

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

### **Decision notice**

**Date:** 30 October 2023

**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 has requested information contained in a redacted footnote to a published letter. The above public authority ("the public authority") relied on section 40(2) of FOIA (third party personal information) to withhold the requested information.
2. The Commissioner's decision is that section 40(2) of FOIA is engaged and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

#### **Background**

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4. On 21 February 2023, the Rt Hon Kemi Badenoch MP, Minister for Women and Equalities, wrote to the public authority to seek:

"your considered advice of the benefits or otherwise of an amendment to the 2010 Act on the current definition of 'sex', along with any connected or consequential enactments, bearing in mind the

advantages and disadvantages that such a change might entail for affected groups.”<sup>1</sup>

5. On 3 April 2023, the public authority responded with a detailed letter setting out the various groups likely to be affected by such a change and whether the change would have a positive, negative or neutral effect on each group – as well as potential issues that a change might create or ameliorate.<sup>2</sup>
6. In an annex to its letter, the public authority gave detailed consideration to how a change in the law might affect specific rights, including pregnancy or maternity rights. It noted that the current Equality Act provisions outlawed discrimination on the basis of pregnancy or maternity but that:

“these provisions would fail to cover trans men who are pregnant and whose legal sex is male. The affected cohort is not hypothetical, as the case of [redacted] illustrates.

“If references to sex in these provisions were read to refer to biological women, a trans man like [redacted] would be protected whether or not he had obtained a GRC [Gender Recognition Certificate].”
7. In the published version of the letter, the word “illustrates” was annotated with a footnote – however the footnote itself was redacted.

## Request and response

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8. On 5 June 2023, the complainant wrote to the public authority and requested information in the following terms:

“On the 3 April 2023, you sent a letter to Kemi Badenoch MP regarding the definition of 'sex' in the Equality Act 2010.

In Annex A to the letter, Pregnancy and maternity section, there are redactions.

Please send me:

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<sup>1</sup> <https://www.equalityhumanrights.com/en/file/43051/download>

<sup>2</sup> [https://www.equalityhumanrights.com/sites/default/files/letter-to-mfwe-definition-of-sex-in-ea-210-3-april-2023\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/letter-to-mfwe-definition-of-sex-in-ea-210-3-april-2023_0.pdf)

- the type of literature which the redacted footnote refers to (court case, medical journal, other journals please specify field, news article, blog post, etc)
  - the year of publication of the literature
  - the country of publication of the literature.”
9. The public authority responded on 22 June 2023. It confirmed that it held the information, but it relied on section 40(2) of FOIA to withhold it. It maintained its stance following an internal review.

### **Reasons for decision**

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10. For information to be personal data, it must both identify a living individual and relate to that individual.
11. The information in question relates to a footnote. Whilst its disclosure might not, in itself, identify an individual, if it were combined with other information in the public domain, the Commissioner is satisfied that it would identify the individual referred to in the letter (whose name is redacted from the published version and who will be referred to in this notice as “the Individual”).
12. Furthermore, if they were to be identified, the Commissioner notes that the published version of the letter contains details about the Individual’s gender and biological sex. Therefore not only would disclosing the withheld information identify the Individual and reveal personal data about them, it would also reveal special category data about them.
13. Special category data includes some of the most sensitive categories of personal data, including information about a person’s ethnic origin, their health or their sexual orientation.
14. Section 40(2) of FOIA will apply to any disclosure that would reveal personal data, of someone other than the requester, where one of three conditions is met. These conditions are that disclosure would:
1. contravene one of the data protection principles; or
  2. override the data subject’s right to object to processing; or
  3. provide the data subject with information they would not be entitled to receive via a subject access request (SAR).
15. If either the second or the third conditions are met, the public authority must also carry out a public interest test before it can withhold the information.

### **The third condition**

16. The third condition is not met here because the Commissioner cannot see any reason (and the public authority has provided no reason) why the Individual would not have been entitled to receive the withheld information if they had made a SAR.

### **The first condition**

17. The Commissioner next turns to the first condition. In relation to a FOIA request, the principle most likely to be affected is the first principle: publication must be lawful, fair and transparent.
18. For publication to be lawful, there must be a specific basis in data protection law that would allow the personal data to be processed in this way.
19. Because it is so sensitive, special category data receives special protection under data protection law. Article 6 of the UK GDPR lists the conditions for processing any personal data. Article 9 of the UK GDPR lists the conditions for processing special category data. In order to process special category data, a public authority must demonstrate that it has **both** an article 6 **and** an article 9 basis for processing.
20. Most of the article 9 bases for processing special category data would not apply to publication. The only two that may be relevant would be if the Individual had consented or had manifestly made the information public themselves.
21. No one has suggested that the Individual has given consent for their personal data to be published. The public authority was not obliged to seek the Individual's consent, nor was the Individual obliged to provide consent.
22. However, consent is not the only lawful basis for publishing special category data. Personal data of this kind can also be published if it has already been manifestly made public by the person whose personal information it is.
23. The Commissioner's guidance on this condition for processing states that, in order to rely on it:  
  
"You need to be confident that it was the individual themselves who actively chose to make their special category data public and that this was unmistakably a deliberate act on their part. There is a difference between assenting to or being aware of publication, and an individual actively making information available. For example, by blogging about their health condition or political views. You might also find it hard to

show that someone has manifestly made information public if, for example, they made a social media post for family and friends but default audience settings made this public. You should therefore be very cautious about using this condition to justify your use of special category data obtained from social media posts.

“To be manifestly made public, the data must also be realistically accessible to a member of the general public. The question is not whether it is theoretically in the public domain (eg in a publication in a specialist library, or mentioned in court), but whether it is actually publicly available in practice. Disclosures to a limited audience are not necessarily ‘manifestly public’ for these purposes. In particular, information is not necessarily public just because you have access to it. The question is whether any hypothetical interested member of the public could access this information.”<sup>3</sup>

24. The Commissioner notes that the Individual has given a number of media interviews as well as publishing their own articles.
25. This is not a case where a newspaper has made an allegation. The Individual has clearly consented to being interviewed and has done so on several occasions. The Commissioner would consider that any personal information a person willingly discloses about themselves in a media interview to have entered the public domain as a result of a deliberate act by that person.
26. The published version of the public authority’s letter refers to the individual as being:
  - a. a trans man; who
  - b. received (unspecified) fertility treatment; and
  - c. subsequently gave birth.
27. Having studied the information in the public domain carefully, the Commissioner is satisfied that facts a), b) and c) are all in the public domain and that they have been placed there as a result of a deliberate action on behalf of the Individual. Even if the withheld information were disclosed and the Individual consequently identified, nothing would be

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<sup>3</sup> <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/special-category-data/what-are-the-conditions-for-processing/#conditions5>

revealed about them that they have not already revealed publicly about themselves.

28. The Commissioner is therefore of the view that, whilst disclosing the withheld information would indirectly reveal special category data about an identifiable individual, there would be a lawful basis on which this special category data could be published.
29. Given that the information is already in the public domain, the Commissioner is also satisfied that the public authority would be pursuing a legitimate interest by publishing the information and that this would be proportionate in the circumstances. The public authority therefore has both an article 6 and an article 9 basis for processing the personal information.
30. Whilst a publication that is lawful is also likely to be fair, the Commissioner has considered the question of fairness separately.
31. The Commissioner recognises that the public authority did, on request, remove all references to the Individual and that the Individual might expect that, in those circumstances, the references would not be reinstated.
32. However, the Commissioner again notes that, even if the withheld information were disclosed, it would reveal nothing about the Individual that was not already in the public domain.
33. The original version of the letter dealt with the issue of how pregnancy and maternity rights might be affected by amending the Equality Act. The public authority noted that there was a potential effect. It then noted that the situation was not a hypothetical one: there were already people who would be affected. The Individual was referenced as one such person.
34. The Commissioner does not consider that any reasonable person reading the letter would infer that the Individual supported any position the public authority had taken – or even that they had been consulted. Therefore the special category data is not being used for an inappropriate purpose and it is not being published in an unfair context.
35. Having chosen to make their personal information public themselves, the Commissioner does not consider that the Individual can reasonably expect that others will not use that personal information as part of a wider public debate. In making the information public, the Individual cannot reasonably expect to retain the same degree of control over how the public chooses to use the information.

36. The Commissioner does not consider that disclosure would be unfair to the Individual, nor does he see why publication could be anything other than transparent.
37. The first condition is therefore not met: publishing the information would not breach any of the data protection principles.

### **The second condition**

38. Finally, the Commissioner has considered the second condition – which, in his view, is met.
39. Unusually in this case, the Commissioner has had to consider whether disclosure would override a valid right to object to processing. The Commissioner considers that, in order to trigger this condition, the objection to processing would need to have been both submitted and agreed to, prior to the request having being made.<sup>4</sup>
40. The public authority explained to the Commissioner that the original version of its letter had not included any redactions. However the Individual had sent correspondence expressing concern about their name being included and, consequently, the public authority had decided to remove all identifying references.
41. When the Commissioner asked for further information, the public authority noted that it had treated this correspondence under “business as usual” procedures but that it recognised, on reflection, that it could equally have dealt with it using its “right to object” process.
42. The public authority argued that it had been processing this personal information on the basis of “legitimate interest” though it recognised it could also have relied on “public task.” It accepted that, in applying the redactions, it had effectively received and agreed to an objection to processing.
43. The Commissioner’s guidance is clear that a person does not have to explicitly mention their right to object in order to engage the process.
44. Therefore the Commissioner takes the view that, whilst the Individual may not have intended to exercise their right to object to processing and the public authority may not have explicitly dealt with it as such,

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<sup>4</sup> The right to object to processing only applies where a data controller is relying on either “public task or exercise of official authority” or “legitimate interests” as their basis for processing. If a public authority discloses information under FOIA it is relying on “legal obligation” as its basis for processing and this basis does not permit any right of objection.

that does not matter. If a person has expressed concern about the way their personal information is being processed and the data controller has, as a result, ceased the processing of that information, then that can be the exercising of a right to object – regardless of the formal process followed. What matters is the effect, not the process that was followed.

45. A person can only object to a public authority processing their personal information if the lawful basis for processing is “legitimate interest” or “public task.” If another lawful basis is being used, no right to object exists.
46. Whilst the public authority’s article 9 basis would have been “manifestly made public by the data subject” (for the reasons already set out above), it would also have needed an article 6 basis for processing. Either legitimate interest or public task could have been relied upon as the article 6 lawful basis and both would have allowed the Individual to object to their personal data being processed in that way.
47. In corresponding in the manner that they did, the Individual has exercised their right to object to processing. In redacting the individual’s name as it did, the public authority gave effect to that right. The second condition is therefore met.

### **Public interest test**

48. The public authority argued that the public interest should favour maintaining the exemption because, having removed the information when asked, the Individual would have a reasonable expectation that it would not be put back into the public domain.
49. The Commissioner recognises that the UK GDPR puts in place high standards for the protection of personal information and numerous safeguards to protect individuals. One of the safeguards is the right of any individual to object to their personal information being used in certain circumstances. Where a right to object to processing has been exercised, that would ordinarily carry a substantial public interest in maintaining the exemption – so as to protect the exercise of that right.
50. However, in these particular circumstances, the Commissioner considers that there are factors which reduce the weight that should be afforded.
51. Firstly, as he has noted above, the Commissioner considers that publishing the information would be lawful, fair and transparent. In particular, he notes that the special category data that would be revealed about the Individual is information that has already been placed in the public domain, by the Individual.



52. The Individual has chosen to make their personal story (including special category data about themselves) very public. That does not mean that they have waived all rights to privacy, but it does mean that they cannot reasonably expect to have the same degree of control over how the information they have made public is subsequently used.
53. Secondly, given that the withheld information was previously in the public domain, the Commissioner is not persuaded that any subsequent damage to the Individual from re-publication would be significant.
54. The letter as a whole would have had maximum impact when it was first published. That is when it would have generated most interest and when the Individual's name would have been most visible. Therefore any significant damage or distress that occurred to the individual would have already occurred. Although the effect will be permanent, re-publishing the information is unlikely to bring it to the attention of significant numbers of people who were previously unaware that the Individual had been mentioned in this context.
55. Finally, the Commissioner has to consider the manner in which the public authority handled the objection to processing. The Commissioner recognises that the public authority is entitled to determine what information it does and doesn't publish on its website. Complying with data protection legislation is one reason why a public authority might choose to redact certain information, but it is far from the only one.
56. Equally, a public authority is not obliged to subject every piece of correspondence it receives to a formal legislative process. Not only would that be impractical, but there is no guarantee that the outcome would be any different. The Commissioner is in no way suggesting that the public authority did not deal appropriately with the Individual's correspondence.
57. However, the Commissioner is also bound to note that whilst, the letter as a whole makes an important contribution to a debate that is both topical and controversial, it is comprehensible with or without knowing the Individual's name. The Commissioner is of the view that the withheld information would make a very limited contribution to that debate.
58. This is an unusual case which tests the interaction between data protection law and FOIA. Even though the special category data involved is widely available in the public domain, the Individual has asked the public authority to stop processing it. Had they not done so, prior to this information request having been made, the Commissioner would have had no hesitation in ordering disclosure.

59. However, the legislation requires the Commissioner to balance the public interest in preserving the right of an individual to object to the way their personal information is being handled, against the public interest in transparency and openness.
60. In the Commissioner's view, data protection law requires tests of proportionality to be carried out where personal information is processed. That would imply that, where an objection to processing has been exercised, there should be a strong public interest in protecting that right – and that right should only be interfered with where there are as strong or stronger public interest grounds for disclosure.
61. In the circumstances of this case, the Commissioner is not convinced that there is a sufficiently strong public interest that would justify overriding the rights of the Individual. Whilst he recognises that allowing the public authority to withhold information that is freely available is somewhat perverse, he is obliged to apply the law as it is written.
62. Therefore the Commissioner accepts that section 40(2) of FOIA applies and he considers that the balance of the public interest should favour maintaining the exemption.

## Right of appeal

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63. 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)

64. 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.
65. 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**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**