

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 August 2016

**Public Authority:** The Department for Education  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P3BT

#### Decision (including any steps ordered)

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1. The complainant has requested all the information held by the Department for Education (the DfE) in its qualified teachers' database for a named individual. The DfE has applied section 40(2) of the FOIA to this request. It also considers that section 38(1) applies.
2. The Commissioner's decision is that the DfE has correctly applied section 40(2) to this request. He has therefore not considered the application of section 38(1) to this request. There are no further steps to be taken.

#### Request and response

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3. On 27 February 2016 the complainant requested all the information held by the DfE in its qualified teachers' database for a named individual. He explained that the individual had consented to the release of the information and sent the DfE a letter to this effect.
4. On 21 March 2016 the DfE responded to this request. It explained that it held the requested information but that it was being withheld under section 40(2) of the FOIA.
5. The DfE explained that the requested information is third party personal data. It explained that it considered disclosure would not be fair and would therefore be in contravention of principle one of the Data Protection Act 1998 (the DPA). It also explained the document the complainant had provided did not constitute consent for disclosure.

6. The DfE explained that section 40(2) is an absolute exemption and therefore not subject to the public interest test.
7. The complainant requested an internal review on 21 March 2016 and argued that section 40(2) is not an absolute exemption. He argued that a teacher's credentials should be made public and that as a parent he has a legitimate expectation that he should be able to obtain validation that a teacher is competent and suitably qualified.
8. The internal review was provided on 13 April 2016 and the DfE confirmed that it wished to apply section 40(2) to this request.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 13 April 2016 to complain about the way his request for information had been handled. He complained about the DfE's application of section 40(2) and its explanation that it is an absolute exemption and not subject to the public interest test. He has also complained that in its response, the DfE did not provide any substantiation of its argument that disclosure would be unfair.
10. The Commissioner considers this case is concerned with the DfE's application of section 40(2) and section 38(1) to the withheld third party personal data. He has also considered the quality of the DfE's response.

### **Reasons for decision**

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11. Section 40(2) of the FOIA specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles. The first principle of the DPA states that personal data must be processed fairly and lawfully.
12. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.
13. The data the complainant has requested is clearly personal data as it relates to an identifiable living individual.
14. In determining whether disclosure of the requested information would contravene the requirements of the first data protection principle, the Commissioner has therefore considered whether providing the personal

data of the individual concerned would be fair. In his consideration of fairness the Commissioner has taken into account the following factors:

- the individuals' reasonable expectations of what would happen to their information;
- the consequences of disclosure, (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

### **Reasonable expectations**

15. The DfE has explained that the personal information it holds on its database of qualified teachers in England (DQT) is used by the DfE to fulfil its functions and meet its statutory obligation to award qualified teacher status and hold a list of prohibited teachers.
16. Access to the DQT is granted to employers so they can check whether individuals they employ (or are considering employing) are suitably qualified and do not have any restrictions against them in relation to teaching in England. Teachers also have access to the database so they can view and update their record.
17. The DfE has explained that it is made clear to teachers how their personal data will be used and that they are informed that their data will only be shared with third parties when the law allows it, or there is a legal requirement for the sharing to take place.
18. The DfE has therefore argued that teachers will have a general expectation of privacy with respect to their personal data held in the database and will not expect it to be shared with anyone who requests it.
19. In this case the individual concerned has explicitly stated that she does not wish her personal details to be disclosed.
20. The Commissioner is therefore satisfied that the individual concerned would have a strong expectation that the withheld personal data in this case would not be placed into the public domain – via disclosure under the FOIA. In reaching this view he has noted that the withheld information is confidential in nature and that consent has not been obtained for disclosure.

### **Would disclosure cause damage and distress?**

21. The DfE has explained that it considers disclosure of the personal data would cause damage and distress to the individual concerned.
22. The complainant has already been provided with a list of the individual's qualifications in response to another FOIA request (case reference FS50585804) and the DfE has explained that the complainant has subsequently also requested a copy of her certificates.
23. The DfE has explained it considers that there appears to be a campaign involving the individual teacher and the school where she works. It has explained that between March 2015 and May 2016 the requester has corresponded with the DfE on 18 occasions, with 16 of the 18 pieces of correspondence relating to the school or this teacher.
24. In view of the above, the Commissioner is satisfied that it is very likely that disclosure of the requested personal data would cause damage and distress to the individual concerned.

### **The legitimate public interest**

25. With respect to the application of section 40(2) of the FOIA to the personal data of third parties, the Commissioner must weigh the public's legitimate interests in the disclosure of the information against the prejudices to the rights, freedoms and legitimate interest of the individuals concerned.
26. The Commissioner has therefore considered whether there is a legitimate interest in the public accessing the withheld information.
27. The DfE has acknowledged that there is a public interest regarding whether those teaching in schools in England are suitably qualified to undertake the roles that they are employed to undertake. It has acknowledged that it is important parents and the general public are satisfied that schools have the relevant checks and measures in place to verify a teacher's qualifications and their suitability to fulfil the roles they are employed to do.
28. However the DfE has argued that there is no legitimate interest in disclosure of the requested information to the public. It has argued that the complainant is already in receipt of a significant amount of the individual's personal information. The complainant has received confirmation of her qualifications and the DfE feels this disclosure in itself satisfies the legitimate public interest in disclosure.
29. Furthermore the DfE has also argued that it is for individual schools to make relevant checks to allow them to be satisfied that their employees

hold the qualifications they claim. With this in mind the DfE does not make such checks on behalf of schools, but does allow schools to make checks via access to the DQT.

30. The DfE has argued that the information it holds on the database is of a very personal nature and would not, if published, satisfy the public interest in teachers being suitably qualified to perform their roles. For example, it has argued that the release of a teacher's National Insurance number, personal email address, disability details or ethnicity would bear no relation to their suitability to undertake their employed role.
31. The DfE considers it is essential that teachers trust it and have confidence that it will not, without their consent, release such personal and identifiable data into the public domain.
32. The complainant has argued to the Commissioner that, in his opinion, from 2009 the individual concerned was not properly qualified to supervise fire activities in the School's Forest School environment. He wishes to know when the teacher concerned obtained her Forest School Practitioner Level 3 Certificate which he argues is the only recognised qualification for this activity. He has explained to the Commissioner that he owns a property adjacent to this Forest School and therefore has a legitimate interest in obtaining confirmation that the individual supervising the fire activities was competent.
33. The complainant has argued that the School has informed him the teacher involved does hold this certificate but has refused to provide any information that verifies the claim or the date the qualification was achieved.
34. In the decision notice for the case reference FS50585804, the School explained it has provided the complainant with all the information it holds regarding the teacher's qualifications. The DfE has confirmed to the Commissioner that it does not hold a copy of the relevant certificate.
35. In this case, the complainant has asked for *all* the information in the DQT regarding this teacher. Although the complainant has argued to the Commissioner that he requires a specific date of a particular qualification, the Commissioner is satisfied that the reasonable expectations of the individual concerned are not outweighed by any legitimate public interest in disclosure. He accepts that disclosure of the personal data in this case would be likely to cause distress. He therefore considers disclosure of the requested information would be unfair and unnecessary in the circumstances.

## **Conclusion: section 40(2)**

36. The Commissioner considers that the exemption of section 40(2) is engaged and that the DfE is correct not to disclose the withheld information. For this reason he has not gone on to consider the DfE's application of section 38(1).

## **The quality of the DfE's response**

37. The complainant initially complained about the DfE's explanation that section 40(2) is an absolute exemption and not subject to the public interest test. He also complained that in its response, the DfE did not provide any substantiation of its argument that disclosure would be unfair.

38. The Commissioner has explained to the complainant that section 40(2) of the FOIA is an absolute exemption, which means that if the condition of the exemption is satisfied, there is no additional public interest test to consider.

39. The Commissioner has explained that the consideration of fairness under section 40(2) does include an evaluation of the legitimate interests of the public. However this is not the same as a public interest test.

40. Under the FOIA, the public interest test carries an assumption of disclosure and the test is whether in all the circumstances of the case the public interest in disclosure is outweighed by the public interest in favour of the exemption.

41. However with the legitimate interest test under section 40(2), the disclosure of the information must be fair to the data subject and assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.

42. The DfE is therefore correct when it explains that the exemption at section 40(2) of the FOIA is an absolute exemption and not subject to the public interest test.

43. The Commissioner is also satisfied that the DfE's response to the complainant was adequate. It explained that it wished to apply section 40(2) of the FOIA to the request because the required information was third party personal data. It considered disclosure would be unfair and therefore in breach of the principles of the DPA. The DfE explained that in coming to this conclusion it had considered the expectations of the data subject and the effect disclosure would have. This is therefore in accordance with its obligations under section 17 of the FOIA.

## Right of Appeal

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44. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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** .....

**Rachael Cragg**  
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**Information Commissioner's Office**  
**Wycliffe House**  
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