

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2024

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

Address: 1 Friargate
Station Square
Coventry
CV1 2GN

Decision (including any steps ordered)

1. The complainant has requested information about action taken against a particular awarding organisation. Ofqual relied on section 31(3) of FOIA (law enforcement) to neither confirm nor deny whether it held the requested information.
2. The Commissioner's decision is that Ofqual was entitled to rely on section 31(3) to neither confirm nor deny whether it held the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 8 March 2024, the complainant wrote to Ofqual and requested information in the following terms:

"...Ofqual have previously upheld 1 of our complaints against [ORGANISATION NAME REDACTED] – namely that they broke condition A8.3 – which requires awarding organisations to 'Establish, maintain, and at all times comply with, up to date written procedures for the investigation of suspected or alleged malpractice

Please can you advise what Formal Action Ofqual took against

[ORGANISATION NAME REDACTED] in this serious matter – as we cannot find any mention of it in Official Ofqual Reporting.”

5. Ofqual responded on 5 April 2024. It stated that it was relying on section 31(3) to neither confirm nor deny whether it held the requested information.
6. Following an internal review, Ofqual wrote to the complainant on 11 May 2024. It maintained its reliance on section 31(3) and advised that it could also rely on section 43(3) to neither confirm nor deny whether it held the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 6 July 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether Ofqual was entitled to rely on section 31(3) to neither confirm or deny whether it held the requested information.

Reasons for decision

Neither confirm nor deny ('NCND')

9. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in a request. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be considering the likely consequences of confirming or denying whether or not particular information is held.
10. Public authorities need to use the NCND response consistently, over a series of comparable requests, regardless of whether or not they actually do hold the requested information. This is to ensure that an NCND response cannot be taken as an indication of whether or not information is in fact held.
11. Ofqual has decided to NCND holding any of the requested information in its entirety, citing section 31(3) of FOIA. It also considers that section 43(3) of FOIA could also apply.
12. The Commissioner has first considered whether Ofqual was entitled to rely on section 31(3) of FOIA.

Section 31 - law enforcement

13. Section 31(3) of the FOIA states that:

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)”

14. Subsection (1) provides a relevant list of activities relating to law enforcement and at part (g) refers to ‘the exercise by any public authority of its functions for any of the purposes specified in subsection (2),’

15. In this case, Ofqual has relied on the NCND exclusion on the basis that confirming or denying whether it holds the information within the scope of the request would be likely to prejudice Ofqual’s regulatory functions set out in section 31(2) of FOIA.

16. In its submission to the Commissioner, Ofqual explained that if held, the information would relate to the following statutory functions in relation to its monitoring and enforcement of compliance with its regulatory framework:

- Ofqual’s powers to set conditions and to take regulatory action are set out in sections 134 and 151 – 152 of the Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA).
- Ofqual published the General Conditions of Recognition, with which all awarding organisations must comply.
- Under section 149 of ASCLA, Ofqual has the power to monitor awarding organisations’ activities that are relevant to their compliance with the General Conditions.
- Ofqual has published its Taking Regulatory Action policy under section 153(1)(a) of ASCLA, which sets out how it monitors awarding organisations and how it will use its enforcement powers.

17. Ofqual explained that its regulatory action function includes the use of its formal enforcement powers under ASCLA (to impose a financial penalty or to remove recognition), and other types of intervention to bring an awarding organisation into compliance with the General Conditions of Recognition.

18. Although Ofqual routinely publishes details of regulatory actions like monetary penalties or withdrawal of recognition, it does not publish details of lower level actions.

19. In this case the requested information relates to details of any action taken by Ofqual concerning a complaint about a particular examining body.
20. In order for a prejudice based exemption such as section 31(3) to be engaged the Commissioner considers that three criteria need to be met:
 - First, the actual harm which the public authority alleges would, or would be likely, to occur if it confirmed whether or not it held the requested information has to relate to the applicable interests within the relevant exemption;
 - Second, the public authority must be able to demonstrate that some causal relationship exists between confirming whether or not the requested information is held and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – that is, confirming whether or not the information is held 'would be likely' to result in prejudice or 'would' result in prejudice.
21. Ofqual explained that it will always neither confirm nor deny whether it holds information for requests of this type to guard against the risk of prejudicing its ability to regulate effectively.
22. Ofqual explained that its use of NCND reflects its need to avoid releasing information inadvertently through its answers to multiple requests over time. It considers that if it answered some requests for information about 'action taken' by denying that it held the information, and others either with a 'neither confirm nor deny' response or by relying on another exemption in FOIA, then a pattern would emerge whereby it would be possible to work out those cases in which Ofqual had and had not taken action.
23. Ofqual considers that it is the emergence of such a pattern, and the inadvertent release of information, that could undermine its ability to properly discharge its investigation and enforcement functions.
24. Ofqual explained that confirming or denying that it held the requested information may mean that its operational teams need to be diverted from their core role to answer questions about why action was taken in some instances and not taken in others. It considers that where the public can work out in which cases Ofqual has taken action, it would inevitably receive requests to disclose information about what action was taken in those cases. It also considers that it may be drawn into debate about the relative merits of its decisions as to the particular

action to take in different cases, and where that debate would concern the choice of low level regulatory action, it would serve little public interest compared to the disproportionate use of its staff resources.

25. Ofqual explained that increased public debate about its regulatory actions has the potential consciously or unconsciously to influence its decisions as to whether to take action and as to what particular action to take, which would undermine the effectiveness of those decisions.
26. It considers that either confirming or denying holding the requested information could influence the way in which awarding organisations cooperate with Ofqual during its enforcement processes. Ofqual explained that where an awarding organisation knows that it is unlikely to become public that it has been subject to action short of a direction, financial penalty or withdrawal of recognition, it is more likely to accept such action at an earlier stage in the process. However, where such action might become public, an awarding organisation might be more incentivised to resist it leading to fewer admissions by awarding organisations and lengthier and more heavily disputed enforcement processes.
27. Ofqual considers that this in turn would damage relationships between Ofqual and awarding organisations, and lead to fewer voluntary admissions of breaches and increases costs which, in relation to this type of enforcement action, Ofqual cannot recover from awarding organisations.
28. Ofqual considers that likelihood of one or all the prejudices described above occurring is 'would be likely'. It explained that, from its engagement activity around updating its 'Taking Regulatory Action' policy, Ofqual is aware that awarding organisations are acutely sensitive to the repercussions of publicly disclosed enforcement action, even when this falls short of a direction, financial penalty or withdrawal of recognition.
29. The Commissioner accepts that the potential prejudice envisaged by the Ofqual clearly relates to the interests which the exemption contained at section 31(1)(g) is designed to protect.
30. The Commissioner is also satisfied that there is a causal relationship between complying with section 1(1)(a) and the envisioned prejudice. Confirming or denying the information is held could impact Ofqual's regulatory action and relationship with awarding organisations. Therefore the second criterion is met.
31. Finally, the Commissioner accepts that the chance of such prejudice is more than a hypothetical possibility; rather there is a real and

significant risk of it occurring if Ofqual complied with section 1(1)(a) of FOIA. The third criterion is therefore met and the exemption is engaged.

Public interest test

Factors in favours of confirming or denying the requested information is held

32. Ofqual has acknowledged that there is an inherent public interest in transparency. It considers that confirming or denying whether the requested information is held could help assure the public that when an awarding organisation has failed to comply with its conditions of recognition, Ofqual will be consistent and proportionate in undertaking its regulatory role.
33. Ofqual has acknowledged that confirming or denying the requested information is held would increase the public's understanding of Ofqual's regulatory action regime. It could also increase public understanding of how often breaches occur. Ofqual considers that there is public interest in encouraging and informing public debate about issues that affect students such as failures in the awarding of qualifications. This would in turn increase public confidence in Ofqual's effective regulation of awarding organisations.
34. On this point, Ofqual has explained that it already publishes details of regulatory actions such as monetary penalties and withdrawals of recognition on its website. Moreover, Ofqual publishes details of its monitoring and enforcement activities in its annual report.
35. In their request for internal review, the complainant argued that: "the requested information is linked to the Award of illegal CAG's in 2021 and Ofqual wish to bury this fact". They argued that all information relating to enforcement actions or warnings against examining boards should be made public for transparency.

Factors in favour of maintaining the NCND response

36. Ofqual has stated that there is a very strong public interest in protecting and safeguarding the ability of public authorities, such as Ofqual, to take regulatory action. It considers that confirming or denying whether the requested information is held would undermine those protections.
37. Ofqual considers that there is a strong public interest in allowing it to fulfil its statutory purpose, and meet its statutory objectives, by preserving its ability to discharge its monitoring and enforcement functions without undue external interference or influence from those detecting a pattern to Ofqual's responses.

38. It added that there is also a public interest in protecting Ofqual's operational teams from additional burden due to external intrusion. Ofqual may be drawn into inefficient debate regarding its low level regulatory action on single cases. It is not in the general public interest that resources are diverted away from core functions in this way.
39. Ofqual explained that there is public interest in facilitating the swift and efficient resolution of enforcement action through low level actions where this will secure future compliance by awarding organisations. It stated that it would be against the public interest to create a situation in which awarding organisations are disincentivised from proactively and openly admitting breaches in a timely manner and incentivised to strongly resist every type of enforcement action.

Balance of the public interest test

40. The Commissioner acknowledges that there is public interest in transparency and the public being assured that concerns about awarding bodies are thoroughly investigated with appropriate remedial actions implemented.
41. He also acknowledges that the wider complaint to which the request information relates concerns the use of Centre Assessment Grades ('CAG') that were used for examinations that took place in 2020 and 2021 during the pandemic. Given the concerns reported about the CAG system, the Commissioner finds that there is public interest in regulatory action connected to that organisation's administration.
42. However, the Commissioner agrees with Ofqual's arguments that increased scrutiny and debate about the lower level action it has taken concerning awarding organisations could detract from its regulatory functions. It could lead awarding organisations to be less willing to proactively report breaches and accept lower level regulatory enforcement action.
43. Although there are wider public interest arguments in favour of confirming or denying whether the requested information is held, the Commissioner notes that the complainant in this case has a personal reason for requesting the information and has raised a wider complaint with Ofqual about their concerns. The complainant has also advised the Commissioner that they had already approached the awarding organisation in question and had been given a response to their query.
44. The Commissioner notes that the complainant also suggested that Ofqual could provide a response to their request in a 'closed agreement', however disclosures under FOIA are 'to the world at large' and cannot be restricted to certain individuals.

45. The Commissioner understands the reasons why the complainant has requested the information and why they are not satisfied with Ofqual's response. However, the Commissioner is mindful that while the complainant is interested in a particular awarding body, Ofqual's response must consider the impact of its response on its regulatory approach in general. It must consider its relationship with all awarding organisations, not just the one specified in the request.
46. The Commissioner considers that there is a risk that confirming or denying the requested information is held in this case could set a precedent, and lead to debate about the investigation and regulatory actions of other concerns and complaints. This in turn could impact Ofqual's approach to investigating issues and its ability to engage awarding organisations on a voluntary and proactive basis.
47. The Commissioner's decision therefore is that the public interest in maintaining this exemption outweighs the public interest in disclosure.

Other matters

48. The complainant has expressed dissatisfaction with Ofqual's handling of their request for internal review. They highlighted that the person who was involved in their previous correspondence with Ofqual and the handling of their complaint to Ofqual, also carried out the internal review of the handling of their FOI request.
49. Section 45 of the Code of Practice states: "It is best practice, wherever possible, for the internal review to be undertaken by someone other than the person who took the original decision."
50. The Commissioner acknowledges that the internal review should ideally be carried out by someone who has not previously been involved in the original decision. However, it must be noted that this is best practice and not a statutory requirement.

Right of appeal

51. 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

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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