

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 January 2020

Public Authority: Equality and Human Rights Commission

Address: 3rd Floor
Arndale House
The Arndale Centre
Manchester
M4 3AQ

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between the Equality and Human Rights Commission (the EHRC) and Girl Guides UK (GG) between specified dates relating to transgender guidance. The EHRC refused to disclose the requested information citing section 31(1)(g) by virtue of section 31(2)(a) to (c).
2. The Commissioner's decision is that the EHRC is entitled to withhold the remaining withheld information under section 31(1)(g) by virtue of section 31(2)(a) to (c) and the public interest rests in maintaining this exemption. She does not therefore require any further action to be taken.

Request and response

3. On 15 December 2018, the complainant wrote to the EHRC and requested information in the following terms:

"On 27 September 2018. @ehrc tweeted 'We have written to @girlguiding about their website but not to say they are a mixed sex organisation. Like any membership organisation, the Equality Act allows Girl Guides UK to restrict membership on the basis of sex. We support their choice to have a trans inclusive policy.'

Please can you disclose:

Any correspondence received from the Guide Association on this matter (from Jan 2016 to Sept 2018)

And any replies or guidance from the EHRC sent to the Guide Association (or their representatives) over the same period.”

4. The EHRC responded on 16 January 2019. It refused to disclose the requested information citing section 31(1)(g) of the FOIA by virtue of sections 31(2)(a) to (c).
5. The complainant requested an internal review on 26 January 2019.
6. The EHRC completed the internal review and notified the complainant of its findings on 13 February 2019. It upheld its refusal to disclose the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 17 February 2019 to complain about the way her request for information had been handled. She disputes the application of the exemption cited and considers the requested information should be disclosed.
8. During the Commissioner’s investigation the EHRC applied three further exemptions; sections 21, 40 and 42. The information withheld under section 42 does not fall within the scope of the request and the information withheld under section 21 was later disclosed. The complainant has raised no objection to the application of section 40 to third party personal data.
9. The remainder of this notice will therefore address the remaining withheld information which does fall within the scope of the request and the application of section 31(1)(g) of the FOIA by virtue of sections 31(2) (a) to (c).

Reasons for decision

Section 31 – law enforcement

10. The EHRC is relying on section 31(1)(g) by virtue of sections 31(2)(a) to (c) as its basis for withholding the requested information. So far as is relevant section 31(1) of the FOIA 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 –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

Section 31(2) – the purposes referred to in subsection 1(g) 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.

11. The EHRC stated that it is a national equality body and is a statutory non-departmental body established by the Equality Act 2006. It has a regulatory and advisory function to enforce the Equality Act 2010. It is responsible for ascertaining whether any person has failed to comply with the Equality Act 2010 under section 31(1)(a), and for ascertaining whether any person is responsible for any conduct which is improper under the Equality Act 2010 under section 31(1)(b). The EHRC also has powers to take regulatory action under the Equality Act 2006, which engages the exemption in section 31(2)(c).
12. The EHRC explained that its legal team contacted GG as part of its regulatory work. The EHRC wanted to share compliant guidance with GG to assist it before it published its final transgender guidance. It confirmed that GG took this opportunity to engage with EHRC to ask for feedback on the guidance. The EHRC confirmed that it considers the remaining withheld information is the EHRC acting in its capacity as a regulator enforcing equalities legislation and providing advice and assistance to GG. The GG transgender guidance was planned for launch on 10 November 2018. The EHRC stated that the complainant made her request on 29 December 2018 very shortly after the guidance had been published on GG's website.
13. It argued that disclosure of the remaining withheld information would be likely to prejudice the EHRC's ability to carry out the functions outlined in section 31(2)(a) to (c). The EHRC advised that for it to function as an effective regulator and be able to ascertain information for the purposes just described, it is essential that the EHRC is able to maintain an appropriate level of confidentiality when conducting its regulatory legal advice work. Disclosure of the remaining withheld information would be

likely to discourage others from sharing information with the EHRC or contacting it for help. This would in turn negatively impact on its ability to request and/or receive necessary information in the future. Preventing the EHRC's ability to maintain a high level of confidentiality in its decision making would be likely to also prejudice its ability to determine when regulatory action should be taken.

14. The Commissioner accepts that disclosure of the remaining withheld information would be likely to prejudice the EHRC's ability to carry out the functions outlined in section 31(2)(a) to (c). It has explained exactly what functions these are and how it relies on stakeholders to engage with it and share and supply information to enable it to carry out these functions effectively. She notes the timing of the request and how this was made in close succession to the publication of the GG guidance and the interactions that took place prior to that between the EHRC and GG. GG and other stakeholders would expect a degree of confidentiality at the time of such interactions and for at least a short period afterwards. Disclosure of such information at the time of active discussions or recent to those discussions when new guidance is being promoted and launched would be likely to discourage those stakeholders from engaging with the EHRC on such matters and openly sharing information. This would then be likely to hinder the EHRC's ability to carry out these functions effectively. It will rely heavily on the co-operation of stakeholders to carry out its duties most effectively and to maintain such co-operation there needs to be a degree of confidentiality and private space in which to discuss and resolve issues and concerns without the need for formal regulatory action.
15. For the above reasons, the Commissioner is satisfied that section 31(1)(g) by virtue of section 31(2)(a) to (c) are engaged.

Public interest test

16. The EHRC stated that it acknowledges the presumption in favour of disclosure and the public interest in understanding the EHRC's work and how it carries out its functions.
17. However, it considers the public interest rests in maintaining the exemption. It argued that as a regulator it must maintain an appropriate level of confidentiality to be able to carry out its role and achieve the best outcomes. It also stated that information provided by others is often key to identifying areas of concern. If third parties did not feel comfortable in coming to the EHRC for assistance or sharing information so freely and of their own volition it is likely that significant areas of concerns may go uncovered and unidentified and this is not in the wider interests of the public.

18. The EHRC considers that it has also put sufficient information into the public domain about its work and, in this particular case, about its engagement with GG. The guidance was published by the time of the request and the EHRC more recently disclosed further information to the complainant. It considers this is sufficient to meet the public interest in the disclosure of the requested information and its interactions with GG. It also considers there is a clear difference between letting people know it is in correspondence with an organisation and providing the detail of information exchanges with that organisation, especially as its interactions were very recent at the time of the request and the finalised guidance had only just been published. It is aware that as a regulator it has a duty to be transparent and let people know of the work it is doing but equally it needs to ensure confidentiality in relation to the detail of the information exchanges with an organisation to allow it to properly conduct its regulatory functions.
19. For the above reasons the EHRC is satisfied that the public interest rests in maintaining the exemption.
20. The Commissioner acknowledges the public interest in openness and transparency and in the EHRC being open and honest about the work it undertakes, the functions it performs and how these are effectively carried out. The complainant herself has also highlighted the public interest in the need for clear guidance for all and for organisations providing single sex services. She considers the law covering single sex specialist services and gender transition is complex, not well understood and is currently being interpreted in widely differing ways.
21. However, in this case, considering how recent the discussions were between the EHRC and the GG at the time of the request and the fact that the finalised guidance had only just been published, the Commissioner considers the public interest rests in maintaining the exemption. She accepts that in order to carry out its functions effectively, engage with third parties and encourage the supply of information to enable it to identify and work through key issues and concerns there needs to be a degree of confidentiality. She accepts that if there was a fear of public disclosure of all discussions and correspondence, third parties would be reluctant to approach the EHRC for advice and support and supply the level of information the EHRC requires. It would then have a knock-on effect on the EHRC's ability to identify and resolve issues and concerns informally and meet its key objectives. Such consequences are not in the interests of the wider public.
22. The Commissioner notes that the EHRC was transparent and open about its engagement with GG and that the GG had already published its guidance on the matter by the time of the request. More recently the

EHRC also disclosed further information to the complainant. She considers the information already available goes a considerable way to meeting the public interest in disclosure.

23. For the above reasons, the Commissioner is satisfied that in this case the public interest in favouring of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

24. 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@justice.gov.uk

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

25. 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.
26. 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

Samantha Coward
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Wycliffe House
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