

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2015

Public Authority: Equality and Human Rights Commission (EHRC)

Address: Arndale House
Arndale Centre
Manchester
M4 3AQ

Decision (including any steps ordered)

1. The complainant has requested information relating to St Mary's University and an alleged breach of the Equality Act. The EHRC provided the complainant with some information in response to the request but redacted some information from a letter it provided to the complainant under section 31(1)(g) with section 2(a) and (c) and section 41 FOIA.
2. The Commissioner's decision is that the EHRC has correctly applied section 41 FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 2 August 2014 the complainant made the following request for information under the FOIA for:

"Having now considered the information you have kindly provided, I wish to make three more requests under the provisions of the Freedom of Information Act 2000. The first is to receive a copy of all communications you have sent to St. Mary's University, Twickenham, about this matter. The second is to receive a copy of the University's replies. The third is to receive a copy of all other papers the Commission may have on this issue, including minutes, notes or records of their deliberations and memoranda or other such documents received from staff or advisers.

It would also be appreciated if you could tell me the following: (i) whether the statement you have made by way of background information constitutes the full reasons and rationale for the Commission's decision; and (ii) whether there is a date by which I have to submit a request for an internal review."

5. On 18 August 2014 the EHRC responded. The EHRC answered the latter part of the request. It refused to provide the information it held within the scope of the former part of the request under section 31 and 41 FOIA.
6. The complainant requested an internal review on 1 October 2014. The EHRC sent the outcome of its internal review on 29 October 2014. It provided the complainant with further information in response to his request but redacted part of a letter under section 31(1)(g) with section (2)(a) and (c) and section 41 FOIA.

Scope of the Case

7. The complainant contacted the Commissioner on 30 January 2015 to complain about the way his request for information had been handled. In particular he asked the Commissioner to investigate whether the redaction made to a letter provided to him was correct.
8. The Commissioner has considered whether the EHRC correctly applied section 31(1)(g) with section (2)(a) and (c) or section 41 FOIA to the redaction made to a letter provided to the complainant.

Reasons for decision

9. The EHRC has argued that section 41 applies to the redacted information as it was provided to it in confidence by St Mary's University.
10. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

11. The EHRC explained that the redacted information reveals advice from a professional legal adviser to the University, which had been sought by the University following the EHRC's contact with them about the alleged breach of the Equality Act.
12. Having viewed this redacted information the Commissioner considers that it is information provided to the EHRC by a third party.

Would disclosure constitute an actionable breach of confidence?

13. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

14. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
15. The EHRC said that the withheld information has the necessary quality of confidence, as it reflects the contents of legal advice obtained by the University. It is not publicly available.
16. Based on the above the Commissioner accepts that the information is not trivial and is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

17. The EHRC explained that the information was communicated in circumstances importing an obligation of confidence. The circumstances in which the information referred to was provided was in the context of an investigation by the EHRC within the scope of its regulatory functions under the Equality Act 2006.
18. It explained that allegations that relate to protected characteristics and discrimination are by nature sensitive and can cause controversy. It said

that it operates a system by which anyone can contact the EHRC in confidence and expect their identity to be protected. Under the same system, an accused organisation is also given the space and confidence to correspond with the EHRC in order to establish facts, put forward their response and allow the EHRC to decide which (if any) statutory power to deploy. This decision-making can be carried out by the EHRC acting alone or in collaboration with the accused organisation, taking into account the nature and the content of the complaint.

19. The Commissioner accepts that there is an implied obligation of confidence on the part of the EHRC that it will not share information provided as part of this process.

Would disclosure be of detriment to the confider?

20. The EHRC said that it is likely that disclosure of this confidential information would amount to an actionable breach of confidence as the organisation could rightly claim that the disclosure makes the enforcement process unfair and could breach the rights of the party or parties involved under Article 6 of the European Convention on Human Rights. The University has expressly withheld consent to disclosure.
21. The Commissioner accepts that disclosure would amount to an actionable breach of confidence, particularly as it is likely that legal professional privilege would attach to the redacted information.

Is there a public interest defence for disclosure?

22. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Trust could successfully rely on such a public interest defence to an action for breach of confidence in this case.
23. The EHRC does not consider that it would have a defence to any action brought in respect of the disclosure of the information identified based on the public interest. This is because of the nature of the information itself and the circumstances in which it was obtained. The University provided the information in good faith, in the context of sharing relevant information to assist the EHRC in its investigation.
24. When considering the public interest regard must also be had to the significant disclosure that has been made in this matter, which the EHRC considers is sufficient to meet the public interest.

25. For his part, the Commissioner considers that there is a general public interest in the EHRC being open and transparent about the regulatory investigations it undertakes.
26. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
27. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
28. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA. The Commissioner has not therefore gone on to consider the application of section 31(1)(g) with section (2)(a) and (c) FOIA any further.

Right of appeal

29. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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