



NCN: [2024] UKFTT 00171 (GRC)

Case Reference: EA/2023/0022

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: Determined on the papers
Heard on: 12 October 2023
Decision given on: 5 March 2024

Before

TRIBUNAL JUDGE FOSS
TRIBUNAL MEMBER SAUNDERS
TRIBUNAL MEMBER PEPPERELL

Between

KEELEY-JASMINE CAVENDISH

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) EQUALITY AND HUMAN RIGHTS COMMISSION

Respondents

Representation:

For the Appellant: the Appellant was unrepresented and did not appear.

For the First Respondent: the First Respondent was unrepresented and did not appear.

For the Second Respondent: the Second Respondent was unrepresented and did not appear.

Decision: The appeal is Dismissed.

REASONS

Introduction to the Appeal

1. On 31 January 2022, the Appellant submitted this request (“the Request”) to the Equality and Human Rights Commission (“the EHRC”):

“I write to request the following information under Freedom of Information legislation for the period between 15 October 2020 to 28 January 2022 inclusive.

• How many virtual and/or in-person meetings have taken place between the chair and/or employees of the EHRC between officers and or representatives of the following organisations?

- Fair Play for Women*
- Sex Matters*
- Fair Cop*
- Women Are Human*

and any other organisation which partly or solely promotes the exclusion of trans+ women from spaces reserved for women.

- Names and role titles of those who attended and the organisations represented.*
- Dates and duration of each meeting.*
- Transcripts of minutes.”*

2. On 24 March 2022, the EHRC provided the Appellant with certain information which it considered to be responsive to the Request, including a copy of an internal EHRC email of 15 December 2021 (“the 15 December 2021 email”) recording a meeting on 14 December 2021 between Marcial Boo, the Chair of the EHRC, Melanie Field, Chief Strategy and Policy Officer of the EHRC, and Naomi Cunningham, described in the email as Chair an organisation called Sex Matters.
3. The EHRC redacted part of the 15 December 2021 email to withhold information which the email records Ms Cunningham providing to EHRC in the meeting about a potential legal case, a “test” case, apparently intended to address some of the issues she raised at the meeting (“the withheld information”). It did so on the basis that the withheld information was exempt from disclosure pursuant to s41 of the Freedom of Information Act 2000 (“FOIA”) (information provided in confidence). On 25 April 2022, the Appellant requested an internal review of the EHRC’s refusal to disclose the withheld information. On 24 May 2022, the EHRC maintained its position on internal review.
4. On 13 June 2022, the Appellant complained to the Information Commissioner (“the Commissioner”). The Commissioner investigated. By his Decision Notice, referenced IC-178245-S4J4, dated 28 November 2022 (“the Decision Notice”), the Commissioner upheld the EHRC’s refusal to disclose the withheld information on the basis that it was exempt from disclosure pursuant to s41(1) FOIA.
5. This is the Appellant’s appeal against the Decision Notice.

Background

6. The 15 December 2021 email was sent by Ms Field to Mr Boo, copying in other officers of the EHRC, effectively as a note of the meeting between Mr Boo, Ms Field and Ms Cunningham on 14 December 2021.
7. In summary, the email records the following matters: Ms Cunningham is an employment and discrimination barrister, Chair of Sex Matters, a group campaigning on the importance of sex in law, policy, language and culture; in that capacity, Ms Cunningham had requested the meeting with the EHRC to discuss two main issues on which Sex Matters campaign: the need for clarity in the meaning of sex, gender or gender identity, and the ability to talk about those issues; Ms Cunningham referred to a need for case law and clearer guidance in relation to the single and separate sex service provisions in the Equality Act 2010, with a key issue being whether the exclusion of trans women from women-only spaces could be justified and whether this was on a rule basis or a case by case basis; her view was that the case by case basis was not workable in practice for decision makers, such as a receptionist at a sports centre; there should be the ability to have a blanket ban on trans women in a women's changing room, to achieve fairness for other service users who would otherwise not be able to know if people were female or not – this was particularly important in rape crisis services; her proposal was that service providers must always have a “third space” of unisex facilities for trans people and that such an approach would be justified by the importance of protecting the privacy, safety and dignity of women, which is the policy aim underlying all the single sex provisions in the Equality Act 2010.
8. The email goes on to record that Ms Cunningham referred to a potential legal case “*to test some of these questions*”, and that she undertook to send the EHRC further information about that so that the EHRC could consider whether to become involved.
9. There is no material before the Tribunal to indicate whether Ms Cunningham or Sex Matters accepts that the 15 December 2021 email is an accurate record of the meeting on 14 December 2021, or that it fairly and fully reflects the views of either of them whether as expressed at the meeting or at all.
10. By its refusal of the Request, the EHRC confirmed that Sex Matters had requested that the withheld information be withheld on the basis that it was provided to the EHRC in confidence; that as the information was obtained by a public authority from another person, and because its disclosure would give rise to an actionable breach of confidence, the s41 FOIA exemption was engaged; s41 FOIA is an absolute exemption so that no consideration of the public interest test under FOIA was required but that the duty of confidence itself contains an analogous, inherent public interest test, which must be considered in order to decide if the information is exempt; in considering whether there was an overriding public interest in the information being disclosed, the EHRC had taken account of the fact that the courts had held that grounds for breaching confidentiality must be valid and strong; it did not consider that there was an overriding public interest to release the details of the case, and consequently concluded that the information was exempt from disclosure under s41 FOIA.

11. On 25 April 2022, the Appellant wrote to the EHRC, requesting an internal review of the EHRC's decision to refuse to disclose the withheld information. She said,

“Ms Cunningham appears to wish to segregate trans+ people into separate facilities and makes the rather patronising assumption that a receptionist at a sport centre would lack the intellectual capacity to make a judgment relating to a customer's gender identity. This is a matter of importance and she appears to wish to deny trans+women their right to gain access to facilities commensurate with their gender identity.

Given the clear legal implication should her opinions be put into practice, it is in the public interest that any test cases upon which Ms Cunningham may base her argument be subject to the fullest scrutiny. By requesting that all details of such a test case are not released into the public domain, Ms Cunningham is putting anyone who may wish to comment at a considerable disadvantage. ...”

12. In upholding its position on internal review on 24 May 2022, the EHRC said this:

“In considering whether there is an overriding public interest in the information provided to us by Sex Matters, we have taken account of the fact that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny.

However there is a wider public interest in preserving the principle of confidentiality, and the courts have therefore held that grounds for breaching confidentiality must be valid and strong.

It is in the public interest for stakeholders to feel that they can openly discuss sensitive situations and potential test cases with us in confidence, so that we can consider the broadest possible range of information available when developing guidance and policy. We must be able to provide assurance that confidences will continue to be respected should the information fall within the scope of an FOIA request. If stakeholders lose trust in us to maintain their confidence, there is a risk that they will no longer share valuable information. There is also a risk of an actionable breach of confidence being committed.

I am not persuaded that there is a public interest defence for breaching confidence in this matter, and therefore there is no overriding public interest to release the details of this case. I have concluded that the exemption applies, and accordingly, the information will not be disclosed.”

13. On 13 June 2022, the Appellant complained to the Commissioner.

14. As part of his investigation, the Commissioner asked the EHRC to explain why disclosure of the withheld information would constitute an actionable breach of confidence by reference to the consideration of these matters: whether the information had the necessary quality of confidence; whether it was communicated in circumstances importing an obligation of

confidence; and whether unauthorised disclosure would cause a detriment to the party who provided the information or any other party. He also asked the EHRC to explain the public interest arguments it had considered in concluding that there was not a sufficient public interest in disclosure of the information to defend any actional breach of confidence.

15. On 23 November 2022, the EHRC responded to the Commissioner. It said that parts of its letter were strictly confidential and not to be disclosed to the Appellant. By order of the Tribunal Registrar of 11 September 2023, it was ordered that the unredacted version of that letter should be held, pursuant to rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the Rules”) on the basis that it will not be disclosed to anyone other than the Commissioner.

16. We summarise the non-confidential parts of the EHRC’s letter of 23 November 2022 as follows:

- a. the EHRC is a statutory non-departmental public body established by the Equality Act 2006, whose core function is to enforce equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation; under section 30(1) of the Equality Act 2006, it has powers to intervene in legal proceedings if it appears to it that the issue considered is relevant to its functions;
- b. the withheld information was exempt from disclosure pursuant to s41 FOIA;
- c. In ascertaining whether the withheld information was confidential, the EHRC had applied the three principles identified in **Coco v A N Clark (Engineers) Ltd** [1968] FSR 415:
 - i. first: the information had the necessary quality of confidence: (i) it was not trivial and was worthy of protection in the sense that the confider had a genuine interest in the contents remaining confidential and there was a strong public interest in ensuring that confidential information conveyed to the EHRC could remain confidential; the information was not otherwise accessible; (ii) the confider had confirmed that the information constituted confidential comments concerning their client; it was crucial for the Commission, in the exercise of its regulatory function, to continue to have confidential discussions with stakeholders and members of the public who wished to consult it and that such persons could rely on this “safe space”; (iii) it was satisfied that disclosure of the information would be against the wishes of the confider and therefore unauthorised; it was a real expectation of the confider that disclosure would have an adverse impact on them professionally.
 - ii. second: the EHRC was satisfied that were the information to be disclosed, the confider would have the ability to bring an action against the EHRC for breach of confidentiality;
 - iii. third: the EHRC did not see any “possible defence” to such an action. In considering that question, it had considered whether there was a public interest in disclosure which overrode the competing public interest in maintaining the duty of confidence; in this context it had paid particular

regard to the wider public interest in preserving the principle of confidentiality, and the impact of disclosure on the interests of the confider; it was essential for the work of the EHRC that confiders should be able to rely on information they provide being treated confidentially where they require it, particularly where an authority relies on the free flow of confidential information from the public to perform its statutory functions; the confider had a reasonable belief that disclosure would have an adverse impact on their interests; although mindful of the public interest in there being transparency in the discussions which the EHRC has with influencing parties, the withheld information would not add any reliable transparency to the EHRC's deliberations. Accordingly, it did not consider that it would have a valid public interest defence to a claim for breach of confidence because the public interest in disclosure was not sufficient to override the competing public interest in maintaining the duty of confidence, and the confider would have a high likelihood of success in a claim for breach of confidence were the information to be disclosed.

- d. additionally, the EHRC considered that the withheld information was exempt from disclosure under s31(1)(c) and (g) FOIA:
 - i. As regards s31(1)(c) FOIA: disclosure of the information would, or would be likely to, prejudice the administration of justice;
 - ii. As regards s31(1)(g) FOIA: disclosure of the information would, or would be likely to, prejudice the exercise by the EHRC of its functions for the purpose of ascertaining whether any person had failed to comply with the law (s31(2)(a) FOIA), and for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or arise (s31(2)(c) FOIA).

17. By his Decision Notice, the Commissioner upheld the EHRC's refusal to disclose the withheld information. He decided that it had the necessary quality of confidence. He said this:

“17. *The EHRC has explained that the details of the test case were conveyed to it with an expectation of confidence. The EHRC has explained that ‘It is crucial for the Commission (EHRC), in the exercise of its regulatory function, that it can continue to have confidential discussions with stakeholders and members of the public who wish to consult us and that such persons can rely on this safe space.’*

18. *The Commissioner must now consider whether unauthorised disclosure would cause a specific detriment to the party that provided it or any other party. The EHRC has explained that, if the information were disclosed, this would have adverse effect on both Sex Matters and the EHRC itself, both of which are expected to safeguard information provided in confidence. Were either party to breach this confidence, it is likely that the confider would be able to bring an actionable breach of confidence against it.*

19. *Although section 41 is an absolute exemption, it's accepted that if there is an overriding public interest in disclosure, this can be used as a defence against any breach of confidentiality that might be brought against the public authority. In other words, the Commissioner must balance the public interest in the information with the inherent public interest in preserving the principle of confidentiality.*
20. *The complainant has a valid interest in the withheld information. They wish to scrutinise how this test case might affect the transgender community. There's a public interest in understanding how organisations such as Sex Matters are involved in the work of the EHRC.*
21. *The Commissioner's guidance states 'Any disclosure of confidential information will to some degree, undermine the principle of confidentiality and the relationship of trust between public authorities and confiders of information. Individuals and organisations may be discouraged from confiding in public authorities if they don't have a degree of certainty that this trust will be respected. The weight carried by this factor will depend upon on the context and, more specifically, how the relationship of trust operates to serve the public interest.'*
22. *The role of the EHRC is to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights within the UK. The EHRC also relies on the free flow of information, from individuals or their representatives, in order to inform and perform these statutory functions. If confiders were deterred from providing information to the EHRC, this would impact the EHRC's ability to carry out its work.*
23. *The Commissioner is mindful that, in relation to this request, the EHRC disclosed an email summary of Sex Matters and the EHRC's meeting, including an outline of Sex Matter's proposed policy. The Commissioner considers the public interest in understanding how these two organisations interact has been largely met and the policy in question can be scrutinised without the need to disclose the test case, which would interfere with the privacy rights of those involved and present the possibility of an actionable breach of confidence.*
24. *With this in mind, the Commissioner is satisfied that section 41 applies and the public interest lies in preserving the principle of confidentiality."*

18. The Decision Notice did not address the EHRC's reliance on s31 FOIA.

Notice of Appeal

19. By Notice of Appeal dated 19 December 2022, the Appellant appealed against the Decision Notice, seeking disclosure of the withheld information. Her grounds of appeal were as follows:

"Ms Cunningham appears to wish to segregate trans+ people into separate facilities and makes the assumption that a receptionist at a sports centre would

lack the intellectual capacity to make a judgment relating to a customer's identity, therefore all trans+ women should be banned from gaining access to single-sex facilities. This is a matter of importance as she appears to wish to deny trans+ women their right to gain access to facilities commensurate with their gender identity.

Given the clear legal implications should her opinions be put into practice, it is in the public interest that any test cases upon which Ms Cunningham may base her argument be subject to the fullest scrutiny. By not releasing such details into the public domain, any interested party who wishes to comment is placed at a considerable disadvantage."

The Commissioner's Response

20. We summarise the Commissioner's Response to the Notice of Appeal, dated 14 March 2023 as follows: the issue for the Tribunal is whether the EHRC would have a defence to an actionable breach of confidence if it were to disclose the withheld information; the fact that the test case referred to was only a "potential" test case lessened or limited any public interest in disclosure; the Commissioner has accepted that the Appellant has an interest in the withheld information and that there was a public interest in understanding how organisations such as Sex Matters are involved in the work of the EHRC; however, the EHRC relies on the free flow of information from individuals and stakeholders to inform and perform its statutory functions; if confiders were deterred from providing information to the EHRC for fear that such information may be disclosed to the public, this would impact the EHRC's ability to carry out its work; the Commissioner was correct to give weight to the fact that a summary of meeting contained in the 15 December 2021 email was disclosed (save for the withheld information) which included an outline of Sex Matter's proposed policy; any public interest in understanding how the two organisations interact was met by this disclosure without the need to disclose the withheld information which would represent an interference with the privacy rights of those involved and an actionable breach of confidence; the EHRC would not have a defence to an actionable breach of confidence if the withheld information were disclosed under FOIA; s41(1) FOIA applied to the withheld information; the Decision Notice was correct in law and the appeal should be dismissed.

The EHRC Response

21. We summarise the EHRC's Response to the Notice of Appeal, dated 15 May 2023 as follows: the Appellant's claim that the withheld information was redacted at Ms Cunningham's request was misleading – while it was correct that the EHRC consulted Sex Matters who did not wish the withheld information to be disclosed, the s41 FOIA exemption was applied by the EHRC because the information was in scope of that exemption; it is not the role of the Tribunal to determine whether the Appellant's comments about Ms Cunningham have substance or to arbitrate the debate about gender critical beliefs; for the Appellant's arguments (that given Ms Cunningham's opinions, it was in the public interest that any test cases upon which Ms Cunningham may base her argument, be subject to public scrutiny), the withheld information needs to contain Ms Cunningham's opinions but, as explained in the Decision Notice, it does not; the test case will be decided in Court; the EHRC's statutory remit under the Equality Act 2006 includes (s30) the capacity "*to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the*

Commission has a function.”; such matters constitute law enforcement within the meaning of s31 FOIA, and on the application of the public interest test required upon the engagement of the exemption afforded by s31 FOIA, the public interest in disclosure was not sufficient to override the competing public interest in maintaining the duty of confidence; the Notice of Appeal did not identify any grounds on which the Tribunal could interfere with the Commissioner’s conclusions; the appeal had no reasonable prospect of success and should be struck out, alternatively dismissed.

Application to strike out the appeal

22. On 8 August 2023, Judge J Findlay refused the EHRC’s application to strike out the appeal, concluding that this was not an appeal which could not be described as not fit for a full hearing; the grounds of appeal engaged with the jurisdiction of the Tribunal under s57 and 58 FOIA, and raised an argument in relation to the material legal conclusion of the Decision Notice; the appeal had sufficient prospects of success as to have the benefit of full argument.

The hearing

23. None of the parties appeared at the hearing, each being content that the Tribunal should consider the matter on the papers. The Tribunal was satisfied that it could fairly and justly determine the issues without a hearing pursuant to Rule 32(1)(b) of the Rules.

24. The Tribunal had before it two bundles, an OPEN bundle and a CLOSED bundle. The CLOSED bundle contained the unredacted 15 December 2021 email (including the withheld information), and the EHRC’s unredacted response of 23 November 2022 provided in the Commissioner’s investigation. It also contained the EHRC’s application by letter to the Tribunal seeking that that unredacted material be held pursuant to s14 (6) of the Rules.

25. The Tribunal is satisfied that the reasons for its decision on this appeal can be demonstrated by this single decision, and that it is not necessary for the Tribunal to issue a separate, CLOSED decision referring to either the withheld information, or those parts of the EHRC’s response to the Commissioner of 23 November 2022 which the Tribunal directed should be held confidential. This is because the Tribunal considers that its reasoning can be sufficiently demonstrated by reference to the material in the OPEN bundle.

Applicable Law

26. The relevant provisions of FOIA are as follows:

Section 1

General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled-

(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) If that is the case, to have that information communicated to him.

...

Section 2

Effect of the exemptions in Part II.

...

- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*
- (3) *For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—*

...

- (g) *section 41*

...

Section 31

Law enforcement

- (1) *Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

...

- (c) *the administration of justice,*

...

- (g) *the exercise by any public authority of its functions for any of the purposes specified in subsection (2)*

...

- (2) *The purposes referred to in subsection (1)(g) to (i) are—*

- (a) *the purpose of ascertaining whether any person has failed to comply with the law,*

...

- (c) *the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,*

...

Section 41

Information provided in confidence

- (1) *Information is exempt information if—*

- (a) *it was obtained by the public authority from any other person (including another public authority), and*
 - (b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*
- (2) *The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.*

Section 58

Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers-*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

27. The import of s58 FOIA is that the right of appeal to the First-tier Tribunal involves a full merits consideration of whether, on the facts and the law, the public authority's response to the Request is in accordance with Part 1 of FOIA (**Information Commissioner v Malnick and ACOBA** [2018] UKUT 72 (AAC); [2018] AACR 29, at paragraphs [45]-[46] and [90]).

Discussion

S41 FOIA

28. By s41(1) FOIA, information is rendered exempt information where it is obtained by a public authority from any other person, and the disclosure of the information to the public by the public authority holding would constitute a breach of confidence actionable by that (or any other) person. The exemption is absolute. Accordingly, disapplication of the duty to disclose does not depend upon a balancing of the public interest in maintaining the exemption on the one hand, against the public interest in disclosure on the other.

29. A public interest defence is, however, available to a claim for breach of confidence. Therefore, a consideration of the public interest is required to determine whether disclosure would constitute an actionable breach of confidence. In assessing that issue, we have sought

to identify the elements of information which enable it properly to be characterised as confidential information, and the grounds on which a claim for breach of confidence in that information might be defeated.

30. Any statutory or contractual restraint effectively imposing confidence aside, there is a jurisdiction in equity to protect confidence (**Douglas v Hello! Ltd and others (No 3)** UKHL 21, [2008] 1 AC 1 at [276]). In **Coco v A N Clark (Engineers) Ltd** [1969] RPC 41, Megarry J identified that there are normally three elements required if, apart from contract, a case of breach of confidence is to succeed:

“First, the information itself in the words of Lord Greene MR in Saltman Engineering Co Ltd v Campbell Engineering Co Ltd must have “the necessary quality of confidence about it”. Second, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.”

31. In *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 281, Lord Goff of Chieveley stated the general principle as being,

“that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others ... in the vast majority of cases ... the duty of confidence will arise from a transaction or relationship between the parties ... But it is well settled that a duty of confidence may arise in equity independently of such cases.”

32. In our view, questions as to whether information has the necessary quality of confidence and whether the circumstances in which it is imparted import an obligation of confidence, will often overlap or at least the answer to the one will often inform the answer to the other.
33. Unless information about potential litigation, that is to say a case in its pre-issue stages, is publicly available, we consider it will generally carry with it connotations of privacy or sensitivity so as to invite natural consideration of whether it should be regarded as confidential: in our view, information which tends to that category would include the identity of parties to or witnesses in the litigation, the stated factual or legal matrix of the dispute, the content or description of potential evidence, and the perceived merits of, or professional advice given in relation to, the case. Some of that information may even attract the special label of legal professional privilege in its various forms, all of which are predicated on confidentiality in any event. Disclosure of such information may discourage parties (including any party with status as a potential intervener) or witnesses from participating in the litigation, and frustrate litigation preparation, including the collation and presentation of evidence (particularly if the information, as recorded, were to undermine such evidence).

34. However, in our view it is the circumstances in which information about potential litigation is communicated from one person to another which may far more readily indicate whether such information is properly to be characterised as confidential. We consider that to be the case here.
35. There is no indication that the parties to the meeting on 14 December 2021 expressly agreed at any point that the withheld information was being proffered or discussed on a confidential basis. While such an agreement might be determinative of the issue, it is not essential. In our view, the context for, and general content, of the meeting, go some considerable way to help guide consideration of whether the withheld information was properly to be regarded as confidential. By his email to her of 22 November 2021, the Chair of the EHRC invited Ms Cunningham, following a briefing she had given to the House of Lords which he had attended, to share her professional expertise with him and, as his email requested, *“informally brief him regarding the Equality Act and GRA.”* Although the 15 December 2021 email refers to Ms Cunningham having requested a meeting in her role as Chair of Sex Matters, it matters not, in our view, who suggested the meeting. We consider it clear from the email exchanges setting up the meeting, and from the 15 December 2021 email itself, that the parties were intending to meet informally (albeit as formal representatives of their respective organisations) for introductory purposes, and with a view to potential further engagement between the parties, with Ms Cunningham’s primary aim being to introduce Sex Matters’ perspective to the EHRC.
36. Having presented certain issues to the EHRC, Ms Cunningham is described as referring to a potential legal case to test some of the issues she had described. We read the 15 December 2021 email as indicating that she volunteered that information. The email goes on to record her as undertaking to send the EHRC further information about the potential test case so that it might consider whether to become involved in it. Whether that undertaking was one she volunteered or to which she agreed upon an expression of interest from, or active request by, the EHRC is unclear.
37. Although this is not apparent from the face of the 15 December 2021 email and was only confirmed by the EHRC in its letter to the Commissioner of 23 November 2022, Ms Cunningham had confirmed to the EHRC that the information constituted confidential comments concerning her client. We should say that it is not obvious to us from any of the information we have seen precisely who her client was or the nature of the professional advice or representation she was providing to them. The EHRC did not explain that to the Commissioner, and there is no direct evidence as to such an adviser-client relationship before the Tribunal. The Appellant has not disputed it. We do not know whether Ms Cunningham confirmed the adviser-client relationship at the meeting on 14 December 2021 or subsequently.
38. Were a relevant adviser-client relationship to have existed giving rise to Ms Cunningham’s knowledge of the information, which was not otherwise accessible to her, that might

indicate a prima facie case of professional confidence, possibly analogous to a contractual obligation, attaching to the information. Absent any indication that the client in question had authorised any disclosure of the information by Ms Cunningham to a third party or that third party's onward disclosure of the information, that would of itself be sufficient in our view to imbue the information in the hands of the EHRC with the necessary quality of confidence. That would appear to be underscored by Ms Cunningham's and/or Sex Matters' preference that the EHRC should not disclose the withheld information, and concern that its disclosure would have an adverse impact on Ms Cunningham professionally.

39. We find that the withheld information was confidential. In so doing, we have taken into account the following: what we have found to be the parties' motives for meeting; the general content and timbre of their discussion, including whether the EHRC might wish to become involved in the test case subject of the withheld information; the possibility of a professional obligation in confidence attaching to the information relating to the confider's professional client; and the innate sensitivity and privacy attaching to information relating to potential litigation in any event. We find that in all the circumstances, the information had the necessary quality of confidence and that the circumstances in which it was imparted to the EHRC, imported an obligation of confidence in relation to it. We accept that were the information to have become known to Ms Cunningham either by virtue of her being instructed in a relevant professional adviser-client relationship or in other circumstances which would justify her not disclosing it, its disclosure by the EHRC may give rise to a professional detriment to her.
40. To assess whether disclosure of the withheld information would give rise to an actionable breach of confidence, we must consider whether there would be a public interest defence available to the EHRC to such a claim. That would be available where any public interest in disclosure outweighed the public interest in upholding the duty of confidence. We acknowledge that it may well be that subject to the identity of a person enjoying such a cause of action, for example Ms Cunningham or Sex Matters or any of those persons who might be affected by disclosure of the withheld information, and how they articulated such a claim, different considerations might arise in the context of assessing any public interest defence. It seems that both the EHRC and the Commissioner have proceeded on the assumption that such a claimant might be Ms Cunningham. Nevertheless, regardless of the possible identity of such a claimant, we consider that for the purposes of assessing whether a public interest defence would be available to the EHRC to such a claim, the broad thrust of the public interest considerations in this context would be similar across all claimants.
41. The Appellant's position in her Notice of Appeal is that Ms Cunningham's apparent wishes (as the Appellant deduces them from the 15 December 2021 email) are a matter of importance as Ms Cunningham "*appears to wish to deny trans+ women their right to gain access to facilities commensurate with their gender identity.*" and that "*given the clear legal implications should her opinions be put into practice, it is in the public interest that any test cases upon which Ms Cunningham may base her argument be subject to the fullest scrutiny. By not releasing such details into the public domain, any interested party who wishes to comment is placed at a considerable disadvantage.*"

42. As we have noted, there is no public interest test to be undertaken in the assessment of the absolute exemption afforded by s41(1) FOIA beyond that within consideration of whether there may be a public interest defence to a claim for breach of confidence. However, taking the Appellant's characterisation of the import of Ms Cunningham's apparent views as arguments in favour of disclosure in the context of assessing any public interest defence to a claim for breach of confidence, we do not consider that those arguments have weight. While the rights of trans+ people are a matter of public interest, it is not the case that the opinions of Ms Cunningham (or anyone) would be determinative of such rights, and thus "*be put into practice*", as the Appellant puts it. Such rights would be determined by the Courts alone, having considered the relevant arguments and evidence, or, separately, by Parliament. A test case would inevitably be subject to public scrutiny and open to public commentary through the litigation process, save in the event of any anonymity or reporting restrictions ordered by the Court, which would themselves need to be publicly reasoned, justified and appropriately confined by the Court.
43. Having viewed the withheld information, we do not consider that its disclosure would achieve any of those things which might otherwise outweigh the public interest in upholding the duty of confidence in it; for example, we do not consider that it discloses a serious iniquity or a matter of significant public concern or risk which would justify disclosure. While its disclosure would contribute to the promotion of openness and transparency as to the EHRC's operations, in our view that contribution would be marginal in this case; the requirement for openness and transparency has been more than adequately met in this case by disclosure of the very great majority of the 15 December 2021 email; the EHRC has left unredacted sufficient information to show that the potential case will test the very questions explored in the 14 December 2021 meeting, as to Ms Cunningham's or Sex Matters' views in relation to which the Appellant has concerns.
44. In favour of upholding confidence in the information, we accept that it is important, if not essential, for the work of the EHRC that individual and corporate confiders should be confident that information they provide to the EHRC, particularly to enable the EHRC to consider the exercise of its intervention powers, will, save in exceptional circumstances (for example, where the information discloses iniquity), be held confidential where the confiders require it. We accept that the provision of such information enables the EHRC to consider fully the performance of its statutory functions, including intervention in appropriate litigation. Were the details of potential test cases provided to the EHRC to have to be disclosed, whether with or without the identity of their provider, and whether or not the EHRC were to resolve to intervene in such cases, we accept that that might have a chilling effect on providers' willingness to engage with the EHRC, and, consequently, the EHRC's knowledge of the prospect of, or ability to intervene timeously and on a considered basis in, test cases. It may also frustrate the preparation of cases and evidence.
45. Moreover, we consider that disclosure of such information may well invite invidious scrutiny or speculation by third parties as to the timing and reasons for the EHRC's decisions as to whether (or not) to intervene in litigation, which may, rightly or wrongly, influence public perception of the EHRC's strategic aims and delivery. We are less concerned that such matters might impact adversely on any party to relevant litigation,

whose outcome rests in the hands of the Court alone. More generally, we consider that disclosure might hamper the EHRC's ability to develop thoughtful and comprehensive guidance and policy which reflects all sides of debate; we can see that information about potential test cases, whether or not they develop into actual litigation, will lend texture and rigour to the fabric of the EHRC's organisational thinking, which should be promoted.

46. Accordingly, we do not consider that in the context of a possible claim for breach of confidence, an argument that the public interest in disclosure outweighs the public interest in upholding the duty of confidence, would succeed. We find that the withheld information is exempt from disclosure pursuant to s41 FOIA.
47. We note that by the Decision Notice, the Commissioner considered that the public interest in understanding how the EHRC and Sex Matters interact had largely been met and that the disclosure of the test case would interfere with the privacy rights of those involved and present the possibility of an actionable breach of confidence. It is not clear to us to which individual person's (or organisation's) privacy rights the Commissioner was referring, or the legal nature of such rights, and whether the possibility of an actionable right of confidence rested in his view on the protection of such rights, as distinct from the public interest in protecting the principle of confidence generally. We have not identified that, in refusing the Request, the EHRC advanced any argument in favour of non-disclosure of the withheld information by reference to any person's privacy rights, and (beyond the Commissioner's passing reference to such rights in his Response to the appeal) no party developed any submissions as to such rights before the Tribunal. We do not, therefore, address the issue of any person's privacy rights in our decision.

S31 FOIA

48. For the same reasons we have identified as justifying the public interest in upholding confidentiality in the information as outweighing the public interest in disclosure in the context of s41 FOIA, we accept that disclosure of the withheld information, would, or would be likely to, prejudice the administration of justice (s31(1)(c) FOIA) or the exercise by the EHRC of its functions within the meaning of s31(1)(g) FOIA as defined at s31(2)(a) and (c) FOIA.
49. S31 FOIA is a prejudice-based exemption. The approach to be taken in prejudice cases was set out in the First Tier Tribunal decision of **Hogan v Information Commissioner** [2011] 1 Info LR 588, as approved by the Court of Appeal in **Department for Work and Pensions v Information Commissioner** [2017] 1 WLR 1:
- a. first: the applicable interests within the relevant exemption must be identified.
 - b. second: the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is "real, actual or of substance".

- c. third: the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a “real and significant” risk of prejudice, or there “may very well” be such prejudice, even if this falls short of being more probable than not.
50. The applicable interests in this case are: (a) the administration of justice (within the sphere of the EHRC’s remit), and (b) the exercise of the EHRC of its functions for the purposes of ascertaining (i) whether any person has failed to comply with the law, and (ii) circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. The EHRC’s position is, and we agree, that the subject matter of the issues discussed with Ms Cunningham as recorded in the 15 December 2021 email is relevant to the EHRC’s function. The Appellant does not dispute that.
51. We consider that the causal relationship between the disclosure of the withheld information and prejudice would be real, actual or of substance. Specifically, should the details of potential test cases such as that in the instant case provided to the EHRC have to be disclosed, we consider that that would, or would be likely to, have a chilling effect on providers’ willingness to engage with the EHRC, and, consequently, the EHRC’s knowledge of, or ability to address, possible failures to comply with the law or to institute or intervene in relevant legal proceedings, or otherwise to exercise its functions. We also consider that there is a risk that were such disclosures to be required, that might adversely affect the collection or quality of evidence to be adduced in relevant proceedings, or otherwise undermine the proceedings.
52. The question of the meaning of likelihood in the current context was addressed by the Tribunal in **John Connor Press Associates v Information Commissioner** (EA/2005/0005, 25 January 2006): “*We interpret the expression “likely to prejudice” as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.*” In so doing, the Tribunal drew on the judgment of Munby J in **R (on the application of Lord) v Secretary of State for the Home Office** [2003] EWHC 2073 (Admin) (a Data Protection Act case) who said: “*Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.*” [100].
53. We adopt the interpretation of “*likely to prejudice*” as meaning that the chance of the prejudice being suffered is more than a hypothetical or remote possibility; there is a real and significant risk. The EHRC presented no witness evidence to the Tribunal on the question of the likelihood of relevant prejudice in this case. The only primary source material, such as it is, before us was the EHRC’s letter to the Commissioner of 23 November 2022, which said, “*...the Commission relies on information provided by confiders in order to carry out its regulatory function. There is a real risk that lack of confidentiality would deter individuals and organisations from sharing information with us or seeking our assistance if we cannot*

treat those communications as confidential; and especially so if they specifically ask us to keep it confidential. ... We also have major concerns that, if this disclosure is made there will be a precedent effect here. Complying with this request and disclosing this information for this one occasion will make it more difficult to refuse requests for similar information in the future. We consider that this would significantly impact the Commission's regulatory work."

54. Despite the relative paucity of evidence from the EHRC before the Tribunal on this point, we acknowledge that officers of the EHRC who are tasked day-to-day with addressing infinite aspects of the EHRC's operations and strategy will, generally, be best placed to assess what is likely to prejudice such matters including, specifically, the prospect of its being made aware of cases which it might institute or in which it might intervene, and the likelihood of that prejudice arising. Accordingly, and having considered all the evidence before us, we accept the EHRC's argument that there is a real risk of prejudice. We reject, however, what appears to be the EHRC's secondary argument that disclosure of the withheld information in this case would set a precedent effect in that it would make it more difficult to refuse requests for similar information in the future. That is because each request must be considered on its merits and in its own factual context.
55. We find that s31(c) and 31(g) FOIA are engaged in relation to the withheld information. We must therefore consider whether the public interest in maintaining those exemptions outweighs the public interest in disclosing that information.
56. By its Response to the appeal, the EHRC made no submissions as to this aspect. However, by its letter to the Commissioner of 23 November 2022 it submitted that it had paid particular regard to the wider public interest in the following matters which it considered demonstrated a strong public interest in non-disclosure: preserving the principle of confidentiality; ensuring that litigation is not unduly influenced; ensuring that the EHRC is able to carry out its regulatory functions properly and effectively ("*Officers need private thinking space, or safe space if they are going to fully explore all aspects of a case without fear that their half-formed opinions would be reported in the press or enter the public domain...*"); not discouraging others from co-operating with the EHRC and supplying it with the information they need on a voluntary basis, even where the provider of the information is not a confidential source; co-operation between those being regulated and the regulator is important. We accept these arguments.
57. In considering factors in favour of disclosure, the EHRC noted that it had considered whether there was a general public interest in disclosing information that promotes accountability and transparency in order to maintain confidence and trust in a public authority. It concluded that given the nature of the withheld information, the public interest would be limited as the information would only be of interest to a very small sector of society and its disclosure would not add anything to the accountability and transparency debate, and that, consequently, the public interest in disclosure was not sufficient to override the competing public interest in maintaining the duty of confidence. Without further

information or submission from the EHRC on this point, we do not accept that the withheld information would only be of interest to a very small sector of society so that the public interest in its disclosure would be limited. We agree, however, that such disclosure as the EHRC has made of the 15 December 2021 email does promote accountability and transparency to support trust and confidence in the EHRC's operations.

58. Balancing all these considerations in the round, we consider there is a public interest in maintaining exemptions from disclosure which would be likely to prejudice (a) the administration of justice, and (b) the exercise of the EHRC of its functions for the purposes of ascertaining (i) whether any person has failed to comply with the law, and (ii) circumstances which would justify regulatory action in pursuance of any enactment exist or may arise, all inherently important matters. We are prepared to accept that the risk of such prejudice is not a hypothetical risk but a real one and likely to occur. Having considered all the circumstances, we find that the public interest in maintaining the exemptions outweighs any public interest in disclosure of the information. Accordingly, we find that the withheld information is exempt from disclosure pursuant to s31(1)(c) and (g) FOIA.

59. We dismiss the appeal.

Signed: *Judge Foss*

Dated: 18 January 2024