

[REDACTED]

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**From:** FOI  
**Sent:** 23 August 2016 09:56  
**To:** [REDACTED]  
**Subject:** EC 100/16 - Internal Review

Dear [REDACTED],

### **Internal Review of FOI 100/16**

Thank you for your recent request dated 26 July 2016 requesting an internal review of the Electoral Commission's response to your request under the Freedom of Information Act 2000 (FOIA), which was given the reference EC 100/16.

The Commission published material relevant to the process and decision for designation of lead campaigners for the EU Referendum. The applicants' campaign strategies and personal data were redacted from the published documents through exemptions applied under sections 40, 41, 43 and 36 of the FOI act. In your request for a review you state that you do not contest the withholding of material under section 40, but that you do contest it where withheld under sections 41, 43 or 36. You also make the point that your request was made on 24 June which is after the referendum date and that we do not appear to have taken that into account.

I have undertaken this review because I am a member of the Commission's management team and I was not previously involved in the original response to your request. I have considered whether the decision to withhold the information you requested was appropriate and in doing so I have:

1. Reviewed the sections of the documents that were redacted
  2. Considered the arguments made in our response to your request (FOI100/16)
  3. Considered the arguments you make in your email of 26 July 2016 referring to sections 36, 41 and 43 of the act
  4. Considered the opinion of the qualified person in relation to section 36
  5. Considered guidance provided by Information Commissioner's Office
1. I have confirmed that the redacted sections of the four documents published on the Commission's website relate to 'Campaigning capacity' (section 5 of the application for designation as lead campaigner) or are personal data. I have also confirmed that the guidance section of the application form specifically states that the Commission will not publish 'information contained in Section 5 – Campaigning capacity'. This undertaking is also repeated in the separate guidance to the designation process published on 3 March 2016 which states that the commission 'will not publish personal contact details or information about your campaign plan and strategy'.
  2. The Commission relied on section 43(2) of FOIA which provides for exemption from disclosure information that would or would be likely to prejudice the commercial interests of any person. We stated that the information we hold relates to the campaign interests of Vote Leave and the In Campaign and their campaign strategies and contains relevant confidential information. We further stated that release of this information could have a detrimental impact on their capacity to campaign. As a counter argument, you maintain that, as the referendum is over and campaigning finished, this assertion has no relevance. You also suggest that the information contained in section 5 of the application does not constitute a 'commercial interest' as explained in ICO guidance. Having reviewed the

redacted information and given that the referendum was over by the time you made your request, I do not believe that the Commission should have relied on this exemption. At the time of the request, there would have been no detrimental impact on the ability of the designated organisations to campaign.

3. The Commission cited Section 41(1) of FOIA and asserted that release of the requested information would constitute an actionable breach of confidence. As stated above, the Commission clearly stated in its guidance and in the guidance accompanying the application form that information provided in section 5 (Campaigning capacity) would not be published. I cannot see any justification for challenging the reasons given in our response to your request in relation to the section 41 exemption. I have also considered the public interest test in relation to this exemption. As we stated in our response, the Commission recognises the public interest in transparency and accountability of public decision making and numerous documents were published in support of this. As a regulator, the Commission relies on the trust of those that report to it and it is important that this trust should be maintained and that therefore, confidentiality should be taken as a given where releasing the information would be actionable and the Commission has stated that the information would not be published. For this reason, I believe that the Commission was correct to decide that the balance of public interest weighed in favour of not disclosing this information. I therefore conclude that the Commission was justified in applying this exemption.
4. The Commission also maintained that section 36(2)(c) applies in this case. I have reviewed the record of the qualified person's opinion in relation to section 36(2)(c) which states that releasing the information would likely cause a prejudice to future dealing with organisations when we request information specifically in relation to any designation applications. It also makes a wider point that there was a promise of confidentiality and that any release would have a detrimental effect on our stakeholder relationships and our ability to conduct our statutory functions. You assert that section 36 deals with the 'exchange of views for the purposes of deliberation'. You are referring to section 36(2)(b)(ii) which states this, however the Commission is relying on section 36(2)(c) which concerns prejudicing the effective conduct of public affairs. Having considered the material, the promise of confidentiality that was given by the Commission and the issues of trust involved and also having considered the record of the qualified person's opinion, I believe that the application of this exemption is justified. There is a public interest test which applies to this exemption. Having considered the arguments, I believe that the Commission satisfied the requirement for transparency in this important decision within the constraints of the promise of confidentiality that was given to applicants and that there is a greater public interest in protecting the Commission's ability in the effective conduct of public affairs by maintaining the trust of past, present and future stakeholders.

I uphold the Commission's decision to apply exemptions under sections 41(1) and 36(2)(c) in relation to the release of the redacted sections of the documents which were the subject of the request. I however believe that section 43(2) did not apply at the time the FOI request was made. In conclusion, the Commission should not, therefore, release this information.

As you will be aware, if you remain dissatisfied with the Commission's response, you have the right of appeal to the Information Commissioner at: The ICO, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Details of the appeal procedure can be found on the ICO website: <http://www.ico.gov.uk/>.

Yours sincerely

**Philip Tucker**

Head of ICT and Facilities