



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

Appeal Reference: EA/2020/0017P

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Marion Saunders
and
Stephen Shaw

Between

Deborah Kol

Appellant

And

**The Information Commissioner
Reigate & Banstead Borough Council**

Respondents

**Determined, by consent, on written evidence and submissions
Considered on the papers on 21 September 2020.**

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 158, together with additional open documents and a closed bundle.

INTRODUCTION

4. The Appellant wrote to Reigate & Banstead Borough Council (the Council) on 22 August 2019 and requested the following information: -
 1. Verifiable institutional details and dates of the accredited and professional qualifications of the specified public officers. The qualifications to be disclosed under the FOIA need only relate to those that bear relevance to their official role at council and performance of public duties.
[Redacted name] (Head of Planning)
[Redacted name] (Conservation Officer)
[Redacted name] (Senior Enforcement Officer)
[Redacted name] (Graduate Planning Officer)
 2. Description of the continuing professional development training and courses (if any) that has been made available to the members of the Planning Department over the past 5 years (2014-2019).

3. The attendance record (by way of course and date) of the specified public officers in 1 above on any of the CPD courses described in 2 above.
5. The Council responded on 3 September 2019 to say that it was withholding the information under section 40(2) FOIA. Following an internal review, the Council wrote to the complainant on 2 October 2019 to maintain the application of section 40(2) FOIA, but the Appellant was referred to some information already in the public domain about two of the named officers.
6. The Appellant contacted the Commissioner on 10 November 2019 to complain about the way her request for information had been handled, and specifically that the Council was incorrect to apply section 40(2) FOIA.

THE LAW AND COMMISSIONER'S DECISION

7. Section 40 (2) FOIA reads as follows: -
 - (2) Any information to which a request for information relates is also exempt information if –
 - (a) it constitutes personal data which does not fall within subsection (1) (personal information of the applicant], and
 - (b) the first, second or third condition below is satisfied.
8. Section 3(2) of the DPA 2018 defines personal data as “any information relating to an identified or identifiable living individual”.
9. The relevant condition (as referred to in s40(2) FOIA) in this case is found in s40(3A) (a):
 - (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.
10. Under s40(7) FOIA the relevant data protection principles in this case are to be found in Article 5(1) of the GDPR. Materially, Article 5(1)(a) reads: -

Personal data shall be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency').

11. Further, by Article 6(1) GDPR: -

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

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

...

- (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...

12. In relation to whether the information requested was personal data, the Commissioner said: -

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

...

16. 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.

13. The Commissioner decided that the information sought was personal data: -

17. The withheld information represents the qualifications (including the relevant institutions and dates) and training held by officers within the Council's Planning Department. The Council has elaborated that the training undertaken by officers within the department is not uniform, but rather, is tailored to the competence of the individual and the specific requirements of their role, as identified and organised by the individual and the line manager. The Council has further elaborated that some training will be specific to the professional status of the individual (i.e. by their type of membership within the Royal Town Planning Institute). Due to these factors, the Council argues that it is not possible to disclose details about the training in an anonymised manner.

14. Next the Commissioner considered Article 5(1)(a) of the GDPR which means that the information can only be disclosed if to do so would be lawful, fair and transparent. As to lawfulness, the Commissioner considered Article 6(1)(f) of the GDPR (as set out above). The Commissioner considered the correct approach to take and said: -

26. ...it is necessary to consider the following three-part test: - i. Legitimate interest test: Whether a legitimate interest is being pursued in the request for information; ii. Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question; iii. Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

15. The Commissioner approached the case by recognising a legitimate interest in ensuring that council officers are appropriately qualified and trained in order to undertake their roles. She said (para 30), that 'this is particularly so in respect of those officers who are involved in planning decisions, as these may have significant impact on both residents and the local environment'.

16. The Commissioner considered that 'Necessary' means more than desirable but less than indispensable or absolute necessity' (para 31) and applied that test to the request. She said that applying the test could also involve consideration of alternative measures which may make disclosure of the requested information unnecessary.

17. The Commissioner was told by the Council that it requires proof of qualifications from would-be employees as part of the recruitment process, and that training was provided to officers as required. The Council said that the relevant academic qualifications of two of the officers (namely the Head of Planning, and the Senior Planning Officer) are

already in the public domain and had provided the Appellant with that information.

18. The Commissioner also made reference to the Council's complaints process as a way of escalating concern about an officer's conduct, and then onwards to the local government ombudsman. Planning decisions could be appealed to the secretary of state under a statutory scheme. The Commissioner concluded: -

34. Having considered these factors, it is apparent to the Commissioner that the professional suitability of individuals is monitored as part of the recruitment process, and that needs for in-post training are assessed by line managers; this indicates to the Commissioner that appropriate processes are in place to ensure that officers within the department are fully able to undertake the roles. It is also apparent to the Commissioner that any public concerns about the conduct or ability of an officer can be escalated to an independent authority for review. The Commissioner considers that the Council's monitoring of qualifications and training, and the existence of proper processes by which a member of the public can challenge the actions of individual officers, addresses the legitimate interest in ensuring that officers are appropriately qualified and trained for the purpose of their role.

19. The Commissioner noted that she had 'undertaken a range of decisions in respect of requests for the qualifications of public authority employees and has consistently found that the disclosure of such information would breach data protection law'. In relation to a case cited by the Appellant - -decision notice FS501469076- where the Commissioner had found that qualifications of members of the Treasury Solicitor's department should be disclosed the Commissioner said: -

36... That decision addressed significantly senior roles ("...compared with civil servants in general...") within national government, and that to undertake those roles individuals needed to be legally qualified to practice as a solicitor or barrister. The context of the withheld information in that case, and the distinct

arguments relating to legitimate interests, were therefore significantly different.

20. On that basis the Commissioner decided that disclosure was not necessary to meet the legitimate interest in disclosure, and therefore did not go on to decide whether the balancing test would require disclosure.

THE APPEAL

21. The Appellant filed an appeal dated 12 January 2020. She disagreed with the Commissioner's findings on the 'necessity point'.
22. She disagreed with the Commissioner's findings in paragraph 17 of the decision notice relating to whether the information was personal data and said that the Commissioner had taken into account irrelevant factors.
23. She thought that the Commissioner had defined 'necessity' wrongly and has made arguments that necessity incorporates the concept of proportionality.
24. She disagreed with the Commissioner as to whether the Commissioner's previous decision notice concerning the treasury solicitor's department was relevant to this case.
25. Reading the Appellant's appeal, it is clear that she is of the view that the public should be entitled to be told the qualifications of Council officers as a way of providing comfort that those employed are properly qualified, and she objects to being referred to the complaints process as an alternative way to FOIA of pursuing matters. She sees no difference between the treasury solicitor case and her request as a means of ensuring public accountability.

26. The Commissioner has filed a Response in which she argues that the information in paragraph 17 of the decision notice was relevant to the decision in relation to personal data. The Commissioner has set out what she says is the relevant jurisprudence in relation to 'necessity' and what it encompasses. The Commissioner repeats the points made in paragraph 36 of the decision notice in relation to the differences between the treasury solicitor case and the present appeal.
27. The Commissioner concludes that it is overwhelmingly likely that the Council holds details of qualifications and training of its employees (and indeed the Council says it does) and notes the Council has disclosed the qualifications of the two senior employees which were available in the public domain. The Commissioner suggested joining the Council as a party to the appeal if further clarification was required, and this was done, but the Council has declined to participate further in the appeal.
28. The Appellant has filed a reply dated 3 April to the Commissioner's response, in which she makes a further plea for transparency and getting rid of unnecessary secrecy. A main point she raises again is that the meaning of 'necessary' embodies the concept of 'proportionality' and she cites the case of *South Lanarkshire Council v Scottish IC* [2013] UKSC 55 in support. She objects to the Commissioner's consideration as to whether there were less intrusive means of meeting the Appellant's legitimate aims, and she cites from paragraph 27 of the *South Lanarkshire* judgment which the Appellant says contains the *ratio* of the judgment. She emphasises again the Commissioner's approach in the previous treasury solicitor case.
29. We should note that the Appellant has had a further issue with the Council, on the basis that it had publicised that she was in dispute with the Council. The Appellant wanted this Tribunal to deal with that issue as

well, but I note that Judge Macmillan made a decision on 19 March 2020 that that issue was outside the remit of this appeal, and therefore we have not considered it.

30. The Appellant has also filed 'final written submissions' dated 7 July 2020. These submissions deal with this further issue and re-iterate many of the points she has made before. The Appellant makes it clear that she is not in dispute with the Council over a planning matter, and so the complaints procedure against any officer is not an appropriate alternative to the disclosure of the information she has requested.

DISCUSSION AND DECISION

31. This is a case which turns on the issue as to whether the Commissioner was correct to decide that disclosure was not necessary to meet the legitimate interest of accountability and transparency in the Council's decision-making processes.
32. We should say something about the necessity test. The Appellant relies on the analysis in paragraph 27 of the *South Lanarkshire* case. In that paragraph, Lady Hale says that 'necessity is well established in community law as part of the proportionality test'. But as Lady Hale went on to say in paragraph 27 what that means is that a 'measure would not be necessary if the legitimate aim could be achieved by something less'. Applying that to the context of this case, if the 'legitimate aim' of ensuring that officers are properly qualified and trained that the Appellant seeks through her FOIA request for personal data can be achieved 'by something less', then disclosure of personal data will not be necessary.
33. In our view, this is the approach that the Commissioner took in the decision notice. Essentially, the Commissioner accepted that the Council had recruitment processes and individual training plans in place to ensure

that officers were properly qualified and trained, and that there were processes in place for challenging the actions of individual officers. It was also the case that the qualifications of two of the officers were in the public domain already.

34. On that basis, 'something less' than the disclosure of personal data was available to meet the Appellant's legitimate aim and so disclosure was not 'necessary'. That analysis is straightforward and addresses the statutory tests in the FOIA and the DPA. The Appellant seems to complain that there is no consideration of Article 8 of the ECHR in the Commissioner's decision (see paragraph 39 of the Appellant's 3 April 2020 document), but that is not required when the task of the Commissioner was to apply the statutory framework in relation to the disclosure of personal data. There is no argument that the proper application of the tests in FOIA would lead to anything other than an Article 8 compliant result.

35. Thus, we agree with the approach taken by the Commissioner. However, when considering the alternatives available it does not seem right to us to place very much weight at all on the processes for challenging the actions of individual officers. That does not seem to us to be an alternative means of ensuring that officers are properly qualified and trained. It is perfectly possible for a properly trained and qualified officer to be guilty of misconduct or poor performance, a complaints procedure would not necessarily be the correct forum for challenging qualifications and training, and these issues might not even be in issue in a complaint process.

36. Nonetheless, in our view, even taking the availability of a complaints process out of the equation, in our view the Council's processes of recruitment and individual training, when coupled with the availability of the qualification of the two senior officers enquired about are sufficient

to meet the Appellant's legitimate interests as set out above. On that basis we agree with the Commissioner on this issue and find that the disclosure of personal data is not necessary for the purposes of FOIA and that the exemption in s40(2) FOIA is rightly relied upon by the Council. Having reached that conclusion, we do not need to go on to consider a balancing exercise between the legitimate interests and the rights of those whose personal data is in issue.

37. We should say something about the 'treasury solicitor case', as it is referred to on a number of occasions by the Appellant. We note that the Commissioner is not bound, in this case, by any conclusions reached in a previous decision notice, and neither is this Tribunal.

38. In decision notice number FS50146907 dated 23 March 2010, the Commissioner decided that s40(2) FOIA did not prevent the disclosure of the identities, contact details, areas of work, branch or profession and date of qualification of all lawyers in the Treasury Solicitor's Department (TSol).

39. In that case the Commissioner decided that as the lawyers concerned were senior officers then disclosure of their personal information would not be unfair. There was a legitimate interest in the TSol being open and transparent in the public knowing that TSol lawyers were qualified to perform their roles. The Commissioner considered that disclosure was necessary to achieve that aim, and that disclosure would not lead to unwarranted interference with the rights of the individuals concerned.

40. In the decision notice in the present case the Commissioner addressed that previous decision in terms set out above, and said that it involved 'significantly senior roles ("...compared with civil servants in general...") within national government, and that to undertake those roles individuals needed to be legally qualified to practice as a solicitor or barrister'. That

may be one difference with the present case. We also note that in the TSoI case, the Commissioner gave no detailed consideration as to whether disclosure was necessary, simply stating that this was the view of the Commissioner. Significantly, it seems to us, the Commissioner does not seem to have considered whether there were any less intrusive measures for meeting the legitimate aim (for example, considering whether the TSoI required legal qualifications as part of the recruitment process). In the current case, the Commissioner has given that issue further consideration (perhaps in the light of more recent case law such as the *South Lanarkshire* case) and concluded that disclosure is not necessary.

41. The Commissioner is entitled to take a different approach to that taken in 2010. In our view to do so, and to reach the conclusions she has done, does not reveal an error of law.

CONCLUSION

42. For the reasons set out above we are satisfied that that the Council was entitled to rely on s40(2) FOIA to withhold the information and the Commissioner's decision notice in upholding that entitlement does not reveal an error of law.

43. Therefore, this appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 6 October 2020.

