

Prejudice to a function of the public authority

The ICO states that when a public authority is seeking to argue that the disclosure would prejudice the exercise of its functions by decreasing the amount of information supplied voluntarily from the organisations it works with, it will first need to establish that those functions are designed for one or more of the purposes specified in section 31(2). It will then need to consider the following two aspects:

1. whether the disclosure would be likely to have an impact on the voluntary supply or free flow of information; and
2. if so, would the impact on the voluntary supply of information be likely to prejudice a function of the public authority?

1. Impact on the voluntary supply of information

In considering whether the disclosure would (or would be likely to) have an impact on the voluntary supply of information, the following factors will be relevant, depending on the circumstances of each individual case:

- the content of the information;
- the timing of the request, for example, in relation to the stage of the investigation being undertaken by the public authority. For instance, if information was disclosed under FOIA during the early stages of an investigation, it may unfairly expose the voluntary supplier of information to adverse publicity or criticism, even though a conclusion to the investigation may not have been reached. In addition, the potential reputational risk may be likely to deter organisations from co-operating on a voluntary basis;
- the public authority's statutory powers to compel engagement in the investigatory process (for example, the power to issue information notices, sanctions for non-compliance or search powers). Although voluntary supply may be affected by disclosure, where the public authority has powers to compel engagement, it may reduce the likelihood of prejudice to a function occurring. On the other hand, the use of formal powers may require the use of extra resources, but this will not necessarily prejudice the exercise of its statutory function;
- incentives that encourage third party engagement;
- the nature of the damage caused by disclosure that the third party foresees. The more damaging the disclosure, the more likely it will discourage provision of information in the future;
- whether there is evidence of lower levels of engagement following disclosure of information under FOIA; and

- whether there is a statutory bar which prevents the disclosure of information provided in circumstances where the provider would not expect disclosure. An absence of statutory protection for the information implies a greater likelihood of prejudice.

Our assessment is outlined below:

- **Content of the information** – One of the documents being sought i.e. the detailed legal argument from CAA to EHRC is of sensitive nature to since it contains legal arguments of the ongoing investigation.
- **Timing of the request and stage of the investigation** – when we received the request, we were still deciding as a regulator whether to take the matter forward. The CAA provided evidence a few weeks ago and Legal is reviewing it in order to decide the most appropriate use of our powers. The likelihood of disclosure affecting our ability to gather future information from this organisation or another (The Labour Party) is medium.
- **EHRC's statutory powers to compel, and incentives that encourage, engagement** – although the EHRC has limited powers to compel organisations to provide information, these are only once formal enforcement action has been taken. S. 6 Equality Act 2006 makes it an offence for persons to disclose information obtained by way of representations in the course of an inquiry, investigation, assessment, notice or agreement (unless one of the grounds applies). However, much of the Commission's work as a regulator is conducted informally. We are very much dependent on organisations co-operating with us in this way. There are no or minimal incentives that encourage engagement, aside from our formal powers, therefore our fear is that publication could deter future co-operations with other organisations and indeed co-operation by The Labour Party in this situation.
- **The nature of the damage caused by disclosure that the third party foresees.** The more damaging the disclosure, the more likely it will discourage provision of information in the future – as above, the fear is that publication would deter future informal cooperation by others and damage the Labour Party's reputation before the investigation is completed.
- **Level of engagement post-FOIA** –we have not seen evidence that organisations have been less willing to provide us with information since FOIA came into full force in January 2005.

- **Whether there was a statutory bar to protect information supplied** –there is no statutory bar preventing the disclosure of information supplied voluntarily to the EHRC and therefore this increases the likelihood of a negative impact, following disclosure under FOIA, on the future supply of information.

Consideration of these factors led to the conclusion that disclosure of the requested information may have an impact on the voluntary supply of information in the future. Therefore we considered point 2.

2. Impact on the voluntary supply of information and whether it is likely to prejudice to a function of the public authority

We considered the following:

- The prejudice identified was the potential to slow down to the EHRC's regulatory process, resulting in less timely regulatory action.
- The concern is that other organisations are less likely to communicate or if they do communication, the nature of these communications may change. This change could affect the EHRC's formal and informal methods of operation as well as its ability to gather and receive wider intelligence.
- Given that the EHRC is responsible for regulating all organisations, even if only a small percentage altered their behaviour following the disclosure under FOIA, there would be a real and significant impact on our ability to carry out the functions described at section 31(2)(f) and (g).