

[REDACTED]

From: FOI
Sent: 06 May 2022 08:34
To: [REDACTED]
Subject: FOI 025-22 - Response
Attachments: FOI 025-22 - Response to Q4.pdf

Dear [REDACTED],

Our Ref: FOI-025-22

Thank you for your email to the Electoral Commission dated 14 March 2022.

The Commission aims to respond to requests for information promptly and has done so within the statutory timeframe of 20 working days (with an extension of up to a further 20 working days for consideration of the Public Interest Test).

Your request is shown below followed by our response.

Background to the FOI requests below

In your FOI response FOI-036-21 published on your website you confirm that you have turned down two application for registration as political parties on the basis that the respective applicants engage in indirect discrimination.

In the cases of both Patriotic Alternative and of PLUR (Peace Love Unity Respect) Party the Electoral Commission states that it has

"a duty as a public body to exercise our functions in accordance with the Equality Act which includes due regard to eliminate discrimination and advance equal opportunity between persons who shared relevant protected characteristics. Where the rules of a party's constitution could discriminate against a person by virtue of that person's protected characteristic(s), the constitution could be deemed unlawful and I may refuse it."

I have investigated this matter and find that the Electoral Commission is not listed in Schedule 19 of the Equality Act 2010 as being one of the public authorities subject to the public sector equality duty arising under s149 Equality Act 2010

FOI Requests

Does the Commission have counsel's opinion or other legal advice or other advice that explains the legal basis for the Commission's claim that it has a s149 Equality Act 2010 public sector equality duty? If so, please supply me with a copy.

In the light of the absence of the Commission from the list of public authorities in Schedule 19 of the Equality Act 2010, does the Commission have counsel's opinion or other legal advice or other advice that establishes the Commission is within the meaning s149(2) a body that is not a public authority? If so please supply me with a copy.

Has the Commission have counsel's opinion or other legal advice or other advice on the effect of the Supreme Court judgment in the case of Lee v Ashers [2018] UKSC 49 upon the Commission's

interpretation of its claimed public sector equality duty under the Equality Act 2010? If so please supply me with a copy.

Has the Commission have counsel's opinion or other legal advice or other advice on the effect of the Supreme Court judgment in the case of Essop and others [2017] UKSC 27 upon the Commission's interpretation of its claimed public sector equality duty under the Equality Act 2010? If so please supply me with a copy.

Does the Commission have any staff guidance, manuals, or policies relating to the exercise of the public sector equality duty it claims and in particular relating to the process of determining aims and in particular relating to the process of determining whether in the view of the Electoral Commission a proposed political party might engage in direct or indirect discrimination? If so please supply me with a copy.

Does the Commission have counsel's opinion or other legal advice or other advice that explains the legal basis for the Commission's claim that pursuant to s149 Equality Act 2010 it has a right to refuse registration of applicants for registered political party status under the Political Parties and Referendums Act 2000 on the grounds that the Commission considers that the applicant is engaged in indirect discrimination? If so please supply me with a copy.

Does the Commission have counsel's opinion or other legal advice or other advice that explains the legal basis for the fact that, notwithstanding the Commission claims it has a public sector equality duty pursuant to s149 Equality Act 2010 the Commission does not claim a legal right to remove political parties from the register of political parties under the Political Parties and Referendum Act 2000 by reason that the political party is engaged in indirect discrimination? If so please supply me with a copy.

Did the Commission take counsel's opinion or other legal advice or other advice to support either of its two rejections of applications to register a political party listed in FO1-036-21 on the grounds that the Commission judged that the proposed parties would on registration be likely to discriminate, contrary to the Equality Act 2010? If so please supply me with a copy.

I understand that under the Act I am entitled to a response within 20 working days of your receipt of this request. Some parts of the request may be easier to answer than others. Should this be the case, I request that you release information as soon as possible.

If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees.

Our response is as follows:

The Commission as a statutory body has specific public functions concerned with political party registration as set out in Political Parties, Elections and Referendums Act 2000 (PPERA). The Commission assesses applications in accordance with PERPA, sections 26, 28 and Part I of Schedule 4. Any application submitted to the Commission for political party registration must include a constitution, which means the document(s) by which the structure and organisation of the party is determined. This would include matters concerned with the criteria for membership of the political party.

Under section 23 of PERPA the Commission has a duty to maintain the registers of political parties.

A political party is obliged to follow the requirements of the Equality Act 2010, in particular the requirements set out in section 101 of that Act. This is quite clearly set out in the guidance published by the Equality and Human Rights Commission titled *The Equality Act 2010: a guide for political parties*. This details how political parties are able to achieve compliance with the Act. Where there is a breach of that Act in relation to the membership criteria, the Commission cannot register a political party, in particular if the required documents necessary for political party registration contravene another provision or enactment. The document(s) setting out the constitution are required to be lawful.

Pursuant to section 149(2) of the Equality Act 2010, a person who is not a public authority listed in Schedule 19 of the Act but who exercises public functions must, in the exercise of those functions, have due regard to the matters set out in section 149(1) of the Act. As the Commission has specific public functions set out in PPERA, the Commission has a duty to comply with the public sector equality duty as detailed in the Equality Act 2010.

For the purposes of responding to your requests for information we have allocated them numbers.

	Request
1	<p><i>I have investigated this matter and find that the Electoral Commission is not listed in Schedule 19 of the Equality Act 2010 as being one of the public authorities subject to the public sector equality duty arising under s149 Equality Act 2010</i></p> <p><i>Does the Commission have counsel's opinion or other legal advice or other advice that explains the legal basis for the Commission's claim that it has a s149 Equality Act 2010 public sector equality duty? If so, please supply me with a copy.</i></p> <p><i>In the light of the absence of the Commission from the list of public authorities in Schedule 19 of the Equality Act 2010, does the Commission have counsel's opinion or other legal advice or other advice that establishes the Commission is within the meaning s149(2) a body that is not a public authority? If so please supply me with a copy.</i></p>
3	<p><i>Has the Commission have counsel's opinion or other legal advice or other advice on the effect of the Supreme Court judgment in the case of Essop and others [2017] UKSC 27 upon the Commission's interpretation of its claimed public sector equality duty under the Equality Act 2010? If so please supply me with a copy.</i></p>
5	<p><i>Does the Commission have counsel's opinion or other legal advice or other advice that explains the legal basis for the Commission's claim that pursuant to s149 Equality Act 2010 it has a right to refuse registration of applicants for registered political party status under the Political Parties and Referendums Act 2000 on the grounds that the Commission considers that the applicant is engaged in indirect discrimination? If so please supply me with a copy.</i></p>
<p><u>Decision:</u></p> <p>We can confirm that information requested as per request numbers 1, 3 and 5 is held by the Electoral Commission (EC).</p> <p>The EC considers this information to be exempt from disclosure pursuant to section 42(1) of the Freedom of Information Act (FOIA) 2000. Please see further explanation below.</p>	

2 *Has the Commission have counsel's opinion or other legal advice or other advice on the effect of the Supreme Court judgment in the case of Lee v Ashers [2018] UKSC 49 upon the Commission's interpretation of its claimed public sector equality duty under the Equality Act 2010? If so please supply me with a copy.*

Decision:

We can confirm that information requested as per request number 2 **is not held** by the EC.

4 *Does the Commission have any staff guidance, manuals, or policies relating to the exercise of the public sector equality duty it claims and in particularly relating to the process of determining aims and in particularly relating to the process of determining whether in the view of the Electoral Commission a proposed political party might engage in direct or indirect discrimination? If so please supply me with a copy.*

Decision:

We can confirm that information requested as per request number 4 **is held** and we are disclosing this to you. Please see the attachment to this email.

The EC considers some of the information exempt from disclosure pursuant to sections 40(2) and 42(1) of the Freedom of Information Act (FOIA) 2000. Accordingly, some of it has been redacted. **Please see further explanation below.**

6 *Does the Commission have counsel's opinion or other legal advice or other advice that explains the legal basis for the fact that, notwithstanding the Commission claims it has a public sector equality duty pursuant to s149 Equality Act 2010 the Commission does not claim a legal right to remove political parties from the register of political parties under the Political Parties and Referendum Act 2000 by reason that the political party is engaged in indirect discrimination? If so please supply me with a copy.*

Answer:

On 23 April 2022 we sought **clarification** concerning the sixth part of your request; we asked that you respond by 29 April. We have not heard back from you and as such, are not able to provide a response to this part of your enquiry.

7 *Did the Commission take counsel's opinion or other legal advice or other advice to support either of its two rejections of applications to register a political party listed in FO1-036-21 on the grounds that the Commission judged that the proposed parties would on registration be likely to discriminate, contrary to the Equality Act 2010? If so please supply me with a copy.*

Decision:

We **neither confirm nor deny** that this information is held or not held in relation to request number 7.

The EC considers that section 42(2) FOIA applies in displacing the duty to confirm or deny this aspect of your request, as per section 1(1)(a) FOIA. **Please see further explanation below.**

In relation to request numbers 1, 3 and 5:

We have carefully considered your request and we can confirm we have also carefully considered the Information Commissioner's Office (ICO) guidance in relation to section 42(1) FOIA.

The EC are withholding this information under section 42(1). Section 42 of the Act provides an exemption for information that is protected by Legal Professional Privilege (LPP). This exemption protects communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the purpose of litigation.

We have considered the public interest test, for and against release of the information you request.

The arguments considered in favour of disclosure:

There is a general public interest in authorities being accountable for the quality of their decision-making, and ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision-making process and access to the information upon which decisions have been made can enhance this accountability. It could also be seen that there is a public interest in some cases in knowing whether or not legal advice has been followed.

The arguments considered against disclosure:

Section 42 reflects a strong public interest in the EC being able to communicate freely with its legal advisers to provide and receive advice in confidence. Public authorities require high quality and comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context and with a full appreciation of the facts, which is necessary to be sought and given in a timely fashion to ensure policy develops in a fully informed way. The legal adviser needs to be able to present the full picture to their clients, which not only includes arguments in support of their final conclusions, but also the arguments that may be made against them. It is in the nature of legal advice that often sets out the possible "for and against" arguments a particular view of weighing up their relative merits. Without such comprehensive advice the quality of the EC's decision-making would be much reduced for the following reasons:

- it would not be fully informed and this would be contrary to the public interest
- to disclose information provided in a legal capacity to a third party could breach the confidentiality status of privileged communications with legal advisers

Disclosure of legal advice provided in confidence also has a high potential to prejudice the EC's ability to defend its legal interests, particularly when the advice has been fully considered and presented without fear or favour, which are neither in the public interest. There is a very strong element of not disclosing in the public interest inbuilt into the concept of Legal Professional Privilege and this has long been recognised, by the Information Commissioner, the Information Tribunal and the courts, and it reflects the importance of legal advice being sought, and given, in confidence. Moreover, the legal advice received by the EC continues to inform our operational processes and decision making and disclosure of such legal advice has a significant deterrent effect on the EC seeking legal advice to properly discharge its statutory functions as bestowed by Parliament.

Conclusion

After carefully considering the opposing public interest arguments in favour of engaging the exemption and in favour of releasing the information, there is, we believe, a strong and overriding public interest in maintaining the principle of legal professional privilege.

In relation to request number 4:

Exemption under section 40(2) of the Freedom of Information Act 2000 (FOIA):

Information is exempt under section 40(2) of the FOIA where release of the information would breach one of the data protection principles in the GDPR. One of the principles states that personal data must be processed fairly and lawfully.

Some of the information contained in the requested information falls within the description of personal data because the information relates directly to an identifiable living individual. Disclosure of this information would breach the first data protection principle, which states the information must be processed fairly and lawfully. Under this provision, we have redacted the names of Commission staff that are not, or have not been part of, our Senior Leadership Group. This is because those members of staff have a reasonable expectation that their personal details will not be made public. This is an absolute exemption under the Act.

Exemption under section 42(1) of the Freedom of Information Act 2000 (FOIA):

We have carefully considered the Information Commissioner’s Office guidance in relation to section 42(1) FOIA.

The EC have redacted some of the information relating to this request under section 42(1). Section 42 of the Act provides an exemption for information that is protected by Legal Professional Privilege (LPP). This exemption protects communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the purpose of litigation.

We have considered the public interest test, for and against release of the information you request.

The arguments considered in favour of disclosure:

There is a general public interest in authorities being accountable for the quality of their decision-making, and ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision-making process and access to the information upon which decisions have been made can enhance this accountability. It could also be seen that there is a public interest in some cases in knowing whether or not legal advice has been followed.

The arguments considered against disclosure:

Section 42 reflects a strong public interest in the EC being able to communicate freely with its legal advisers to provide and receive advice in confidence. Public authorities require high quality and comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context and with a full appreciation of the facts, which is necessary to be sought and given in a timely fashion to ensure policy develops in a fully informed way. The legal adviser needs to be able to present the full picture to their clients, which not only includes arguments in support of their final conclusions, but also the arguments that may be made against them. It is in the nature of legal advice that often sets out the possible “for and against” arguments a particular

view of weighing up their relative merits. Without such comprehensive advice the quality of the EC's decision-making would be much reduced for the following reasons:

- it would not be fully informed and this would be contrary to the public interest
- to disclose information provided in a legal capacity to a third party could breach the confidentiality status of privileged communications with legal advisers

Disclosure of legal advice provided in confidence also has a high potential to prejudice the EC's ability to defend its legal interests, particularly when the advice has been fully considered and presented without fear or favour, which are neither in the public interest. There is a very strong element of not disclosing in the public interest inbuilt into the concept of Legal Professional Privilege and this has long been recognised, by the Information Commissioner, the Information Tribunal and the courts, and it reflects the importance of legal advice being sought, and given, in confidence. Moreover, the legal advice received by the EC continues to inform our operational processes and decision making and disclosure of such legal advice has a significant deterrent effect on the EC seeking legal advice to properly discharge its statutory functions as bestowed by Parliament.

Conclusion

After carefully considering the opposing public interest arguments in favour of engaging the exemption and in favour of releasing the information, there is, we believe, a strong and overriding public interest in maintaining the principle of legal professional privilege.

In relation to request number 7:

We have carefully considered your request and we can confirm we have also carefully considered the Information Commissioner's Office guidance in relation to section 42(2) FOIA.

Section 1(1)(a) FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is known as 'the duty to confirm or deny'. The EC can neither confirm nor deny that it holds the information you have requested owing to an exemption designed to protect Legal Professional Privilege. Section 42(2) states:

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

The full text of exemptions can be found at www.legislation.gov.uk and further guidance on how they operate can be located on the Information Commissioner's Office website www.ico.org.uk.

Section 42(2) removes the duty to confirm or deny, if to do so would involve the disclosure of any legally privileged information. It is subject to a public interest test.

The EC considers very strongly that Legal Professional Privilege protects the confidentiality of communications between a client and their legal adviser, but what it specifically protects is the substance of those communications. This interpretation is supported by the comment of Mr Justice Mann in *USP Strategies v London General Holdings Ltd* [2004] EWHC 373 (Ch), that:

"The proper analysis, consistent with Three Rivers, is to continue to afford privilege to material which evidences or reveals the substance of legal advice" (paragraph 20).

The fact of whether a public authority has sought or received legal advice is not itself legally privileged, unless disclosing that fact would reveal the substance of those communications.

You have asked the EC for very specific information which, whether if held or not by the EC, could be seen as revealing that the EC has received specific advice in relation to those applications you refer to in your request to register a political party. This confirmation or denial that information is held, would or could of itself, disclose legally privileged information, should that information exist or not.

There is no requirement to demonstrate any prejudice or adverse effect when applying section 42, since it is a class-based exemption: i.e. there is no need to show that any harm would occur from disclosure of the information.

The general public interest inherent in this exemption will always be strong due to the importance of the principle being Legal Professional Privilege.

Public interest test factors favouring confirmation or denial

Public authorities should be accountable for the quality of their decision making process and there is a public interest in confirming or denying in the interests of transparency and informing the public.

Factors against confirmation or denial

Decisions by public authorities should be made in a fully informed legal context. There is a strong public interest in protecting communications if held, or not, between a lawyer and a client which the EC would suppose to be confidential and to protect the ability for the EC to be able to seek out legal advice. Without recourse to such advice a public authority's decision making may be compromised because it will not be fully informed.

Conclusion

The decision to issue a 'neither confirm nor deny' response is not affected by whether the EC does or does not hold the information but relates to the consequences of confirming or denying the information is held. The starting point and main focus in most cases will be theoretical considerations about the consequences of confirming or denying that a particular type of information is held. This approach is quite clearly reflected and endorsed in the guidance issued by the ICO.

The decision to neither confirm nor deny is separate from a decision not to disclose information and needs to be taken entirely on its own merits. The EC considers the balance of the public interest favours maintaining its 'neither confirm nor deny' position. The ability for the EC to be able to take legal advice in future could be adversely affected by revealing whether we have or have not sought legal advice previously, or providing information which could reveal the specific nature of legal advice, whether it is held or not. Lastly, nothing in this response should be taken as conclusive evidence that the information you requested exists or does not exist.

I trust that this information satisfies your request. The Commission strives to be an open, transparent authority, but in some circumstances we cannot responsibly release requested information, and we ask for your understanding in this regard.

If you are not satisfied with this response, please note that the Commission operates a review procedure, details of which can be found on the Commission website at:

<https://www.electoralcommission.org.uk/freedom-information/make-a-freedom-information-request>.

Please also note that if you have exhausted all internal Commission review procedures and you are still not satisfied you have the right to appeal to the Information Commissioner. Details of this procedure can be found on the ICO website: <https://ico.org.uk/>.

Yours sincerely

Information Officer

FOI@electoralcommission.org.uk

The Electoral Commission

electoralcommission.org.uk

Information for release under request 4

Extract of registration application assessment template:

Equality Act consideration	<ol style="list-style-type: none">1. I have / have not identified any issues in the legislation relating to equalities legislation.2. Where my recommendation is to reject this constitution against the requirements of PPERA, I have not contacted the party about this consideration – this will be addressed in any rejection correspondence. If the delegated decision maker is minded to approve this constitution against PPERA, the party will be contacted in relation to this matter before a final decision is made.
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Electoral Commission guidance for political parties on registering and maintain a party:

<https://www.electoralcommission.org.uk/i-am-a/political-party/registering-and-maintaining-a-party>

Information from EHRC website:

[The Equality Act 2010: a guide for political parties](#)

Commented [1]: [REDACTED]

If the issue is relatively minor (e.g. "membership is for UK citizens only") please revert to the party and request clarification on the matter. This correspondence should make clear we are considering this against the EqA rules, set out the issue we have identified, tell the party it is open to them to amend their constitution in relation to this matter and where necessary request clarification on the number of members.

25 members consideration – Please consider if the party structure gives an indication of the likely size of the membership. For example, a national party is more likely to have a bigger membership than a local party. This may be because the party has indicated that it will have a number of regional or local branches, has a number of internal committees and officers etc. conversely, if a party's membership is restricted, for example to its elected councillors or the directors of its company, this makes it more likely that its membership will be smaller.

Assessments should set out in detail the considerations made in relation to the above, as well as any correspondence with the party on this matter.

Commented [2]: If application is for Northern Ireland, amend to 'Equalities legislation issue identified' if relevant.

The Equality Act does not cover NI, but s75 of Northern Ireland Act has a similar regulatory [REDACTED]

[REDACTED]

Commented [3]: Delete as necessary.