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PRESIDENT
HEALTH, EDUCATION AND SOCIAL CARE CHAMBER**

PRESIDENTIAL GUIDANCE NOTE No 3 of 2023:

This Practice Guidance revises and replaces Presidential Guidance Note No 1 of 2023 on Recording of Hearings in the Health, Education and Social Care Chamber and Transcription of Recordings, dated 1 February 2023

**RECORDING OF HEARINGS
IN THE
HEALTH, EDUCATION AND SOCIAL CARE CHAMBER
AND TRANSCRIPTION OF RECORDINGS**

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1. The Tribunals, Courts and Enforcement Act 2007 Schedule 4 Part 1 paragraph 7 provides that the Chamber President is to make arrangements for the issuing of guidance on changes in the law and practice as they relate to the Chamber.
2. This guidance relates to the arrangements for the recording of hearings and transcription of recordings in HESC.
3. This Presidential Guidance has effect from 15 January 2024.
4. In this Presidential Guidance:
 - references to “the Rules” are to the Tribunal Procedure (First-tier Tribunal)(Health, Education and Social Care Chamber) Rules 2008;
 - “HESC” means Health, Education and Social Care Chamber;
 - “HMCTS” means His Majesty’s Courts and Tribunals Service;
 - “party” means—
 - (a) in a mental health case, the patient, the responsible authority, the Secretary of State (if the patient is a restricted patient or in a reference under rule 32(8) (seeking approval under section 86 of the Mental Health Act 1983)), and any other person who starts a mental health case by making an application;
 - (b) in any other case, a person who is an appellant, applicant or respondent in proceedings before the Tribunal or, if the proceedings have been concluded, a person who was an appellant, applicant or respondent when the Tribunal finally disposed of all issues in the proceedings;
 - “recording” means an audio recording in any medium from which any sound may be produced or reproduced, or the making of any such recording, and “record” and “recorded” shall be construed accordingly;
 - “preliminary hearing” means a case listed for an initial case management hearing and includes a hearing conducted in whole or in part by video link or by telephone;
 - “substantive hearing” means a case listed for a final oral hearing and includes a final hearing conducted in whole or in part by video link;
 - “transcript” means a document that sets out in writing, in whole or in part, what has, or appears to have been said, as captured in a recording;
 - “Tribunal” means a tribunal of any composition or jurisdiction sitting within HESC.

Making of recordings

5. Unless the Tribunal directs otherwise, HMCTS shall usually make audio recordings of substantive hearings in HESC where the technical facility exists to do so and where such recordings can be securely retained. This applies to all substantive hearings, whether they are held in public or private, and whether they are held in person or remotely.
6. It shall be at the discretion of the judge considering the case (either of the Tribunal's own choosing or where one of the parties make a request) whether they direct the recording of any preliminary, case management or other form of hearing (where such facilities exist).
7. More particularly:
 - 6.1 Hearings held in person can only be recorded where suitable equipment is installed or available in the hearing room. (There are some court and tribunal venues in England and Wales where, because of co-location with other jurisdictions, the Tribunal will be able to use the Digital Audio Recording Transcription and Storage ('Darts') system in the court room.) In the mental health jurisdiction, suitable recording equipment is not currently available in hospitals.
 - 6.2 The facility exists to record hearings held remotely via videolink using the HMCTS Cloud Video Platform (or once introduced, the HMCTS Video Hearings Service) and for those recordings to be securely retained by HMCTS. Consequently, HMCTS shall usually record substantive hearings held remotely.
 - 7.3 Previous recording experience shows that, occasionally, there will be a malfunction, which means that a recording cannot be made. If a recording cannot be made in respect of a hearing that otherwise would be recorded, the hearing will be delayed by no more than 15 minutes to allow HMCTS to restore recording functionality. If that functionality cannot be restored within 15 minutes, the hearing will proceed for that session, and for any further session during which the malfunction continues without a recording being made. Any failure in connection with audio recording does not affect the validity of the hearing.
8. Deliberations held in private between the judge and any non-legal members/panel will not be recorded. Pre-hearing examinations in the mental health jurisdiction will not be recorded.
9. Parties should, in accordance with previous practice, keep a handwritten record of the proceedings.
10. The written decision remains the explanation and outcome in HESC cases and should form the basis of any application for onward appeal or review.
11. HMCTS will not make audio-visual or visual recordings of any hearings.
12. Audio recordings are Crown copyright. The use, capture, re-editing or redistribution of the material in any form without permission could attract liability for breach of

copyright and/or defamation, in addition to the possibility of contempt proceedings.

13. HMCTS is responsible for the storage, retention and destruction of audio recordings and any transcripts of audio recordings that have been made, (other than audio recordings authorised by the Tribunal to be made by a party in exceptional circumstances). HMCTS will act in accordance with the terms of the Records Retention and Disposition Schedule applicable to HESC:

<https://assets.publishing.service.gov.uk/media/62b47cfd3bf7f0af821efef/health-education-social-care-chamber-rrds.pdf>

Prohibition on other recordings

14. No party, representative, witness or member of the press or public may record a hearing in HESC without the permission of the Tribunal. Making a recording without permission has always been and remains a contempt of court punishable in law (section 9(1)(a) of the Contempt of Court Act 1981.)
15. Any person who wishes to make a recording of a hearing as a reasonable adjustment should make an application to the Tribunal as soon as possible, following the guidance found here: [Equality and diversity – HM Courts & Tribunals Service – GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/equality-and-diversity-hm-courts-and-tribunals-service).
16. Permission shall only be given in exceptional circumstances and where the application has provided supporting evidence and an explanation for the need.
17. It is envisaged those exceptional circumstances will be where the making of such a recording is necessary to uphold the Tribunal’s overriding objective to deal with cases fairly and justly in order to ensure the effective participation of a vulnerable party or witness or by way of reasonable adjustment for a person with a disability.
18. If such permission is given, the Tribunal may impose any conditions, including as to deletion of the recording, as it sees fit.
19. Unless permitted by the Tribunal under paragraph 16 above, a Tribunal will not permit the parties to record the hearing themselves simply because the technical facility for HMCTS to do so does not exist. This is because HMCTS must retain control of all arrangements for making and storing recordings.

Transcripts

Transcripts at personal expense

20. Subject to this Guidance, parties shall have the opportunity to obtain a transcript of the recorded hearing at personal expense. They must complete Form EX107 and follow the guidance provided by HMCTS on the gov.uk page found here:

[Apply for a transcript of a court or tribunal hearing - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/apply-for-a-transcript-of-a-court-or-tribunal-hearing)

See also the EX107GN guidance notes setting out the process and cost element in

more detail.

21. On receipt of Form EX107, HMCTS will send the request to a judge to consider. This will not necessarily be the judge who heard the case. Such a decision will generally be taken on the papers by a District Tribunal Judge without a hearing.
22. Permission is a judicial decision, and subject to the guidance given below. Hearings in both Special Educational Needs and Mental Health Tribunals are generally heard in private (rule 26(2) and rule 38). The HESC Chamber has general powers to:
 - prohibit the disclosure or publication of documents or information 'relating to the proceedings' (rule 14(1));
 - prohibit the disclosure of a document or information to a person if the Tribunal is satisfied that such disclosure would be likely to cause the person or some other person serious harm and considers it proportionate to give such a direction (rule 14(2)).
23. Given the Tribunal has a discretion to prohibit disclosure or publication of documents and information under rule 14, the judge must weigh requests for a transcript with, amongst other things, the open justice principle and provide reasons.
24. Whether a departure from the principle of open justice is justified in any particular matter will depend on the facts of the case. The Tribunal must conduct a balancing exercise that will be fact-specific. Any risk of harm that the disclosure may cause to the maintenance of an effective judicial process or to the proper administration of justice (or the legitimate interests of others), may amount to reasons for redaction or refusal. This is further addressed under 'Considerations for the Tribunal' below.
25. A request for a transcript will not by itself alter any time limits set-out in the HESC Rules, unless a judge directs otherwise.
26. If permission is given for a transcript to be made, the request will be sent back to HMCTS for the transcription service process to be followed. The transcriber will provide the draft transcript directly to the Tribunal/judge so that the draft can be checked, amended and approved.
27. Any transcript which is produced will not include any oral judgment or reasons given at the hearing.
28. When reviewing the transcript, the judge (who may be a District Tribunal Judge and not the hearing judge), shall have regard to:
 1. Ensuring that the transcript is of the hearing itself and not of parts immune from disclosure (such as the deliberations in private between the Judge and non-legal members; discussions between the parties in the hearing room before the hearing has commenced, after it has concluded, or during any adjournment; or any oral judgment and reasons); and
 2. Where appropriate, ensuring that the transcript is in compliance with the guidance given below. To that end, the person reviewing the transcript may consult the hearing judge if required.
29. It is not the role of the reviewing judge to check the transcript against the recording. The responsibility for the accuracy of the transcript lies with the transcription service.
30. The approved transcript will then be sent back to the chosen transcription company

and will be sent directly to the requesting party from the transcribers.

Transcripts at public expense

31. A transcript must be paid for unless the Tribunal believes there are exceptional circumstances for it to be produced at public expense.
32. Having regard to the scheme for the production of written reasons under rules 30 and 41, and the representatives and parties opportunity to take handwritten notes during the hearing, the Tribunal will only order the provision of a transcript at public expense, in whole or in part, in circumstances where a formal application has been made and supporting reasons and evidence provided, along with the completed EX107 transcript request form.
33. It is envisaged those circumstances will be where the provision of a transcript at public expense, in whole or in part, is necessary to ensure the effective participation of a vulnerable party or witness or as a reasonable adjustment for a person with a disability, and which cannot otherwise be addressed by the production of written reasons, (or, exceptionally, by giving them permission to make their own recording or to listen to a recording made by HMCTS).
34. The response to an application for a transcript at public expense is a judicial decision in the form of a case management order. Such a decision will generally be taken on the papers and without a hearing. Similar considerations to those outlined above under 'Transcripts at personal expense' shall apply. The Tribunal may ask for supporting evidence to be provided (e.g., as to income or medical evidence), and the Tribunal may seek observations from the other party.
35. The Tribunal may decide that the overriding objective and interests of justice are served by arranging for a portion of the audio recording, rather than the audio recording in its entirety, to be transcribed at public expense.

Considerations for the Tribunal when an application for a transcript is received

36. Most requests for a transcript will come from parties or their representatives who have already heard the content of the hearing and seen the evidence (including, for example, where it contains private medical evidence or the personal data of third parties.) A request for a transcript from a party at personal expense should therefore, subject to what follows, usually be granted.
37. In deciding whether a transcript (or part thereof) should not be provided, the judge shall have regard to, amongst other things:
 - (a) whether release of a transcript may have an adverse effect on the health or another risk of harm in the short or long term, to any individual connected to the case;
 - (b) the need to protect the parties or another's privacy (where applicable);
 - (c) the nature of the evidence in the proceedings (where applicable);
 - (d) whether there are any special factors that would militate against the provision of a transcript;

(e) whether there is a risk of distribution of the transcript and any undertakings that have been given.

38. In hearings held in private, the judge shall usually seek the other party's views before considering the matter.
39. The judge may require a non-disclosure undertaking to be given by the requesting party.
40. Where permission for a transcript is refused, the judge must give clear reasons for making that decision. These reasons need not be lengthy, but should demonstrate succinctly why permission was refused.

Use of transcripts and information

41. Section 12 of the Administration of Justice Act 1960 provides that where a court is sitting in private, as is nearly always the case in Mental Health and Special Educational Needs Tribunal proceedings, publication of information relating to proceedings shall be a contempt of court (s 12(1)(a)(iii) and 12(1)(b).)
42. The copy of any transcript issued is for the sole use of the parties to the proceedings. Distribution, publication or broadcasting of the transcript, including by social media, to third parties who are not connected with the proceedings may constitute a contempt under the Administration of Justice Act 1960 and/or the Contempt of Court Act 1981.
43. The transcript may contain the personal data of others referred to within the transcript and unauthorised distribution or publication may also be in breach of data protection legislation.
44. Examples of what may constitute misuse include the following:
 - (a) a party (or representative of a party) who has obtained a transcript of a hearing (or part thereof) that was held in private then forwards it to an individual who was not entitled to be present at such a hearing;
 - (b) a party (or representative of a party) who has obtained such a transcript forwards it to a person thereby identifying any individual in respect of whom an anonymisation order has been made; and
 - (c) a party (or representative of a party) publishes an altered or misleading version of the transcript, including by placing it online or on social media (which may also attract civil liability.)
45. Parties are reminded of the prohibitions set out in rule 14, namely:
 - (1) The Tribunal may make an order prohibiting the disclosure or publication of—
 - (a) specified documents or information relating to the proceedings; or
 - (b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.
 - (2) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—

- (a) the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
- (b) the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.

- (3) If a party (“the first party”) considers that the Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party (“the second party”), the first party must—
 - (a) exclude the relevant document or information from any documents that will be provided to the second party; and
 - (b) provide to the Tribunal the excluded document or information, and the reason for its exclusion,so that the Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).
- (4) The Tribunal must conduct proceedings as appropriate in order to give effect to a direction given under paragraph (2).
- (5) If the Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Tribunal may give a direction that the documents or information be disclosed to that representative if the Tribunal is satisfied that—
 - (a) disclosure to the representative would be in the interests of the party; and
 - (b) the representative will act in accordance with paragraph (6).
- (6) Documents or information disclosed to a representative in accordance with a direction under paragraph (5) must not be disclosed either directly or indirectly to any other person without the Tribunal’s consent.

46. Importantly, under rule 14(7):

(7) Unless the Tribunal gives a direction to the contrary, information about **mental health cases** and the names of any persons concerned in such cases must not be made public.

47. An application to publish a transcript may be made separately to the relevant Deputy Chamber President in HESC and will be decided on a case-by-case basis. The Tribunal can exercise its authority to disclose information more publicly, but this must be exercised consistently with a range of considerations, including the open justice principle, the Article 6 and 8 rights of the parties and others, and with the overriding objective of rule 2 of the Procedure Rules in mind. This may involve taking representations from the other party.

48. Any breach of the above rules is likely to be considered a contempt of court with any appropriate sanction attaching.

Access to recordings

49. Given that the majority of hearings held in HESC are held in private and there exists scope for unauthorised onward dissemination, no party, representative, witness or member of the press or public will be provided with a copy of any audio recording

made by HMCTS, save that in exceptional circumstances, the Tribunal may give access to all or part of an audio recording of a hearing for which an application has been made with supporting evidence and explanation.

50. Parties and representatives should, as they have previously done, keep a handwritten record of the proceedings, and will have the Tribunal's decision to frame any onward application or appeal.
51. While it is not possible to provide an exhaustive list, it is envisaged the circumstances where it is necessary and in the interests of justice to allow access to audio recordings will be limited to, for example, ensuring the effective participation of a vulnerable party or witness or by way of reasonable adjustment for a person with a serious disability. In such circumstances, the Tribunal will be entitled to consider whether a transcript is sufficient and if not, why not, and why (if appropriate) an application was not made before the hearing, and what steps the individual took in advance of the hearing to ensure a handwritten record was kept. (By Rule 2(4) parties must co-operate with the Tribunal generally.)
52. It would not be an exceptional circumstance for a party or representative to apply to listen to an audio recording to better understand why the Tribunal reached the decision, since that will be apparent from the written reasons for its decision.
53. Access to audio recordings may be given to the judiciary and complaints investigation bodies.
54. A Tribunal may listen to all or part of an audio recording during the course of a hearing or when preparing its judgement.
55. Nothing in this Presidential Guidance has any bearing on how, if at all, the Upper Tribunal makes use of audio recordings or transcripts in Upper Tribunal hearings in the context of an appeal. That is exclusively a matter for the Upper Tribunal.
56. In the exceptional circumstances that a copy of the audio recording is issued, it is for the sole use of the parties to the proceedings. Distribution, publication or broadcasting of the recording, including by social media, to third parties who are not connected with the proceedings may constitute an offence under section 9(1)(b) of the Contempt of Court Act 1981, which makes it an offence to "publish a recording...by playing it in the hearing of the public or any section of the public, or to dispose of it with a view to such publication."
57. Importantly, the recording may contain the personal data of others also recorded or referred to within the recording and unauthorised distribution or publication may be in breach of data protection legislation.

Recording oral judgments

58. When a judge announces a Tribunal's decision with reasons orally, pursuant to rule 30 or 41, those reasons may be recorded, as they are delivered, on a dictation device or other recording equipment as provided by HMCTS.
59. The decision announced orally may, at the judge's request, be transcribed and provided to the judge to assist them in drafting the written reasons for the decision. The written decision will stand as the authoritative statement of the Tribunal's reasons for its decision, which may develop or differ from the reasons given orally.

Third parties and interested persons

60. Any applications from third parties not directly connected to the proceedings may be made separately to the relevant Deputy Chamber President of HESC and will be decided on a case-by-case basis. Any application will include a range of considerations, including the open justice principle, the Article 6 and 8 rights of the parties and others, and the overriding objective of rule 2 of the Procedure Rules. This may involve taking representations from the parties.
61. A non-party shall only usually be able to request a transcript for the parts of the hearing held in public. The requester must pay the charges authorised by any scheme in force, unless an order has been made for the provision of the transcript, in whole or in part, at public expense. A transcript is not usually provided at public expense where the request has come from a non-party, such as a member of the press or public.

This Presidential Guidance has effect from 15 January 2024.

Signed on the original

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PRESIDENT OF THE HEALTH, EDUCATION AND SOCIAL CARE CHAMBER

14 December 2023