will therefore proceed to consider the lesser threshold of "would be likely to". If this threshold is not met, it follows that the higher threshold of "would" does not also apply.

⁵ EA/2005/0005

30. CCEA presented the same arguments in support of its application of section 43(2) to those outlined in paragraph 41 above. The Commissioner will therefore not repeat them here.
31. Although the Commissioner does not agree that the withheld information falls within the definition of a trade secret, he is satisfied that disclosure of the requested information would be likely to prejudice the commercial interests of CCEA. He will now explain why.
32. CCEA has informed the Commissioner that it trades in a competitive market against four other awarding organisations. It is currently the market leader, with a 70 percent market share. That would make knowledge of its in-house examination procedures extremely valuable and advantageous to its competitors, thereby causing prejudice to CCEA's commercial interests by endangering its position in a highly competitive market and almost certainly reducing its share of that market.
33. The fact that schools and colleges have a number of awarding organisations from which to choose, in terms of entering their candidates for examination papers. Should CCEA's developed processes be disclosed into the public domain, therefore seen by other awarding organisations, those organisations could adopt CCEA's processes as their own, meaning that schools and colleges may choose other awarding organisations where they have previously chosen CCEA due to its production of quality examination papers producing valid and reliable results. This would be likely to cause significant prejudice to CCEA's commercial interests as it would interfere with what had previously been a level playing field, by placing CCEA at a competitive disadvantage.
34. Having concluded that the commercial interests of CCEA are likely to be prejudiced the exemption is engaged in relation to the withheld information, the Commissioner must next consider the application of the public interest test.

Public interest test

Public interest arguments in favour of disclosing the requested information

35. CCEA stated that it was aware that there was an overall public interest in the general transparency and accountability of public bodies.
36. CCEA is also aware that it is in the public interest to inform the public of the decision-making processes within public bodies, to inform public debate and to demonstrate how public funds are spent by those bodies.

Public interest arguments in favour of maintaining the exemption

37. CCEA states that disclosure of the withheld information would be likely to prejudice its commercial interests and jeopardise its place in a competitive market. The Commissioner recognises that there is a public interest in maintaining fair competition within an unregulated market and that disclosure of the withheld information would endanger that fairness, ultimately leading to less choice and quality for the public.

Balance of public interest arguments

38. CCEA stated that it had considered various factors in determining if the public interest lies in disclosure of the question papers production files. These included:
 - Would the information help public understanding?
 - Is similar information in the public domain?
 - Would there be any prejudice or harm caused by disclosure?
 - Is there a public interest in the issue, e.g. is there a policy decision involved?
 - Would disclosure show how public money is spent?
39. CCEA stated that the question paper production files demonstrate a commercial process or activity. They do not define policy or demonstrate how public money is spent. There is no similar information in the public domain and harm would be likely to be caused to CCEA's qualifications business if this information was disclosed.
40. CCEA has considered the relative weight of arguments both for and against disclosure. In this instance it has concluded that the benefits of disclosure do not override the prejudice disclosure would cause and,

therefore, the public interest in maintaining the section 43(2) exemption outweighs that in disclosure of the withheld information. The Commissioner has reached the same conclusion.

Right of appeal

- 41. 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: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

- 42. 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.
- 43. 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

**Racheal Cragg
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