

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 December 2021

Public Authority: Equality and Human Rights Commission
Address: 2nd Floor, Arndale House
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') investigation into the Labour party.
2. The EHRC initially withheld all information that falls within the scope of the request under section 42 (legal professional privilege) of the FOIA.
3. During the course of this investigation, the EHRC changed its stance to rely upon section 42(1) and section 42(2), the neither confirm nor deny provision.
4. The Commissioner's decision is that the EHRC is entitled to rely on section 42(1) in relation to part 2 of the request and that the public interest test favoured maintaining the exemption.
5. The Commissioner also finds that the EHRC was entitled to rely on section 42(2) in relation to part 3 of the request, and that the public interest test favoured maintaining the neither confirm nor deny provision.
6. The Commissioner requires the EHRC to take no further steps.

Request and response

7. On 18 December 2020 the complainant wrote to the EHRC and requested information in the following terms:

"In accordance with the FOI Act please provide the following:

 1. *The definition of antisemitism the EHRC relies upon in reaching its conclusions that the Labour Party broke the law.*
 2. *Copies of the legal opinion giving rise to the conclusions that the Labour Party broke the law.*
 3. *Copies of any dissenting legal opinions that the EHRC received."*
8. The EHRC responded on 19 January and explained that part 1 of the complainant's request was exempt under section 21 (Information accessible to applicant by other means) of the FOIA. The EHRC directed the complainant to the report¹ it had produced into the labour party which contained the definition of antisemitism that the EHRC had relied upon.
9. In relation to parts 2 and 3 of the request the EHRC explained, *"We are withholding the information requested in 2 and 3 as we consider that an exemption applies."* The EHRC cited section 42 (legal professional privilege) as its basis for refusing to disclose the information.
10. Following an internal review the EHRC wrote to the complainant on 16 February 2021, upholding its original position.

Scope of the case

11. The complainant contacted the Commissioner on 4 March 2021 to complain about the way that their request for information had been handled. The complainant did not raise any concerns regarding part 1 of the request and therefore the Commissioner has not gone on to consider this matter any further.
12. The complainant is concerned that since the EHRC has *'concluded that there were unlawful acts of harassment and discrimination for which the*

¹ [Investigation into antisemitism in the Labour Party \(equalityhumanrights.com\)](https://equalityhumanrights.com)

Labour Party is responsible, its rationale behind this decision should be disclosed.

13. At the point that the Commissioner wrote to the EHRC to outline the scope of her investigation, the EHRC explained that it *'initially understood that what was being asked for under part two of the request was the formal legal opinion the Commission received from external counsel engaged by the Commission to work on the Investigation.'*
14. The EHRC then went on to explain that, upon reviewing the matter, it *'does not interpret "the legal opinion" as relating to just one piece of formal advice from counsel and considers that there are large volumes of correspondence between itself and its legal advisors which could potentially be caught by this request, across roughly 3,000 emails.'* The EHRC therefore changed its position to rely upon section 12 (cost of compliance exceeds appropriate limit) of the FOIA.
15. The EHRC confirmed to the Commissioner that, whilst any correspondence with its legal advisors that may fall within the scope of the request was being withheld under section 12, the formal legal opinion provided by counsel was being withheld under section 42(1) and section 44.
16. The Commissioner therefore contacted the complainant to clarify what information they hoped to receive in response to part 2 of the request. The complainant confirmed that they wished to receive a copy of the formal legal opinion that the EHRC received from counsel.
17. The complainant elaborated that, as a member of the Labour Party, they felt tarnished by the findings of the EHRC's report and had concerns that the counsel given to the EHRC may pose some conflict of interest.
18. In relation to part 3 of the request the EHRC explained that, during its original handling of the request, it *"reviewed a sample of its records of correspondence with legal advisors but considered that all of the information held which may fall within the second and third parts of the request would fall within the exemption under section 42 FOIA. The Commission confirmed that the information held was exempt on this basis to the complainant in both the response and the internal review response but did not specifically confirm or deny that information corresponding to either the second or third parts of the request was held."* In its submission to the Commissioner, the EHRC confirmed that it was changing its position to neither confirm nor deny that it held any dissenting legal opinions.
19. The Commissioner therefore considers the scope of her request to be to determine whether the EHRC is entitled to rely upon section 42(1) and 42(2) as it has done.

20. If the Commissioner determines that the EHRC is not entitled to rely upon section 42(1) as its basis for refusing to disclose the formal legal opinion, she will go on to consider the EHRC's application of section 44.

Reasons for decision

Legal professional privilege

21. Section 42(1) states:

'Information in respect of which a claim to legal professional privilege, or in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.'

Section 42(2) states:

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.'

22. Consideration of section 42 is a two-stage process. Firstly, the Commissioner must decide if the exemption is engaged. Secondly, as section 42 is a qualified exemption, it is subject to the public interest test. This means the Commissioner must determine if the public interest in maintaining the exemption outweighs the public interest in disclosure or in confirming or denying whether the requested information is held.

Part 2 of the request, 'the formal legal opinion'

23. The Commissioner's guidance² clarifies the two different types of privilege within LPP. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. Whereas advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the main purpose of seeking or giving legal advice.
24. The EHRC has confirmed that the formal legal opinion it holds is subject to advice privilege.

² [legal_professional_privilege_exemption_s42.pdf \(ico.org.uk\)](#)

Is the exemption engaged?

25. Firstly the Commissioner will consider if the formal legal opinion would fall within the classes specified in section 42(1). In order to assist the Commissioner with this investigation, the EHRC has provided the Commissioner with a copy of the formal legal opinion that it holds.
26. LPP protects the confidentiality of communications between a client and their legal adviser which is vital in protecting the fairness of legal proceedings. However, what LPP specifically protects is the substance of those communications. The fact that a public authority has sought or received legal advice is not itself legally privileged, unless disclosing that fact would reveal the substance of those communications.
27. Having considered the withheld information, the Commissioner is satisfied that the purpose of this information is to seek or give legal advice in relation to the EHRC's investigation into the labour party. Furthermore, disclosure of this information would do more than simply confirm that legal advice had been given and sought (a fact that is obvious due to the nature of the EHRC's investigation). Having reviewed the withheld information, the Commissioner is satisfied that disclosure of this information would disclose the substance of that legal advice.
28. The Commissioner is satisfied that the formal legal opinion engages section 42(1). Therefore the exemption is engaged and the Commissioner has gone onto consider the public interest test later on in this notice.

Part 3 of the request, 'copies of any dissenting legal opinion'

Neither confirm nor deny

29. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in a request.
30. However, there may be occasions whereby complying with section 1(1)(a) would itself disclose information which would be covered by the relevant exemption. In circumstances such as this the public authority may respond by neither confirming nor denying whether it holds the requested information.
31. The decision to use a neither confirm nor deny response will not be affected by whether a public authority does, or does not hold the requested information. The key issue for neither confirm nor deny in most cases will be theoretical considerations about the consequences of confirming or denying whether the information is held.
32. A public authority will need to use the neither confirm nor deny response consistently, over a series of separate requests, regardless of whether

or not it holds the requested information. This is to prevent refusing to neither confirm nor deny being taken by requesters as an indication of whether or not information is in fact held.

33. To clarify, whilst the EHRC originally applied section 42 to the complainant's request, it *'did not specifically confirm or deny that information corresponding to either the second or third parts of the request was held.'* The EHRC has changed its position to now neither confirm nor deny whether it holds any dissenting legal opinions in relation to its investigation.
34. To reiterate, the Commissioner does not need to consider whether the EHRC actually holds the information or the disclosure of any requested information that may be held. The Commissioner need only consider whether the EHRC is entitled to neither confirm nor deny whether it holds any information in relation to part 3 of the request.

Is the exemption engaged?

35. Firstly the Commissioner will consider, if the EHRC held any dissenting legal opinions, this information would fall within the classes specified in section 42(1) of the FOIA.
36. If a public authority confirms or denies that it holds legal advice, this may in itself reveal something about the substance of that advice. 'Substance' means the content, rather than simply the general subject of the advice. In instances like this, a public authority should neither confirm nor deny that it holds the requested information.
37. The Commissioner has considered the specificity of the request and the type of information that would fall within the scope of part 3 of the request. The Commissioner is satisfied that, were the EHRC to confirm or deny that it held any dissenting legal opinions, it would essentially be confirming or denying that it received counsel that the Labour Party did not break the law.
38. The Commissioner is satisfied that the exemption is engaged and the Commissioner has gone onto consider the public interest test.

The public interest test

Public interest arguments in disclosure/confirming or denying that the requested information is held

39. To reiterate, the complainant is concerned that any rationale behind the EHRC's findings should be made public. The complainant summarised his position '*He who asserts must prove is surely the maxim here for such a key issue.*'
40. The EHRC has acknowledged that there is a public interest in being transparent about the legal advice that helped to inform its investigation and findings.
41. The EHRC has also explained that, were it to disclose the formal legal opinion the public would be granted the opportunity to study this advice, and therefore the robustness of the EHRC's investigation, for themselves.
42. Furthermore, if the EHRC denies holding any dissenting legal opinions, this would reassure the public that the EHRC's findings were wholly supported by the legal advice that it received.
43. Were the EHRC to confirm that it holds any dissenting legal opinions, this would increase public debate and understanding surrounding the report and the advice upon which its conclusions are based upon.
44. The Commissioner considers that additional weight is added to the above, given that a significant group of people have been affected by discrimination within the labour party. This same group of people have been affected by the EHRC's subsequent investigation and findings.

Public interest arguments in maintaining the exemption/neither confirming nor denying that the requested information is held

45. The EHRC has explained to the Commissioner that '*the public interest in maintaining legal professional privilege is, on its own, a weighty factor.*'
46. The Commissioner's guidance sums up this inherent public interest in maintaining LPP as follows, '*safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.*' However, this is not to say that section 42 is an absolute exemption; to maintain the exemption or to rely upon the neither confirm nor deny provision the public interest must favour doing so.
47. The EHRC has explained that its report, which details its findings and recommendations and how it came to them, has now been released into the public domain. The EHRC believes that disclosure of the formal legal

opinion, or confirming or denying that it holds any dissenting legal opinion *'would serve no additional public interest'* as the EHRC *'provided a great deal of information in the report in relation to its approach to the investigation and the legal basis for finding that unlawful acts had been committed.'*

48. The EHRC is concerned that there is a particularly strong public interest in maintaining advice privilege in this case due to the 'live' nature of the EHRC's work with the labour party. To summarise, at the end of its investigation the EHRC issued an unlawful act notice under section 21 of the Equality Act 2006. This notice compelled the labour party to *'prepare an action plan for the purpose of avoiding repetition or continuation of the Unlawful Acts.'*³ This action plan has since been published on Labour's website.⁴
49. The EHRC has explained that *'The Commission continues to rely upon legal advice received in the course of the Investigation in exercising its powers under section 22 of the Equality Act 2006⁵ to monitor compliance with the Action Plan and take enforcement in respect of non-compliance for a period of five years after the Action Plan has come into force.'*
50. The EHRC have explained that *'The Commission also notes that, at the time of writing, Ken Livingstone and Pam Bromley have applied to court for a judicial review of the Commission's findings in the report. As such, the Commission may need to rely upon legal advice received in defending the recommended actions and outcomes of the report at judicial review, in the event that permission is granted.'*
51. To reiterate, the Commissioner has determined that, were the EHRC to disclose the formal legal opinion or confirm or deny that any dissenting legal opinion is held this would, in itself, disclose the substance of the information held.
52. The EHRC believes that, were it to confirm that it held any dissenting legal opinions there may be arguments raised that it ignored such advice. Alternatively, were the EHRC to deny that it held any dissenting legal opinions there may be arguments raised that it did not seek balanced advice and did not consider all possible legal arguments.

³ [Investigation into antisemitism in the Labour Party \(equalityhumanrights.com\)](http://equalityhumanrights.com), page 103

⁴ [Labour Party EHRC Action Plan](#)

⁵ [Section 22, Action Plans Equality Act 2006 \(legislation.gov.uk\)](http://legislation.gov.uk)

53. The EHRC is concerned that, were such substance of its legal advice to be disclosed, it may impair the EHRC's ability to rely upon legal advice both in the course of exercising its regulatory functions and defending its actions on judicial review.
54. Whilst the Commissioner accepts that the above arguments are valid, she needs to consider where the public interest lies; either in disclosing the formal legal opinion and confirming or denying dissenting legal opinions are held or in maintaining the exemption and the neither confirm nor deny provision of section 42.

Balance of the public interest arguments

55. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for their decisions. She also acknowledges that there has been some criticism of the EHRC's report and has taken this into account when considering where the public interest lies.
56. The Commissioner believes that the public interest lies in protecting the substance of the legal advice in this instance, though she notes that it is a fine balance.
57. Having reviewed the ERHC's report, the Commissioner is satisfied that the EHRC has robustly explained the reasoning behind its findings, without risking the prejudice that comes with the disclosure of the substance of privileged information. Maintaining this privilege allows the EHRC to undertake its role robustly and efficiently, both supporting and monitoring the Labour Party in its enactment of its action plan.
58. Ultimately, the Commissioner is mindful of the mechanisms by which the EHRC's report, and any legal opinions sought as part of its investigation, may be challenged. It is not the role of the FOIA to make such challenges.
59. As previously stated, an appeal has been launched into the EHRC's report. Therefore, it is more important than ever to uphold advice privilege and not disclose any material of substance that may affect the fairness of such proceedings.
60. The Commissioner returns to the complainant's concern that '*He who asserts must prove*' and concurs. The Commissioner believes that the appropriate next steps are to allow the aforementioned appeal to take place, and for the EHRC to receive and act upon advice privilege without prejudice and thus be able to enact its obligations and defend its findings as robustly as possible.
61. With this in mind, she considers that the EHRC is entitled to rely upon section 42(1) as a basis for refusing to disclose the formal legal opinion

in relation to part 2 of the request, and that the public interest lies in maintaining the exemption. With this in mind, the Commissioner has not gone onto consider the EHRC's application of section 44.

62. Furthermore, she considers that the EHRC is entitled to rely upon section 42(2) as a basis for refusing to confirm nor deny that it holds any dissenting legal opinions in relation to part 3 of the request, and that the public interest lies in maintaining the neither confirm nor deny provision.

Other matters

63. Returning to the EHRC's submission as outlined in paragraph 18, the Commissioner notes that the EHRC's initial response to the request falls below the expected standard and does not meet the requirements of section 17(1) FOIA which states:

Refusal of request

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

Whilst the Commissioner acknowledges that a public authority is entitled to change its position throughout the handling of a request, a public authority must explain clearly to a complainant if it is relying upon a neither confirm not deny provision within the FOIA.

64. Furthermore, at the stage that the EHRC decided to change its interpretation of the scope of part 2 of the request, it should have contacted the complainant directly to gain clarity on this matter. It should not be the role of the Commissioner to do so.

Right of appeal

65. 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

66. 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.
67. 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

Alice Gradwell
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