

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 November 2021

Public Authority: General Teaching Council Northern Ireland
Address: Albany House
73-75 Great Victoria Street
Belfast
BT2 7AF

Decision (including any steps ordered)

1. In a multi-part request, the complainant requested information from the General Teaching Council Northern Ireland (GTCNI) relating to its Publication Scheme, meetings, minutes of meetings, procedures and its handling of complaints/referrals about teachers. The complainant also requested further, related, information in a subsequent request.
2. GTCNI ultimately provided some information but withheld the remainder citing sections 22 (information intended for future publication), 40(2) (personal information) and 42 (legal professional privilege) of FOIA.
3. The Commissioner investigated its application of sections 22 and 40(2) to the information withheld by virtue of those exemptions.
4. The Commissioner's decision is that GTCNI correctly withheld information withheld by virtue of section 40(2) but that section 22 is not engaged.
5. She also found procedural errors relating to GTCNI's overall handling of the requests.
6. The Commissioner requires GTCNI to take the following steps to ensure compliance with the legislation:
 - issue a fresh response with regard to the information within the scope of part (2) of the request dated 13 May 2019, namely "*copies of all approved GTC committee minutes since April 2018*";
 - issue a response to the request for information dated 16 July 2019.

7. GTCNI must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

8. GTCNI¹ is the professional body for teachers in Northern Ireland:

"GTCNI was established by the Education (NI) Order 1998 to provide a range of functions including maintaining a Register of teachers, regulating the teaching profession and providing advice to DE and employers about important professional issues including registration and professional standards.

The General Teaching Council for Northern Ireland (Registration of Teachers) (Amendment) Regulations (Northern Ireland) 2015 gives GTCNI the power to remove a teacher from the Register on the grounds of misconduct. This legislation also means individual teachers can make representations to GTCNI and that any teacher, who has been removed from the Register, has the right of appeal to the High Court".

Request and response

9. On 13 May 2019, the complainant wrote to GTCNI, making a multi-part request for information comprising 16 items. For the purposes of this decision notice, the relevant parts of that request are:

1. I seek a copy of the GTC's Publication Guide and any Information Guide which accompanies it.

2. As there are no minutes currently published on the GTC website for 2019, I ask for copies of all approved Council Minutes so far this year and those outstanding from June 2018 (none of these are on the website). In addition I ask for copies of all approved GTC committee minutes since April 2018.

¹ <https://gtcni.org.uk/>

5. Please provide written details on the GTC's procedures enabling Council members not in attendance, either at GTC Council meetings or at one of its Committees, to carry out their oversight responsibilities when issues are dealt with "in Committee"?

10. Since the transfer of power to GTC (in 2015) to consider cases and remove teachers from the Register –

a) How many cases/ referrals were outstanding when this power was passed to the Council?

b) How many cases/referrals have been referred in each of the years since then. Please quantify the numbers in each of the following years 2015, 2016, 2017, 2018, and to date in 2019?

c) How many cases/referrals has the Council processed through all of the stages in each of the following years 2015, 2016, 2017, 2018, and to date in 2019?

d) How many cases/referrals are still pending from each of the following years 2015, 2016, 2017, 2018, and to date in 2019?

e) How many teachers have been removed from the Register by the Council in each of the following years 2015, 2016, 2017, 2018, and to date in 2019?

d)[sic] Please provide a copy of the process used by Council to address cases/referrals prior to the 30 January 2019.

e)[sic] How is it possible to access the outcomes of any cases previously dealt with?"

10. The Commissioner notes the duplication within the subsection labelling in part (10) of the request. For the purposes of this decision notice, she will refer to the last two subsections as (f) and (g).

11. GTCNI responded on 10 June 2019. It denied holding recorded information within the scope of some parts of the multi-part request. With respect to the information it does hold, while it variously provided information and explanations in response to the multi-part request, it did not cite any specific exemptions.

12. The complainant requested an internal review on 16 July 2019. Having considered the response to part (5) of the request, he also made a fresh request in which he sought further information:

"As my request asked for written details of the process please direct me to where this is stated within the GTC procedures, the Corporate Governance Framework or the Standing Orders. Please

regard this as a fresh FOI request. I also request details as to the number of Council members requesting such an update following each "in committee" meeting in the last two years. Separately I ask how many Council members have the Chair or the Vice Chair felt a requirement to provide an update to after each of those "in Committee" meetings? I look forward to these additional FOI requests being answered."

13. GTCNI finally provided an internal review on 30 July 2020 in which it revised its position, formally confirming its application of section 42(1) (legal professional privilege) and variously citing sections 22 (information intended for future publication) and 21 (information accessible to applicant by other means) of FOIA.

14. In relation to the request dated 16 July 2019, GTCNI told the complainant:

"In relation to question five I have asked that the Chair register your new request as a fresh FOI".

Scope of the case

15. The complainant first contacted the Commissioner on 28 June 2020 regarding his request for information dated 13 May 2019. In correspondence dated 29 June 2020 he submitted a separate complaint. That complaint was about GTCNI's handling of a different request, namely the request for information dated 16 July 2019.

16. Following further correspondence, the complainant contacted the Commissioner on 3 September 2020 confirming the nature of his complaint about the way his requests for information dated 13 May 2019 and 16 July 2019 had been handled.

17. He expressed dissatisfaction with the length of time GTCNI took to carry out an internal review of his request for information dated 13 May 2019. He also raised procedural issues with respect to GTCNI's compliance with section 17, notably its failure to cite exemptions in its response dated 10 June 2019 and its failure to advise him of his right to request an internal review. He also complained about GTCNI's handling of parts (1), (2) and (10) of his request for information:

- he complained that the GTCNI has failed to comply with its duty to have a publication scheme (part (1) of the request);

- he disputed GTCNI's application of sections 21 (information accessible to applicant by other means) and 22 (information intended for publication) to part (2) of the request;
 - he disputed its application of section 42(1) (legal professional privilege) to part (10) of the request, on the grounds that the information requested was largely of a numerical nature. He therefore considered that the requests within the scope of (10)(a-e) could have been fulfilled.
18. With respect to his request for information dated 16 July 2019, he complained that GTCNI had failed to respond to that request.
 19. The complainant also raised other matters that are outside the remit of this decision notice.
 20. As is her practice, the Commissioner wrote to both parties setting out the scope of her investigation, namely GTCNI's handling of parts (1), (2) and (10) of the original request and its handling of the fresh request, dated 16 July 2019, arising from part (5) of the original request.
 21. In light of the complainant's view that the information requested at part (10) of the request was largely of a numerical nature, and could therefore be provided, the Commissioner raised this matter specifically with GTCNI.
 22. In order to progress her investigation, the Commissioner found it necessary to issue the Chief Executive of GTCNI with an Information Notice (IN), in accordance with her powers under section 51 of FOIA.
 23. With respect to part (1) of the request, during the course of the Commissioner's investigation, GTCNI confirmed that it has now adopted her model publication scheme.
 24. At part (2) of the request, the complainant requested '*copies of all approved Council Minutes so far this year and those outstanding from June 2018*' and '*copies of all approved GTC committee*'.
 25. In its submission, GTCNI confirmed that details of all approved Council Minutes had been published. The Commissioner addresses its handling of the remaining information within part (2) of the request below.
 26. Having revisited its handling of part (10) of the request, GTCNI clarified its response and provided the Commissioner with a copy of the withheld information. Although not explicitly citing an exemption in respect of the withheld numerical information within the scope of parts (10)(a-e) of the request, the Commissioner considers that its arguments relate to section

- 40(2) (personal information). GTCNI referred to section 42 of FOIA with respect to the information requested at parts (10)(f-g).
27. In light of the above, the analysis below considers the application of section 22 to the withheld minutes within the scope of part (2) of the request and section 40(2) to the withheld numerical information within the scope of parts (10)(a-e) of the request.
 28. The Commissioner has not considered GTCNI's handling of parts (10)(f-g) of the request given the complainant's emphasis on the numerical aspect of the information requested at part (10) of the request.
 29. The Commissioner has also considered the procedural matters arising from GTCNI's handling of the requests for information.
 30. She has considered GTCNI's handling of the internal review in 'Other matters' below.

Reasons for decision

Section 22 information intended for future publication

31. Section 22(1) of FOIA states that information is exempt if -
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
 - (b) the information was already held with a view to such publication at the time when the request for information was made, and*
 - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).*
32. It is a qualified exemption and therefore, if it is engaged, it is subject to the public interest test.
33. In correspondence with the complainant, GTCNI variously told him that it is not current practice to publish committee minutes, and that section 22 applied.
34. During the course of the Commissioner's investigation, GTCNI explained the process relating to minutes.

35. Based on that explanation, the Commissioner is not satisfied that GTCNI has demonstrated that it intended to publish the requested copies of all approved GTC committee minutes since April 2018, at any point.
36. Accordingly the Commissioner does not find section 22 engaged.

Section 40 personal information

37. Section 40(2) of 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.
38. In this case the relevant condition is contained in section 40(3A)(a)². 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').
39. 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 FOIA cannot apply.
40. 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?

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

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

42. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
43. 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.

² As amended by Schedule 19 Paragraph 58(3) DPA.

44. 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.
45. In response to part (10) of the request, GTCNI told the complainant that GTCNI has received referrals relating to allegations of teacher misconduct in accordance with its powers. It provided the complainant with details of the number of initial referrals received since 2015 and, of those, the number that have been closed and the number either classified as 'Cases at Screening Stage' or 'Open Cases' (at employer stage). However it told him:

"It is not possible to provide a further breakdown of these figures in the interests of protecting the identity of individuals".

46. The complainant was dissatisfied with that response. He considered that GTCNI had refused to provide supply the requested information "under the pretext of protecting identifies [sic]".
47. He argued that, by asking for numbers of cases etc by year, he is not seeking the identity of any individual.
48. The Commissioner's guidance³ states:

"The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them".

49. The Commissioner is satisfied that information about an individual's referral to the Council in relation to an allegation of misconduct undoubtedly relates to them.
50. The second part of the test is whether an individual can be identified from the withheld information.
51. The complainant disputed that disclosure of the requested information would disclose personal details. He told the Commissioner:

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

"My FOI Request dated 13 May 2019 is listed as number 10 and the first five sub-sections of it – a),b),c),d), and e) only sought numerical information".

52. Having viewed the withheld information, the Commissioner accepts that it comprises numerical information. She also accepts that the numbers within the scope of the request are low.
53. The Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a member of the public would breach the data protection principles.
54. She accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.
55. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
56. The ICO's Code of Practice on Anonymisation⁴ notes that:

"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".
57. In summary, the motivated intruder test is that if the risk of identification is reasonably likely, the information should be regarded as personal data.
58. In the circumstances of this case, having considered the withheld information and the wording of the request, the Commissioner is satisfied that the information both relates to and identifies the teachers

⁴ <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

59. She has reached that conclusion on the basis that the focus of the information is the individuals who were the subject of the referrals and that the information is clearly linked to those individuals because it is about the referral and its outcome.
60. In the circumstances of this case, the Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information, the low number of individuals involved and other information which is likely to be in, or come into, the possession of others.
61. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
62. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

63. 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".

64. 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.
65. 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.

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

66. 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”⁵.

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

68. 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

69. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to

⁵ 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”.

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

70. In support of disclosure of the requested information, which he considered to be information about “*the amount of work the GTC was involved in*”, the complainant told the Commissioner:

“... I had not asked for any details of the nature of the referrals or any details on any aspect of any individual referral which was before the GTC. In fact as a public body it is imperative that it is accountable and transparent in its operations and providing information on the extent of regulatory issues which it has to be involved in is in fact a public interests matter as is its desire to withhold that data”.

71. He also argued:

“There is no possibility of breaching confidentiality when providing numerical data, there is no impairment of the integrity and viability of the decision making process, by providing pure numerical data which indicates the quantity of the workload arising from the GTC having to exercise one of its primary functions”.

72. The Commissioner accepts that there is a legitimate interest with regard to accountability in relation how GTCNI is fulfilling its regulatory requirements in respect of regulation of the teaching profession.

Is disclosure necessary?

73. ‘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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

74. The Commissioner is prepared to accept that disclosure of the withheld information is necessary to meet the interests identified above.

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

75. It is necessary to balance the legitimate interests in disclosure against the data subject’s interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under 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.

76. 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.

77. 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.

78. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

79. The Commissioner acknowledges that the complainant argued that GTCNI's website states that, if the GTCNI makes an Order on a Registered Teacher, a notice will be published on its website. She also accepts that he did not refer to there being any such cases on the website.

80. The Commissioner recognises that, in its submission to her, GTCNI explained the context within which it seeks to take forward professional regulation. It also stressed the importance, given what it described as "the parochial nature" of Northern Ireland and of the Education sector, of maintaining confidentiality.

81. The Commissioner is mindful of the context of the request for information, namely referrals relating to allegations of teacher misconduct. She is also mindful of her finding above in relation to the motivated intruder test.

82. She has taken into account that GTCNI states on its website that decisions made by the Council can be published, and this may include notification on its website. However, she has been unable to find any such details in the public domain.

83. The Commissioner appreciates that the individuals within the scope of the request would have no expectation that their personal data would be disclosed under FOIA.

84. Furthermore, the Commissioner accepts that disclosure of the withheld information risks invading the privacy of the individuals concerned.
85. The Commissioner considers that disclosure of their personal information under FOIA would be likely to result in unwarranted damage or distress to the individuals concerned.
86. 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 and so the disclosure of the information would not be lawful.
87. 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.

Conclusion

88. The Commissioner has therefore decided that GTCNI was entitled to withhold the information under section 40(2), by way of section 40(3A) (a).

Section 10 time for compliance

89. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
90. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
91. With respect to the request dated 13 May 2019, the complainant told the Commissioner:

"My emailed request was made on 13 May 2019 and the GTC response was only sent on the 11 June (Note the email sent on the 11 June 2019 (Item 2(a) contained a letter dated 10 June Item 2(b))"

92. The Commissioner's guidance states:

"Under the Act, most public authorities may take up to 20 working days to respond, counting the first working day after the request is received as the first day".

93. In this case, 13 May 2019 was a Monday, therefore, taking into account the Bank Holiday at the end of May, the twentieth working day after the

request was received was 11 June 2019. It follows that the response was provided within the statutory timeframe.

94. With respect to the request submitted on 16 July 2019, the complainant told the Commissioner on 3 September 2020:

"... this separate and new request for an FOI was, and has continued to be ignored".

95. The Commissioner finds that GTCNI breached section 10(1) of FOIA by failing to comply with section 1(1) of FOIA within the statutory time period.

Section 17 refusal of request

96. The Commissioner's guidance⁶ on refusing a request states:

"You must refuse requests in writing promptly or within 20 working days (or the standard time for compliance) of receiving it.

In the refusal notice you should:

- *explain what provision of the Act you are relying on to refuse the request and why;*
- *give details of any internal review (complaints) procedure you offer or state that you do not have one; and*
- *explain the requester's right to complain to the ICO, including contact details for this".*

97. GTCNI acknowledged, in its correspondence with the complainant regarding his request of 13 May 2019, that it did not notify him of the appropriate exemptions when applying them in its response.

98. The Commissioner finds that GTCNI breached section 17(1)(b) by failing to specify, in its refusal notice, the exemptions claimed.

⁶ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#18>

99. It also breached section 17(7) by failing to provide details of its complaints handling process and particulars of the right of the complainant conferred by section 50 of FOIA.

Section 19 publication schemes

100. Under section 19 of FOIA a public authority has a duty to adopt and maintain a publication scheme, and publish information in accordance with that publication scheme.

101. With reference to the information requested at part (1) of the request, GTCNI acknowledged that, at the time of the request, it had not adopted the Commissioner's model scheme. The Commissioner therefore finds a breach of section 19(1).

Other matters

Internal review

102. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.

103. In this case, the internal review that the complainant requested on 16 July 2019 was not completed in accordance with that guidance.

104. The Commissioner expects GTCNI to ensure that the internal reviews it handles in the future adhere to the timescales she has set out in her guidance.

Right of appeal

105. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

106. 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.

107. 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

Laura Tomkinson
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