

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 May 2020

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

Decision (including any steps ordered)

1. The complainant has requested the audio recording of a Professional Conduct Panel hearing into a case against five teachers. The request was refused by the Department for Education (the DfE) under section 40(2), 31(2) and 14 of the FOIA.
2. The Commissioner's decision is that the public authority has correctly applied the section 40(2) exemption to the request and there is no lawful basis for disclosing the requested information.

Request and response

3. On 19 December 2019 the complainant made a request to the DfE in the following terms:

"On 19th October 2015, the National College for Teaching and Leadership Professional Conduct Panel began a hearing into the case of Mr. Monzoor Hussain, Mr. Hardeep Saini, Mr. Arshad Hussain, Mr. Razwan Faraz, and Ms. Lindsey Clark. The hearing ran until the 23rd of June 2016, following which the post-trial legal arguments began. The hearing was discontinued on 30th May 2017 after it was discovered there had been, on the part of the NCTL, "an abuse of the process" of such seriousness that it offend[ed] the panel's sense of justice and propriety. What ha[d] happened ha[d] brought the integrity of the process into disrepute.

The outcome of the hearing was published on 13th June 2017:

<https://www.gov.uk/government/publications/teacher-misconduct-panel-outcome-mr-monzoor-hussain-mr-hardeep-saini-mr-arshad-hussain-mr-razwan-faraz-ms-lyndsey-clark>

On page 3 of that document, it's clearly stated: The hearing took place in public and was recorded. The panel's decision as announced in public.

*Therefore, the following should be an innocuous freedom of information request. I would like to request a copy of the **entire audio recording** of that hearing. It is my understanding that the recording does not exist in a single file; it is multiple files, made over the course of proceedings. I am requesting all of them; i.e. the full recording of the proceedings."*

4. The DfE responded on 21 January 2019 and confirmed the requested information was held. The information was refused on the basis of section 40(2) and 31(2)(c) of the FOIA.
5. The complainant requested an internal review on 25 January 2019. An internal review was conducted on 26 February 2019. The internal review found the section 40(2) and 31(2) exemptions had been correctly applied and also indicated the section 14 exemption was applicable as complying with the request would cause a disproportionate level of disruption or distress due to the time needed to comply.

Scope of the case

6. The complainant contacted the Commissioner on 6 June 2019 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld information within the scope of the request on the basis of section 14 of the FOIA or either of the exemptions at section 40(2) or 31(2) of the FOIA.

Background

8. The information in this case relates to the so-called 'Trojan Horse' affair. This involved investigations into the alleged infiltration of Islamist extremists into the education sector in Birmingham. As part of these investigations, a Professional Conduct Panel hearing was undertaken, including the individuals named in the request. These hearings investigate whether there has been 'unacceptable professional conduct', 'conduct that may bring the profession into disrepute' or 'conviction, at any time, of a relevant offence'.

9. These hearings are held in public with audio recordings being taken and the DfE routinely publishes summaries of cases/outcomes as they did in this case in June 2017. Audio recordings are made by the NCTL to ensure a clear record of what was said at hearings is held and in the event that future allegations are brought against the teachers in question.

Reasons for decision

Section 14 – vexatious requests

10. Section 14(1) provides that a public authority is not obliged to comply with a request that is vexatious. In this case the DfE cited section 14(1) on the basis of the burden that it believes the request would impose upon it.
11. Ordinarily, where the concern of a public authority is about the burden of a request, the relevant provision of the FOIA would be section 12(1). This section provides that a public authority is not obliged to comply with requests where the costs of doing so would exceed a limit. However, a public authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information, which was the concern of the DfE in this case.
12. A public authority may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation. This can include the time spent on considering exemptions and making redactions or, in this case, anonymising information.
13. However, the Commissioner considers there to be a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information and
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO and
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
14. The Commissioner has considered the representations from the DfE to understand to what extent the request would impose a burden.

15. The DfE has explained the withheld information consists of 43 days worth of audio recordings that are contained on a number of discs and USBs. The DfE considers that to ensure no personal information is unfairly or unlawfully released it would need to analyse every single minute of hundreds of hours of audio material to ensure personal information is removed or 'bleeped' out.
16. The DfE considers that as the hearings relate solely to accusations made against, and evidence given by individuals, it would be impossible to anonymise the recordings themselves as all the material relates to the individuals concerned and the allegations made. The DfE therefore considers that complying with the request would put an undue and unreasonable burden on it.
17. In addition to this it is argued the DfE investigative team has limited resources as well as having a number of other current and live investigations. To add further burden on the investigate team of having to re-examine 43 days' worth of audio recording in scope of the request whilst other investigations are 'live' would unnecessarily prolong current live investigations and possible delay further hearings. The DfE also argues it would divert resources away from key roles.
18. The DfE has been able to establish the exemptions likely to apply to the information and, in fact, in the case of section 40(2) has not suggested there would be information in scope not covered by this exemption. It is difficult to see how this would create an unreasonable burden on the DfE.
19. In terms of the argument about the diversion of resources from other live investigations; again as it is not apparent how complying with the request would be burdensome given the blanket application of the exemptions the Commissioner is not minded to accept there would be a significant diversion of resources from other key roles.
20. The Commissioner does not therefore consider that section 14 can be applied in this case and the request is not vexatious. She has therefore gone on to consider the use of the other exemptions to refuse the request.

Section 40 – personal data

21. Section 40(2) of the 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.

22. 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 General Data Protection Regulation ('GDPR').
23. 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 the FOIA cannot apply.
24. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

25. Section 3(2) of the DPA defines personal data as:

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

26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. 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.
28. 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.
29. The request specifically asked for the audio recordings of the hearing. The Commissioner understands that as well as the summary of the hearing that has been published the full transcripts were also provided to certain individuals such as the lawyers for the teachers. However, the

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

Commissioner the full transcripts are not publicly available beyond their dissemination to select individuals involved in the hearings and appeals.

30. The audio recordings would therefore reveal the identities of individuals involved as well as attributing specific comments and opinions to those individuals. The personal data would therefore be significant and would also capture information related to religious views due to the hearing relating to alleged extremism, even where comments made are not explicitly about religion the personal data captured will be intrinsically linked to this by the very nature of the hearing.
31. In the circumstances of this case, having considered the nature of the information, the Commissioner is satisfied that it would relate to several data subjects involved in the hearing. She is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
32. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
33. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

35. 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.
36. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
37. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

38. Information relating to special category data is given special status in the GDPR.

39. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
40. The Commissioner is of the view that the requested information does include special category data. Whilst not all of the withheld information would be special category data there will be clear references to the religious beliefs of some of the individuals and the entirety of the hearing will be to discuss this in some form or another; as such it would be difficult to separate out the special category data without rendering some of the remaining information meaningless, particularly as the request concerns audio recordings.
41. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
42. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
43. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
44. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing any special category data in the recordings would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
45. The Commissioner has gone on to consider if there is an Article 6 condition to allow for the lawful processing of the remaining personal data in the audio recordings that is not special category data.

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

46. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
47. 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.

48. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, 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.
49. 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

50. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.

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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

51. 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.
52. The Commissioner understands that the complainant considers the audio recordings to be primary and most accurate source of what was said in the hearing. The complainant argues that the audio files will contain important information not found elsewhere such as how statements were spoken including intonation and emotion. The complainant argues this is essential for public scrutiny and transparency in this case.
53. The DfE recognises there are legitimate interests in transparency and accountability.

Is disclosure necessary?

54. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
55. The DfE considers that the disclosure of the summary of the hearing and the subsequent report following an investigation into the 'Trojan Horse' case goes a long way to meeting any legitimate interest in the disclosure of the full audio recordings. There is also information already in the public domain such as the names of the individuals alleged to be involved and some of the details of the nature of the allegations.
56. Whilst the Commissioner accept that there is already information in the public domain about this case it is noted that the complainant does not consider this meets his request or the legitimate interests he is trying to pursue. The complainant requires to know the specific ways in which statements were spoken and the emotion used in order to fully understand how views were presented in the hearing. Disclosure of the requested information is therefore 'necessary' to meet the legitimate interests identified by the complainant.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

57. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For

example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

58. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
59. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
60. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
61. The Commissioner has previously considered a request for an audio recording of a misconduct hearing³ and, whilst the circumstances are not identical, there are certain parallels to be drawn. As in that case the Commissioner accepts the disclosing an audio recording has the potential to cause distress to the data subjects and expose them to intrusive attention. The Commissioner also continues to maintain that disclosing an audio recording is more serious than publishing a transcript or summary.
62. The DfE acknowledges the information relates, for the main part, to the individual's working lives rather than their private lives but in any event there is no expectation this information will be made public and no reference given at these hearings that recordings will be publicly accessible. The Commissioner accepts that data subjects involved in hearings would have a reasonable expectation that details disclosed in these hearings to the level that would be disclosed in the audio recordings would be kept confidential even if the outcome is made public.

³ ICO Decision Notice FS50544464

63. The Commissioner recognises the general expectation of privacy that is provided with regard to investigations or hearings. This has been confirmed by the Information Tribunal in several instances and in case EA/2008/0038 it was noted that "*there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters.*"
64. The audio recordings also contain personal data of witnesses as well as details of the allegations that may not be in the public domain. Disclosure against the reasonable expectations of these individuals is likely to cause distress particularly when having regard for the nature of the information and the allegations that were investigated.
65. The DfE considers that making the recordings available 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 undermine the process or credibility of the hearing panel themselves.
66. The DfE also believes that disclosing the recording could have a considerable impact upon the five named teachers as once released there is no control over how the recordings could be circulated, referenced or edited. Given that the hearing was discontinued and the allegations were not pursued and no action taken by the DfE against the teachers, the DfE is concerned that perpetuating the circulation of allegations whose veracity was never fully investigated or resolved would be fundamentally unfair to the teachers.
67. The complainant argues that the audio files contain information about the hearing not available in any other way such as information on how words were spoken, volume and emotion. He argues there is a great public interest in this matter and not having access to all information relating to the hearings is an impediment to reporting on and understanding the issue.
68. The Commissioner again stresses that as far as she is aware the transcript of the hearings is not publicly available and therefore she cannot ignore that disclosing the audio recordings would involve placing a significant amount of previously unknown information into the public domain. The Commissioner considers recordings to be more sensitive than transcripts due to the nature of the way information is held, with comments directly attributed to individuals and showing emotion.

69. The Commissioner considers that disclosure of the case summary and later the report goes a long way to meeting the legitimate public interest in this case in relation to allegations and how these were investigated.
70. The Commissioner agrees that it is the general expectation of the data subjects concerned that their personal data will remain private and confidential and will not be disclosed to the world at large. Disclosure under the FOIA would confirm to the world at large very specific details of the allegations and how these were investigated, directly attributing comments and opinions to named individuals as well as revealing details about witnesses and those involved in the proceedings.
71. Taking into account what information has already been disclosed by the DfE and the information already in the public domain via press reports, the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects. Individuals involved in the hearing would not have any expectation that the information, particularly in the form of audio recordings, could be disclosed into the public domain and disclosing this information is likely to cause some distress and upset.
72. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing the information which is not special category information and so the disclosure of the information would not be lawful.
73. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent. The Commissioner has also not gone on to consider the section 31 exemption.

Right of appeal

74. 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

75. 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.
76. 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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