

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 27 April 2011**

**Public Authority:** Qualifications and Curriculum  
Development Agency

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

### Summary

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The complainant made a request to the Qualifications and Curriculum Development Agency (QCDA) for information relating to Testbase software which was created by a company called Doublestruck which contains past examination questions obtained by Doublestruck from QCDA. QCDA refused to provide this information to the complainant as it stated it was exempt from disclosure under section 43(2) of the Freedom of Information Act 2000 (the "Act"). The Commissioner considers that the section 43(2) exemption was correctly engaged in this case.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## Background

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2. Doublestruck is a private sector body and the main function of its business is to produce educational software and assessment material for UK schools. Its website states that Testbase products are to be found in more than 90% of UK secondary schools and more than 70% of UK primary schools.

## The Request

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3. The complainant made a request to QCDA on 21 August 2010. The request was for the following information:

*"What are the financial arrangements between you and the company Doublestruck (creator of the Testbase software)?*

*Please could I have the details since the creation of the software.*

*Do you hold records of the total revenue of the Testbase software or is that information held only by Doublestruck/Individual schools?"*

4. On 16 September 2010 QCDA responded to the request for information. It confirmed that it held the information that the complainant had requested and provided him with information relating to the financial arrangements between QCDA and the company Doublestruck since the creation of the software. It also confirmed that it held information relating to the total revenue of the Testbase software but stated that it was exempt from disclosure under section 43(2) (prejudice to commercial interests). QCDA provided the complainant with an explanation as to why it believed section 43(2) was applicable.
5. As the complainant was dissatisfied that some of the information he had requested had been withheld under section 43(2), on 16 September 2010 he asked QCDA to conduct an internal review.
6. On 8 October 2010 QCDA wrote to the complainant with the result of the internal review it had carried out. The review stated that the complainant had been provided with the information he had requested in relation to the financial arrangements between

QCDA and Doublestruck however confirmed that it was withholding the total revenue of the Testbase software under section 43(2). It therefore upheld its initial decision.

## **The Investigation**

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### **Scope of the case**

7. On 8 October 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner will consider whether QCDA was correct to withhold the total revenue of the Testbase software under section 43(2) of the Act.

### **Chronology**

8. The Commissioner wrote to QCDA on 19 January 2011 to ask for further submissions in support of its application of section 43(2).
9. On 14 February 2011 QCDA responded to the Commissioner, it provided further arguments in support of its application of section 43(2).

## **Analysis**

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### **Substantive Procedural Matters**

#### **Exemptions**

##### **Section 43(2)**

10. Section 43(2) provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
11. In this case QCDA has stated that disclosure of the requested information would be likely to prejudice the commercial interests of the company Doublestruck.

12. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to Doublestruck's commercial interests.
13. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,  
  
*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*
14. The Commissioner has also noted guidance issued by the Scottish Information Commissioner in relation to commercial interests and section 33(1)(b) of the FOI (Scotland) Act 2002. This guidance states that,  
  
*"...commercial interests will specifically relate to any commercial trading activity it undertakes, e.g. the ongoing sale and purchase of goods and services, commonly for the purpose of revenue generation. Such activity will normally take place within a competitive environment."*
15. The Commissioner considers that the purchase of and forward sale of past examination questions is a commercial activity in that it relates to the sale and purchase of goods. As such he considers that the withheld information falls within the scope of the exemption.
16. The Commissioner therefore went on to consider how any prejudice to Doublestruck's commercial interests would be likely to be caused by the disclosure of the requested information.
17. The Commissioner notes that the information requested is the total revenue of Doublestruck's Testbase software (which contains past examination questions purchased from QCDA). The prejudice claimed is that Doublestruck's competitors may use this information to gain a commercial advantage. The prejudice claimed therefore relates to Doublestruck's ability to participate competitively in relation to the purchase and sale of past examination questions.
18. In support of its use of this exemption QCDA stated that it had contacted Doublestruck to ask it for its views in relation to this. Doublestruck has argued that the requested information is

commercially sensitive as it could be used by a competitor to consider whether to invest in the market, to estimate its market penetration and to gain a competitive advantage over Doublestruck.

19. Doublestruck has also argued that the requested information could be used alongside information which it is legally required to publish through Companies House. It has suggested that the information could be used to “pick apart” its published account and therefore could provide an insight into revenue from other business arrangements with other companies (which are not public authorities). It has suggested that this could seriously damage its reputation and the confidence that other business partners have in Doublestruck. It has stated that its other business partners may decide not to continue to do business with Doublestruck if they are concerned that information relating to their accounts could be derived through disclosure of information relating to QCDA and Doublestruck.
20. The Commissioner is mindful of the Tribunal’s decision in *Hogan v Oxford City Council* (EA/2005/0026) (EA/2005/0030) in which it was commented that, “Second the nature of the ‘prejudice’ being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and prejudice and the prejudice is, as Lord Falconer of Thoronton has stated “real, actual or of substance” (Hansard HL (VOL. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on ‘prejudice’ should be rejected.” The Commissioner has therefore sought to determine whether the prejudice claimed by QCDA is “real, actual or of substance”.
21. The Commissioner is also mindful of the Tribunal decision in the case of *Derry City Council v the Information Commissioner* (EA/2006/0014). In this case the Council argued that the commercial interests of a third party, Ryanair, would be likely to be prejudiced if the requested information were disclosed. The Council did not ask Ryanair for its views as to whether it believed its commercial interests would be likely to be prejudiced nor did Ryanair present any evidence to the Tribunal. The arguments put forward by the Council to the Commissioner as well as to the Tribunal were based upon the Council’s thoughts on the point and not on representations made by Ryanair. In the absence of any evidence from Ryanair the Tribunal stated that it was unable to

conclude that Ryanair's commercial interests would be likely to be prejudiced.

22. The Commissioner acknowledges that in this case QCDA did contact Doublestruck for its views in relation to this request.
23. The Commissioner notes that Doublestruck is a private company which is a licensee of National Curriculum test materials. It competes with other private companies which are similarly licensed in purchasing and then selling on past paper examination questions. He considers that if the total revenue of its Testbase software (which contains past examination questions purchased from QCDA) were disclosed this could enable competitors to gain an insight into the viability and profitability of this particular software to decide whether to expand or invest into a similar venture. Disclosure may encourage Doublestruck's competitors to enter into a similar venture which without this information those competitors may not have done so. If the market were to become oversaturated due to disclosure of the requested information this may hinder Doublestruck's market position.
24. The Commissioner also considers that the requested information would be likely to be used alongside Doublestruck's annual accounts (published on Companies House) to determine the amount of revenue obtained through the Testbase software (which contains QCDA past examination questions) in comparison to the overall revenue obtained by Doublestruck. The Commissioner considers that this could allow Doublestruck's competitors to estimate its market penetration within this particular area which would be likely to give those competitors a commercial advantage in terms of developing their own business strategies. The Commissioner notes that whilst the total revenue requested would not provide competitors with an in-depth knowledge of this particular software it could provide competitors with an indication of the viability and profitability of investing in this area which they would not ordinarily have had. It may enable them to develop business strategies in this area more quickly and more directly. This may give competitors a commercial advantage over Doublestruck as Doublestruck itself would not have had such information in its possession when it developed its own business strategy in this area.
25. The Commissioner does not consider that disclosure of the requested information could enable Doublestruck's published accounts to be broken down further in terms of its revenue

through ventures with other private companies as the submissions he has received do not evidence how this would be done.

26. Finally in this case QCDA has argued that disclosure of the requested information would be likely to prejudice Doublestruck's commercial interest rather than would prejudice Doublestruck's commercial interests. Therefore the threshold to prove would be likely to prejudice is lower than if QCDA had claimed that the commercial interests would be prejudiced. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
27. The Commissioner considers that if the requested information were disclosed it would be likely to be used by Doublestruck's competitors, along with other information in the public domain, to gain a commercial advantage over Doublestruck in terms of deciding whether to invest in this particular area by giving an indication of the viability and profitability of this area. He considers that the risk of prejudice is substantially more than remote. This is because the requested information relates to a private company's accounts which would not ordinarily be disclosed into the public domain and therefore Doublestruck's competitors would be likely to use this information as described above.
28. Upon the evidence provided by QCDA the Commissioner considers that Doublestruck's commercial interests would be likely to be prejudiced by disclosure of the requested information. On this basis the Commissioner has decided that the section 43(2) exemption is engaged and has therefore gone on to consider the public interest test in this case.

### **Public interest arguments in favour of disclosing the requested information**

29. The Commissioner considers that there is a public interest in QCDA as a public authority for the purposes of the Act being transparent, open and accountable.

## **Public interest arguments in favour of maintaining the exemption**

30. The Commissioner considers that there is a public interest in companies being able to compete fairly within the market in which they operate and therefore not putting companies at a commercial disadvantage.

## **Balance of the public interest arguments**

31. The Commissioner considers that there is a public interest in QCDA being open, accountable and transparent, however in this case the Commissioner is aware that QCDA has disclosed the figure it charges Doublestruck to allow it access to a bank of questions in one subject at one key stage to one pupil for one year. It has therefore provided the figure QCDA is charging and therefore receiving in relation to its provision of past examination questions to be used by Doublestruck through its Testbase software. Therefore this disclosure goes some way to reducing the weight of these public interest arguments.
32. The Commissioner also considers that the request does not relate to the spending of public money, it relates to the revenue received by a private company through the sale of software it has developed. The private company has purchased examination questions from QCDA to use within the software package it has created and is therefore putting money into the public purse by purchasing these questions.
33. The Commissioner notes that Doublestruck is a private company and publishes information which all private companies are required to publish on Companies House. He considers that it is not in the public interest for the requested information to be published as this is over and above what other private companies, and Doublestruck's competitors, would be required to publish. He considers that there is a strong public interest that wholly private companies are not put at a competitive disadvantage within the market place in which they operate.
34. Taking all of the public interest arguments into account the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.
35. The full text of section 43 can be found in the Legal Annex at the end of this Notice.



## **The Decision**

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36. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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37. The Commissioner requires no steps to be taken.

## Right of Appeal

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38. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 27<sup>th</sup> day of April 2011**

**Signed .....**

**Pamela Clements  
Group Manager, Complaints Resolution  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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### General Right of Access

#### **Section 1(1) provides 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."

#### **Section 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **Commercial Interests**

### **Section 43 provides that -**

“(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”