

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

### **Decision notice**

**Date:** **22 December 2025**

**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 relating to the Equality and Human Rights Commission's (EHRC) interim guidance following the Supreme Court judgement For Women Scotland Ltd v The Scottish Ministers. The EHRC withheld the requested information, citing section 36 (prejudice to effective conduct of public affairs) of FOIA as its basis for doing so.
2. The Commissioner's decision is that the EHRC was correct to rely on sections 36(2)(b)(i), (b)(ii) and (c) of FOIA to withhold the requested information.
3. The Commissioner does not require the EHRC to take any further steps.

### **Request and response**

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4. On 15 May 2025, the complainant wrote to the EHRC and requested information in the following terms:

"copies of all written, WhatsApp or SMS text message, and email communications between EHRC staff responsible for policy on matters relating to sex and gender and EHRC Directors regarding the EHRC's interim guidance following the Supreme Court judgement For Women Scotland Ltd (Appellant) v The Scottish Minister (Respondent).

This includes John Kirkpatrick, Moya Alcock, Joe Corcos, Bill Malloy, Anna Boaden, Adam Sowerbutts, and Martin Crick, or any other person who holds the role of Director at the EHRC. It should also include communications sent or received by staff of these individuals who may manage communications on their behalf, for example private secretaries or other administrative assistants.

My request covers communications between 14 April 2025 and today's date, 15 May 2025."

5. The EHRC responded on 9 July 2025. It relied on sections 36(2)(b)(i), (b)(ii) and (c) of FOIA to refuse to disclose the requested information.
6. Following an internal review the EHRC wrote to the complainant on 12 September 2025. It maintained its original position.

## Reasons for decision

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### Section 36 – effective conduct of public affairs

7. The EHRC relied on the following subsections of section 36 of FOIA to withhold the requested information:
  - (2) Information to which this section applies is exempt information if in the reasonable opinion of a qualified person, disclosure of the information under this Act-
    - (b) would, or would be likely to, prejudice-
      - (i) the free and frank provision of advice,
      - (ii) the free and frank exchange of views for the purpose of deliberation
    - (c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.
  8. In determining whether these exemptions are engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors, including:
    - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.

- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

9. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. The qualified person's opinion does not have to be the most or only reasonable opinion that could be held in relation to the particular subject; it only has to be a reasonable opinion.

10. In terms of the process of seeking this opinion, the EHRC sought the opinion of its then Chair, Baroness Kishwer Falkner on 19 May 2025 with regard to whether sections 36(2)(b)(i), (b)(ii) and (c) of FOIA were engaged. The Commissioner is satisfied that, for the purposes of section 36 of FOIA, the Chair has been provided with delegated responsibility by the Secretary of State to act as the qualified person for the EHRC.

11. The qualified person was provided with a copy of the information falling within the scope of the request, along with a submission from an official in the Information Governance team regarding the application of the exemptions. The submission contained the background and context of the request, the full wording of the exemptions that the official was seeking to rely on, along with arguments and counter arguments for the qualified person to consider when forming their opinion as to whether the exemptions were applicable. On 27 May 2025 the qualified person confirmed that they agreed that the exemptions were engaged.

12. While the rationale as to why the exemptions apply is contained in the recommendation from an Information Governance official to the qualified person, the which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other public authorities).

13. Turning to the substance of the opinion, the Information Governance official explained to the qualified person that the request related to the publication of an interim update published by the EHRC on 25 April 2025 regarding the practical implications of the UK Supreme Court judgement in *For Women Scotland Ltd v The Scottish Ministers*, which ruled that in the Equality Act 2010 'sex' means biological sex.

14. Regarding considerations as to why prejudice or inhibition would occur as a result of disclosure of the requested information, the official set out the following points to the qualified person:

- At the time of the request, and of seeking the qualified persons opinion, work to update both statutory and non-statutory guidance, to reflect the judgement, was ongoing.
- Following the Supreme Court judgement and as part of the preparation for the Interim Update and revisions to the Code of Practice for services, public functions and associations, the EHRC staff and Board have had free and frank discussions and exchange of views as to the implications of that ruling and the content of any advice which should be issued to the public as a result.
- It is important to safeguard the ability to have such free and frank discussions and to allow an open exchange of views in order to fully explore and consider all implications and properly disseminate the meaning of the ruling to the public and to inform future guidance. Having issued the Interim Update, the EHRC was working at pace to incorporate the implications of the Supreme Court judgement into its statutory and non-statutory guidance, principally Code(s) of Practice issued under Section 14 of the Equality Act 2006.
- The issues around the interpretation of sex and gender within the Equality Act 2010 have been a long-standing area of public debate and political conflict between gender critical rights campaigners and advocates for trans rights. While the Supreme Court judgement provided clarity to the law, it also contributed to further polarised debate on these issues.
- Given the polarised debate on these issues, disclosure of the information would be likely to introduce a chilling effect on discussions around updates to the EHRC's statutory and non-statutory guidance, both at present and in the future. Following publication of the Interim Update on 25 April 2025, the EHRC received an unprecedented volume of negative correspondence and media coverage, the extent of which required a police presence at an all-staff event on 29 April 2025 and an instruction to work remotely on 2 May 2025 following a large protest outside the EHRC's Glasgow office; the EHRC was also aware of a further demonstration planned shortly after the time at which it was seeking this opinion. The Board of Commissioners had also been subjected to similar vitriol, on-line and in correspondence.
- If the requested information was disclosed, and, in particular, following this negative activity, staff and Commissioners would be likely to become circumspect in expressing themselves openly, honestly and completely when imparting advice in this area and may become hesitant to fully explore options and offer views

during the process of deliberation for fear of future disclosure. This is likely to result in a severe loss of frankness and candour in such important discussions. This will impact the quality of the advice and the EHRC's ability to comprehensively evaluate competing arguments in respect of updates to both statutory and non-statutory guidance. This, in turn, would be likely to lead to less robust decision-making by the EHRC in this area, which given the wide-reaching implications of the Supreme Court judgement, would not be in the public interest. The EHRC's statutory Codes of Practice carry significant weight, and courts and tribunals must take the Codes into account in cases involving discrimination in particular settings, therefore any detriment to decision-making in respect of the Codes and related non-statutory guidance in this highly complex area of law would not be in the public interest.

- The requested information was created within a safe space with a high degree of frankness and candour to enable the EHRC to reach regulatory decisions based on proper consideration of objective and impartial advice. Disclosure of the information would remove the safe space in which staff can express themselves openly in discussions around the provision of guidance on sex and gender.
- There is an inherent interest in ensuring the EHRC is able to undertake live policy work on highly sensitive issues such as this without premature public or media involvement/distraction. Disclosure of the information would be likely to exacerbate the discourse surrounding these sensitive issues and subsequently generate additional workstreams to manage. This would divert the EHRC's exceptionally limited resources away from progressing live policy and regulatory work across all important areas of its remit in order to manage the disruptive effects of disclosure. This would not be in the public interest or in line with its public commitment to produce authoritative guidance for ministerial approval by June 2025 following the Supreme Court judgement and would inevitably prejudice, or be likely otherwise to prejudice, the effective conduct of public affairs.

15. The Information Governance official also put forward the following counter-arguments for the qualified person to consider when forming their opinion:

- There is a significant public interest in transparency and accountability relating to the decision-making processes of public authorities.
- Since FOIA was introduced in 2005, public officials recognise that it is not possible to guarantee the confidentiality of their advice or

deliberations and are expected not to be easily deterred from expressing their views by the possibility of future disclosure. However, in areas where the public interest is served by clarification of the law and it is the statutory duty of the regulator to provide this clarification, it is essential that there is a safe space in which the regulator is able to debate the interpretation of the law in order to provide clear guidance.

- The Supreme Court judgement, and revised guidance which incorporates the implications of that judgement, will have a significant impact on protected groups, particularly those with a GRC or who otherwise identify as 'trans'. Where such an impact is present, it is important that the EHRC promotes transparency and remains accountable for its decision-making. It is arguable that disclosing the information would serve this interest. However, the EHRC considers that this argument, although very valid, is outweighed by the argument that disclosing the candid and unofficial exchange of ideas and opinions on the implications of the Supreme Court judgement and subsequent amendments to the Code of Practice will fuel continued polarised debate in this area, thereby diminishing the clear and authoritative guidance of the EHRC and the clarity that is so sought by the public in this area.

16. The complainant challenged the EHRC's grounds for applying section 36 in their request for an internal review. They argued that the EHRC's application of the exemption goes way beyond the types of information that section 36 was intended to keep privileged, and also goes counter to the historical precedent of similar FOIA requests made to other government departments and public bodies that have been complied with.
17. The complainant further argued that the EHRC's grounds for applying the exemption renders all FOIA requests futile, with any and all discussions between EHRC staff and management on any issue exempt from disclosure under FOIA. They considered that the EHRC's interpretation of the exemption shields the Chair and Senior Management from any scrutiny of their decision-making.
18. The complainant also argued that EHRC's assertion that disclosure of the information would inhibit free and frank provision of advice is a poor one, as the names of junior civil servants would be redacted so they could not be identified.
19. The Commissioner has considered the arguments put forward by both the EHRC and the complainant, along with having viewed the withheld information. Whilst the interim guidance had already been published by the EHRC at the time of the request, the Commissioner acknowledges

that, due to the implications of the judgement, there was a need for the EHRC to act quickly in making the interim guidance available as soon as possible following the judgement. However, the Commissioner is satisfied that the work to produce the amended statutory and non-statutory guidance and the updated Code of Practice was still very much a live and ongoing process, with the advice and deliberations feeding into the interim guidance continuing to be relevant to that work. The Commissioner therefore accepts that it was reasonable for the qualified person to conclude that disclosure of the requested information would be likely to prejudice or inhibit the free and frank provision of advice, exchange of views for the purpose of deliberation, and the effective conduct of public affairs.

20. The Commissioner is further satisfied that the envisaged prejudices relate to the subsections being relied upon by the EHRC. In respect of sections 36(2)(b)(i) and (b)(ii), he accepts that it is logical to argue that disclosure of the requested information, whilst the process of the producing the final amended pieces of guidance was ongoing, would be likely to cause a chilling effect on future discussions, as such inhibiting the provision of advice and the exchange of views for the purpose of deliberation. In respect of section 36(2)(c), the Commissioner accepts that it is logical to argue that in turn such an outcome would be likely to impact more broadly on the quality of the final pieces of guidance produced by the EHRC, if candid contributions feeding into such guidance are reduced or undermined.
21. The Commissioner's conclusion is, therefore, that the exemption provided by sections 36(2)(b)(i) and (b)(ii) are engaged. The Commissioner is also satisfied that it was reasonable for the qualified person to conclude that, as a result, section 36(2)(c) is also applicable.

### **Public interest test**

22. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although the Commissioner has concluded that the qualified person's opinion is a reasonable one, the withheld information must still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **23. Public interest arguments in favour of disclosure**

24. The EHRC acknowledged that there is a general public interest in promoting transparency, accountability, and public understanding and involvement in the democratic process. Disclosure of the requested information would serve this interest.

25. The EHRC also accepted that holders of public office are accountable to the public for their decisions and actions and must be accepting of the scrutiny necessary to ensure this, and act and take decisions in an open and transparent manner. Disclosure of the requested information would serve the public interest in this regard.
26. The EHRC further accepted that public officials are expected not to be easily deterred from expressing their views by the possibility of future disclosure.
27. Finally, the EHRC stated that the Supreme Court judgement, and any guidance which incorporates that implications of that judgement, will have a significant impact on protected groups, particularly those with a Gender Recognition Certificate or who otherwise identify as 'trans'. Where such an impact is present, it is important and in the public interest for the EHRC to promote transparency and remain accountable for its decision-making.
28. The complainant argued that the release of documentation demonstrating effective and robust decision-making on a matter of high public interest would serve to strengthen the effective conduct of public affairs at the EHRC.
29. The complainant further argued that the EHRC's interpretation of the exemption shields the Chair and Senior Management from any and all scrutiny under FOIA of their decision-making, which is an extremely worrying precedent to set for an independent public body. This is particularly true when the request is being made by an elected Member of Parliament who sits on the Committee whose role it is to scrutinise the organisation.

### **Public interest arguments in favour of maintaining the exemption**

30. The EHRC explained that the issues around the interpretation of sex and gender within the Equality Act 2010 have been a long-standing area of public debate and political conflict between gender critical rights campaigners and advocates for trans rights. Whilst the Supreme Court judgement has provided clarity to the law, the judgement has contributed to further polarised debate on these issues.
31. The EHRC further explained that, given the continued debate on these issues, disclosure of the information would be likely to introduce a chilling effect on discussions around updates to the statutory and non-statutory guidance. Staff are likely to become circumspect in expressing themselves openly, honestly, and completely when imparting advice in this area and become hesitant in exploring all available options when exchanging their views during processes of deliberation. This chilling

effect is likely to result in a severe loss of frankness and candour in such discussions, impacting on the quality of advice provided to the EHRC and its ability to evaluate competing arguments in respect of updates to its guidance. This, in turn, would be likely to lead to less robust decision-making by the EHRC in this area, which given the wide-reaching implications of the Supreme Court judgement, would not be in the public interest.

32. The EHRC also explained that the interim update was published to highlight the main consequences of the Supreme Court judgement whilst work to update its statutory and non-statutory guidance to reflect the judgement was ongoing. Principally, this includes the EHRC's statutory Code of Practice for services, public functions and associations. Disclosure of the requested information would be likely to inhibit the free and frank provision of advice and candid exchange of views required to reach regulatory decisions and fully explore and consider all implications of the judgement in its guidance. The EHRC's Codes of Practice carry significant weight, and courts and tribunals must take the Codes into account in cases involving discrimination in particular settings, therefore any detriment to decision-making and the development of the Codes and related non-statutory guidance in this highly complex area of law would not be in the public interest.
33. The EHRC also argued that the requested information was created within a safe space with a high degree of frankness and candour to enable it to reach regulatory decisions based on proper consideration of objective and impartial advice. Disclosure of the requested information would remove the safe space required by staff to fully express themselves openly and debate and develop ideas around the provision of guidance on sex and gender following the Supreme Court judgement. By removing the safe space in which staff can exchange candid views when deliberating on these issues, this is likely to cause some to restrict debate for fear of disclosure. This, in turn, would negatively impact the EHRC's ability to make informed and robust decisions in this area and inevitably weaken and diminish the provision of clear and authoritative guidance and the clarity that is so sought by the public in this area. This would not serve the public interest.
34. Finally, the EHRC set out that there is an inherent interest in ensuring that it is able to undertake live policy work on highly sensitive issues such as this one without premature public or media involvement. Disclosure of the requested information would be likely to exacerbate the discourse surrounding these sensitive issues and generate additional workstreams to manage. This would divert the EHRC's exceptionally limited resources away from progressing live policy and regulatory work across all areas of its remit in order to manage the effects of disclosure, which would not be conducive to the effective delivery of its statutory

role. As a publicly funded organisation, there is a significant public interest in ensuring the EHRC's resources are deployed in the most effective and efficient manner.

### 35. **Balance of the public interest**

36. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion when applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest dictates disclosure.
37. Furthermore, where the Commissioner has accepted that disclosure of the requested information would be likely to cause inhibition there will always be a public interest in preventing such an outcome. The weight that should be attached to that public interest will be determined by the severity of the inhibition and the likelihood of it occurring.
38. With regard to the public interest in disclosure of the information, the Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something that is in the public interest. The Commissioner also acknowledges the complainant's reasoning that the public interest favours disclosure in this case.
39. In this case, the Commissioner considered whether any of the withheld information so clearly related solely to the interim guidance that had already been published, that the public interest in its disclosure could be considered separately to the rest of the withheld information. However, he concluded that the information was all so intertwined with other related information on the judgement, and its wider implications and repercussions, that separate considerations were not necessary.
40. The Commissioner first wishes to note that the fact the request was made by an elected Member of Parliament who sits on the Committee whose role it is to scrutinise the organisation, is not considered to be a valid public interest argument. All requests for information should be handled as applicant and motive blind, and the same response provided regardless of who the requester may be. Disclosure of information under FOIA is to the world at large and not just the requester.
41. The Commissioner accepts that there is a very strong public interest in the Supreme Court judgement and its implications, as well as more generally in the matter of sex and gender. Disclosure of information

relating to significant decisions impacting the lives of protected groups undoubtedly carries a weighty and wide-ranging interest.

42. However the Commissioner also considers the early stage at which the information was requested - shortly after the judgement and whilst the process to produce amended guidance was very much ongoing - to be a pivotal factor in the public interest considerations in this case. The EHRC, in its role as the independent regulator for equality and human rights, is trusted with providing guidance for policy makers, public sector bodies and businesses on equality and human rights law. Where any amendments occur to such laws, the Commissioner considers it vital that the EHRC is allowed a safe space to carry out its function of producing updated statutory and non-statutory guidance to the highest standard. The Commissioner does not consider it to be in the public interest to disclose information that would risk inhibiting the advice and deliberations feeding into that guidance.
43. Giving due consideration to the emotive subject matter and wide-ranging implications of the judgement in this case, the Commissioner is satisfied that disclosure of the requested information would be likely to provoke further polarised reactions. Having regard for the extreme nature of some of those reactions, such as threatening communications and vandalism at EHRC offices, the Commissioner is further satisfied that the EHRC is correct that the free and frank provision of advice, and the free and frank exchange of views for the purpose of deliberation would likely be inhibited. Whilst it is correct that officials should not be easily deterred from expressing their views by the possibility of future disclosure, it is reasonable to understand in this case why they would likely be fearful of expressing their views so candidly.
44. Finally, during the Commissioner's investigation of this case, the EHRC confirmed that its statutory Code of Practice for services, public functions and associations has been handed to the UK Government, but is yet to receive legal status pursuant to the requirements of section 14 of the Equality Act 2006. Therefore the provision of advice around sex and gender remains a live and evolving issue. Furthermore, it is important to recognise that this Code is not the only piece of statutory guidance that will require updates as a result of the judgement – extensive updates across the EHRC's other guidance will also be required in the near future, including its statutory Code of Practice for Employment and other non-statutory guidance products such as technical guidance for schools and separate and single-sex service providers guidance. The Commissioner is therefore satisfied that any hinderance to the input from EHRC officials could prejudice the overall quality of the amended statutory and non-statutory guidance and, as such, the EHRC's ability to carry out its public duty, which would be firmly against the public interest.

45. Taking into account all of the above factors, the Commissioner has concluded that the balance of the public interest favours maintaining the exemption. The Commissioner's decision is therefore that the EHRC was correct to rely on sections 36(2)(b)(i), b(ii) and (c) of FOIA to withhold the requested information.

## **Right of appeal**

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46. 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)  
General Regulatory Chamber  
PO Box 11230  
Leicester  
LE1 8FQ

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)

47. 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.

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

**Carly Smith**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**