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For the attention of Bjørn Erik Thon, Data Protection Commissioner;
Tobias Judin, Head of International

Our ref

Your ref
20/03087-14
Date
21 August 2020

By email to tobias@datatilsynet.no

Dear Sirs

Response to the Norwegian Data Protection Authority's ("NO DPA") Advance Notification dated 7 August 2020 ("Advance Notification")

Together with Advokatfirmaet Selmer AS, Norwegian counsel, we have been instructed by the International Baccalaureate Organization and International Baccalaureate Organization (UK) Limited (together the "IBO"), in relation to this matter.

We refer to the NO DPA's Order to Provide Information dated 20 July 2020 ("**Order**"), IBO's letter of response to the Order dated 31 July 2020 ("**IBO Response**") and the Advance Notification referred to above.

Summary

We note the NO DPA's assertion that it has the competence to pursue this matter in line with the Personal Data Act Section 20 and Article 55(1) of the GDPR. However, for the reasons set out in this letter, the IBO considers that Article 56(1) of the GDPR is applicable and that the Information Commissioner's Office in the UK ("**ICO**") is the relevant competent supervisory authority. We therefore consider it appropriate that this matter, if not resolved by this letter, should be transferred to the ICO.

To be co-operative, we have also addressed in this letter the comments and issues set out in the Advance Notification to shed additional light on the substantive matter in this case. In the event that the NO DPA is determined to have the appropriate competence to resolve this matter, we reserve the right to supplement this letter with additional information and considerations before the NO DPA makes any final resolution.

In any event, we do not agree that this is a matter that can or should be dealt with under the data protection regulatory framework. The question of fairness of an examination or assessment model does not equate to fairness of processing of personal data in the context of the GDPR. Likewise, the accuracy of a system in grading academic ability is not equivalent to the accuracy principle set out in the GDPR. The IBO has processed students' personal data fairly, lawfully, and in compliance

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with its obligations under the GDPR. Any concern relating to a student's awarded grade is only appropriate to be dealt with under the appeals mechanism put in place by the IBO for such issues.

Lead Supervisory Authority

We note from the Order that the NO DPA considers that it *"would be competent to pursue this matter in line with Article 55(1) [of the GDPR], since Article 56(1) [of the GDPR] would not be applicable"* based on the NO DPA's presumption that the IBO's 'main establishment' is located outside of the EEA, regardless of whether cross-border processing is taking place pursuant to Article 4(23) of the GDPR.

We do not agree with the NO DPA's assumption of competence based on the disapplication of Article 56 of the GDPR and provide responses below to address each of the main points:

Cross-border processing

- The identification of a lead supervisory authority is relevant where a controller is carrying out the cross-border processing of personal data. We consider that the processing of students' personal data in the context of assessments constitutes 'cross-border processing' pursuant to Article 4(23) of the GDPR because it constitutes the processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union (i.e. in the UK) but which substantially affects or is likely to substantially affect data subjects in more than one Member State (i.e. students across Europe, including in Norway).

Main establishment

- Article 4(16) of the GDPR states that 'main establishment' means: *"as regards a controller with establishments in more than one Member State, the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union and the latter establishment has the power to have such decisions implemented, in which case the establishment having taken such decisions is to be considered to be the main establishment"*.
- The IBO has offices in Switzerland, the Netherlands, Singapore, the United Kingdom and the United States.
- Although the IBO is headquartered in Switzerland, the International Baccalaureate Organization (UK) Limited ("**IBO UK**") is the central administration entity for the IBO's Assessment Division with 261 personnel located in the UK. The IBO UK is also the assessment centre for the International Baccalaureate certification, meaning that it is the entity responsible for making decisions on the purposes and means of the processing of personal data of students for assessment purposes and has the power to implement such decisions. As set out on the IBO's website, *"Assessment is managed by the IB Global Centre"* in the UK. The IBO's primary assessment information system is also hosted in the UK, operated in the UK, and supported by an internal team based in the UK. In addition, all production, printing and distribution of exam papers and candidate results is also managed in the UK.
- IBO UK is registered as a data protection fee payer with the ICO with registration number Z2324875. IBO UK has also appointed a Data Protection Officer in the UK.
- We therefore consider that IBO UK is the 'main establishment' for the purposes of Article 4(16) of the GDPR.

Lead Supervisory Authority:



- Pursuant to Article 56 of the GDPR, “*the supervisory authority of the main establishment [...] of the controller [...] shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller [...]*”.
- Taking into account the role of IBO UK as the IBO’s main establishment in the Union for the purposes of the cross-border processing of students’ assessment data, we consider that Article 56(1) of the GDPR is applicable and that the ICO in the UK is competent to act as the lead supervisory authority in this matter. IBO UK has been in discussions with the ICO on this point and these discussions are ongoing. In the course of these discussions, we understand that the NO DPA has asserted to the ICO that it has been corresponding with the IBO in Switzerland regarding this matter. We would like to draw to the NO DPA’s attention that all correspondence has actually been undertaken by the data protection team in the UK. We would refer the NO DPA’s attention to correspondence from Jon Tomkinson and Richard Jenkins in particular, who are both employees of IBO UK and based in the UK. As stated above, all decisions relating to processing of personal data in the context of examinations and assessments are undertaken in the UK.

Although our client provided the IBO Response in order to be co-operative (notwithstanding the assessment above), it now considers it appropriate that this matter should be transferred to the ICO in its capacity as the lead supervisory authority.

Competency of the Data Protection Regulatory Framework

Notwithstanding the IBO’s views above in relation to the ICO’s capacity as the lead supervisory authority in data protection matters, we also do not consider that the data protection regulatory framework is the competent or appropriate framework for this matter. As explained further in this letter, we do not consider the academic ability of students to be a matter of fact capable of being accurate or inaccurate from a GDPR perspective. Similarly, the question of fairness of an examination or assessment model does not equate to fairness of processing of personal data in the context of the GDPR.

If there are any concerns that final grades do not reflect a student’s academic ability, there are formal and thorough processes in place for appeal. This is a matter of examination and assessment rigour and it is not appropriate for this process to be bypassed and for any amendment of assessment results to be dealt with using the data protection regulatory framework. The IBO is in any event currently taking additional steps for the 2020 session to address any concerns¹ and these measures were presented to Ofqual (the competent regulatory authority in England for qualifications, examinations and assessments) prior to announcing them to schools. Ofqual was satisfied that the additional measures the IBO took continued to be within the boundaries of its Regulations.

In any event, the International Baccalaureate certification is considered an international education in Norway, as stated in the Regulation for admission to higher education § 2-2 (3)-(4). This means that the Norwegian statutory provisions regulating the awarding process of final grades in the Norwegian public school system, including the Norwegian Education Regulation Section 3-14, do not apply to the IBO. We therefore do not consider that complaints in relation to International Baccalaureate certification grades are matters which can be resolved under Norwegian law or by the Norwegian Authorities. This was acknowledged by the Norwegian ministry of education who stated on 14 July 2020: “We understand that IB students want colleges and universities to take into account that their grades this year have not been decided as normal due to the virus. But neither

¹ <https://ibo.org/news/news-about-the-ib/update-m20-dp-cp-results/> [accessed 20 August 2020]



the Ministry of Education, The Coordinated Admissions, nor universities and colleges can change an official diploma from IB or other school systems. This is a matter that the IBO must deal with².

Advance Notification

Notwithstanding the assessment above and in keeping with our client's desire to be co-operative, the responses below are provided to address the NO DPA's comments set out in the Advance Notification.

Awarding Model

In response to the NO DPA's request for the IBO to describe its May 2020 awarding model, the NO DPA was informed that that the model relied on the following components:

1. coursework grades;
2. predicted grades; and
3. "School Context".

We note the NO DPA's comments that the IBO "*withheld information regarding which weight "school context" and "historical data" are given in the model*" but, in any event, it does not consider the "*magnitude of the respective coefficients to be decisive, as those data should not have been used at all*".

If more specific detail about the IBO's 2020 awarding model is required in order to resolve any data protection concern, the IBO is willing to make further disclosures to the relevant competent authority. However, we consider it appropriate for the above-described issue of competency of the lead supervisory authority to be resolved prior to any disclosure of detailed information, which the IBO considers to be commercially sensitive and protected by intellectual property rights.

Notwithstanding this, we refer the NO DPA back to the IBO Response where a description of the IBO's May 2020 awarding model was provided, setting out each of the components of the model and explaining the process used to arrive at the model. In relation to the weighting of the various components, the model is complex and, as pointed out in the IBO Response, each International Baccalaureate subject has its own design of coursework and final examinations meaning that the relevant weighting and inputs vary between subjects (as they do every year). By way of example, some subjects do not involve any coursework so there cannot be a weighting for this component in those subjects.

We therefore do not agree that the IBO has withheld information. In contrast, the IBO has provided full and complete information to the relevant regulators and organisations which are competent in the areas of education and assessments, and has taken all reasonable steps possible to ensure that its May 2020 awarding model (including all of its components) was subject to rigorous testing, verification and scrutiny by relevant experts. The IBO is a recognised awarding organisation under Ofqual, the regulator for qualifications, examinations and assessments in England. In order to satisfy Ofqual that the International Baccalaureate was in compliance with regulations that Ofqual applied to deal with COVID-19 and to ensure that its methods were in line with industry standards, the IBO submitted full details of its awarding model to Ofqual for regulatory scrutiny at two stages in its assessment process. Ofqual, competent in examinations and assessments, raised no objections to the awarding model for the 2020 session.

Fairness

² Office translation, emphasis added.



- *Reasonable expectations of the data subject*

Although the IBO agrees that students expect their grades to be awarded based on their academic achievements (which ordinarily includes examination grades), the IBO believes that, in light of the cancellation of examinations due to the current COVID-19 pandemic, the reasonable expectations of the 2020 cohort of students would include:

- changes to the method of calculation of their final grades (the only alternative being for no grades to be awarded for the 2020 session);
- additional components to be taken into account in calculating their final grades. In the 2020 session, the IBO has been clear that it is calculating the grade the student would have received if the examinations were not cancelled, not simply awarding a grade for the coursework as the only assessment (see below for further details of why the evidence demonstrates that this was the fairest model to adopt);
- coursework grades and predicted grades to be taken into account in the calculation of their final grades but, in line with the usual grading process, for these not to be the only relevant components. The IBO often sees that students can perform better in either their coursework or examinations and this has been taken into consideration. For example, at the cohort level, the IBO is aware that, in a typical session, a student who is predicted a grade 5 and who achieves a grade 5 on his/her coursework may receive a lower final grade overall due to his/her performance on the examinations. This is reflected in the calculation which the IBO used for the 2020 session, which has been created by modelling previous session data. Similarly, the IBO is aware that school predicted grades are close to, but sometimes different from, the final grade. In a normal session, the IBO is aware that in 55% of cases students achieved at least a grade different to what was predicted by their teacher; and
- standardisation of grades to be undertaken in line with usual grading processes which include, for example, adopting marking standards, setting grade boundaries and using moderation procedures etc.

Additionally, the IBO believes that it took reasonable steps to ensure fairness between the current 2020 cohort of students and those of previous years. The IBO's obligation to students in this exceptional session is that their grades can be fairly considered alongside previous and future grades issued by the IBO, so that these students have a qualification which is equivalent to all other International Baccalaureate alumni.

In light of the above, the IBO continues to believe that its awarding model for 2020 corresponds with reasonable expectations, albeit in extraordinary circumstances.

We note the NO DPA's assertion that students would expect a grade to be awarded based on their demonstrable academic achievements and that the grade would reflect the work they have put in as well as the knowledge and skills they have attained. However, taking this to its logical conclusion could only result in no grades being awarded for this session given that examinations were cancelled and there was, therefore, no way for students to demonstrate their academic achievements throughout the entire session. We do not consider this to be a satisfactory alternative.

- *Potential for discrimination*

The IBO has this year, as with any other year, carefully considered its assessment process to limit any potential for discrimination.



The IBO's data was used in a recent analysis³ conducted by Ofqual which evaluated the appropriateness and fairness of certain grades issued this year. This exercise was also conducted to check that certain groups of students had not been unfairly advantaged or disadvantaged over others.

One of Ofqual's main findings was that, overall, "*grade distributions this year appear generally similar to grade distributions observed for previous years*" and "*neither the shape nor the skew*" appears to have changed substantially from previous years, suggesting that, overall, "*the awarding process in 2020 has not been majorly affected by the pandemic*". Another key finding was that, in most cases, attainment gaps have not increased over time between different demographic groups.

As such, the potential for discrimination in the 2020 awarding model has not only been considered by the IBO itself but also the competent regulatory authority for qualifications, examinations and assessments.

This is similar to previous analysis undertaken with respect to potential bias and discrimination in relation to predicted grades. Ofqual has, as part of its consideration of appropriate assessment processes for the 2020 awards, reviewed studies into potential bias and discrimination in teacher predictions and assessments⁴ when compared with exam assessment results. That research found that some bias can be seen in teacher assessments with respect to factors including a student's gender, ethnicity, age and special educational needs. However, such bias is not always present, and when it is, it is both inconsistent across different subjects and small.

- *Undue adverse effects*

We note that the NO DPA was contacted regarding a student who was predicted the same grade as his/her coursework grade in a particular subject but received a lower final grade. We do not agree that this outcome equates to unfair processing of personal data under the GDPR. It cannot follow that every student who does not receive their 'expected' grade in any assessment year, has the right under the GDPR to have that grade amended to reflect his or her expected result.

The ICO's guidance on 'fairness' confirms that personal data may sometimes be used in a way that negatively affects an individual without this necessarily being unfair and, rather, what matters is whether or not such detriment is justified⁵. In this case, as already set out above, predicted grades and coursework grades do not always correlate with a student's final grade and, as a result, this year's results would be skewed if final grades were determined by coursework grades and predicted grades alone due to the significant increase in the level of predicted grades awarded by teachers this year.

Additionally, for the students that perform better under examination conditions and achieve higher grades in these assessments, it is the IBO's view that calculating final grades based on coursework and predicted grades, without any standardisation to reflect the influence of examinations, could potentially also adversely affect those students.

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/909045/An_analysis_of_grades_awarded_for_Level_3_and_Level_4_VTQs_130820.pdf [accessed 20 August 2020]

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879605/Equality_impact_assessment_literature_review_15_April_2020.pdf [accessed 20 August 2020]

⁵ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/lawfulness-fairness-and-transparency/> [accessed 20 August 2020]



Transparency

We do not agree with the NO DPA's assertion that the IBO has not been transparent regarding the awarding model for the 2020 session.

There is a considerable amount of information on the IBO's website⁶ regarding the awarding model for 2020. This information was made publically available to explain the process being undertaken by the IBO in response to the extraordinary circumstances of the 2020 session. The information explains, in a transparent and easily accessible way, the three components which fed into the calculation of this session's grades. The IBO considers that this satisfies the requirements for transparency set out in Recital 39 of the GDPR, being that "*any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used*". The IBO further disagrees with the NO DPA's assertions that lengthy and complex information regarding the awarding model was required as this would not be easily understood by the students themselves and would have likely led to additional confusion.

In addition, the IBO provided detailed information to schools regarding the 2020 awarding process in order that the schools could also assist their students in understanding the process.

Accuracy

We note the NO DPA's statement that "*grades only comply with the accuracy principle of the GDPR if they do in fact accurately reflect the actual academic level of the student in question*".

Whilst, in principal, the IBO agrees that grades should of course reflect the academic level of the student in question, it disagrees that this is linked to the 'accuracy' of any particular grade from a GDPR perspective. The GDPR does not define the word 'accurate'. However, the UK Data Protection Act 2018 does say that 'inaccurate' means "*incorrect or misleading as to any matter of fact*".⁷ This is an interpretation of the term "accurate" that is also applicable under the Norwegian Data Processing Act. The academic level of any particular student cannot be said to be a statement of fact comparable to, for example, the student's age, address or contact details. It is, by its very nature, subjective. Whilst examinations are traditionally used as a method of trying to assess the appropriate academic level of a student, it cannot follow that an examination grade will only ever be 'accurate' from a GDPR perspective if it reflects the 'actual academic level of the student in question' as this is not an objective matter of fact to which the accuracy principle can apply.

Likewise, the IBO does not believe that it would be accurate for the assessment of its courses to be based solely on coursework, predicted grades or even other work carried out by students throughout the year, without any standardisation to reflect the influence of examinations. As set out above, predicted grades and coursework grades cannot also be said to 'accurately' reflect the actual academic level of the student in question as it is well known and documented that some students perform well in their coursework and other students perform well in examinations.

For the same reasons, the IBO does not agree with the NO DPA's analogy using Sections 3-14 of the Norwegian Education Regulation to suggest that it is a relevant basis for assessing whether grades comply with the 'accuracy' principle of the GDPR.

⁶ See for example: <https://www.ibo.org/news/news-about-ib-schools/the-assessment-and-awarding-model-for-the-diploma-programme-may-2020-session/> [accessed 20 August 2020] and <https://www.ibo.org/globalassets/news-assets/coronavirus/may-2020-awarding-further-information-en.pdf> [accessed 20 August 2020]

⁷ Emphasis added.



In any event, we note that the use of standardisation is a well-established method adopted by a number of assessment bodies across Norway, as well as the rest of the world, to calculate and benchmark results. For example, Mensa uses 'normed' tests to compare an individual's score against the scores of other test takers. Since the use of such standardisation naturally takes into account factors other than an individual's own documented achievements, the NO DPA's conclusion in relation to 'accuracy' (i.e. standardisation leads to results which are not 'accurate') would have far-reaching implications on the education and assessment sector as a whole and goes beyond the NO DPA's competency as a data protection supervisory authority.

Conclusion

For the reasons set out above, the IBO considers that it has processed the personal data of students in a fair and transparent manner in accordance with the principles of the GDPR and despite extraordinary circumstances. The IBO further disputes the assertion that any grades awarded in accordance with the 2020 awarding model are inherently inaccurate as the academic ability of an individual student cannot be considered a matter of fact capable of being accurate or inaccurate from a GDPR perspective.

Notwithstanding the IBO's position as stated above with respect to the substantive points raised by the NO DPA in its Advance Notification, the IBO further does not consider the NO DPA to have jurisdiction with respect to this matter and considers that it should, if not resolved by this letter, be transferred to the ICO in its capacity as the IBO's lead supervisory authority.

Yours faithfully

Herbert Smith Freehills LLP

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