

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 October 2023

Public Authority: The Office of Qualifications and Examinations Regulation

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

Decision (including any steps ordered)

1. The complainant requested information from the Office of Qualifications and Examinations Regulation ("Ofqual") relating to communications between the Secretary of State's office and the Chief Regulators. Ofqual refused the request under section 14(1) of FOIA (vexatious requests).
2. The Commissioner's decision is that the request was not a vexatious request.
3. The Commissioner requires Ofqual to take the following step to ensure compliance with the legislation.
 - Issue a fresh response to the complainant, which does not rely on section 14(1) of FOIA.
4. Ofqual must take this step 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

The request

5. On 7 February 2023 the complainant made the following request for information under FOIA:

“Could you please disclose all records of communications between the Secretary of State’s office and the various Chief Regulators (including the Interim Chief Regulator) since January 2020?”

6. Ofqual responded on 7 March 2023 and refused to provide the requested information citing section 14(1) FOIA as its basis for doing so.
7. Following an internal review on 4 May 2023 Ofqual maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 3 July 2023 to complain about the way their request for information had been handled.
9. This notice covers whether Ofqual correctly determined that the request was vexatious.

Reasons for decision

Section 14(1) – vexatious requests

10. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
11. The word “vexatious” is not defined in FOIA. However, as the Commissioner’s updated guidance on section 14(1)¹ states, it is established that section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.

¹ <https://ico.org.uk/for-organisations/dealing-with-vexatious-requests-section-14/>

12. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.
13. However, the ICO recognises that dealing with unreasonable requests can strain resources and get in the way of delivering mainstream services or answering legitimate requests. These requests can also damage the reputation of the legislation itself.
14. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal (UT) in the leading case on section 14(1), *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) ("Dransfield")². Although the case was subsequently appealed to the Court of Appeal, the UT's general guidance was supported, and established the Commissioner's approach.
15. Dransfield established that the key question for a public authority to ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
16. The four broad themes considered by the Upper Tribunal in Dransfield were:
 - the burden (on the public authority and its staff);
 - the motive (of the requester);
 - the value or serious purpose (of the request); and
 - any harassment or distress (of and to staff).
17. However, the UT emphasised that these four broad themes are not a checklist, and are not exhaustive. They stated:

"all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA" (paragraph 82).

² <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3680>

The PA's view

Impact upon resources

18. Ofqual has stated that it has expended an enormous amount of resource over the last three years in responding to the complainant's requests. It has provided the Commissioner with details of the detrimental impact of complying with the request.
19. Ofqual considers that the complainant's pattern of behaviour demonstrates that they are firmly of the belief that there has been wrongdoing and/or improper conduct by Ofqual and remains dissatisfied that this is not the case, despite Ofqual's engagement with their requests and disclosure of information. Ofqual informs the Commissioner that the complainant, despite its best efforts, has continued to burden a small FOI team with requests, despite not uncovering any such wrongdoing or improper conduct by Ofqual.
20. Ofqual states that other departments within it such as policy, complaints, data protection and regulatory departments have also expended considerable resources in responding to the complainant when they have been contacted.
21. Ofqual is of the opinion that despite disclosures, the complainant appears to misconstrue information to support their own views despite there being no evidence of wrongdoing and/or improper conduct having taken place.

Why this impact would be unjustified or disproportionate in relation to the request itself and its inherent purpose or value

22. During the unprecedented circumstances due to the pandemic, Ofqual states that it was aware that its decision-making would be a matter of public interest and scrutiny. Acknowledging this public interest, Ofqual has proactively published a significant amount of information on its own website, embarked upon public consultations, appeared before the Education Select Committee, and responded to a large number of Freedom of Information requests, including those made by the complainant.
23. Ofqual wishes the Commissioner to note that some requests made by the complainant, whilst placing a significant burden on Ofqual, were responded to in the interest of transparency. Ofqual considers that it has at all times attempted to be transparent and open about its affairs.
24. Ofqual considers that the current request is unfocused, is not aimed at any event or specific piece of information and is not limited to decisions made during the pandemic. It comes after the successful awarding of

results in summer 2022 and a return to more normal times. The request itself requires a wide search to be undertaken of all relevant communications in whatever form to be identified, reviewed, and disclosed.

25. It is Ofqual's view that there is no inherent purpose or value in carrying out these extensive searches for all communications over such a long time-period as indicated in the request. This would involve a search across the organisation for all physical and electronic records. Whilst most records are likely to be held digitally, since communications from the Secretary of State may come from the Department for Education (DfE), it would be necessary to search all emails from DfE. Ofqual works with DfE on a regular basis as the work of the two organisations is closely linked. The organisations will regularly communicate with each other on matters of common interest concerning a number of Ofqual's functions. Whilst keywords may be searched, references to Secretary of State can be made in many cases and is unlikely to narrow the search.
26. In addition, Ofqual states that it is not aware of all the staff who would have been employed in the Secretary of State's office. It also wishes the Commissioner to bear in mind that there have been six different Secretaries of State in the time-period indicated. Given this to be the case, Ofqual does not consider that a serious purpose or value exists, and it considers the complainant's request to be "a form of fishing expedition."
27. Ofqual considers that it is not simply the search that would impose a disproportionate burden, however, the ongoing nature of the complainant's wide-ranging requests for information being followed up with further requests in the hope of uncovering wrongdoing is having a detrimental impact on Ofqual's ability to deal with other matters due to the resources being made available to the complainant.
28. Ofqual refers to the decision notice which the complainant states prompted the current request (IC-193428-FS47). The request which was the subject of that decision notice was for records of the occasions on which Ofqual has contacted the Secretary of State since January 2020 to consult them about examination arrangements. Ofqual, by noting an earlier communication with the complainant, identified that the information requested related to grading decisions made by Ofqual in 2021. Ofqual originally refused to disclose the requested information under section 36(2)(c) of FOIA, however the Commissioner ordered disclosure on public interest grounds as the issue of exam policy and grading processes throughout the pandemic generated significant public interest.

29. Ofqual states that the current request does not make it evident that it relates to the previous decision. It asserts that it is unable to make the connection and indeed did not do so upon receipt of the request. It also asserts that the ICO's decision did not indicate that the requested information itself was of great public interest, therefore it considers that the burden placed upon Ofqual if it were to respond to this request would be disproportionate as it does not see any inherent purpose or value in the request.

Details of wider context and history to the request

30. Ofqual has informed the Commissioner that its FOI team has had in-depth engagement with the complainant throughout 2020, 2021, 2022 and 2023. It wishes the Commissioner to note that this has not been as a stakeholder but as a member of the public making information requests. According to Ofqual the complainant has submitted requests almost every month since June 2020, often two or three at a time. On occasion, such as March and September 2021, 6 requests per month were received and in November 2021 seven requests were received.
31. Ofqual has drawn the Commissioner's attention to the entirety of requests that were made by the complainant over the last three years and asked the Commissioner to note the frequency, volume and the changing nature of the requests as evidenced in a spreadsheet provided to the Commissioner. Ofqual has asked the Commissioner to note that the requests are usually wide-ranging and in many cases request several different pieces of information. As such, these are not considered as straightforward requests but require a significant resource not only from the FOI team but across the organisation to search, collate and review the information.
32. Ofqual asserts that, on many occasions, the complainant was not satisfied with its responses and any released information or explanations of its decision-making, and continued a pattern of trying to uncover evidence of improper conduct or wrongdoing.

The complainant's view

33. The background to the complainant's request, as set out in paragraph 28 above, is the Commissioner's Decision Notice IC-193428-F4S7, in which he considered Ofqual's application of Section 36(2)(c) to a similar request, and ordered disclosure. The complainant received the disclosed information on 7 February 2023. The contents of that disclosed information prompted the complainant to make the request which is the subject of this notice.

34. The complainant cites a previous decision notice of the Commissioner (IC-134878-Q7J6) and the Commissioner's words regarding communication between the Secretary of State and Ofqual:-

"First, there is a public interest in facilitating scrutiny of the nature of DfE's communications with Ofqual on this issue. Secondly, and relatedly, there is a public interest in facilitating scrutiny of the forum in which the DfE has communicated with Ofqual on this issue. Thirdly, there is a public interest in facilitating scrutiny of the DfE's policy on this issue."

The complainant states that exactly the same considerations apply to this current request, and show that it has a serious purpose.

35. The complainant states that their requests do not constitute harassment of Ofqual as they are "interested in records, not [Ofqual's] explanation of its own behaviour." They state that requesting records is the only reasonable way to access the true facts.
36. The complainant further points out that concerns about inappropriate influence of ministers on Ofqual's decisions have been raised in both Parliament and in the national press. For example, the chair of the Education Committee wrote to the Secretary of State about his "serious doubts about the independence, accountability and transparency of Ofqual", which he set out in considerable detail³. Similarly, a report in The Independent noted concerns about "Ofqual's independence as a regulator"⁴
37. The complainant accepts that they have submitted a large number of requests to Ofqual over the last three years. The complainant states that in part, the number of requests submitted is due to their duties as trustee of a qualifications organisation. However, they assert that a significant portion of the requests are due to Ofqual's unreasonable and obstructive behaviour, which they claim has made it necessary to submit multiple requests of a period of months to obtain a tiny piece of information.

³ <https://committees.parliament.uk/publications/3401/documents/32495/default/>

⁴ <https://www.independent.co.uk/news/education/education-news/ofqual-exam-results-algorithm-b1721658.html>

38. The complainant accepts that Ofqual is correct in stating that many of their requests “have an overarching theme to understand the decisions that Ofqual has made in relation to the provisions for Private Candidates”. The complainant states that this is in keeping with their duties as trustee of an organisation representing private candidates. However, the current request is not related to that theme, so that is not relevant in this case.
39. The complainant accepts that they regularly communicate with Ofqual’s policy, complaints and data protection teams. They assert that this communication is often part of their duties as trustee of a qualifications organisation (for example, Ofqual’s policy team often invites him to meetings), and has nothing to do with whether this particular request is vexatious.
40. The complainant also states that Ofqual correctly points out that they have had personal meetings with two different Chief Regulators. The complainant states that Chief Regulators are busy people, and do not offer meetings lightly, so the complainant considers that these meetings constitute evidence that their engagement with Ofqual has a serious purpose.
41. The complainant states that Ofqual asserts that it is having to deal with “the same issues that have previously been responded to”. In fact, the complainant points out that they have not previously asked for the records which are the subject of this current request.

The Commissioner’s decision

42. In cases where a public authority is relying on section 14(1), it is for the public authority to demonstrate why it considers that a request is a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA.
43. The Commissioner has considered Ofqual’s arguments as set out in paragraphs 18-32 above and also the complainant’s view on why the request has serious purpose and value and why the requested information is of significant public interest.
44. The complainant has previously pointed the Commissioner to a letter they 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.
45. The complainant argued 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." Following disclosure of the requested information as ordered by the Commissioner under the decision notice (IC-193428-F4S7), the complainant responded as follows:

'...the excerpt that Ofqual has disclosed shows the Secretary of State playing a central role in the setting of grade boundaries.'

46. Ofqual states that this is not the case and has quoted from its covering e-mail to the complainant:-

'In considering the document we have now disclosed, you should note that the discussion it records occurred whilst the country continued to deal with the pandemic and at a time when Ofqual was considering how best to secure the maintenance of standards going forward, in the context of the awards made in summer 2020 using Centre Assessment Grades. Ofqual will take into account a range of views whenever it is considering important decisions, such as deciding on the arrangements for GCSE, AS and A level exam series, in accordance with its statutory objectives and duties. This includes the views of the Secretary of State. Such engagement is consistent with Ofqual's Governance Framework and with the Memorandum of Understanding between Ofqual and the Department for Education. The excerpt of the discussion attached is illustrative of such engagement in exceptional circumstances.'

47. The complainant states that they are seeking records, not explanations, from Ofqual regarding the issue of ministerial influence on grade boundaries. The complainant considered that the information disclosed as a result of the decision notice mentioned above indicated that there was such influence, contradicting Ofqual's assertions, and they are therefore now seeking records of all communications Ofqual's Chief Regulators had with the Secretary of State during the relevant time period.
48. The Commissioner accepts that the complainant has previously made numerous requests for information to Ofqual, and that Ofqual has expended considerable resources in replying to these. However, he also accepts that the complainant's current request does have serious purpose and value, as there is a significant public interest in the arrangements for exams during the period of the pandemic.
49. The Commissioner has also considered the fact that the complainant's request was prompted by the previous disclosure. Ofqual has stated that it did not have any way of connecting the two requests, although this current request was made on the same day the complainant

received the disclosed information. Ofqual has also stated that the previous decision notice did not indicate that the requested information therein was of great public interest, although the Commissioner in the decision notice ordered disclosure on the grounds that the public interest in disclosure, due to the significant public interest in the issue of exam policy and grading arrangements during the pandemic, outweighed that in maintaining the exemption.

50. The Commissioner considers that, although the current request imposes a burden upon Ofqual's resources, which have already been significantly expended in responding to previous requests, this is not disproportionate to the inherent purpose and value of the request. The clear purpose and value of the request is in trying to ascertain what, if any, involvement the Secretary of State had in exam and grading arrangements during the pandemic. The Commissioner considers that Ofqual could engage with the complainant in narrowing or refining the request regarding use of appropriate keyword searches etc. in order to lessen the burden of the search.
51. The Commissioner has concluded, from considering the points of view of both the complainant and Ofqual, that, given the significant public interest in the subject matter i.e. whether there was any ministerial influence on exam grading processes during the pandemic, and the fact that the clear purpose of the request is to ascertain this, the burden placed upon Ofqual by the request is not disproportionate to the request and its clear inherent purpose and value.
52. The Commissioner's decision is therefore that the request was not vexatious and he orders Ofqual to issue a fresh response which does not rely on section 14(1) of FOIA.

Right of appeal

53. 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

54. 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.
55. 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

Deirdre Collins
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