

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2023

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

Decision (including any steps ordered)

1. The complainant submitted a request for information about a professional conduct panel hearing carried out by the Teaching Regulatory Agency (TRA). The TRA is an executive agency of the Department for Education (DfE) and so DfE is the appropriate public authority for the purposes of FOIA.
2. DfE withheld the information under section 40 and section 38 of FOIA, which concern personal data and health and safety respectively. DfE has subsequently confirmed that it's also relying on section 36(2)(c) to withhold the information, which concerns prejudice to the effective conduct of public affairs.
3. The Commissioner's decision is that DfE is entitled to withhold the requested information under section 36(2)(c) of FOIA. It's not necessary for DfE to take any corrective steps.

Request and response

4. The complainant made the following information request to DfE on 23 June 2023:

“On 5 May, your professional conduct panel gave its decision in the case of Joshua Sutcliffe. Please provide me with an electronic copy of the recording of the portion(s) of his hearing at which he gave evidence, including both examination-in-chief and cross-examination.”

5. DfE’s final position in its internal review dated 28 July 2023 was to withhold the requested information under section 40(2) and 38(1) of FOIA.
6. During the course of his investigation, DfE confirmed to the Commissioner that it has also applied the exemption under section 36(2)(c) of FOIA to the information the complainant has requested.

Reasons for decision

7. This reasoning focusses on DfE’s application of section 36 of FOIA to the complainant’s request. If necessary, the Commissioner will also consider DfE’s application of sections 38 and/or 40.
8. In their request for an internal review, at which point DfE was only relying on section 40(2), the complainant said that section 40(2) didn’t apply to misconduct hearings which took place in public. They said that this was confirmed in the First-tier Tribunal (FTT) decision in *Kanter-Webber v Information Commissioner and the Chief Constable of Cambridgeshire Constabulary* [2023] UKFTT 441 (GRC)¹.
9. In its submission to the Commissioner, DfE has first explained that the conduct panel hearing referred to in the current request took place earlier in 2023. Allegations were made against the teacher in question regarding: their repeated failure to use a specific pupil’s preferred pronouns; the teacher expressing their views to pupils on the wrongfulness of equal marriage and/or homosexuality; showing pupils a video(s) about masculinity, which contained inappropriate comments; and encouraging or directing pupils to watch his YouTube channel/profile, which contained inappropriate content, including comments relating to Islam and Mormonism.
10. DfE says that the conduct panel concluded that some, but not all, of the allegations are proven. As a result the teacher was prohibited from teaching indefinitely and cannot teach in any school, sixth form college,

¹ [https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3232/Kanter-Webber,%20Gabriel%20\(EA-2021-0376\)%20Allowed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3232/Kanter-Webber,%20Gabriel%20(EA-2021-0376)%20Allowed.pdf)

relevant youth accommodation or children's home in England. The teacher may apply for the prohibition order to be set aside, but not until 15 May 2025. The teacher is also entitled to appeal this decision to the High Court and the Commissioner understands from information in the public domain that the teacher is doing so.

11. In its submission DfE goes on to address the comparison the complainant has made between their request to the department, a court case, and a recent appeal which was allowed at First Tier Tribunal. The latter dealt with a request made to Cambridgeshire Constabulary for a copy of the audio recording/transcript of that recording of the disciplinary hearing of a police officer.
12. DfE argues that there are distinct, significant and fundamental differences between these requests. Police misconduct and teacher misconduct hearings are different due to the participants involved, particularly with vulnerable children as witnesses, and the different levels of detail published following these hearings.
13. DfE also argues that disclosure is likely to be detrimental to its ability to thoroughly investigate serious allegations that have been made and to administer appropriate measures where allegations are proven. DfE notes that the public can attend these hearings, albeit via registration and after appropriate vetting to ensure the safety and wellbeing of those attending. A detailed final report is also published where a teacher is barred from teaching. As such DfE considers that its commitment to transparency is met.
14. Releasing the audio recording of the hearing would be likely, DfE says, to have a corrosive effect on the teacher misconduct process. It would lessen the depth and candidness of the evidence provided, recorded and subsequently published in the final reports where some/all of the allegations are proven. If this corrosive effect were to occur, any subsequent published reports may not have the depth and breadth of evidence and information currently provided. This would lessen the depth and quality of the information the public can access to understand specific hearings and their outcomes, which would not be in the public interest.

Section 36 – prejudice to the effective conduct of public affairs

15. Under section 36(2)(c) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the effective conduct of public affairs. Section 36 is subject to the public interest test.

16. As noted, the exemption at section 36(2)(c) can only be engaged on the basis of the reasonable opinion of a qualified person. In its submission to the Commissioner DfE advised that its qualified person (QP) was the Rt Hon Nick Gibb MP, Minister of State for Schools. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5) of FOIA.
17. DfE has provided the Commissioner with a copy of its communications with the QP about the request. The QP's gave their opinion on 10 September 2023. From these communications the Commissioner accepts that the QP gave their opinion that the exemption was engaged.
18. The QP was provided with the background and context of the request, a description of the information being withheld and arguments for withholding and disclosing the information. On the basis of the submission provided to them, the QP's opinion was that disclosing the information would be likely to otherwise prejudice the effective conduct of public affairs.
19. The complainant has argued that the recording can't be exempt from disclosure under FOIA (under section 40) because the hearing was held in public.
20. In its submission to the QP, DfE noted that TRA hearings are held in public, unless directed to be heard in private by a professional conduct panel. However DfE explained that, although members of the press or public are permitted to observe a public hearing, that permission is subject to agreeing certain terms and conditions. So it's not the case that TRA allows completely unfettered access to a public hearing.
21. To be permitted access, a member of press or public must provide certain details of their identity and agree to a declaration. This declaration includes an undertaking that they will not record the hearing, which is prohibited.
22. DfE noted that TRA does record its hearings which is for the purpose of good administration. Teachers who are subject to a prohibition order have a statutory right of appeal to the High Court. In these cases it's helpful to provide the High Court with a transcript of the hearing. The recording is not subject to wider dissemination, and it's not its purpose to be released into the public domain.
23. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the

most reasonable opinion. Having considered the QP's submission, the Commissioner accepts that the QP's opinion in this case was a reasonable one.

24. As noted, the QP's opinion was that the envisioned prejudice would be likely to occur through disclosing the withheld information. The Commissioner accepts that's a credible level of likelihood and that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.
25. Having considered all the criteria associated with the application of section 36(2)(c), the complainant's point and the material DfE has provided, the Commissioner finds that the requested information engages that exemption. He has gone on to consider the associated public interest test.

Public interest test

26. In its submission to the Commissioner, DfE has acknowledged that there's a strong public interest in openness around the processes by which teacher misconduct is investigated. People need to be confident that these processes are able to remove teachers who are unsuitable to teach.
27. However, in favour of maintaining the exemption DfE argues that releasing the audio recording would be likely to prejudice the integrity and proper discharge of the TRA's regulatory function. It would also undermine the department's ability to conduct its public affairs effectively and to ensure inappropriate individuals are barred from teaching.
28. DfE considers that disclosing the recording would make witnesses and complainants less willing to provide evidence, refer cases of serious teacher misconduct, attend proceedings or otherwise fully and confidently engage with the TRA in exercising its function. This is because of the possibility of recordings being put into the public domain without their consent. Such recordings would then be in the public domain for perpetuity, without any control, protections or restrictions by the participants, TRA or department.
29. Deterring witnesses and schools from fully engaging with these hearings would have a detrimental impact on such misconduct hearings. If parties are less willing to be free, frank and candid at these hearings, or even attend these hearings (DfE says it would not 'force' witnesses to attend or provide evidence, especially where they are children and deemed as vulnerable) the depth and quality of the evidence put to the panels would be significantly reduced. This would make it less likely for them to

be able to make a fully informed decision. In turn this could lead to individuals being allowed to continue teaching where, if the evidence and engagement had been more expansive, they would have been barred from teaching. As this process involves removing individuals from the teaching register that may present a risk to the welfare of children, to prejudice this would clearly not be in the public interest.

30. Hearings are held in public which ensures transparency and accountability. However, the hearings take place in a controlled environment where observers must register their interest and provide the TRA with further information. This is in part to protect witnesses or the teacher themselves, should suitable accommodations need to be considered by the tribunal. Releasing the hearing recordings into the public domain would negate this principle to the detriment of the involved parties, especially where, as stated, witnesses are classed as vulnerable. This could also have a negative impact on the teachers at the centre of such hearings, especially if, following appeal or future reconsideration by panel, they are allowed to return to teaching.
31. DfE argues that disclosure is also likely to prejudice the willingness of schools to furnish it candidly with any alleged misconduct occurring within their schools. This would cause a detriment to witnesses', parents' and governors' confidence in TRA proceedings, as well as confidence in the school in question, and/or the wider schools system.
32. Such hearings often involve the use of children's data, including data/information which may make it possible, if released unfettered, to identify individual children. Such a release into the public domain could present concerns related to safeguarding and the welfare of children, which the TRA takes important measures to uphold.
33. DfE also says that there's a significant importance in maintaining an official record of proceedings conventionally provided via certified transcript. This is in contrast with an oral recording which does not have the same formal status and would be more susceptible to editing and manipulation.
34. In its public interest discussion, DfE has also discussed circumstances specific to the current case; however, to protect individuals involved the Commissioner doesn't intend to reproduce in this notice.
35. DfE concludes its submission by confirming that releasing the requested recording, for the reasons stated above, is likely to prejudice the effective conduct of public affairs. This is because it would be likely to prejudice the TRA's ability to carry out its regulatory function(s) effectively. TRA must be able to ensure that teachers receive a fair hearing; that witnesses can provide evidence in a safe and protected

environment; and that individuals who are unsuitable to teach are barred from doing so. This is even more important when there are concerns relating to safeguarding.

The Commissioner's conclusion

36. The Commissioner notes that the professional conduct panel's decision about Joshua Sutcliffe², with its associated reasoning, was published in May 2023. The decision details the hearing, including the evidence provided by Mr Sutcliffe. The Commissioner considers that publishing this decision addresses the public interest in openness and transparency about how the TRA handled the allegations about Mr Sutcliffe. Disclosing the recording of Mr Sutcliffe's evidence to the hearing would add little to published decision, in the Commissioner's view.
37. The evidence Mr Sutcliffe provided to the hearing must by its nature discuss the allegations against him and must indirectly include the evidence others provided to the hearing. The Commissioner therefore agrees with DfE that disclosing the requested recording would potentially make witnesses and schools less likely to engage in TRA's regulatory processes, in the future. This is because they may be concerned about the possibility that hearing recordings could be put into the public domain without any controls or context. It's not in the public interest for the robustness of TRA's functions to be put at risk.
38. In addition, the matter of this specific hearing was and remains 'live' as Joshua Sutcliffe is appealing the outcome of the TRA's hearing. This strengthens the argument for withholding the information, so as not to interfere with or frustrate any future proceedings.
39. The Commissioner is satisfied that in the circumstances of this case the public interest favours withholding the requested information.
40. The Commissioner has decided that section 36(2)(c) is engaged and that the balance of the public interest favours maintaining this exemption.
41. Since the Commissioner has found that section 36 of FOIA can be applied to the requested information, it hasn't been necessary to consider DfE's application of sections 38 and 40 to the request.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1158599/OFFICIAL_-_SENSITIVE_Sutcliffe_Joshua_SOS_Decision_Formatted_0.1.pdf

Right of appeal

42. 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

43. 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.
44. 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

Cressida Woodall
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