

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 December 2021

**Public Authority:** Equality and Human Rights Commission  
**Address:** Arndale House  
The Arndale Centre  
Manchester  
M4 3AQ

### **Decision (including any steps ordered)**

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1. The complainant has requested from the Equality and Human Rights Commission (EHRC) the nature of complaints that were sampled in a report, *Investigation into antisemitism in the Labour Party*<sup>1</sup> that was published in October 2020. The EHRC refused to provide this information, citing section 44 – prohibitions on disclosure, later it also cited section 31 – law enforcement.
2. The Commissioner's decision is that the EHRC has correctly cited section 44(1)(a) of the FOIA.
3. The EHRC is not required to take any further steps.

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<sup>1</sup> [Investigation into antisemitism in the Labour Party \(equalityhumanrights.com\)](https://equalityhumanrights.com)

## **Request and response**

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4. On 29 October 2020 the complainant made the following request for information under the FOIA –

*"I have viewed the report online and note you sampled 70 cases. I wish to see the nature of these complaints but cannot see where you have described them in the report. If I have missed the references then please could you provide them. If they are not described in the report then please could you email them to me, so I can see, as all readers of the report should be able to see, the nature and extent of the anti-semitism in each of the complaints."*

5. The EHRC responded on 20 November 2020 and refused to provide the requested information citing section 44 of the FOIA – prohibitions on disclosure, quoting the specific enactment as section 6 of the Equalities Act 2006 (EA 2006).

6. The complainant requested a review on 10 December 2020, revising his request as follows:

*"Please accept this email as a request for review. The report refers 70 sampled complaints. I wish to view the complaints to identify which of the 11 examples of antisemitism were crossed. On which forum/platforms were they made eg Facebook. I do not wish to see details which would identify the complainer, these details can be blacked out."*

7. The EHRC provided an internal review on 11 January 2021 in which it maintained its original position.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 26 April 2021 to complain about the way his request for information had been handled. He disagreed with the EHRC's refusal to provide the information he had requested.

9. On 26 October 2021, the EHRC sent its response to the Commissioner's investigation letter (minus the withheld information which it provided at a later date). The EHRC said that it now considered that the information requested by the complainant was what he had sought under the internal review request. It had therefore responded to the Commissioner

in respect of the request as revised in the internal review request, rather than the request as it had been originally submitted. In its response, the EHRC said that it was also citing section 31 (law enforcement) regarding the requested information.

10. The Commissioner considers the scope of this case to be the EHRC's citing of section 44 and section 31 of the FOIA.

## **Reasons for decision**

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### **Section 44 – Prohibitions on disclosure**

11. Section 44 is an absolute exemption. This means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.
12. Section 44 of the FOIA states that:
  - (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*
    - (a) is prohibited by or under any enactment,*
    - (b) is incompatible with any Community obligation, or*
    - (c) would constitute or be punishable as a contempt of court.*
13. The EHRC has provided the requested information to the Commissioner and stated that section 44(1)(a) FOIA applies to the whole of the withheld information. The withheld information consists of the nature of the complaints and the forum/platform upon which they were made.
14. The Commissioner needs to consider whether the information it has withheld under this exemption is prohibited by law.

### **The complainant's view**

15. Firstly, the complainant stated in his complaint to the Commissioner that the EHRC could resolve his complaint if it was to "*Make recommendation for change to legislation*".
16. The complainant provided his arguments as to why he believed that this information should be released by attaching some correspondence he had had with his MP's office. In this correspondence he contended that the report omitted to state the facts and reproduce the complaints which he believes he has a right to know on several grounds:

- They should have been in the report.
  - He argues that members of the Labour party have been smeared by the report.
  - EHRC is a publicly funded body which should function to enlighten the public, not hide from it and frustrate it.
17. He stated that it appeared that the EHRC are complying with the law as it stands and asked if the statute had been drawn up incorrectly. By this the Commissioner understands him to mean the Equality Act 2006 (section 6, section 20) and the Freedom of Information Act 2000 (section 44(1)(a)), suggesting that they are not fit for purpose.
18. The complainant expressed his views in several emails to the Commissioner during October 2021. The Commissioner responded to an email sent by the complainant on 5 October 2021 by explaining the position from the ICO's point of view. The complainant had argued that the law was not fit for purpose. Whether the complainant meant the EA 2006, the FOIA 2000, or both, is unclear. Certainly it is clear from separate correspondence that the complainant provided as supporting information, he was not content with the legislation that allowed this information to be withheld. The Commissioner pointed out to the complainant that the ICO does not make legislation.
19. He also asked why his correspondence with the EHRC had to be dealt with under the FOIA and he suggested that it could have been reviewed under alternative legislation or under the common law so that it could be provided without redaction. The Commissioner expressed the view that the EHRC was obliged to consider the request under the FOIA, that he had complained to the Regulator of the FOIA, and that the investigation would have to be considered under that legislation and not whether it could have been provided by some alternative route.
20. The complainant asked that the whole of his email to the EHRC be included but the Commissioner pointed out that the whole statement was not the request itself.
21. The complainant wrote again to the Commissioner on 7 October 2021. Having accepted the Commissioner's view, the complainant revised that acceptance and presented the argument that the ICO, as the experts, should have a view and that in that capacity it should be listened to. Again he asked the Commissioner to consider his supporting correspondence to his MP where he had set out this view: "*When basic*

*information is prohibited by law from being accessed, there is something wrong with the legislation.*" The Commissioner stated that the ICO does provide its views from time to time to government about the legislation it regulates but that the legislation, as it stands, allows public authorities to exempt certain information.

22. Whether the complainant expected the Commissioner to intervene in the operation of the Equality Act 2006 is unclear. However, the Commissioner explained the role and functions of the Office, provided links to the relevant sections of the FOIA, and outlined the role of the investigator. It was emphasised that the broader workings of the FOIA would not be under consideration but a specific analysis of this particular withheld information. The Commissioner could not provide an opinion about the legality of parliament's actions. Providing such a view is outside the role and would require legal advice/opinion.
23. The complainant asked the Commissioner what section in the legislation prevented the ICO investigating whether the government had acted "*ultra vires*"<sup>2</sup> in prohibiting by law access to information. The Commissioner could not provide an opinion about the legality of parliament's actions.

### ***The EHRC's view***

24. The EHRC explained that under section 6(2)(b) EA 2006<sup>3</sup>, it would be prohibited from disclosing information it held in response to this request. The EHRC stated that this legislation prohibited it from disclosing submissions made in relation to, or otherwise in the course of, an investigation made under section 20 of the EA 2006, unless disclosure is authorised by virtue of section 6(3) EA 2006.
25. The EHRC confirmed to the Commissioner that it had conducted a further review of the information held that fell within the scope of the request and the arguments that had been raised by the complainant in his internal review request. It upheld its previous assessment and concluded that all the information fell within section 44.
26. In answer to the Commissioner's investigation letter, the EHRC explained why it had not concluded that the gateways to disclosure or

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<sup>2</sup> Acting beyond one's legal power or authority

<sup>3</sup> [Equality Act 2006 \(legislation.gov.uk\)](http://legislation.gov.uk)

exceptions to the prohibition contained within the enactment were not engaged in respect of the request. The EHRC said it was their understanding that, as it had discretion as to whether to use the gateways to disclose or withhold information, it did not consider that it was required to demonstrate that the decision not to use a gateway was reasonable.

27. The EHRC underpinned its view by citing the decision in *Ofcom v Gerry Morrissey and the Information Commissioner, 2011 UKUT 116 AAC*<sup>4</sup> that neither the Commissioner nor the tribunal has jurisdiction to determine whether a public authority withholding information under section 44(1)(a) FOIA had acted reasonably in not disclosing the information pursuant to a statutory gateway. In [FS50694304](#) the Commissioner confirmed that she would not question or examine the reasonableness of Ofcom's decision that the information should not be disclosed via a gateway. The EHRC, referring to that decision, said that the Commissioner would only verify that that authority had made the decision and not consider whether the decision was reasonable.
28. The EHRC's view is that it does not accept "*that a gateway is available to it in the present circumstances, as disclosure of information under FOIA is not one of the authorised disclosures listed under section 6(3)*". It noted that the complainant had said in his internal review request that he did not wish to see details that would identify the complainant and stated that they could be redacted. The EHRC explained that it did not consider that it was possible to disclose the information and ensure that no individual could be identified from disclosing this information. The EHRC considers that there is a risk that individuals could be identified, even with redacted names, from publicly available information. The EHRC had stressed that submissions were given on the assumption that they would not be made publicly available.

### **The Commissioner's view**

29. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following: i. primary legislation (an Act of Parliament); or ii. secondary legislation (a Statutory Instrument).
30. The Equality Act 2006 states the following -

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<sup>4</sup> [OFCOM v Morrissey & Information Commissioner \[2011\] UKUT 116 \(AAC\) \(22 March 2011\) \(bailii.org\)](#)

**"6 Disclosure**

*(1) A person who is or was a Commissioner, an Investigating Commissioner, an employee of the Commission or a member of a committee established by the Commission commits an offence if he discloses information to which this section applies unless subsection (3) authorises the disclosure.*

*(2) This section applies to information acquired by the Commission—*  
*(a) by way of representations made in relation to, or otherwise in the course of, an inquiry under section 16,*  
*(b) by way of representations made in relation to, or otherwise in the course of, an investigation under section 20..."<sup>5</sup>*

31. Section 6(3) of the legislation sets out the circumstances in which a disclosure can be authorised -

*(3) This subsection authorises a disclosure made—*  
*(a) for the purpose of the exercise of a function of the Commission under any of sections 16, 20, 21, 24, 25, 31 and 32,*  
*(b) in a report of an inquiry, investigation or assessment published by the Commission,*  
*(c) in pursuance of an order of a court or tribunal,*  
*(d) with the consent of each person to whom the disclosed information relates,*  
*(e) in a manner that ensures that no person to whom the disclosed information relates can be identified,*  
*(f) for the purpose of civil or criminal proceedings to which the Commission is party, or*

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<sup>5</sup> Ibid

*(g)if the information was acquired by the Commission more than 70 years before the date of the disclosure.”*

32. The Commissioner is satisfied that the EHRC made the decision that the requested information could not be disclosed under any of the available gateways set out above. EHRC's view is that it would be unable to disclose information that ensures that no person to whom the disclosed information relates can be identified. The Commissioner will not consider whether that decision was reasonable, as set out in paragraph 27 of this decision notice.
33. The Commissioner accepts that the requested information in this case was subject to a statutory prohibition on disclosure, provided by EA 2006, section 6(2)(b) and that the EHRC has satisfied itself that none of the gateways authorising disclosure are available. Therefore it is exempt from disclosure under FOIA by virtue of the absolute exemption at section 44. As the exemption is absolute, the public interest cannot be considered.
34. The Commissioner notes that the complainant himself acknowledged that there did not appear to be a route to disclosure under the existing legislation. The fact that he would like the legislation to change is not relevant to this decision as it is beyond the powers of the Commissioner who can only regulate the FOIA as it stands. It is also beyond the regulatory powers of the Commissioner to comment on the operation of the EA 2006. The complainant's reasons for his complaint, with regard to changes in legislation, are outside of either public authority's remit.
35. As the Commissioner has decided that section 44 has been correctly cited she has not gone on to consider the EHRA's citing of section 31.



**Right of appeal**

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36. 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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.

38. 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 .....**

**Janine Gregory  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**