

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 an employment tribunal case.
2. The Commissioner's decision is that the Equality and Human Rights Commission (EHRC) has correctly applied section 41(1) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

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

"I am writing to you to request full details of the case you quoted in your evidence to the Women and Equalities Committee. Since the information would have been provided in public to the Employment Tribunal I would like the name of the person who applied to the tribunal and the name of the company that was fighting the case.

Here is the extract from the evidence:

B v P, Employment Tribunal, (concluded: Apr 2015)

The claimant was a successful partner in a professional services firm. She claims that after her two pregnancies and maternity leave, she was discriminated against and eventually forced out of the partnership. The case was settled on confidential terms to the client's satisfaction"

5. The EHRC responded on 16 December 2016 and refused to provide the information requested citing section 41 of the FOIA as its basis for doing so.
6. The EHRC provided an internal review on 23 December 2016. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 30 January 2017 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the EHRC has correctly applied section 41 to the withheld information.

Background

9. EHRC explained that under section 28 of the Equality Act 2006 it is able to provide legal assistance to a person who has or may have a claim relating to a breach of the Equality Act 2010. The EHRC may provide the legal assistance itself or arrange for another person to provide it.
10. The provision and arrangement of such legal assistance is carried out by, or under the supervision of, lawyers employed by the EHRC. When the EHRC and its lawyers are providing legal assistance they are bound by professional duties of confidence. Under [outcome 4.1 of the Solicitors Regulation Authority's Code Conduct](#) ('the Code'), a solicitor must –

'...keep the affairs of clients confidential unless disclosure is required or permitted by law or the client consents;...'
11. It further explained that the EHRC provided legal assistance to [redacted] under section 28 of the Equality Act 2006 in relation to a claim in the Employment Tribunal. Claims in the Employment Tribunal are governed by the [Employment Tribunal Rules of Procedure](#). Under rule 56 any preliminary hearings are held in private, unless one of a number of specific decisions is to be made. Pursuant to rule 59, as the complainant suggests, final hearings are heard in public, unless the Employment Tribunal orders otherwise.

12. However, the EHRC's legal assistance led to the settlement of the case and a judgment under rule 52. Consequently, no final hearing was held in public.
13. Even if any information about the case were public, the terms of the settlement agreement are clear that both parties are still prevented from discussing the settlement or in any way draw attention to the case and wider circumstances.
14. In relation to the EHRC's ability to discuss or disclose information about the case, the settlement agreement includes a specific term requiring [redacted] to instruct the EHRC, via the solicitor handling her case, to keep all information relating to the case confidential.
15. As [redacted] legal representative, the EHRC is therefore under a professional duty of confidence to [redacted] regarding **all** information relating to the case, including the complainant's specific request for the names of [redacted] and her former employer.
16. The EHRC did not provide the withheld information to the Commissioner as this consisted of a large amount of highly-sensitive information in both electronic and hard copy forms. It was the EHRC's view, that it was not necessary for the Commissioner's functions for all of this information to be disclosed.
17. Having considered EHRC's response to her enquiries the Commissioner is satisfied that in this case, it is not necessary to see the withheld information.

Reasons for decision

Section 41 – information provided in confidence

18. Section 41(1) of the FOIA states that:

"Information is exempt information if –

a) it was obtained by the public authority from any other person (including another public authority), and

b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Was the information obtained from another person?

19. The EHRC was provided with the case details by [redacted] and her former employer when it was acting as [redacted]'s legal adviser. Clearly then, the information was obtained by the EHRC from another person.

Would disclosure constitute an actionable breach of confidence?

20. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

21. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
22. EHRC explained that none of the case details are accessible to any persons other than the parties, their legal representatives and the Employment Tribunal. It argued that the details of the case are far from trivial and are highly sensitive to both parties.
23. Under section 28 of the Equality Act 2006 EHRC is able to provide legal assistance to a person who has or may have a claim relating to a breach of the Equality Act 2010. Information provided in the course of discharging those functions will clearly carry some importance. The Commissioner is therefore satisfied that the information is clearly more than trivial and is not accessible by any other means.

Was the information imparted in circumstances importing an obligation of confidence?

24. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
25. EHRC stated that, as explained by the Master of the Rolls and Lord Justice Diplock in *Parry-Jones v Law Society* [1968] 2 W.L.R. 397 the

affairs of a solicitor's client enjoy the quality of confidence due to a contractual term, whether express or implied, between the solicitor and his client.

26. EHRC stated that the information was obtained by it in its role as legal advisers to [redacted] and the EHRC is subject to a specific instruction not to disclose the information. Consequently, the EHRC has a legal, regulatory and professional duty of confidence to [redacted] in respect of the information.
27. The Commissioner accepts that the information would have been provided in confidence. Clearly, legal matters naturally attract an obligation of confidentiality.

Would disclosure be of detriment to the confider?

28. EHRC explained that it was important to understand, any disclosure by it of the details of the case could cause [redacted] to breach the terms of the settlement agreement leaving her at risk of severe financial detriment. Further, and crucially, identifying [redacted] publicly as having been party to discrimination proceedings against her previous employer could damage her professional reputations and cause her difficulties when seeking new employment.
29. The Commissioner accepts that disclosure of the information could have serious detriment to the confider.

Is there a public interest defence for disclosure?

30. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether EHRC could successfully rely on such a public interest defence to an action for breach of confidence in this case.
31. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, significant public interest factors must be present in order to override the strong public interest in

maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.

32. The EHRC maintains it is clear that it would not have a public interest defence to a breach of [redacted]'s confidentiality.
33. Consequently, the disclosure of the information to the public would undoubtedly constitute a breach of confidence actionable by [redacted]. It would also leave the Commission and employees at risk of regulatory action from the Solicitors Regulation Authority.
34. The complainant stated that it was his contention that the reason for not releasing information is contrary to the FOI Act which specifically says information must not be withheld if it is embarrassing to the organisation. He considered that it is embarrassing to EHRC because it had appointed a partner of the firm in question to chair the organisation and it would also be embarrassing if EHRC cited the case against that firm to Parliament in a recent inquiry.
35. The complainant further stated that he was aware that some of the information was already in the public domain. However, as explained in paragraph 14, the settlement agreement includes a specific term requiring [redacted] to instruct the EHRC, via the solicitor handling her case, to keep all information relating to the case confidential.
36. The Commissioner has not been presented with any evidence to suggest that the public interest in disclosing the information is of such significance that it outweighs the considerable interest in maintaining the trust between confider and confidant.
37. Having considered all the circumstances of this case, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
38. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.
39. The Commissioner is also mindful of her role as regulator of the Data Protection Act. Given the nature of some of the information requested in this case, she also considers that section 42 of the FOIA may also be engaged with regard to some of the withheld information.

Right of appeal

40. 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

41. 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.

42. 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

Pamela Clements
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