

# **Consultation on amending statutory guidance for Condition G4**

Guidance on maintaining confidentiality of assessment materials, including the conduct of specified training events



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# **1. Introduction**

## **Scope of this consultation**

This consultation is on statutory guidance for Condition G4 (Maintaining confidentiality of assessment materials, including the conduct of specified training events).

We are consulting on new guidance because feedback suggests the current guidance could be clearer and more helpful. We asked stakeholders for views on the existing guidance and they told us that parts of it were unnecessarily burdensome, such as that relating to recording of training events. They also told us that parts of it only appeared relevant to awarding organisations offering general qualifications so were not relevant or difficult to follow for awarding organisations offering vocational qualifications. The feedback also suggested that some awarding organisations were interpreting the guidance inconsistently.

We would welcome your feedback on our proposed guidance.

We do not propose any changes to Condition G4 itself.

## **Summary of proposals**

We seek views on draft guidance for the following Condition:

- G4 – Maintaining confidentiality of assessment materials, including the conduct of specified training events.

We propose that this updated guidance will replace, in its entirety, the existing guidance for Condition G4, and will come into place this spring.

## 2. Background

### Ofqual's statutory guidance

We publish guidance<sup>1</sup> to help awarding organisations understand how to comply with our rules, known as *General Conditions of Recognition*<sup>2</sup>. The Apprenticeships, Skills, Children and Learning Act 2009 requires that recognised awarding organisations have regard to the guidance we publish. This means that they must review the guidance and take seriously what it says. Guidance is not a further set of rules; an awarding organisation does not have to follow it if it has good reason not to as it may find different ways to meet a Condition.

Most of our guidance takes the form of positive and negative indicators. These indicate whether an awarding organisation is complying with a Condition. This type of guidance explains what 'good' and 'bad' looks like. For example, if an awarding organisation does 'X', we are likely to find that it is compliant with the relevant Condition; if it does 'Y', we are likely to find it is non-compliant.

We also publish guidance relating to particular issues that may apply to more than one Condition<sup>3</sup>. This type of guidance sets out what the Conditions require and the factors an awarding organisation should consider when dealing with that issue.

The form of guidance we publish for a particular Condition or issue will vary depending on what is most likely to help awarding organisations understand our Conditions. In some instances, such as proposed here, we may use a combined approach.

### Overview of Conditions and guidance relating to confidentiality of assessment materials

In 2013, we strengthened our Conditions to reduce the risk of confidential information being shared, especially with teachers, where that could threaten the validity of qualifications. We also required awarding organisations to make training materials available to all teachers, even if they had not attended training events. The Conditions did not ban training events (which we had considered), but set out clearly who could be present at them. We published guidance on these Conditions and answers to some questions that we received about them. We committed to keeping the Conditions and the guidance under review.

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<sup>1</sup> <https://www.gov.uk/government/publications/guidance-to-the-general-conditions-of-recognition>

<sup>2</sup> <https://www.gov.uk/government/publications/general-conditions-of-recognition>

<sup>3</sup> See for example: Guidance on making changes to incorrect results and Guidance on considering Marking Errors on a review or appeal

In 2016, we wrote to all awarding organisations asking for feedback about the impact of these Conditions and sought feedback from teachers. We considered information from a mystery shopping exercise we conducted on training events for teachers and intelligence from event notifications (the process awarding organisations use to tell us if certain things, such as breaches of assessment confidentiality, occur).

The feedback we received highlighted some positive and negative impacts of the current Conditions. For example, Condition D8 (Making available information to help meet Teachers' needs) and Condition C2.5 (Arrangements with Centres) about providing information and guidance to Centres, are seen to have had a positive impact on the provision of information.

Most of the feedback related to the impact of Condition G4 (Maintaining confidentiality of assessment materials, including the conduct of specified training events). Some respondents suggested the restriction on who can deliver training should be relaxed to improve the quality of training.

Some respondents told us it can be difficult to comply with Condition G4, particularly for smaller awarding organisations, or in subjects with low take-up, as an awarding organisation will have fewer subject specialists available to deliver training. Some respondents, however, supported the Condition, suggesting it prevents trainers from being put in difficult situations when they might deliberately or inadvertently reveal confidential information about assessments.

There were mixed views on the guidance and its usefulness. For example, the guidance on recording training events was felt by some to improve quality, while others saw it as burdensome. Responses indicated some awarding organisations are confused about what is, and what is not, prohibited.

We concluded that the risk of confidential assessment material being shared remains too great to remove or change the Condition. We believe our Conditions are proportionate to these risks. We decided to help awarding organisations better understand what is required and how to comply by improving our guidance.

### **3. Proposals**

#### **Amended guidance for Condition G4 – Maintaining confidentiality of assessment materials including the conduct of specified training events**

We propose to amend our existing guidance for Condition G4 and revise the format, making it easier to understand and follow. We are not making any changes to the Condition itself.

We propose that, in addition to positive and negative indicators, we explain the context for the indicators and suggest what an awarding organisation should consider when assuring itself it is complying with the Condition. We discussed this approach with some awarding organisations. Most found the narrative guidance helpful. We welcome views on the content and style of the guidance.

We plan to remove some detail from the existing guidance that we think is unnecessary, such as instances where the positive and negative indicators mirror one another.

We have also refined the wording to make it clear the guidance does not impose rules beyond what the Condition requires and sought to consolidate guidance from other sources and ensure it accurately reflects current practices.

#### **Implementation**

We have used feedback from approximately 50 awarding organisations and exam boards in drafting this new guidance.

We will consider any comments we receive through this consultation and revise the drafts as appropriate. We propose to implement our amended guidance this spring. As we are not changing our Conditions, only the guidance to support them, we believe this will allow sufficient time for awarding organisations to consider the amended guidance.

## 4. Proposed guidance

We set out below our proposed amended guidance. We propose that the new guidance below will replace the guidance currently in place for Condition G4. We have included line numbers alongside the guidance to help respondents refer to specific parts of the guidance in their responses. The line numbers will not appear in the final version of the guidance.

### **Guidance on Condition G4 – Maintaining the confidentiality of assessment materials, including the conduct of specified training events**

We require an awarding organisation to provide Teachers with the information they might reasonably expect from an awarding organisation to help them prepare Learners for assessments<sup>4</sup>. An awarding organisation must ensure it does not disclose confidential information about its assessments when doing so.

- 5 One way many awarding organisations choose to meet this requirement is by running training events for Teachers. A training event is typically a meeting at which Teachers are given information about a particular regulated qualification, to help them to deliver it. The meeting could be held remotely or face-to-face and could be for an individual or a number of people.
- 10 Our Conditions include specific requirements that relate to ‘prohibited training’. While prohibited training includes events, it could also include other interactions between those with knowledge of the contents of assessments and Teachers (for example during visits to schools or colleges by awarding organisation staff or examiners who have access to confidential information about assessments).
- 15 We want awarding organisations to make sure confidential information is not shared that would give some Learners an advantage over others, or that prevents their attainment being accurately measured. Where an awarding organisation has reasonable grounds to believe that there has been a breach of confidentiality, it must investigate the breach to establish whether a breach has occurred. Where
- 20 confidential information is shared, we want awarding organisations to respond effectively to mitigate any risks to the fairness and validity of the assessment.

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<sup>4</sup> This is required by Condition D8: ‘In respect of each qualification which it makes available, an awarding organisation must ensure that there is available to each Teacher any information which, for the purposes of preparing Learners and persons likely to become Learners for assessments for that qualification, the Teacher may reasonably require to be provided by the awarding organisation.’

## When does information about an assessment need to be kept confidential?

25 Confidential information about an assessment is information which, if disclosed, could compromise the ability of the assessment to provide an accurate measure of a Learner's attainment.

Information about when or how particular knowledge, skills or understanding will be assessed, will be confidential if the assessment was designed in a way that assumes the Learner will not know that information before taking the assessment.

30 Whether information is confidential will depend on the qualification and materials in question. When deciding whether particular information about assessments or assessment materials is confidential, an awarding organisation should consider (alongside any other factors it considers relevant):

- 35 • the knowledge, skills or understanding being assessed and the method of assessment;
- whether advance knowledge of the information or assessment materials could provide an unfair advantage to a Learner who has this information over a Learner who does not;
- 40 • whether knowledge of the information could enable a Teacher or Learner to anticipate the requirements of an assessment, to the extent that they would not need to fully complete the course of study.

An awarding organisation's assessment of the factors above, and the extent to which information is confidential, will vary depending on the type of assessment. For example:

- 45 • for an unseen written assessment, information relating to specific questions, the way in which knowledge will be assessed or the topics to be assessed in a particular year, might be confidential. However, some assessments are designed so the Learner is given advance materials that indicate for one question the topic to be covered. In this case the advance materials could cease to be confidential
- 50 at the time they are released to Learners;
- for an assessment of a skill, the fact that a Learner will need to demonstrate that skill for an assessment might not be confidential. But the particular context in which that skill will need to be demonstrated in the assessment might be;
- 55 • for an assessment testing Learners' recall of particular knowledge, knowledge of the precise items a Learner will need to recall or the order in which they must recall it might be confidential;
- for an assessment where a Learner produces a project, portfolio, artefact or object, there might be no information which is confidential.

60 These examples are not exhaustive. An awarding organisation will need to determine, for each assessment, which information about the assessment must be confidential to measure accurately a Learner's attainment.



Where an awarding organisation provides more general information, for example on techniques for responding to questions, it must ensure that this does not include prohibited training.

65 **How should an awarding organisation ensure that the confidentiality of its assessments and information about those assessments is maintained?**

70 An awarding organisation should consider how it can stop confidential information about assessments being disclosed. To reduce the risk of disclosure, an awarding organisation should consider:

- restricting who has access to confidential material to the people who need it;
  - keeping accurate records of who has had access to confidential information;
  - putting in place appropriate contractual obligations, with employees and/or third parties, to protect the confidentiality of the information for the time the information remains confidential.
- 75

**What steps should an awarding organisation take to ensure that confidential information about assessments is not disclosed when providing information to Teachers?**

An awarding organisation should consider:

- 80 • how it makes sure confidential information is not disclosed at training events about general assessment approaches;
- how it manages the risk of disclosure of confidential information by those involved in the development, delivery or award of qualifications who:
  - 85 ○ are also Teachers of that particular qualification;
  - train, either directly or indirectly, other Teachers of that qualification;
  - train others who will deliver training for that qualification;
- how it avoids disclosure of confidential information through its specification, website or other published materials;
- how it responds to queries from Teachers or Learners about its qualifications.

90 An awarding organisation should consider contractual arrangements which prevent confidential materials being shared. This could include contracts requiring those who have had access to confidential information to:

- maintain confidentiality both during, and after, their term of employment or engagement;
- 95 • understand what may constitute a conflict of interest and declare any such interests;
- notify the awarding organisation promptly where they are, will be, or have been, involved in the preparation of a revision guide or other resource that relates to a qualification for which they hold confidential information.

100 An awarding organisation should consider guidance and training for people with access to confidential assessment material on how to maintain confidentiality, including when:

- interacting with Teachers,
- preparing resources for Teachers;
- 105 • training Teachers on setting, delivering or marking assessments;
- preparing resources for Learners;
- interacting with Learners.

An awarding organisation should tailor any training to reflect different roles and responsibilities.

110 **How should an awarding organisation make sure that the steps it has taken are sufficient to prevent confidential information about assessments being disclosed?**

An awarding organisation should consider how it monitors the delivery of training events, to assure itself that confidential information about assessments (or information that is implied to be confidential) is not shared. Monitoring could include, but is not limited to:

- 115 • sending an observer to monitor a sample of training events for Teachers;
- reviewing recordings of training events.

120 People with access to confidential information about a qualification can develop training materials or pre-record content to be used during training. The Condition does not prohibit this, as it is not a simultaneous exchange of information, and provided they do not disclose confidential information.

An awarding organisation should consider the confidentiality of assessment materials or information about assessments when those with access to confidential information:

- 125 • interact with Teachers, for example in Centres where they teach;
- deal with queries as an awarding organisation employee/contractor;
- are involved in the development of qualification resources, for example a revision guide;
- 130 • interact with Learners, including those they teach.

The awarding organisation should consider additional controls when anyone who has access to confidential information develops learning resources for that qualification, to ensure the materials do not risk compromising the validity of the assessment.

135 An awarding organisation should consider whether to monitor data about assessments to identify and/or investigate potential breaches of confidentiality.

## **What should an awarding organisation do where it suspects a breach of confidential information about an assessment?**

An awarding organisation must investigate allegations of breaches of confidentiality to:

- 140 • understand the allegations and whether a breach of confidentiality has taken place;
- identify the likely impact of a breach;
- comply with the requirements of Condition B3, where there has been, or is likely to be an Adverse Effect.
- 145 • manage the impact of the breach.

It should also:

- maintain a record of all allegations of breaches of confidentiality;
- follow its investigation process and document what it has done;
- keep its approach to managing actual and alleged breaches of confidentiality
- 150 under review and prevent similar breaches from recurring.

## **How should an awarding organisation ensure that training and information about training that it makes available to Teachers is accessible?**

An awarding organisation must take all reasonable steps to ensure that its training is reasonably available to all Teachers preparing Learners to take the assessments for that qualification, that it advertises the availability of the training and that it publishes the content of training. It might do this by for example:

- publishing on its website all presentations and other materials used at training events for Teachers (this could be in a secure area as appropriate);
- 160 • clearly advertising training, ensuring training events are accessible or providing electronic access to training events or materials;
- making materials reasonably available in suitable formats for Centres, including in accessible formats as needed and where this is possible;
- signposting all relevant information about a qualification from the specification
- 165 pages,
- providing to Teachers, a direct subject or qualification specific contact who has not had access to confidential information;

## **Examples of positive indicators which suggest an awarding organisation is likely to comply with Condition G4 are:**

170 The awarding organisation:

- is clear which assessment materials and information are confidential;

- 175 • is able to identify whether confidentiality of the contents of assessment materials or information about the assessment is necessary, keeps its arrangements for doing this under review and monitors their effectiveness and implementation;
- monitors how effectively it prevents the disclosure of confidential information, including by Teachers to Learners.
- 180 • knows who has had access to confidential assessment materials or confidential information about an assessment, for each of its qualifications;
- requires current staff and contractors (and former staff and contractors as far as is reasonable) who have had access to confidential information to seek its
- 185 agreement before preparing training materials;
- monitors the training and training materials that it delivers to make sure confidential information is not shared at events, for example by:
  - 190 ○ reviewing training materials before they are used;
  - reviewing recordings of training events;
  - sending observers to monitor samples of training events;
- takes steps to identify whether confidential information has been disclosed by current, or former, staff or contractors and, if so, mitigate any Adverse Effect, by
- 195 for example:
  - monitoring training and materials provided or endorsed by people who have had access to confidential information;
  - enforcing confidentiality agreements;
  - 200 ○ having in place a process for receiving reports of instances where the delivery of training has, or may in the future, threaten the confidentiality of the content of assessments or information about assessments;
  - investigating instances where it has reason to believe that the confidentiality of the content of assessments or information about assessments may have been breached;
  - 205 ○ replacing assessments where a breach of confidentiality could impact on the validity of the assessment;
  - where there might have been a breach of confidentiality, and the assessment has not been replaced, monitoring performance to determine whether there was any impact on the assessment's validity;
  - 210 ○ taking action against those that it discovers have breached the confidentiality of the content of assessments to prevent reoccurrence
  - monitoring publicly available information, for example websites and social media, to identify instances where materials may have been made available inappropriately;
  - 215 ○ monitoring data about assessments to identify instances where confidential material may have been shared.

- keeps its arrangements under review.

220 **Examples of negative indicators which suggest an awarding organisation is not likely to comply with Condition G4 are:**

The awarding organisation:

- experiences breaches in the confidentiality of its assessment materials;
- 225 • does not use and apply its own policies for securing confidentiality;
- cannot identify people who have or have had access to confidential assessment materials;
- 230 • allows people who have or have had access to confidential information to attend training events for Teachers;
- does not train people who have access to confidential assessment materials on how to protect their confidentiality;
- endorses, or is seen to endorse, prohibited training;
- 235 • has not properly evaluated, and where required, validated evidence collected during an investigation into a suspected or alleged breach of confidentiality;
- does not investigate or take action where a breach of confidentiality is suspected or confirmed.
- 240

**Question 1: To what extent do you agree or disagree that the proposed amended guidance will help awarding organisations to understand the requirements of Condition G4?**

**Question 2: Do you have any comments on the proposed amended guidance for Condition G4? For specific comments, please refer to the relevant line numbers in your response.**

**Question 3: To what extent do you agree or disagree that the proposed style of guidance will help awarding organisations to understand the requirements of Condition G4? Please provide any additional comments on the style of the guidance.**

## 5. Equality analysis

We are subject to the public sector equality duty. Appendix A sets out how this duty interacts with our statutory objectives and other duties.

We considered the potential impact on students who share protected characteristics<sup>5</sup> of the draft guidance included in this consultation. The guidance applies equally to all awarding organisations offering regulated qualifications. Awarding organisations must have regard to this guidance; they do not have a duty to follow it directly in all cases.

We did not identify any positive or negative impacts of our proposed amended guidance for people because of their protected characteristics.

**Question 4: We have not identified any ways in which the proposed amended guidance would impact (positively or negatively) on persons who share a protected characteristic. Are there any potential impacts we have not identified?**

**Question 5: Are there any additional steps we could take to mitigate any negative impact resulting from these proposals on persons who share a protected characteristic?**

**Question 6: Do you have any other comments on the impacts of the proposals on students who share a protected characteristic?**

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<sup>5</sup> For the purposes of the public sector equality duty, the 'protected characteristics' are disability, racial group, age, religion or belief, pregnancy or maternity, sex, sexual orientation, gender reassignment.

## 6. Regulatory impact

We considered the regulatory impact of introducing this revised guidance. Awarding organisations must have regard to our guidance, so amending and increasing the length of the guidance will increase the overall impact of our requirements in terms of the amount of information that awarding organisations must have regard to. Awarding organisations will need to read and familiarise themselves with this guidance.

Awarding organisations do not have to follow our guidance. Where an awarding organisation has reason to depart from the guidance, it can do so. The obligation on an awarding organisation is to comply with the Conditions, which we do not propose to change. Providing guidance should also help awarding organisations to understand better how to comply with our requirements.

This revised guidance for Condition G4 replaces that which is already in place. While awarding organisations will have to familiarise themselves with the new guidance, they will already have regard to that which exists already. In part, we are removing unnecessary detail. It is for awarding organisations to determine how to comply with the Condition and whether this is an appropriate way to do so.

We consider the impact of the guidance we are putting in place to be proportionate and necessary to ensure that confidential information about assessments is not shared.

**Question 7: We have not identified any ways in which the proposed amended guidance will unduly increase the regulatory impact of our proposals. To what extent do you agree or disagree with this assessment?**

**Question 8: Are there any additional steps we could take to reduce the regulatory impact of our proposals?**

**Question 9: Are there any costs or benefits associated with our proposals which we have not identified?**

## 7. Responding to this consultation

### How to respond

The closing date for responses to this consultation is **7 April 2017**.

Please respond to this consultation in one of three ways:

- complete the online response at [http://www.smartsurvey.co.uk/s/consultation\\_on\\_guidance\\_for\\_condition\\_G4](http://www.smartsurvey.co.uk/s/consultation_on_guidance_for_condition_G4)
- download the [response form](#) from
- and either:
  - email your response to [consultations@ofqual.gov.uk](mailto:consultations@ofqual.gov.uk) – please include the consultation title *Consultation on amending statutory guidance for Condition G4* in the subject line of the email and make clear who you are and in what capacity you are responding; or
  - post your response to: *Consultation on amending statutory guidance for Condition G4*, Ofqual, Spring Place, Herald Avenue, Coventry, CV5 6UB, making clear who you are and in what capacity you are responding.

### Evaluating the responses

To evaluate responses properly, we need to know respondents' names and the capacity in which they are replying. We will therefore only consider your response if you complete the information page.

Any personal data (such as your name, address and any other identifying information) will be processed in accordance with the Data Protection Act 1998 and our standard terms and conditions.

We will publish the evaluation of responses. Please note that we may publish all or part of your response unless you tell us (in your answer to the confidentiality question) that you want us to treat your response as confidential. If you tell us you wish your response to be treated as confidential, we will not include your details in any published list of respondents, although we may quote from your response anonymously.

**Please respond by 23:45 on 7 April 2017.**



## 8. Appendix A – Ofqual’s role, objectives and duties

Our statutory objectives include the qualifications standards objective, which is to secure the qualifications we regulate:

(a) give a reliable indication of knowledge, skills and understanding; and

(b) indicate:

(i) a consistent level of attainment (including over time) between comparable regulated qualifications; and

(ii) a consistent level of attainment (but not over time) between qualifications we regulate and comparable qualifications (including those awarded outside of the UK) that we do not regulate.

We regulate so that qualifications properly differentiate between students who have demonstrated that they have the knowledge, skills and understanding required to attain the qualification and those who have not.

We also have a duty under the Apprenticeship, Skills, Children and Learning Act 2009 to have regard to the reasonable requirements of relevant students, including those with special educational needs and disabilities, of employers and of the higher education sector, and to aspects of government policy when so directed by the Secretary of State.

As a public body, we are subject to the public sector equality duty<sup>6</sup>. This duty requires us to have due regard to the need to:

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Equality Act 2010;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The exam boards design, deliver and award GCSE, A level and AS qualifications and are required by the Equality Act, among other things, to make reasonable

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<sup>6</sup> Equality Act 2010, s.149

adjustments for disabled people taking their qualifications, except where we specified that such adjustments should not be made.

When we decide whether such adjustments should not be made, we must have regard to:

- (a) the need to minimise the extent to which disabled persons are disadvantaged in attaining the qualification because of their disabilities;
- (b) the need to secure that the qualification gives a reliable indication of the knowledge, skills and understanding of a person upon whom it is conferred;
- (c) the need to maintain public confidence in the qualification.

Legislation therefore sets out a framework within which we must operate. We are subject to a number of duties and we must aim to achieve a number of objectives. These different duties and objectives can, from time to time, conflict with each other. For example, if we regulate to secure that a qualification gives a reliable indication of a student's knowledge, skills and understanding, a student who has not been able to demonstrate the required knowledge, skills and/or understanding will not be awarded the qualification. A person may find it more difficult, or impossible, to demonstrate the required knowledge, skills and/or understanding because they have a protected characteristic. This could put them at a disadvantage relative to others who have been awarded the qualification. It is not always possible for us to regulate so that we can both secure that qualifications give a reliable indication of knowledge, skills and understanding and advance equality between people who share a protected characteristic and those who do not. We must review all the available evidence and actively consider all the available options before coming to a final, rational decision.

Qualifications cannot be used to mitigate inequalities or unfairness in the education system or in society more widely that might affect, for example, students' preparedness to take the qualification and the assessments within it. While a wide range of factors can have an impact on a student's ability to achieve a particular mark in an assessment, our influence is limited to the way the qualification is designed and assessed.

We require the exam boards to design qualifications to give a reliable indication of the knowledge, skills and understanding of those on whom they are conferred. We also require the exam boards to avoid, where possible, features of a qualification that could, without justification, make a qualification more difficult for a student to achieve because they have a particular protected characteristic. We require exam boards to monitor whether any features of their qualifications have this effect.

In setting the overall framework within which exam boards will design, assess and award GCSE, A level and AS qualifications, we want to understand the possible impacts of the proposals on persons who share a protected characteristic.

The protected characteristics under the Equality Act 2010 are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnerships
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

It should be noted that with respect to the public sector equality duty under section 149 of the Equality Act, we are not required to have due regard to impacts on those who are married or in a civil partnership.

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