

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2014

Public Authority: The Equality and Human Rights Commission
Address: 2nd Floor Arndale House
The Arndale Centre
Manchester
M4 3AQ

Decision (including any steps ordered)

1. The complainant has requested a submission provided by the Foreign and Commonwealth Office (FCO) to the European Court of Human Rights (ECofHR) in relation to a particular case. The Equality and Human Rights Commission (EHRC) refused to provide the requested information under section 32(1)(a) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the EHRC has correctly applied section 32(1)(a) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 10 August 2013, the complainant wrote to the EHRC and requested information in the following terms:

"Could I be sent a copy of any of the submissions made by FCO to the European Court of Human Rights in the same case, if they are in your possession. They may have been passed directly to the EHRC by a government department or come to you via another party in the case.
CASE OF McCAUGHEY AND OTHERS v. THE UNITED KINGDOM
(Application no. 43098/09)

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122370>

According to the judgment (extract below) there were three UK submissions, one on 2 June 2011, one later and a third in July 2012.

"On 1 February 2011 the application was communicated to the Government. The Court also decided to rule on the admissibility and merits of the application at the same time (Article 29 ? 1).

5. On 2 June 2011 the Government requested the Court to strike out the application in the light of a recent judgment (In the matter of an application by Brigid McCaughey and another [2011] UKSC 20). The applicants submitted observations on this request. On 6 September 2011 the Court rejected the Government's request and the parties' observations on the admissibility and merits were then requested and submitted. In July 2012 the Court received another round of observations from each party."

5. The EHRC responded on 4 September 2013. It refused to provide the requested information under section 21 and section 32(1)(b) FOIA.
6. Following an internal review the EHRC wrote to the complainant on 30 September 2013. It withdrew its application of section 21 and section 32(1)(b) FOIA but said that section 32(1)(a) FOIA was applicable.

Scope of the case

7. The complainant contacted the Commissioner on 15 October 2013 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the EHRC has correctly applied section 32(1)(a) FOIA to the withheld information in this case.

Reasons for decision

9. Section 32(1) FOIA states that, "Information held by a public authority is exempt information if it is held only by virtue of being contained in- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter." Section 32(4) states that, "In this section- (a) "court" includes any tribunal or body exercising the judicial power of the State."
10. In this case, the withheld information is a submission provided by the FCO to the ECofHR in relation to a particular case. It would therefore

appear to fall within remit of section 32(1)(a) FOIA. However the complainant has argued that he does not consider that the ECofHR is a "court" within the definition of section 32(4) FOIA. He has explained that as the ECofHR does not have any direct power within the UK it is not a body exercising the judicial power of the State and therefore cannot be covered by the definition set out in section 32(4) FOIA.

11. The EHRC has explained that it has taken account of the interpretation in 'Blackstone's Guide to the Freedom of Information Act 2000 ("FOIA"), Fourth Edition and the words, "It should nevertheless be noted that s32 (4) (a) is phrased to 'include any tribunal or body exercising the judicial power of the State. Accordingly, it may be possible to argue that this definition extends to cover courts or tribunals that do not actually exercise the judicial power of this state, such as the European Court of Justice or the European Court of Human Rights.
12. The complainant has further said that, "I argue only in relation to the European Court of Human Rights. Other international courts may be different but Strasbourg does not exercise "the Judicial power of the State" as its judgments are not in themselves enforceable in the UK, or elsewhere, and indeed are passed to the Council of Ministers of the Council of Europe (COE) for consideration as to political action, if any, required to be undertaken by the relevant state party. The Ministers have the power to enforce not the court." He went on to explain "If those drafting the FOI Act had wanted to include the Strasbourg court they would have said so and would thus not have used a phrase like "of the State" and would surely have included such by adding to those bodies or types like tribunals subject to the FOI exemption for papers of a court." He concluded that "The fact remains also that the FOI Act does not bite abroad. Strasbourg may well be subject to a different FOI regime in France and indeed others of the 47 CoE member states. Why then should the UK FOI Act when it contains no specific mention of this foreign Court put a local barrier on release of information which may well not apply in its host country or the other member states? It surely was a matter for France in concert with the CoE to make a Europe-wide FOI exemption rule for the court if it so desired?"
13. The complainant has made a request to a public authority within the UK which is subject to the FOIA. The Commissioner considers that although the ECofHR does not exercise the judicial power of the state, section 32(4) FOIA only states that a court 'includes' such bodies and therefore this is not a complete definition. Although he does not consider that the definition would extend to include every court outside the UK (for example courts exercising the judicial power of another State with no relevance to UK law), as this is an international court and the UK (along with all other Member States) has formally recognised its jurisdiction, it

is reasonable to consider it to be a court for the purposes of section 32(1)(a) FOIA.

14. The Commissioner therefore considers that the EHRC has correctly applied section 32(1)(a) FOIA to the withheld information in this case. Section 32 confers absolute exemption on information to which it applies, so no consideration of the public interest test is required.

Right of appeal

15. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

16. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
17. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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