

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2021

Public Authority: Equality and Human Rights Commission

Address: 2nd Floor, Arndale
The Arndale Centre
Manchester
M4 3AQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the Equality and Human Rights Commission's ('EHRC') investigation¹ into the Labour party.
2. The EHRC originally withheld all information within the scope of the request under section 44(1)(a) (prohibitions on disclosure) of the FOIA.
3. During the course of this investigation, the EHRC changed its stance. The EHRC has now confirmed that it does not hold all of the information that falls within the scope of the request and the information that it does hold is exempt from disclosure under section 44(1)(a) and section 31(1)(g) by virtue of section of 31(2)(c) (law enforcement).
4. The Commissioner's decision is that, in relation to parts 1 and 2 of the request, on the balance of probabilities, the EHRC does not hold the requested information. The Commissioner has also determined that the EHRC is entitled to withhold the information that it does hold under section 44(1)(a).
5. The Commissioner does not require the EHRC to take any further steps.

¹ [Investigation into antisemitism in the Labour Party | Equality and Human Rights Commission \(equalityhumanrights.com\)](https://equalityhumanrights.com)

Request and response

6. On 27 October 2020, the complainant wrote to the EHRC and requested information in the following terms:

"(1) How many of the 220 antisemitism complaints referred to in the executive summary related to non-members of the party, to "ordinary" members or to CLP office-holders?"

(2) How many of these complaints were found to be groundless or require no administrative action?"

(3) How many of the 23 instances cited of "political interference in the complaints process" related to separate cases? In particular,

(a) How many of them related to the Brick Lane mural you assert was antisemitic (a claim specifically denied by the artist)?"

(b) How many related to what you describe as "the second complaint of antisemitism against Ken Livingstone"?"

(4) How many Jewish Labour Party members complained to you that Ken Livingstone's comments about Naz Shah in April 2016 shocked them or angered them?"

(5) How many Jewish Labour Party members complained to you about Ken Livingstone's comments in April 2016 about an "Israel lobby"?"

(6) How many Jewish Labour Party members complained to you that they felt personally harassed by Pam Bromley's comments about

(a) "a fifth column in the Labour Party"?"

(b) "fake accusations of antisemitism in the Labour Party."?"

7. On 27 November 2020 the EHRC responded and confirmed that the requested information was exempt under section 44(1)(a).

8. On 30 November 2020 the complainant requested an internal review and stated *"to guard against the slightest possibility of mosaic harm or jigsaw identification, I am willing to revise my request."* The complainant revised their request as follows:

"(1) How many of the 220 antisemitism complaints referred to in the executive summary related to non-members or "ordinary" members of the Labour Party?"

(2) How many of these complaints were found to require no administrative action?"

(3) How many of the 23 instances cited of "political interference in the complaints process" related to separate cases?

(4) How many Jewish Labour Party members complained to you about Ken Livingstone's comments in April 2016, either about Naz Shah or about an "Israel Lobby"?

(5) How many Jewish Labour Party members complained to you that they felt harassed by any of Pam Bromley's cited comments."

9. The EHRC provided the outcome to its internal review on 18 December 2020. It upheld its previous position.
10. During the Commissioner's investigation, the EHRC changed its stance. It confirmed that it does not hold the information in relation to part 1 and 2 of the request. It maintained that information in relation to part 3 of the request is exempt under section 44(1)(a) and also cited a new exemption, section 31(1)(g) by virtue of section 31(2)(c) (law enforcement).
11. The EHRC also confirmed that, in relation to parts 4 and 5 of the request, it *'holds information from Labour Party members who provided evidence that the above incidents had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for members, and prospective members, of the Labour Party, particularly those who were Jewish ("Effect Evidence"). With regards to the Effect Evidence the Commission holds information on how many of the individuals identified as Jewish or did not identify as Jewish. Whilst the Commission holds the information requested in relation to the Effect Evidence, it is conscious that questions four and five of the Internal Review Request could be interpreted as much wider than this and may refer to any number of submissions obtained during the course of the Investigation.'*
12. For clarity, the EHRC explained that the 'Effect Evidence' was being withheld under section 44(1)(a) and also cited a new exemption, section 31(1)(g) by virtue of section of 31(2)(c) (law enforcement). The EHRC confirmed that any further submissions it obtained during the course of its investigation would be exempt from disclosure under section 12 (cost of compliance exceeds appropriate limit.)
13. The Commissioner instructed the EHRC to communicate this change of stance to the complainant directly so they could confirm the scope of their complaint.
14. The complainant did not provide this confirmation to the EHRC so the Commissioner obtained it from the complainant directly during a phone call of 2 November 2021. The complainant confirmed that they were

only concerned with the 'Effect Evidence' and not any wider submissions.

Scope of the case

15. The complainant contacted the Commissioner on 19 August 2021 to complain about the way that their request for information had been handled.
16. The complainant expressed the view that the EHRC must hold the information in relation to parts 1 and 2 of the request. The complainant considers that, in order to conduct a '*credible and robust*' investigation, the EHRC must hold a detailed breakdown of the complaints it studied.
17. The complainant also expressed the view that section 6(3)(b) and section 6(3)(e) of the Equality Act 2006 would allow the EHRC to disclose the requested information in relation to parts 3, 4 and 5 of the request.
18. The Commissioner therefore considers the scope of his investigation to be to determine whether the EHRC holds information in relation to parts 1 and 2 of the request. The Commissioner will also consider if the EHRC is entitled to withhold the figures in relation to parts 3, 4 and 5 of the request under section 44(1)(a). Depending on the Commissioner's findings, the Commissioner may go on to consider whether the EHRC is entitled to rely upon 31(1)(g) by virtue of section of 31(2)(c).

Reasons for decision

Parts 1 and 2 of the request

19. Section 1 of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him."*

20. In this case, the complaint disputes the EHRC's position that it does not hold this information. The complainant has explained to the

Commissioner that, if this information is not held, it would undermine the robustness and credibility of the EHRC's investigation.

21. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant's request at the time that the request was received.
22. To assist the Commissioner in reaching this determination, the EHRC has provided further information relating to its investigation and the searches it conducted.
23. Annex 7 'How we conducted this investigation' of the EHRC's report into antisemitism in the Labour Party² explains:

'To assess whether the Labour Party had committed unlawful acts of discrimination, harassment, or victimisation in relation to its members, we analysed a sample of 70 complaints of antisemitism made against Labour Party members. This sample included:

- *58 complaints chosen by us, from over 220 complaints identified in:*
- *submissions from the Jewish Labour Movement (JLM) and Campaign Against Antisemitism (CAA)*
- *a report by Professor Alan Johnson, 'Institutionally Antisemitic: Contemporary Left Antisemitism and the Crisis in the British Labour Party'³ (March 2019), and*
- *information in the public domain, and*
- *12 complaints put forward by the Labour Party.'*

24. The EHRC has explained that, whilst the executive summary of the report refers to 220 plus complaints, it only investigated 70. Therefore it only holds information relating to 70 complaints and cannot provide answers to the requestor's questions at parts 1 and 2 of the request.

² Page 126, [Investigation into antisemitism in the Labour Party \(equalityhumanrights.com\)](https://www.equalityhumanrights.com)

³ [Institutionally-Antisemitic-Report-FINAL-6.pdf \(fathomjournal.org\)](https://www.fathomjournal.org)

25. In relation to part 1 of the request, the EHRC explained that, of the 70 complaints that it did investigate, the status of the complainant was not always given. Furthermore, the EHRC explained that it *'had chosen not to verify whether the complaints it investigated were from members of the Labour Party'*.
26. The EHRC has further elaborated that *'any information it has concerning membership would need to be verified with the Labour Party and/or through other information that may be available in the public domain.'*
27. The Commissioner disagrees, the FOIA covers held information, regardless of its accuracy. Therefore, if the EHRC held a breakdown of membership types for all 220 plus complaints, the EHRC would not need to verify this information prior to disclosure.
28. However, the Commissioner concurs with the EHRC when it says that the *'FOIA does not require public authorities to find out information from elsewhere or to create information if they do not already have the relevant information in recorded form.'*
29. In relation to part 2 of the request, the EHRC has explained that *'it was able to collate some information responsive to the question for the 70 cases it investigated'* but, of those 70 complaints *'the general quality of the record-keeping in the Labour Party's complaint sample was very poor and important documents were missing from the files....This was evident in 62 of the 70 files in our sample.'*
30. Whilst the EHRC did *'request information from the Labour Party with respect to the outcome of complaints regarding whether they resulted in disciplinary action...many of the files contained no evidence of the outcome of the complaint.'*
31. The EHRC clearly does not hold information in relation to the 220 plus complaints. Of the 70 that it does hold, the EHRC chose not to record the membership status of the complainant. Furthermore, information relating to the outcome of the complaint is incomplete due to the poor record-keeping within the Labour Party (discussed in more detail in page 10 of the report).

The Commissioner's view

32. During the Commissioner's phone call with the complainant of 2 November 2021, the complainant expressed concerns about the EHRC's investigation and report. The complainant acknowledged that, even if the Commissioner determined that the information in relation to parts 1 and 2 of the request was not held, it *should* be held by the EHRC.
33. It is not the role of the Commissioner to comment on whether information should be held, only to determine if it is likely that it is held.

The Commissioner cannot scrutinise the way in which the EHRC conducted its investigation or whether it did so using a robust, or detailed enough, sample. The EHRC's has issued an unlawful act notice on the Labour Party and the Commissioner notes the party has decided not to appeal.

34. The EHRC provided the Commissioner with detail surrounding the searches that it undertook for this information, *'The Commission considers that a Senior Associate (Enforcement), Head of Enforcement and five members of the LPI (Labour Party Investigation) Team considered these questions and that the searches conducted were exhaustive.'* The EHRC's answers always came back to it has not ever held the complaints files for the complaints that it did not investigate.
35. The EHRC cannot provide the requestor with a figure in relation to parts 1 and 2 of their request because it does not hold information relating to all 220 plus complaints. Furthermore, the information that it does hold is incomplete in relation to the detail that the complainant wants.
36. Therefore the Commissioner is satisfied that, on the balance of probabilities, the EHRC does not hold the information in relation to parts 1 and 2 of the request.
37. The Commissioner notes that, in the EHRC's submission, it explains, upon further reviewal of parts 1 and 2 of the request *'the meaning of the references to 'groundless' and 'requires no administrative action' become unclear. For example: where complaints were not acted on by the Labour Party, would these complaints be classified as 'groundless'? If a member resigned before the complaint was lodged or finally determined would this still be classified as requiring no administrative action?'* The Commissioner will discuss this in the 'other matters' section of this notice.

Parts 3, 4 and 5 of the request -

38. Section 44 of the FOI 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 retained EU obligation, or*
- c) would constitute or be punishable as a contempt of court."*

Is disclosure of the requested information prohibited by or under any enactment?

39. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:

- i. primary legislation (an Act of Parliament);
- ii. secondary legislation (a Statutory Instrument).

40. The EHRC supports organisations in challenging discrimination of protected characteristics⁴, protecting human rights and regulating compliance with the Equality Act 2010. The Equality Act 2006 established the EHRC, merging the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission, and outlines its statutory obligations.

41. Section 20(1) of the Equality Act 2006 states:

- "(1) The Commission may investigate whether or not a person—*
- (a) has committed an unlawful act,"*

42. Section 6 of the Equality Act 2006 states:

- (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—*
 - (b) by way of representations made in relation to, or otherwise in the course of, an investigation under section 20.*
- (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,*

⁴ age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

- (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*
- (g) *if the information was acquired by the Commission more than 70 years before the date of the disclosure.”⁵*

43. The EHRC has stated it “*would be prohibited from disclosing information it held in response to a Request under section 6(2)(b) EA 2006. Section 6(2)(b) of the EA 2006 provides that the Commission is prohibited 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.*”
44. The Commissioner must now consider if numerical figures would fall under information as referred to in section 6(2) of the Equality Act 2006. To reiterate, the complainant is not requesting the content of the complaints that related to ‘political interference in the complaints process’ or Ken Livingstone’s comments and Pam Bromley’s comments. The complainant is requesting data relating to these complaints.
45. Having been provided with the withheld information and considered the matter, the Commissioner is satisfied that these figures have been created through the course of EHRC’s investigation into the Labour Party, using the submissions and the evidence provided to it. Therefore, the Commissioner considers the exemption engaged.

Are any of the exceptions contained in section 6(3) of the Equality Act 2006 applicable?

46. The Commissioner concurs with the EHRC that the requested figures are exempt from disclosure in accordance with section 6(1) of the Equality Act 2006.

⁵ [Equality Act 2006 \(legislation.gov.uk\)](http://legislation.gov.uk)

47. The complainant has specifically cited 6(3)(b) (in a report of an inquiry, investigation or assessment published by the Commission) and 6(3)(e) (in a manner that ensures that no person to whom the disclosed information relates can be identified) would allow the EHRC to disclose the withheld figures. The EHRC has addressed each of these exceptions in turn.
48. Firstly, the EHRC has explained that the requested information represents *'additional information relating to the numbers of complaints received which was not published in the Report, and it is not a simple clarification of information published in the Report.'*
49. Secondly, the EHRC has explained that it *'considers that providing granular detail on the number and types of complaints would risk an individual being identified from other information available publicly. The Commission does not consider that it is possible to disclose the information in a manner that ensures no person could be identified.'*
50. Furthermore, the EHRC has explained it *'has discretion as to whether to use the gateways to disclose or withhold the requested information, it is not required to demonstrate that the decision not to use a gateway was reasonable.'*
51. This is in line with the Commissioner's guidance *'Section 44 prohibitions on disclosure'* which states *'If the authority has decided that information should not be disclosed under a gateway, the Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable.'*⁶
52. Ultimately, whilst the Commissioner acknowledges the complainant's concerns, if a public authority decides that the prohibitions on disclosure is not disapplied by a gateway, the Commissioner will accept that this is the case. This position was established by the binding decision of the Upper Tribunal in *Ofcom v Gerry Morrissey* and the IC, 2011 UKUT 116 AAC.

The Commissioner's view

53. The Commissioner is satisfied that section 6 of the Equality Act 2006 would prohibit disclosure and therefore the EHRC was entitled to rely on section 44 of the FOIA to withhold the information. Since the Commissioner is satisfied that section 44 is engaged in relation to parts

⁶ [Prohibitions on disclosure \(section 44\) - FOIA guidance - version 1.1 31122020 \(ico.org.uk\)](https://ico.org.uk/for-organisations/foia-guidance/section-44-prohibitions-on-disclosure)

3, 4 and 5 of the request, he has not gone onto consider the EHRC's application of section 31(2)(c).

54. Since section 44 is an absolute exemption, there is no requirement to conduct a public interest test.

Other matters

55. As previously discussed, the EHRC has changed its stance during the handling of this complaint. Firstly to confirm it did not hold information which in its refusal notice it claimed was exempt from disclosure. Secondly to question the scope of information that it does not hold and the original scope of the information that fell within parts 4 and 5 of the request. The Commissioner notes that a similar change in stance occurred in IC-91941-Y7R6.
56. Whilst a public authority is entitled to change its stance, the Commissioner would expect procedural matters, such as the scope of a request and whether information is held, to be certain at the time that an investigation commences. If there is any doubt, this should be clarified with the complainant during the public authority's handling of a request.

Right of appeal

57. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

58. 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.
59. 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

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