

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 30 July 2007

Public Authority: The Ministry of Justice
Address: Selborne House
54 Victoria Street
London
SW1E 6QW

Summary

The complainant submitted a request to the Tribunal Service (an executive agency of the Ministry of Justice) for information about the relationship between the ethnicity of claimants who submitted applications to the Employment Tribunal Service and the outcome of each claimant's case. The public authority refused the request on the basis that it did not hold the information requested. The Commissioner has concluded that whilst the public authority did not hold any researched statistics which could have been used to answer the request in full, he believes that the public authority did hold some raw data which fell within the scope of the request. However, the Commissioner accepts that to provide this information would have exceeded the appropriate cost limit.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On the 27 November 2005 the complainant asked the Employment Tribunal Service ('ETS') to provide her with any or all researched data on the numbers and outcomes, of unrepresented and represented Black (and not Asian or Caucasian) descent complainants, that have brought complaints of race and disability discrimination and victimisation to the Employment Tribunal and Court.
3. The ETS responded to this request on 21 December 2005 and informed the complainant that 'we are unable to assist you with your request...'

[because] the ETS does not produce statistics with regard to the ethnicity of claimants nor whether or not parties are represented'.

4. However, the ETS did inform the complainant that employment tribunal decisions are placed in the public domain and that race and disability judgements are copied to the Commission for Racial Equality and Disability Rights Commission respectively. The ETS also informed the complainant that a regular survey of Employment Tribunal claims is commissioned by the Department for Trade and Industry ('DTI') and published reports of findings may be found on the DTI website.

The Investigation

Scope of the case

5. On 8 January 2006 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant argued that the ETS was incorrect to refuse her request on the basis that it did not hold the information she requested. The complainant believed that under section 71 of the Race Relations Act 1976 and the Race Relations Amendment Act 2000, the ETS had a duty 'to promote good race relations, etc, by monitoring the numbers and outcomes of represented and unrepresented black complainants lodged at employment tribunals and courts' and therefore should be able to provide her with the information she requested.
6. At the time the request was submitted in November 2005, the ETS fell under the remit of the Department for Trade and Industry ('DTI'). In April 2006 the Tribunals Service, an executive agency of the Department for Constitutional Affairs ('DCA'), took over responsibility for the ETS. In May 2007 the responsibilities of the DCA were transferred to the new Ministry of Justice ('MOJ').
7. On the basis of the changes in departmental responsibility outlined above, the Commissioner considers it appropriate to serve this decision notice on the MOJ.

Chronology

8. The Commissioner wrote to the ETS on 27 June 2006 and asked it to comment on the complainant's allegation that the Race Relations Act 1976 placed a statutory duty on it to compile statistics about the ethnicity of claimants to the ETS and therefore it should have been able to provide her with the information she requested. The Commissioner also asked the ETS to respond to a number of specific questions about its practices. These questions were:
 - *Does the ETS have any procedures in place for the ethnic monitoring of claimants?*
 - *Does the ETS record whether claimants are represented or unrepresented at hearings?*

- *I understand that the DTI conducts surveys into Employment Tribunal claims. Does the ETS supply the DTI with any information relating to the ethnicity of claimants?*
 - *Does the ETS hold any information similar to that requested by [the complainant]?*
9. On the 25 July 2006 the ETS wrote to the Commissioner and informed him that he could expect a substantive response to his letter of 27 June 2006 'within the next few days.'
10. On the 3 August 2006 the ETS wrote to the Commissioner again and explained that the case had been transferred to the DCA's Access Rights Unit because the ETS now fell under its remit for freedom of information issues.
11. On the 18 August 2006 the Commissioner emailed the DCA in order to clarify when it would be sending the Commissioner a response to his letter of 27 June 2006. The DCA responded on the same day and informed the Commissioner that due to a number of key staff taking annual leave to coincide with the Parliamentary recess, it had not been possible to compose a response. The DCA also informed the Commissioner that it had only taken over responsibility for the ETS in April 2006 and therefore would need more time in order to understand the way the ETS operated.
12. The DCA provided the Commissioner with a response to his enquiry on 3 November 2006. In this response the DCA confirmed that:
- 'the ETS does not hold statistical information relating to the numbers of represented, or unrepresented black appellants, in a readily available format. The right under the Freedom of Information Act 2000 is to recorded information and there is therefore no requirement under the Act for public authorities to undertake analysis, or create information in order to respond to requests'.*
13. In conclusion to its letter the DCA explained to the Commissioner that 'no statistics have been produced in detail sought by [the complainant], and neither would it be possible to produce such statistics, at least not without some considerable effort.'
14. The Commissioner wrote to the DCA on 11 November 2006 and asked for clarification on the following issue: the Commissioner suggested that he understood the DCA's position to be that the information requested was not held. However, its suggestion that it would be possible to provide the complainant with some information, albeit that this process would involve "some considerable effort", appeared to contradict the statement that no information covered by the request was held. The Commissioner asked the DCA to consider if it was more appropriate that this request was refused the basis of section 12 (cost of compliance exceeds the appropriate limit). The Commissioner raised these questions as it appeared to him that it might be possible for the DCA to provide some information which would fulfil the complainant's request, at least in part, but the cost of locating, retrieving and extracting this information would exceed the appropriate cost limit.

15. The DCA acknowledged receiving the Commissioner's letter on 20 November 2006 and explained that it expected to be in a position to provide a substantive response by 12 December 2006.
16. Having failed to receive a response by the 12 December 2006, the Commissioner contacted the DCA on a number of occasions in order to establish when the DCA would be sending the Commissioner a response to the matters he had asked for clarification on.
17. The DCA provided the Commissioner with a substantive response on 19 February 2007.
18. In this response the DCA confirmed that its position was that it did not hold the information requested and that 'to provide the statistics requested would require the generation of new statistics following a detailed analysis of the information which was held and to do so, would go beyond the public authority's obligations under the Act'.
19. The DCA also provided the Commissioner with a detailed explanation of how a claimant would submit an application to the ETS and how this application would be processed. The DCA explained that since 1 October 2005 applicants to the Employment Tribunal have filled in an ET1 form and an accompanying equal opportunities monitoring form ('EOM form'). The ET1 form asks for details of the claim and whether the applicant will be represented; the EOM form is optional and includes questions about the ethnicity of the claimant.
20. The DCA provided the Commissioner with an outline of how the ET1 and EOM forms were processed at the time of the request in November 2005. The process was as follows: upon receipt of each application the details on the ET1 form were entered onto a case management database and a unique case number was assigned. The information on the EOM form was not entered onto the case management database. Furthermore, the unique case number was only transferred onto the hard copy of each ET1 form and not transferred on to the hard copy of corresponding EOM form. After the details contained on the ET1 forms were entered onto the database, the ET1 and EOM forms were separated from each other and stored in different locations by the DCA. The DCA also explained that the EOM forms were then removed periodically by contractors working for the DTI.
21. Therefore, the DCA explained that at the time of the request it would have been impossible to marry up the corresponding ET1 and EOM forms in order to create the statistics needed to answer the request.
22. The DCA also outlined to the Commissioner how the process of administering the ET1 forms had changed since April 2006. Since that date the unique case reference number was now transferred on to both the ET1 form and the EOM form, although the forms were still stored in separate locations. The DCA acknowledged that given this change in the procedure it would now be possible to marry up the two forms that each claimant had submitted and then 'match the

data, extract it and analyse and create the information. But their view was that to do so would involve considerable effort and it would not be a proper use of departmental resources. The Department has not sought to rely on section 12 because it does not hold the statistical data'.

23. The Commissioner wrote to the DCA again on 28 February 2007 and asked for clarification on a number of further issues. The Commissioner sought confirmation as to whether the outcome of each case was entered on to the case management system and recorded on the actual case file. The Commissioner asked the DCA to confirm whether it retained any record of the information contained on the EOM form (e.g. a photocopy or details entered on to a database) after these forms were transferred to the contractors working for the DTI. The Commissioner also asked the DCA to highlight any differences in procedures at the time of the request (27 November 2005) and now.
24. The DCA provided the Commissioner with a response to these points on 4 April 2007. In this response the DCA confirmed that the outcome of each case is recorded on the database as "case closed" and the outcome of the jurisdiction, e.g. unfair dismissal, race discrimination, unpaid wages, are also put onto the database. The DCA explained that whilst all the papers are retained inside each case file, no details of the outcome of the case are put on the file cover of the case file. The DCA reiterated that the details of the ethnicity of claimant were not recorded on either the database or on any part of the paper case file. The DCA also confirmed that copies of the EOM forms were not made before the forms were transferred to the DTI.
25. The Commissioner contacted the MOJ on 23 May 2007 and indicated that he was satisfied that at the time of the request the ETS had not undertaken any statistical analysis needed to create figures which could be used to fully answer the complainant's request. However, the Commissioner informed the MOJ that he was now of the opinion that the ETS did hold some information which fell within the scope of the request. The Commissioner believed this information to be the raw data contained on the ET1 forms. In the Commissioner's opinion using the raw data contained on the ET1 forms the complainant could have inferred the reasons why the individuals had applied to the ETS and in some cases this would reveal the ethnicity of some individuals. For example an ET1 form could state that an individual was applying to the ETS because they felt that they had been racially discriminated against because they were black. Whilst the Commissioner acknowledged that disclosure of this information would not fully answer the complainant's request, he believed that it fell within the scope of the request because it would, in some cases, reveal a link between the ethnicity of applicants to the ETS, the nature of their claim and some of the other information requested.
26. Therefore, the Commissioner suggested to the MOJ that it did hold some of the information covered by the request and in response the ETS should have provided the complainant with the raw data contained on the ET1 forms in which black claimants made allegations of race or disability discrimination. The Commissioner therefore asked the MOJ to provide him with an estimate of the costs involved in this process. In providing this estimate the Commissioner asked the MOJ to make reference to the costs involved in the four activities public

authorities can charge for under The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'), namely:

- (a) Determining whether the information is held,
- (b) Locating the information, or a document containing it,
- (c) Retrieving the information, or a document containing it,
- (d) Extracting the information from a document containing it.

27. The MOJ provided the Commissioner with a response on 4 July 2007. The MOJ had established that by the date of the request, 27 November 2005, there had been 17,111 applications to the ETS between 1 October 2005 and the date of the request.
28. The MOJ explained that in order to establish whether there was any reference to the ethnicity of claimant all 17,111 ET1 forms would have to be located and retrieved. Each of these forms would then have to be read in order to establish whether the relevant information (i.e. any record of claimant's ethnicity and if they were applying to the ETS because they had been racially discriminated against) was contained on the forms. The MOJ suggested that to complete this task would take 'a considerable period of time'.
29. However, rather than provide a cost estimate of this specific task, the MOJ provided a detailed cost breakdown of the cost of locating, retrieving and extracting information from the 17,111 EOM forms, rather than cost estimate of extracting the relevant information from the ET1 forms themselves. In providing this estimate the DCA suggested that the cost of locating, retrieving and extracting the information on the ET1 forms would be in excess of the time which has been calculated for obtaining information from the EOM forms.
30. The cost estimate with regard to the EOMs forms was as follows:
31. At the time of the request, the information contained on the EOM forms was not recorded on the electronic case management system used by the ETS. Therefore in order extract data from these forms they would have to be physically located and retrieved manually. The MOJ explained that for the period October 2005 to November 2005 each relevant form would still be held in one of the 25 local employment tribunal offices. The MOJ explained that it would take on average 1-2 minutes to review each form in order to establish if the claimant had identified themselves as being black, or black British. Furthermore, the data extracted from this process would have to be collated on an Excel spreadsheet and the data from each of the local offices would have to be forwarded to a central point. The MOJ highlighted the fact that this process would obviously take an additional time and thus incur further costs.
32. The MOJ therefore suggested that if it took 2 minutes to review each EOM form and there were 17,111 forms for the period in question, then it would take 34,222 minutes to identify any claimants who are black or black British. This equates to 570.366 hours, or 81 working days based upon a 7 hour working day.

Analysis

Section 1

33. The Commissioner has established that section 71 of the Race Relations Act 1976 places a general statutory duty on all public authorities to eliminate unlawful racial discrimination and to promote equality of opportunity to, and good relations between, persons of different racial groups. However, the Commissioner does not consider that this duty can be interpreted to mean that the ETS is under a duty to compile the specific statistics needed to answer this particular request. Furthermore, the Commissioner is satisfied that the ETS has not compiled such statistics as part of an established policy or business need, rather than because of statutory duty. The Commissioner is therefore satisfied that the researched statistics needed to fully answer the complainant's request are not held.
34. However, the Commissioner notes the complainant's request asked for 'any or all researched data' in relation to the ethnicity of applicants to the ETS and their reasons for applying to the ETS. As outlined above, the Commissioner considers that the ETS did hold some information which fell within the scope of the complainant's request (see paragraph 26). By failing to confirm to the complainant that it held some information which fell within the scope of her request the Commissioner considers that the DCA, as the public authority, breached section 1(1)(a) of the Act.

Section 12

35. Section 12 of the Act removes the obligation on public authorities to comply with section 1 of the Act if the authority estimates that the cost of complying with the request would exceed the appropriate limit. The appropriate limit, as prescribed by the Regulations, is £600 for Central Government and £450 for other public authorities, with staff time calculated at a rate of £25 per hour. When calculating whether the appropriate limit is exceeded, authorities can take account of the costs of determining whether the information is held, locating and retrieving the information, and extracting the information from other documents. They cannot take account of the costs involved with considering whether information is exempt under the Act. For the public authority to legitimately cite section 12 in this case, therefore, it needs to demonstrate that the time needed to comply with the request exceeds 24 hours.
36. The Commissioner has established that the number of ET1 forms submitted to the ETS between 1 October 2005, the date the form was introduced, and the date of the request, 28 November 2005, was 17,111.
37. However, the MOJ did not provide the Commissioner with a cost estimate of locating, retrieving and extracting the relevant information from the 17,111 ET1 forms. Instead he was provided with an outline of the process of locating and retrieving the 17,111 EMO forms and a cost estimate for this process.

38. The Commissioner considers that it is important to note that the process of locating and retrieving the ET1 forms is likely to differ from the process of locating and retrieving the EMO forms. The MOJ suggested that the EMO forms for the period in question had not been scanned on to the case management system and therefore the ETS would have to locate and retrieve the original hard copies of all the EMO forms. However, the Commissioner notes that the ET1 forms for the period in question were entered on to a case management database and therefore the process of locating and retrieving the ET1 forms was likely to be a quicker process (see paragraph 20). Furthermore, if these forms were all on the case management system this may alleviate the need for all 25 local tribunal offices to be involved in the location and retrieval process. Rather a central ETS office could have extracted all of the information.
39. Nevertheless, the Commissioner is satisfied that the process of extracting the necessary information from the 17,111 ET1 forms (whatever the costs of locating and retrieving these forms) would be a lengthy process, the cost of which, in itself, would exceed the appropriate limit. The DCA has estimated it would take 2 minutes to review each of the EOM forms in order to establish if the claimant had indicated their ethnic origin as black or black British. The Commissioner considers that it is also reasonable to estimate that it would take 2 minutes to review each ET1 form in order to establish if the claimant was applying to the ETS because they had been discriminated against because they were black. Therefore in order to extract any relevant information from the 17,111 forms the Commissioner accepts that this would take over 570 hours and thus clearly exceed the appropriate cost limit of £600.

The Decision

40. The Commissioner is satisfied that at the time of the request in November 2005 the ETS was correct to inform the complainant that it did not hold the researched statistics which could have been used to fully answer her request.
41. However, the Commissioner believes that in response to the request the ETS should have informed the complainant that it held some raw data on the ET1 forms which fell within the scope of her request. Whilst the Commissioner is satisfied that the ETS could have correctly relied on section 12 to refuse to provide this information, by failing to inform the complainant of this it breached section 1(1)(a) of the Act.

Steps Required

42. The Commissioner does not require the public authority to take any steps.

Right of Appeal

43. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

“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 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 3(1) provides that –

“in this Act “public authority” means –

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which –

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6”

Section 3(2) provides that –

“For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person,
or

(b) it is held by another person on behalf of the authority.”

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.