



Case Reference: EA/2021/0374

First-tier Tribunal  
General Regulatory Chamber  
Information Rights

Heard: on the papers  
Heard on: 8 June 2022

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY

TRIBUNAL MEMBER MARION SAUNDERS

TRIBUNAL MEMBER PAUL TAYLOR

Between

ANTHONY GALLAGHER

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

**Decision:** The appeal is dismissed.

# REASONS

## Introduction

1. This is an appeal against the Commissioner's decision notice IC-106048-C1H0 of 22 November 2021 which held that Oxford, Cambridge and RSA Examinations Ltd ('OCR') correctly applied s 12(1) of the Freedom of Information Act 2000 (FOIA). The Commissioner found that OCR breached its s 16 duty to provide advice and assistance.
2. The Commissioner required no steps to be taken.

## Background

3. OCR is wholly owned by Cambridge University Press, which is part of the University of Cambridge. It is therefore a publicly-owned company within s 6 FOIA.
4. OCR awards GCSE, A level and vocational qualifications. The summer 2020 examinations were cancelled due to coronavirus and replaced with the higher of the student's centre assessment grade or their calculated/standardised grade. Ofqual produced a document entitled 'Student guide to appeals, malpractice and maladministration complaints, Summer 2020. What to do if you have concerns or questions about your grades.' ('the Ofqual guide'). The version of the Ofqual guide in the bundle is an updated version published in August 2020.
5. The Ofqual guide states at p 4:

If you have concerns about how your grades were calculated, this information should help you understand if you have a reason to make a complaint about malpractice or maladministration (wrongdoing). This could include if you have concerns about bias or discrimination.

...

### **Making a complaint about bias, discrimination, malpractice or maladministration**

You cannot appeal because you disagree with the centre assessment grades or rank orders given by your school or college. However, you might be concerned that your centre assessment grades or your rank order positions were wrong because you believe the judgement was influenced by things other than evidence about your academic performance. We know that some students, and groups representing students, were concerned that some centre assessment grades and rank order positions could be influenced by bias or discrimination. Individual cases of bias or discrimination would be taken very seriously, and we expect them to be rare.

If bias or discrimination affected your centre assessment grades or rank order positions this summer, this could be a form of malpractice or maladministration (wrongdoing).

If you think malpractice or maladministration might have affected you, then you should first discuss this directly with your school or college and raise a complaint through its complaints policy. If you feel that your concerns have not been addressed, you could then consider raising your concerns about malpractice or maladministration with the exam board. It is important to remember that this would not be an appeal, but rather an allegation (accusation) that malpractice or maladministration happened in relation to your centre assessment grades or rank order positions.

Such allegations would be serious and taken seriously. As you would be making a malpractice or maladministration allegation you would not be subject to the deadline for appeals.

6. The Joint Council for Qualifications ('JCQ') have produced a document entitled 'Suspected Malpractice Policies and Procedures, 1 September 2020 to 31 August 2021' ('the JCQ Malpractice guide'). It defines malpractice as:

Malpractice', means any act, default or practice which is a breach of the Regulations or which:

- gives rise to prejudice to candidates; and/or
- compromises public confidence in qualifications; and/or
- compromises, attempts to compromise or may compromise the process of assessment, the integrity of any qualification or the validity of a result or certificate; and/or
- damages the authority, reputation or credibility of any awarding body or centre or any officer, employee or agent of any awarding body or centre.

Malpractice may or may not relate directly to sitting an examination. Awarding bodies are aware of the possibility of novel or unexpected forms of malpractice emerging as technologies and the nature and organisation of examination centres change.

...

Awarding bodies are obliged to notify the qualifications regulators of certain malpractice incidents, in accordance with the regulators' conditions.

The following are types of malpractice (Appendix 2 gives examples for each type):

- breach of security;
- deception;
- improper assistance to candidates;
- failure to co-operate with an investigation;
- maladministration;
- candidate malpractice.

7. Under 'Individual responsibilities, the JCQ guide states:

2.1 The regulators' General Conditions of Recognition state that awarding bodies must:

- establish and maintain, and at all times comply with, up-to-date written procedures for the investigation of suspected or alleged malpractice or maladministration; and

...

2.2 The awarding body will:

- oversee all investigations into suspected or alleged malpractice;

...

- report the matter to the regulators and other awarding bodies in accordance with the regulators' General Conditions of Recognition;

...

8. Under 'the awarding body's response to an allegation of malpractice, the JCQ guide provides:

5.1 In the case of notifications of suspected malpractice received from examiners, moderators, monitors, external verifiers, the regulators or members of the public (including informants), the awarding body will consider the information provided and decide to:

- take no further action; or
- ask the head of centre, or another suitably qualified individual, to gather evidence in support of an investigation into the alleged malpractice and to submit a written report; or
- investigate the matter directly.

5.2 The awarding body will notify the relevant regulator as soon as it receives sufficient evidence of suspected malpractice that meets the notification requirements set out in B3 of the regulators' Conditions of Recognition. ...

5.3 On receipt of a notification of suspected malpractice submitted by a head of centre, the awarding body will consider the information provided and decide:

- to take no further action; or
- if the notification takes the form of a report, to make a decision on the case in accordance with the procedures, (where the evidence permits) - see sections 8 - 13; or
- to ask the head of centre to gather further evidence in accordance with paragraphs 6.1 - 6.6; or
- to investigate the matter further itself

9. Ofqual have issued guidance entitled 'Malpractice data submission, Guide to the data submission process' (the 'malpractice data submission guide'). The version in the bundle is dated September 2020. That document states '...we require awarding organisations to provide exams delivery data for regulation qualifications... malpractice data will be collected for GCSE, GCSE linear, GCSE full course, GCSE short course, AS and A level, Project L3 and Advanced Extension Award qualifications... All malpractice cases that are investigated should be reported.'

10. There is a document in the bundle labelled 'Reference 2'. It is a table of complaints reported by OCR to Ofqual on 19 November 2020. They all relate to the June 2020

exam series. One of the columns in that table is headed 'type of offence'. The text included in the 'type of offence' column comes from a pre-agreed list of offences (see p 7 of the malpractice data submission guide). The 'type of offence' includes 'Maladministration' and 'Bias or discrimination' along with numerous other types of offence.

11. The category of offence 'Bias or discrimination' was one of two new categories of offence (along with 'negligence') introduced in 2020 to capture malpractice cases related to the centre assessment grade process put in place due to the coronavirus (COVID-19) pandemic.

### **Request and response**

12. On 23 March 2021 Mr. Gallagher made the following the request:

[1] The number of malpractice/maladministration/bias/discrimination complaints that have been made to OCR relating to the Summer 2020 exams.

[2] The number of malpractice/maladministration/bias/discrimination complaints that have formally been investigated by OCR relating to the Summer 2020 exams.

[3] The outcome of the formal investigations (i.e. how many successful/rejected).

[4] The criteria/guidance that OCR used to determine whether a complaint would be formally investigated.

[5] The date when the figures in 1 and 2 were last reported Ofqual.

13. OCR replied on 19 April 2021. In relation to parts 1-3 of the request OCR confirmed that it held the information but refused to provide it under s 12(1) FOIA on the basis that the costs of searching each complaint to identify the type of complaint made would exceed the appropriate limit. It provided some information requested in parts 4 and 5.

14. Mr. Gallagher wrote to OCR on 19 April 2021, stating that he was providing clarification and in the alternative, seeking an internal review. He stated:

Regarding Points 1-3, it would appear that you may have misinterpreted the request based on your response. I am not asking for you to analyse each complaint and categorise it as either malpractice, maladministration, bias or discrimination so there should be no need to read through 50 pages of a complaint. Ofqual stated that complaints could be made on the basis of either of those four headings (or indeed combinations of them) and it is this total number that I was requesting in item 1. From your response, it would appear that this figure is "in excess of 300 cases". Please can you provide this exact figure.

It should also be possible to provide a response to Point 2. Even if you haven't already provided this figure to Ofqual or recorded it as a metric, it should still not take more than a minute to assess each case to see if you simply dismissed it or formally investigated.

For Point 3, it is inconceivable that OCR would not keep statistics on the outcome of their formal investigations, not least as this may need to be provided to Ofqual. Again, it should not take more than a minute to determine the outcome of each case if necessary.

I hope this clarification will now enable you to provide the requested information for Points 1-3, bearing in mind that this request was made on 31 March. If there was no misunderstanding about the request then please treat this email as a request for an internal review.

15. OCR upheld its decision on internal review on 11 May 2021. OCR stated that it was not possible to provide the information requested in an accurate way without individually checking and cross-checking case files.
16. Mr. Gallagher referred the matter to the Information Commissioner on 14 May 2021.

### **The Decision Notice**

17. The Information Commissioner was satisfied that OCR had estimated reasonably that the cost of complying with the request would exceed the appropriate limit. She found that OCR was entitled to rely on 12(1) FOIA. The Commissioner found that OCR had not complied with s 16 FOIA.
18. The Commissioner recognised that the only reliable way of extracting all the information within the scope of the complainant's request would be to review each complaint file manually: first to determine whether it fell within the scope of the request, second (for those files that did fall within scope) to determine whether information had been sought from the institution complained about (to assess if the complaint had been formally investigated) and thirdly to establish what the outcome of that complaint was (if indeed there had been one).
19. The Commissioner accepted that complaint files can vary considerably in length and therefore OCR's estimate of five minutes per file was not wholly unreasonable. The Commissioner also noted that, in order to review all 594 complaints without exceeding the cost limit, OCR would need to be able to review each file and extract the necessary data in under two minutes – which she does not consider feasible.
20. OCR kept a separate record of malpractice cases, but the Commissioner noted that the complainant's definition went wider than malpractice alone, meaning that all complaint files would need to be searched.
21. The Commissioner took the view that OCR could have offered to help Mr. Gallagher to refine his request by limiting it to malpractice complaints. Failing to offer this advice and assistance was a breach of s 16.

### **The Appeal to the Tribunal**

22. The grounds of appeal are, in summary, that:
  - 1) OCR and the Commissioner have misunderstood the scope of the request.

- 2) The response to part 5 was in breach of s 1 FOIA. It does not confirm if they held the information
- 3) The Commissioner was wrong to conclude that responding to the request would have exceeded the limit:
  - i. If the information requested in part 5 was held, then OCR would not have had to search for the information requested in the other parts. The search should not have taken over the limit.
  - ii. The separate 'malpractice' data could have been the data requested in parts 1 and 2.
  - iii. An electronic keyword search should have been possible rather than reading all cases.
  - iv. The OCR reasoning is unconvincing.
  - v. 'Formally investigated' should not have been interpreted to mean cases where the OCR had written to the school or college to request further information.
  - vi. The OCR could filter the cases before reading them by, for example, filtering out complaints raised before 19 August 2020.
- 4) The Commissioner should have ordered OCR to provide advice and assistance, having found a breach of s 16.

### **The Commissioner's response**

23. The request sought the number of complaints for malpractice/ maladministration/ bias/ discrimination complaints. It was clear this was in respect of the Summer 2020 exams given the terms of the request. The request did not refer to Ofqual and the special reporting requirements for such data.
24. Plainly read the request was not tied to any reporting specifically for Ofqual. Therefore, particularly in respect of bias and discrimination complaints not related to malpractice but still relating to the summer 2020 exams, there were additional complaints not within the scope of the Ofqual data but in scope of the Request.
25. The Commissioner understands that the OCR did originally interpret the request as seeking individual totals for each of the types of complaint listed. In light of the appellant's clarification the OCR confirmed that it would still need to manually review the files to accurately ascertain the total.
26. The Commissioner asked OCR to clarify this on 23 December 2021. OCR clarified that it was malpractice data that was reported to Ofqual on 19 November. Bias and discrimination complaints data is not held or reported in the same way. A search and a manual review was therefore still necessary in order to respond to the request.
27. The request was restricted to the summer 2020 exams. There was no reference to Ofqual complaints or complaints following the issuing of the Ofqual procedure.

28. The Commissioner remains satisfied with OCR's submissions and explanations as to the need to conduct a manual review.
29. The Commissioner understands that 594 may be the total number of complaints for 2020 and 326 the number of complaints for the summer 2020 exams. Both would exceed the appropriate limit.
30. For the purposes of s.12 FOIA it is irrelevant whether a public authority could have organised its records more efficiently.
31. Even if it were found to be possible for the OCR to comply with part 1 of the request it would still be permitted to rely on section 12 FOIA in respect of all of the request given that it would need to manually review the files in order to comply with parts 2 and 3.
32. The OCR's method of defining formal investigation was an appropriate objective interpretation.
33. In relation to the steps order, the Commissioner exercised her discretion not to order advice and assistance to be provided given that she had set out this advice and assistance in the Decision Notice. To have ordered the step in such circumstances would have clearly been disproportionate. This ground of appeal is ultimately academic given that the appellant has been provided with the advice and assistance the Commissioner considers to have been appropriate at paragraph 36 of her Decision Notice.

#### **Mr. Gallagher's reply**

34. This was a simple request asking for the number of complaints and investigations that were carried out following the summer 2020 examinations. The term 'malpractice/maladministration/bias/discrimination' was used because this was the terminology used by Ofqual in their guidance and these were the only grounds for a candidate to complain about their results. Part 5 of the request asked when the data was reported to Ofqual.
35. Mr. Gallagher's response prior to the internal review should have left OCR in no doubt because he stated 'Ofqual stated that complaints could be made on the basis of either of those four headings or indeed combinations of them and it is that total number that I was requesting'.
36. There would be no need to look at a timetabling complaint to see if it contained allegations of bias or discrimination because it would not be covered by the Ofqual guidance.
37. OCR produced the same response to the clarified FOIA request so even if the original request had been more explicit it would have received the same response.



38. By confirming the date that the data was provided to Ofqual OCR were implicitly acknowledging Ofqual's special reporting requirements. It remains unclear whether all the complaints requested in the FOIA request are included in the malpractice information reported to Ofqual.
39. OCR should have been aware of an alternative interpretation of the request.
40. Given that OCR provided the date that the information in parts 1 and 2 had been reported to Ofqual it is confusing as to these figures could not be provided in response to the FOIA request. OCR have now confirmed that they did not provide the figures in parts 1 and 2 to Ofqual and therefore the response to part 5 was in breach of s 1 FOIA.
41. The data reported to Ofqual does include bias and discrimination – see Reference 2.
42. If the only place where complaints had been categorised was in the submission to Ofqual, these figures should have been provided. If a complaint had not been categorised, there was no requirement to categorise it to respond to a FOIA request so s 12 would not have been triggered. FOIA asks for recorded information irrespective of whether that information is accurate.
43. The figures in reference 2 would appear to satisfy parts 2 and 3 or 1 and 3 of the request.
44. The decision notice states at para 28, 'In the time period requested, OCR has recorded 326 complaints of malpractice/maladministration, bias and/or discrimination, logged across the various systems'. This appears to be the figure requested in part 1 of the request.
45. Even if there could be cases of bias or discrimination outside of those that OCR reports to Ofqual, OCR do not need to review all the cases, they only need to review those that have not been reported to Ofqual, because they have already been categorised. Around 150 cases have been reported to Ofqual. The remaining cases could be reviewed within the appropriate limit.
46. It would be surprising if OCR do not routinely categorise their complaints in case they had to provide the data to Ofqual.
47. OCR are required to report all investigations to Ofqual. This data was readily available. Instead, they decided to arbitrarily define a formal investigation as one where they contacted the school/college (a definition that doesn't work if the complaint doesn't involve a school/college) and since they don't readily have this information were able to claim a Section 12 exemption.

48. The Commissioner should have ordered OCR to provide further advice and assistance. Only OCR know how they recorded the complaints and investigations that resulted from candidates complaining under Ofqual's scheme.

### **Evidence and further submissions**

49. We read and took account of an open bundle.

### **The relevant law**

50. Under s 12(1) a public authority is not obliged to comply with a request for information where:

...the authority estimates that the costs of complying with the request would exceed the appropriate limit.

51. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is £450.
52. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in-
- (a) determining whether it holds the information,
  - (b) locating it, or a document which may contain the information,
  - (c) retrieving it, or a document which may contain the information, and
  - (d) extracting it from a document containing it. (See regulation 3).
53. The Regulations specify that where costs are attributable to the time which persons are expected to spend on the above activities the costs are to be estimated at a rate of £25 per person per hour.
54. The estimate must be sensible, realistic and supported by cogent evidence (**McInnery v IC and Department for Education** [2015] UKUT 0047 (AAT) para 39-41).
55. The test is not a purely objective one of what costs it would be reasonable to incur or reasonable to expect to incur. It is a test that is subjective to the authority but qualified by an objective element. It allows the Commissioner and the tribunal to remove from the estimate any amount that the authority could not reasonably expect to incur either on account of the nature of the activity to which the cost relates or its amount. (**Reuben Kirkham v Information Commissioner** [2018] UKUT 126 (AAC)).

### *The Task of the Tribunal*

56. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

## Discussion and Conclusions

### *Scope of the request*

57. Taking into account the clarification provided on 19 April 2021, we find that, objectively construed, part 1 of the request was for the *total* number of complaints for malpractice, maladministration, bias or discrimination, rather than for separate figures under each of those headings.
58. We do not accept that the request, construed objectively, is limited to those complaints which OCR was required to report to Ofqual. Nor do we accept that the request, construed objectively, is limited to 'the unique complaints process introduced for the summer 2020 exams'. That may have been what the appellant intended to ask for, but that does not determine the scope of the request.
59. Part 1 of the request asks for the number of malpractice/maladministration/bias/discrimination complaints that have been **made to OCR** relating to the Summer 2020 exams. This is unambiguous. It is not limited to complaints by particular individuals (see, for example, the list of the bodies and individuals that might report malpractice to awarding bodies at 4.4 of the JCQ Malpractice guide) nor is it limited to complaints about particular individuals (e.g. candidate malpractice or centre staff malpractice) nor is it limited to just complaints of malpractice (that OCR was required to report to Ofqual). The fact that in part 5 the appellant asks for the date when these figures were last reported to Ofqual does not, in our view, alter the clear meaning of part 1.
60. Part 2 of the request asks for the number of malpractice/maladministration/bias/discrimination complaints that have been formally investigated, and part 3 asks for the outcome of those investigations. Again, this is unambiguous, and its meaning is not altered by part 5 of the request.
61. In his letter of 19 April 2021, in which the appellant clarifies his request, he refers to Ofqual as follows:

I am not asking for you to analyse each complaint and categorise it as either malpractice, maladministration, bias or discrimination so there should be no need to read through 50 pages of a complaint. Ofqual stated that complaints could be made on the basis of either of those four headings (or indeed combinations of them) and it is this total number that I was requesting in item 1.

62. The appellant did not specify where or in what context Ofqual had stated that, 'complaints could be made on the basis of either of those four headings (or indeed combinations of them)'. The fact that OCR referred to the Ofqual guide in its response does not mean that the request was limited to complaints made by students in accordance with the process set out in that guide.
63. OCR is required to report certain data to Ofqual. It is required to report all malpractice cases that are investigated. When reporting the malpractice data, OCR is required to specify the type of offence from a pre-agreed list. 'Maladministration' is an example of a type of offence. In relation to the summer 2020 exams, 'discrimination or bias' was added as a type of offence. There are a number of other types of offence such as 'breach of security', 'the alteration of any results documents including certificates' and 'improper assistance to candidates'.
64. We do not accept that, objectively construed, the request is for either the total number of complaints of malpractice, or for the number of malpractice complaints that were classified as bias or discrimination or maladministration. That is not what the appellant asks for in the request. The request would include, for example, all complaints of bias or discrimination received by OCR related to the summer 2020 exams, whether or not these fell within the definition of malpractice. OCR have stated that not all complaints of bias or discrimination include malpractice.
65. We accept that it is objectively reasonable to construe 'formally investigated' as meaning those complaints where OCR contacted the school or college. OCR review all complaints individually, but do not contact the school or college in all cases. The appellant states that 'formally investigated' should have the meaning given to it in the references provided in answer to part 4 of the request, namely the JCQ Malpractice guide, the OCR complaints policy and the Ofqual guide.
66. The tribunal has read those documents. They do not provide a definition of a 'formal investigation'. Further, the JCQ malpractice guide and the Ofqual guide are about investigations of malpractice allegations. The request was not limited to complaints of malpractice. In those circumstances, it is objectively reasonable to interpret a formal investigation as one which involved contacting the relevant school or college for information.

*Is the estimate sensible, realistic and supported by cogent evidence?*

67. In the light of our findings on the scope of the request above, the information reported to Ofqual and contained in Reference 2 in the bundle is not the requested information. It would not therefore have been possible to respond to the request simply by providing the information contained in Reference 2 to the appellant.
68. Reference 2 is not simply an inaccurate version of the requested information, it is different information. It is not a record of the total number of malpractice/maladministration/bias/discrimination complaints made to OCR

relating to the Summer 2020 exams. Although some malpractice complaints are complaints of discrimination, not all complaints of discrimination are malpractice complaints. For example, a complaint of a failure to make reasonable adjustments would be a complaint of discrimination, and therefore captured by the request, but it would not necessarily fall within the definition of malpractice.

69. OCR have multiple recording systems for complaints: spreadsheets, a CRM Database and other industry specific examination processing systems (EPS). Some complaints are held in paper form and in electronic records held in the network folders and email accounts for individuals in the teams. Complaints are not logged in a central location.
70. Some complaints are not logged as complaints but handled immediately by the appropriate individual. Some complaints may have been logged in each of the respective systems. Particularly in relation to the 2020 exam period, there was a rise in the complexity of complaints. The complaints contained multiple elements across a variety of complaint categories. The systems and processes in place within the complaint teams were not set up in a way that enabled OCR to effectively capture all elements of a complaint in one central location.
71. For the above reasons, in order to ascertain the total number of malpractice, maladministration bias and discrimination complaints we accept that OCR would have to review each complaint individually to ascertain if it fell within one of those categories.
72. OCR have stated that in the time period requested, over the multiple systems, they have logged 326 complaints of malpractice/maladministration, bias and/or discrimination across the various systems. This figure includes the duplication of complaints as described above. It is therefore *not* the total figure of complaints as requested by the appellant. The system does not allow the OCR to easily extract the total number of complaints of the requested categories.
73. We do not accept that the figure of 326 falls within the scope of the request, but is simply inaccurate. Where there is a request for the total number of a particular kind of complaints, if the public authority holds a different number, which it knows does not represent the total number of complaints, that number is not within the scope of the request. It is not the requested information.
74. We accept that in order to determine if complaints of the relevant categories had been formally investigated and to identify the outcome of those complaints, as requested in parts 2 and 3, an individual review of each complaint would be necessary. OCR stated that the total number of complaints received in 2020 was 594.
75. The appellant argues that the maximum amount of complaints that need to be reviewed must be 396. That was the figure initially provided by OCR to the

Commissioner. The appellant argues that OCR do not have to review each one of those 396 complaints, because they would not have to look through the approximately 150 complaints that had been reported to Ofqual. They have already been categorised and the penalty recorded. The appellant argues that this would leave 176 complaints to review.

76. Each complaint would take between 5 and 10 minutes to review. If each complaint took 5 minutes, 176 complaints would take 14 hours and 40 minutes to review. If each complaint took 10 minutes, 176 complaints would take 29 hours and 20 minutes. Taking a mid-point of 7.5 minutes, 176 complaints would take 22 hours to review. Even assuming that the appellant is right, and OCR's recording systems would allow them to identify and set aside the complaints that had been reported to Ofqual without reviewing those complaints, then 22 hours would be a reasonable estimate in our view.
77. Further, from the information provided by OCR, it seems unlikely to us that it would be a matter of simply setting aside the complaints that had been reported to Ofqual. In order to identify duplicate complaints, it would, in our view, be necessary to review the complaints that had been reported to Ofqual. To identify if a complaint had been 'formally investigated' it would be necessary to review the complaints that had been reported to Ofqual. Further, from the information provided by OCR, we accept that they would also have to search through information that had not formally been classed as a complaint.
78. Based on all the matters set out above, we accept that is reasonable to estimate that it would take in excess of 18 hours to comply with the request.
79. In response to part 5 of the request, which asked when the figures requested in parts 1 and 2 were last reported to Ofqual, OCR stated as follows:

Malpractice data was sent to Ofqual on 19 November 2020, they have now published their report (link below) this data covers all malpractice not just bias/discrimination.
80. The appellant argues that if 19 November 2020 is the date that the figures requested in 1 and 2 were last reported to Ofqual, then there is no need for any search in order to answer parts 1 and 2. We reject this submission. It is clear from the response and from later correspondence, as we have found above, that the malpractice data reported to Ofqual is not the requested data.
81. The appellant argues that if 19 November 2020 is not the date that the figures requested in parts 1 and 2 were reported to Ofqual then the response to part 5 was a breach of s 1 FOIA.
82. The response to part 5 could have explicitly stated that the information requested in part 5 was 'not held'. In our view OCR's position should have been apparent to the appellant looking at the response as a whole. The Commissioner's investigation

focused specifically on whether or not OCR was entitled to rely on s 12 and whether they provided reasonable advice and assistance. The decision notice did not reach a determination on whether or not the response to part 5 of the request complied with s 1 FOIA. We therefore have no jurisdiction to deal with this issue.

83. In para 11 of his reply, the appellant argues as follows. FOIA is a request for recorded information. If a complaint has not been categorised, then there is no requirement to categorise it to respond to a FOIA request. Section 12 is accordingly not triggered, because OCR do not have to categorise the complaints in order to respond to the request.
84. We reject this argument. First, we agree with the following paragraph from the FTT's decision in **Home Office v IC and Cobain**, cited in **Coppel, Information Rights Vol I - Commentary**, at para 20-007:

Public authorities are frequently requested under FOIA for statistics. They may not previously have extracted the particular statistic from their records but may be able to do so easily. In that case, the authority would be regarded as holding the requested information. By contrast, where the requested statistic cannot be derived readily from the existing records (because, say, the request is for a level of detail which simply cannot be ascertained from existing records), then it would be regarded as a request, falling outside FOIA, for the public authority to create new information, and the authority would be entitled to respond that it did not hold the requested information. Determining whether a requested statistic is "held", by virtue of the public authority holding the "building blocks" of raw data from which the statistic can be derived, turns therefore on the complexity of the operations which need to be performed on the building blocks and the degree of skill and judgement necessary to ascertain whether a particular building block should be regarded as contributing to the statistic.

85. On this basis, in our view OCR were correct to state that they 'held' the requested figure even though they had to derive it from the building blocks of the individual complaint records. Although it was going to take a lot of time, it does not appear that the operations which had to be performed in relation to each complaint would be complex or require a high degree of skill and judgment.
86. In any event, if the appellant is right, and OCR should have stated that it did not hold the information, the logical consequence of this is not, as the appellant asserts in para 11, that it should instead have provided the figures in Reference 2, i.e. the figures reported to Ofqual. As we have found above, these were not the figures requested. The fact OCR did not otherwise hold the figures requested would not change that pos.

87. The appellant does not challenge the Commissioner's finding that there was a breach of s 16, he challenges the Commissioner's decision not to order any steps to be taken. The appellant now has the figures in Reference 2 and has had the opportunity to submit a refined request. Standing in the shoes of the commissioner we determine that it is not appropriate to order any steps to be taken as a result of the breach of section 16.

88. On the above grounds the appeal is dismissed.

Signed Sophie Buckley

Date: 16 June 2022

Judge of the First-tier Tribunal

Promulgated: 17 June 2022