

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2017

Public Authority: Equality and Human Rights Commission
Address: Arndale House, Arndale Centre
Manchester, M4 3AQ

Decision (including any steps ordered)

1. The complainant has requested information relating to a Target Operating Model ('TOM') and Expression of Interest Forms ('EOI').
2. The Commissioner's decision is that Equality and Human Rights Commission (EHRC) has correctly applied section 21 to part of the requested information. In addition, she also finds that EHRC correctly cited section 40(1) and 40(2) of the FOIA to the information withheld under that exemption. Finally the Commissioner finds that EHRC has also correctly cited section 22 of the FOIA to the remaining withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Background

4. The complainant was an employee of EHRC at the time of the request, when the organisation was restructuring.

Request and response

5. On 17 October 2016, the complainant, wrote to EHRC and requested information in the following terms:

"Please find a list of question I have concerning the TOM and the EOI.

- a. *What is the process for appeal against the decision?*

- b. *Names of the panel members assessing the application and any other person who may have assisted or taken part in the assessment*
- c. *Scores given by each of the panel (please provide a copy of any notes that were taken during the assessment, electronic or written)*
- d. *Please provide details of any weighting that was used*
- e. *Please provide details of any negative evidence/examples in my application*
- f. *Please confirm if my application went to the moderation panel, if it did who was on the moderation panel and provide any notes electronic or written*
- g. *Please provide details of the appeals process for the application stage.*

Further to this please provide the answers to the follow questions:

- i. *On what date did the Board/Senior Management decide that the TOM was the way forward for the Commission?*
 - ii. *What date was the decision announced to the workforce?*
 - iii. *On what dates were all TOM meetings and EOI workshops to date held?*
 - iv. *How long before these meeting/workshop were held did the Commission know that they were going to hold them?*
 - v. *What action did the Commission take to provide reasonable adjustments (RA's)? By this I mean other than just asking members of staff to let them know about their need for RA's?*
 - vi. *How many TOM meetings EOI workshops was I able to attend where the Commission had provided the RA's I needed?*
 - vii. *5.17 of the Equality Act 2010 Employment Code of Practice... Did the Commission know of my disabilities? I.e. my mobility and hearing?*
 - viii. *Does the Commission have a record of my disabilities?*
 - ix. *Where does the funding come from to pay for the RA's I need?*
 - x. *Who has overall control of this funding?*
 - xi. *What date did the Commission publish the EOI form for staff to complete?*
 - xii. *What date were staff advised that they had to complete them by? Was there any extension to this date? If so, what was the extension date?*
 - xiii. *Did the Commission know in advance that I was having concerns? about taking part in EOI due to not being able to take part in meetings/workshops? If so what help did they provide me and when?*
 - xiv. *How many of the members of CU haven't been given posts? How many of those are disabled staff?*
6. EHRC responded on 15 November 2016. It provided some information within the scope of the request but refused to provide the remainder. It cited sections 21, 22 and 40 of the FOIA as its basis for doing so. In addition it denied holding the requested information at parts iv); v) and vi).

7. Following an internal review EHRC wrote to the complainant on 9 January 2017. It provided some further information in response to part iv) however it upheld its position with regard to the application of the exemptions previously cited to the remaining withheld information.

Scope of the case

8. The complainant contacted the Commissioner on 12 January 2017 to complain about the way his request for information had been handled.
9. In its submission to the Commissioner the EHRC noted that the complainant had not raised any concerns relating to section 21 at the review stage and therefore it was unaware that this had been a concern to the complainant.
10. However, the complainant had stated in his correspondence to the Commissioner that he considered that all the exemptions cited had been used inappropriately. It is on that basis that this issue has been considered in this decision notice.
11. With regard parts ix and x of the request, the complainant stated he was not asking for his personal data, but where the funding came from the pay for the reasonable adjustments he needed. The information relating to this has been provided outside of the FOIA and therefore has not considered in this decision notice.
12. Therefore, the Commissioner considers the scope of this case to be to determine is EHRC has correctly applied sections 21, 22 and 40 of the FOIA to the withheld information.

Reasons for decision

13. Section 21(1) of the FOIA states:

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

14. The purpose of the section 21 exemption is to ensure that there is no right to access information via the FOIA if it is available to the requester by another route. Although the information may be available elsewhere, a public authority will need to consider whether it is actually 'reasonably accessible' to the applicant before it can apply section 21. Defining 'reasonably accessible' is open to interpretation, however where there is another existing, clear mechanism by which the particular applicant can

access the requested information outside of the FOIA, it will be reasonably accessible to them.

15. EHRC explained that it considered several pieces of the requested information were reasonably accessible to the complainant. The first of these was his request for the date on which the EHRC decided that its TOM was 'the way forward'.

i. On what date did the Board/Senior Management decide that the TOM was the way forward for the Commission?

16. The EHRC interpreted this aspect of the request as the date on which its Board of Commissioners (as the highest decision making authority under section 2 of the Equality Act 2006) discussed the proposed operating model and agreed to its implementation. That decision was taken by the Board on 27 June 2017. The decision is recorded in the Board minutes which are made available on the EHRC's website in accordance with its publication scheme. EHRC provided the complainant with a precise link to where the information could be found on its website.
17. The Board minutes are made available by the EHRC as part of its publication scheme. Consequently, it is information which may be regarded as reasonably accessible pursuant to section 21(3) FOIA.
18. Having reconsidered this issue following the Commissioner's correspondence, the EHRC maintains the view that it correctly applied the exemption contained in section 21 FOIA to this aspect of the request. However it recognises that it should have been clearer in explaining the terms used in the Board minutes to the complainant and why the minutes were relevant to this aspect of his request. The EHRC rectified this lack of clarity at the review stage by explaining the terms used in the minutes and why they were relevant.

ii. What date was the decision announced to the workforce?

19. The second piece of information the EHRC considered was reasonably accessible to the complainant by other means was the date on which the decision to implement the TOM was announced to its employees. The EHRC announced the decision to implement the TOM to all of its employees, including the complainant, on 19 July 2016.
20. The EHRC acknowledged that it had mistakenly informed the complainant the date was 27 July 2016 and apologised for any confusion this has caused. As this information was recently provided to the complainant before his request, the EHRC considered that the information was reasonably accessible to him by other means.

On what dates were all TOM meetings and EOI workshops to date held?

21. The third piece of information the EHRC considered was reasonably accessible to the complainant was the dates of meetings and workshops relating to the TOM organisational changes and associated Expression of Interest Forms (EOI). EHRC explained these dates were recently provided to its employees, which at that point included the complainant, via line managers and various other forms of internal communications, such as calendar invites, internal communications emails and corporate weekly updates.

What date did the Commission publish the EOI form for staff to complete?

22. The fourth piece of information the EHRC considered was reasonably accessible to the complainant was the date that it made the EOI forms available to staff to complete. EHRC explained letters and follow-up emails had been sent to all staff, which included the complainant, directing them to the form and guidance on how it was to be completed.

What date were staff advised that they had to complete them by? Was there any extension to this date? If so, what was the extension date?

23. The fifth piece of information the EHRC considered was reasonably accessible to the complainant was the date, including any extension date, by which it told its employees to complete their EOI forms. The EHRC said it considered that this information was reasonably accessible to the complainant because the information had been communicated to all of its employees. However, the EHRC actually provided the information requested.

Conclusion

24. Having considered EHRC's response the Commissioner is satisfied that, in relation to the five pieces of information detailed above, section 21 applies. This is because, as an employee at the time some of the information had been provided to the complainant by line managers in email communications and the complainant also had access to EHRC's intranet.

Section 22 - Information intended for future publication

- xiv. How many of the members of CU haven't been given posts?*
(the second part of this request is dealt with in paragraph 52 onwards)

25. Section 22 states that:

(1) Information is exempt information if –

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

26. In order to determine whether section 22 is engaged the Commissioner therefore considered the following questions:

- When the complainant submitted the request, did EHRC intend to publish the information at some date in the future?
- If so, had EHRC determined this date when the request was submitted?
- In all the circumstances of the case, was it 'reasonable' that EHRC should withhold the information from disclosure until some future date (whether determined or not)?

Was the information held at the time of the request with a view to its publication at a future date?

27. EHRC explained that it applied section 22 to one piece of withheld information - how many members of CU (Correspondence Unit) were not given posts in the TOM organisational restructure.

28. As part of the wider TOM organisational restructure plan, the EHRC intended to publish an organisational chart which would show how many members of CU were not given posts in the TOM organisational restructure.

29. There was no set date for publication of the organisational chart at the time the request was received. The intention to publish the organisational chart was part of the overall operation of the TOM organisational restructure. Consequently, the exact date depended on progress of other elements of the restructure. As work on the restructure progresses, a decision on the exact date of publication will be made.

30. The EHRC is aware that information is only exempt from disclosure on the basis of a future intention to publish, if it is reasonable in all the circumstances to withhold the information from disclosure. The EHRC

explained that it factored this requirement into its consideration when applying the exemption to the information regarding how many members of CU were not given posts in the TOM organisational restructure. The EHRC decided that it was appropriate and in line with established employment/organisational restructure practices to follow the planned TOM organisational redevelopment timeline. The EHRC took the view that it would be unfair to its employees for information to be disclosed out of sync with the intended plan. Consequently, the EHRC considered that it would not be reasonable in all the circumstances to disclose the information before its intended publication.

31. The EHRC remains of the view that the publication of the information in question should be carried out as part of the wider planned TOM organisation restructure plan rather than on an ad-hoc basis via FOIA requests from former employees.
32. The Commissioner's guidance¹ states that although a public authority must hold the information at the time of the request with a view to its publication, the exemption does not require a set publication date in place. A public authority may still be able to apply section 22 if:
 - there is a publication deadline, but publication could be at any date before then;
 - publication will take place once other actions have been completed;
 - publication will take place by reference to other related events; or
 - there is a draft publication schedule that has not been finalised.
33. Therefore as long as the public authority has decided that it or another person will publish the information at some time in the future, the exemption may apply.
34. The Commissioner is satisfied that it was reasonable for EHRC to withhold the information from disclosure until some future date
35. As information intended for future publication is a qualified exemption, the EHRC should have considered whether there was any public interest in disclosing the information prior to the intended publication. The EHRC did not identify any such public interest nor present any arguments for

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intendedforfuture-publication-and-research-information-sections-22-and-22a-foi.pdf>

or against disclosing the requested information. Consequently, the Commissioner has made her own determination.

Public interest test

36. The Commissioner considers there is a general public interest to disclose information, as it increases transparency and accountability of public authorities.
37. The complainant has argued that this answer does not apply now, as from the 1 December those selected have been slotted in.
38. Given that EHRC's response was 15 November 2016 the Commissioner cannot consider events that happened after that. In cases such as these the Commissioner can only consider what was available or intended at the time of the request.

Conclusion

39. In this instance the Commissioner is satisfied that there is no overriding public interest argument for the information to be provided in advance of publication.
40. Having considered the EHRC's submission the Commissioner is satisfied that there is/was a settled intention to publish the requested information, at the time of the request, once the organisation restructure is completed. Therefore she finds that EHRC has correctly applied section 22 to this part of the withheld of the information.

Section 40 – Personal information

41. The complainant requested the following information:

vi. How many TOM meetings EOI workshops was I able to attend where the Commission had provided the RA's I needed?

vii. 5.17 of the Equality Act 2010 Employment Code of Practice... Did the Commission know of my disabilities? I.e. my mobility and hearing?

viii. Does the Commission have a record of my disabilities?

42. Section 40(1) states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

43. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
44. The complainant asked a series of questions regarding the EHRC's records of his disabilities and reasonable adjustments it had made in view of those disabilities.
45. The complainant also asked if the EHRC knew that he was having concerns about taking part in the EOI process due to not being able participate in the EOI meetings/workshops and if so what help the EHRC provided to the complainant to facilitate his participation and when.
46. EHRC considered that any information it held regarding these matters would by its nature relate to, and identify, the complainant.
47. Consequently, the EHRC found that the complainant was requesting his own personal data, as defined by section 1(1) of the Data Protection Act 1998, and applied the exemption in section 40(1) FOIA.
48. Section 40 is an absolute exemption and therefore is not subject to the public interest test.
49. In his correspondence to the Commissioner the complainant considered that part of his request only required 'yes/no' answers. The Commissioner acknowledges that this may appear to be the case, however as the request for information was made under the FOIA, consideration has to be given to the fact that the information would be in the public domain.
50. The Commissioner is satisfied that the information requested above is the personal data of the requestor and indeed also constitutes sensitive personal data. This relates to information concerning an individual's racial or ethnic origin, political opinions, religious beliefs, trade union activities, physical or mental health, sexual life, or details of criminal offences.
51. In accordance with paragraph 20 of the ICO's guidance on the [personal information exemption](#), when applying the personal data of the requestor exemption to the complainant's requests for his own personal data, the EHRC explained to the complainant that it would continue its consideration of his request as a subject access request under the Data Protection Act 1998 once he had paid the required fee.

Section 40(2)

- xv. *How many of those are disabled staff?*
(this relates to number of members of CU staff who haven't been given posts)
52. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
53. The Commissioner has again first considered whether the withheld information is personal data as outlined in paragraph 37.
54. In this instance the information in question, in theory, is statistical. However, the complainant asked for the number of people with a disability in a very small group of people, of which he was part. Due to the small sample size of the group, EHRC considered that any confirmation by it that the whole group or none of the group has a disability will disclose to members of the public sensitive personal data (see paragraph 42) about the individuals who make up the group. EHRC further considered that any confirmation that a certain number of the group have a disability will make it likely that any members of the public, with any knowledge of the group, particularly the EHRC's employees and ex-employees, will be able to use the statistical number together with have other information to identify the individual(s) within the group who have a disability.
55. As the EHRC considered it likely the statistical information would identify individuals within the small group, it was not able to say that the statistical number of people with a disability within the group is sufficiently anonymised so that it does not fall within the definition of personal data contained in section 1(1) of the Data Protection Act 1998.
56. Any request for the statistical information from those outside the group would have to be considered in accordance with the data protection principles pursuant to section 40(2) FOIA.
57. The Commissioner is satisfied that the information requested about the group is third party personal data. She has therefore gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has initially considered whether the disclosure of the withheld information under the FOIA would be fair.
58. When considering whether the disclosure of this information under the FOIA would be fair, the Commissioner has to take into account the fact that FOIA is applicant blind and that disclosure should be considered in the widest sense – that is, to the public at large. The Commissioner is

not able to take into account the unique circumstances of the complainant. Instead the Commissioner has had to consider that if the information were to be disclosed, it would in principle be available to any member of the public.

Reasonable expectations of data subjects

59. Although EHRC has not provided specific arguments in support of the exemption the Commissioner is mindful of her role as the regulator of the DPA and therefore has a responsibility to ensure compliance with that piece of legislation.
60. It is clear that it would be beyond the reasonable expectations of those concerned to have this information disclosed to the public at large.

Legitimate public interest in disclosure

61. The Commissioner has not been presented with any arguments from the complainant to make a compelling case that disclosure would be in the legitimate public interest.
62. The individuals concerned are not in a senior position and even if they were there would have to a very strong public interest to disclose sensitive personal data.
63. Given that the information withheld under section 40(2) relates to sensitive personal data, there is an even stronger case for it to remain exempt from disclosure.
64. The Commissioner is therefore satisfied that EHRC has correctly withheld this information under the exemption at section 40(2) of the FOIA.

Right of appeal

65. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

66. 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.

67. 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

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