



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

**Appeal Reference: EA/2021/0078**

**Heard remotely by video conference  
On 13 August 2021**

**Before**

**JUDGE HAZEL OLIVER  
ALISON LOWTON  
GARETH JONES**

**Between**

**MARTIN OGAZI**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**Appearances:**

Appellant – in person  
Respondent – did not attend

**Determined at a remote hearing via video (Cloud Video Platform) on 13 August 2021.**

**DECISION**

The appeal is dismissed.

# REASONS

## Mode of hearing

1. The proceedings were held by video (CVP). All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. The appellant appeared in person, and the Commissioner did not attend the hearing.

## Background to Appeal

2. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 10 February 2021 (IC-64015-M8K4, the "Decision Notice"). The appeal relates to the application of the Freedom of Information Act 2000 ("FOIA"). It concerns information requested from Beths Grammar School (the "School") about exam grades for GCSE economics.

3. GCSE grades in summer 2020 were assessed by schools rather than by external examinations due to the Covid-19 pandemic. The appellant's son was awarded a grade for GCSE economics by the School. The appellant was not happy with the grade awarded and corresponded with the School about this. On 21 August 2020 he asked how to appeal the results. The School replied on 1 September. They explained they would not be reconsidering the grade and provided him with the following information for his son –

- April report: Trial exam grade
- November report: Trial exam grade and Predicted grade
- June (Yr 9) report: Trial exam grade and Current grade

4. On 3 September 2020 the appellant wrote to the School and requested the following information (the "Request"):

*"...the following information for all students who were in year 10 with [name redacted] that took Economics;*

- 1. April report: Trial exam grade*
- 2. November report: Trial exam grade and Predicted grade*
- 3. June (Yr 9) report: Trial exam grade and Current grade*

*In the same manner in which you providing the grades for [name redacted] in your first response to my email."*

5. The appellant contacted the School again on 7 September and added the following to the Request – *"...the actual final grade given for each student for Economics."*

6. The School responded on 17 September 2020. It disclosed an anonymised version of the requested information, with names redacted and with the information presented in a randomised format, in the form of six data sets. It stated that it would not be providing the information in the format requested because to do so would breach the General Data Protection Regulation (GDPR). It therefore withheld this information under section 40(2) FOIA (personal data).

7. The appellant wrote to the School to say that it should not have randomised the data, and he had asked for the results in the same format as provided for his son in order to determine the consistency of the grading format. The appellant complained to the Commissioner on 8 October 2020. The Commissioner asked the School to carry out an internal review on 27 October. The School responded on 11 November and maintained that it could not disclose the information in the format requested.

8. The Commissioner decided:

- a. The information requested was personal data. Although the appellant had not asked for the names of the students, the Commissioner accepted that unrandomised information could allow identification of some of the individuals, particularly low or high achievers.
- b. In the circumstances, there is a legitimate interest in ensuring that the School determined the students' final grades consistently and in line with the guidance set out by Ofqual. The unusual circumstances and controversy around the awarding of GCSE grades in 2020 also indicates a legitimate interest in the information requested.
- c. However, disclosure of this information is not necessary. The School has provided as much information as possible in order to meet the legitimate interests identified while protecting the personal data of the students involved. The Commissioner was satisfied that there are less intrusive means of achieving the legitimate aims identified, and that these aims have been met by disclosure of an anonymised version of the six data sets.

### **The Appeal and Responses**

9. The appellant appealed on 10 March 2021. His grounds of appeal are:

- a. The Commissioner was wrong to decide that the test of necessity was not met.
- b. He disputes various claims made by the School to the Commissioner –
  - i. The School said the information was of limited value as various other factors were involved, but he had been given no indication by the School that other parameters were considered.
  - ii. The School did not inform him at any point that the right of appeal had lapsed.
  - iii. It was not his intention to know the identity of the students, only the grades to establish consistency.
  - iv. It would benefit the whole class to find out if there were anomalies in determining grades, due to the way the subject was taught and the significant disruption in teaching.
- c. The basis for his request was that there could be a problem with the “consistency” of the teaching provided if there was not a regular teacher in place, and the information is necessary for this purpose.

10. The Commissioner's response maintains that the Decision Notice was correct. She maintains that disclosure is not necessary under the relevant test. In addition, if a balancing test did need to be applied, data relating to children is given specific protection by the GDPR and their rights are likely to override any possibility of disclosure under FOIA. It is unlikely that the information requested would enable anyone to identify "anomalies" because the School used other parameters as well, and the appellant did not address reasonable and valid concerns about distress and upset to the students.

### **Applicable law**

11. The relevant provisions of FOIA are as follows.

**1 General right of access to information held by public authorities.**

- (1) *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.*

.....  
**40 Personal information.**

- (1) *Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
- (2) *Any information to which a request for information relates is also exempt information if –*
- (a) *it constitutes personal data which do not fall within subsection (1), 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, or*
  - (b) *would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.*

.....  
**58 Determination of appeals**

- (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.*

12. The Section 3(2) of the Data Protection Act 2018 ("DPA") defines "personal data" as "*any information relating to an identified or identifiable living individual*". This includes an individual who can be indirectly identified from that information in combination with other information. The "processing" of such information includes "*disclosure by transmission, dissemination or otherwise making available*" (s.3(4)(d) DPA), and so includes disclosure under FOIA.

13. The data protection principles are those set out in Article 5(1) of the General Data Protection Regulation (“GDPR”), and section 34(1) DPA. The first data protection principle under Article 5(1)(a) General Data Protection Regulation (GDPR) is that personal data shall be: “*processed lawfully, fairly and in a transparent manner in relation to the data subject*”. To be lawful, the processing must meet one of the conditions for lawful processing listed in Article 6(1) GDPR. These include where “*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.*” (Article 6(f)). The GDPR goes on to state that this condition shall not apply to processing carried out by public authorities in the performance of their tasks, but section 40(8) FOIA omits this provision, meaning that Article 6(1)(f) can be used as a lawful basis for the disclosure of personal data under FOIA.

14. The legitimate interests balancing test under Article 6(f) involves consideration of three questions (as set out by Lady Hale DP in ***South Lanarkshire Council v Scottish Information Commissioner*** [2013] UKSC 55):

- (i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- (ii) Is the processing involved necessary for the purposes of those interests?
- (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The wording of question (iii) is taken from the Data Protection Act 1998, which is now replaced by the DPA and GDPR. This should now reflect the words used in the GDPR – whether such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

15. In ***Goldsmith International Business School v Information Commissioner and the Home Office*** [2014] UKUT 563 (AAC), Upper Tribunal Judge Wikeley set out eight propositions taken from case law as to the approach to answering these questions. These include: “necessity” carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity; the test is one of “reasonable necessity”, reflecting European jurisprudence on proportionality; and this involves the consideration of alternative measures, so the measure must be the least restrictive means of achieving the legitimate aim in question.

## Issues and evidence

16. The issues are:

- a. Is the information asked for in the Request personal data?
- b. If so, is there a lawful basis for processing the data by disclosing it under FOIA?
  - i. Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
  - ii. Is the processing involved necessary for the purposes of those interests?
  - iii. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

17. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the withheld information.
- c. Oral submissions from the appellant at the hearing.

## **Discussion and Conclusions**

14. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

15. The appellant explained the background to the Request at the hearing. He had been concerned about his son's teaching in economics because he had been taught by different teachers and there was no consistency. He was worried this would cause a problem with the exam. He was reassured by being told his son could attend extra lessons and had achieved a certain grade in a recent assessment, and he also arranged a private tutor. However, his concerns were realised when exam grades were based on predicted results due to the Covid-19 pandemic. He believes it was hard to make a fair judgment on the final grade when there had been inconsistent teaching.

16. The appellant says he contacted the School within 24 hours of the result being released. He was told by the School they would not be appealing the result based on the data used to generate the grade, which was given as grades in trial exams and predicted grades. He was told the only option was to retake the exam. He disputes that the School told him he could appeal to the exam board until the last day.

17. The appellant feels it necessary to obtain the information so he can decide whether to appeal the exam result. The deadline for doing so has passed, but he feels the School got in his way and did not assist him with appealing. He needs data for an appeal, which is why he asked the School for the information that they told him had been used to generate the grade.

18. In answer to questions from the Tribunal, the appellant explained that data in the format he had requested would show if there were inconsistencies. By way of example, if one student had three Bs in trial exams and was awarded a final grade of A, while another student had three Bs in trial exams and was awarded a final grade of B, this would show an inconsistency. He could then ask the School about the reasons for this inconsistency. This could then be used in an appeal, for example if it showed inconsistency connected to race or for other reasons. Data in the format provided to him does not allow him to check for inconsistencies, as it is randomised.

19. ***Is the information asked for in the Request personal data?*** The appellant says that he had only asked for anonymised data. He disputes that anonymised grades would reveal the identity of students. He would struggle to find out how to identify individuals from the requested data. This was not his intention – he wanted to identify any inconsistency in predicted and final grades, not the identity of the individuals involved.

20. We accept that the appellant's intention in requesting the data was not to identify individual students. However, disclosure under FOIA is disclosure to the world at large. We accept the School's position that students may share assessment grades with each other and their parents, They may also have general knowledge about how some members of the class are doing and so be able to work out other students' grades, including where marks have been announced in class.

21. We agree with the Commissioner that disclosure of unrandomised information in the format requested by the appellant could allow identification of some of the students. This is particularly the case for the lower and higher achievers in the class, where a set of particularly high or low grades could be linked more easily with an individual student who is known to be a high or low achiever. We accept that the appellant does not wish to identify individual students. But, disclosure of the data in the format requested would potentially allow identification of the grades of individual students by the appellant, his son, other students, or others connected with those students. Trial exam grades, predicted grades and actual grades are clearly personal academic information. We accept that individual exam predictions and results are personal information which many students would wish to keep private. We therefore find that the information requested is personal data, because it is personal information that can be linked to individuals.

**22. *Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*** We find that the appellant does have a legitimate interest in making the Request. He wishes to see the data in order to identify whether there are any inconsistencies, and use this for the purposes of an appeal about the exam grade awarded by the School. As noted by the Commissioner, there is a legitimate interest in ensuring that the School determined the students' final grades consistently and in line with the guidance set out by Ofqual. This is particularly relevant in light of the unusual circumstances around the awarding of GCSE grades in 2020.

**23. *Is the processing involved necessary for the purposes of those interests?*** The Commissioner found that disclosure under FOIA was not necessary for these purposes. The appellant maintains that the data he requested is necessary in order to identify any inconsistencies in how grades were awarded, so he can use this information for the purposes of an appeal.

24. We have taken account of the information provided by the School during the Commissioner's investigation. Their letter of 19 January 2021 explained that the grades requested by the appellant was only part of the process of determining final grades. These were used to provide an initial ranking for the group of students. This was then moderated by Heads of Department, including discussions about previous assessment data, current effort levels and prior attainment. The ranking was then reviewed by the Senior Leadership Team (SLT) Line Manager, wider SLT and the Head of Centre. The School's position is that the information requested by the appellant is not reflective of the final grade awarded to the student, because each student and their circumstances was considered before a final grade was allocated to them.

25. The appellant complains that this was not explained to him at the time. He asked for this data because the School had told him they used a fixed set of parameters. It is correct that the School's email to the appellant of 1 September 2020 only referred to the data requested by the appellant, and did not provide a fuller explanation of how grades had been assessed. However, we accept that the information provided by the School during the Commissioner's investigation

is correct. We have also seen an email sent to parents (page C135 open bundle) which set this out. The initial ranking was moderated based on a range of factors and then reviewed before being finalised. This means that the data requested by the appellant would not provide an accurate way of assessing inconsistencies in final grading, because it does not show all of the matters taken into account. This would not assist the appellant, or others interested in the consistency of grading.

26. The appellant also complains that the School did not inform him that his right of appeal has lapsed. It does appear that the School's email of 1 September 2020 did not explain the appeal process. An email of 3 September did refer to contacting the exam board. The deadline for contacting the exam board of 17 September was given in the School's refusal notice of the same date. The School could have helped the appellant by providing this information earlier. However, this does not mean that disclosure was necessary for the purposes of an appeal.

27. The test is whether disclosure was a "reasonably necessity". The appellant's interests in the information are to establish any inconsistencies for the purposes of a possible appeal, and there are also wider interests in consistency in the context of how GCSE grades were awarded in 2020. We accept that the information provided by the School in an entirely randomised format does not allow any assessment of consistency to be made. We do not agree with the Commissioner that this randomised data was a less intrusive means of achieving the legitimate aims identified. However, it is clear that the information requested by the appellant would provide only a partial picture of how grades were awarded, as there was also a moderation and review process which looked at individual circumstances. We therefore find that disclosure was not reasonably necessary for these purposes, because it would provide an incomplete picture and only further these interests in a limited way.

28. For completeness we have gone on to consider the balancing test, on the assumption that the test of necessity had been met.

29. ***Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?*** The appellant argues in his appeal that the disrupted teaching in economics meant there could not be a consistent continuous assessment of and familiarity with the students by the teacher. He says it would actually be beneficial to the entire economics class if it found there were anomalies in the means of determining their grades.

30. As already discussed, disclosure of the requested information would only further these interests in a limited way, because it provides an incomplete picture of how grades are assessed. Identification of anomalies might benefit some of the students who took economics, and be of more general public interest, but the requested data is unlikely to be an accurate way of determining anomalies.

31. This must be balanced against the privacy rights of the students whose personal data might be revealed by disclosure of the requested information. This is data about children (individuals under the age of 18, as GCSEs are usually taken at ages 15 or 16). Personal data relating to children is given specific protection under the GDPR. Recital 38 GDPR states, "*Children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data*". In the context of the balancing test, Article 6(f) GRPR refers to protection of personal data, "*in particular where the data subject is a child*". This means that the privacy



interests of the students should be given additional weight in the balancing test. Individual students may not wish their assessment grades, predictions and final grades to be known publicly. They would have no expectation that this would happen. Disclosure under FOIA would cause distress to these students, particularly if they were low achievers and/or vulnerable, or may be challenged by other students about their grades.

32. The appellant has said that it may benefit the economics students to find out if there were anomalies. Although the information would be of interest to some individuals, the requested information is incomplete and so not an accurate way of identifying anomalies. The fact that this might benefit some students does not prevent disclosure from breaching the privacy rights of other students, which must be given particular weight because the students are children.

33. We therefore find that disclosure of the information requested by the appellant under FOIA would be unwarranted because of the prejudice to the privacy rights of the children involved.

34. We uphold the Commissioner's decision that the School was entitled to rely section 40(2) FOIA (personal data) to withhold the requested information and we dismiss the appeal.

Signed: Hazel Oliver  
Judge of the First-tier Tribunal

Date: 27 August 2021  
Promulgation Date 31 August 2021