

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 December 2022

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 any records of discussions with the Secretary of State on the arrangement for GCSE, AS and A Level exam series since January 2020. Ofqual disclosed some information but withheld one record of a discussion on the basis of section 36(2)(c).
2. The Commissioner's decision is that section 36(2)(c) is engaged but the public interest favours disclosing the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the excerpt from the email sent on the Secretary of State's behalf on 9 November 2020 to Ofqual's Interim Chief Regulator
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 April 2022 the complainant made a request to Ofqual for information in the following terms:

"I'm interested in the occasions on which Ofqual has consulted with the Secretary of State since January 2020. I've previously asked for records of occasions on which ministers have been involved with Ofqual's decision-making, but Ofqual has said that it does not hold any such records and it does not consider the interactions between Ofqual and ministers preceding Ofqual's decisions to amount to ministerial "involvement". Matthew Humphrey explained:

[W]e consider that consulting the Secretary of State on important decisions, such as deciding on the arrangements for GCSE, AS and A Level exam series, is legitimate and consistent with both Ofqual's Governance Framework and the Memorandum of Understanding between Ofqual and the Department for Education.

Could you please disclose the records of the occasions since January 2020 on which Ofqual has consulted the Secretary of State in the way that Matthew Humphrey describes? I am interested in the dates, the decisions in question, and any records that Ofqual holds of the Secretary of State's views about those decisions."

6. Ofqual responded on 24 June 2022. It confirmed it held information relevant to the request. Ofqual provided a paragraph it considered could be disclosed and pointed to a published letter from Ofqual's Chief Regulation to the Secretary of State from December 2020. Ofqual had identified one further paragraph in scope of the request that it considered was exempt from disclosure under section 36 of FOIA.
7. The complainant responded on the same date. They stated they were unhappy the dates had been removed from the provided paragraph and that they disagreed with the decision to withhold information under section 36.
8. Ofqual conducted an internal review and responded on 30 August 2022. Ofqual accepted it had not provide appropriate context for the paragraph it had provided and clarified this was from a letter dated 23 November 2020 sent by Ofqual's Interim Chief Regulator to the Secretary of State. Ofqual explained the context of this letter and that a previous letter had been published.
9. With regard to the second piece of information; Ofqual again accepted that context had not been provided and confirmed this was an excerpt

from an email sent on the Secretary of State's behalf on 9 November 2020 to Ofqual's Interim Chief Regulator. The email recorded the contents of discussions between the Secretary of State and the Interim Chief Regulator at a meeting the previous week. Ofqual maintained that this had been correctly withheld under section 36(2)(c) of FOIA.

Reasons for decision

10. Section 36(2)(c) of FOIA states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. Section 36 is a unique exemption which relies upon the opinion of the public authority's 'qualified person' in order to be engaged. With section 36, the Commissioner does not necessarily need to agree with the opinion of the qualified person in order for the exemption to be engaged. He needs only satisfy himself that the Qualified Person's ("QP's") opinion is an opinion that a reasonable person could hold.
12. In Ofqual's refusal notice, it explained it was relying upon section 36(2)(b)(ii) and section 36(2)(c). However, the internal review and the submission that it provided to the QP only put forward arguments in relation to section 36(2)(c). Therefore, the Commissioner considers that section 36(2)(b)(ii) cannot be engaged.
13. The Commissioner must therefore consider whether disclosure would "otherwise prejudice" the effective conduct of public affairs. His guidance on this limb of the exemption and the relevant case law state that, in order to engage this limb, a public authority must demonstrate some form of prejudice, not covered by another limb, that might result from disclosure.
14. Ofqual provided the Commissioner with a copy of a submission it had sent to its Chief Regulator. The Commissioner is satisfied the submission was sent to the QP and they provided their opinion.
15. The submission the QP signed off clarified that the discussion referred to in the email pre-dates Ofqual's final decision on grade distribution. That decision had been [published in a letter dated 2 December 2020](#) sent by the Chief Regulator to the Secretary of State. It was argued that disclosing the content of that discussion – which took place before Ofqual had made its final decision as to grading policy – would be likely to cause confusion about the grading process and could mislead the public which would undermine public confidence in the assessment

process. The QP accepted that disclosure would be likely to otherwise prejudice the effective conduct of public affairs.

16. It is not the role of the Commissioner to substitute his own opinion for that of the QP. The QP is best placed to know the circumstances of their organisation and the significance of the information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.
17. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
18. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.
19. The Commissioner does not consider that the QP's opinion is so unreasonable as to be irrational or absurd. It is not wholly unreasonable to suppose that disclosing information recording views on the grading process could have an impact on public confidence in the assessment process.
20. The Commissioner has therefore accepted that the QP's opinion in respect of section 36(2)(c) of FOIA is reasonable and thus this limb of the exemption is engaged.

Public interest test

21. Even where the QP has identified that disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
22. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
23. The Commissioner has accepted as reasonable that the lower bar of prejudice is engaged. This means that the chance of prejudice occurring doesn't have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.

24. In favour of disclosure Ofqual recognised the public interest in transparency and accountability and that disclosing the specific information in this case could shed more light on the nature of the relationship between Ofqual and the Secretary of State to show whether Ofqual's independence is maintained.
25. The complainant had argued that there was no validity to the argument that disclosing the information would make it difficult to obtain the Secretary of State's views in the future and that 'causing confusion' was not a legitimate factor to consider in the public interest test.
26. The complainant pointed the Commissioner to a letter he had received from Ofqual in response to a different FOIA request in which Ofqual stated that grade boundaries are set by exam boards and Ministers do not play a role in the setting of ground boundaries. The complainant therefore argued that disclosing the information was in the public interest and that:

"In fact, it is clearly and widely documented that the entire purpose of Ofqual's existence is to eliminate ministerial influence from grade boundaries and grade distributions. The withheld record of Ofqual's consulting the Secretary of State on the question of grade distribution is therefore a record of something grossly improper, which is why it is in the public interest to disclose it."
27. In terms of the arguments for withholding the information; Ofqual argued that the discussion took place before the final decision on grading policy had been made. The final decision has since been made and Ofqual is working to restore public confidence in the integrity of the assessment process and disclosure would undermine this. Ofqual further argued that decisions on grading taken with respect to the 2021 exam series remain relevant for future exam series and this therefore remains a 'live' issue.
28. In Ofqual's submissions to the Commissioner it argued that disclosure would risk out of date information regarding the development of Ofqual policies being in the public domain. It argued that this may dilute the candid nature of any future views for fear of outdated information relating to views on exam policies making it into the public domain in the future, in turn creating confusion for the public. Ofqual argued that given the impact of the pandemic on the delivery of exams and the delivery of policies in this area it is essential that only the latest detail regarding the policies is in the public domain. Unnecessary release of information could cause further confusion and stress for students undertaking their exams.

29. Ofqual also advanced arguments regarding the 'safe space' needed to work and deliberate issues with the Department for Education (DfE). It outlined its concerns that disclosure could erode this safe space and this is needed to allow for candid discussions to make policy decisions. Ofqual also referred to the 'chilling effect' on future discussions should the information be disclosed, specifically in relation to the engagement with the DfE and the Secretary of State.
30. Finally, Ofqual stated that the issue was still live as its policies relating to exams are still undertaking a period of change reflecting the impact of the pandemic on the education sector. Ofqual stated it was working closely with the DfE to make decisions on policies related to exams in 2023. It argued that the passage of time has not affected the public interest arguments for withholding the information as exam policies have been developed and changed in line with the sector's response to the pandemic and exam policies remain a 'live' policy area that continue to be updated.
31. The Commissioner notes that the issue of exam policy during the pandemic and how the grading process works has generated significant public interest. There are valid and weighty arguments for disclosing information which sheds some light on the decision-making process behind this.
32. The Commissioner notes that the pandemic created unprecedented situations and whether or not Ofqual would normally have discussed grading with the Secretary of State is not a relevant consideration. Ofqual have acknowledged that discussions took place and the Commissioner considers that given the public interest in the issue and the wide-ranging impact of the grading policy during the pandemic there is a significant weight given to disclosing information that may inform the public on how decisions were made, particularly after the decision has been made and implemented so is no longer 'live'.
33. The QP's opinion was that disclosing the information would be likely to otherwise prejudice the effective conduct of public affairs. In accepting the exemption is engaged the Commissioner acknowledges there is some weight to the public interest in withholding the information and maintaining the exemption but how much weight will be determined by the severity and extent of any prejudice that might occur.
34. Prejudice to the effective conduct of public affairs usually refers to an adverse effect on a public authority's ability to offer an effective public service, in this case Ofqual's ability to continue to make and influence decisions on grading policy through 2023. Much of Ofqual's arguments around this relate to the public interest in preserving the safe space

needed for deliberation and in ensuring there is no chilling effect on future interactions with the DfE and other stakeholders.

35. Whilst both safe space and chilling effect arguments can carry some weight, the purpose of section 36(2)(c) is to consider the effect of making the information public on a public authority's service and is not directly concerned with the impact on internal deliberations as this is covered by other limbs of the exemption, namely section 36(2)(b)(i) and (ii). That being said, there is some weight to these arguments as the discussions in this case are with an external stakeholder (the Secretary of State).
36. The weight given to these arguments will be more significant if the issue is still live which Ofqual has argued is the case. The Commissioner is not inclined to accept the issue is still live or even was when the request was made. The information is from 2020 and relates to the 2021 exam series. 2022 exams were sat 'in person' again and whilst the grading had not returned pre-pandemic grading it was different than in 2020 and 2021. The Commissioner therefore fails to see how the information in question – notes of a discussion regarding the grading process for 2021 – can still be a live issue.
37. Having viewed the withheld information the Commissioner also notes that this does not contain overly candid views but rather a short record of a discussion with few opinions being expressed. Given the high-level nature of this and the fact it is the Secretary of State involved in the discussion the Commissioner is not minded to accept that there would be a significant impact on the safe space Ofqual needs to deliberate on issues in the future. The Commissioner considers that any harm likely to occur would be minor and the Secretary of State should not be dissuaded from offering views and opinions in the future as a result of this.
38. Ofqual has also touched on the potential for disclosure of the information to cause confusion – the Commissioner gives this argument little weight. It is not clear to the Commissioner why only information on the latest detail regarding grading policies be in the public domain and why it would cause confusion. If Ofqual has genuine concerns in this regard it can provide explanations to support the disclosure of the information and set out why the information may not be in line with the current policy.
39. The Commissioner considers there are significant public interest arguments in favour of disclosure in this case and that the arguments for withholding the information are less compelling and any potential prejudice that might occur is minimal.

40. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours disclosing the withheld information.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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

Jill Hulley
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