

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2024

Public Authority: Equality and Human Rights Commission (EHRC)

Address: Arndale House, The Arndale Centre, Manchester, M4 4AQ

Decision (including any steps ordered)

1. The complainant has requested EHRC to disclose any correspondence with Theatre Royal Stratford East regarding the Black Out performance of 'Tambo & Bones' on Wednesday 5 July 2023. EHRC refused to disclose the information citing section 31(1)(g) of FOIA.
2. The Commissioner's decision is that EHRC is entitled to rely on section 31(1)(g) of FOIA. He therefore does not require any further action to be taken.

Request and response

3. On 27 September 2023, the complainant wrote to EHRC and requested information in the following terms:

"Please provide any correspondence with Theatre Royal Stratford East, Gerry Raffles Square, London E15 1BN regarding the Black Out performance of 'Tambo & Bones' on Wednesday 5 July 2023."
4. EHRC responded on 13 October 2023. It refused to confirm or deny holding the information under section 31(3) of FOIA.
5. The complainant requested an internal review on 9 November 2023.

6. EHRC carried out an internal review and notified the complainant of its findings on 8 December 2023. After consultation with the theatre, it withdrew its application of section 31(3), confirmed that it does hold information but now considers it is exempt under section 31(1)(g) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 1 January 2024 to complain about the way their request for information had been handled. They stated that the Chair of the Board at the theatre notified them in writing that the theatre has been in communication with EHRC and they felt it was unreasonable for the theatre to have any expectation of non-disclosure of its correspondence. They consider the theatre should be fully aware that EHRC is subject to FOIA and therefore disclosure.
8. The Commissioner considers that the scope of his investigation is to establish whether or not EHRC is entitled to rely on section 31(1)(g) of FOIA.

Reasons for decision

Section 31 – law enforcement

9. Section 31(1)(g) states that information is exempt from disclosure if its disclosure 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.
10. EHRC has stated that it is the following purposes referred to in subsection 2 which are relevant to this case:
 - (a) the purpose of ascertaining whether any person has failed to comply with the law, and
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
11. Section 31 is also subject to the public interest test.
12. EHRC confirmed that it is the UK's national equality body and is a statutory non-departmental public body established by the Equality Act 2006. It safeguards and enforces laws that protect people's right to

fairness, dignity and respect. It advised that its functions are set out in section 8 of the Equality Act 2006.

13. It explained that it has a real concern about sharing its correspondence with those bodies it regulates with the world at large and disclosing details of how it conducts its regulatory work in any specific case. It stated that the nature of its engagement with regulated entities will vary, depending on the circumstances including the nature of the body, the concern in question and its own wider strategic goals.
14. EHRC advised that its overall approach is set out in its Litigation and Enforcement Policy¹. This policy is available to the public and sets out its regulatory approach.
15. It stated that disclosing specific details of how it applies that policy in a specific case and in relation to a specific organisation and set of circumstances, in relation to which it may or may not need to consider regulatory action in the future, would be likely to be damaging. It advised that this is because it is likely to have a direct and negative impact on its exercise of its regulatory functions and be likely to prejudice how it engages on matters, if it was required to disclose the correspondence. EHRC confirmed that it would tend to limit the flexibility of its appropriate regulatory approach from case to case and disclosure of such correspondence may serve to fetter its regulatory response in future cases.
16. EHRC said that it is also concerned that if it were to disclose information shared with it in its role as regulator, this would be likely to negatively impact on the effectiveness of its preliminary enquiries. It argued that given that the theatre voluntarily provided it with information, there is a real and significant risk that other organisations may not engage with it as candidly and openly in future and only provide information at a superficial level.
17. It commented that although it has powers to compel organisations to provide information, this is a more adversarial process and requires additional time and resource. Ascertaining information voluntarily through preliminary enquiries rather than using its legal powers is a more efficient use of its resources and allows it to engage with many more organisations.
18. EHRC stated that it finds it more advantageous to use a cooperative process to build relationships across regulated entities. It confirmed that

¹ [Our litigation and enforcement policy | EHRC \(equalityhumanrights.com\)](https://equalityhumanrights.com/our-litigation-and-enforcement-policy/)

organisations are more likely to engage with it and follow its recommendations if it is seen as a trusted source of support.

19. The Commissioner accepts the potential prejudice claimed by EHRC, which clearly relates to the interests the exemption contained at section 31(1)(g) is designed to protect.
20. The Commissioner is also satisfied that the prejudice being claimed is "real, actual or of substance", and that there is a causal link between disclosure of the withheld information and the prejudice claimed.
21. The Commissioner accepts that EHRC relies heavily on the free flow and voluntary supply of information from those it regulates in order to carry out its functions swiftly and most effectively. It has said that it does have powers to compel those it regulates to provide information but this process is time consuming, costly and much more inflexible which means that if it had to use or rely on such powers more regularly (as a result of damaging the free flow of information and the willingness of those it regulates to volunteer and share information) it would be likely to result in EHRC engaging with fewer organisations and tackling fewer concerns or issues across the sector.
22. He acknowledges that if EHRC were to disclose the withheld information it would be likely to deter organisations from engaging so freely and candidly with EHRC for fear the information they have shared will make its way into the public domain. It would also have an impact on the quality of information organisations are prepared to share with EHRC. Organisations are more likely to engage and cooperate with the process, and follow the recommendations EHRC puts forward, if it is seen as a trusted source of support.
23. As the Commissioner is satisfied that section 31(1)(g) of FOIA is engaged, he will now go on to consider the public interest test.

Public interest test

24. EHRC advised that there is a public interest in disclosing information that holds regulatory bodies who enforce the law to account and recognises that this increases transparency around how such bodies perform their functions. It understood that without this information, the public may lack confidence and trust in these bodies.
25. However, as a regulator it believes it must maintain an appropriate level of confidentiality to be able to carry out its role and to protect its ability to enter into dialogue in a confidential manner with bodies where it has concerns about compliance with the equality enactments and/or human rights. It said that this is to allow those bodies to commit to engaging with it and changing their policies and procedures, where necessary.

26. EHRC said that there is a public interest in encouraging cooperation and the voluntary supply of information between itself and the regulated party. Disclosure of the requested information may discourage cooperation and deter the voluntary supply of information due to concerns of it being shared more widely, which in turn would be likely to prejudice the exercise of its functions. It argued that such consequences are not in the wider interests of the public.
27. It commented that if it were unable to ascertain sufficient information through its preliminary enquiries it would need to rely more on using its formal powers to compel disclosure. It argued that given the additional time and resource needed to use its formal powers it would be unable to engage with as many organisations and this not in the public interest.
28. EHRC confirmed that there is a clear and significant public interest in protecting society from infringements of equality and human rights law, and it must therefore safeguard against any actions that would or would be likely to cause harm to its regulatory activity.
29. EHRC decided therefore that the public interest rests in maintaining the exemption.
30. The Commissioner recognises the public interest in openness, transparency and accountability and how disclosure of the information would provide more of an insight into how EHRC handles concerns and works with organisations to ensure that they are compliant with the equality laws. Disclosure would reassure the public that particular issues and concerns have been addressed efficiently and effectively by the regulator and any remedial action or recommendations suggested have been adhered to.
31. However, on this occasion the Commissioner considers the public interest rests in maintaining the exemption. Disclosure of the withheld information would be likely to prejudice EHRC's preliminary enquiries with organisations and the ability of EHRC to engage with those organisations swiftly and effectively and obtain the information it needs to address any concerns. This is not in the public interest.
32. Disclosure would be likely to deter organisations from engaging so freely with EHRC in the future and dilute the quality of information they are willing to share. This would hinder EHRC's ability to carry out its statutory functions and effectively regulate the equality laws. It would be likely to lead to EHRC having to use or rely on its more formal powers, which would be much more costly and time consuming. This is not in the wider interests of the public. EHRC would be likely to deal with less but at a higher cost.

33. The Commissioner accepts that in order to operate efficiently and effectively EHRC needs to maintain an appropriate level of confidentiality so as to protect the free and swift dialogue with the organisations it has concerns about. So, on balance the Commissioner is satisfied that the public interest rests in maintaining the exemption.

Right of appeal

34. 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

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Coward
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