

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 21 July 2023

**Public Authority:** Oxford, Cambridge and RSA Examinations Ltd

**Address:** The Triangle Building  
Shaftesbury Road  
Cambridge  
CB2 8EA

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to 'A' level Art and Design results for 2019 and 2022 from Oxford, Cambridge and RSA Examinations Ltd (OCR). OCR stated that part three of the request would exceed the fees limit (section 12 of FOIA) and withheld the information relating to parts one and two under section 43(2) of FOIA – commercial interests.
2. The Commissioner's decision is that section 43(2) of FOIA is not engaged.
3. The Commissioner requires OCR to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information withheld under section 43(2) of FOIA to the complainant.
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

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5. On 22 January 2023, the complainant wrote to OCR and requested information in the following terms:

"I am seeking the following information in relation to A level Art and Design results for 2022 and 2019 and hope that you will be able to assist me with this request.

1. The number of centres that were awarded adjusted marks after moderation, broken down by endorsement e.g. Fine Art, Photography etc. in 2022 and 2019.
  2. The number of candidates that were awarded adjusted marks after moderation, broken down by endorsement e.g. Fine Art, Photography etc. in 2022 and 2019.
  3. The number of centres that were awarded adjusted marks after moderation for the first time in 2022 and 2019. How many centres had never had their centre/teacher marks adjusted before and were awarded adjusted marks for the first time in 2022 and 2019."
6. OCR responded on 14 February 2023 and stated that it held information relating to parts one and two of the request but was withholding it under section 43(2) of FOIA. Regarding part three, OCR explained that the data was not recorded in its systems in line with what had been requested and that it would require both programming and manual activity to extract it. In OCR's estimation, this would exceed the fees limit (section 12 of FOIA).
7. On 20 February 2023 the complainant accepted that part three would exceed the appropriate limit. They did ask though whether refining the data to 2022 would change this.
8. The complainant requested that the exemption cited for parts one and two be reviewed as information had been provided to them by another exam board (not subject to the FOIA).
9. No internal review was carried out at that time.

## Scope of the case

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10. The complainant contacted the Commissioner on 29 April 2023 to complain about the way their request for information had been handled. They were unhappy that an internal review had not been conducted and disagreed with the non-disclosure of information relating to points one and two of the request. The complainant pointed out that another exam

board that was not subject to the FOIA had provided the information to them and that this raised questions about transparency and accountability.

11. After the Commissioner wrote his investigation letter to OCR, it confirmed that it had reviewed the request (it is unclear whether this review has been communicated to the complainant) and would have upheld the original response regarding parts one and two of the request.
12. OCR also considered whether reducing the volume of data in part three of the request would bring it under the appropriate limit. It concluded that just locating the data for 2022 would have brought it over the limit.
13. As the complainant accepted in their internal review request that OCR had applied section 12 correctly to part three of the request and asked for a review of the response to parts one and two, the Commissioner will not investigate this aspect further. The Commissioner considers that the scope of his investigation is to look at whether OCR is entitled to rely on section 43(2) of FOIA as a basis for refusing to provide the withheld information.

## Reasons for decision

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### Section 43(2) – commercial interests

14. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
15. The Commissioner has defined the meaning of the term “commercial interests” in his guidance on the application of section 43 as follows:

“A commercial interest relates to a legal person’s ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.”<sup>1</sup>

16. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.

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<sup>1</sup> [Section 43 - Commercial interests | ICO](#)

17. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
18. The public authority must demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real and of significance for it to be successfully engaged.
19. The exemption is subject to the public interest test. This means that, if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
20. OCR has provided the Commissioner with the information it withheld from the complainant. In order to explain the context of the request, OCR included a description of the process of marks moderation and adjustments:

"Students Non-Examined Assessment (NEA/Coursework) is marked by the school/centre.

- A sample is then sent to OCR where a moderator reviews the schools marks. This is the part of the process referred to as 'moderation'.

- If the moderator feels the school have been too harsh or too lenient they adjust the marks and the students are awarded the adjusted marks. This is the 'adjustment' part of the process, and can result in marks being increased or decreased according to the moderator assessment. This process is effectively a check on whether the school/centre has complied with our syllabus requirements and marked accordingly."

21. The Commissioner firstly needs to consider whether the actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed relates to commercial interests.
22. OCR states that -

"it has already been established that the offering of courses by universities is a commercial activity (University of Central Lancashire (UCLAN) v IC and Professor Colquhoun, EA/2009/0034) and we consider that this principle extends to our own courses/syllabus and examination processes, including the validation of how this is applied in centres/schools".

23. In its response to the complainant OCR stated that disclosing the requested information "would be likely to have a detrimental impact on its commercial interests". It argued that its competitors are not obliged to release this information because they are not subject to the FOIA. OCR contended that "if the information regarding entries was broken down by unit for GCE Art & Design and the number and percentage of mark adjustments were to be made public, it would be likely to create a real and significant risk" to its commercial interests and it would not allow OCR "to compete effectively and fairly in the interests of learners".
24. As to what insight the requested information would give to its competitors that would be detrimental to its commercial interests, OCR argues that disclosure -

"would allow our competitors an insight into where we may have schools/centres who are not satisfied with how OCR moderates their teacher awarded marks and this will allow those competitors to approach those centres, reducing OCR's market share..."

It would allow them,

"to identify which units were more or less popular and which units had higher or lower percentage adjustments than their equivalent qualifications, providing them with valuable insight which they could use to target our customers which would be unfair to OCR."

25. OCR considers that disclosure of the information from a "recent customer base" would be likely to have a prejudicial effect on its commercial interests:

"If such information was available to our competitors, it is highly likely that they would be able to use it in a way that would be damaging to our commercial interests. Because the other exam boards are not subject to the Act, we believe this puts us at a considerable commercial disadvantage."

26. The central argument from OCR appears to be the fact that it is subject to the FOIA and its competitors are not. This argument does have relevance where it is clear that disclosing certain information will cause detriment to the commercial interests of an organisation when that same information does not have to be disclosed by its competitors. In this instance, the Commissioner does not accept that OCR has convincingly explained the causal relationship between the disclosure of this specific information and the resulting prejudice to its commercial interests. The suggestion that competitors can target customers from the disclosure of the requested information is tenuous. Consequently, the Commissioner does not accept that the exemption is engaged.

27. He has therefore not gone on to consider the public interest test in this matter.

### **Other matters**

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28. The Commissioner notes that the complainant asked for an internal review on 20 February 2023. It is unclear when the OCR conducted an internal review and whether it has been provided to the complainant but it was after the Commissioner sent his investigation letter, some three months later.
29. The section 45 code of practice<sup>2</sup> recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from the receipt.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

## Right of appeal

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30. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**