

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 January 2013

Public Authority: Council for the Curriculum Examinations & Assessment

Address: 29 Clarendon Dock
Clarendon Road
Belfast
BT1 3BG

Decision (including any steps ordered)

The complainant has requested information from the Council for the Curriculum Examinations & Assessment ("CCEA") regarding checks undertaken for GCE Mathematics examination papers. CCEA provided the complainant with all information it held relevant to his request other than certain personal information ("the withheld information") which was withheld citing section 40(2) of FOIA as a basis for non-disclosure. The Commissioner's decision is that CCEA has provided the complainant with all information it holds within the scope of his request other than the withheld information, to which it has correctly applied section 40(2) of FOIA. Therefore, the Commissioner requires no steps to be taken.

Request and response

1. On 27 June 2012, the complainant wrote to CCEA and requested information in relation to checks undertaken for specific GCE Mathematics examination papers.
2. CCEA responded on 20 July 2012. It stated that it was disclosing all information it held which was relevant to the complainant's request other than the withheld information, for which it cited section 40(2) of FOIA as a basis for non-disclosure.
3. Following an internal review CCEA wrote to the complainant on 20 August 2012. It disclosed some further information which was relevant to his request, however it upheld the original decision to withhold certain information, again citing section 40(2) of FOIA as a basis for non-disclosure of the withheld information. In relation

to the further information which was disclosed, some personal information (i.e. the name of the specialist who undertook further checks) was also withheld under section 40(2) of FOIA.

Scope of the case

4. The complainant contacted the Commissioner on 22 August 2012 to complain about the way his request for information had been handled. He specifically stated that he believed CCEA ought to hold more information within the scope of his request and asked the Commissioner to investigate this. He also asked the Commissioner to investigate CCEA's application of section 40(2) of FOIA to the further information withheld at internal review stage, i.e. the name of the specialist undertaking the further checks.
5. The Commissioner has considered both of the above issues in his investigation.

Reasons for decision

Does CCEA hold any further information relevant to the complainant's request?

Section 1

6. Section 1(1) of FOIA states that any person making a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
7. The Commissioner has considered whether CCEA has complied with section 1 of FOIA.
8. On 28 November 2012, the Commissioner asked CCEA the following questions to determine what information it held that was relevant to the scope of the request:
 - Was any further recorded information ever held, relevant to the requested information, by CCEA or anyone on behalf of CCEA?
 - If so, what was this information? What was the date of its creation and deletion? Can CCEA provide a record of its deletion/destruction and a copy of CCEA's records management policy in relation to such

deletion/destruction? If there is no relevant policy, can CCEA describe the way in which it has handled comparable records of a similar age?

- Is there a reason why such information (if held or ever held) may be concealed?
- What steps were taken to determine what recorded information is held relevant to the scope of the request? Please provide a detailed account of the searches that you have conducted to determine this.
- If the information were held would it be held as manual or electronic records?
- Is there a business purpose for which the requested information should be held? If so what is this purpose?
- Are there any statutory requirements upon CCEA to retain the requested information?
- Is there information held that is similar to that requested and has CCEA given appropriate advice and assistance to the applicant?

9. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency*¹ in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is the test the Commissioner will apply in this case.

10. In discussing the application of the balance of probabilities test, the Tribunal clarified that test required consideration of a number of factors:

- the quality of the public authority's initial analysis of the request;

¹ EA/2006/0072

- the scope of the search that it decided to make on the basis of that analysis and the thoroughness of the search which was then conducted; and the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light.
11. The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.
 12. The Commissioner is also mindful of *Ames v the Information Commissioner and the Cabinet Office*². In this case Mr Ames had requested information relating to the "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the dossier was *"...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what..."* However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not *"...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one..."* Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.
 13. On 19 December 2012 CCEA responded to the questions detailed at paragraph 11 above. It explained that the complainant had had received all recorded information held by CCEA within the scope of those requests. No relevant recorded information was withheld by CCEA.
 14. CCEA explained to the Commissioner that any relevant information would be held by CCEA in hard copy format. It specified a number of individuals and teams which it had questioned in order to ascertain whether they held any information relevant to the complainant's request. It explained that only one team held such information and that this was provided to the complainant. The complainant has received hard copies of all routine checks, plus an additional check carried out on the GCE Mathematics papers and CCEA holds no further information other than that which has been redacted and withheld under section 40(2) of FOIA.

² EA/2007/0110

15. The Commissioner has considered CCEA's explanation of its search procedures and has concluded that these were thorough and that CCEA took all reasonable steps to ascertain what recorded information, if any, it held which was relevant to the complainant's request. CCEA explained to the Commissioner that the checks were only introduced in 2012 as a result of issues raised regarding the 2011 papers. It stated that it has provided the complainant with all information within the scope of his request that it has produced since the introduction of the checks. The checks were introduced as an interim measure and are subject-specific – no such checks are carried out for any other papers. Therefore, CCEA considers that it has provided all advice and assistance to the complainant that it is able to. The Commissioner is satisfied that there was no further information within the scope of the complainant's request held by CCEA at any time.
16. In reaching a conclusion in this case, the Commissioner has taken into account the responses provided by CCEA to the questions posed by him during the course of his investigation. The Commissioner is also mindful of the Tribunal decisions highlighted at paragraphs 12 and 15 above. The Commissioner considers that on the balance of probabilities CCEA holds no further recorded information relevant to the scope of the complainant's request.

Was section 40(2) correctly applied to the withheld information?

17. Section 40(2) of FOIA provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
18. One of the conditions, listed in section 40(3)(a)(i), is where disclosure of the information to any member of the public would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 (the DPA.)
19. In its refusal notice to the complainant, CCEA stated that it was withholding the names of individuals who undertook examination checks as it considered these to be exempt from disclosure under section 40(2) of FOIA. It stated that the information was personal data from which individuals (other than the complainant) could be identified and that its disclosure would breach the first data protection principle.
20. The first data protection principle requires that the processing of personal data be fair and lawful and,

- at least one of the conditions in schedule 2 is met, and
- in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

21. In order to reach a view on whether this exemption could be applied, the Commissioner initially considered whether or not the information in question was in fact personal data.

Is the requested information personal data?

22. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:

- from those data,
- or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

23. The Commissioner considers that the requested information is personal data as specific living individuals could be identified from it.

Would disclosure of this personal data be unfair and in breach of the first data protection principle?

24. The personal data in this case would relate to the named individuals in a professional capacity. This is significant in that the Commissioner has made a clear distinction in previous decisions between requests for information relating solely to professional matters and information relating to individuals outside their professional capacity. The Commissioner's position is that he considers it far less likely that disclosure of personal data relating to professional matters would be unfair than would disclosure of information relating to individuals in a non-professional capacity.

25. It is important to consider what expectation of disclosure the individuals would hold regarding their personal data. The Commissioner would consider it reasonable that senior staff would have an expectation that their names would be disclosed, however CCEA has informed the Commissioner that those who undertook checks of the papers are junior or contracted staff. It is not CCEA's policy to routinely disclose the names of such staff, although staff may choose to make their names known. CCEA has informed the Commissioner that those carrying out checks would be aware of this policy and have not indicated that they wish their names to be disclosed.

26. CCEA has provided the complainant with the majority of the information it holds which falls within the scope of his request. The Commissioner considers this significant as it demonstrates that CCEA wishes to be open, transparent and accountable about its work and has attempted to do so as far as possible without disclosing details relating to specific individuals. It can be argued, therefore, that a disclosure of information relating to routine checks carried out on specified examination papers is sufficient to demonstrate CCEA's openness and accountability with regard to this issue without it being necessary to disclose the names of specific individuals who carried out these checks.
27. CCEA is also concerned about the possibility of detriment to the named individuals through disclosure of their details. CCEA states that it would be relatively easy to track down the individuals at their place of employment and that this may lead to harassment, which would cause detriment to the individual. The individual has not consented to disclosure of his name and CCEA does not consider that such consent, if requested, would be forthcoming.
28. As mentioned previously, the Commissioner has taken a clear line that disclosure of personal information relating solely to an individual in a professional capacity would be less likely to be considered unfair than disclosing information about an individual's private life. It can also be argued that employees of public authorities should have an expectation that they will be accountable.
29. However, the Commissioner has also previously concluded that disclosure of information about complaints made against individual employees would be unfair, as the employees would have a reasonable expectation that such information would not be disclosed, and because of the potential detriment that could result from disclosure of information of this kind. It is also of significance that the NIHE has demonstrated transparency through disclosure of statistical information about complaints and its complaints procedures.
30. The Commissioner is of the view that the exemption under section 40(2) by virtue of section 40(3)(a)(i) of FOIA is engaged. In making this decision the Commissioner has first concluded that disclosure of the requested information would constitute a disclosure of personal data. The Commissioner considers that it is clear that specific individuals could be identified from the requested information.

31. Secondly, the Commissioner concludes that disclosure of this personal data would be unfair and thus would be in breach of the first data protection principle. In making this decision, the Commissioner has taken into account the lack of expectation on the part of the individuals named in the request that this information would be disclosed, the potential for detriment as a result of disclosure and that the NIHE has disclosed statistical complaint information.

Right of appeal

32. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.

34. 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
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