

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 October 2023

Public Authority: The Office of Qualifications and Examinations
Regulation (Ofqual)

Address: Earlsdon Park
53-55 Butts Road
Coventry
CV1 3BH

Decision (including any steps ordered)

1. The complainant has requested from Ofqual emails sent between an individual at the Department for Education and eight individuals at Ofqual between a certain timeframe. Ofqual provided some information in its response and further information at a later date but continued to withhold part of the information, citing section 36 (prejudice to the effective conduct of public affairs) and section 40(2)(personal information) of FOIA.
2. The Commissioner's decision is that Ofqual correctly cited section 36 regarding the information it withheld. However, Ofqual breached sections 1(1)(b), 10(1), and 17(1) of FOIA by failing to respond within the legislative timeframe and providing information late to which the complainant was entitled.
3. The Commissioner does not require further steps.

Request and response

4. On 18 June 2022 (received 20 June 2022), the complainant wrote to Ofqual and requested information in the following terms:

'I am interested in the 708 emails sent between [named individual] and eight people associated with Ofqual [named individuals] between 3 and 15 January 2021. Could you please disclose those emails?

As you may recall, I have previously asked for similar information, and Ofqual has already identified the emails in question. However, Ofqual previously rejected my request on cost grounds, as follows:

As we explained in our response to your previous requests, whilst we have been able to identify the emails between the individuals named by you relatively quickly, in order to ascertain whether they contain information within the scope of your request we would have to locate, retrieve and extract the relevant information falling under your request from each email individually leading to the request exceeding the limit.

I have carefully formulated this new request so that Ofqual's concern about costs quoted above does not apply. The emails in their entirety are in "within the scope of [my] request", and Ofqual has already identified and located the emails. Furthermore, in a letter of 8 June, [named individual] estimated the cost of extracting the information from those emails:

This method would require each email to be opened in order to copy its content and paste it into a single word document. Ofqual estimates that this process could take up to 1 minute per email, which would equate to almost 12 hours.

[named individual]'s estimate appears to be inflated: I don't think it would take anything like 12 hours to copy and paste the content of 708 emails. However, even using that inflated figure, it appears that the overall cost of disclosure will be substantially below the statutory limit. As you may know, for the purpose of calculating that cost, there are four "allowable activities":

- determining whether the information is held (this is already complete)

- locating the information (this is already complete; Ofqual says that "we have been able to identify the emails between the individuals named by you relatively quickly")
- retrieving the information (this is likely to take negligible time, given that Ofqual has already identified the emails based on an IT search)
- extracting the information [redacted name] estimates, improbably, that this will take up to 12 hours. It may be the case that exemptions apply to some of the information in question.

However, considering exemptions and applying redactions are not allowable activities, and cannot be used in calculating costs. It is therefore clear that the Section 12 exemption does not apply to this request...'

5. In its original response, dated 18 November 2022, Ofqual provided a number of emails (450 emails had been located). The Commissioner does not hold the full chain of correspondence but Ofqual explained that the request was referred back to it on 14 February 2023 as a result of the internal review that had been requested after the original response.
6. Ofqual responded on 5 May 2023 by providing further emails and links to published emails. Ofqual withheld some of these emails:

"The withheld information consists of back-and-forth emails to formalise a joint consultation with the Department of Education (sic) (DfE) and develop government policy following the cancellation of exams in 2021".
7. It cited section 36(2)(b) and (c) and section 40(2) of FOIA as its reason for doing so. Ofqual also explained that there was a smaller number of emails that actually fell within the scope of the request than had been identified as part of an IT search in June 2022 because the main individual named in the request had only been copied into a number of these.
8. On the same day the complainant asked for an internal review.
9. Following an internal review, Ofqual wrote to the complainant on 26 May 2023 acknowledging that its initial response had been outside the statutory timeframe but maintained its position regarding section 36 of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 17 July 2023 to complain about the way their request for information had been handled.
11. On 25 September 2023 after the Commissioner has sent his investigation letter inviting Ofqual to reconsider its position, it provided further information to the complainant. However, part of the requested information remained withheld.
12. After the latest release of information from Ofqual, the complainant raised certain points. They asked why the disclosure was labelled 'Official Sensitive: Not to be shared further without permission' when it was a disclosure to the public that cannot take account of who had made the request, the merits of the application or its purpose. Ofqual replied on 3 October 2023 accepting that this had been done in error.
13. After the further disclosure, the complainant told Ofqual that the redaction was "unnecessarily heavy in places" where there were no recipients and no subject (emails 11 January 2021 18:35 and 18:36). The complainant was not content with the redaction of the email address of a senior member of staff.
14. Ofqual responded by explaining that the highlighted emails had not been redacted – "These emails were part of a chain, and have been extracted from that chain as they appeared." Ofqual went on to say that it did not hold them separately and did not hold the recipient/s or subject heading/s.
15. Additionally, Ofqual explained to the complainant that the email address was redacted because it was not the senior individual's Ofqual address and that it considered that section 40(2) was engaged, despite their seniority.
16. The complainant had accepted that the names of junior officials remain redacted and the Commissioner had therefore not included personal data as part of his investigation. He does not intend to look at the withholding of an email address, given Ofqual's explanation and the fact that the name of the individual was not withheld.
17. The Commissioner considers that the scope of his investigation is to consider Ofqual's citing of section 36 of FOIA to withhold some of the requested information and any procedural matters that occurred.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

18. Section 36 FOIA says 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)(b) would, or would be likely to, inhibit -

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

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

19. Ofqual has cited section 36(2)(b)(i), (ii) and 36(2)(c) in relation to the withheld information which the Commissioner has been provided with. The information that falls within the scope of section 36 is described by Ofqual as follows:

“a. emails and attachments that evidence discussions between DfE and Ofqual regarding arrangements for awarding in 2021 and development of a consultation document that was later subject to publication.

b. emails and attachments relating to draft communications (letters) setting out thoughts and comments by officials that were subject to future publication.

c. emails that deal with timings of matters for the 2021 consultation.”

20. The Commissioner is required to consider the qualified person’s (QP) opinion as well as the reasoning which informed that 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.
21. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person (QP) unless the information is statistical.
 22. The QP at Ofqual is Dr Jo Saxton who was Chief Regulator of Ofqual at the time of the request and continues to hold that position until December 2023. The Commissioner is satisfied that they were the appropriate QP to give an opinion. The opinion of the QP was sought in order to respond to the complainant. At that time they were shown a copy of Ofqual's representations and a summary of the nature of the information falling within the scope of the request. There is no date of submission to the QP but Dr Saxton gave an opinion on 27 April 2023.
 23. In the QP form there were arguments mainly in favour of withholding the information but counter arguments were presented and there was the suggestion that the passage of time might mean that some further emails could be released. Emails were provided to the QP for potential release alongside the information it considered should not be disclosed.
 24. The Commissioner next needs to establish whether the QP's opinion was reasonable.

Is the qualified person's opinion reasonable?

Section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c)

25. The QP in relation to the exemption at section 36 must give an opinion that the release of the requested information would or would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
26. The Commissioner's guidance¹ explains the prejudice in section 36(2)(c) as referring to an adverse effect on a public authority's -

"ability to offer an effective public service or to meet [its] wider objectives or purpose, but the effect does not have to be on [its] authority; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure".

¹ [Section 36 - Prejudice to the effective conduct of public affairs | ICO](#)

27. The guidance examines the definition of what is 'reasonable' in the context of section 36:

"...if it is an opinion that a reasonable person could hold – then it is reasonable...This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion does not become unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold."

28. In order to determine whether section 36 is engaged the Commissioner must decide whether the QP's opinion was a reasonable one. In doing so the Commissioner has considered the following factors:

- Whether the prejudice/inhibition relates to the specific subsection that has been cited. If the prejudice or inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request.
- The qualified person's knowledge of, or involvement in, the issue.

29. The Commissioner's guidance makes it clear that he is primarily concerned with the reasonableness of the substantive opinion and that he is not explicitly required to assess the quality of the reasoning process that lay behind it. It is the content of the opinion or the submission made to support it that is relevant to his assessment of whether the opinion is reasonable.

30. The QP gave the opinion that the inhibition/prejudice would be likely to occur. In its response to the complainant Ofqual said that it was of the opinion that disclosure "would inhibit its ability to give or receive advice, exchange views, and undertake effective policy development processes with stakeholders".

31. Firstly, Ofqual contended that the 'live' nature of the information was an important factor:

"Whilst arrangements for 2021 had concluded at the time of the request, there were continuing ongoing discussions regarding contingency arrangements should exams not be able to go ahead in the future that are closely linked to 2021 arrangements. Many of the matters discussed and raised as part of the discussions regarding 2021 arrangements were subject to further discussion and were revisited when discussing future contingency planning."

Ofqual argues that it is not possible to separate out "the future contingency arrangement" from the discussions that took place in 2021. It argues that "It was a real and ongoing live matter at the time of the request".

32. When the request was made "future contingency arrangements for awarding had not been agreed and would be subject to a joint consultation between Ofqual and DfE". The discussions in 2021 were considered to be a 'live' issue and "were matters that would go on to be considered again as part of the contingency consultation".
33. Secondly, Ofqual argued that there was a "need for robust discussion". It points the Commissioner to the free and frank views, advice and deliberations about the consultation arrangements. Ofqual underlines its point by stating that this was taking place "against the backdrop of the pandemic" when "Decisions were required to be made at speed and individuals were frank and free with their thoughts."
34. Thirdly, regarding the "candid discussions relating to the timing of events" Ofqual considers that "while the two organisations continued to work together on a future contingency consultation" disclosure "would be likely to cause prejudice to the effective working relationship and conduct of effective (sic) affairs". It argues that individuals "are likely to be reticent in providing any criticism or challenge" and that "strong and forthright language...would not be forthcoming during future engagements". Ofqual stressed the importance of clear advice.
35. Ofqual also argues that it has released information that sets out its position "that timing of events was a concern" and that the "disclosure of the withheld information would be likely to lead to inhibition in the future":

"Whilst the 2021 arrangements had concluded, the two organisations needed to work together to consult on future contingency arrangements and disclosure of this information at the time of the request would be likely to lead to individuals not being willing to express themselves freely during the ongoing future arrangements."

36. There were back and forth discussions "in relation to the arrangements for 2021 but also for future arrangements". Ofqual states that,

"It should be noted that individuals were working under intense pressure and put forward comments that would not have been expected to be released whilst there remained ongoing and live issues or where there was an expectation that the two organisations would work together on connected matters and undertake a further

joint consultation. It is not unreasonable to suppose that disclosure of the information would be likely to result in inhibition to express free and frank views and advice when considering the future contingency arrangements."

37. Ofqual acknowledges that civil servants "must be robust in meeting their responsibilities and not easily deterred from providing advice". However, it is also important that they can "enter into free and frank discussions during an ongoing emergency. This is especially so in relation to timing of events...where there are ongoing and live issues". Views relating to awarding arrangements "were relevant and continued to form part of the consideration of future contingency arrangements that would be developed by the organisations". The disclosure of early draft documents would be likely to have a chilling effect as organisations may be reluctant to have early discussions about contentious matters and exchange information in robust language. Ofqual accepts that chilling arguments have to be carefully considered but are relevant in this scenario "where views were expressed freely and frankly during a time when there was a crisis and there remained an ongoing need to plan for future crisis". The withheld information also contains comments from stakeholders and junior officials. Ofqual suggests that "there may be repercussions for expressing themselves" for all concerned.
38. Fourthly, the effective conduct of public affairs itself would be likely to be prejudiced. The process itself "will be impacted by disclosure":

"It would inhibit the organisations engaging with each other at an early stage to share preliminary thoughts and how best to deal with matters in case of a future emergency."

Ofqual believes that

"the information requested would be likely to impact on the process and inhibit individuals from freely engaging with each other in cases of emergency or similar honest and forthright discussions in the future".

39. Ofqual argues that "Any inhibition or reluctance to engage would not assist with achieving well considered policy". Disclosure "would be likely to seriously impact on collaboration and participation of organisations in times of an emergency" when action is required. The

"information remained sensitive at the time of the request as whilst exams were planned to be delivered as usual in 2022, there remained an ongoing need to ensure that careful deliberations and discussions took place to put in place future contingency plans".

40. The complainant does not accept Ofqual's position arguing that -

"the public authority has refused to disclose some emails from a very senior public servant in January 2021 who has since retired. The public authority's argument is that disclosing the emails would harm its ability to deliberate in the future. It also argues that, because it has published some unrelated information (e.g. speeches by Board members given to unions) it doesn't have to disclose the information I have asked for. I don't think there is any merit in these arguments..."

41. The Commissioner accepts that the requested information was sensitive at the time of the request and that its disclosure would be likely to inhibit the free and frank provision of advice/exchange of views and would be likely otherwise to prejudice, the effective conduct of public affairs. He is satisfied that the QP's opinion is reasonable and that all three limbs of section 36 that were cited are engaged at the lower level of inhibition/prejudice.

Public interest test

42. Although he agrees that the exemption is engaged, the Commissioner has gone on to consider whether it is in the public interest to disclose the remaining withheld information or maintain the exemption.

Public interest factors in favour of disclosing the information

43. The complainant has argued that they are -

"not convinced that its refusal is justified. On the contrary, since time has passed since Ofqual's refusal, it is now even less likely that the harms it described would be likely to occur, and the factors it listed in favour of refusal are even less compelling".

44. Ofqual acknowledged the public interest in the decisions it makes and "the processes Ofqual uses to inform decision making, as there is a general public interest in good decision-making by public bodies".

45. Disclosure "may increase public understanding of how Ofqual considered what it should consult on regarding awarding grades for the summer 2021 exam series". There is a "public interest in understanding how Ofqual reached decisions about awarding grades for the summer 2021 exam series". At the time Ofqual published extensively "to keep interested stakeholders, such as students, parents, teachers and schools informed of developments". Interested parties were encouraged to read and participate in the public consultation.

Public interest factors in favour of maintaining the exemption

46. Ofqual detailed the “substantial information relating to its decisions available on its website², through representations before the Education Select Committee and directly through media engagement”. It also referred to the amount of information it had released to the complainant and the level of engagement it had invited. Ofqual does not consider that there is a “wide public interest” in the information that remains withheld and that the requester/complainant is pursuing a personal interest. In its view, the balance fell in favour of maintaining the exemption because of the likely impact on the “development of future policies and thereby prejudice the effective conduct of affairs”.

Balance of the public interest

47. The Commissioner is aware that the request for information was made over a year after the information it sought. He has also borne in mind the fact that individuals in public authorities are fully aware of FOIA and the fact that any information held might be released to the public.
48. In response to the Commissioner’s investigation Ofqual has recently provided additional information to the complainant. In doing so it took account of the passage of time. However, even after this further consideration, Ofqual took the decision that it could not release all the requested information.
49. The Commissioner recognises that there was a need to take action swiftly during the pandemic and views needed to be sought on significant matters in a hothouse environment. Ofqual has referred to contingency plans that may be required again as part of its argument for non-disclosure. The Commissioner is not convinced by this argument. However, much of this information is in draft form and he considers that the public interest was met by the publication of the documents listed by Ofqual and what it describes as “the thinking behind the decisions made for assessments and awarding for the summer 2021 exam series”. In addition to which Ofqual has released information several times to the complainant. Consequently, the balance of public interest in this instance for the disclosure of the remaining withheld information is not

² [Simon Lebus responds to the Secretary of State's letter of 13 January 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/answers/simon-lebus-responds-to-the-secretary-of-state-s-letter-of-13-january-2021) and [Consultation on how GCSE, AS and A level grades should be awarded in summer 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/consultation-on-how-gcse-as-and-a-level-grades-should-be-awarded-in-summer-2021)

persuasive. The Commissioner has decided that it is not in the public interest to release the information.

Procedural matters

50. 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.”

51. Ofqual breached section 1(1)(b) by providing information to which the complainant was entitled beyond the statutory timeframe.

52. Section 10(1) of FOIA states that a public authority must respond to a request promptly and “not later than the twentieth working day following the date of receipt”.

53. Ofqual acknowledged in its internal review that it took more than the statutory 20 working days to respond to the requester/complainant and consequently breached section 10(1) of FOIA. Ofqual also breached section 17(1) of FOIA because it failed to issue a refusal notice within the required timescale.

Right of appeal

54. 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

55. 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.
56. 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

Janine Gregory
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