

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 January 2023

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

Decision (including any steps ordered)

1. The complainant has requested information provided during a consultation. The above public authority ("the public authority") relied variously on sections 36 (prejudice to the effective conduct of public affairs) and 41 of FOIA (breach of confidence) to withhold the requested information.
2. The Commissioner's decision is that the public authority was entitled to rely on section 36 of FOIA and that the balance of the public interest favours maintaining the exemption. The public authority breached section 17 of FOIA as it failed to identify, in its refusal notice, an exemption it later came to rely upon.
3. The Commissioner does not require further steps.

Request and response

4. On 21 July 2022, the complainant wrote to the public authority and requested information in the following terms:

"In a previous FOI request asking for consultation responses on the Equality Act Codes of Practice in 2010 I was told these were not found but a document called 'Press for Change', which is an annotated version of the draft Code of Practice was located during the search. Please can you disclose this document."

5. The public authority responded on 16 August 2022. It relied on section 41 of FOIA to withhold the requested information. A position it upheld following an internal review.
6. During the course of the Commissioner's investigation, the public authority revised its stance and relied on both section 41 and section 36 of FOIA to withhold the requested information.

Reasons for decision

7. Section 36 of FOIA allows a public authority to withhold information whose disclosure would (or would be likely to) result in certain types of prejudice. In order to engage the exemption, a designated senior individual within the public authority known as the Qualified Person (usually the chief executive or equivalent) must provide an opinion stating that disclosure would (or would be likely to) cause prejudice and why this would happen. That opinion must be one that is reasonable.
8. The public authority's Qualified Person is its Chair, Baroness Kishwer Falkner. The Commissioner is satisfied that Baroness Falkner provided an opinion on 11 January 2023.
9. In Baroness Falkner's opinion, disclosure would prejudice the free and frank exchange of views for the purposes of deliberation and would otherwise prejudice the effective conduct of public affairs.
10. Disclosure would prejudice the free and frank exchange of views because:
 - "Disclosing detailed responses to previous consultations would be highly likely to inhibit some groups or individuals from sharing their views with us. In the present case, where we would be disclosing only one document from one responder and are unable to provide any further responses or context to the previous consultation, we think it is reasonable to suppose that would (or would be likely to) seriously inhibit some parties from responding to our consultations and offering input in the important work that we carry out.
 - "Annotated comments were made in good faith. Putting this in the public domain could potentially cause reputational detriment to the particular individual who made those comments and could harm their career."
11. Disclosure would otherwise prejudice the effective conduct of public affairs because:

- “The document requested was provided by an external source and not intended for publication. It should have been disposed of 5 years after the closure of our file, in line with our data retention policy but that did not happen. It would be undesirable to disclose historic and confidential information which should have been disposed of, and would set an unfortunate precedent. Disclosure of such information would be likely to have a significant adverse effect on the willingness of some to engage with us as an organisation, whether through a formal consultation mechanism or otherwise.
 - “Disclosing this material on its own is likely to require significant internal resource to provide the required qualification and narrative to ensure its publication provides a balanced picture of the process undertaken in 2010. In the current context, we consider that it is reasonable to believe that calling that resource off other projects would, or would be likely to prejudice the effective conduct of our affairs.”
12. As the Commissioner has noted in numerous previous decisions, it is not his responsibility to stand in the shoes of the Qualified Person. The Qualified Person is a very senior person within a public authority who should have wide knowledge of the public authority’s functions – and hence the potential effects of disclosure. Because of this, the Commissioner does not consider that the bar for accepting an opinion as “reasonable” is high.
13. Considering that individuals and organisations may be less likely to participate in consultations in future if previous responses are disclosed is not an absurd or irrational opinion. However, the Qualified Person has deployed this argument twice. In order to “otherwise” prejudice the effective conduct of public affairs, the prejudice identified must be something not covered by any other exemption. The Commissioner accepts that it is reasonable to consider that disclosure may prejudice the free and frank exchange of view, but any chilling effect will not “otherwise” cause prejudice – because the prejudice has already been covered.
14. The Commissioner also accepts as reasonable that the public authority may need to divert additional resources away from other tasks if the information is disclosed outside of its proper context. Whilst he is sceptical of the degree to which a diversion of resources would be necessary, he does not consider it irrational to suppose that some reallocation of resource would be required. He is therefore satisfied that the Qualified Person has identified a way in which disclosure might “otherwise” prejudice the effective conduct of public affairs.

15. Before moving on to public interest, the Commissioner wishes to note that, to the extent the public authority is concerned about reputational damage to Press for Change or its leadership as individuals, the Qualified Person's opinion is not reasonable.
16. Press for Change's website describes the organisation as:

"a key lobbying and legal support organisation for Trans people in the UK...PFC addresses both the immediate legal needs of Trans people who have faced unlawful discrimination, or abuse of their human rights as well as focusing on the needs of society, business, the public service sector and government to move forward in its understanding of Trans people and their lives. We achieve this through engagement, education, and training."
17. The withheld information shows, in broad terms, Press for Change suggesting amendments to a draft document that, in its view, would improve the lives of trans people. It should come as no surprise to anyone vaguely familiar with this organisation that Press for Change would take this stance in a consultation of this kind.
18. There are of course those who disagree (in some cases profoundly) with the ideas Press for Change promotes – equally there are many who support those ideas. However, it is difficult to see why revealing the comments made by Press for Change is likely to damage its reputation – any more than the Catholic church's reputation might be damaged if it were found to have contributed to the same consultation, arguing for amendments in accordance with Catholic teaching.
19. The withheld information reveals nothing about Press for Change itself that is not already available on the organisation's website. The organisation was contributing to a consultation it was entitled (if not encouraged) to contribute to. Merely revealing views that others might disagree with (however profoundly) does not equate to reputational damage.
20. Finally, the Commissioner would note that the fact that information has been unintentionally retained beyond its retention period is not, in itself, a valid reason for withholding information. A public authority must consider the information it holds in recorded form at the point it responds to a request – regardless of whether it ought to hold the information.
21. However, the Commissioner accepts that the remainder of the Qualified Person's opinion is reasonable and therefore section 36 of FOIA is engaged.

Public interest test

22. In balancing the public interest, the Commissioner has taken into account that Press for Change is an organisation set up to lobby government and other public authorities. By its own admission, it seeks to influence legislation and policy. As a general rule, there should be high standards of transparency around such organisations' attempts to influence public policy – regardless of the particular interest they are advocating for.
23. The Commissioner also notes that, whilst it does not have the status of law, the Code of Practice is an important document which influences the application and interpretation of the Equality Act and associated legislation. There is some public interest in understanding the process by which the current Code was created.
24. However, in this particular instance, the Commissioner is not persuaded that the public interest favours disclosure.
25. The Equality Act Code of Practice contains sections that were at the time and remain today, particularly contentious – especially debates about the ways in which the rights of trans people should be recognised. Unfortunately such debates are frequently heated, with those on both sides of the debate accusing their opponents of intimidation and attempting to silence opposing points of view.
26. In those circumstances, it is important for the public authority to be able to allow organisations to contribute on a confidential basis and, when it does provide such an opportunity, to respect that confidence.
27. Whilst some organisations will not be deterred from lobbying public bodies by publicity – if they don't lobby, they have no influence – it is in the public interest that consultations of this type should seek views from as many different interested parties as possible. The Commissioner considers that there is a likelihood that some organisations may choose to stay out of such debates (even though they may have a valuable contribution to make) because they are worried about their submissions becoming public and antagonising either (or even both) sides of the argument. That is not in the public interest.

28. Information in the public domain¹ suggests that the public authority may be considering updating the current Code of Practice. If that were to be the case, organisations considering participating may well be deterred by the experience of previous contributors – which would lead to a poorer quality Code.
29. The Commissioner has also had regard to the way in which the withheld material came to exist. This was not an instance in which Press for Change had sought privileged access via a private meeting. This was a consultation in which the public authority was actively seeking the views of a wide variety of interested groups.
30. Furthermore, whatever suggestions Press for Change (or indeed any of the other groups who contributed) made, the responsibility lay with the public authority (and only the public authority) to decide what was ultimately included in the Code of Practice. Any changes it made from earlier drafts should only have been incorporated because they were good changes – regardless of the organisation that suggested them. The public authority also has the power to change the Code, if it sees fit. Therefore it is the public authority that should be held accountable for any changes made, not the organisation(s) that suggested them.
31. Finally, the Commissioner notes that disclosure will provide only a partial – and therefore potentially misleading – picture of overall responses to the consultation.
32. In response to an earlier request made by the complainant, the public authority has already confirmed that it no longer holds copies of submissions made by a number of other groups to the same consultation. There is a risk that the recorded information the public authority is still able to disclose is seen as carrying greater influence than was actually the case at the time. Whilst it is possible to reduce this risk by explaining that other submissions are no longer held, the lack of comparison still presents an issue for both the public authority and Press for Change as, although the public authority can make assertions about what other groups might have suggested, it no longer has the evidence to substantiate such assertions.
33. Just because a review of the draft versions indicated that later drafts had incorporated a particular change suggested by Press for Change (if indeed that were the case), it would not necessarily mean that Press for

¹ <https://sex-matters.org/posts/single-sex-services/statutory-codes-of-practice-under-review/>

Change was the only group advocating for such a change. Equally, if a suggestion had not been incorporated, it would not necessarily mean that Press for Change's view was not taken seriously – other groups may have provided convincing reasons as to why a change was not necessary.

34. Releasing information that was devoid of context would be inherently unfair to Press for Change and, in the current climate, is likely to incite abuse of the organisation and those associated with it.
35. Furthermore, the Commissioner accepts that, because of the misleading picture that would be presented, the public authority would be required to divert its resources to explaining and contextualising the information it had disclosed. Whilst this is unlikely to cause a major distraction it is still not in the public interest.
36. The Commissioner is thus satisfied that, in the circumstances of this case, the public interest favours maintaining the exemption.

Procedural matters

37. As the public authority did not cite section 36 of FOIA until after the 20 working day timeframe, it breached section 17 of FOIA.

Right of appeal

38. 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

39. 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.
40. 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

Roger Cawthorne
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