

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 June 2011

Public Authority: Equality and Human Rights Commission
Address: 3 More London Riverside
Tooley Street
London
SE1 2RG

Summary

The complainant requested copies of letters the public authority had written to a Mosque in Bolton, Greater Manchester pursuant to its consideration of allegations that the Mosque had breached its obligations under the Race Relations Act.

The public authority withheld the information requested on the basis of the exemption at section 31(1)(g) of the Act by virtue of the purposes expressed in sections 31(2) (a) and (c). The Commissioner found that the exemption at section 31(1)(g) was engaged by virtue of the purpose expressed in section 31(2)(a) and that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant made four separate complaints to the Charity Commission, Islamic Human Rights Commission, Bolton City Council, and the Equality and Human Rights Commission that a Mosque in Bolton was operating a discriminatory membership policy. He alleged

that the Mosque was refusing to grant membership to persons of Pakistani ethnic origin. These organisations, including the Equality and Human Rights Commission, subsequently considered these allegations.

The Request

3. On 4 March 2010 the complainant wrote to the public authority and requested copies of the letters it had written to the Masjid-E-Noor-UI-Islam Mosque (the Mosque) in Bolton, Greater Manchester pursuant to its consideration of the complaint. The request was phrased as follows:

'Can you please show the same transparency as the charities commission and release all the letters you have sent to Noor-UI-Islam mosque?'

4. On 1 April 2010 the public authority responded. It withheld the letters held on the basis of the exemption at section 31(1)(g) by virtue of the purpose expressed in section 31(2)(a). The public authority further concluded that, on balance, the public interest in maintaining the exemption outweighed the public interest in disclosing the letters.

5. On 1 April 2010 the complainant requested a review of the public authority's decision. He phrased the grounds of his appeal as follows:

'You are now the only public body which has refused to release any communications with the mosque, where as the Charities commission is also engaged in Legal enforcement action and has stronger powers than yourselves and has released all of its communications, whilst the matter has been ongoing; this has aided your investigation as opposed to prejudicing it.'

.....I want the individual reviewing this decision to take account of all the charities commission letters I have provided to you, as well as the letters from the other bodies.'

6. On 30 April 2010 the public authority responded. It upheld the original decision to withhold the letters.

The Investigation

Scope of the case

7. On 5 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He submitted that the public authority had refused to disclose the letters requested on the grounds that they were confidential.
8. The complainant however argued that the issue (i.e. allegation of racial discrimination against the Mosque) was no longer confidential because of the disclosures (under the Act) of the letters written to the Mosque by the Charity Commission, Bolton City Council, and the Islamic Human Rights Commission. According to the complainant, the Charity Commission had also specifically disclosed the communications it had received regarding the issue from the public authority as well as its responses.
9. The complainant provided the Commissioner with copies of the letters and communications referred to above.
10. The complainant urged the Commissioner to order the disclosure of the letters held by the public authority because '.....the matter is [no] longer confidential for the Equalities Commission to Withhold communications with the mosque as the matter is already in the Public domain.'

Chronology

11. On 18 June 2010 the Commissioner wrote to the public authority and requested copies of the letters withheld (hereinafter referred to interchangeably as the disputed information).
12. On 15 July 2010 the public authority responded. It provided copies of the letters withheld and also provided additional representations on the application of the exemption.
13. On 25 November 2010, after the case had been allocated to a case officer, the Commissioner wrote to the complainant outlining the scope of the investigation. He invited the complainant to comment if necessary. The complainant did not express any disagreement with the scope of the investigation.
14. The Commissioner and public authority's subsequent exchanges are contained in emails and letters of 30 November 2010, 1 December 2010, 14 December 2010, 6 January 2011 and 19 January 2011.

Analysis

Substantive Procedural Matters

Exemptions

15. The statutory provisions of the Act referred to below can be found in the legal annex.

Disputed Information

16. The withheld letters which constitute 'the disputed information' are described below.

- Letter of 5 February 2010 from the public authority to Trustees of Masjid-E-Noor-UI-Islam Mosque, and
- Letter of 3 March 2010 from the public authority to President of Masjid-E-Noor-UI Islam Mosque.

Section 31(1)(g)

17. Information is exempt on the basis of the section 31(1)(g) if it is not exempt under section 30 and if its disclosure under the Act would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection 2.
18. As noted above, in its letter of 1 April 2010 to the complainant, the public authority considered the withheld letters above exempt on the grounds that disclosure would or would be likely to prejudice the exercise of its functions for the purpose of ascertaining whether any person has failed to comply with the law (i.e. purpose expressed in section 31(2)(a)).
19. The public authority however further submitted to the Commissioner that it also considered the purpose expressed at section 31(2)(c) applied. The purpose at section 31(2)(c) is of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

Section 31(1)(g) by virtue of the purpose expressed in section 31(2)(a).

20. The Commissioner first considered whether the disputed information was correctly withheld on the basis of section 31(1)(g) by virtue of the purpose in section 31(2)(a).
21. The public authority explained that it had written the letters above to the Mosque pursuant to the exercise of its enforcement powers

regarding a possible breach of the the Race Relations Act 1976 (RRA). According to the public authority, the letters were sent specifically in contemplation of legal action against the Mosque for alleged breach of the Race Relations Act 1976 (RRA). The RRA was one of the equality enactments that the public authority was charged with enforcing. The public authority has specific duties and powers under the Equality Act 2006.

22. In order for the exemption to be engaged, the Commissioner requires the function identified by a public authority for the purposes of section 31(1)(g) to be a function which is:

- (i) designed to fulfil one of the purposes specified in s31(2) and,
- (ii) imposed by statute (or in the case of a government department, authorised by the Crown) and,
- (iii) specifically entrusted to the relevant public authority to fulfil (rather than just a general duty imposed on all public authorities).

23. Section 16(2) of the Equality Act 2006 provides that:

(2) If in the course of an inquiry the Commission begins to suspect that a person may have committed an unlawful act—

(a) in continuing the inquiry the Commission shall, so far as possible, avoid further consideration of whether or not the person has committed an unlawful act,

(b) the Commission may commence an investigation into that question under section 20,

(c) the Commission may use information or evidence acquired in the course of the inquiry for the purpose of the investigation, and

(d) the Commission shall so far as possible ensure (whether by aborting or suspending the inquiry or otherwise) that any aspects of the inquiry which concern the person investigated, or may require his involvement, are not pursued while the investigation is in progress.

Section 20(1) provides:

20 Investigations

(1) The Commission may investigate whether or not a person—

(a) has committed an unlawful act,

(b) has complied with a requirement imposed by an unlawful act notice

under section 21, or

(c) has complied with an undertaking given under section 23.

24. The Commissioner accepts the public authority does have a relevant function that meets the criteria detailed in paragraph 22 above. The question in this case is whether the information disclosed would be likely to prejudice the public authorities' function of ascertaining whether any person has failed to comply with the law. A question arises as to whether disclosure of the public authorities' letters to the Mosque would be likely to prejudice this function, noting section 16(2)(a) of the Equality Act 2006. The Commissioner accepts that it is possible for relevant prejudice to occur from the disclosure of this information. When the public authority is at the early of stages making enquiries it is unclear whether the matter will proceed as a section 16 inquiry or a section 20 investigation. At this stage the public authority is ascertaining whether the any person has failed to comply with the law.
25. The public authority argued that disclosing the disputed information would be likely to prejudice its ability to exercise its function as a regulator in conducting preliminary inquiries, and, depending on the outcome, in deciding whether it should take enforcement action against the Mosque for breach of the RRA. It explained that, as is the practice with most potential legal action, initial correspondence and inquiries and/or investigations are undertaken in confidence and in line with the principles of natural justice. According to the public authority, it was highly likely that disclosure at the time of the request would have led to undue media attention on the matter. The public authority argued that such premature disclosure could have exposed both itself and the Mosque to unwarranted criticism. The Mosque especially would have faced a real risk of reputational damage in relation to unproven allegations.
26. The public authority stressed that the constant public scrutiny and unwarranted criticism would have made it extremely difficult for it to conduct its inquiry/investigation and would have also placed the Mosque in an unfair or even disadvantageous position. Therefore, there was a real and significant possibility that disclosure would have been likely to prejudice the ability of the public authority to ascertain if the Mosque had indeed breached the RRA as had been alleged.
27. The public authority additionally noted other religious bodies could consequently become hesitant in engaging with it in the future consequently prejudicing its ability to conduct future inquiries/investigations.

28. With respect to the complainant's assertion that other public bodies had released information similar to the information he had requested from the public authority, the public authority strongly argued that in general, the application of exemptions and subsequent assessment of the public interest balancing test must be done independently by each body/organisation who take into account different factors. It argued that this approach was in part due to the differing powers and procedures that the different bodies have, how they conduct inquiries/investigations, and what the potential outcomes could be.

Likelihood of prejudice

29. The exemptions at section 31(1) are prejudiced based which in effect means that in order to engage the exemption a public authority needs to demonstrate that the disclosure of the information requested would or would be likely to harm the relevant interest(s) protected by the exemptions. This is otherwise referred to as the 'prejudice test' and the Commissioner considers the Information Tribunal's (Tribunal) comments in *Hogan v the ICO and Oxford City Council* useful in this regard. According to the Tribunal;

'The application of the prejudice test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the exemption.....Second, the nature of prejudice being claimed must be considered.....A third step for the decision-maker concerns the likelihood of occurrence of prejudice.'

30. With regards the third step, in the Commissioner's opinion, 'likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. On the other hand, 'would prejudice' places a much more evidential burden on a public authority and must be at least more probable than not.
31. The Commissioner first considered whether the complainant was correct in his assertion that the information in the letters above was in the public domain at the time of the request.
32. The Commissioner notes that the correspondence disclosed by the Islamic Human Rights Commission, Bolton City Council, and the Charity Commission cover a period between September 2009 and February 2010.
33. As far the Commissioner can tell, the disclosures to the complainant were made pursuant to requests under the Act. From the correspondence, it is clear that these organisations were making preliminary enquiries relating to allegations that the Mosque was operating a discriminatory membership policy.

34. The Commissioner therefore agrees with the complainant that the subject matter of the allegations was certainly in the public domain at the time of his request to the public authority in March 2010. The Commissioner also agrees with the public authority that, in principle, each public body must be allowed to independently assess whether information it holds should be disclosed under the Act.
35. However, the starting point always has to be with the withheld information. Having had the benefit of reviewing the disputed information, the Commissioner disagrees with the complainant that it is materially similar to the correspondence previously disclosed by the organisations above. The public authority's letters cover the matter in much more substantial detail than the organisations above. As already noted, they were written in contemplation of potential legal action against the Mosque under the RRA by the body charged with enforcing the provisions of the RRA. It is immediately evident from the letter of 5 February 2010 that the public authority was making very detailed enquiries to determine whether the membership policy operated by the Mosque contravened the legislation it is charged with enforcing. The Commissioner notes that the letter of 3 March 2010 was a follow up to the previous letter of 5 February and did not therefore contain as much detail as the initial letter. However, in his opinion, the letter of 3 March cannot be viewed in isolation and must necessarily be considered in the context of the letter of 5 February.
36. The Commissioner therefore finds that the information in the public domain at the time of the request was not enough to have rendered the disputed information innocuous and therefore not deserving of the protection offered by the exemption at section 31(1)(g).
37. In terms of the prejudicial effect of disclosure, the Commissioner finds that the reasons given by the public authority for withholding the information are inherent in the exemption at section 31(1)(g) by virtue of section 31(2)(a). An important factor is the timing the request and it is clear that the likelihood of prejudice is greatly increased if disclosure takes place whilst an inquiry/investigation is ongoing. The Commissioner is persuaded by the public authority's arguments above that disclosure would have been likely to prejudice the exercise of its function in ascertaining whether the Mosque had in fact breached the RRA. He accepts that there was a real and significant possibility that disclosure would have prejudiced the public authority's ability to exercise its function in that regard. He also accepts that it was likely that disclosure would have been likely to have prejudiced other similar inquiries/investigations in the future.

38. In view of his finding above, the Commissioner did not go on to consider whether the exemption at section 31(1)(g) was also engaged by virtue of the purpose expressed in section 31(2)(c).

Public Interest test

39. The exemptions at section 31(1) are qualified which means that if engaged, a public authority must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

40. The public authority acknowledged the presumption in favour of disclosure under the Act.
41. The public authority further recognised the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

Public interest arguments in favour of maintaining the exemption

42. The public authority argued that it was in the public interest for it to be able to make enquiries about alleged breaches of the RRA in confidence so as not to interfere with the principles of natural justice.
43. The public authority further argued that it had a duty to ensure that the Mosque is not subjected to unwarranted public attention and that community relations were not adversely affected while preliminary enquiries were still ongoing. Such public attention which could also prejudice its investigation would not be in the public interest.
44. The public authority also argued that it would not be in the public interest if other religious bodies could not count on the public authority to maintain the confidentiality of exchanges in the course of an investigation. This could seriously undermine its role as an independent regulator and consequently prejudice its ability to conduct inquiries/investigations.
45. The public authority was therefore firmly of the view that to disclose the disputed information would be likely to prejudice its ability to conduct its role in enforcing the RRA to such an extent that this outweighs the arguments in favour of disclosure.

Balance of the public interest arguments

46. The Commissioner also recognises the general public interest in disclosure acknowledged by the public authority. Specifically, the Commissioner considers that there was a public interest in establishing that the public authority had taken the allegations against the Mosque seriously and was investigating accordingly. The withheld letters would have been useful in establishing how seriously the public authority had taken the allegations and allowing scrutiny of their regulatory approach.
47. There was to an extent also a public interest in disclosing exchanges regarding an issue which was arguably already public knowledge by virtue of the disclosures already made by the Charity Commission, Islamic Human Rights Commission and Bolton City Council.
48. The Commissioner however considers there is a strong countervailing public interest in protecting the ability of the public authority to exercise its function in ascertaining compliance with the law. The public interest in maintaining the integrity of the process significantly outweighs the inherent public interest in openness, evidenced by the disclosures which had already been made by the organisations above. There was a real and significant risk that the ongoing process could have been significantly compromised if the disputed information had been disclosed by the public authority at the time of the request.
49. The Commissioner therefore finds that in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosure.

The Decision

50. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

51. The Commissioner requires no steps to be taken.

Right of Appeal

52. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 13th day of June 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

Section 31(3) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."