

The National College for Teaching and Leadership

And

**Monzoor Hussain, Hardeep Saini, Arshad Hussain, Razwan Faraz and
Lindsey Clark**

1. This is the decision of the Panel in respect of the NCTL's application of 11 January 2017 for the Panel to amend paragraph 10(1) of its decision of 20 December 2016.
2. The Panel considered it was appropriate to rehearse some of the relevant background.
3. Issues relating to what were alleged to be shortcomings on the part of the NCTL to fulfil its disclosure obligations first came to the attention of the Panel when it received an email dated 24 November 2016 from the solicitor acting on behalf of Mr Faraz. An urgent application for disclosure was attached to that email relating primarily to documents in respect of one witness who had been called by the NCTL to give evidence to the Panel. The application expressed wider concerns with the overall position regarding disclosure.
4. Subsequently, expressions of concern were made by the representatives of other respondent teachers regarding the approach of the NCTL relating to its disclosure obligations. These refer to documentary evidence and transcripts of oral evidence relating to regulatory proceedings contemplated or brought against other individuals linked with the investigation which ensued following the publication of the Trojan horse letter in November 2013.
5. Consequently, even though it had intended to announce its substantive decisions in respect of the respondent teachers on 23 December 2016, the Panel decided to hold a case management hearing on 20 December 2016 to consider the outstanding issues of disclosure which had been brought to its attention.

6. By the time of the hearing on 20 December 2016, it became clear that substantial amounts of additional documentation had been reviewed by the NCTL and that disclosure of further material had taken place.
7. Whilst none of the teachers' representatives had made specific reference to them in their initial representations, the NCTL's review included the transcripts of 50 individuals ("the interviewees") who had been interviewed in the course of the investigation undertaken by Peter Clarke which led to the publication of a report dated July 2014 entitled "Report into allegations concerning Birmingham Schools arising from the "Trojan horse" letter".
8. In the course of that investigation, a number of those individuals were interviewed jointly by Peter Clarke and by Birmingham City Council which was carrying out its own investigation.
9. In advance of the hearing on 20 December 2016, the NCTL lodged an application dated 16 December 2016.
10. At paragraph 2 of the application, the presenting officer stated that he had reviewed all the transcripts from the Clarke investigation. He had concluded that the transcripts of seven of those individuals interviewed may potentially be of assistance to the defence and therefore should be disclosed.
11. The Panel was not aware that any of the respondent teachers had specifically raised the issue of the transcripts of the interviewees, and approached the matter on the basis that this formed part of the NCTL's late review of its disclosure obligations.
12. As for the Clarke report itself, its existence, with its reference to the material on which it is based, had been known to the presenting officer and the respondent teachers certainly from the outset of proceedings. In the opening note and in the oral submissions of the presenting officer at the very start of the hearing, the Clarke report was described as a document which contained useful background information but it was not the primary evidence on which the Panel was invited to decide the case.

13. Subsequently, on 24 November 2015, despite opposition from certain of the respondent teachers, the Clarke report was admitted into evidence.
14. Finally, in advance of closing submissions in June 2016, the NCTL served a Scott schedule. In respect of allegation 1 which affects all respondent teachers, the NCTL identified three categories of evidence, namely the WhatsApp messages, the Clarke report, and, "the inference drawn from the evidence set out below".
15. The NCTL's application of 16 December 2016 was the first reference the Panel had seen to the transcripts forming part of the disclosure process. It had not been privy to any correspondence that may have been exchanged between the NCTL and the respondent teachers at any stage during the proceedings with regard to this material nor had it been asked at any stage to consider an application by one or more of the respondent teachers for their specific disclosure.
16. In its application, the NCTL stated that there were competing interests in play in that the interviews were conducted on the basis of assurances of confidentiality. The Panel will comment in due course on its assessment of any assurances which may have been given to those interviewed by Mr Clarke.
17. Of the seven interviewees who the presenting officer believed may be of assistance to the defence, three of them did not consent to the transcripts being disclosed. One interviewee had stated, "I am really sorry but I do not want my transcript being released as there are things in it that I talked about and if made public could be used against certain individuals".
18. Nevertheless, the NCTL invited the Panel, "... to weigh the competing interests in this case and, if they agree that the public interest in the fair administration of justice outweighs the competing interests, to make an order that the NCTL should disclose to the defence the material listed below", which included the transcripts of the three individuals who did not consent to their disclosure.

19. At no time prior to the hearing on 20 December 2016 did the representatives of the respondent teachers state specifically that they required the disclosure of the transcripts of all of the interviewees.
20. However, in the course of the hearing on 20 December 2016, Ms McDonald, on behalf of Mr Arshad Hussain, stated initially that she applied for the disclosure of the transcripts of the interviewees and who had also given evidence in the course of these proceedings. Ms Darwin and Ms Langdon, representing Mr Faraz and Ms Clark respectively, applied for the disclosure of the transcripts of all interviewees and Ms McDonald subsequently supported that application.
21. Unfortunately, the presenting officer did not comment on or make any submission to resist those applications in advance of the Panel deciding on the directions that it made on 20 December 2016. The presenting officer has subsequently apologised for his failure to do so. It was only after the directions were made on 20 December 2016 that the presenting officer raised his concerns with the Panel at the hearing with regard to the ability of the NCTL to comply with the direction that the transcripts of all those interviewed in the course of the Clarke investigation should be disclosed. The Panel has accepted the presenting officer's apology but wishes to record its considerable regret that the presenting officer did not raise these important matters on 20 December 2016.
22. On 20 December 2016, the presenting officer invited the Panel to agree that, in the case of those listed at paragraph 2 of the NCTL's application of 16 December 2016, the public interest in the fair administration of justice outweighed the competing interest of those three interviewees who did not consent to the disclosure of their transcripts. The information relating to those three individuals was restricted to that which is contained at paragraphs 3(b), (c) and (d) of the application.
23. At the time of the application on 20 December 2016, the Panel concluded that Mr Colman had not included any other interviewees on the basis that, in his judgement, the transcripts of their interviews did not contain any material which either undermined the NCTL's case or assisted that of the teachers. The Panel was not informed that those

interviewed by Peter Clarke in the course of his investigation, but not included in the list contained in the application, were in a different position to those who were included and who did not consent. At no stage was the Panel referred to the Clarke report itself. In making the direction that it did on 20 December 2016, the Panel took into consideration the added protection afforded by direction 10(2) which restricted the use of the transcripts such that they could only be used for the purpose of these proceedings subject to the exceptions outlined.

24. The Panel therefore bore in mind that disclosure of the transcripts would be restricted to the respondent teachers and their representatives. If it transpired that one or more of the respondent teachers wished to rely on the evidence contained within any of the transcripts disclosed in the course of this process, that party would need to make an application under paragraph 4.18 of the Teacher Misconduct – Disciplinary Procedures for the Teaching Profession. This stipulates that the Panel may admit any evidence, where it is fair to do so, which may reasonably be considered to be relevant to the case.
25. Paragraph 4.19 states that, "Evidence not disclosed in accordance with paragraph 4.20 will be admitted only with the permission of the Panel at the hearing".
26. If a teacher or teacher's representative does not comply with paragraph 4.20 of the rules, the evidence can only be admitted at the discretion of the Panel and the Panel may then waive or amend the periods of time if it is in the interests of a fair hearing.
27. If any of the respondent teachers do apply to the Panel for permission to admit evidence which has come into its possession as a result of the disclosure which has been made by the NCTL since November 2016, the Panel can, if it considers it to be in the interests of justice, either protect the identity of individuals by holding part of the hearing in private or by anonymising the name and identity of any witness to whom reference is made in the documents or both. Indeed, a number of witnesses who have given evidence to this Panel in the course of these proceedings have been anonymised. In this way, the individual is protected from the public becoming aware of his or her identity.

28. Having permitted the NCTL to pursue its application of 11 January 2017, the Panel has now listened to the basis on which Mr Colman invites it to amend direction 10(1) made on 20 December 2016.
29. The application is supported by NAHT, ASCL and Birmingham City Council who were all represented by Counsel at the hearing on 16 and 17 February 2017.
30. The application is resisted by all of the respondent teachers.
31. The Panel has read all of the written submissions which have been presented to it by the parties and the NAHT, ASCL and Birmingham City Council which have been supported by detailed oral submissions to which the Panel has listened very carefully. The Panel has also reviewed the documentation which has been submitted in advance of the hearing on 16 and 17 February 2017 which was not before it on 20 December 2016. The Panel has read the legal advice and the comments made by certain of the parties in respect of that advice.
32. The primary ground on which Mr Colman relies is that, other than those named in paragraph 2 of his application of 16 December 2016, the content of the transcripts of those interviewed in the course of the Clarke investigation are irrelevant to the allegations being pursued against the respondent teachers. It is important to recognise that this is not a case where the presenting officer is proposing that evidence which is harmful to the NCTL's case or helpful to the respondent teachers' case should not be disclosed.
33. Whilst the NCTL's procedural rules are silent with regard to the test for disclosure, the Panel has adopted the civil test for standard disclosure. Consequently, the test which has been applied by the Panel in reaching the first stage of its decision is whether the material might assist the case of the respondent teachers or undermine that of the NCTL. If any support is required for that approach, it can be found at paragraph 44 of the judgment of Mr Justice Phillips in the appeals of Anwar and Ahmed v NCTL and Secretary of State for Education [2016] EWHC 2507 (Admin) where the judge says, "*....the NCTL*

was obliged to disclose material.....which might assist the Appellants' case or damage its own.....".

34. The Panel took into account that fairness, to include the overall fairness of the hearing, ordinarily requires that any material held by the NCTL which weakens its case or strengthens that of the respondent teachers should be disclosed to the respondent teachers.
35. The responsibility for the assessment as to relevance, in other words whether it assists the respondent teacher's case or harms that of the NCTL, rests with the NCTL and is determinative, unless and until one or more of the respondent teachers puts evidence before the Panel which demonstrates that the assessment undertaken by the presenting officer has been wrong or unreliable.
36. If the transcript of any particular interviewee neither weakens the NCTL's case nor strengthens that of the respondent teachers, there is no requirement to disclose it. Furthermore, taking account of the NCTL's position, the presenting officer has also confirmed that there will be no application to introduce evidence at this stage which assists the NCTL's case.
37. The Panel determined that it should resist generalised allegations on the part of the respondent teachers of the inadequacy of the NCTL's approach to disclosure to support its argument that the assessment on the part of the NCTL of what needs to be disclosed cannot be trusted and that therefore the entirety of the transcripts should be disclosed.
38. The current position is that the transcripts of 16 interviewees have been disclosed to the respondent teachers, to include the seven listed in paragraph 2 of the NCTL's application of 16 December 2016. The nine interviewees who make up the balance of the 16 have consented to the disclosure of their transcripts.
39. The presenting officer has re-asserted that, consistent with what is said in his application of 16 December 2016, only the transcripts of those seven listed in paragraph 2 provide evidence which might assist the respondent teachers or harm the NCTL's case. He

maintains that the transcripts of the nine interviewees which have subsequently been disclosed support his assertion that they, and the remainder of the undisclosed transcripts, are irrelevant to the allegations being faced by the respondent teachers.

40. In her written submissions, Ms Langdon states on behalf of Ms Clark that this is not correct but does not go on to explain why it is not correct. The Panel has not been provided with any specific evidence which demonstrates that the presenting officer's assertion is either wrong or unreliable.

41. Ms Darwin submitted very strongly that it was simply not possible to trust the judgement of the presenting officer when considering whether any material either undermined the NCTL's case or assisted the case of the respondent teachers. The Panel understands why Ms Darwin should make such submissions. The Panel made it clear in its decisions of 20 December 2016 and 16 February 2017 that it is very regrettable that these shortcomings in the disclosure process only came to light in November 2016 and subsequently. This is particularly so when the Panel had been in a position to announce its final decisions in these proceedings on 23 December 2016. It also took into consideration the acknowledgement of the NCTL of its failure to fulfil its disclosure obligations said, in part, to be as a consequence of "departmental misunderstandings" of what was required. However, other than the assertion that the assurances of the presenting officer cannot be trusted, no specific evidence has been put before the Panel to indicate that the disclosure obligations should extend to all transcripts.

42. Indeed, there have been no representations from any of the respondent teachers to say that one or more of the nine transcripts contain information which is either damaging to the NCTL's case or helpful to their case.

43. The Panel does not consider that, at this late stage, the NCTL is obliged to disclose evidence which is adverse to the respondent teachers' cases. However, it does consider that material which may go to the credibility of an interviewee who had given evidence in these proceedings or the consistency of his or her account is relevant to the extent that it might undermine the NCTL's case and/or assist the respondent teachers' cases.

44. In the balance of the transcripts which are undisclosed, there are transcripts of four interviewees who gave evidence in these proceedings.
45. The presenting officer has maintained that what they said in their interview with Peter Clarke is consistent with the evidence they gave before the Panel. The presenting officer also said that they have withheld their consent because, in their interview with Peter Clarke, they mentioned other matters which they do not wish to be disclosed and which go beyond the allegations faced by the respondent teachers.
46. The Panel has decided that the transcript of an interview in the course of the Clarke investigation of a person who subsequently gave evidence to this Panel might assist the respondent teacher's case or damage that of the NCTL.
47. The Panel noted that this coincides with the basis on which Ms McDonald initially pursued her application, namely that disclosure of the transcripts of those interviewees who gave evidence before the Panel should be disclosed. It is also consistent with the written submission of Mr Henderson who stated at paragraph 12(d) that, "extraordinarily the NCTL still asserts (paragraphs 6 and 9 of the application) that all these transcripts are irrelevant, despite the clear value of these in establishing the consistency and therefore credibility of the witnesses the NCTL has relied on".
48. However, the Panel is not satisfied that the respondent teachers have produced sufficient evidence to establish that the presenting officer's assessment in respect of the remainder of the transcripts is either wrong or unreliable.
49. Having found that the transcripts of the four interviewees who also gave evidence before this Panel might assist the respondent teachers' cases or undermine the NCTL's case, even though the material is relevant, the Panel went on to consider whether disclosure was necessary for disposing fairly of the proceedings. The four interviewees had declined to give their consent to the disclosure of the transcripts and the Panel understands that those interviewed in the course of the Clarke investigation were, according to the presenting officer, provided with assurances of confidentiality.

50. In such circumstances, the Panel had to carry out a balancing exercise between the competing issues of public policy, namely the public interest in the proper administration of justice (which may lead to the assurance of confidentiality, if one was provided, being overridden) and the public interest in ensuring that members of the public are prepared to come forward to assist in investigations such as the one undertaken by Peter Clarke.

51. In relation to this issue, the NCTL, the NAHT, the ASCL and Birmingham City Council have produced documentation and witness evidence which had not been before the Panel at the hearing on 20 December 2016. The NAHT produced two witness statements to support its submissions, from Peter Clarke and Simon Thomas. Mr Thomas is a solicitor for the NAHT and made his statement on behalf of eight NAHT members.

52. Before giving their interview, interviewees were asked to sign a consent form. Three different versions of a consent form were produced. Two versions of the form include a request for the interviewee to give his or her consent to the sharing of information from the transcript of their interview with third parties for the purposes of their investigations. All versions of the form state that information they provided may appear in Peter Clarke's report, but that it would be done in a way which would mean that the interviewee would not be identifiable as the source of that information. The Panel had no explanation before it as to why three versions of the consent form were produced and the circumstances in which the different versions were used. The Panel had before it signed consent forms in each version with signatures and dates redacted.

53. As already noted, Mr Clarke provided the Panel with a witness statement for this part of the hearing (this is the first occasion on which the Panel has received direct evidence from Mr Clarke). In his witness statement, Mr Clarke states at paragraph 4 that:

"The witnesses I interviewed were all offered the opportunity to give their evidence with an assurance of confidentiality, using a formula approved by government lawyers, and which involved a document signed by both the interviewer and interviewee at the beginning of each interview. My recollection is that the wording of the signed

assurances were to the effect that the contents of the interviews would not be shared without the express permission of the witness."

54. The Panel noted that the detail provided by Mr Clarke in this paragraph 4 did not accord with the content of the consent forms that were placed before the Panel. His recollection of the wording of the signed assurance did not accord with the wording on the three versions of the consent form that were placed before the Panel.

55. However, the Panel is satisfied that the indication given by Peter Clarke that the information would be shared would have been understood by the interviewees to mean that it would be shared with Birmingham City Council or similar organisations for the purpose of investigating concerns raised. It was suggested that a relevant third party would include the Panel but, on balance, the Panel did not consider this to be a correct interpretation taking account of its function.

56. As for the distinction between anonymity and confidentiality, the Panel was concerned that these terms were used too casually and without precision at the time of the investigation, the Clarke report and subsequently. However, the Panel took account of, and attached considerable weight to, what was said in the statement of Simon Thomas. He confirmed that all members of his Union, the NAHT, who were interviewees said to him that they received assurances that their evidence would be given on an anonymous and confidential basis and that the content of the transcripts would almost certainly enable them to be identified.

57. The Panel fully understands and acknowledges that the respondent teachers entirely refute and reject any suggestion that they would behave in the manner outlined which has given rise to the concerns expressed by the interviewees. Furthermore, the Panel will not allow such suggestions to affect in any way the decisions it reaches in respect of the substantive allegations.

58. Nevertheless, it is not appropriate for the Panel to ignore the assurances provided to, or the concerns expressed by, the interviewees for the purpose of determining the

application made by the NCTL. Interviewees have expressed what the Panel accept are genuine concerns but, for the purposes of its decision, the Panel emphasises that it did not have to make a determination that such concerns were caused by any conduct or potential conduct on the part of the respondent teachers.

59. On balance, the Panel is satisfied that, whilst the forms of consent did not provide the interviewees with the blanket assurance of confidentiality which has been argued, the interviewees believed that, in agreeing to be interviewed by Peter Clarke and his team, the content of that interview and the interviewee's identity would remain confidential. The Panel accepts that a number of the interviewees have said that, had they been aware that transcripts of their interview would become more widely known, they would not have participated in the investigation.

60. The Panel is satisfied that, in respect of those who were interviewed in the course of the Peter Clarke investigation who also gave evidence to this Panel, the public interest in the fair administration of justice and ensuring that the respondent teachers receive a fair trial outweighs the interests of the interviewees and any assurances of confidentiality with which they were provided. Indeed, it should be borne in mind that the identity of the four who gave evidence at the hearing of these proceedings will already be known to the respondent teachers and therefore it is not a question of their anonymity being maintained insofar as the respondent teachers are concerned.

61. If the respondent teachers apply to admit the transcripts (or any part of them) of any of the four interviewees who gave evidence to this Panel and if those witnesses were anonymised in the course of these proceedings, such anonymisation will continue.

62. Even if one or more of the four interviewees were not anonymised when giving evidence to the Panel, it is open to the NCTL to apply for those interviewees to be anonymised if the respondent teachers apply to admit the transcript or any part of it into evidence. The Panel would consider the merits of such an application if and when it is made.

63. In the circumstances, save in respect of the four interviewees who have also given evidence in these proceedings, in the absence of specific evidence to challenge or undermine the firm commitment from the presenting officer, given both in writing and in oral submission to the Panel, that the content of the undisclosed transcripts are irrelevant to these proceedings and that the NCTL's disclosure obligations have now been met, and taking account of the public interest in ensuring that members of the public are prepared to come forward and participate in investigations such as that undertaken by Peter Clarke, direction 10(1) of its decision of 20 December 2016 will be amended so that it will read as follows:

64. *"By 4 pm on Monday 13 March 2017, the NCTL shall disclose to the respondent teachers the transcripts of interviews of those interviewed in the course of the Peter Clarke investigation who have provided written consent to disclosure together with the transcripts of those interviewed in the course of the Peter Clarke investigation who have also given evidence to the Panel in these proceedings."*

65. The Panel does not consider that there is a need to amend paragraph 4 of its decision of 20 December 2016 as it does not form part of the directions made and that part of the earlier decision is superceded by this decision.

66. To confirm, the decision of the Panel is that the direction at paragraph 10(1) of its decision of 20 December 2016 is amended as follows:

67. By 4 pm on Monday 13 March 2017, the NCTL shall disclose to the respondent teachers the transcripts of interviews of those interviewed in the course of the Peter Clarke investigation who have provided written consent to disclosure together with the transcripts of those interviewed in the course of the Peter Clarke investigation who have also given evidence to the Panel in these proceedings.

68. The direction at paragraph 10(2) will remain in accordance with the original decision.

1 MARCH 2017

