

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

### **Decision notice**

**Date:** 6 December 2022

**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 asked a series of questions of the Equality and Human Rights Commission ('EHRC'). The EHRC responded to each question in turn disclosing relevant information. They cited sections 21, 22, 40(2) and 36(2) of FOIA to withhold some of the information in scope of the request.
2. The Commissioner's decision is that the EHRC was entitled to rely on sections 22, 40(2) and 36(2) to withhold the requested information. However, by failing to respond to the request within 20 working days, the EHRC breached sections 1, 10 and 17 of FOIA.
3. No steps are required as a result of this decision notice.

## Request and response

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4. On 16 February 2022, the complainant made the following request for information to the EHRC:

"1. In an interview with Holyrood Magazine, Baroness Falkner (CEO of EHRC) said "I don't know what the meaning of that word is" when asked "Are you a transphobe?". She then went on to say that the word was "bandied around too much", as seen written in the interview.

a) For the record, could the EHRC and Baroness Falkner in particular clarify and correct the record as to whether or not Baroness Falkner knows what transphobia is.

b) For the record, could the EHRC clarify what training and development and what knowledge and skills Baroness Falkner has developed in order to tackle transphobia and trans issues, given that gender reassignment is defined in law as a protected characteristic Equality Act 2010).

2. Given that it has been widely reported that staff turnover rates are high at the EHRC, can you please provide the turnover rates of LGBT+ staff and then also all staff over the last three years.

3. It has been reported in the media that the EHRC had drafted guidance which proposed the protection of sex single spaces as opposed to single gender spaces, and that women would only be allowed to enter a women's only space if they could prove they were a biological woman. Can you please clarify: is there any truth to the media reports regarding this? what evidence has been drawn upon to come to these conclusions?

4. Following the recent guidance to the UK government around delaying a ban on conversion therapy for trans people, and then also asking the Scottish government to delay changes to the Gender Act, can the EHRC please provide copies of the Equality Impact assessments it has done with regard to these two issues - equality impact assessments are a mandatory component of all public sector organisations under the Public Sector Equality Duty, requiring organisations like the EHRC to demonstrate how they are showing due regard for the protected characteristics, and what is being done to foster excellent relations between said characteristic groups."

5. The EHRC provided an interim response on 16 March 2022 and followed this up with their full response on 31 March 2022. The EHRC answered each question in turn and cited sections 21, 22, 40(2) and 36(2) of FOIA for withholding specific information within the request and citing their public interest arguments.
6. The complainant responded the same day and said that they took issue with all the responses provided and requested a review. At internal review, the EHRC clarified some points raised and gave some further guidance but maintained its position. It reiterated their previous response that the climate of debate is heated and there is substantial polarised debate in the press and on social media which causes harm and distress and stated that section 36 was applied to ensure that there is a safe space for professionals to discuss matters in a frank and open manner.

## **Reasons for decision**

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### **Section 22 – information intended for future publication**

7. Section 22(1) of FOIA says that information is exempt information if:
  - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not)
  - (b) the information was already held with a view to such publication at the time when the request for information was made, and
  - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in (a).
8. Section 22 is a qualified exemption which means it is subject to the public interest test.
9. In this case, the EHRC advised that information is published in annual reports, and that accounts for 2019/20 and 2020/21 were available via a link they provided, and that 2021/22 figures will be published in due course.
10. The Commissioner considers that given the EHRC has made information available previously and plans to do so in future with regards to turnover of staff, there is no indication they will not adhere to this policy and therefore, its likely they will be able to make this information available to the public in due course. However, they have stated that they do not intend to publish turnover rates of LGBT+ staff as they consider this

could lead to the disclosure of sensitive personal data (further dealt with in paragraph 11 below). The Commissioner therefore considers that the public interest favoured non-disclosure at the time of the request.

### **Section 40(2) – personal information**

11. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

15. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. In this case the withheld information is numbers of LGBT+ staff who had left the EHRC which on its face may not appear to constitute personal data. However, given the specific sensitive nature of the information regarding staff employed by the EHRC, and the information to which the complainant already has access to for the relevant years, the Commissioner is satisfied that data subjects could be indirectly identified by the complainant in this case if this information were to be disclosed.
20. In the circumstances of this case, having considered the information available to him, the Commissioner is satisfied that the information relates to the sexual orientation of particular staff. He is satisfied that this information both relates to and identifies particular data subjects given information the complainant has access to. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
22. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

23. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

24. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
25. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
26. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

**Is the information special category data?**

27. Information relating to special category data is given special status in the UK GDPR.
28. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious, or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
29. Having considered the wording of the request, and the specific information provided to the complainant, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that it relates to the sexual orientation of data subjects whom the complainant may be able to identify given information they have access to.
30. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
31. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
32. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
33. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

### **Section 36 – Prejudice to the effective conduct of public affairs**

34. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
35. The EHRC has applied sections 36(2)(b)(i) and (ii) to withhold some of the requested information. Arguments under these sections are usually based on the concept of a 'chilling effect.' The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage

the quality of advice and deliberation and lead to poorer decision making.

36. The Commissioner's guidance on section 36<sup>2</sup> states that information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. In this case, the EHRC believes that the external bodies it consults on around conversion therapy and gender reassignment reform, which in itself is an extremely sensitive issue may, going forward, be more circumspect with their advice, if they are concerned that the views they express may be made public.
37. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that The Minister overseeing the EHRC is authorised as the qualified person under section 36(5) of FOIA and that she gave the opinion that the exemption was engaged. The Commissioner accepts that it was reasonable for the qualified person to consider that there was a need to protect the confidentiality of discussions and deliberations with external agencies. He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. He is therefore satisfied that the exemption was engaged correctly.
38. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the nature of the requested information and that this is a live issue and more detailed consideration is needed. The EHRC needs to be able consider advice which might be considered controversial (banning conversion therapy). If contributors were concerned that these discussions might be made public, the resultant loss of frankness and candour in the course of discussions and deliberations would be likely to damage the quality of advice to decision makers, and thus inhibit the EHRC's ability to make informed decisions relating to the reforms.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

39. The Commissioner considers the public interest in good decision-making by the EHRC to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served if the information were disclosed, on balance, he finds the public interest in protecting the EHRC's access to unfiltered and frank advice on an ongoing issue to be the stronger argument.
40. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that the EHRC was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse the request.

### **Procedural matters**

41. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. Where a public authority considers the information is exempt from disclosure, section 17 of FOIA requires it to issue a refusal notice, explaining why.
42. Section 10(1) of FOIA requires these actions to be taken within 20 working days of receipt of the request.
43. In this case, EHRC took 30 working days to respond to the request, it therefore breached sections 1(1)(a), 10 and 17 of FOIA.



## Right of appeal

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44. 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)

45. 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.
46. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**