IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

Case No. EA/2013/0041

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50476630
Dated: 6 February 2013

Appellant:	**David Tredrea**
First Respondent:	**The Information Commissioner**
Second Respondent:	**General Medical Council**

On the papers

Date of decision:

Before
CHRIS RYAN
(Judge)
and
HENRY FITZHUGH
DAVID WILKINSON

Subject matter:
- Law enforcement s.31
- Personal data s.40
- Public interest test s.2

Cases: *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).
Pink Floyd Music Ltd v EMI [2010] EWCA Civ 1429

IN THE FIRST-TIER TRIBUNAL **Case No.** EA /2013/0041
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 6 February 2013 is substituted by the following notice:

Public Authority: General Medical Council

Complainant: David Tredrea

Decision: The Decision Notice of 6 February 2013 should stand, save that the Public Authority should, within 35 days of the date of the Tribunal's Decision below, disclose the parts of the closed transcript of the hearing of the GMC's Fitness to Practise Panel between 11th and 19th January 2012 that are set out in Annexes 1 to 3 of the Tribunal's Decision, redacted in the manner indicated in those Annexes, as well as the transcript of the Legal Assessor's speech to the said Panel on 19 January 2012.

REASONS FOR DECISION

Summary of our decision

1. This Appeal arises out of a hearing and determination by the Fitness to Practice Panel ("the Panel") of the General Medical Council ("GMC"), which took place in January 2012. We have decided that some parts of the transcript of that hearing, that were stipulated as "closed" by the Panel, should have been disclosed in response to a request made under section 1 of the Freedom of Information Act 2000 ("FOIA"). However, we have concluded that the GMC was right to withhold other parts, in particular the evidence and submissions concerning the medical condition of the individual whose behaviour was being investigated (who we will refer to throughout this decision as "D"), including her own evidence.

Background

2. The GMC is a statutory body which regulates doctors. This includes the assessment of whether an individual doctor is fit to practise. The GMC's authority in this respect is derived from the Medical Act 1983

and the detailed procedures to be followed during a fitness to practise hearing are set out in the General Medical Council (Fitness to Practise) Rules 2004 ("the Rules"). They include rules that enable the Panel to exclude the public from a hearing if, in the particular circumstances of the case, other interests, such as the right to privacy of the doctor under investigation, outweigh the normal public interest in holding hearings of this nature in public. The Rules make specific provision for the panel to operate in closed session where it is considering the mental or physical health of a doctor, although the rule is not absolute and may be ignored if there is a strong public interest in conducting the hearing in public.

3. Although the Rules are not entirely clear on the application of the Rules to transcripts of hearings, we are satisfied that the same general criteria for determining whether or not part of a hearing should be conducted in private session apply to the release into the public domain of any transcript of that part. Indeed, the point was not contested by any party to the Appeal.

4. In January 2012 D appeared before the Panel accused of having dishonestly worked while on certified sick leave. The Panel heard submissions at the outset as to whether parts of the evidence should be heard in private and decided, under application of the relevant provisions in the Rules, that evidence relating to D's health should be heard in closed session. It then proceeded to consider, first, whether D's actions had impaired her fitness to practise and, second, (having concluded that they did) what sanction, if any, should be imposed. D did not give evidence during the first stage of the process but did during the second.

5. The parts of the transcript that were designated by the Panel as "closed" were as follows:
    a. 11 January 2012: A large part of the opening speech of counsel instructed by the GMC to present the case against D. The opening consisted, very largely, of information about D's health from time to time, placing that history alongside the narrative of her activities, in private practice and within the NHS.
    b. 12 January 2012: Parts of the cross examination of a Dr Lynn, as well as questions put to him by the Panel. The closed evidence consisted of detail about D's medical health and elements of her behaviour from time to time caused by her medical condition.
    c. 13 January 2012: The evidence of a Dr Ballard which, following a few non-contentious opening questions apparently designed to set the witness's evidence in context, constituted a full review of D's medical records at relevant times. The records on which Dr Ballard was asked to comment included notes of conversations with D in the course of consultations and correspondence with D and other medical practitioners on the subject of D's health.

d. 16 January 2012: Part of the presentation, by D's counsel, of the justification for D's decision not to give evidence during the first stage of the proceedings. It deals exclusively with a medical issue.
e. 17 January 2012: The closing submissions by the GMC's counsel at the conclusion of the first stage of the proceedings. These consisted largely of a summary of D's medical history, put into the context of the chronology of the case as a whole, including the occasions when D undertook work while on certified sick leave. Our careful review of the document leads us to conclude that the medical details are so inextricably combined with the chronology that the document would be unintelligible if those details were to be redacted.
f. 17 January 2012: The closing submissions by D's counsel, which included some mention of D's health, although we believe that the transcript would still be intelligible if those references were to be redacted.
g. 18 January 2012: A part of the closing submissions in reply presented by GMC's counsel. The submissions focused entirely on D's medical issues.
h. 19 January 2012: D's evidence during the sanctions stage of the hearing. The evidence contained a certain amount of information about D's health but, particularly at the cross examination stage, dealt with other subject matter.
i. 19 January 2012: The closing submissions on sanctions made by counsel for the GMC and counsel for D, which included very little mention of health issues.
j. 19 January 2012 The speech by the GMC's Legal Assessor setting out his advice to the Panel, which makes no reference to health issues.

6. At the end of the hearing the Panel decided that, notwithstanding its earlier conclusion that D's actions had impaired her fitness to practise, it was not necessary to impose any sanction because of mitigating circumstances and the steps D had taken subsequently to avoid any repetition. Both parts of the Panel's decision were fully reasoned and included a full summary of the evidence and submissions provided to the Panel, including the dates when D was on sick leave and a certain amount of information about the medical practitioners she consulted, although not the nature of the health problems she suffered.

The Appellant's request for information and his complaint to the Information Commissioner.

7. On 3 February 2012 the Appellant wrote to the GMC recording his concern at the outcome of the Panel's hearing. He expressed the view that the Panel had reached its decision not to impose any sanction on the basis of dishonest evidence given by D and submissions made on her behalf, which were factually incorrect. In particular, he said, the Panel's conclusion, that D had gained insight

into her behaviour and that the stresses in her private life had been resolved, were inconsistent with other evidence he had made available to the GMC regarding D's actions during the period immediately before the Fitness to Practise hearing, including evidence she had herself given in other proceedings. The Appellant also proffered evidence, which he said demonstrated that D was continuing to work in private practice despite her assurances to the Panel, under oath, that she had recognised the need to withdraw from that type of work. On this basis the Appellant suggested that he had provided the Panel with sufficient evidence about the unreliability of D's evidence to justify reviewing its decision to close the case. The letter then read:

> *"Might I please request a transcript or recording which includes* [D's] *oral evidence at the FTP hearing? If it is necessary for me to apply under DPA or FoI rules, perhaps this letter could be regarded as a formal request."*

8. The reference to "FoI rules" demonstrates the Appellant's intention to invoke FOIA section 1, which imposes on the public authorities to whom it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

> *"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*

9. The GMC refused to release any part of the closed transcript on the basis that it included the personal data of a third party and was therefore exempt information under FOIA section 40(2), an absolute exemption. The Appellant requested the GMC to undertake an internal review of its decision, making it clear that his request was *"limited to the non-health related elements…"* of D's testimony. The outcome of the review was communicated to the Appellant by a letter from the GMC dated 1 May 2012. It recorded that the information request had been *"for the complete transcript in respect of the Fitness to Practise hearing"* and maintained the GMC's reliance on section 40(2) to justify refusing to disclose. When the Appellant subsequently complained to the Information Commissioner about the manner in which his request had been handled he stated that he wished to have disclosed to him *"…full FtP transcripts and any other papers relevant to* [D] *investigation"*. In the course of the Information Commissioner's investigation the Appellant made it clear that *"…if the GMC argue that*

much of the transcript data is about her personal health, of course, I have no problem with appropriate redaction."

10. At the conclusion of his investigation the Information Commissioner issued a Decision Notice on 6 February 2012.

The Decision Notice and the Appeal to this Tribunal

11. The Information Commissioner proceeded on the basis that the information requested was the entirety of the closed transcripts. He appears to have made no attempt to separate medical information, as he had been invited to do by the Appellant. On that, arguably false, basis he found that all the information withheld by the GMC related to a named individual, D, and constituted her personal data. He concluded that its disclosure would breach the first data protection principle. It was therefore exempt from disclosure under FOIA section 40(2). The Decision Notice also makes reference to the possible categorisation of the requested information as sensitive personal data which should not be disclosed unless at least one of the stringent conditions set out in Schedule 3 of the Data Protection Act 1998 ("DPA") is satisfied.

12. The Information Commissioner's reasoning was expanded upon in a Confidential Annex to the Decision Notice. The Information Commissioner has subsequently agreed that this contained no information that should remain confidential and it was disclosed to the Appellant. The Annex recorded the Information Commissioner's conclusion that:

> *"the GMC has only withheld the parts of the hearing held in private where the named doctor's health was discussed. The Commissioner considers that the data subject's right to confidentiality of their health information would not be outweighed by the legitimate public interest in this case and therefore it would be unfair to disclose the transcripts relating to the closed part of the hearing."*

13. The Information Commissioner concluded that the GMC had been entitled to refuse to disclose the Appellant's request.

14. On 5 March 2013 the Appellant filed an appeal to this Tribunal.

15. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based.

16. The Appellant's Grounds of Appeal acknowledged that he had been provided with the transcripts for the open part of the hearing but reiterated his requirement for the GMC to "*disclose fully the transcript of their Fitness to Practise (FtP) Hearing*" concerning D. Later in his Grounds of Appeal the Appellant stated:

> *"For clarification* [the Appellant] *explicitly does not seek in this request or has ever sought disclosure of any information that relates directly to* [D's] *personal health."*

Further on he says that he *"…contends there is more contained within the undisclosed elements of transcript than just personal health matters"* and invited the GMC to *"redact all details of personal health to preserve confidentiality".*

17. A direction was made to the effect that the GMC be joined as a respondent and both the Information Commissioner and the GMC filed a Response to the Grounds of Appeal. The Appeal was directed, by consent, to be determined on the papers, without a hearing, which was in our view an appropriate procedure to adopt. A bundle of documents was prepared for our use and further written submissions were filed by the parties. The GMC was also directed to provide the Tribunal with a copy of the closed session transcripts that had not been disclosed to the Appellant. We have therefore had the advantage, inevitably denied to the Appellant, of having reviewed the detailed content of the withheld transcripts.

18. The GMC introduced in its Response an additional ground for refusing disclosure, which had not been considered in the Decision Notice. This was that the information requested was exempt under FOIA section 31(1)(g) (prejudice to regulatory functions).

<u>The law relied on by the GMC and Information Commissioner.</u>

19. FOIA section 40(2) provides that information is exempt information, for the purposes of the obligation to disclose under section 1 (see paragraph 8 above) if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.

20. Section 1 of the DPA provides the following relevant definitions:

> *"data" means information which-*
> *(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,*
> *(b) is recorded with the intention that it should be processed by means of such equipment,*
> *(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,*
> *(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68, or*

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d)

"'personal data' means data which relate to a living individual who can be identified-
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller"

21. "Sensitive personal data" is defined in DPA section 2 as follows:

In this Act "sensitive personal data" means personal data consisting of information as to—

(a) …

(e) [the data subject's] *physical or mental health or condition,…"*

22. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

"Personal data shall be processed fairly and lawfully, and in particular shall not be processed unless-
(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

23. Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

The term "processing" has a wide meaning (DPA section 1(1)) and includes disclosure.

24. Schedule 3 sets out the conditions that must be satisfied for the processing of sensitive personal data. These are in addition to the Schedule 2 conditions, one of which must also be satisfied. None of them have application to the facts of this case. It follows that if we find that the withheld information, or any part of it, constitutes sensitive

personal data there are no circumstances that apply in this case that would justify its disclosure.

25. A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles, including the determination of what is "necessary" for the purpose of identifying a legitimate interest. In order to qualify as being "necessary" there must be a pressing social need for it - C*orporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

26. FOIA section 31(1)(g) provides that information is exempt if its disclosure "*would or would be likely to prejudice … the exercise by any public authority of its functions for any of the purposes specified in subsection (2).*

27. That subsection reads:
"The purposes referred to in subsection 1(g)…are-
(a) …
(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on."

28. FOIA section 31 creates a qualified exemption, with the result that, if found to be engaged, the public interest balancing test, set out in FOIA section 2(2)(b) must be carried out and disclosure ordered unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The structure of this determination

29. The Decision Notice did not differentiate information that was sensitive personal data from other data. However, the GMC made the point, in its Response, that parts of the withheld transcripts contained information that did not constitute sensitive personal data, although it argued that it was nevertheless justified in refusing disclosure of that information under either section 40(2) or 31(1)(g). We believe that the differentiation is significant and we will consider, first, the extent to which the withheld transcripts contain sensitive personal data (paragraphs 30 and 31). That will result in the disposal of much of the Appeal but we will then consider whether either of the other two exemptions justify the maintenance of confidentiality in respect of the

remaining information in the withheld transcripts (paragraphs 32 - 40 for section 40(2) and paragraphs 41 for section 31(1)(g)).

Sensitive Personal Data

30. We have carefully reviewed the closed transcript in order to establish how much of it was the sensitive personal data of D, that is to say, it is information about her "physical or mental health". We find as follows:
    i. The GMC opening speech (paragraph 5 a. above) consisted very largely of sensitive personal data and that this could not be redacted without rendering the extract as a whole meaningless;
    ii. The closed evidence of Drs Lynn and Ballard (paragraph 5 b. and c. above) comprised sensitive personal data;
    iii. The reasons given for D not giving evidence (paragraph 5 d. above) constituted sensitive personal data;
    iv. The GMC's closing submissions (paragraph 5 e. above) constituted sensitive personal data and, to the small extent that it included other information, it would not be possible, in our view, to make sense of the document if the sensitive personal data were to be redacted;
    v. The closing submissions of D's counsel (paragraph 5 f. above) do contain some sensitive personal data but the relevant part of the transcript would be intelligible if that information were to be redacted. We have set out in Annex 1 a copy of this part of the transcript showing the redactions that are required in order to remove any sensitive personal data.
    vi. The small part of the closing submissions in reply presented by the GMC's counsel, which were heard in closed session, (paragraph 5 g. above) consisted of sensitive personal data.
    vii. D's evidence during the sanctions stage of the hearing (paragraph 5 h. above) consisted partly of sensitive personal data, which could be redacted without this part of the transcript being rendered unintelligible. We have set out in Annex 2 a copy of this part of the transcript showing the redactions that are required in order to remove any sensitive personal data.
    viii. The closing submissions on sanctions presented to the Panel by the GMC's counsel (paragraph 5 i. above), included some of D's sensitive personal data, although this could be redacted without rendering the rest of the document unintelligible. We have set out in Annex 3 a copy of this part of the transcript showing the redactions that are required in order to remove any sensitive personal data.
    ix. The Legal Assessor's speech to the Panel contained no sensitive personal data.

    We conclude, therefore, that the GMC was justified in refusing to disclose the information identified in sub-paragraphs (i) to (iv) and sub-paragraph (vi) above. The information identified in sub-paragraphs (v), (vii) and (viii), once the identified sensitive personal data has been redacted from it, should be disclosed unless it is found to be exempt for one of the other reasons put forward by the GMC. The Legal

Assessor's advice (sub-paragraph (ix)) should be disclosed unless, again, it is exempt for one of those other reasons.

31. The three Annexes referred to are to remain confidential until the expiration of the time limit for appealing this determination or, in the event that an appeal is launched, the date when that appeal shall have been determined or withdrawn.

32. The conclusion we have reached in respect of D's medical information is, of course, consistent with the Appellant's confirmation that he did not in fact seek such information. We are satisfied that the material falling to be disclosed under this decision has not been so heavily redacted as to render it unintelligible or to encourage speculation about the redacted portions, any more than did the non-specific references to health in the Panel's decisions.

Personal Data

33. We are satisfied that the remaining information in the closed transcript, after redaction of sensitive personal data, does constitute personal data. This was not challenged by any of the parties.

34. We have set out above the law that governs the release under the FOIA of personal data that does not fall within the more rigorous regime that applies to sensitive personal data. In applying those laws in order to determine whether or not disclosure of the remaining information would be contrary to the data protection principles we have to consider:
    i. whether disclosure at the time of the information request would have been necessary for a relevant legitimate purpose; without resulting in
    ii. an unwarranted interference with the rights and freedoms or legitimate interests of D.

    And if our conclusion on those points would lead to a direction that the information should be disclosed we have also to consider:
    iii. whether disclosure would nevertheless have been unfair or unlawful for any other reason.

35. The Appellant presented a considerable body of information and argument which, he said, gave rise to a significant public interest in the disclosure of the withheld information. It represented a serious attack on D's honesty when giving evidence and when authorising those representing her to make the submissions that were presented to the Panel. The Information Commissioner had acknowledged in his Decision Notice that there was a legitimate public interest in the disclosure of information which would demonstrate whether or not the Panel operated effectively. The GMC did not challenge the need for transparency generally but argued that, as the GMC's own procedures provided adequate safeguards against a doctor who acted dishonestly or fraudulently during a Panel hearing, disclosure to the world was not

necessary. It went further to suggest that an order for disclosure would amount to an interference by this Tribunal into questions that fell within the exclusive jurisdiction of the Panel.

36. The GMC also argued that disclosure of the information in the transcripts of the closed hearing would represent an unwarranted interference with D's privacy rights and would be unfair to her.

37. We do not, of course, wish to interfere with the right of the Chair of the Panel to regulate the conduct of its hearings. However, we do not accept that, in carrying out the balancing exercise required by the FOIA in the circumstances of this case, we are trespassing on the Panel's exclusive jurisdiction. This is particularly so when what is under review is, not the decision of the Panel's Chair to hold part of a hearing in public (which falls squarely within her jurisdiction to manage the hearing) but the subsequent categorisation of part of the transcript as confidential. If the effect of a ruling on transcript confidentiality is to prevent the public having access to information which it would otherwise be entitled to see, under the normal application of the law contained in the FOIA, then this Tribunal should not be prevented from exercising its powers to order disclosure. We therefore turn to answer the questions set out in paragraph 34 above.

38. We do not accept that the Appellant's allegations of dishonesty directed at D give rise to a legitimate public interest in disclosure of the information in question. His arguments were not supported by evidence that we found convincing and the justification for disclosure is limited, in any event, because of the remedy available under the GMC's own procedures. However, we do consider that there is a legitimate public interest in all judicial proceedings, including those affecting the freedom of a doctor to continue in practice, being conducted in public unless there are compelling reasons for privacy. The concept of open justice is a feature of English law of great significance, reaffirmed most recently in the decision of the Court of Appeal in *Pink Floyd Music Ltd v EMI* [2010] EWCA Civ 1429. The justification for privacy in this case, once the medical information has been redacted, is more difficult to establish. Against that must be set the public interest in seeing as much as possible of the evidence and submissions that led the Panel to conclude that no sanction should be imposed despite its conclusion that D's fitness to practise had been impaired.

39. When turning to consider the degree to which disclosure of the remaining withheld information would interfere with D's privacy we take particular note of the amount of information that was set out in the Panel's two published decisions, as well as the open parts of the transcript of hearing. Having carefully reviewed the information remaining in the closed transcripts, after the redaction of information about D's health, we see nothing of significance that either had not already been put into the public domain or, if it had not, constituted a

material interference with D's right to privacy. We conclude, therefore, that the public interest in open justice outweighs any private interest in retaining confidentiality over any of the remaining information that had not already found its way into the public domain.

40. We also conclude that there is nothing in the circumstances of this case that would make disclosure unfair or unlawful for any other reason. D would have no legitimate expectation of confidentiality extending to any part of the record of a public hearing other than those parts of it that contained medical information about her.

Regulatory Enforcement

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41. The GMC argued that disclosure would have a chilling effect on the Panel's work and prejudice the ability of the GMC to discharge its regulatory functions. We see the force of those arguments when applied to information about the medical condition of an individual brought before the panel and, in particular, the evidence of witnesses providing information about such an individual's medical condition. However, the arguments lose all impact once the medical information has been removed or redacted under the application of the law relating to sensitive personal data. We do not believe that disclosure of the remaining information in this case would deter witnesses or otherwise hamper the Panel's work, in light of the amount of information which the Panel had itself put into the public domain and the fact that Panel hearings should be conducted in public unless there are cogent reasons for imposing a degree of confidentiality. We conclude, therefore, that the exemption was not engaged in respect of the non-medical information. It is not therefore necessary to consider the public interest balance.

Conclusion

42. We conclude that, as the only ground of appeal on which the GMC has succeeded is that based on the presence of D's sensitive personal data, the redacted versions of the closed transcript extracts set out in Annexes 1, 2 and 3, and the whole of the transcript recording the legal assessor's advice to the Panel, should be disclosed to the Appellant by the GMC. The GMC was justified in refusing to disclose the rest of the closed transcript.

43. Our decision is unanimous.

Chris Ryan
Judge

31 March 2014