

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2014

Public Authority: Ofqual
Address: Spring Place
Coventry Business Park
Herald Avenue
Coventry
CV5 6UB

Decision (including any steps ordered)

1. The complainant requested information about Ofqual's subject experts. Ofqual withheld the information, citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that Ofqual has correctly applied this exemption and does not need to take any further action.

Request and response

3. On 8 May 2013, the complainant wrote to Ofqual (Office of Qualifications and Examinations Regulation) and requested information in the following terms:
"Please list all subject experts, their names, their affiliations, and their qualifications so the public may have a chance to vet them. This is what the Select committee implied. And indeed what other professional organisations asked for."
4. This request was similar to information requests the complainant had made on 15 and 16 July 2012. On those occasions, in responses dated 31 July 2012 and 13 August 2012, Ofqual had provided some of the requested information, and withheld one element – the names, affiliations and qualifications of its subject experts - citing the exemption under section 40(2) of the FOIA.

5. On 9 May 2013, Ofqual responded to the complainant's request of 8 May 2013. It withheld the requested information and cited the complainant's previous requests and its responses to these as its basis for doing so.
6. Following an internal review, Ofqual wrote to the complainant on 28 June 2013. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 12 August 2013 to complain about the way their request for information had been handled.
8. After liaising with the complainant, the Commissioner focussed his investigation on whether Ofqual correctly applied the exemption under section 40(2) to the complainant's request.
9. The complainant submitted detailed arguments in support of their position that Ofqual should disclose the requested information. The Commissioner has also considered these as part of his investigation.

Reasons for decision

10. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of a third party (ie someone other than the requester) and the conditions under either section 40(3) or 40(4) are also satisfied.
11. The Commissioner therefore first considered whether the requested information is the personal data of a third party.
12. The Data Protection Act (DPA) defines personal data as '*...data which relate to a living individual who can be identified from those data...*'
13. The Commissioner is satisfied that Ofqual's subject experts could be identified if their names, affiliations and qualifications were to be released, and that the requested information is therefore the personal data of the experts (the data subjects).
14. Having decided that some of the requested information is third party personal data, the Commissioner then turned his attention to the conditions under section 40(3).
15. The first condition under section 40(3)(a)(i) says that personal data is exempt from disclosure to a member of the public if doing so would contravene one of the data protection principles set out in Schedule 1 of

the DPA. The Commissioner considered whether Ofqual was correct when it argued in its submission that disclosing the information would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully...'.

16. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:
 - What reasonable expectation do the individuals have about what will happen to their personal data?
 - Have the individuals given their consent to disclosure?
 - What might be the likely consequences resulting from disclosure?
17. Assessing fairness however, also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so. The Commissioner therefore also finally considered these interests.
18. Expectation: Whether an employee might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to the employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
19. The information in this case concerns individuals engaged by Ofqual to provide it with expert advice on a range of subject specific or assessment matters.
20. The complainant argues that those defined as experts who provide specialist advice about national exams that affect millions of children must be "very senior" and, as "public officials", should expect to be publicly identified.
21. Ofqual currently has approximately 640 individual subject experts on its subject expert database. It has told the Commissioner that these individuals are not public officials or Ofqual employees; they are engaged on a 'call off/as required' basis to provide Ofqual with expert advice when this is not available in-house. The Commissioner is prepared to accept this explanation.
22. In addition, the Commissioner understands that, while some of these individuals might be senior in their substantive roles, their role as a subject expert is to offer advice; they are not decision-makers or senior within Ofqual. Nor is the role of subject expert a public facing role.

23. Ofqual also drew the Commissioner's attention to its Information Charter. This forms part of its application process for the role of specialist and includes a commitment to protect personal data in line with the requirements of the Data Protection Act and Ofqual's own Privacy Policy.
24. The complainant has concerns that this Charter only appeared to come to light in Ofqual's submission to the Commissioner. It is not unusual, however, for a public authority to identify additional evidence and arguments in order to address the Commissioner's specific and detailed questions.
25. Having considered the arguments of both the complainant and Ofqual, the Commissioner agrees with Ofqual that the subject experts it engages might reasonably expect that their personal data will not be disclosed.
26. Consent: Ofqual has told the Commissioner that the subject experts it engages have not consented to their personal data being disclosed.
27. Consequences of disclosure: Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.
28. Ofqual maintains that disclosing the requested information might have two adverse consequences. The information request that is the subject of this notice is the ninth request for information related to examinations and qualifications that the complainant has made to Ofqual since February 2012.

During this period, Ofqual has said that it has had to respond to, what it considers to be, potentially abusive comments made to a member of staff relating to these requests.
29. Firstly therefore, Ofqual has told the Commissioner that, given the above, if this information was released into the public domain it could be used to lobby and cause nuisance to its subject experts. This would be likely to cause those individuals a degree of distress.
30. Secondly, in its response of 13 August 2012, Ofqual told the complainant that disclosing the requested information may affect the willingness of specialists to work with Ofqual in the future.

31. The Commissioner is aware that the complainant does not accept this argument. The Commissioner, however, considers it is possible that routinely releasing subject experts' personal data may make it more difficult to attract individuals to that role, or maintain them in it. This may happen if individuals are aware that their role as an Ofqual subject expert may intrude into their personal or professional life – through being identified and approached by members of the public.
32. As outlined in paragraph 16, the Commissioner takes into account the "likely consequences" resulting from disclosure; it is not necessary for any consequences to be certain. In this case, he considers that the two possible consequences resulting from disclosure, which Ofqual has described, are credible.
33. Legitimate interest in disclosure to the public: Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
34. Ofqual told the complainant in its response of 13 August 2012 that it accepted there may be some interest in knowing which individuals have given it advice on qualifications. However, it did not accept there was a wider public interest as the requested information relates to individuals who are not directly employed by Ofqual, but who are contracted on a case by case basis.
35. Ofqual's use of subject experts was highlighted in an Education Select Committee report in July 2012¹, to which Ofqual responded in October 2012. The complainant has cited this report as evidence that the Committee asked for more transparency regarding external subject experts, quoting the specific recommendation:

"While we accept Ofqual's rationale for its lack of in-house subject expertise, criticisms from the subject communities lead us to conclude that Ofqual needs to be more transparent about its consultation with and use of external subject experts."

¹ [The administration of examinations for 15–19 year olds in England](#)

36. The complainant has interpreted this recommendation to mean that Ofqual should be transparent about who it engages as subject experts ie it should identify those individuals. Ofqual maintains that it is a recommendation to review how it engages and uses experts, including issues of transparency more broadly.
37. The Commissioner has noted Ofqual's comments on its interpretation of the Select Committee's findings. He also notes that Ofqual told him in its submission that it is in the process of undertaking a review in accordance with the Select Committee's recommendation.
38. The Commissioner accepts that there is a legitimate interest in overall transparency in the way a public authority such as Ofqual conducts its business. However, there is no presumption that this should automatically take priority over personal privacy. The Commissioner judges each case on its merits.
39. In this case, the Commissioner is not convinced that the specific information requested is of sufficient wider public interest to warrant overriding the protection of the third party personal data of those concerned.
40. Having considered both parties' submissions he is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that Ofqual has put forward for protecting the individuals' personal data, namely:
 - the individuals' likely expectations about how their personal data will be managed, implicit in the role of subject expert;
 - the experts' lack of consent to its release; and
 - the possible negative consequences of releasing the information – both to the subject experts and Ofqual more generally.
41. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the data subjects and that it would not be fair to disclose the requested information in this case. Consequently, the Commissioner considers that section 40(3)(a)(i) could be applied to this request, and that Ofqual is correct to withhold the information.
42. He did not therefore go on to consider whether disclosing the information would breach the second data protection principle (that personal data 'shall be obtained only for one or more specified and lawful purposes...'), which Ofqual had also cited, or any of the other conditions under section 40(3) or 40(4).

Right of appeal

43. 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: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Rachael Cragg
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
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SK9 5AF