



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

EA/2013/0021

B E T W E E N:-

JAMES NICHOLSON

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

**THE COUNCIL FOR THE CURRICULUM, EXAMINATIONS &
ASSESSMENT**

Second Respondent

Tribunal

**Brian Kennedy QC
Paul Taylor
Steve Shaw**

Hearing: Bedford House on Monday the 19th August 2013.

Subject matter: Freedom of Information Act 2000 generally and also, specifically whether section 40(2) exemption engaged.

DECISION OF THE FIRST-TIER TRIBUNAL:

The Tribunal grants the appeal in part.

REASONS:

Introduction

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (**“the Act”**) generally and also specifically in relation to exemptions claimed under section 40(2).
2. The appeal is against the decision of the Information Commissioner, who is the First Named Respondent, (**“the Commissioner”**) contained in a Decision Notice (**“the Decision Notice”**) dated 16th January 2013 (reference FS50461773).
3. The Tribunal Judge and lay members sat on the 19th August 2013 and decided the case after an oral hearing where the Appellant represented himself and the Second Respondent (**“the CCEA”**) and their witnesses were represented by a Peter Hopkins of counsel instructed by Carson McDowell, solicitors.

Request by complainant:

4. The complainant wrote to the second respondent on 27th June 2012, with the following request: *“Under the Freedom of Information Act, I would like to be provided with the documentation relating to those checks for the GCE Mathematics papers C4, M1, M4, S1 and S2 papers”*.
5. By letter dated the 27th June 2012 the CCEA disclosed a copy of the information it maintained was held, (though with the names of the individuals undertaking the checks of the examination papers withheld),

relying upon the exemption under Section 40(2) of the Act. The CCEA advised that a further check on Mathematics was carried out by a Professor from Queen's University Belfast though advised that no formal documentation of this process was held. It later transpired that these subsequent checks were not carried out by a University Professor but by a Doctorate/teacher.

6. Following an internal review, the CCEA disclosed to the Appellant a copy of the front page of each of the mathematics papers requested which were signed as confirmation that the requested checks had been completed. The copies were redacted in part. CCEA advised that a verbal report was given to the subject officer for Mathematics following the completion of the checks and that the front covers of each paper are the only documents held on record in relation to the completed checks. The CCEA withheld the name of the individual who undertook the checks, under section 40(2).

The Commissioner's Decision:

7. The Commissioner served a Decision Notice dated the 16th January 2013 in relation to this matter in accordance with Section 50 of the Act. The Commissioner decided that CCEA has provided the Appellant 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).

Grounds of appeal:

8. The Appellant claims to demonstrate that there were serious errors in the GCE Mathematics papers, the subject matter of his request. He understandably argues that students undertaking the exams in question inter-alia would have been disadvantaged by the errors he identified. He cannot accept that the checks which would or should have exposed these errors have not been recorded and the detail of the results recorded on documents which were retained by the CCEA.

9. The Appellant also argues that the name of the expert undertaking the checks in question and the dates of checking should be disclosed on the disclosed documents. This is because, in his opinion, there needs to be capacity for scrutiny as to whether someone employed at public expense could be regarded as having the appropriate experience and qualifications for the task.
10. At hearing the parties helpfully agreed the grounds of appeal were essentially: a) Whether or not any information held by the CCEA at the time of the request and within the scope of the request has not been disclosed and b) Does the exemption under Section 40(2) apply to the name of the expert/s engaged in the checks.

Tribunal's Reasons:

11. In relation to the first ground a) The Tribunal accept the submissions of the Appellant that the date on the front pages disclosed to him are important and should not have been redacted. We find as a fact that the date should have been disclosed and we direct that this matter is now properly disclosed to the Appellant.
12. In relation to the second ground, i.e. does the exemption under Section 40(2) apply to the name of the academic engaged in the checks, in the course of the hearing the Appellant effectively abandoned his argument and seemed to accept the reasoning for redaction of the name on the front page of the examination papers disclosed. At the hearing he did not argue against the redaction of the name. He distinguished the date which he argued in itself was important. In any event and for the avoidance of doubt the Tribunal accepts the need for redaction and accepts that in the particular circumstances of this case and for the reasons given by both respondents, Section 40(2) is engaged. This is an absolute exemption and accordingly this Tribunal rules redaction of the name on the front page of the said examination papers disclosed remain redacted.

13. The Appellant argues that such an important matter should have given rise to more notes and recorded discussion, analysis and or comment. He cannot accept that all or any written records had not been retained by the time of his request. The Tribunal understands this concern and doubt. An important matter of such concern to so many exam candidates should be a matter of significant public interest and one would expect some record of the tests or checks carried out by any expert to be recorded. It seems to the Tribunal that the Appellant has a genuine and legitimate concern that such a failure to permanently record particulars of the checks might well be perceived as a cover up and not in the public interest. The Appellant further strongly objected to the CCEA not having been engaged in the formal process of this appeal until as late as August 2013.

Evidence:

14. An aide memoir was released to the Appellant in the course of his complaint to the Commissioner but it is not disputed that this document was created after the date of the request and therefore is not the subject of this appeal. The CCEA called two witnesses to explain the background to the limited disclosure of information available at the time of the request. The first was Phyllis Rolleston whose witness statement is on record. Ms. Rolleston took the oath and under cross examination she confirmed that she had not asked the expert if he had made written notes as she had not in fact met him. She confirmed that any expert would be escorted to their office for checks and it would not be the custom or practice to allow any papers, including notes, out of this office. She was questioned about the witness statement provided to the Tribunal by Mr. Joe McGurk, Officer for Mathematics and Business Assurance for the CCEA and Mr. McGurks' comment that he anticipated that expert's notes had been destroyed. Her evidence was that Mr. McGurk told her he had made no notes of his discussions with the experts. When questioned further she indicated that she did not know if any notes were made or destroyed by any expert. She told the Tribunal that she could not shed any light on this point except that it was a very confidential process and only a small team consisting of six

persons would be involved. She explained that she had dealt with the team leader, a senior executive officer and spoke to this person within a day or two of the Appellant's request. She confirmed the testimony of the team leader is that the expert produced no notes or documents after his checks. She did concede that she felt it was a matter of concern that there is no record and she would be making recommendations. She accepted under cross examination that she could see no need for the redaction of the date on the front pages disclosed.

15. The second witness called by the second respondent was Mr. Martin Quinn, Director of Corporate Services at the CCEA, whose formal statement is on record and who took the oath and was cross examined by the Appellant. He stated that he had been too busy to provide clarification to the Appellant upon his request. He did not have time. Later when asked by the Appellant about post request comments written by Mr. Quinn he was unaware of how many times an emergency of this type (urgent interim measures for carrying out exam paper checks) had occurred. He did not know why the date had been redacted from pages disclosed and stated that he would not have redacted it. In general the Tribunal found Mr Quinn unable to assist in any of the pertinent details as he seemed to rely on staff to advise him about all the relevant matters pertaining to the request. He was of little assistance. He seemed to regard the Appellant's request as a nuisance and bordering on vexatious.
16. The Tribunal find it unfortunate that Mr. McGurk was not available to give evidence although on balance we accept that his absence is because he is unwell at this time.
17. Accordingly, and for the reasons given above, this Tribunal finds that the second respondent failed to provide all information within the scope to the request at the time of the request. The dates should not have been redacted and this information should now be provided in its' original form. Otherwise however we have not been persuaded that there was other documentation at the time of the request. That is not to say that this is a

satisfactory position but we are not here to determine that issue. Having heard Ms. Rolleston, who was a most helpful witness, under extensive and effective cross examination by the appellant, we are satisfied, on the balance of probabilities that there probably was no other documentation within the scope of the request at the time she investigated it, that is within two days of the request being made.

Conclusion:

18. In light of the foregoing, the Tribunal allows this appeal in part. The requested information (the redacted dates) should be disclosed.
19. The parties have the right to apply to the Upper Tribunal for permission to appeal. Any such application must be made to the Tribunal in writing within 28 days of this decision.

Brian Kennedy QC
Tribunal Judge

29th August 2013