ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50508627

Dated: **12th. February, 2014**

Appeal No. EA/2014/0125

Appellant: **Joseph Reynolds ("JR")**

First Respondent: **The Information Commissioner ("the ICO")**

Second Respondent: **The Office of Qualifications and Examination Regulation("Ofqual")**

Before

David Farrer Q.C.

Judge

and

Suzanne Cosgrave

and

Jean Nelson

Tribunal Members

Date of Decision: **10th. December, 2014**

Date of Promulgation: **15th December, 2014**

J.R. appeared in person

The ICO did not appear

Carol Evans appeared for Ofqual.

Subject matter:
FOIA s.40(2) Whether disclosure of the requested information was fair and lawful.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal concludes that the exemption provided for by s.40(2) of FOIA does not apply because the request satisfies condition 6(1) of Schedule 2 to the Data Protection Act, 1998 and disclosure would be fair and lawful.

The Tribunal therefore allows the appeal.

Ofqual is required to disclose the requested information, namely the names, affiliations and qualifications of all the subject experts held by Ofqual on 13th. May, 2013. within 28 days of the publication of this Decision.

Dated this 10th day of December, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1. Ofqual was established by statute in 2009 as the regulator for qualifications other than degrees in England and for vocational qualifications in Northern Ireland. It has specified statutory obligations, requiring it to ensure that regulated qualifications awarded by examining organisations give a reasonable indication of knowledge and understanding and assess levels of attainment consistently, one with another.

2. The content of courses and examinations and the standards applied by bodies awarding these qualifications are therefore central to Ofqual's functions. The 2009 statute requires it to publish general conditions of recognition of the award of regulated qualifications.

3. Ofqual engages independent subject experts to advise it ad hoc on a range of matters relevant to its role as regulator, including the design and comparability of qualifications and the standards of work to be expected. The commitment required of experts varies from one to another. Ofqual takes decisions in the light of such advice, generally sought from two separate experts.

The Request

4. JR' s interest in Ofqual's work was aroused when he saw what he believed to be unsuitable and inadequate reading material which his daughter was studying for a GCSE English examination. He wanted to know who the experts were who approved such course material and what was their expertise.

5. He made two requests for information in July, 2012. Ofqual provided some information but withheld names, affiliations and qualifications, citing the exemption under FOIA s.40(2).

6. By e mail dated 8th. May, 2013 JR renewed his inquiry by a request in the following terms -

   (i) *"Please list all subject experts, their names, their affiliations and their qualifications so the public may have a chance to vet them. This is what the Select Committee implied. And indeed what other professional organisations asked for."*

7. Ofqual repeated its earlier refusals, relying on the same exemption, s.40(2). It maintained that position by letter of 28th. June, 2013 following an internal review. JR complained to the ICO.

8. In the latter part of 2012 the Select Committee on Education of the House of Commons heard evidence on the administration of examinations for 15 - 19 year olds in England. Its report, to which the request refers, spoke at paragraph 111 of "r*ecurring criticisms of Ofqual's lack of in - house subject expertise and of a lack of transparency in its use of external subject experts"*. It concluded at paragraph 112, " . . .*criticisms from the subject communities lead us to conclude that Ofqual needs to be more transparent about its consultation with and use of external subject experts."*

9. As a result of that report and perhaps the earlier response to its evidence to the committee, Ofqual introduced into its standard terms and conditions for admission to the list of experts a provision (in Annex B) which explicitly indicated that the name, qualifications, affiliations and current employment of experts would be published. Those terms were apparently effective from August 2014. It seems that they applied to experts recruited by the time of JR's request, only when they reapplied after the introduction of the new standard terms. They did not apply to them at the date of the request.

The Decision Notice ("The DN")

10. By DN dated 12th. February, 2014 the ICO upheld Ofqual's refusal referred to in paragraph 7. He concluded that the information requested was the personal data of the various experts, which is clearly right. Considering the question whether proc-

essing such personal data would be unfair, he took account of three factors, namely -

(i) What were the experts' reasonable expectations as to disclosure of such data to the public ?

(ii) Had they consented to disclosure ?

(iii)What were the likely consequences of disclosure ?

11. He judged that the experts' role was not that of the decision - maker and was not "public - facing". He referred to Ofqual's Information Charter which formed part of the application process for the engagement of experts and included a commitment to the protection of personal data. No expert had consented. The ICO concluded that disclosure was likely to result in lobbying and nuisance to the experts - a finding apparently linked to a comment made by JR in correspondence with a member of staff - and that it could well discourage candidates from applying to act as experts in the future. In his response the ICO rightly abandoned the latter point; clearly, future recruitment problems have no bearing on the fairness of processing the personal data of an expert already recruited.

12. The ICO found that disclosure would be unfair. He did not consider whether any of the conditions specified in Schedule 2 to the Data Protection Act, 1998 ("the DPA") was satisfied.

13. JR appealed to the Tribunal.

The issues

14. As to third party personal data, section 40(2) of FOIA provides an absolute exemption from disclosure if either of two conditions set out in s.40(3) is satisfied.. The material condition here, as in the great majority of appeals relating to this provision, is that disclosure of the personal data to a member of the public otherwise than under FOIA would contravene one of the data protection principles (s.40(3)(a)(i)). So far as relevant to this appeal, the first data protection principle, enacted in Part 1 of Schedule 1 to the DPA, requires that -

(i) *"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-*

(a) at least one of the conditions in Schedule 2 is met ."

(ii) Condition 6(1), which is the only material Schedule 2 condition here, reads

(iii) "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".

15. The requirements for fairness and lawfulness are unqualified and satisfaction of a Schedule 2 condition is simply a specific aspect of such requirements which must be met. Nevertheless, where the specified justification for processing is established and the processing is not unwarranted, it is unlikely that it will be deemed unfair, let alone unlawful. Mindful of the overriding requirement of fairness, we nevertheless considered at the outset of our deliberation whether condition 6(1) of Schedule 2 was satisfied.

The case for the Respondents

16. Viewing their submissions in the terms of condition 6(1), neither the ICO nor Ofqual expressly disputed that JR was pursuing a legitimate interest, namely an investigation of the credentials of outside experts recruited to advise Ofqual on matters critical to its function as regulator. The objection was that disclosure would be likely to cause prejudice to the legitimate interests of the experts, hence was unfair. The ICO confined himself to the submissions that they had a reasonable expectation that the requested personal data would not be disclosed and that disclosure was likely to result in prejudice in the form of lobbying and nuisance.

17. Ofqual supported those submissions and, as to reasonable expectations, relied on the terms of the Pre - Approval Questionnaire ("the PAQ") and the standard contract supposedly current at the date of the request. In the course of Ofqual's oral submissions Ms..Evans acknowledged that the exhibited contract was not that

standard contract so there was no evidence to support this element of her submission .The Tribunal was referred to paragraph 6.1 of the exhibited contract which provided for the expert's consent to Ofqual *"holding and processing data relating to you for legal, personnel, administrative and management purposes"*, This was apparently relied on as an implied limitation on any disclosure of personal data in response to an external request. However, that seems to us far from clear; moreover, this provision appeared in the form of contract used after the decision to require consent to publication of names, qualifications and affiliations. Furthermore, the PAQ made clear that Ofqual 's duties under FOIA could result in disclosure of personal data. Even if the standard contract current in May 2013 contained paragraph 6.1, we would therefore not attach any significance to it.

JR's case

18. Put shortly, he argued that subject experts should be identifiable. There is no good reason why an expert should be unwilling to disclose his credentials to the public. They are relevant to his important work in the public sphere, not his private life. Experts are generally keen to publicise their expertise. There is no unwarranted prejudice to the expert in publicity for these matters. The purposes of his intended investigation were to ascertain whether the subject experts had the expertise attributed to them by OFQUAL and whether they had interests in or links with the awarding bodies, such as to create apparent conflicts of interest.

The Tribunal's reasons

19. We readily conclude that JR was pursuing a legitimate, indeed a very important interest in seeking the requested information. The concerns of the Select Committee and such bodies as ACME (representing mathematics) reinforce such a finding. Ofqual's undoubtedly sincere assurances as to the rigour of its selection procedures and the quality of successful candidates do not weaken the public's proper interest in satisfying itself that this important task is being performed by properly qualified experts, free of conflicting interests. Identification of individuals and their detailed credentials is plainly necessary for such verification. The subject

community, by which we understand those qualified to discuss and assess the expertise and the opinions of an external adviser in the subject concerned (e.g., ACME), clearly needs to know, not just the collective profile of those who advise, but who those advisers are.

20. As regards prejudice, we accept that the reasonable expectation of the data subject as to disclosure of his personal data is a factor in the assessment. We do not believe, however, that an expectation that the requested personal data would remain confidential was reasonable.

21. The work of these expert advisers is of great importance, both as to the standards and the content of public examinations. It requires a high degree of transparency, as the Select Committee recognised. We interpret its finding of "*a lack of transparency in its use of external subject experts"* as referring precisely to the lack of information on the issues identified in JR's request. In its Response Ofqual suggested a different construction of this finding but it evidently recognised the need for change as a result of the Select Committee report, since it took steps to ensure that experts engaged in the future would consent to disclosure of the information that JR requested.

22. More fundamentally, we conclude that Ofqual, in drafting PAQs and terms of engagement for these experts prior to 2013 and then withholding this information when responding to a series of requests from JR, failed to have regard to the Nolan principles contained in the first report of the Nolan Committee on Standards in Public Life, published in 1994, six years before FOIA was enacted and eleven years before it came into force. Two of the seven principles were entitled "Accountability" and "Openness". The report stressed the need for transparency in the conduct of public business unless really cogent wider considerations demanded that secrecy be maintained. Such openness is essential when questions are raised as to the identity and credentials of subject experts, appointed by a statutory body, who are paid from public funds.

23. The likelihood that the experts would suffer prejudice in the form of harassment through "lobbying and nuisance" was minimal, in our opinion, a view possibly

supported by the absence of complaints of such conduct since Ofqual changed its policy on disclosure in 2013.

Summary

24. The Tribunal adjudges that the disclosure of the requested personal data clearly satisfied condition 6(1) of Schedule 2 and was fair since disclosure was strongly in the public interest and caused no significant prejudice to any legitimate interest of the data subjects, let alone their rights or freedoms.

25. For these reasons we allow this appeal.

26. Our decision is unanimous.

Notice of attendance

27. Rules 33 and 34 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009/1976 ("the 2009 rules") provide that all parties are entitled to be notified of the date and time of an oral hearing and to attend and participate. Rule 33(2) empowers the Tribunal to request or direct a party to attend. Rule 36 allows the Tribunal to proceed in the absence of a party if satisfied that such notice has been given. There is no general requirement in the 2009 rules that a party notify the Tribunal of its intention to appear. Nevertheless, the Tribunal routinely inquires beforehand as to who will attend on behalf of each party and prepares a notice for all parties on the basis of the replies. This is clearly useful information, which assists in the fulfilment of the overriding objective (see Rule 2). In this appeal, as in some others in the recent experience of the members of this panel, the public authority respondent gave no prior indication of its intention to appear but duly attended and made oral submissions through Ms. Evans. It is highly desirable that notice of attendance should be given and that the role of representatives, whether as advocate or observer, should be made clear so that realistic assessments can be made of the duration of the hearing. It may be that a direction to this effect would be helpful in future appeals. We should add that, in this appeal, no significant problem was caused by this omission.

Signed

David Farrer Q.C.
Tribunal Judge

10th. December, 2014