



NCN: [2023] UKFTT 00336 (GRC)

Case Reference: EA/2022/0350

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

**Determined on the papers
On 7 March 2023**

Decision given on: 22nd March 2023

Before

**TRIBUNAL JUDGE CL GOODMAN
TRIBUNAL MEMBER DR A GASSTON
TRIBUNAL MEMBER MS K GRIMLEY EVANS**

Between

NIGEL WILSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision:

The appeal is dismissed.

Decision Notice IC-155261-W7B6 is in accordance with the law.

REASONS

Background

1. The Teaching Regulatory Agency (“TRA”) is an executive agency of the Department for Education (“the DfE”), responsible for regulating the teaching profession in England, including awarding qualified teacher status (“QTS”), maintaining a record

of teachers, and dealing with misconduct hearings. Schools and other employers can search the TRA record of teachers to confirm that an individual has QTS and identify any prohibition, sanction or restrictions.

2. On 20 October 2021, the Appellant made a request under the Freedom of Information Act 2000 (“FOIA”) to the TRA as follows:

“Please provide a copy of the list of all qualified teachers in England. I would prefer this list in electronic format by email if possible.”

[The request for information is referred to in this Decision as the Request.]

3. In later correspondence, according to the DfE, the Appellant explained:
“I am seeking sufficient personal data about qualified teachers within the Qualified Teacher Status (QTS) register for England to protect public safety. I have suggested the personal data which will help to protect public safety, without breaching the privacy requirements in data protection legislation, based on information available in other nations. This personal data includes full name, gender, registration status, date of qualification, qualifications, last known employer, and any conditions or restrictions placed on working as a teacher by the TRA.”
4. The DfE responded to the Request on 16 December 2021, confirming that it held the requested information but refusing to communicate it to the Appellant because it was exempt information by virtue of section 40(2) FOIA (personal data).
5. That response was upheld on internal review on 12 January 2022. The Appellant complained to the Commissioner via their MP.
6. On 14 September 2022, the Commissioner issued Decision Notice IC-155261-W7B6. The Commissioner decided that the DfE was entitled to rely on section 40 FOIA to withhold the requested information. The Commissioner accepted that the Appellant had a legitimate interest, but disclosure was not necessary to meet that interest under Article 6(1)(f) the UK General Data Protection Regulation (“UK GDPR”). The legitimate interest was already met through the checking and employment processes in place at schools, including checks with the TRA and the Disclosure and Barring Service (paragraph 40-41). There was no “pressing social need” in these circumstances to interfere with the teachers’ privacy rights and disclosure would not be “the least restrictive means of satisfying the legitimate interest test” (paragraph 42).
7. The Commissioner decided that the DfE had breached section 10 FOIA by failing to respond to the Request in the statutory time frame of 20 working days. No steps were required.
8. The Appellant appealed to the Tribunal on the following grounds:
 - a. the list of prohibited teachers was available only to current and prospective employers of school staff.
 - b. the public should have access to a list of qualified teachers in England “for the legitimate and overriding interest of ensuring public safety”;

- c. a register of teachers is available to the public in all the other countries of the United Kingdom.
 - d. the previous regulatory body, the General Teaching Council, which closed in 2012, stated on its website that “checking the [QTS] Register is a key public safeguard”; and
 - e. other regulatory bodies, including those for doctors, nurses, other healthcare professionals and social workers, maintain a publicly accessible register of qualified professionals.
9. In its Response, the Commissioner relied on the Decision Notice and submitted that there were “other less privacy intrusive means of achieving the Appellant’s legitimate interest regarding public safety” [paragraph 20]. It acknowledged that the list of prohibited teachers was not available to the public, but submitted that the outcomes of teacher misconduct panels were published on the.gov.uk website.
 10. In Reply, the Appellant complained that the outcomes of misconduct panels were not easily searchable and that checks performed by schools and employers on teachers did not meet his “acknowledged legitimate interest” because they were not accessible to him. He submitted that a national register of teachers was necessary in England so that teachers could not avoid scrutiny by moving from employer to employer.
 11. All parties consented to the appeal being dealt with on the papers. The Tribunal was satisfied that it could properly determine the issues without a hearing and that it was fair and in the interests of justice to do so.
 12. In reaching its decision, the Tribunal took into account all the evidence before it. The Tribunal had before it an open bundle of 90 pages. Our findings were made on the balance of probabilities.

The Law

13. Section 1(1) FOIA 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.”

14. Section 2(2) provides that:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

15. Section 40 FOIA provides:

...

(2) Any information to which a request for information relates is... exempt information if –

(a) it constitutes personal data... and

(b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –

(a) would contravene any of the data protection principles...

....

(7) In this section –

“the data protection principles” means the principles set out in –

(a) Article 5(1) of the UK GDPR, and

(b) section 34(1) of the Data Protection Act 2018...”

16. The first data protection principle under Article 5(1)(a) of the UK GDPR is that personal data shall be:

“processed lawfully, fairly and in a transparent manner in relation to the data subject”

17. Article 6(1) UK GDPR provides that:

“Processing shall be lawful only if and to the extent that at least one of the following applies:

...

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”

18. In *Goldsmith International Business School v Information Commissioner and Home Office* [2014] UKUT 563 (AAC), Upper Tribunal Judge Wikeley considered previous authority on the definition of the word “necessary” in this context and concluded that:

- a. “‘necessity’ carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity” [37].
- b. “the test is one of “reasonable necessity”, reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term” [38]; and
- c. “The test of reasonable necessity itself involves the consideration of alternative measures, and so “a measure would not be necessary if the legitimate aim could be achieved by something less”; accordingly, the measure must be the “least restrictive” means of achieving the legitimate aim in question” [39].

19. Section 40(2) FOIA is an absolute exemption in relation to the first condition under section 40(3A) FOIA and not subject to the public interest test.
20. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:
 - “(1) If on an appeal under section 57 the Tribunal considers -
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.
 - (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”
21. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before us. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made.

Discussion

22. The Tribunal applied the law as set out in paragraphs 13 to 19 above.
23. The Appellant did not dispute that the requested information was “personal data” as defined in section 3(2) of the Data Protection Act 2018.
24. The Tribunal considered whether the first condition in section 40(3A) FOIA was satisfied because disclosure of the requested information to a member of the public otherwise than under FOIA would not be “lawful” pursuant to Article 6(1)(f) UK GDPR.
25. The Commissioner accepted, and the Tribunal agreed, that the Appellant had a legitimate interest in obtaining the names of qualified teachers for the purposes of public safety.
26. The Tribunal went on to consider whether disclosure of the requested information was “necessary” for the purposes of that legitimate interest, applying Upper Tribunal Judge Wikeley’s guidance in *Goldsmith* (paragraph 18 above).
27. The Tribunal took into account, as submitted by the Appellant, that in Wales, Scotland and Northern Ireland, an online register is available for members of the public to check a teacher’s registration status. Similar registers are available in England for other professionals, such as doctors, nurses, social workers and solicitors.
28. However, the issue for the Tribunal is not whether it might be desirable for public safety that the TRA administer and make available to the public an online register of qualified teachers in England as teaching regulators do in other countries. Decisions about whether this would be an appropriate way to protect the public, and if so, how

it should be managed and financed, are for the Government and Parliament, not this Tribunal. The issue for this Tribunal is whether, applying Upper Tribunal Judge Wikeley's guidance, the disclosure to the public of the TRA list of qualified teachers in response to the Request is reasonably necessary to achieve the legitimate aim of public safety, whether it is the "least restrictive" means of achieving that aim, or whether it could be achieved by something less.

29. The Tribunal were not persuaded that disclosure of the TRA's list of qualified teachers would necessarily achieve the legitimate aim. A list provided in response to the Request would be a "snapshot", as the DfE submitted, of the individuals on the list at the point in time when it was disclosed – and not a dynamic, live register like those made available by regulators in Wales, Scotland and Northern Ireland. The DfE's database holds records of over 1,845,000 individuals and the associated data changes on an hourly basis. Because it is a list of all qualified teachers, it would include individuals who are no longer teaching or who have never taught. It would not include individuals teaching in schools where QTS is not required (such as academies and independent schools). There would be no process for individuals' details to be updated or removed if they stopped teaching, nor for details of new restrictions or prohibitions to be added or removed if lifted. The list disclosed to the Appellant would quickly become out of date and misleading – it could even be damaging to public safety to rely on it.
30. The Tribunal found that there are other ways of achieving the legitimate public safety aim which are less restrictive and intrusive of the individuals' privacy rights than making their details available to the public. Schools and other employers are currently required to conduct pre-employment checks on teachers, and they are able to check the TRA register of qualified teachers for that purpose. The outcomes of professional conduct panel hearings where a teacher may be restricted or prohibited from teaching, and details of forthcoming hearings, are published. When considering the extent of intrusion into privacy rights, the Tribunal noted that the individuals on the list have not consented to release of their information to the public and there was no evidence before us of any specific statutory power for the TRA to publish their details (unlike, for example, in Wales under the Education Workforce Council (Main Functions) (Wales) Regulations 2015).
31. Taking all this together, the Tribunal found on balance that disclosure of the requested information was not necessary for the purposes of the legitimate interest of public safety. Disclosure would not be lawful and would therefore infringe the first data protection principle under Article 5(1)(a) UK GDPR. The first condition in section 40(3A) is not satisfied and the requested information is therefore exempt under section 40(3) FOIA. This is an absolute exemption and so no public interest test applies. The DfE was entitled to refuse to communicate the requested information to the Appellant.
32. As we found that disclosure was not necessary for the purposes of the legitimate interest, we did not go on to consider the balancing test of whether the legitimate interest would be overridden by the interests or fundamental rights and freedoms of the data subjects.

33. The Decision Notice is correct, and the appeal is dismissed.

Signed Judge CL Goodman

Date: 15/03/2023