

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 April 2022

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

Address: Earlsdon Park
53-55 Butts Road
Coventry
CV1 3BH

Decision (including any steps ordered)

1. The complainant has requested information from Ofqual relating to the Acting Chief Regulator's report and Board minutes. Ofqual provided some information but refused other information citing section 36(i), (ii) and 36(2)(c)(prejudice to the effective conduct of public affairs), section 42 (legal professional privilege) and section 22 (future publication).
2. The Commissioner's decision is that Ofqual has cited section 36 appropriately to part seven of the information request and that the public interest at the time the request was made favoured withholding the requested information.
3. The Commissioner does not require Ofqual to take any further steps.

Request and response

4. On 29 April 2021 the complainant wrote to Ofqual and requested information in the following terms:

"Please can I request the following information under the

Freedom of Information Act:

1. In the acting chief regulators report from December last year, she mentions a "readiness review" that Ofqual would undertake with exam boards in the Spring. Have this reviews happened / are they due to happen? If they have, please can I get a copy of the said reviews.
2. In the same report, Dame Glenys Stacey said that an evaluation programme is underway and "considering aspect of the approaches and delivery of the grades" in 2020 and GQ and VTA. Again, has this concluded, and if so, please can I get the outcomes of that programme i.e. any reports or evaluation documents?
3. In the same report, Stacey says they expect to have published a report on the limitations of using statistical approaches like those used in the standardisation of GCSE, AS and A-levels in summer 2020 (see point 25 of the Stacey's report¹)
4. In board minutes from December, it said that "considerable work" was underway by Ofqual's research chair on lost learning. Please can I get a copy of this work?
5. In those same board minutes, it speaks about Ofqual's 2021 corporate plan. Please can I get a copy of this?
6. In board minutes from 13 January, it says that the chair reminded boards members to have regard to the "legal advice" that had been circulated on January 12 outlining the risks associated with the arrangements for awarding 2021. It also outlined the mitigating factors associated with the risks. Please can I get a copy of this advice?
7. The same minutes mention a report from the 2021 committee. Please can I get any reports made by the 2021 committee?"

¹ [Acting Chief Regulator's report \(Open Paper\) \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

5. On 28 May 2021 Ofqual responded as follows:

Part 1 – Ofqual stated that the notes of the reviews were still in production but were exempt under section 36.

Part 2 – Ofqual provided links to publicly available information.

Part 3 – Ofqual provided a link to the report.

Part 4 – Ofqual cited section 22 – future publication.

Part 5 – Ofqual provided the corporate plan via a link.

Part 6 – Ofqual refused this information, citing section 42 – legal professional privilege.

Part 7 – Ofqual cited section 36 – prejudice to the effective conduct of public affairs.

6. On the same day the complainant requested an internal review:

'I would like to request an interview review on the following information:

1. Readiness reviews point 1 of my request - when will the notes of the reviews be finalised? Can I please access a copy of them then?

2. 2021 committee report 13 Jan point 7 of my request - I disagree with the conclusion here. If it was not for the government's decision to cancel normal exams this summer, the 2021 committee would have continued like any other sub-committee. They were set up for the exact purpose of managing, scrutinising and analysing plans for 2021 assessments, therefore I think your reasoning that their report could "damage public confidence in the arrangements for 2021" is flawed. It is within the utmost public interest to know what highly qualified experts thought of the potential for this summer's arrangements. I also cannot see how it would affect confidence, as by then the decision on the final approach to grading had not been taken, but the public deserve to know what the government and its agencies were advised in the early stages - it is paramount in the interests of public interest.

3. Please can I also now request a copy of the terms and reference as well as the membership of the 2021 committee.'

7. The review request was acknowledged on 4 June 2021 by Ofqual.
8. Ofqual treated the third part of the internal review request as a new request and disclosed the information on 28 June 2021.

9. On 1 July 2021 Ofqual said it would need more time.
10. On 16 July 2021, Ofqual provided the internal review in which it maintained its original position.

Scope of the case

11. The complainant contacted the Commissioner on 27 July 2021 to complain about the way their request for information had been handled.
12. Ofqual responded to the Commissioner and, in view of the passage of time, released some redacted information to the complainant on 28 February 2022 relating to part seven of the request (the 2021 Committee Report).
13. Ofqual also took the decision to carry out a further internal review regarding part one of the request because the Qualified Person's (QP) opinion was concerned with prejudice caused by disclosure of the notes of interviews, rather than the later finalised reviews sent to exam boards.
14. Ofqual then conducted a further review which considered the finalised readiness reviews and and communicated the result on 18 March 2022, again citing section 36 regarding this information. It also cited section 31(1)(g), section 43(2) and section 41.
15. Subsequently, the complainant confirmed that they were content with the internal review response regarding part one of their request. However, they were not content with the partial disclosure regarding part seven of the request and the amount of redaction.
16. The complainant did not query the citing of section 22 or section 42 at the first internal review. The Commissioner considers therefore that the scope of this case is solely Ofqual's citing of sections 36(2)(b)(i), (ii) and 36(2)(c) regarding part seven of the request.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

17. Section 36 FOIA provides that,

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

information under this Act -

(2)(b) would, or would be likely to, inhibit -

- i. the free and frank provision of advice, or*
- ii. the free and frank exchange of views for the purposes of deliberation, or*

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

18. Ofqual has applied sections 36(2)(b)(i), (ii) and 36(2)(c) in relation to the whole of the withheld information that is being considered here (part seven of the request). Its view rests on how matters stood at the time of the initial refusal and the outcome of the internal review. The Commissioner has been provided with the withheld information. He is unable to describe the withheld information in any detail. However, Ofqual has released some of the information which is a record (described as a Committee Report), which should have been dated 13 January 2021 (incorrectly dated "2020"). Essentially it is an information and discussion paper representing the views and advice of the Committee in relation to the proposed consultations on summer 2021 assessment arrangements for GCSE, AS, and A levels. The paper invited the Ofqual Board to note and consider its views and advice.
19. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the QP) within the public authority giving an opinion on the likelihood of prejudice occurring. The Commissioner is required to consider the QP's opinion as well as the reasoning which informed that opinion. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
20. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a QP. The QP at Ofqual at the time of the request was Simon Lebus, the Chief Regulator. The Commissioner is satisfied that he was the appropriate qualified person to give an opinion. The opinion of the QP was sought on 21 May 2021 and given on 24 May

2021. The information was described to the QP, as indicated on the form provided to the Commissioner.

21. Ofqual explained that it had also consulted the current QP and Chief Regulator, Dr Jo Saxton, as part of the process of responding to the Commissioner. The current QP was content with the partial disclosure of the Report that was made on 28 February 2022 but agreed that the remainder of the Report should not be disclosed.
22. Ofqual explained that the information was given to the QP (not described) and that the QP sits on the Ofqual Board and would have seen the report when it was presented to the Board. The QP was provided with arguments for maintaining the exemption and contrary arguments.
23. The Commissioner next needs to establish whether the qualified person's opinion was reasonable.

Is the qualified person's opinion reasonable?

24. The QP identified and gave their opinion that the three limbs of the exemption that they believed were applicable - sections 36(2)(b)(i), (ii) and 36(2)(c) FOIA applied to the withheld information. This means that the QP's opinion was that release would inhibit the free and frank provision of advice, the free and frank exchange of views, and that it would be likely otherwise to prejudice the effective conduct of public affairs.
25. The Commissioner's guidance² regarding the definition of "reasonable" is as follows:

"In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law...The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."

² [Section 36 \(ico.org.uk\)](https://ico.org.uk)

26. In order to determine whether section 36(2)(b)(i), (ii) and 36(2)(c) are engaged the Commissioner must determine whether the QP's opinion was a reasonable one. In doing so the Commissioner has considered the following factors -

- Whether the prejudice/inhibition relates to the specific subsection that has been cited, in this case sections 36(2)(b)(i), (ii) and 36(2)(c). If the prejudice or inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request.
- The qualified person's knowledge of, or involvement in, the issue.

Section 36(2)(b)(i)

27. The term "advice" is not defined in the legislation. However the Commissioner's guidance³ states that:

"Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views."

28. The Commissioner's guidance also explains that,

"Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority."

29. In the QP's opinion, disclosure would be likely to inhibit the free and frank provision of advice. Ofqual's view is that it needs a 'safe space' to provide advice and develop ideas and form opinions away from external

³ [Section 36 \(ico.org.uk\)](https://ico.org.uk)

influence and distraction. It contends that disclosing the report could give a misleading impression of the decision-making and discourage Ofqual from seeking high quality advice to inform its thinking around high profile issues and inhibit its ability to promote public confidence in itself and the qualifications it regulates.

30. The effect described by Ofqual relates to the inhibition on its relationship with its stakeholders, present and future, when providing advice. The Commissioner is satisfied that the QP's opinion is reasonable in respect of this limb of section 36 and is therefore engaged.

Section 36(2)(b)(ii)

31. In the QP's opinion, disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, known as the 'chilling effect'. Ofqual argues that the report was specifically marked as a 'closed' Report. The Report summarises the points considered and views reached. Disclosure could lead to a chilling effect both internally and externally as it might inhibit the free and frank exchange of views which are necessary to discuss sensitive and contentious views when exercising its regulatory functions. Disclosure could dissuade stakeholders from sitting on the committee and providing frank views. This would be likely to inhibit its ability to receive high quality, diverse opinions and negatively affect its ability to regulate effectively.
32. The Commissioner's guidance states that arguments under s36(2)(b)(i) and (ii) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.
33. The Commissioner's guidance also explains that the chilling effect operates at various levels:

"If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes."⁴

⁴ [Section 36 \(ico.org.uk\)](https://ico.org.uk)

34. The effect described by Ofqual relates to the inhibition on the internal and external exchange of views. The Commissioner is satisfied that the QP's opinion is reasonable in respect of this limb of section 36 and is therefore engaged.

Section 36(2)(c)

35. The Commissioner must lastly consider whether it is reasonable to argue that disclosure would be likely to "otherwise prejudice" the conduct of public affairs. The Commissioner's guidance on section 36(2)(c)⁵ makes it clear that this limb, "is concerned with the effects of making the information public" and the "prejudice to the effective conduct of public 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". If disclosing information would interfere with or distract from the process in any other way, or would prejudice or undermine the decision itself, rather than the frankness of the discussion specifically, then this argument relates to section 36(2)(c).
36. The QP reached the view that the disclosure of this information would be likely otherwise to prejudice the effective conduct of public affairs. The report contains the committee's views on the summer 2021 assessment arrangements which Ofqual argues could harm its ongoing relationship with its stakeholders, particularly because of the impact the pandemic has had on education and examinations.
37. The Report remains relevant to Ofqual's thinking and it outlines certain matters that cannot be discussed here that relate to imminent (at the time) 'live' issues - the arrangements for assessments in summer 2021. Ofqual states that disclosure would be likely to damage its future working relationship with its stakeholders. These relationships are a key way to ensure its policy approach is effective to meet its statutory objectives. Damage to its stakeholder relationships would therefore be harmful to its ability to carry out effective regulation.
38. These relationships remain sensitive due to the impact of the pandemic and they are central to ensuring Ofqual's policy approach meets its statutory objectives. Ofqual also believes that there would be likely to be prejudice to the 2022 summer examination process. In the internal review, Ofqual explained that future assessment periods will require consideration of the sensitive issues that were discussed in the Report,

⁵ [Section 36 \(ico.org.uk\)](https://ico.org.uk)

for example, in the event of a further national lockdown. Ofqual has put in place contingency plans⁶ should that event occur.

39. When the request was initially refused, teachers and centres were engaged in a time-consuming and pressurised process of determining Teacher Assessed Grades. Awarding organisations were conducting quality assurance checks and Ofqual was seeking to ensure that the regulatory framework was operating effectively. Ofqual argues that disclosure of the information would be likely to be disruptive and affect its ability to deliver its statutory objectives to secure standards in qualifications and promote public confidence in qualifications.
40. Ofqual's contingency arrangements for the summer 2022 awarding process is for Teacher Assessed Grades to be awarded. In other words, the same process used to award grades in summer 2021. For these reasons, the points made in the paragraphs above remain 'live' and relevant to the disclosure of the withheld information.
41. The prejudice it describes is to confidence in the system itself. The Commissioner accepts that this exemption is engaged at the lower level. The Commissioner's guidance makes it clear that he is primarily concerned with the reasonableness of the substantive opinion and that he is not explicitly required to assess the quality of the reasoning process that lay behind it. It is the content of the opinion or the submission made to support it that is relevant to his assessment of whether the opinion is reasonable.
42. The Commissioner is therefore satisfied that this part of the QP's opinion is reasonable and that this limb of the section 36 exemption is also engaged.

Public interest test

43. Having concluded that section 36 is engaged, the Commissioner has gone on to consider the public interest in this matter.

Public interest arguments in favour of releasing the withheld information

44. The factors that Ofqual took into account are as follows:
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⁶ [Contingency arrangements: GCSE, AS, A level, Project and AEA - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/contingency-plans-for-gcse-as-a-level-project-and-aea)

- There is a general public interest in transparency and accountability. Ofqual states that this promotes public understanding, encourages good decision-making by public bodies and ensures that they act fairly and with integrity, making the best use of public resources.
 - The public interest in transparency and accountability is heightened because of the large numbers of individuals affected by the arrangements for summer 2021 examinations and the importance of those results for the individuals concerned. Greater transparency around the development of Ofqual's decision-making strategy could result in greater confidence in its regulatory activities.
45. The complainant provided part of their argument when they requested that Ofqual carry out an internal review:

"If it was not for the government's decision to cancel normal exams this summer, the 2021 committee would have continued like any other sub-committee. They were set up for the exact purpose of managing, scrutinising and analysing plans for 2021 assessments, therefore I think your reasoning that their report could "damage public confidence in the arrangements for 2021" is flawed. It is within the utmost public interest to know what highly qualified experts thought of the potential for this summer's arrangements. I also cannot see how it would affect confidence, as by then the decision on the final approach to grading had not been taken, but the public deserve to know what the government and its agencies were advised in the early stages - it is paramount in the interests of public interest."

46. The complainant outlined their view when they complained to the Commissioner. They argue that the public deserves to be kept well-informed as to what methods are available and why they could not only have disadvantages but advantages for students. The complainant questions whether it is for Ofqual to decide what is an "unhelpful" or "distracting" debate. Their view is that it is in the public interest that teachers know what options have been considered in view of the additional workload. The complainant also disagrees that disclosure is prejudicial to centres and that, even if that were the case, it is in the public interest for schools and students to know which methods could impact on them. Finally, the complainant disagreed that disclosure would cause a 'chilling effect' because it is in the public interest to know what the experts thought of plans for exams in 2021. They contend that there should be a full and frank debate about how to

approach assessment in the public interest and that maintaining a relationship with stakeholders is not the responsibility of the public.

Public interest arguments in favour of maintaining the exemption

47. Ofqual argues that the heightened public interest in transparency and accountability must be considered in the context of the joint consultation run by Ofqual and the Department for Education in January 2021. This consultation received 100,596 responses and informed the approach for summer 2021 alternative assessments arrangements and allowed for meaningful stakeholder input. Ofqual explains that this consultation process took place after the creation of the report and addressed issues considered by the committee in the report⁷. Public interest must also be seen in the light of a second published analysis and quality assurance of the results⁸.
48. Thirdly, Ofqual cited its summer report⁹ concerning results. In its opinion, within this context there was no significant increase in transparency and accountability that would arise from disclosure.
49. The disclosure of the information is likely to harm Ofqual's relationships with its stakeholders. It would be likely to undermine its ability to form well considered policy approaches and therefore meet its regulatory objectives. There is a strong public interest, it argues, in ensuring that this does not happen.
50. Ofqual's view is that disclosing the withheld information could lead to an unhelpful and distracting debate which is not in the public interest. It argues that avoiding distracting debate was particularly important when it came to teachers, as they had discretion in the way that they arrived at Teacher Assessed Grades.

⁷ [Consultation on how GCSE, AS and A level grades should be awarded in summer 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/consultation-on-how-gcse-as-and-a-level-grades-should-be-awarded-in-summer-2021)

⁸ [Analysis of results: A levels and GCSEs, summer 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/analysis-of-results-a-levels-and-gcse-summer-2021) and [Guide to AS and A level results for England, 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/guide-to-as-and-a-level-results-for-england-2021) and [Guide to AS and A level results for England, 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/guide-to-as-and-a-level-results-for-england-2021)

⁹ [GCSE, AS and A level summer report 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/gcse-as-and-a-level-summer-report-2021)

51. Ofqual considers that the contextual factors which inform the report are still 'live' due to the ongoing disruption in schooling caused by the pandemic. It considers that the thinking in the report remains relevant to Ofqual as it considers and develops its decision-making strategy.
52. Ofqual believes that it is of vital importance to maintain public confidence in the examinations process beyond the awarding of grades in summer 2021 and there is a substantial possibility that arrangements for future assessment periods will require consideration of the sensitive issues discussed in the report. Ofqual places weight on the fact that its arrangements for summer 2021 were established in guidance.

Balance of the public interest

53. The Commissioner does not disagree with the complainant's position that it is in the public interest to know what highly qualified experts thought about the summer 2021 assessment arrangements. However, the withheld information was 'live' when it was requested and it was prior to the assessments taking place. In a finely balanced decision, the Commissioner accepts that disclosing the withheld information at the time the request was made would not have been in the public interest as it was important to maintain the public's confidence and avoid distraction and potential disruption during the pandemic.
54. The Commissioner's decision is qualified by his opinion that Ofqual cannot continue to use the argument that the information will be 'live' on an ongoing basis for any future scenarios where the pandemic might again affect the examination process. In other words, should a similar request be made now, the balance of the public interest may have shifted.

Right of Appeal

55. 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@justice.gov.uk

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

56. 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.
57. 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
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