

Decision 020/2006 Mr A and the General Teaching Council for Scotland
<i>Information relating to complaint about a teacher</i>

Applicant: Mr A

Authority: General Teaching Council for Scotland

Case No: 200502357

Decision Date: 06 February 2006

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 020/2006 Mr A and the General Teaching Council for Scotland

Request for information relating to a complaint about a teacher – section 34(3) information obtained from confidential sources for the purposes of an investigation – section 38(1)(a) personal data of which the applicant is the data subject – section 38(1)(b) personal data of third parties where disclosure would contravene any of the data protection principles

Facts

Mr A applied under the Freedom of Information (Scotland) Act 2002 (FOISA), on behalf of his son, for information relating to the investigation by the General Teaching Council for Scotland of a complaint about a teacher. The General Teaching Council refused this request on the basis that (i) release of the information requested under FOISA would constitute the disclosure of sensitive personal data contrary to the data protection principles (exempt under section 38(1)(b) of FOISA) and (ii) the information was exempt from disclosure under section 34(3) of FOISA as information obtained from confidential sources for the purposes of an investigation into a person's conduct and their fitness to carry on a profession. The public interest test had been applied to the latter exemption, as required by FOISA, and the General Teaching Council did not consider disclosure to be in the public interest. Mr A asked for a review of the decision and the General Teaching Council upheld its decision on review. Mr A applied to the Commissioner for a decision.

Outcome

The Commissioner found that the General Teaching Council for Scotland had acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in applying the exemption in section 38(1)(b) of FOISA to certain of the information withheld. In addition, he found that certain of the information withheld was exempt from disclosure under section 38(1)(a) of FOISA.

The Commissioner found that the General Teaching Council for Scotland had not acted in accordance with Part 1 of FOISA in applying the exemption in section 34(3) of FOISA to the information withheld.



The Commissioner found that the General Teaching Council for Scotland had not acted in accordance with Part 1 of FOISA in applying section 38(1)(b) of FOISA to all of the information withheld, as documents 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 19, 20, 21(a), 22 and 23 could be released if redacted to remove all information identifying the subject of the information and other individuals referred to in them, including home addresses but not references to employees of the General Teaching Council, which merely described them performing the functions to which the applicant's request related. The Commissioner required that this information be released to the applicant, redacted as indicated above, within two months of the date of this decision notice.

Appeal

Should either Mr A or the General Teaching Council for Scotland wish to appeal against this decision, there is a right of appeal on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Background

1. In a letter of 18 June 2005, Mr A requested from the General Teaching Council for Scotland (GTC) all information held by the GTC regarding a misconduct case against a teacher about whom he had submitted a complaint. (The GTC had found that there was insufficient evidence to support Mr A's complaint.)
2. The GTC responded on 29 June 2005, confirming that it held the information requested but refusing to provide it, on the basis that (i) release of the information requested under the Freedom of Information (Scotland) Act 2002 (FOISA) would constitute the disclosure of sensitive personal data contrary to the data protection principles (exempt under section 38(1)(b) of FOISA) and (ii) the information was exempt from disclosure under section 34(3) of FOISA as information obtained from confidential sources for the purposes of an investigation into a person's conduct and their fitness to carry on a profession.



3. The public interest test had been applied to the latter exemption, as required by FOISA, and the GTC did not consider disclosure to be in the public interest on the basis that any public interest in disclosure was outweighed by the exemption from the subject information provisions contained in section 31 of the Data Protection Act 1998 (DPA), which relates to regulatory activity.
4. Mr A requested a review of the GTC's decision on 5 July 2005.
5. The GTC responded with its decision on review on 22 July 2005, upholding the original decision and endorsing the reasons given for that decision.
6. Mr A applied to me for a decision in a letter received on 29 July 2005. The case was allocated to an Investigating Officer.

Investigation

7. Mr A's application was validated by establishing that he had made a valid request for information to a Scottish public authority and had appealed to me only after asking the GTC to review its response to that request.
8. The Investigating Officer wrote to the GTC on 29 August 2005, seeking its comments on the application. In particular, it was asked to pay particular attention to the reasoning behind its identification of the information requested as sensitive personal data and to why releasing the information would breach any of the data protection principles. It was also asked to provide the following information:
 - a) All correspondence between it and Mr A;
 - b) A copy of the minute of the meeting at which his complaint was discussed; and
 - c) All supporting information it held relative to his complaint.



9. The GTC responded on 12 September 2005, providing copies of the information requested. It advised that the information requested constituted the personal data of two individuals (Mr A's son and the teacher complained about) and was sensitive personal data within the meaning of section 2 of the DPA, being information as to, for example, the person's commission or alleged commission of an offence (or the proceedings relating that offence). Releasing the information would breach the data protection principles because it could not be done in conformity with at least one condition in schedule 2 of the DPA and one in schedule 3, as required by the first data protection principle (fair and lawful processing).
10. In all other respects, the GTC adhered to the reasoning in its original decision.
11. In response to further queries, the GTC confirmed the steps taken to ascertain what information it held in relation to Mr A's request (which I consider to have been satisfactory) and also clarified the basis on which it believed the section 34(3) exemption applied.
12. In the course of the investigation, Mr A confirmed to the Investigating Officer that he was making the information request on behalf of his son.
13. Of the information provided by the GTC, I have not treated documents 3 (including 3(a) and (b)) and 10 (both letters to Mr A regarding the GTC's complaints processes, attaching material which is readily accessible to the public in any event) or 24 (the record of a telephone conversation between Mr A and a member of GTC staff regarding the request for information) as falling within the scope of Mr A's request.



Commissioner's analysis and findings

14. The GTC is established under the Teaching Council (Scotland) Act 1965 and is the professional registration and regulatory body for teachers in Scotland. It is required to maintain an Investigating Sub-Committee to conduct preliminary investigations into cases of potential misconduct. This Sub-Committee, which dealt with Mr A's complaint, operates under procedural rules made by the GTC. It reaches a decision as to whether further disciplinary action is warranted in any given case on the basis of information gathered by an Investigating Officer. The teacher who is the subject of the complaint may be asked to provide a written statement or explanation, but the Sub-Committee does not conduct hearings or invite either the complainer or the teacher to attend its meetings. Its rules (unlike those of certain other fora of the GTC relating to hearings) are silent as to whether it will conduct its business in public or in private and generally as to the confidentiality or otherwise of material considered by it. There is nothing to indicate that the subjects of complaints and consequent investigations are given any specific assurance of confidentiality.

Personal Data (section 38(1)(b) of FOISA)

15. The GTC withheld information from Mr A on the basis of section 38(1)(b) of FOISA. Under section 38(1)(b), as read in conjunction with section 38(2)(a)(i), third party personal information is exempt from release if its release would breach any of the data protection principles
16. The GTC argued that the information requested by Mr A was sensitive personal data within the meaning of section 2 of the DPA. This would mean that its processing would not comply with the first data protection principle unless at least one of the conditions in schedule 2 of the DPA and one of the conditions in schedule 3 of the DPA were met. In other words, conditions in both schedules would require to be met before the information could be released under FOISA.
17. Assuming the information in question can be characterised as sensitive personal data (other than personal data of the applicant), I accept this argument. If the information is simply personal data rather than sensitive personal data, then only one of the conditions in schedule 2 would require to be met.



18. The GTC argues that the information requested comprises the personal data of two persons, Mr A's son and the teacher complained about. Given the definition of personal data contained in section 1(1) of the DPA (i.e. data relating to a living individual who can be identified either from those data alone or from those data combined with other information in the possession of or likely to come within the possession of the data controller) and bearing in mind the gloss placed on that definition by the Court of Appeal in the case of *Durant v Financial Services Authority* [2003] EWCA 1746 (i.e. that the information must be biographical in respect of the individual concerned to a significant extent and must have that individual as its focus), I am satisfied that all the information is personal data. For the most part, I accept the GTC's identification of the relevant data subject, although I would take the view that the records of certain telephone conversations between Mr A and GTC staff have Mr A himself as their focus (regarding which, see my analysis in respect of section 38(1)(a) below).
19. Regarding Mr A's son, I accept the argument that the relevant data is sensitive. Whether this were the case or not, however, I would not regard its release as consistent with the first data protection principle. In the great majority of cases, all data about a child will relate to his or her private (as opposed to professional or public) life. In the circumstances, I am not persuaded that any of the conditions in either schedule 2 or schedule 3 would apply should the information be released.
20. While I accept that Mr A has advised the Investigating Officer that he is acting on his son's behalf (and in this connection I would refer once again to my analysis in respect of section 38(1)(a) below), the messages he has given in this connection have been contradictory and I am not persuaded that his desire that the information be disclosed under FOISA rests on a full understanding of the consequences (i.e. release would be to the public at large and not just to him and his son): accordingly, I am not convinced that he could be said to be giving informed consent to disclosure on his son's behalf such as would satisfy the requirements of the DPA. For all of these reasons, I accept that all of the information contained in documents 2, 15 and 15(a) (with the exception of 15(a)H – see below) would be exempt under section 38(1)(b).



21. Regarding the information about the teacher (documents 1, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15(a)H, 15(b), 16, 17, 19, 20, 21(a), 22 and 23), I think the position is slightly less straightforward. I accept that documents 2, 4, 8, 11, 15(b) and 16 contain sensitive personal data relating to the teacher and in any event am not persuaded that any of the conditions in either schedule 2 or schedule 3 would apply if the information were to be released. I accept that substantive information gathered in the course of investigation into a person's professional competence (for example, information relating to the person's conduct or character) is not information which the subject of the investigation would reasonably expect to be placed in the public domain, whether or not any specific assurance had been given in that regard. Moreover, I am not persuaded that there are any grounds on which to find the release of the information fair. Accordingly, I would not regard the release of the information in its present form as fair or lawful and therefore compliant with the first data protection principle.
22. While I accept that the information relating to the teacher is exempt in its present form, I consider that much of it (particularly that which narrates the procedures followed) could practicably be redacted to take it outwith the scope of the exemption. This should have been done by the GTC. It would require the removal of all information identifying the subject of the information and other individuals referred to in it (including home addresses), although in the case of GTC employees referred to purely in an employment context the Information Commissioner's guidance, "Freedom of Information: access to information about public authorities' employees", would require to be taken into account. Having considered this guidance, I would not regard it as appropriate to delete references to GTC staff which merely describe them performing the functions to which Mr A's request relates.
23. The conclusion I have set out in paragraph 22 above would apply to documents 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 19, 20, 21(a), 22 and 23. On the other hand, it would not apply to the more substantive information forming documents 1, 4, 15(a)H and 15(b), which I would regard as subject to the exemption under any circumstances.



Personal Data (Section 38(1)(a) of FOISA)

24. The GTC has not argued that section 38(1)(a) of FOISA (under which information is exempt if it is personal data of which the applicant is the data subject) applies in this case, but in the circumstances of the case I think it important that this exemption be considered. Mr A appeared on first sight to be requesting the information on behalf of his son and has since confirmed to me that he was doing so. I have no reason to question his right to do so, but it does mean that his son can (and should) be regarded as the applicant for the information. That being the case, I am satisfied that all the information identified under paragraph 20 above would be exempt under section 38(1)(a). In the circumstances, it appears that this exemption (rather than section 38(1)(b)) should apply to the information in question, but the situation (in particular the position of Mr A's son, assuming he has capacity to give or withhold consent to disclosure) is not entirely clear: given that I am satisfied that the section 38(1)(b) exemption would apply to the information in any event (and given that the effect would be the same, whichever exemption applied), I will not consider the matter further. I am also satisfied that the section 38(1)(a) exemption would apply to documents 18 and 21 (the telephone records referred to in paragraph 17 above), which I would regard as substantially personal data relating to Mr A himself.
25. The exemption in section 38(1)(a) is an absolute one and there is no need to consider either the data protection principles or the public interest. Its purpose is to ensure that personal data is, on the whole, accessible to the individuals whom it concerns only and not to the world at large. FOISA exists to promote public access to information and consequently must contain provisions to exempt information which relates to the private lives of particular individuals and is properly the preserve of those individuals alone. That kind of information should, however (for the most part), still be accessible to those individuals and their representatives under the DPA.

Investigations by Scottish public authorities (section 34(3) of FOISA)

26. The GTC has also argued that the information withheld from Mr A is exempt under section 34(3) of FOISA. This exemption has four strands to it:
- (i) The information must have been obtained or recorded for the purposes of an investigation;
 - (ii) The investigation must have been carried out by virtue of Her Majesty's prerogative or under statutory powers;
 - (iii) The investigation must have been carried for one or more of the purposes listed in section 35(2) of FOISA; and



- (iv) The information must relate to the obtaining of information from confidential sources.
27. I accept that the information sought by Mr A is information gathered or recorded for the purposes of an investigation. The investigation was carried out under section 10B of the Teaching Council (Scotland) Act 1965 and I agree with the GTC that either or both of the purposes set out in section 35(2)(b) (to ascertain whether a person is responsible for conduct which is improper) and section 35(2)(d)(ii) (to ascertain a person's fitness or competence in relation to any profession or other activity which the person is, or seeks to become, authorised to carry on) could apply to it. What is less certain, however, is whether any of the information satisfies the final test. In other words, does it relate to the obtaining of information from confidential sources?
28. I do not dispute that certain of the information was provided to the GTC in confidence. There is no doubt in my mind that that was the expectation of Mr A, the subject of the investigation and others who provided information for the investigation. Equally, I accept that much of the information gathered was of a nature that would merit the protection of confidentiality. Therefore, I agree that information for the GTC's investigation was obtained from confidential sources.
29. The purpose of section 34(3) is not, however, to protect information gathered from confidential sources, or necessarily the confidentiality of the source itself. It concerns information relating to the obtaining of information from those sources. In other words, information about the process of gathering the information, for example (to quote my own briefing on the exemption) "about how such information is gathered, how informants are recruited and how information obtained from confidential sources is transmitted". I would expect anything falling within the exemption to be distinctive to the mode of gathering the information, something which, if were released to the public might be detrimental to the process. I have received nothing from the GTC which persuades me that detriment of this kind might occur, given that in any event the information would only be released with anything that might identify the sources removed. In conclusion, I can find no information within the documents withheld from Mr A that I would regard as being covered by the exemption.
30. As I do not consider the exemption in section 34(3) applies to any of the information requested by Mr A, I am not required to consider the public interest test as it applies to the exemption.



Decision

I find that the General Teaching Council for Scotland (GTC) acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in applying the exemption in section 38(1)(b) of FOISA to certain of the information withheld. In addition, I find that certain of the information withheld is exempt from disclosure under section 38(1)(a) of FOISA.

I find that the GTC did not act in accordance with Part 1 of FOISA in applying the exemption in section 34(3) of FOISA to the information withheld.

I find that the GTC did not act in accordance with Part 1 of FOISA in applying section 38(1)(b) of FOISA to all of the information withheld, as documents 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 19, 20, 21(a), 22 and 23 could be released if redacted to remove all information identifying the subject of the information and other individuals referred to in them, including home addresses but not references to employees of the GTC which merely describe them performing the functions to which the applicant's request relates. I require the GTC to release these documents to Mr A, redacted as indicated above, within two months of the date of this decision notice.

Kevin Dunion
Scottish Information Commissioner
06 February 2006