NCN: [2024] UKFTT 001003 (GRC)

Case Reference: EA/2023/0471

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by Cloud Video Platform
Heard on: 18 June 2024
Further Consideration on the papers on: 23 October 2024
Decision given on: 6 November 2024

Before

TRIBUNAL JUDGE HEALD
TRIBUNAL MEMBER PEPPERELL
TRIBUNAL MEMBER GASSTON

Between

JEREMY YALLOP

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:
For the Appellant: Mr Yallop represented himself
The Respondent did not attend

Decision:
1.The appeal is Allowed.
2 A copy of this decision shall be provided to **T**he Office of Qualifications and Examinations Regulation

Substituted Decision Notice: The Office of Qualifications and Examinations Regulation shall, within 35 days of being sent this Decision, respond to the Appellant's request for information of 18 June 2022 (in so far as it has not done so already) without reliance on sections 36(2)(b)(i) & (ii) or section 36(2)(c) Freedom of Information Act 2000

REASONS

1. This Appeal is by section 57 Freedom of Information Act 2000. It concerns a request for information made by the Appellant to The Office of Qualifications and Examinations Regulation on 18 June 2022 and a Decision Notice ref. IC-247848-Z6G6 issued by the Respondent on 9 October 2023.

2. What follows is a summary only of the submissions, evidence and our view of the law. It does not seek provide every step of our reasoning. In this Decision the following definitions are adopted:-

Freedom of Information Act 2000	FOIA
The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009	the 2009 Rules
public interest balance test from section 2(1)(b) FOIA	the PIBT
Jeremy Yallop	the Appellant
The Information Commissioner	the IC
The Office of Qualifications and Examinations Regulation	Ofqual
Department for Education	DfE
Secretary of State	SoS
IC's Decision Notice dated 9 October 2023 ref IC-247848-Z6G6	the DN
Grounds of Appeal	GoA
Upper Tribunal	UT
First-tier Tribunal	FtT
Qualified Person and Qualified Person's Opinion	QP and QPO
open bundle (page references are to the Bundle)	the Bundle
IC's decision notice IC-134878-Q7J6 dated 10 October 2022	the October 2022 DN
IC's decision notice IC-193428-F4S7 dated 23 December 2022	the December 2022 DN

Background

3. Ofqual is a non-ministerial government department and responsible for regulating examinations and relevant qualifications. It was established by the Apprenticeships, Skills, Children and Learning Act 2009. The Appellant told us (A22) that Ofqual was set up:-

"*...amidst increasing public concern about grade inflation and political interference with its predecessor, the Qualifications and Curriculum Authority (QCA), which the chairman of the*

Children, Schools and Families Select Committee, Barry Sheerman, described in the following terms

QCA wasn't independent. If someone is looking over the QCA's shoulder all the time watching and observing them, even if it's informally, quietly, beneath the radar, you can't claim it's independent."

The Committee went on to recommend that "observers should be banned from Ofqual, and non-governmental bodies should have a memorandum to establish lines of responsibility"

4. The Appellant said that "*From the very beginning of Ofqual's existence there was concern that its decisions might, like its predecessor's, be influenced by ministers*" and:-

   "*Up to 2020 Ofqual appears to have retained operational independence from ministers, in accordance with the statutory framework. For example, it does not seem to have allowed observers from the Department for Education (DfE) to attend its Board meetings, and of the approximately 100 public consultations that it conducted during that period, none were conducted jointly with the DfE.*"

5. This Appeal relates to Ofqual's and others' role in the UK's response to the COVID-19 pandemic as it related to relevant examinations and grades.

6. In the GoA and at the Appeal the Appellant explained the background to this Appeal, as he saw it. He told us that in March 2020 the then SoS of the DfE used powers in section 129 The Apprenticeships, Skills, Children and Learning Act 2009 to require Ofqual to devise a system for issuing grades to students for the 2020 summer exam series without the examinations taking place. The Appellant set out passages of the direction from the SoS (A23):-

   "*It is my policy that the 2020 summer exam series for GCSEs, AS and A levels in England cannot proceed as planned. […]*

   As such, it is Government policy that these students should be issued with calculated results based on their exam centres' judgements of their ability in the relevant subjects, supplemented by a range of other evidence. […]

   Ofqual should also mandate the method of calculating final grades based on the evidence provided for each student. Ofqual should ensure, as far as is possible, that qualification standards are maintained and the distribution of grades follows a similar profile to that in previous years"

7. He told us that the Chair of Ofqual took the view that it was obliged to implement this policy which he said led to the "public outcry" in August 2020 when the results came out which:-

   "*...forced Ofqual to abandon the system altogether and instead award the grades originally assigned by teachers*"

8. The Appellant also set out for the Tribunal his view on how (in his words) Ofqual subjugated itself to ministers. For example he said in the GoA (A25):-

   "*The public rejection of its 2020 arrangements, the disapproval of the Secretary of State, and the deposition of its Chief Regulator put Ofqual into a state of crisis. In response, in the months that followed, Ofqual took various steps to subjugate itself to ministers.*"

   and

   "*From 2021 Ofqual also started to conduct many of its consultations jointly with the DfE. The ostensible idea was for each organisation to make the decisions on consultation questions that lay within its remit but, in practice, as Ofqual's Director of Policy explained to me when the first joint consultation was launched, Ofqual had little influence on the outcome. It is the records of events leading to that first consultation that are the subject of this appeal*"

9. We do not know if Ofqual would agree the Appellant's view and it is not our role to make findings of fact about these matters or to decide if the working relationship between Ofqual and the DfE and SoS at this time was appropriate. Nothing said in this Decision, which has as its focus the DN, should be taken as a criticism of the DfE or Ofqual or how matters were dealt with at the clearly unprecedented time in question. We can say however that the impact of Covid-19 and the response to it on education and the public examination system has been and continues to be widely debated and reported.

Entitlement to Information

10. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held (section 1(1)(a) FOIA) and if that is the case to be provided with that information (section 1 (1)(b) FOIA).

11. These entitlements are subject to exemptions which can be absolute by section 2(2)(a) FOIA or subject to the PIBT which is that:-

    "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

Role of the Tribunal

12. The Tribunal exercises a *"full merits appellate jurisdiction"* (I*C v Malnick and ACOBA [2018] UKUT 72)* and its role is set out in section 58 FOIA. This provides that:-

    (1) If on an appeal under section 57 the Tribunal considers –

    (a) that the notice against which the appeal is brought is not in accordance with the law, or

    (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

13. We also had regard to *Peter Wilson -v- The Information Commissioner [2022] UKFTT 0149* in which it was held:-

"30...the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision making process or to correct the drafting of the Decision Notice."

14. We noted in *NHS England -v- Information Commissioner and Dean [2019] UKUT 145 (ACC)* the UT said:-

"10. The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply..."

Chronology

15. As the chronology of this matter has a degree of complexity it is set out in outline.

date	**event**	**page of the Bundle(s)**
2022		
18th June	request for information made by Appellant	A46
1st November	1st QPO sought	not in bundle
2nd November	email with documents for the QPO	not in bundle
18th November	Ofqual responds to Appellant's request	A47
23rd December	IC issues the 2022 DN	
2023		
6th January	internal review requested by Appellant	A55
9th February	Ofqual agree saying *"I have decided that Ofqual should look at your request again"*	A56
26th April	email sent with documents for the QPO	not in bundle
27th April	2nd QPO signed by QP	A10 closed Bundle
5th May	Outcome of internal review notified to Appellant	A59
5th May	further internal review requested by Appellant	A97
26th May	Ofqual responds to request for internal review of 5 May	A98
17th July	Complaint made to the IC by Appellant	D182

25th September	Ofqual report the outcome of a further review of their decision	A107
9th October	the DN issued	A1
9th October	Appeal EA/2022/0354 between the Appellant and the IC & the DfE relating to the October 2022 DN resolved by consent	A136
6th November	Appeal commenced	A14

Previous request and response

16. From the GoA we noted that the Appellant had made a previous request. He described it as follows (A26):-

"In October 2021, in an attempt to establish the extent of David Brown's influence over Ofqual, I asked Ofqual to disclose the emails they held for which he was a sender or recipient. My request was rejected on the grounds that the volume of correspondence ("around 11500 emails") was too great.

After several attempts to narrow my request to avoid exceeding the statutory costs set out in the Freedom of Information (FOI) Act 2000, on 18 June 2022 I sent a substantially revised request (Appendix F) for records of David Brown's correspondence with senior Ofqual staff"

Request, responses and reviews

17. As set out above on 18 June 2022 (A46) the Appellant asked Ofqual in summary as follows:-

'I am interested in the 708 emails sent between [named individual] and eight people associated with Ofqual [named individuals] between 3 and 15 January 2021. Could you please disclose those emails?"

18. Ofqual replied on 18 November 2022 (A47). In summary their response was:-

(a) to say they had some information requested and to provide some of it

(b to indicate that some other information was not being disclosed in reliance on the exemptions found at sections 36(2)(b)(ii) and section 36(2)(c) FOIA (A49)

19. An internal review was sought by the Appellant on 6 January 2023 (A55). He says (A26 para 25) that he was motivated to seek a review having seen the seen the 2022 DN. We note that this DN related to a similar request for information as follows:-

" *On 8 April 2022 the complainant made a request to Ofqual for information in the following terms:*

"I'm interested in the occasions on which Ofqual has consulted with the Secretary of State since January 2020. I've previously asked for records of occasions on which ministers have

been involved with Ofqual's decision-making, but Ofqual has said that it does not hold any such records and it does not consider the interactions between Ofqual and ministers preceding Ofqual's decisions to amount to ministerial "involvement". Matthew Humphrey explained:

[W]e consider that consulting the Secretary of State on important decisions, such as deciding on the arrangements for GCSE, AS and A Level exam series, is legitimate and consistent with both Ofqual's Governance Framework and the Memorandum of Understanding between Ofqual and the Department for Education.

Could you please disclose the records of the occasions since January 2020 on which Ofqual has consulted the Secretary of State in the way that Matthew Humphrey describes? I am interested in the dates, the decisions in question, and any records that Ofqual holds of the Secretary of State's views about those decisions."

20. We also note that in the 2022 DN the IC decided as follows:-

"1. The complainant has requested any records of discussions with the Secretary of State on the arrangement for GCSE, AS and A Level exam series since January 2020. Ofqual disclosed some information but withheld one record of a discussion on the basis of section 36(2)(c).

2. The Commissioner's decision is that section 36(2)(c) is engaged but the public interest favours disclosing the information.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation...":

21. On 9 February 2023 Ofqual in response said (A56):-

"In summary, I have decided that Ofqual should look at your request again. This letter explains my decision. I apologise for the short delay in issuing this decision"

and (A58)

For the reasons set out above, I have decided that Ofqual should reconsider its response to the request you submitted on 20 June 2022 in view of the ICO Decision Notice IC-193428-F4S7. {the 2022 DN] *I will therefore remit this matter to Ofqual's FOI team for its attention.*

22. On 5 May 2023 (A59) Ofqual reported the outcome of its internal review which was in summary to say:-

"Our response

We explained in our response dated 18 November 2022 that the IT search we had carried out had returned around 450 emails, a number of which were emails in which David Brown was cc'd rather than a direct sender or recipient. We provided you with a number of emails within scope of your request with our response dated 18 November 2022.

Information we are disclosing

Having reviewed the emails and in the light of the passage of time we are disclosing some further emails to you. We have therefore attached to this correspondence some of the information you have requested. Where final versions of documents that were attached to emails have been published, we have provided a link to those published versions.

Information we are not disclosing

We have decided not to disclose other information as Ofqual is of the opinion that this would inhibit its ability to give or receive advice, exchange views, and undertake effective policy development processes with stakeholders"

23. The exemptions relied upon were those set out at section 36(2)(b)(i) & (ii) and section 36(2)(c) FOIA. They also relied upon section 40(2) FOIA (A65).

24. On 5 May 2023 (A97) the Appellant sought a further internal review. Ofqual replied on 26 May 2023. There was at this stage no change to their position.

Complaint

25. On 17 July 2023 the Appellant complained to the IC (D182). He said:-

"I disagree with the public body's refusal to provide the information I requested"

"I don't object to the exclusion of certain personal data (the names of junior civil servants) from the disclosure. I disagree with the public authority's application of section 36 and with its public interest test"

26. On 25 September 2023, following the lodging of the complaint, Ofqual provided more information (A107) but some of the information requested remained withheld.

The DN

27. On 9 October 2023 the IC issued the DN (A1-A13) which said that:-

"*1. The complainant has requested from Ofqual emails sent between an individual at the Department for Education and eight individuals at Ofqual between a certain timeframe. Ofqual provided some information in its response and further information at a later date but continued to withhold part of the information, citing section 36 (prejudice to the effective conduct of public affairs) and section 40(2)(personal information) of FOIA.*

2. The Commissioner's decision is that Ofqual correctly cited section 36 regarding the information it withheld. However, Ofqual breached sections 1(1)(b), 10(1), and 17(1) of FOIA by failing to respond within the legislative time frame and providing information late to which the complainant was entitled.

3. The Commissioner does not require further steps."

Appeal

28. On 6 November 2023 the Appeal was lodged (A14-A21) in respect of the DN. The outcome sought was *"I would like the Tribunal to order Ofqual to disclose all the information in the scope of my request by substituting a fresh Decision Notice for the Information Commissioner's notice."*

29. The grounds are (A18):-

"The Information Commissioner has decided that the information I requested should be withheld on the basis of a Section 36 exemption, after carrying out a public interest test. I disagree with his decision: I think that Section 36 is not engaged, and that the public interest is overwhelmingly in favour of disclosure when factors overlooked by the Commissioner are taken into account. I will send supporting documents by separate cover."

30. In support of the Appeal the Appellant provided detailed GoA with supporting documents (A22-A137).

Evidence and matters considered

31. The Appellant attended the Appeal by CVP and it was useful to hear directly from him. Ofqual did not attend and were not a party to the Appeal. The IC did not attend. There was no witness statement evidence for Ofqual or the IC.

32. For this Appeal as well as the matters mentioned above we also had:-

(a) the IC's response of 19 December 2023 (A138-151)

(b) the Appellant's reply of 10 January 2024 (152-155)

(c) the content of the Bundle

(d) the documents provided in response to the Directions in June 2024.

33. We were able to review closed material provided pursuant rule 14(6) 2009 Rules and the Directions of 29 December 2023 and 31 January 2024. As a result of the outcome of this Appeal we have not required a gist of the dosed material to be provided to the Appellant.

34. One matter we consider it worth recording in detail is that the Appellant set out in the GoA (A25) and repeated at the Appeal his own direct evidence about the interplay between DfE and Ofqual. He said (A26):-

"*... after the August 2020 crisis David Brown started to play a central role in Ofqual's operations. However, the extraordinary nature of his involvement in Ofqual first became apparent to me on 17 February 2021, when I attended a meeting to discuss 2021 assessment arrangements for private candidates (i.e. students not associated with schools). The meeting was also attended by representatives of Joint Council for Qualifications, the four General Qualifications Awarding Organisations (Pearson, AQA, OCR, WJEC), Ofqual (represented by Richard Garrett and a junior colleague), the DfE (represented by David Brown and three junior colleagues), and various organisations connected with home education.*

At the meeting I set out an argument for the papers taken by private candidates to be marked by awarding organisations rather than teachers. To my surprise, my proposal, which was clearly a matter for Ofqual, received a response from David Brown, who made it clear that it was he, not Ofqual, who would make the decision".

35. We understand from the Appellant that Mr Brown:-

"... is not the Secretary of State, he was a person of considerable seniority and influence within Government, proud of developing policy "under intense scrutiny". He describes his role at the time of the emails in the following terms:

"Rapidly created a team to advise ministers and the Prime Minister, working closely with the regulator, Ofqual. Announced two highly regarded policy packages which received widespread support. Built relationships with Ofqual building a strong, collaborative and trusted partnership widely recognised as a vital pillar to success. Gained the respect and confidence of ministers and Number 10 to present a bold package under intense scrutiny."

36. We do not know if this is a fair view of Mr Brown and his role or whether the Appellant was justified to be surprised that Mr Brown had asserted it was he and not Ofqual who would make the decision (and it is not our role to decide if it was in fact "*clearly a matter for Ofqual*") but we did conclude that the Appellant attended the meeting on 17 February 2021 and had accurately reported this exchange and his response to it.

Scope

37. From the Bundle we noted that Ofqual had provided information to the Appellant in response to his request on 18 November 2022, 5 May 2023 and 25 September 2023 after the involvement of the IC. There remains a number of items not disclosed but provided to the Tribunal in the Closed Bundle from B23 to B75.

38. Having reviewed the various responses from Ofqual and the IC and having heard from Mr Yallop (who indicated he did not Appeal the use of section 40(2)) we concluded that this Appeal related to the deployment by Ofqual of the exemptions at sections 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA but not to other matters raised such as the use of section 40 (2) FOIA and the IC's conclusion that Ofqual failed to comply with sections 1(1)(b), 10(1) and 17(1) FOIA.

Legal Position

39. The relevant parts of section 36(2) FOIA (which are subject to the PIBT) provide as follows:-

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 –
…
(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

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

40. The route to a decision in relation to section 36(2) is to:-

(a) verify the identity of the QP

(b) establish what the QPO said

(c) consider if the QPO reasonable

(d) and, if it was a reasonable QPO, then in all the circumstances of the case to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

41. As regards reasonableness of the QPO we had regard to the UT Decisions in *Information Commissioner v Malnick & ACOBA [2018] UKUT 72 (AAC)* and *Guardian Newspapers Ltd & Brooke v IC & BBC (EA/2006/0011).* From para 31-33 of *Malnick* we noted:-

"...Section 36 (for present purposes – see section 2(3)(e)) confers a qualified exemption and so a decision whether information is exempt under that section involves two stages: first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition ("prejudice") would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

"The QP is not called on to consider the public interest for and against disclosure. Regardless of the strength of the public interest in disclosure, the QP is concerned only with the occurrence or likely occurrence of prejudice. The threshold question under section 36(2) does not require the Commissioner or the F-tT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal)."

"Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage..."

42. At para 62 – 64 of *Guardian Newspapers* the UT said:-

"62. On the plain words, it could be said that no more is required than that the qualified person's conclusion is a reasonable one. On that view, the process by which the opinion was reached could be looked at as evidence tending to support or undermine the objective reasonableness of the opinion, but no further. Errors in the process would not of themselves vitiate the opinion. Provided the conclusion was reasonable, it would not matter how it had been arrived at.

63. Against this, can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as "the reasonable opinion of a qualified person" under s 36 merely because the conclusion happened to be objectively reasonable?

64. On this point we consider that the Commissioner is right, and that in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at. We derive this conclusion from the scheme of the Act and the tenor of s 36, which is that the general right of access to information granted by s 1 of the Act is only excluded in defined circumstances and on substantial grounds. The provision that the exemption is only engaged where a qualified person is of the reasonable opinion required by s 36 is a protection which relies on the good faith and proper exercise of judgment of that person. That protection would be reduced if the qualified person were not required by law to give proper rational consideration to the formation of the opinion, taking into account only relevant matters and ignoring irrelevant matters. In consideration of the special status which the Act affords to the opinion of qualified persons, they should be expected at least to direct their minds appropriately to the right matters and disregard irrelevant matters. Moreover, precisely because the opinion is essentially a judgment call on what might happen in the future, on which people may disagree, if the process were not taken into account, in many cases the reasonableness of the opinion would be effectively unchallengeable; we cannot think that that was the Parliamentary intention."

43. Only if the threshold is passed does the question of the PIBT arise for which we had regard to the legal authorities such as *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560* (para 149) and *Christopher Martin Hogan and Oxford City Council v the Information Commissioner EA/2005/0026&0030.*

44. The relevant date for the purposes of applying the PIBT and determining the applicability of any exemption is the date of Ofqual's response we referred to *Montague v ICO and Department for Business and Trade* [*2022] UKUT 104 (AAC*) which at para 5 says:-

"*As to the Public Interest Timing Issue, we conclude it is to be judged at the time the public authority makes its decision on the request which has been made to it and that decision making time does not include any later decision made by the public authority reviewing a refusal decision it has made on the request.*"

The First QPO for Ofqual's November 2022 response

45. Although we would have concluded that the November 2022 QPO was (*Malnick)* reasonable we were not satisfied with the evidence provided for this QPO. What we had was an Ofqual internal email of 2 November 2022 "*for Jo's S36 Qualified Person Opinion*" to which information was attached including a completed standard but unsigned QPO form.

46. We also saw that on 18 November 2022 a representative of Ofqual (but not the QP) wrote to the Appellant and said:-

"Ofqual's qualified person has formed the opinion that disclosure of the requested information would be likely to...":

47. The use and full completion of a standard form is not a requirement for a QPO. However, in our view, there must be some evidence to show that the QP actually gave an opinion. The evidence provided contains no signature or email or note or statement or direct indication that the QP agreed this QPO.

48. When preparing the email of the 18 November 2022 the writer might have seen the absence of a signature on the form used and could potentially have checked with the QP by email or in person and thereafter been able to say words to the effect " *having spoken to the QP I know that the QP formed the opinion etc*" or presented in evidence the exchange of any relevant messages. A confirmation could have been sought at any time after the Appeal had been commenced including in response to the Directions of the 18th and 27th June 2024.

49. In our view had Ofqual's position in this Appeal been reliant upon the November 2022 position we would have concluded, on the evidence, that the QP had not formally given an opinion and we would have allowed the Appeal on that basis.

The second QPO for Ofqual's 5 May 2023 Response

50. As set out above following the response in November 2022 the Appellant asked for a review and this was produced on 5 May 2023. As part of that process it appears that the QPO process was carried out again.

51. The evidence we saw for the 2nd QPO is a copy of the standard QPO form dated 27 April 2023 and signed by the QP (A10-A22) as seen in the Closed Bundle.

52. From this we could see that the QP by section 36(5)(c) FOIA was Dr Jo Saxton, Ofqual's Chief Regulator and that the QPO was that that the inhibitions at sections 36(2)(b)(i) & (ii) and 36 (2)(c) FOIA were "likely to occur".

53. We could also see that analysis had been done on both arguments for and against the use of the various exemptions (D214-D221 in the Bundle). The argument put for why the inhibition / prejudice applied were set out in the DN and are summarised as follows (A6):-

    (a) Ofqual said that it was of the opinion that disclosure "*would inhibit its ability to give or receive advice, exchange views, and undertake effective policy development processes with stakeholders".*

    (b) the live nature of the information was an important factor (A7)

    (c) "*Ofqual argued that there was a "need for robust discussion" It points the Commissioner to the free and frank views, advice and deliberations about the consultation arrangements. Ofqual underlines its point by stating that this was taking place "against the backdrop of the pandemic" when "Decisions were required to be made at speed and individuals were frank and free with their thoughts."*(A8)

(d) while Ofqual and DfE continued to work together *" disclosure "would be likely to cause prejudice to the effective working relationship and conduct of effective (sic) affairs". It argues that individuals "are likely to be reticent in providing any criticism or challenge" and that "strong and forthright language…would not be forthcoming during future engagements".* Ofqual stressed the importance of clear advice.

(e) "disclosure of the withheld information would be likely to lead to inhibition in the future":

(f) It is not unreasonable to suppose that disclosure of the information would be likely to result in inhibition to express free and frank views and advice when considering the future contingency arrangements."

(g) (A9) *a*lthough civil servants must be robust and not easily deterred:-

"... it is also important that they can "enter into free and frank discussions during an ongoing emergency. This is especially so in relation to timing of events…where there are ongoing and live issues". Views relating to awarding arrangements "were relevant and continued to form part of the consideration of future contingency arrangements that would be developed by the organisations". The disclosure of early draft documents would be likely to have a chilling effect as organisations may be reluctant to have early discussions about contentious matters and exchange information in robust language. Ofqual accepts that chilling arguments have to be carefully considered but are relevant in this scenario "where views were expressed freely and frankly during a time when there was a crisis and there remained an ongoing need to plan for future crisis". The withheld information also contains comments from stakeholders and junior officials. Ofqual suggests that "there may be repercussions for expressing themselves" for all concerned"

(h) "...the effective conduct of public affairs itself would be likely to be prejudiced. The process itself "will be impacted by disclosure":

54. In the DN Ofqual's conclusion is that:-

"Any inhibition or reluctance to engage would not assist with achieving well considered policy". Disclosure "would be likely to seriously impact on collaboration and participation of organisations in times of an emergency" when action is required.

55. The IC, after setting out a summary of the Appellant's position (para 40), set out its conclusion at para 41 (A10) as follows:-

"The Commissioner accepts that the requested information was sensitive at the time of the request and that its disclosure would be likely to inhibit the free and frank provision of advice/exchange of views and would be likely otherwise to prejudice, the effective conduct of public affairs. He is satisfied that the QP's opinion is reasonable and that all three limbs of section 36 that were cited are engaged at the lower level of inhibition/prejudice."

56. While the QPO form does not reveal the date the opinion was sought we had also been provided with an email of the 26 April 2023 *"for Jo's Qualified Persons Opinion"* which indicates the date with adequate accuracy and also reveals the information provided to the QP to help form the opinion.

57. From the evidence and on the basis of *Malnick* we concluded than the QPO was reasonable.

The PIBT- preliminary issue

58. As a result of the chronology in this case we had first to consider the date for the PIBT consideration to be made. In summary the issues identified were these:-

(a) the request was made on 22 June 2022 and the response should have been with the requester /appellant by section 10(1) FOIA promptly and in any event "*not later than the 20th working day following the date of receipt*". It was sent on 18 November 2022.

(b) the Appellant's request for a review on 6th January 2023 resulted in a fresh QPO process in April 2023 and a response provided on 5 May 2023.

(c) a further response was provided on 25 September 2023.

59. The Appellant addressed this in his reply (A154) and said:-

"*However, the Montague judgment does not support this conclusion. The relevant date was in fact the date by which Ofqual was obliged to respond to my request, i.e. July 2022, not the date to which it unlawfully postponed its response, in breach (as the Decision Notice records) of s.17(1) of FOIA*"

Furthermore, Ofqual compounded the problem by releasing information piecemeal, re-considering the engagement of Section 36 at each stage, using a new relevant date each time"

60. We could see that there might be a case where excessive delay by a public authority in providing its response could on the facts mean that the public interest test outcome moved from being in favour of disclosure to against disclosure or vice versa due to the passage of time and/or material issues arising in that period of delay. We could also see that hypothetically in such a situation an injustice might arise.

61. In our view, in this case as time passed and the live issues which were the subject of the requested material began to move into the recent past, the balance moved further towards disclosure rather than maintenance of the exemption.

62. In any event and based on *Montague* we considered the PIBT as at 23 November 2022 ie the date of the 1st response to the relevant request. We also concluded that our decision would not have changed whether the PIBT was reviewed as at the date the response should have been given in July 2022, the date it was in November 2022 or the date the further response was given after the renewed QPO in May 2023 or in September 2023.

PIBT

63. From our review of the evidence and from hearing from the Appellant we were satisfied that all parties had considered the PIBT appropriately. We set out below a

summary of the public interest balance arguments put to us in the papers and at the Appeal.

In favour of disclosure

64. We noted the following arguments put in favour of disclosure:-

(a) the general principle of transparency (A49)

(b) "*There is a public interest in the decisions Ofqual makes, and the processes Ofqual uses to inform decision making, as there is a general public interest in good decision-making by public bodies*" (A50)

(c) to aid the increase of public understanding of how Ofqual *made decisions about awarding grades for the summer 2021 exam series, and in turn improve public confidence in Ofqual's performance as a regulator, and in the qualifications which Ofqual regulate*" (A50).

(d) to allow there to be scrutiny of the relationship between Ofqual and the DfE (A31).

(e) to support the "*The public interest in facilitating scrutiny of the forum in which the Department for Education has communicated with Ofqual on the relevant issue*"

(f) because of the public interest "*in information about ministerial influence during the pandemic*" *(A31).*

65. The Appellant also referred (A31) to his suspicion that there had been wrongdoing. He said:-

"*The Commissioner's guidance says*

If there is a plausible [elsewhere: reasonable] suspicion of wrongdoing, this may create a public interest in disclosure. And even where this is not the case, there is a public interest in releasing information to provide a full picture.

At the time I submitted my request, Ofqual was aware of my reasonable suspicion of wrongdoing; I had explained to it why David Brown's interventions appeared improper. Furthermore, a recent First Tier Tribunal decision (Appendix Q) established that recent ministerial interventions in Ofqual's decisions gave rise to a reasonable suspicion of wrongdoing in the relationship between Ofqual and the DfE. However, Ofqual failed to include the reasonable suspicion of wrongdoing in the public interest test."

66. We noted that in support of a number of these submissions the Appellant referred us to a consent order in appeal EA/2022/0354 between himself and the IC and DfE (A136) (based on the October 2022 DN) and to the December 2022 DN which while not in the Bundle is a matter of public record. As regards the consent order we saw that in the recitals to it this said:-

"*AND UPON the Commissioner reviewing all the circumstances of the case when considering the public interest tests for each exemption, and accepting the relevance of the Appellant's reasonable suspicion of wrongdoing.*"

67. That came with a note as follows (D136):-

"The word "wrongdoing" is used here as this is consistent with the terminology of the Commissioner's published guidance on the public interest test, though the word can of course be interpreted in various ways. In the context of this case the Commissioner considered that the Appellant had a reasonable suspicion that the DfE had sought to influence Ofqual's decision making, and this was arguably improper based on the Appellant's submissions. However, the Commissioner also acknowledges the various submissions made by the DfE with regards to the appropriateness of these communications. The Commissioner however is of course unable to determine whether or not any "wrongdoing" or improper conduct actually occurred but has accepted that there was a stronger public interest in disclosing the requested information due to these concerns."

68. As regards the December 2022 DN (ref IC-193428-F4S7) we noted this involved Ofqual and related to similar issues. The IC in this matter concluded that:-

"1. The complainant has requested any records of discussions with the Secretary of State on the arrangement for GCSE, AS and A Level exam series since January 2020. Ofqual disclosed some information but withheld one record of a discussion on the basis of section 36(2)(c).

2. The Commissioner's decision is that section 36(2)(c) is engaged but the public interest favours disclosing the information. "

69. At para 39 of the December 2022 DN the IC concluded:-

"The Commissioner considers there are significant public interest arguments in favour of disclosure in this case and that the arguments for withholding the information are less compelling and any potential prejudice that might occur is minimal."

70. The Appellant at the Appeal repeated a number of these reasons and said that in his view:-

(a) the issue is tremendously important and impacted two million school children

(b) it possibly reveals impropriety and his reasonable suspicion of wrongdoing had been overlooked in the DN

(c) it is important to know if Ofqual's decisions were made by Ofqual or were improperly influenced by government

(d) while decisions had to be made rapidly, a high level of scrutiny should be expected especially in these sort of situations.

71. The Appellant did not accept the argument that the issue was "live" (A29). He also (for example at A32) rejected the assertion that disclosure would inhibit interactions and damage relationships. He also said (in effect) that were a disclosure to reveal some impropriety it would be wrong to call that "damage."

72. The Appellant accepted that there had been a number of previous disclosures and information had already been published but in his view the argument that this meant that the balance of the public interest was against disclosure "*contains almost nothing of substance*".

73. At para 56 of the GoA (A33) he summarised as follows:-

"Ofqual's subjugation to the DfE after the 2020 crisis directly led to outcomes in 2021 that were even further from what Ofqual considered a rational grade distribution. There is no doubt that, without ministerial involvement, Ofqual would be freer to pursue its statutory objectives, and it is consequently irrational to argue that reducing ministerial involvement by disclosing its extent could somehow harm Ofqual's decision-making."

Arguments for maintaining the exemption

74. In its response to the request for information on 18 November 2022 (A50) Ofqual accepted there was public interest in disclosure but said that in its view

"The public interest in understanding how Ofqual reached decisions about awarding grades for the summer 2021 exam series was to a degree served by the publication of the consultation on the awarding arrangements, and subsequent published information about Ofqual's decision making, which can be found here"

75. When writing on 5 May 2022 Ofqual said (C164):-

"Disclosure of the emails may increase public understanding of how Ofqual considered what it should consult on regarding awarding grades for the summer 2021 exam series. The public interest in understanding how Ofqual reached decisions about awarding grades for the summer 2021 exam series is served by Ofqual's extensive publications at the time to keep interested stakeholders, such as students, parents, teachers and schools informed of developments. These include the public consultation itself that interested parties were encouraged to read and participate in."

76. Ofqual listed a substantial number of items in support of this contention by which it says the public interest has been served including:-

(a) Simon Lebus' response dated 13 January 2021 to the SoS letter dated 13 January 2021 to Ofqual

(b) the consultation on how GCSE, AS and A levels grades should be awarded in summer 2021

(c) numerous press releases, speeches and blogs

(d) Board papers from 7 January 2021 to 11 February 2021

(e) Recovery committee papers

77. Reason to maintain the exemption also included these (C164):-

(a) "*...disclosure would be likely to severely impact on the process of preparing a consultation for publication and discourage participants in that process from engaging openly and honestly about arrangements arising from similar circumstances, undermining Ofqual's working relationship with its stakeholders. Ofqual's relationship with its stakeholders is important to ensuring that Ofqual's policy approach meets its statutory objectives.*"

(b) although Ofqual accepted the 2021 exam series had concluded it:-

"*remains engaged in working with DfE, Ministers and the Secretary of State in resilience planning. Ofqual continues to work closely with all stakeholders, and in particular DfE and awarding organisations, and is continuing to do so in relation to managing awarding arrangements in any future crisis*"

(c) Ofqual was working on resilience planning and the views expressed in 2021

"*...will likely be revisited and will play a key feature in this engagement.*"

(d) "*Both Ofqual and others will need to deliberate freely and frankly with each other and consider matters on this live issue. It is vital for Ofqual to obtain views from all stakeholders and have candid conversations around those arrangements. It would be likely that disclosure of the withheld information would inhibit free and frank views and advice during this process. Should Ofqual or its stakeholders be inhibited from expressing their views candidly during live, ongoing discussions about such arrangements, this would likely have an adverse impact on Ofqual's ability to deliver exam series during any future crisis effectively and fairly*"

(e) of the importance to enable Ofqual to have back and forth dialogue with stakeholders "*...in order to develop and refine policy options*"

78. Ofqual also said (C165) that the process of:-

"*...drafting and perfecting policy documents would likely be inhibited should the space for that process be open to the public gaze*"

79. Additionally Ofqual said:- (C166):-

"*It is vital that Ofqual retains the trust and co-operation of its stakeholders in order to be able to facilitate any necessary future work around, for example, contingency arrangements for any future exam series. Disclosure of emails which passed between Ofqual and DfE as part of fast moving, urgent deliberations on awarding arrangements for 2021, would be likely to undermine the relationship between Ofqual and DfE.*"

80. The IC in the DN said (A11):-

"*Ofqual detailed the "substantial information relating to its decisions available on its website, through representations before the Education Select Committee and directly through media engagement". It also referred to the amount of information it had released to the complainant and the level of engagement it had invited. Ofqual does not consider that there is a "wide public interest" in the information that remains withheld and that the requester/complainant is pursuing a personal interest. In its view, the balance fell in favour of maintaining the*

exemption because of the likely impact on the "development of future policies and thereby prejudice the effective conduct of affairs"

PIBT Balance

81. As regards balance the Appellant was strongly of the view that the balance favoured disclosure.

82. Ofqual said in summary that while it accepted there was a public interest in the material requested that interest was substantially satisfied by the provision of a large amount of material and that the balance favoured the reasons given to maintain the exemptions.

83. The IC said (A11) as regards balance:-

"47. The Commissioner is aware that the request for information was made over a year after the information it sought. He has also borne in mind the fact that individuals in public authorities are fully aware of FOIA and the fact that any information held might be released to the public.

48. In response to the Commissioner's investigation Ofqual has recently provided additional information to the complainant. In doing so it took account of the passage of time. However, even after this further consideration, Ofqual took the decision that it could not release all the requested information.

49. The Commissioner recognises that there was a need to take action swiftly during the pandemic and views needed to be sought on significant matters in a hothouse environment. Ofqual has referred to contingency plans that may be required again as part of its argument for non-disclosure. The Commissioner is not convinced by this argument. However, much of this information is in draft form and he considers that the public interest was met by the publication of the documents listed by Ofqual and what it describes as "the thinking behind the decisions made for assessments and awarding for the summer 2021 exam series". In addition to which Ofqual has released information several times to the complainant. Consequently, the balance of public interest in this instance for the disclosure of the remaining withheld information is not persuasive. The Commissioner has decided that it is not in the public interest to release the information."

Tribunal's review of the PIBT

84. We reviewed the closed material having regard to the exemptions and the prejudice /inhibition identified in the QPO.

85. Having found the QPO to be reasonable we accept that preventing the prejudice or inhibition identified in the QPO is in the public interest.

86. In our deliberations we had regard to the decision of the UT i*n Davies v IC and The Cabinet Office [2019] UKUT 185 (AAC).* In this case the UT said:-

" *25 There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of public affairs are to be treated with some caution. In Department for Education and Skills v Information Commissioner and Evening Standard EA/2006/0006, the First-tier Tribunal commented at [75(vii)] as follows:*

"In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil servants since the Northcote-Trevelyan reforms. These are highly-educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions. The most senior officials are frequently identified before select committees, putting forward their department's position, whether or not it is their own."

26.Although not binding on us, this is an observation of obvious common sense with which we agree. A three judge panel of the Upper Tribunal expressed a similar view in DEFRA v Information Commissioner and Badger Trust [2014] UKUT 526 (AC) at [75], when concluding that it was not satisfied that disclosure would inhibit important discussions at a senior level:

> *75. We are not persuaded that persons of the calibre required to add value to decision making of the type involved in this case by having robust discussions would be inhibited by the prospect of disclosure when the public interest balance came down in favour of it..*
>
> *76...They and other organisations engage with, or must be assumed to have engaged with, public authorities in the full knowledge that Parliament has passed the FOIA and the Secretary of State has made the EIR. Participants in such boards cannot expect to be able to bend the rules."*

87. In *Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC), [2017] AACR* 30 Charles J held:-

"*27...The lack of a right guaranteeing non-disclosure of information, absent consent, means that that information is at risk of disclosure in the overall public interest (i.e. when the public interest in disclosure outweighs the public interest in non-disclosure). As soon as this qualification is factored into the candour argument (or the relevant parts of the safe space or chilling effect arguments), it is immediately apparent that it highlights a weakness in it. This is because the argument cannot be founded on an expectation that the relevant communications will not be so disclosed. It follows that if he is properly informed, a person taking part in the discussions will appreciate that the greater the public interest in the disclosure of confidential, candid and frank exchanges, the more likely it is that they will be disclosed. In general terms, this weakness in the candour argument was one that the courts found persuasive and it led many judges to the view that claims to PII based on it (i.e. in short that civil servants would be discouraged from expressing views fully, frankly and forcefully in discussions relating to the development of policy) were unconvincing.*

"*28 The same weakness exists in respect of a qualified FOIA exemption because any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest.*"

"*29...In my view, evidence or reasoning in support of the safe space or chilling effect argument in respect of a FOIA request that does not address in a properly reasoned, balanced and objective way:*

i) this weakness,

ii) the public interest in there being disclosure of information at an appropriate time that shows that the robust exchanges relied on as being important to good decision making have taken place, and

iii) why persons whose views and participation in the relevant discussions would be discouraged from expressing them in promoting good decision making and administration and thereby ensuring that this is demonstrated both internally and when appropriate externally,

is flawed."

88. We accepted most of the arguments put both in favour of disclosure and maintenance of the exemption. However we identified these submissions we did not accept:-

(a) we do not think it likely disclosure of the closed material from 2021 would (assessed as at November 2023 see para 64) have undermined the relationship between Ofqual and the DfE being two important organisations involved in very serious issues and required and able at both a corporate and individual level to work constructively and collaboratively.

(b) we do not accept as suggested by Ofqual (C164) that disclosure would discourage participants in a consultation from engaging "honestly".

(c) we agree with the IC (A11) that the public interest arguments relating to future contingency planning are not convincing.

89. The December 2022 DN and the consent order in Appeal EA/2022/0354 are noteworthy due to their factual connection to this Appeal and as they were referred to by the Appellant. However apart from noting that the IC in EA/2022/0354 matter accepted "*the relevance of the Appellant's reasonable suspicion of wrongdoing*" we did not find them particularly helpful for our deliberations on the basis that they were connected to the specific facts of those cases.

90. For us, on balance and on the basis of the authorities referred to, we concluded that the public interest in transparency around the response of Ofqual and the DfE to the exceptional events that confronted them does outweigh the many arguments we accept exist to maintain the exemption.

91. We accept that the issue is balanced but were persuaded to this view because of our assessment of the weight of the public interest in how Ofqual and DfE worked together to find solutions for so many people in such an impactful area of public life.

92. The withheld information gives evidence of how decision-making was handled by government at a crucial point. Although communications were made under pressurised circumstances, they are ones which are well understood by the wider world and which should be judged in that light.

93. Overall, we find that the overarching public interest is in transparency to allow for fuller understanding and scrutiny of decision-making which affected the lives of the many candidates directly impacted and society more widely in meaningful and long-lasting ways.

Section 40(2) FOIA

94. We noted that in existing disclosures made in response to the Appellant's request a number of redactions had been made of personal data pursuant to section 40(2) FOIA. This exemption is not a contested issue in this Appeal and for the avoidance of doubt our Decision accepts that further disclosures made as a result of it may have redactions on the same basis.

Decision

95. Accordingly it is our Decision that that DN was not in accordance with the law and a substituted Decision Notice is given whereby Ofqual are required to respond to the request (in so far as they have not done so already) without reliance on section 36(2) FOIA but where appropriate subject to section 40(2) FOIA.

Signed: Tribunal Judge Heald **Date: 4 November 2024**

Promulgated: **Date: 06 November 2024**