

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 October 2014

Public Authority: Department for Education
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested from the Department for Education an electronic audio recording of a Professional Conduct Panel hearing concerning a named teacher, which took place in November 2013.
2. The Commissioner's decision is that the Department for Education has correctly applied section 40(2) of the FOIA to withhold the requested information.

Background information

3. This case relates to Professional Conduct Panel hearings concerning the conduct of teachers. These hearings investigate whether there has been unacceptable professional conduct, conduct that may bring the profession into disrepute or a conviction at any time of a relevant offence and, subject to a panel's conclusion, result in a decision about whether a prohibition order is necessary.
4. Unless the panel agree on a private session, Professional Conduct Panel hearings are held in public with audio recordings being taken. Written transcripts of open sessions are not taken and the Department for Education (the DfE) routinely publishes summaries of cases and their outcomes.
5. Audio recordings of panel hearings are made by the National College for Teaching and Leadership (NCTL) to ensure that it has a clear record of

what has been said at hearings. This is particularly useful when considering appeals or judicial reviews. Recordings are also kept should later allegations be brought against the teacher.

6. Prior to the start of a hearing, individuals are told that it will be recorded. However, the NCTL does not indicate (implicitly or expressly) in any document or during the hearing itself, that the audio recording will be provided on request to any individual.
7. From 5-7 November 2013 a Professional Conduct Panel (the Panel) of the (NCTL)¹ convened to consider the case of a teacher, (name redacted). The hearing took place in public and was recorded.² The decision of the Panel was that it would not be proportionate or appropriate to impose a prohibition order. A 15 page summary of the hearing is available to the public on the Government's website.³

Request and response

8. On 22 April 2014 the complainant wrote to the Department for Education (DfE) and requested information in the following terms:

"Under the Freedom of Information Act 2000, please provide me with an electronic copy of either the audio recording or at your discretion the transcript of the Professional Conduct Panel hearing of (name redacted) which took place in November 2013. I understand that the hearing took place in public so there should not be any privacy issues: I remind you of the recent Information Tribunal ruling in Tredrea (EA/2013/0041) ('Tredrea) which found that section 40 is not engaged in respect of the personal data of those who participate in a public hearing.

¹ <https://www.gov.uk/government/organisations/national-college-for-teaching-and-leadership>

² <https://www.gov.uk/government/publications/teacher-misconduct-forthcoming-professional-conduct-hearings>

³ [https://www.gov.uk/government/publications/teacher-misconduct-panel-outcome-\(name-redacted\)](https://www.gov.uk/government/publications/teacher-misconduct-panel-outcome-(name-redacted))

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325485/No_order_made_\(name_redacted\)Rachel](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325485/No_order_made_(name_redacted)Rachel)

Please also provide me with an electronic copy of the bundle provided to the Panel, as well as the "additional documents" admitted late and referred to in the case's 'summary of evidence'."

9. The DfE responded on 16 May 2014. It stated that it held the requested information but was withholding it under section 40(2) of the FOIA as it included personal data the disclosure of which it said would be unfair under the Data Protection Act 1998.
10. On 16 May 2014, the complainant requested an internal review. He pointed out that as the hearing was in public the individuals concerned could not have had any expectation of privacy. Furthermore, he referred to the Information Tribunal ruling in the case of Tredrea which he said found that the transcripts of public disciplinary hearings did not engage section 40(2) of the FOIA.
11. Following an internal review the DfE wrote to the complainant on 12 June 2014. It stated that it was upholding its earlier decision to withhold the requested information under section 40(2) of the FOIA. It also said that it would be relying on section 31(2)(c) of the FOIA on the basis that disclosure would be likely to prejudice the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

Scope of the case

12. The complainant contacted the Commissioner on 12 June 2014 to complain about the way his request for information had been handled. He said he only wanted to contest the DfE's refusal to disclose the audio recording not its refusal in relation to the documents. He also said he would be happy to accept a transcript rather the audio recording as he had indicated in his original request.
13. The Commissioner contacted the DfE on 26 June 2014 in relation to the scope of the complainant's complaint and the fact that he would be willing to accept a transcript rather than an audio recording.
14. The DfE responded by telephone on 30 June 2014 and clarified that it didn't hold a transcript of the hearing just an audio recording.
15. On 17 July 2014 the Commissioner wrote to the complainant and confirmed that the scope of his investigation would be restricted to his request for the audio recording only.

Reasons for decision

16. The DfE has applied the exemptions under sections 40(2) and 31(2)(c) of the FOIA to withhold the requested information. The Commissioner will now deal with each exemption in turn.

Section 40(2) of the FOIA

17. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
18. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:
- “data which relate to a living individual who can be identified –
- (i) from those data, or
 - (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”
11. The two main elements of personal data are that the information must ‘relate’ to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
12. Although the Commissioner has not listened to the requested information which comprises of an audio recording of the Professional Conduct Panel convened on 5 -7 November 2013 he understands from the DfE that it contains information relating to a named teacher, a pupil and other third parties that were involved in the hearing. This information (especially when considered with the published online summary) relates to living individuals from which they could be identified.
13. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that “Personal data shall be processed

fairly and lawfully". Furthermore, at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

19. The Commissioner's approach to assessing fairness is set out in his guidance on 'personal information' at paragraph 44 which lists the four main issues to be considered. They are as follows;⁴

- whether the information is sensitive personal data;
- the possible consequences of disclosure on the individual;
- the reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and
- any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.

Any sensitive personal data

20. Sensitive personal data is defined by section 2 of the DPA as personal data consisting of information as to—

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union,
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf

21. As mentioned above, if the disclosure of sensitive personal data is considered to be fair, a condition in both Schedule 2 and 3 must also be met. However, the Commissioner's approach is that if the information is sensitive personal data, this should first be taken into account as part of the assessment of fairness, before, if necessary, going on to consider Schedule conditions.
22. In this case, it is clear from the published online summary and the details provided to the Commissioner by the DfE that the requested information contains sensitive personal data. The case itself involves allegations of a sexual nature and sexual preference relating to both the teacher and the pupil. The sensitivity of this information is particularly heightened when put in the context of an audio recording. This recording not only reveals exactly what was said but also how it was said.
23. Although the Commissioner accepts that a printed version of some of the requested information has been made available to the public in the published summary this is not the same as a full audio recording. The latter would record everything that was said verbatim and the way it was said. The former would simply be a selected and edited summary at the writer's discretion.
24. The Commissioner also accepts that any member of the public (including the complainant) could have attended the hearing and listened to the proceedings. However, this is not the same as being in possession of an audio recording that could be referenced at any time in the future.
25. The complainant has made reference to the fact that the hearing was one which any member of the public could have attended and has also suggested that First Tier Tribunal decision in the case of Tredrea was authority for the point that transcripts of public disciplinary hearings do not engage section 40(2) of the FOIA.
26. The DfE has argued that the case of Tredrea is distinguishable from the present one for a number of reasons. Firstly, the Tredrea hearing involved a doctor, panel members and witnesses to assess the doctor's fitness to practice. Elements of the case that discussed the doctor's health were heard in private (i.e. her sensitive personal information). The Tribunal concluded that while some of the information in the transcript did not engage section 40(2) of the FOIA, those parts that related to the doctor's health did. The present case involved a teacher, pupil and witnesses. The hearing recorded allegations of a sexual nature and sexual preference. This is sensitive personal information relating to both the teacher and the pupil. Unlike the Tredrea case, the DfE does not believe that it is possible to isolate this information from the rest of the evidence. It believes that all of the evidence relates to the nature of

the relationship between the teacher and the pupil and therefore all surrounds sensitive personal information.

27. As all of the requested information is inextricably linked to sensitive personal data, the Commissioner believes that the data subjects concerned would have a reasonable expectation that this information would not be disclosed to the world at large under the FOIA.

The possible consequences of disclosure on the individual

28. The DfE has stated to the Commissioner that the disclosure of an individual's personal and sensitive personal data , both without their consent or any expectation of it being made public, particularly in an audio format, would lead to unwarranted and substantial damage and distress being experienced by the data subjects. The DfE believes that this presents a potential breach of the 6th Data Protection Principle (the rights of individuals).
29. The Commissioner accepts that disclosing an audio recording has the potential to cause distress to the data subjects and expose them to intrusive attention. He also believes that the consequences of disclosing an audio recording, is more serious than that of publishing a transcript or summary for the reasons stated above.

The reasonable expectations of the individual

30. Although individuals are told at the outset that Professional Conduct Panel hearings will be audio recorded, as mentioned above, the NCTL does not indicate (implicitly or expressly) in any document or during the hearing that the audio recording will be provided on request to any individual. The DfE therefore takes the view that the teacher concerned or any of the parties involved (in particular the pupil and the witnesses) would not have had any reasonable expectations that the audio recording would be disclosed under the FOIA.
31. To confirm its approach the DfE informed the Commissioner that it approached the relevant parties who it said had subsequently confirmed their unwillingness to provide consent by vehemently refusing the request.
32. The complainant, on the other hand, makes the point that as the hearing was in public, any member of the public could have attended and for that reason the data subjects that participated in it would not have had a reasonable expectation of privacy. Furthermore, he makes reference to the decision of the First Tier Tribunal in the case of Tredrea where the judge stated (in relation to a request for a *transcript* of a fitness to practice hearing) that the GP concerned would not have a

legitimate expectation of confidentiality extending to any part of the record of the public hearing except those parts that contained medical information about her (as this would be her sensitive personal data).

33. The DfE has drawn a distinction between the 'Tredrea' decision and the present one. The former case concerned the request for a transcript of a fitness to practice hearing whereas the present one concerns the request for an audio recording.
34. The DfE has informed the Commissioner that in its view a transcript of a hearing would provide a substantially less emotive record of events than that of a live audio recording. It said that audio recordings capture the emotions felt and expressed by each and every participant (subject, witness or otherwise) whilst recorded voices and accents can lead to the identification of participants. The DfE believes that the making available of such recordings could lead to future witnesses being intimidated by the possibility of their statements being made public. They may be reluctant to provide testimony and this, in turn could critically undermine the process or credibility of the hearing panels themselves. The DfE takes the view that these considerations mitigate against the provision of a recording which would not apply to a transcript.
35. The Commissioner accepts the DfE arguments that the disclosure of a transcript would provide a substantially less emotive record of events than a full live audio recording.
36. The Commissioner believes that the data subjects would have had a reasonable expectation that the audio recording of the hearing was being made as a record, to assist the panel in producing the report. He also believes that they would have known that anyone present in the public hearing would have heard the proceedings. He also accepts that they may have been aware that media reports of the proceedings might remain accessible in the future. However, the Commissioner takes the view that none of these types of disclosure would expose the same level of detail or be as intrusive as would be disclosing the audio recording. The Commissioner has therefore concluded that it would be hard to argue that there was a reasonable expectation of disclosure in this case.

The legitimate public interest

37. The Commissioner considers that there is a legitimate public interest in the disclosure of information relating to the misconduct of teachers and the processes and procedures in place which demonstrates that this is investigated and dealt with appropriately.
38. He also believes that there is a public interest in the disclosure of information that demonstrates that the NCTL's Professional Conduct

Panel hearings are operating effectively. Some of these hearings are held publicly (with audio recordings) and case summaries and/or outcomes are routinely published.

39. The Commissioner considers that disclosure of the case summaries/outcomes and the fact that some of the hearings are public goes a long way to meeting the legitimate public interest in this case in relation to the investigation and consideration of misconduct by teachers.
40. The Commissioner has gone on to consider what is the legitimate public interest in having the audio recording, as opposed to the detailed published report of the hearing, being made available but is not persuaded that the extra level of detail provided by the audio recording is necessary.
41. The DfE has suggested that disclosure of audio recordings might critically undermine the process or credibility of the Professional Conduct Panels which would not be in the public interest. The DfE has argued that audio recordings capture the emotions felt and expressed by each and every participant whilst recorded voices and accents can lead to the identification of participants. The DfE believes that the making available of such recordings could lead to future witnesses being intimidated by the possibility of their statements being made public. This might result in them being reluctant to provide testimony which in turn could undermine the process or credibility of the hearing panels.
42. The Commissioner accepts whilst there is a public interest in knowing that the misconduct of teachers is being adequately and thoroughly investigated he believes that any disclosure that might undermine the effectiveness of the Professional Conduct hearings would not be in the public interest.
43. The Commissioner has taken into account the time which has elapsed between the actual incidents taking place (between January 2006 and July 2007) concerning the teacher and the pupil in the present case and the actual Professional Conduct Panel hearing in November 2013 and the complainant's request in April 2014. The Commissioner accepts the DfE's arguments that the seven year time gap between the incidents themselves and the subsequent hearing and the complainant's information request, means that any need or wider public interest has substantially diminished.
44. The Commissioner has also considered the Tredrea case which the complainant has suggested is authority for the proposition that transcripts of public disciplinary hearings do not engage section 40(2) of the FOIA and therefore should be disclosed.

45. The first point the Commissioner would like to make is that First Tier Tribunal hearings (such as the one in Tredrea) are not binding on him.
46. Secondly, he believes that the decision in Tredrea is distinguishable from the present case for a number of reasons. Firstly, in the Tredrea case there was some suggestion that the doctor was dishonest. That is the situation in the present case. Secondly, the Tredrea was decided on its own particular facts and doesn't lay down a general principal on the disclosure of transcripts of public disciplinary hearings. Thirdly, the Tredrea case was concerned with the disclosure of a transcript whereas the present case relates to the disclosure of an audio recording of a disciplinary hearing. Forthly, the GMC in the Tredrea case has been granted leave to appeal to the Upper Tribunal. Finally, it was easier to isolate the aspects of the Tredrea case relating to the doctor's sensitive personal data concerning her health (which the Tribunal concluded should not be disclosed). The present case involves allegations of a sexual nature and sexual preference relating to both the teacher and pupil which are inextricably linked to all of the evidence discussed at the hearing.
47. The Commissioner has concluded it would be unfair to disclose the requested information and that section 40(2) by virtue of section 40(3)(a)(i) FOIA was applied correctly in this case.
48. As the Commissioner is satisfied that section 40(2) of the FOIA has been correctly applied by the DfE in this case he has not gone on to consider the application of section 31(2).

Right of appeal

49. 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

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

50. 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.

51. 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

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