

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2022

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant submitted a request for information under FOIA to the Teaching Regulatory Agency ("TRA") on 20 October 2021, requesting a list of all qualified teachers in England.
2. The TRA is an executive agency of the Department for Education ("DfE"). For the purposes of this notice the DfE will be referenced as the Public Authority.
3. The DfE confirmed it held the information but would not release the list as it was withheld under Section 40 (personal information) of FOIA.
4. The Commissioner's decision is that the DfE are correct to rely on section 40 in relation to the withheld information. However, the DfE failed to respond to the request within the statutory time frame of 20 working days and has therefore breached section 10(1) of FOIA.
5. The Commissioner does not require any further steps to be taken by the DfE in relation to this decision notice.

Request and Response

6. The complainant made the following request for information under FOIA, on 20 October 2021:

"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."
7. The DfE responded to the request for information on 16 December 2021. They confirmed they held the information on their database. The DfE stated the information would be withheld as it was exempt from disclosure under s40(2)(personal information) of FOIA as it contained third party personal data.
8. On 18 December 2021, the complainant requested an internal review as they were not satisfied with the response.
9. The DfE responded to the internal review request on 12 January 2022. They stated their internal review had upheld their position and the information could not be released.
10. On 7 February 2022, the complainant contacted the ICO to complain about the DfE's handling of their request for information.

Scope of the case

11. On 7 February 2022, the complainant contacted the ICO via their Member of Parliament, to complain about the DfE's handling of their request for information.
12. The scope of this decision notice is to consider if section 40(2) was appropriately applied to the withheld information.

Reasons for decision

Section 40 (personal information)

13. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

14. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles, Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual."

Is the information personal data?

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. The DfE has confirmed that the information requested would contain personal details, such as name, age, gender, qualifications, last or current employer of each individual, as well as any restrictions on their teaching. This information would make individuals identifiable.
21. In this case, the complainant has requested a list of all qualified teachers in England. The Commissioner is satisfied that the requested information is personal data as it relates to and identifies the individuals

¹ As amended by Schedule 19 Paragraph 58(3) DPA

who are qualified teachers and therefore, falls within the definition of 'personal data' in section 3(2) of the DPA.

22. In their response to the Commissioner, the DfE advised their register consisted of 1,845,000 individuals however, this figure can change on a daily basis.

23. The DfE further advised the Commissioner:

"there is currently no statutory requirement to publish qualified teachers' details, unlike prohibited teachers where there must be a public record that can be accessed on request or via the GOV.UK website. The public could also approach individual schools should they wish to request information on what qualifications named teachers at the school hold."

24. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

27. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.

28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

29. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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"².

30. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- a. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - b. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - c. **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
31. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
33. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The complainant advised the DfE of the reason for the request:
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² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

"I have already stated this, but for clarification, 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."

35. The Commissioner accepts the complainant has a legitimate interest in obtaining the information in terms of highlighting the need for public safety.
36. However, the DfE indicate information can be obtained for those individuals who might pose a risk in other ways. The DfE do not consider the complainant has a legitimate interest and point out the following:

"Should they have concerns about an individual, the public can view teachers prohibited from the profession on GOV.UK website, where forthcoming professional conduct panel hearings are listed, as are the outcomes of these hearings. Individuals can also request that the TRA checks a teacher against our record to advise whether they are prohibited. Employers must conduct pre-employment checks before hiring a teacher where they will be able to access whether they are restricted or prohibited."

37. The DfE also note that individuals employed in Academies or Independent Schools do not necessarily need to be qualified teachers and so the list would not contain these individuals. In this respect the register is not comprehensive. However, the DfE indicate in such cases, members of the public should approach the school directly should they have any concerns.

Is disclosure necessary?

38. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

39. In its submissions to the Commissioner, the DfE provided links to information currently available in the public domain.³ They explained that currently individuals can request the TRA to check if an individual has been barred.
40. The DfE have assured the Commissioner that schools and employers are required to run relevant checks on teachers for employment purposes. These include checks with the TRA and the Disclosure and Barring service. By completing such checks, schools and other employers would be advised if there were any restrictions or prohibitions placed on that individual. The Commissioner has noted that the DfE provide search options to schools and colleges via the DfE portal to assist them with this task.
41. Therefore, the Commissioner does not consider in this case that there is pressing social need to interfere with the privacy rights of those individuals registered as qualified teachers in order to satisfy the legitimate interest. The legitimate interest of ensuring public safety as set out by the complainant, appears to be met already through the checking and employment processes in place.
42. The Commissioner would agree with the DfE, that to disclose the withheld information would not be the least restrictive means of satisfying this legitimate interest.
43. The Commissioner notes, the complainant has identified that both Scotland and Wales have continued to make their list of qualified teachers public. However, in England as there are other checks and processes in place through the employment checks of those who work with children which are in place to safeguard the public. Currently, there remains no legal requirement for the DfE to publish the register in England.
44. The Commissioner is mindful that disclosure under FOIA is disclosure to the world at large. Therefore, the effect of complying with this request would be that the register containing information about individuals and

³ <https://www.gov.uk/guidance/teacher-misconduct-attend-a-professional-conduct-panel-hearing-or-meeting#forthcoming-hearings>

³https://www.gov.uk/search/all?parent=&keywords=panel+outcome+misconduct&level_one_taxon=&manual=&organisations%5B%5D=teaching-regulation-agency&organisations%5B%5D=national-college-for-teaching-and-leadership&public_timestamp%5Bfrom%5D=&public_timestamp%5Bto%5D=&order=updated-newest

their identity would effectively be publicly disclosed and would be accessible to anyone, for any purpose.

45. The Commissioner has therefore concluded that disclosing the list would not be lawful and the necessity element of article 6(1)(f) of the GDPR is not met. Disclosure of the withheld information would breach the first data protection principle and so is exempt from disclosure on the basis of section 40(2) of FOIA.
46. As the Commissioner has concluded that the necessity test is not met, he has not gone on to consider the balancing test in this case.
47. It is the Commissioner's decision that the DfE was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 10 – time for compliance

48. Section 1(1) of FOIA states that:

Any person making a request for information to a public authority is entitled

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

49. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,
- (b) states the name of the applicant and an address for correspondence, and
- (c) describes the information requested.

50. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under FOIA.
51. Section 10 of FOIA states that responses to requests made under the Act must be provided "promptly and in any event not later than the twentieth working day following the date of receipt."
52. From the evidence presented to the Commissioner in this case, in failing to issue a response to the request within 20 working days, the DfE has breached section 10 of the FOIA.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Phillip Angell
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