

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 May 2013

Public Authority: Council for the Curriculum Examinations & Assessment

Address: 29 Clarendon Dock
Clarendon Road
Belfast
BT1 3BG

Decision (including any steps ordered)

The complainant has requested information in relation to the marking examination papers issued by CCEA. The Commissioner's decision is that CCEA has breached sections 1(1)(a) and 10(1) of FOIA by not responding to the complainant within the statutory time for compliance as set out in FOIA. The Commissioner is also satisfied, on the balance of probabilities, that CCEA holds no further information within the scope of the complainant's request that it has not already disclosed to the complainant. The Commissioner therefore orders no steps to be taken.

Request and response

1. On 15 and 20 August 2012, the complainant wrote to CCEA and requested information in the following terms:
 - A copy of the written record of any changes to the MOU for [name [name redacted] and [name redacted].
 - A copy of any correspondence or records of telephone conversations between [name redacted] and CCEA or [name redacted] and CCEA relating to a change in the MOU or what might be termed as a clarification of the MOU.
 - Is the principal examiner referred to in pages 7 and 11 of [name redacted]'s report the same person?
 - Page 11 of the [name redacted] report says that the principal examiner did not highlight any specific concerns. How was this

reported 'fact' ascertained by [name redacted] given that he did not interview the principal examiner?

- Why was the principal examiner not interviewed?
2. CCEA responded on 24 August 2012. It stated that the complainant's requests concerned the 2 named individuals, who were not in themselves subject to FOIA, therefore CCEA was refusing to provide the complainant with the requested information on the grounds that the request was not valid.
 3. The complainant requested an internal review of CCEA's decision on 22 August 2012. Having not received any internal review response, the complainant complained to the Commissioner on 15 October 2012.
 4. The complainant again contacted the Commissioner to state that he had received an internal review response on 26 October 2012, however he was not satisfied with this as it was late and did not provide him with all the information which he believed CCEA to hold in relation to his requests.
 5. On 31 October 2012 CCEA offered to meet with the complainant in order to discuss all issues and hopefully informally resolve his complaint. The Commissioner understands that this meeting took place, however it was not successful in resolving all of the issues, so the complainant has asked the Commissioner to proceed with his investigation of the complaint.

Scope of the case

6. The complainant contacted the Commissioner on 15 October 2012 to complain about the way his request for information had been handled.
7. The Commissioner has considered CCEA's handling of the request. The Commissioner notes that, not having previously treated the complainant's requests as requests under FOIA, CCEA appears to have later done so, and provided a refusal notice to the complainant on 26 October 2012. It provided some information in response to the complainant's request and stated that it did not hold the remaining requested information. The Commissioner accepts that this is a refusal notice rather than an internal review and has treated it accordingly. However, given the delays which have been incurred to date, the Commissioner has used his discretion to proceed to making a decision in the absence of an internal review.

Reasons for decision

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

Section 1

8. Section 1(1) of FOIA states that any person making a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
9. The Commissioner has considered whether CCEA has complied with section 1 of FOIA.
10. On 8 February 2013, the Commissioner asked CCEA the following questions to determine what information it held that was relevant to the scope of the request:
 - Was any further recorded information ever held, relevant to the requested information, by CCEA or anyone on behalf of CCEA?
 - If so, what was this information? What was the date of its creation and deletion? Can CCEA provide a record of its deletion/destruction and a copy of CCEA's records management
 - policy in relation to such deletion/destruction? If there is no relevant policy, can CCEA describe the way in which it has handled comparable records of a similar age?
 - Is there a reason why such information (if held or ever held) may be concealed?
 - What steps were taken to determine what recorded information is held relevant to the scope of the request? Please provide a detailed account of the searches that you have conducted to determine this.
 - If the information were held would it be held as manual or electronic records?
 - Is there a business purpose for which the requested information should be held? If so what is this purpose?
 - Are there any statutory requirements upon CCEA to retain the requested information?
 - Is there information held that is similar to that requested and has CCEA given appropriate advice and assistance to the applicant?
11. The Commissioner is mindful of the Tribunal's decision in Bromley

v the Information Commissioner and the Environment Agency¹ in which it was stated that *"there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records"*. It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is the test the Commissioner will apply in this case.

12. In discussing the application of the balance of probabilities test, the Tribunal clarified that test required consideration of a number of factors:
 - the quality of the public authority's initial analysis of the request;
 - the scope of the search that it decided to make on the basis of that analysis and the thoroughness of the search which was then conducted; and the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light.
13. The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.
14. The Commissioner is also mindful of *Ames v the Information Commissioner and the Cabinet Office*². In this case Mr Ames had requested information relating to the "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the dossier was *"...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what..."* However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not *"...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one..."* Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.
15. CCEA responded to the questions detailed at paragraph 11 above. It explained that the complainant had had received all recorded

¹ EA/2006/0072

² EA/2007/0110

information held by CCEA within the scope of those requests. No relevant recorded information was withheld by CCEA.

16. CCEA explained to the Commissioner that CCEA holds no record of changes to the MOUs for [name redacted] or [name redacted]. Consequently there is no correspondence or records of telephone conversations held. CCEA was able to answer one of the questions concerning the [name redacted] report but not the remaining two questions. The complainant was advised that the DENI, as the sponsor of both reports would have to be asked for clarification not CCEA. He was advised that CCEA did not correspond with [name redacted] in relation to the compilation of his report.
17. CCEA informed the Commissioner that only two units had input into this request. These were the Financial Services team and the CCEA Regulator. They have confirmed that they do not hold any further information which would be relevant to or within the scope of this request.
18. CCEA informed the Commissioner that information of the type requested by the complainant could be a mixture of paper and electronic records. For example, contracts and changes to contracts would be signed and dated and therefore held in a paper file. Emails would most likely be stored in Outlook folders but could also be printed and held in the corresponding paper file.
19. Under the Limitations Order (NI) 1989 CCEA is required to retain contracts and changes to awarded contracts for 6 years from the end of the contract. Any destruction and/or disposal of documents would be carried out after this period and in accordance with CCEA's Disposal Schedule.
20. In reaching a conclusion in this case, the Commissioner has taken into account the responses provided by CCEA to the questions posed by him during the course of his investigation. The Commissioner is also mindful of the Tribunal decisions highlighted at paragraphs 11 and 14 above. The Commissioner considers that on the balance of probabilities CCEA holds no further information within the scope of the complainant's request other than that which it has already provided to the complainant.

Procedural requirements

Section 10(1): Time for compliance

21. Section 1(1)(a) of FOIA requires a public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
22. Section 10(1) requires that the public authority comply with section 1 promptly and in any event no later than 20 working days after the date of receipt of the request.
23. The Commissioner notes that the complainant's requests for information were made on 15 and 20 August 2012, however he did not receive any information, or a valid refusal notice until 26 October 2012. From the information provided to the Commissioner in this case it is evident that CCEA did not respond to the complainant under FOIA within the statutory time frame and therefore it breached section 10(1) of FOIA. In relation to the complainant's requests, CCEA failed to confirm or deny within the statutory time for compliance that it held information in relation to this. Therefore, it has also breached section 1(1)(a) of FOIA.

Right of appeal

24. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

25. 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.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
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