

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

### **Decision notice**

**Date:** **5 August 2021**

**Public Authority:** **Ofqual**  
**Address:** **Earlsdon Park**  
**53-55 Butts Road**  
**Coventry**  
**CV1 3BH**

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

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1. The complainant has requested statistical information relating to the adjustments made to A-level grades in 2020, based on what is known as 'the algorithm'.
2. The Commissioner's decision is that Ofqual has properly engaged section 36(2)(c) (prejudice to the effective conduct of public affairs) of the FOIA but that the public interest lies in disclosure, rather than maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information.
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.

### **Background information**

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5. Whilst Ofqual works closely alongside the Department for Education ('DfE') they are separate bodies; Ofqual regulates qualifications, examinations and assessment in England and the DfE is responsible for children's services and education.
6. In light of the ongoing pandemic, the DfE decided that A-level exams could not take place in Summer 2020.

7. Therefore, following public consultation,<sup>1</sup> alternative arrangements were put in place which involved teachers making judgements about what grade a student would have achieved had exams taken place. This estimate is what is known as a Centre Assessment Grade ('CAG'). Teachers were also required to provide a ranking for each student comparing them to all other students at the same centre with the same CAG.
8. These two pieces of information were then placed into a grades standardisation algorithm, devised by Ofqual, which also took into account the centre's performances in each subject over the previous three years. For the purposes of this notice, this grades standardisation algorithm shall be known as 'the algorithm.'
9. In his statement to Parliament of 23 March 2020<sup>2</sup> the Secretary of State for Education outlined the intention that the algorithm would be used to determine students' grades in lieu of exams. He stated 'The government will not publish any school or college level educational performance data based on tests, assessments or exams for 2020.'
10. The algorithm produced what the government acknowledged as 'significant inconsistencies' and subsequently A-level results were changed to reflect the CAGs. The only exception would be if a student had achieved a higher grade as a result of the standardisation process.
11. At the time that Ofqual conducted its internal review into this request for information, it was understood that exams would be taking place in Summer 2021.
12. However, following consultations, it has been decided that exams will not go ahead and teachers will once again be asked to make judgements that will be used in awarding students their A-level grades. Again, the DfE has announced that it will not publish educational data at centre level for 2021.<sup>3</sup>

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<sup>1</sup> [Exceptional arrangements for exam grading and assessment in 2020 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/exceptional-arrangements-for-exam-grading-and-assessment-in-2020)

<sup>2</sup> [Letter to the Chief Regulator of Ofqual \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/462212/letter-to-the-chief-regulator-of-ofqual-20200323.pdf)

<sup>3</sup> [Coronavirus \(COVID-19\): school and college accountability 2020/21 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/coronavirus-covid-19-school-and-college-accountability-2020-21)

## Request and response

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13. On 15 August 2020, the complainant wrote to Ofqual and requested information in the following terms:

*"For each A level provider in England, please provide the data you have for the % of students who had their teacher assessed grades adjusted up or down and by how many grades."*

14. Ofqual responded on 28 September 2020 and directed the complainant to 'Awarding GCSE, AS, A level, advanced extension awards and extended project qualifications in summer 2020: interim report'<sup>4</sup> which was published on 13 August 2020. On page 135 the report gives the number of CAGs in England that had been adjusted up and down by the algorithm and by how many grades.

15. The complainant responded on 29 September 2020 and explained that the figures provided by the aforementioned report were not granular enough to satisfy their request. The complainant clarified that they wished to receive:

*"I'm looking for a list of all the centres with the adjusted grades for each centre, up, down or same. % is gr8."*

16. Ofqual responded on 8 October 2020 and confirmed that it held the requested information but that it was being withheld under section 40 (personal information).

17. On 9 October 2020 the complainant responded and once again requested:

*"Just centre name; % grades up 2 grades at that centre; % grades up 1 grade; % the same grade; % -1 grade; %-2 grades; %-3 grades."*

18. The complainant also contacted Ofqual on 13 October 2020 and stated: 'no personal data [had been] requested.'

19. Ofqual interpreted the complainant's correspondence as a request for internal review which it provided on 5 November 2020. Ofqual stated that it was incorrect to apply section 40 as it had done. Ofqual clarified

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<sup>4</sup> [Awarding GCSE, AS, A level, advanced extension awards and extended project qualifications in summer 2020: interim report \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

that it considered the requested information exempt from disclosure and cited section 36(2)(c) as its basis for doing so.

## Scope of the case

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20. The complainant contacted the Commissioner on 12 November 2020 to complain about the way that their request for information had been handled. The complainant raised their concern that the public interest in disclosure was evident in the reports of parents who intended to sue the regulator as a result of the algorithm. The complainant noted that disclosure was required in order to provide students and their parents with reassurance going into what would have been the exam period for 2021.
21. The complainant also outlined concerns that students who attended centres in lower income areas may have been disadvantaged as a result of the algorithm and disclosure would hold Ofqual accountable to these claims.
22. The Commissioner therefore considers the scope of her investigation to be to determine whether Ofqual is entitled to rely on section 36(2)(c) and, if so, whether the public interest lies in maintaining the exemption or in disclosure.

## Reasons for decision

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23. Section 36(2) of the FOIA states that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

24. Section 36(4) of the FOIA states that:

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of the qualified person.”

25. Having reviewed the withheld information, the Commissioner is satisfied that it represents statistical information and therefore she is satisfied that the Chief Regulator, who is the Qualified Person for Qfqual, was not

consulted in this instance. Instead, members of staff from Ofqual's Regulation Development and Impact and Legal Moderation and Enforcement Departments have liaised with the complainant and the Commissioner regarding these matters.

26. Section 36 is a qualified exemption, other than for information held by Parliament. In order to engage a prejudice based exemption such as section 36 there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld 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,
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
27. Consideration of the exemption at section 36 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
28. This means that even if the Commissioner finds that the exemption has been applied properly, the public authority must still disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **The applicable interests**

29. The Commissioner's guidance *Section 36, 'Prejudice to Effective Conduct of Public Affairs'*<sup>5</sup> states 'Prejudice to the effective conduct of public

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<sup>5</sup> [section 36 prejudice to effective conduct of public affairs.pdf \(ico.org.uk\)](https://ico.org.uk/section-36-prejudice-to-effective-conduct-of-public-affairs.pdf)

affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.'

30. Returning to paragraph 26, the Commissioner is satisfied that the arguments presented by Ofqual outline how disclosure would prejudice the effective conduct of public affairs.

### **The nature of the prejudice**

31. The Commissioner must now consider if there is a causal link between the withheld information and the prejudice that section 36(2)(c) is designed to protect. Although a public authority will not necessarily be able to provide evidence in support of this causal link, the Commissioner must be satisfied that disclosure is practically and logically capable of harming the interest in some way.
32. Ofqual has explained that the decision not to publish educational data at centre level for 2020 was made in an effort to make the grading process as robust as possible. Recognising the difficult decisions that it was asking teachers to make, the DfE wanted to ensure that teachers made these decisions without fear of judgement.
33. Expanding on this, Ofqual has explained that centres were required to implement an internal quality assurance process concerning the judgments made by teachers. Students were also able to request information relating to their own performance from their centre and subsequently complain to the centre or the exam board if they believed their CAG was the product of an unfair or discriminatory process.
34. The requested information is precisely the type of centre level information that the DfE committed publicly not to publish and Ofqual is concerned that disclosure would seriously damage the trust teachers placed in the DfE during the pandemic.
35. Ofqual has explained that centres have a legitimate expectation that centre level performance would not be made publicly available and, returning to paragraph 12, disclosure would undermine current government policy also.
36. Ofqual has explained that its own relationship with stakeholders, particularly teachers, centres and their representatives, would be damaged by disclosure in light of this legitimate expectation. In turn, this is likely to prejudice the extent to which Ofqual can engage with the aforementioned stakeholders in order to perform its functions.

37. The Commissioner questions the extent to which disclosure would affect the relationship between Ofqual and its stakeholders. Firstly, she notes that the DfE committed publicly not to publish educational data at centre level for 2020 but Ofqual did not. Furthermore, the Commissioner notes that centres are unlikely to rely upon a good working relationship as a basis for engaging with Ofqual but, as awarding organisations, a legal obligation to engage with the appropriate regulator.
38. Ofqual has highlighted to the Commissioner the change in circumstances that have occurred throughout the handling of this request, as outlined in paragraphs 11 and 12. Ofqual considers there is too much uncertainty surrounding future examinations which are dependent on the evolution of the ongoing pandemic. Therefore, teacher judgements may be relied upon in the future and disclosure would be likely to effect the spirit in which these judgments are made.
39. Ofqual considers that disclosure would be likely to undermine not just the A-level qualifications for Summer 2021 but any novel approach which relies upon centres providing information to Ofqual, should circumstances deem this necessary.
40. The Commissioner would argue that teachers must make any such decision based solely on the merits of the student and the possibility of disclosure and accountability are likely to mitigate the influence of any irrelevant factors during this decision making process.
41. The Commissioner, having reviewed the withheld information, also notes that the statistics do not identify any specific departments or teachers within centres. Therefore individual teachers are, to a certain extent, protected from any scrutiny that disclosure may cause.
42. Ofqual considers disclosure could lead to comparison, scrutiny and judgements made on individual centres based on the variance in CAGs and adjustments made by the algorithm. In turn, this would be likely to lead to an unfair perception or potential criticism of specific centres as being less reliable, more critical or more lenient than others.
43. Ofqual is concerned that this would be likely to undermine the integrity of the A-level qualifications for 2020, resulting in less confidence in certain centres and unfair prejudice on students whose grades were based on circumstances wholly beyond their own control – the pandemic.
44. Ofqual has gone on to describe that disclosure would be likely to have a disruptive effect on centres and lead to a diversion of resources in managing any adverse publicity that disclosure would be likely to cause, particularly in centres at the extreme ends of variation. Ofqual has outlined the prejudicial effects, and reputational damage, that it

foresees centres would suffer should the requested information be disclosed.

45. Whilst the Commissioner acknowledges this possibility, she considers that Ofqual have failed to consider why the public may be interested in the requested information. If disclosure shows that a centre had a high number of CAGs that were significantly adjusted, it raises valid questions and concerns about the processes that were followed at that centre which require appropriate investigation.
46. Whilst the Commissioner accepts that disclosure would be likely to undermine the integrity of the grades produced as a result of the algorithm, she does not consider that this would result in any further prejudice for the students in question who will now have been placed into their respective employment and/or university and from which they will be assessed on their merits of the past year.

### **The likelihood of the prejudice**

47. Ofqual has explained that it has applied the exemption on the basis of the lower threshold of prejudice, that disclosure 'would be likely' to result in prejudice. ICO guidance, '*The Prejudice Test*<sup>6</sup> defines this lower threshold as 'there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.'
48. Ofqual considers that prejudice would be likely to occur and 'It maintains this position having consulted with relevant internal stakeholders, the Department for Education and having had the benefit of taking legal advice.'

### **Is the exemption engaged?**

49. The Commissioner is satisfied that the three criteria outlined in paragraph 26 have been met and therefore she considers section 36 to be properly engaged. She has therefore gone on to consider the public interest test and the Commissioner may still require Ofqual to release the requested information if the public interest in doing so outweighs the public interest in maintaining the exemption.

### **Public interest**

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<sup>6</sup> [the\\_prejudice\\_test.pdf \(ico.org.uk\)](https://ico.org.uk/the-prejudice-test.pdf)



## Public interest in disclosing the information

50. Ofqual has cited the general principles that underpin the FOIA, transparency and openness, as factors in favour of disclosure. Disclosure would assist the general public in understanding the government's decision to reverse its use of the algorithm to determine a student's grade. Expanding on this, disclosure would help to inform the public's confidence in Ofqual as a regulator.
51. Ofqual recognises that disclosure would illustrate the variances of adjustments that the algorithm made to CAGs across centres in England. However, Ofqual states 'Ofqual puts the public interest on the point no higher than this, recognising the fact that differences will naturally occur in cases where teachers have in good faith exercised their judgement simply on the basis of their assessment of the cohort put before them.'
52. Ofqual also recognises that disclosure may promote the integrity of awarding qualifications in 2021 through publication of centre-level awarding information. However Ofqual 'ascribes less weight to this consideration, recognising the limitations of the information just highlighted and also the fact that specific quality assurance mechanisms were in place for centre/teacher judgements provided in 2020 and 2021 respectively.'
53. The Commissioner's guidance '*The Public Interest Test*<sup>7</sup>' outlines the difference between information which interests the public (and that which may be discussed in the media) and that which is within the best interest of society to disclose. However, the Commissioner would argue that Ofqual has underestimated the public interest in disclosure.
54. The algorithm saw almost 40% of students in England, Wales and Northern Ireland awarded a grade lower than their CAG<sup>8</sup> and was met with widespread criticism within the mainstream media.
55. There were concerns that the algorithm itself was unlawful, not only breaching anti-discrimination standards but also Article 22 of the GDPR<sup>9</sup> which outlines the right not to be subject to fully automated decision-making that significantly affects individuals. The complainant has made this request based on concerns that students attending lower-

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<sup>7</sup> [the public interest test.pdf \(ico.org.uk\)](#)

<sup>8</sup> [A-levels and GCSEs: How did the exam algorithm work? - BBC News](#)

<sup>9</sup> [Rights related to automated decision making including profiling | ICO](#)

performing centres from more deprived areas were disadvantaged by the algorithm.

56. The Commissioner's guidance states 'There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all' and the Commissioner considers that disclosure would hold Ofqual accountable to such accusations. Disclosure would also help to inform those seeking legal action against Ofqual, either in relation to qualifications originally handed out in 2020 or in anticipation for 2021.

#### Public interest in maintaining the exemption

57. Ofqual appears to give significant weight to the fact that following government consultation, exams were once again cancelled for 2021 and therefore the reliance on teacher judgements is a 'live' issue once more.
58. Ofqual has cited the prejudice that it has identified in paragraphs 32-43 as the factors in favour of maintaining the exemption. Ofqual has outlined that it considers 'these impacts, which it views are likely to materialise, would not be in the public interest.'
59. Since the requested information does not require individual teachers to be accountable for the CAGs that they awarded, the Commissioner fails to see how disclosure would affect any future CAG that a teacher may award. Furthermore, if for any reason a teacher did feel pressured into awarding an inappropriate CAG, the internal quality assurance process referred to within paragraph 33 would be likely to come into play.

#### Balancing the public interest

60. The Commissioner has considered all competing public interest arguments and she is of the opinion that Ofqual has failed to acknowledge the scope of the public interest in disclosure.
61. The Commissioner considers that disclosure would serve to build a bigger picture of Ofqual's processes and will help to inform any student who believes they have received an unfair grade in 2020 or CAG in 2021. For example, any student who feels that their CAG is too low this year may be more inclined to challenge this fact in centres where significant numbers of grades were revised upwards in 2020.
62. Whilst the Commissioner acknowledges that disclosure would be likely to generate some centre-level media interest and scrutiny, she considers such enquiries to be valid and the Commissioner notes that disclosure may prompt students, or their parents, to engage in complaints procedures that are already in place as outlined in paragraph 33.

63. Having considered the circumstances of the case, the Commissioner has decided that the public interest lies in disclosure. Whilst the Commissioner acknowledges Ofqual's arguments, she does not consider that disclosure would be likely to affect the spirit in which teachers would award CAGs. If anything, she considers the potential of disclosure serves to ensure that teachers are awarding CAGs appropriately.

### **The Commissioner's view**

64. The Commissioner finds that Ofqual has properly engaged section 36 to the extent that disclosure would be likely to prejudice the effective conduct of public affairs, particularly in light of the DfE's public commitment to withhold this type of information.
65. However, the Commissioner considers that the public interest lies in disclosure to address the concerns of the public regarding the algorithm and hold centres accountable for any discrepancies or misapplication within the CAGs awarded. In turn, this will help the current cohort of A-level students in ascertaining if their CAG has been awarded fairly.
66. The Commissioner acknowledges that disclosure may lead to the diversion of resources across centres but she considers such diversions proportionate, taking into account existing procedures, any inconsistencies that the disclosed information may highlight and the continued public interest in this information.
67. Ultimately, disclosure would seek to build a bigger picture of a process that delivered 'significant inconsistencies' and will demonstrate how justified and widespread concerns regarding the algorithm were. The Commissioner concurs with Ofqual when it says that disclosure would be likely to have repercussions. However, the Commissioner disagrees with the prejudice to current students that Ofqual has foreseen and, with this in mind, orders disclosure.

## Right of appeal

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68. 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)

69. 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.

70. 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

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**