

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

### **Decision notice**

**Date:** 23 January 2018

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

**Address:** 1 Hills Road  
Cambridge  
CB1 2EU

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

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1. The complainant has requested statistical information from Oxford, Cambridge and RSA Examinations (OCR) in relation to the total number of malpractice cases over a five year period. OCR refused to disclose this information citing sections 12, 21 and 43 of the FOIA.
2. In relation to section 12 of the FOIA, the Commissioner has decided that OCR applied this exemption appropriately to the fifth element of the complainant's request.
3. However, in relation to elements one to four, the Commissioner has decided that OCR was incorrect to rely on sections 21 and 43 of the FOIA.
4. The Commissioner requires OCR to take the following steps to ensure compliance with the legislation.
  - OCR should disclose to the complainant the total number of cases of malpractice over the timeframe specified in the request, provide a breakdown showing the type of malpractice, disclose who was involved and the known sanction (element one to four of the request, as worded in paragraph 6 below).
5. 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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6. On 29 March 2017, the complainant wrote to OCR and requested information in the following terms:  
  
"Under the FOIA, could you please:
  - \* disclose the total number of cases of malpractice over the last five calendar years;
  - \* provide a breakdown showing the type of malpractice;
  - \* disclose who was involved - e.g. examiner, teacher, candidate etc;
  - \* disclose the known sanction.
  - \* disclose if any cases involved a report/s to the police."
7. OCR responded on 24 April 2017. It refused to disclose the requested information citing section 43 of the FOIA.
8. The complainant requested an internal review on 24 April 2017.
9. OCR carried out an internal review and notified the complainant of its findings on 15 May 2017. It upheld the application of section 43 of the FOIA and also commented that it considered section 21 applied and section 12 to the fifth element of the request.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 16 May 2017 to complain about the way his request for information had been handled. He stated that he remains dissatisfied with the way his request was handled, as OCR continues to refuse to disclose the requested information.

## **Reasons for decision**

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### **Section 12**

11. Section 12 of the FOIA states that a public authority is not obliged to comply with a request if it estimates that it would exceed the appropriate limit.

12. The relevant Regulations which define the appropriate limit for section 12 purposes are The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI 2004 No 3244. These are known as the 'Fees Regulations' for brevity. Regulation 3 of the Fees Regulations states that the appropriate limit is £450.00 or 18 hours at an hourly rate of £25.00.
13. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
  - determining whether the information is held;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
14. With regards to the last element of the complainant's request, OCR explained that the information is not readily available. This is because the records it keeps are based on malpractice cases rather than reports to the police. To establish the number of cases that may have been disclosed to the police, OCR would have to review each and every case file over the time period specified in the request and it has estimated that it would exceed the cost limit prescribed by the FOIA by a considerable amount.
15. The Commissioner is unable to discuss further how the cost of compliance would be exceeded in this case in the main body of this notice, as to do so would involve disclosing the number of case files that would need to be reviewed and therefore the withheld information for element one of the request. She has therefore used a confidential annex.
16. The Commissioner is only able to say in the main body of this notice that she is satisfied with the explanations provided by OCR, these demonstrate that compliance would exceed the cost limit and therefore that section 12 of the FOIA applies to the fifth element of the request.
17. The Commissioner will now address the first four elements of the request and OCR's application of sections 21 and 43 of the FOIA.

## Section 21

18. Section 21(1) of FOIA states that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
19. Section 21(2) states that for the purposes of subsection (1) –
  - (a) Information may be reasonably accessible to the applicant even though it is accessible only on payment, and
  - (b) Information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
20. For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.
21. OCR explained that the Office of Qualifications and Examinations Regulations (Ofqual) promotes standards and public confidence in regulated qualifications and in order to discharge this duty it actively monitors malpractice and where necessary takes action to prevent and maximise deterrents against it. In particular Ofqual produced regulations requiring awarding bodies to take steps to prevent malpractice and in order to allow Ofqual to monitor awarding bodies' compliance with such regulations, awarding bodies are required to supply Ofqual with information about malpractice. It provided a link to the Statistical Release Malpractice for GCSE and A level Summer 2016 Exam Series:  
  
<https://www.gov.uk/government/statistics/malpractice-for-gcse-and-a-level-summer-2016-exam-series>  
  
OCR advised that all awarding bodies are required to provide data on malpractice to Ofqual annually and annually Ofqual produce this statistical release on malpractice. It explained that the regulations also give Ofqual the right to audit any of OCR's processes including its malpractice process.
22. OCR explained that Ofqual provides a complete picture of malpractice across all the major exam boards in England, Wales, and Northern

Ireland and represents an accurate and comprehensive picture of what is happening in this area. As OCR contributes to the report and the above report includes its data, it considers section 21 of the FOIA applies. It stated that the above report is accessible to the complainant and therefore available to him by other means.

23. For section 21 of the FOIA to apply, the requested information must be available to the complainant by other means. So, all the requested information; not just some of it or similar information. The Commissioner has reviewed the report and notes that it provides data on malpractice across the exam boards but in a consolidated format. It does not provide access to OCR's individual data or the individual data of any of the other exam boards mentioned. The information is collated, presented and published across all examining boards subject to this report. The report may provide similar information but it does not provided the information requested and so the requested information cannot be said to be reasonably accessible to the complainant by other means. For these reasons, the Commissioner does not agree that section 21 of the FOIA is engaged.

### **Section 43**

24. Section 43 of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of OCR or a third party.
25. This exemption is also subject to the public interest test. So, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of OCR or a third party, OCR must also consider the public interest arguments for and against disclosure and demonstrate that the public interest rests in maintaining the exemption.
26. OCR explained that it is the only main exam board in England which is subject to the FOIA. This places OCR in a commercially disadvantageous position, as it has to compete in the qualifications sector with other organisations which are not subject to the FOIA and which, therefore, will never be forced to disclose any information which undermines their commercial interests.
27. It states that disclosure of data about OCR malpractice cases could lead to centres choosing another exam board instead if they perceive the levels of malpractice to be high or if they have concerns about the type of malpractice that has been found. And, given that malpractice data on other exam boards will never be available as they are not subject to the FOIA, there is no comparative data available for centres to consider.

28. OCR confirms that its competitors could take advantage of this situation to encourage centres to switch to them and would have insight into the levels and types of malpractice that OCR has to deal with and the sanctions taken. It reiterated again that OCR would not be able to get the same insight into them. It explained further that OCR could be singled out for negative media attention as a result of the release of its own data and this could lead to potential reputational damage which would have an adverse effect on OCR's commercial interests. The other exam boards would not be subject to equivalent levels of media scrutiny in this respect.
29. To support its case further, OCR provided some background on the malpractice process for awarding bodies. It stated that to protect the integrity of the qualifications offered by all awarding bodies all allegations of malpractice in a centre (i.e. a school or college) in relation to examinations and assessments are investigated irrespective of the underlying cause or the people involved. Malpractice includes maladministration and non-compliance. All awarding bodies under the umbrella of the Joint Council for Qualifications (the JCQ is a membership organisation comprising the seven largest providers of qualifications in the UK) investigate malpractice using the same process and imposing the sanctions as set out in the JCQ's process documentation.
30. Suspected malpractice can be identified and reported to OCR in a variety of ways (by the centre itself, examiners, centre staff and so on) and can be done anonymously. Investigations can be carried out by the head of centre and reported to the awarding body which determines whether or not malpractice has taken place, who has committed the malpractice, and the sanction to be imposed on candidates and/or centre staff and/or the centre itself. Centre sanctions are where OCR imposes a restriction or an action on a centre because of a finding of malpractice against the centre. This can be given to a centre at the same time as a sanction against members of staff but will depend on the seriousness of the malpractice.
31. OCR argued that its main competitors are AQA and Pearson. These will be involved in investigating malpractice but, as they are not subject to the FOIA, detailed information about their malpractice cases will never be available in the public domain. It stated that this cannot be overlooked as this places it in a position of competitive disadvantage and the situation is made all the more perverse by the fact that the other main awarding bodies in England (AQA and Pearson) are also delivering public examinations and that AQA is around twice the size of OCR.
32. It advised that the information which is publicly available on malpractice is that which is released by the awarding bodies' regulator, Ofqual. The

fact that this information is published in a consolidated form, despite the fact that Ofqual has a breakdown of data for each awarding body is significant and suggests that Ofqual does not want to put any one awarding body at a disadvantage and that it does not want to publish data which could lead to meaningless and misleading comparisons.

33. OCR stated that the examinations market is price inelastic and depends quintessentially on quality of support for teaching and the more general reputation of an awarding body. How OCR is perceived as being competent or otherwise in dealing with malpractice could clearly have an impact on OCR's reputation. Given that all centres tend to use at least one qualification from each awarding body, the quality of each versus the others can be compared by every customer. The information that is in the public domain from the regulator enables comparisons between those aspects of service that impact on awarding bodies' reputations to be made by each customer. Selective information eliminates comparison and thereby distorts the picture in favour of those producing less information, or none at all.
34. Reputation is, therefore very critical for OCR to maintain its competitive position. It went on to say that malpractice does not only reflect on the candidates and centres but on OCR as well, not least as media coverage of malpractice will usually cite the awarding body involved especially in the absence of other material which is confidential. In the absence of any available comparative data it could be determined from OCR data that the nature of OCR exams allows more or less malpractice to be committed and that OCR is more or less inclined to pursue cases of malpractice. This has the potential to undermine OCR and the sector as a whole.
35. In summary, OCR stated that if the total number of malpractice cases was disclosed this could lead to potential customers being dissuaded from joining OCR if they perceive the level of cases to be high and they have no data against which to compare this. Malpractice can lead to candidates not being issued with results which could deter centres from doing OCR exams if they perceive that OCR is tougher on malpractice than other awarding bodies. This would have the impact of reducing OCR's income from qualifications and it is possible that its competitors might seek to take advantage of this information to recruit more centres to their benefit and OCR's detriment.
36. In terms of the breakdown of type of malpractice, it stated that the media might use this information to single out OCR and run stories which would have an adverse impact on OCR's reputation and OCR would not be in a position to point to any comparative data for other awarding bodies.



37. With regards to the breakdown of groups who were involved, OCR advised that potential examiners might be put off from working with OCR which would make it difficult for OCR to operate effectively in delivering public examinations since they rely on its examiners and recruitment is already challenging.
38. In respect of the breakdown of sanctions, it argued that potential whistleblowers might be deterred which would undermine the system as they are often relied upon for reporting of incidences of malpractice which centres might try to otherwise cover up. Centres might also choose to be less co-operative in the handling of malpractice investigations. Both of these potential consequences would have a detrimental effect on OCR's ability to perform its functions as an exam board and thereby damage its commercial interests.
39. In its submissions OCR has repeatedly pointed out that it is the only main examining board in England subject to the FOIA. No other exam boards are and more importantly its main competitors AQA and Pearson are not. The Commissioner considers this argument alone is not enough to warrant the non-disclosure of information. This argument is really only of relevance if the requested information is commercially sensitive and if the requested information is as sensitive as OCR says the Commissioner would not order its disclosure.
40. The fact is OCR is subject to the FOIA and therefore has a duty to be open and transparent wherever possible with the information it holds. The relevant consideration here is whether disclosure of the requested information would or would be likely to prejudice the commercial interests of OCR.
41. OCR has explained that all awarding bodies under the umbrella of the JCQ investigate malpractice using the same process and impose sanctions as set out in the JCQ's process documentation. Therefore there is a defined process and defined sanctions for types and severity of malpractice. If presented with the same case OCR and other awarding bodies should investigate it in the same manner and impose the same sanctions. There should therefore be little room for taking an individual approach or showing leniency or a particularly tough approach. It is in the interests of OCR and all other awarding bodies to investigate and sanction in a robust and fair manner and in a manner which fully complies with the JCQ's defined process.
42. The Commissioner remains unconvinced that disclosure of the requested information in this case, which is statistical information for the number of malpractice cases broken down by type and those sanctioned, would enable anyone viewing it to decide whether OCR has taken the correct approach or not, or whether it has been lenient in some cases or



particularly tough. The requested information provides no details of the cases investigated, what was reported, the merits of a given case, how this was handled or in what particular circumstances a sanction was given or not.

43. OCR has confirmed that the withheld information details the malpractice cases reported against pupils sitting their qualifications, centres (such as schools and colleges) and centre staff. It is understood that OCR has a responsibility to tackle and prevent malpractice wherever possible but the cases reported are those alleged to have taken place at school, college and pupil level away from OCR and to a noteworthy extent outside of its control. The statistics reflect if anything on pupils, centres and centre staff reported to have committed malpractice rather than OCR as an awarding body.
44. The Commissioner considers the vast majority of pupils, centres and centre staff view malpractice as unacceptable and malpractice is rare when viewed against the amount of qualifications and examinations that are sat across the UK each year. The Commissioner considers a centre cannot see from the requested information how malpractice cases have been dealt with (whether leniently, tough or just right) and how OCR's cases compare with other awarding bodies (as this information is not available; only in a consolidated format); it does not contain that level of detail or content from which such judgements can be made. In addition, given the fact that the vast majority of centres and staff view malpractice as unacceptable, a centre's decision to go with one awarding body over another will be more influenced by the needs of its pupils, the needs of the centre and what is the best possible qualification available.
45. With regards to OCR's competitors, again, the requested information does not reveal any information about the content of cases reported, how these were investigated and in which cases sanctions were imposed. So, the Commissioner is struggling to understand exactly how this information would be beneficial to them or could be used to the detriment of OCR. It is thought that other awarding bodies will know too the difficulties faced in eradicating malpractice within schools and college and will know that, although measures can be put into place to try and eradicate this as much as possible, it comes down to the nature of pupils and centre staff in any one year and at any one time.
46. With regards to whistleblowers, it is acknowledged that there is a reliance of them reporting cases to the relevant awarding body. However, the Commissioner remains unconvinced that whistleblowers would be deterred from reporting cases if this information was disclosed. Sanctions should be made in cases where it is deemed necessary and such sanctions only reflect on those that have committed the

malpractice or have had a part to play in its occurrence; not the whistleblowers.

47. It is possible to see that an unusually high number of cases against one awarding body may lead some to believe this is a result of something the body is doing or not doing and this could potentially impact upon them commercially. However, this is not an argument the OCR has made to the Commissioner.
48. For the above reasons, the Commissioner is not satisfied from the submissions she has received from OCR that section 43 of the FOIA applies in this case.
49. As she has decided, based on the evidence presented by OCR, that section 43 of the FOIA is not engaged, there is no requirement to go on to consider the public interest test.

## Right of appeal

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50. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

51. 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.
52. 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 .....**

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
**Wilmslow**  
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