Neutral citation number: [2024] UKFTT 699 (GRC)

Case Reference: EA/2023/0419

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard on the papers

Heard on: 23 July 2024
Decision given on: 30 July 2024

Before

TRIBUNAL JUDGE CHRIS HUGHES
TRIBUNAL MEMBER SUZANNE COSGRAVE
TRIBUNAL MEMBER AIMEE GASSTON

Between

GABRIEL KANTER-WEBBER

Appellant

and

1 - INFORMATION COMMISSIONER
2 - DEPARTMENT FOR EDUCATION

Respondent(s)

Cases
IC v Malnick and ACOBA (GIA/447/2017)
Morton v IC & Wigan MBC [2018] UKUT 295 (AAC)

Decision: The appeal is Dismissed

REASONS

1. The Teaching Regulatory Agency is the part of the Second Respondent which is responsible for considering charges of professional misconduct against registered teachers. On 23 May it published the outcome of a disciplinary hearing held over 11 days between January and May 2023. On 23 June the Appellant in these proceedings made a request for information:

"On 5 May, your professional conduct panel gave its decision in the case of Joshua Sutcliffe. Please provide me with an electronic copy of the recording of the portion(s) of his hearing at which he gave evidence, including both examination-in-chief and cross-examination."

2. On 30 June the DfE refused the request relying on s40(2) of FOIA (personal data of someone other than the requester), stating:

"Disclosure of this information would be considered unfair under the Data Protection Act 2018. By that, we mean the likely expectations of the data subject that their information would not be disclosed to others and the effect which disclosure would have on the data subject. Section 40(2) is an absolute exemption and is not subject to the public interest test."

3. That day the Appellant sought a review of its original decision arguing that s40 FOIA did not apply to a misconduct hearing held in public advancing this claim based on a tribunal decision arising from an appeal he had brought.

4. In a reply communicated on 28 July the DfE maintained that position stating:

The department has decided to uphold the original decision to withhold the information you requested under section 40(2) of the Freedom of Information Act 2000 (the Act) in the interests of protecting the personal data of those who attended the hearing, particularly that of vulnerable witnesses.

5. It also relied on s38(1)(a) (disclosure would or would be likely to endanger the physical or mental health of any individual). Since it is a qualified exemption it weighed the competing interests:

Argument for disclosure

It is in the public interest for public authorities to be accountable for the quality of their decision-making. Transparency in the decision-making process and access to the information on which decisions have been based, facilitate that accountability.

Argument against disclosure

Disclosure of the recording of the teacher's evidence would be likely to have a detrimental effect on vulnerable witnesses, endangering their mental and physical wellbeing, not least through disclosure of material which would identify those individuals in the public domain as a permanent record. The department considers that the robust publication of the decision document on GOV.UK suffices to protect the wellbeing of vulnerable participants whilst balancing the public interest in ensuring that proceedings and decision-making are open to public scrutiny.

Having considered the public interest test for section 38(1)(a), the department finds that it is in the public interest to withhold the information due to the likely detrimental effect it would have on the mental and physical wellbeing of those participants, particularly those that are vulnerable.

6. The Appellant complained to the Information Commissioner the same day, stating:

Hi, see attached correspondence with the Teaching Regulation Agency.
They are relying on ss 38 and 40.
The former is inapplicable because all of the requested information was already, voluntarily, placed into the public domain at the public hearing. It therefore cannot possibly be prejudicial to anyone's health and safety.
The latter is inapplicable because the Tribunal has explicitly held that there is no reasonable expectation of privacy in respect of misconduct proceedings held in public.

7. The Commissioner investigated; seeking the arguments of the DfE; which responded by (inter alia) relying on s36 FOIA (Prejudice to the effective conduct of public affairs) which provides (so far as is relevant):-

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

8. The qualified person whose opinion was relied upon was the Minister of State for Schools, Mr Nick Gibb, who was satisfied that the exemption was engaged. S36 is a qualified exemption and requires the consideration of the balance of public interest struck between protecting the interest engaging the exemption and the interest furthered by disclosure.

9. The Commissioner noted DfE's arguments as to the issues raised by this regulatory hearing, in contrast to the police regulatory process relied up by the Applicant:

12. DfE argues that there are distinct, significant and fundamental differences between these requests. Police misconduct and teacher misconduct hearings are different due to the participants involved, particularly with vulnerable children as witnesses, and the different levels of detail published following these hearings.

13. DfE also argues that disclosure is likely to be detrimental to its ability to thoroughly investigate serious allegations that have been made and to administer appropriate measures where allegations are proven. DfE notes that the public can attend these hearings, albeit via registration and after appropriate vetting to ensure the safety and wellbeing of those attending. A detailed final report is also published where a teacher is barred from teaching. As such DfE considers that its commitment to transparency is met.

14. Releasing the audio recording of the hearing would be likely, DfE says, to have a corrosive effect on the teacher misconduct process. It would lessen the depth and candidness of the evidence provided, recorded and subsequently published in the final reports where some/all of the allegations are proven. If this corrosive effect were to occur, any subsequent published reports may not have the depth and breadth of evidence and information currently provided. This would lessen the depth and quality of the information the public can access to understand specific hearings and their outcomes, which would not be in the public interest.

…

20. In its submission to the QP, DfE noted that TRA hearings are held in public, unless directed to be heard in private by a professional conduct panel. However DfE explained that, although members of the press or public are permitted to observe a public hearing, that permission is subject to agreeing certain terms and conditions. So it's not the case that TRA allows completely unfettered access to a public hearing.

21. To be permitted access, a member of press or public must provide certain details of their identity and agree to a declaration. This declaration includes an undertaking that they will not record the hearing, which is prohibited.

22. DfE noted that TRA does record its hearings which is for the purpose of good administration. Teachers who are subject to a prohibition order have a statutory right of appeal to the High Court. In these cases it's helpful to provide the High Court with a transcript of the hearing. The recording is not subject to wider dissemination, and it's not its purpose to be released into the public domain.

23. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion. Having considered the QP's submission, the Commissioner accepts that the QP's opinion in this case was a reasonable one.

24. As noted, the QP's opinion was that the envisioned prejudice would be likely to occur through disclosing the withheld information. The Commissioner accepts that's a credible level of likelihood and that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.

25. Having considered all the criteria associated with the application of section 36(2)(c), the complainant's point and the material DfE has provided, the Commissioner finds that the requested information engages that exemption. He has gone on to consider the associated public interest test.

10. In considering the balance of public interest the Commissioner recognised the importance of transparency about such hearings in order to maintain public confidence in the fairness and effectiveness of the disciplinary process. The release of the recording would be likely to make witnesses and complainants less likely to come forward with the evidence needed and lessen the ability of the DfE to remove inappropriate individuals from the teaching profession. While the hearings are in public they are conducted in such a way as to protect participants. He noted that:-

Such hearings often involve the use of children's data, including data/information which may make it possible, if released unfettered, to identify individual children. Such a release into the public domain could present concerns related to safeguarding and the welfare of children, which the TRA takes important measures to uphold.

11. The Commissioner noted that the decision and reasoning of the panel in this case had been published in May 2023, that Mr Sutcliffe's evidence of necessity had to address the evidence from the witnesses in the hearing who described his actions and the Commissioner was satisfied that the disclosure of the recording would impact on the participation of witnesses in future cases: *"because they may be concerned about the possibility that hearing recordings could be put into the public domain without any controls or context. It's not in the public interest for the robustness of TRA's functions to be put at risk."* The Commissioner upheld the DfE's position on s36(2)(c) and did not consider the other exemptions.

12. In applying to the tribunal the Appellant argued:-

The requested information constitutes the transcripts/ audio recording of part of a teacher misconduct hearing. This hearing took place in public (as is required by law, save in cases where a party successfully applies for a private sitting).

Fundamentally, it is impossible to see how the release of the requested information could prejudice any of the interests set out in FOIA s 36, because it entered the public domain, albeit temporarily, at the time of the hearings. If it was going to prejudice an important public interest, the public authority would have applied for a private hearing. They did not do so, and instead ventilated the requested information at a public hearing. They cannot now turn round and say that the cat they let out of the bag is a danger to the public interest – at least, not without clear evidence of what has changed since the hearing.

13. In resisting the appeal the Commissioner carefully considered the component parts of the Appellant's brief and unconsidered grounds of appeal. It treated it as a challenge to the proposition that the Minister's opinion was reasonable citing the explanation in *Malnick*:

"…it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7) in relation to the Houses of Parliament) it is to be afforded a measure of respect"

And noted that:

"In any event, it is well-established that prior publication does not preclude the engagement of an exemption upon later publication (see, for example, Morton v IC & Wigan MBC [2018] UKUT 295 (AAC)"

14. The Commissioner further argued that while members of the public could attend the proceedings and hear the evidence, that was a distinct proposition from releasing a recording available in perpetuity without any control or protection for the individuals. The Commissioner addressed the fundamental question of the public interest.

"Finally, any public interest there may be in openness and transparency about how the TRA handled allegations about Mr Sutcliffe has been met on the facts of this case by the publication of the PCP's decision with its associated reasoning in May 2023. The decision provides details of the hearing, including the evidence provided by Mr Sutcliffe. As such, disclosure of the requested information would add little to the published decision, limiting any public interest in disclosure"

15. The Appellant replied to the Commissioner:

All of the requested information was, by definition, placed into the public domain at the time of the misconduct hearing. The TRA was content for all of the requested information to enter, and remain in, the public domain. It may not in fact have remained in the public domain, but the TRA – having taken the decision to go ahead with a public hearing free from reporting restrictions – was clearly open to the prospect that everything which transpired therein could be heard, transcribed and/or recorded by any member of the press or public.
A similar consideration applies to witnesses: every witness who appears (voluntarily) before a public teacher misconduct hearing does so in the knowledge that everything they say and do is liable to be heard, transcribed and/or recorded by any member of the press or public.
An observer who makes such a record is free to do anything they like with it. In particular, they are free to make it public – for example, over the internet – either contemporaneously or at any time in the future: see NT1 and NT2 v Google [2018] EWHC 799 (QB), [2019] QB 344 at [113] and Crossley v Newsquest (Midlands South) [2008] EWHC 3054 (QB) at [58].
The Commissioner cites the Upper Tribunal case of Morton to claim that prior publication does not absolutely preclude the engagement of an exemption upon later publication. But Morton is not relevant here at all. Firstly, the requested information in Morton had never been in the public domain (see [41], [52] and [68]),
whereas in my case, the entirety of the requested information was ventilated in public. Secondly, the decision in Morton was based on the need to protect the feelings and reputations of individuals who had been wrongfully accused of misconduct and subsequently exonerated (see [61]), whereas in my case, the only individual accused of misconduct was found to have indeed committed misconduct.
As such, given that the prospect of prejudice to public functions is fanciful, it is impossible to see how the section 36 opinion can be considered reasonable. I note, in particular, the lack of any evidence or witness statements whatsoever from the TRA.
In the alternative, if section 36 is indeed engaged, the public interest in maintaining it is infinitesimally small given the fact that the requested information has previously been ventilated in public and that all participants were aware of that at the time. Moreover, the public interest in increasing awareness of how teacher misconduct in a case such as this is dealt with is considerable.
As regards the difference between an audio recording and a transcript, I am personally content either way. Should the TRA wish to provide the requested information in the form of a transcript, that is fine with me.

16. In resisting the appeal the DfE relied on a further exemption s31 which addresses circumstances where disclosure would or would be likely to prejudice to the exercise by the Secretary of State, the Department and/or the TRA of their functions for the

purposes of ascertaining whether any person is responsible for any conduct which is improper and/or whether circumstances which would justify regulatory action exist.

17. It also provided a detailed witness statement from Stuart Bromfield a senior official of the TRA. He explained the various steps to protect the identity of vulnerable witnesses and explained:

…I am strongly of the view that disclosure would cause serious prejudice to the integrity of the TRA process and its ability to discharge its regulatory functions and support the exercise by the Secretary of State of her power to make prohibition orders in appropriate cases. Further, I do not consider that there is any countervailing public interest in disclosure.

30. The key concern I have is that complainants and witnesses (who are often vulnerable) are likely to be less willing to refer cases of serious teacher misconduct to the TRA, provide evidence, attend PCP hearings and otherwise engage with the TRA, if there is a possibility of the recording of a hearing (or part of it) being released into the public domain without their consent. This is the same concern that led the Minister to express the opinion that disclosure of the information sought by the Appellant would or would be likely to prejudice the effective conduct of public affairs.

…

36. Additionally, in its published decision documents, it is the TRA's practice to replace witness names with ciphers (e.g. "Person A" or "Pupil A"). The TRA publishes decision documents in relation to teachers for as long as the prohibition order is in force, in accordance with the 2012 Regulations. In practice this information can be published for many years. Whilst the TRA is mindful of the principles of open justice, it is of the view that placing the names of witnesses into the public domain for extended periods of time, particularly in circumstances where professional witnesses have since changed jobs or role, and other witnesses or victims move on with their lives, does not strike the right balance between the rights of the individual and the public interest. Witnesses will typically want to 'move on' with their lives and careers after providing evidence in a PCP hearing. TRA decision documents contain a comprehensive summary of the evidence provided to the PCP. If a recording of the hearing were to be released, it is the TRA's view that this would undermine the reasons for the practice of using ciphers, and it would continue to associate a witness with a teacher and with proven serious misconduct long after it is reasonable to do so. Further, if a witness knew from the outset that they would continue to be associated with a hearing for a particular teacher or with particular misconduct long after the hearing had concluded, then they would be less willing to engage with the TRA during an investigation or to provide evidence at a PCP hearing.

37. If there is a possibility of audio recordings being made public, I believe it is likely that some cases that should be investigated will never to come to the TRA's attention in the first place, because the individuals who could raise allegations about the teacher are put off from coming forward…."

Consideration

18. In considering this, in addition to the open bundle, the tribunal has had the benefit of a closed bundle containing the submissions made by DfE to the Commissioner and the transcript of the evidence sessions where Mr Sutcliffe gave evidence. That transcript, while lengthy, adds nothing of substance to the 30 page decision of the tribunal which carefully reviewed and summarised his evidence with respect to the allegations made against him. That decision was placed in the public domain weeks before the Appellant made his request.

19. In the review of the refusal (sent to the Appellant on 28 July) the existence of a detailed public decision was drawn to his attention (it is not clear whether he was aware of it before he made his original request), however in his subsequent communications he has not addressed the extent to which the public interest in transparency may have been met by the publication of the decision.

20. Similarly although the decision notice clearly set out the reasons why teachers disciplinary hearings are held in public and the steps taken both to prevent the making of recordings and to protect the identity of young people, he asserted in his reply to the Commissioner's response to the appeal: *"every witness who appears (voluntarily) before a public teacher misconduct hearing does so in the knowledge that everything they say and do is liable to be heard, transcribed and/ or recorded by any member of the press or public"*. Exaggerating the possibility of such inappropriate conduct in the face of the steps taken to prevent it creates the danger of normalising such conduct to the harm both of young people giving evidence and the regulatory system trying to protect them.

21. The Appellant is also inconsistent in his argument – claiming that once a hearing is in public it remains in public, and therefore a recording made for another purpose (to enable any necessary checks for the purpose of an appeal) should also now be put into the public domain – in effect a further publication of material no longer accessible. However the hearing, conducted in public in the interests of justice has already been overtaken by the public judgement of the disciplinary panel which fairly summarises the evidence from the hearing. While sensationalist journalists, commentators and polemicists may wish to have access to every detail in order to add *"corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative"* (W. S. Gilbert 1885) for their writings; the public interest in open justice is fully met by the fact that the hearing was open to the public and a full reasoned decision was placed in the public domain very soon after the conclusion of the hearing.

22. In making his request and pursuing his appeal the Appellant has relied on a tendentious interpretation of a case decided with respect to a different exemption, from a different disciplinary framework in different circumstances. Whichever way that case may have been decided it is not binding on this tribunal.

23. The Appellant has failed to address the significant ethical issues underlying the statutory exemptions relied upon by the DfE and accepted (with respect to s36) by the Commissioner.

24. The first exemption relied upon, the personal data exemption in s40 was clearly highly relevant to the importance of protecting as far as possible the privacy of young people giving evidence in a controversial case.

25. The second, s38, addressed the need to protect such vulnerable witnesses from the harm which foreseeably would flow from disclosure of information which led to their identification.

26. The third exemption, s36, was supported by the qualified person's opinion approved by the Schools Minister which fully explored the issues for the effective administration of the regulatory process in place to protect young people in schools and the risks if those exemptions respecting the privacy and concern for the welfare of vulnerable people were not upheld and the mechanisms to give some shelter from sensationalist coverage were removed. Not only did that opinion meet the relatively low standard needed of being a reasonable opinion, it would be difficult, in all the circumstances of the case (including in particular the publication of a lengthy reasoned decision which set out Mr Sutcliffe's evidence on the various issues), to view an opinion which did not engage the exemption as properly reasoned. The fourth exemption raised by the DfE (s31- law enforcement) is also (despite the arguments the Appellant gleaned from one of his other cases) clearly engaged.

27. The approach adopted by DfE in conduct hearings and publishing decisions, ensuring there is no recording of the hearings and not using the names of vulnerable witnesses is in essence the approach of many courts (now including family courts) in facilitating public access and understanding while protecting vulnerable people. The disclosure of the requested information would do harm, it is decisively no more in the public interest than "shouting fire in a crowded theatre" which (as J. S. Mill noted) would be an abuse of free speech, even if endorsed by self-proclaimed "free-speech absolutists".

Signed Hughes Date: 30 July 2024

Promulgated on: 30 July 2024