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Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2017

Public Authority: 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 information relating to Equality and Human Rights Commission's (the EHRC) reasonable adjustments for disabled clients and section 28 of the Equality Act.
2. The Commissioner's decision is that the EHRC has correctly applied section 40(2) (third party personal data) to the information withheld in part a) of the request. She further finds that EHRC does not hold the information requested at part b) of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the information identified during the Commissioner's investigation, if it has not already done so, that is, the outlook appointment entry.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 19 August 2016, the complainant wrote to the EHRC and requested information in the following terms:

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- a) *“any information pertaining to the Commission’s consideration of the point identified by the RDMP in December 2015, namely the extent to which Ombudsmen are subject to the Public Sector Equality Duty and the extent to which the Legal Ombudsman should review whether solicitors should have made reasonable adjustments to their services assessing the quality of those services when provided to disabled clients. This should include any records of the discussion/consideration of this point and any records relating to actions taken and outcomes.*
- b) *records showing*
- i) the Commission’s consideration of whether S.28 permits it to assist with cases going before the ECtHR, which can only consider breaches of the Convention, not breaches of Equality Act 2010;*
- ii) how many times the Commission has assisted under S.28 with a case going before the ECtHR and which Articles it relied on;*
- iii) what the Commission’s interpretation of S.28 (12-13) Equality Act 2006 is and what effect it believes those subsections have on S.28(1) in terms of what types of cases it can assist with.”*
6. The EHRC responded on 15 September 2016 and provided some information within the scope of the request but refused to provide the remainder. It cited section 40(2) of the FOIA as its basis for doing so.
7. In addition the EHRC denied holding the information requested at part b(iii) of the request.
8. Following an internal review of parts a); b(i) and b(ii) the EHRC wrote to the complainant on 26 October 2016. It maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 13 January 2017 to complain about the way his request for information had been handled.
10. In further correspondence with the Commissioner the complainant explained that in point a) of his request he asked for “any information pertaining to the EHRC’s consideration of the point identified by the RDMP in December 2015”, namely the extent to which Ombudsmen are subject to the Public Sector Equality Duty.
11. The complainant considered that this should include any records of the discussion/consideration of this point and any records relating to actions taken and outcomes.

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12. He further identified that he was complaining about the EHRC's failure to provide said information and that the response to part a) of the request should also be considered.
13. The complainant also explained that his FOI request had been for any records that did not meet the criteria to be provided in response to his Subject Access Request (SAR). The complainant had raised a separate complaint about how his SAR had been dealt with. The complainant stated that the matter of whether some of that information should have been provided in response to his FOI request still needs to be considered. He went on to refer to specific documents.

I believe you also need to consider whether the documents I referred to in my letter to you dated 21 November 2016, specifically on p.4 under 2(a)(i) and p.6 under 2(b)(i-vii), should have been provided in response to my FOI.

14. Finally the complainant was concerned whether it was appropriate for Ms Hewitt to deal with the internal review request.
15. The Commissioner considers the scope of this case to be to determine if the EHRC has correctly applied section 40(2) to part of the withheld information. In addition she will consider if the EHRC holds any further information regarding part b(i) of the request and does not hold the information requested at point b(iii) of the request.
16. In addition she will also consider whether the complainant should have been provided with any additional information under the FOIA that was not covered by his SAR.

Reasons for decision

Parts a) and b) of the request

Section 1 – Information held/not held

17. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request and, if so, to have that information communicated to them, subject to the application of any exemptions that are appropriate.
18. Where there is some dispute between the amount of information identified as being held by a public authority and the amount of information that a complainant believes may be held, the Commissioner,

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following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.

19. Therefore, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or whether such information was held at the time of the request).
20. EHRC explained that a 'Memo' was sent on 5 September 2016 to its Legal Team Freedom of Information Co-ordinator asking for the Legal Team to search for and retrieve any information relevant to the request. The Legal Team was deemed to be the relevant team to approach, given that the request concerned the use of the EHRC's legal powers and a Regulatory Decision Making Panel (often referred to as 'RDMP') paper – a matter which sits within the responsibility of the Legal Team. On 12 September 2016, a member of the Legal Team confirmed:

"I'm not aware of any consideration by the Commission of the question of whether we are permitted to provide section 28 assistance to cases coming before the European Court of Human Rights ('ECtHR'). I've searched the counsel's opinion database and not found anything relevant.

"I can find no cases assisted by the Commission under section 28 which were going before the ECtHR. In the master record of section 28 cases, ECtHR does not appear against any cases in the field for "court/tribunal". And where that field is blank, I have checked whether it is a case against the UK to identify if it might be a ECtHR case and none are."

21. EHRC explained that information regarding the cases it has been involved with pursuant to section 28 of the Equality Act 2006 is held centrally in the 'Master record of section 28 cases' on the EHRC's shared G-drive network/Legal files. In the interests of thoroughness, it stated that the database of Counsel's opinion, which is also held centrally, was also searched. As both these databases are held centrally, a search of information held locally on personal computers used by staff was not necessary.
22. It further explained that due to the nature of section 28(12) and (13) and the relationship with section 28(1) of the Equality Act 2006, any cases which included their involvement would relate to the ECtHR and the UK. The 'Master record of section 28 cases' was, therefore, searched for ECtHR but it did not appear against any cases in the field for 'court/tribunal'. Where that field was blank, further checks were carried out for cases involving the 'UK'. The Counsel's opinion database was also

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searched for references to the relevant parts of section 28 of the Equality Act 2006.

23. EHRC stated that if the information was held it would be held electronically in the 'Master record of section 28 cases' which is stored on the its shared G-drive network/Legal files. As mentioned above, if the information was held there is also a possibility that it would be held on the Counsel's opinion database.
24. Following the Commissioner's correspondence, the EHRC asked the Legal Team again about whether any information about this issue was held and how it would approach the interpretation of section 28(12) and (13) and section 28(1). The Legal Team again said that it was not aware of any information such as minutes, Code of Practice, press release or legal submissions being held relevant to the scope of the request.
25. The Legal Team further explained that if the question of how to interpret the relevant subsections arose, they would consult the Explanatory Notes to the Equality Act 2006 and legal databases, such as Westlaw and LexisNexis. The EHRC would of course also have the option of obtaining external legal advice regarding the interpretation.
26. The EHRC stated that the retention review period for its legal records is currently six years. The EHRC's document retention policy is currently being reviewed. Generally, however, information about its approach to or interpretation of a specific statutory provision would be held by the Legal Team in the relevant part of the EHRC G-drive until such a time as the information was no longer relevant to its work.
27. Enquiries with the EHRC's Legal Team have confirmed that the specific issue, to which the requested information relates, has never come up as part of its work to date. Consequently, there has never been a business purpose for which the requested information should be held.
28. The EHRC further stated that as a public body accountable for public funds, it needs to maintain records regarding its decision making. Consequently, in the EHRC's view, if the issue had been raised previously there would be an appropriate record of the information held in the Legal Team's area of the EHRC's G-drive.
29. The EHRC maintained that it does not, and has not, held information relevant to the scope of this part of the request.
30. Following further correspondence with the Commissioner the EHRC undertook further searches. These searches identified that a senior lawyer who had written to the complainant on 15 August 2016, had a meeting scheduled with a colleague from the Correspondence Unit on 9 August 2016. The subject of this meeting was to discuss the

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complainant's case. The meeting was recorded on the 'Outlook' calendar system and EHRC acknowledged that this information should have previously been disclosed to the complainant.

31. EHRC explained that this information was identified through questioning members of the legal team and carrying out searches, including of the Outlook calendars in light of the response. No further information has been identified that falls within the scope of the request.
32. Having considered the above, the Commissioner is satisfied that EHRC has carried out thorough searches for the requested information in the most relevant and likely places. The Commissioner is further satisfied that if such information was held then the searches detailed above would have identified it.
33. The Commissioner considers that, on the balance of probabilities, no further information related to the request is held by EHRC.

Part a) of the request

Section 40(2) – Third party personal data

34. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data

35. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
36. The information being withheld is the names of three specific members of staff. EHRC explained that they are an officer that presented the request for assistance to a RDMP and two staff who were consulted on the extent to which public ombudsmen are subject to the public sector equality duty.
37. It is clear that the names of the individuals will relate to them and make them identifiable.

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Would disclosure breach the Data Protection Principles?

38. The Commissioner has 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 would be fair.

39. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- the reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
- the circumstances in which the personal data was obtained;
- any particular circumstances of the case, e.g. established custom or practice within the public authority; and
- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- the consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed?

In consideration of this factor the Commissioner may take into account:

- whether information of the nature requested is already in the public domain; if so the source of such a disclosure;
 - and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
40. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.

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41. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
42. EHRC explained that at the internal review stage it had considered that disclosure of the responsible officer's name may have been fair. However, it further considered that none of the conditions in Schedule 2 of the DPA were met and so maintained the exemption.
43. With regard to the two remaining staff EHRC stated that it would be unfair to disclose their names as:
 - they had not given their consent;
 - the data was being processed for the purposes of their work at ECHR;
 - the staff were neither senior nor did they have public facing roles;
 - they had no expectation that their names would be disclosed to the public at large;
 - they were consulted only on a technical matter and did not make a proposal or decision in relation to the individual's case.
44. The Commissioner is satisfied that the two members of staff consulted on a technical matter would have a reasonable expectation in the circumstances of this case that their names and contact details would not be disclosed under FOIA and therefore would be unfair, breaching the first data protection principle. This information is therefore exempt from disclosure on the basis of section 40(2) of the FOIA.
45. With regard to the name of the responsible officer, this information has been provided to the complainant outside of the FOIA. The Commissioner cannot see any compelling reason for disclosure under the FOIA and therefore considers this information also to be exempt on the basis of section 40(2).

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Other matters

Was it appropriate for Ms Hewitt to deal with the IR?

46. The Commissioner has no authority to order a public authority on how it carries out its internal review process, nor who should be responsible for it. She expects appropriate processes to be in place, and in this instance is satisfied that is the case.

Should the complainant have been provided with any additional information under the FOIA that was not covered by his SAR?

47. The EHRC explained that a number of emails and other documents were provided to the complainant in response to his SAR of 19 August 2016. These were redacted to remove information which identified members of its staff.
48. The EHRC stated it had explained to the complainant that this information was not disclosable in response to the SAR. The EHRC further stated that it recognised that the complainant asked for any information that was not disclosable in response to his SAR to be considered for disclosure under the FOIA.
49. The EHRC explained to the Commissioner that the information identified a number of members of its staff and was the personal information of those members of staff. Given that it was not reasonable in the circumstances to provide that information in response to a SAR, EHRC could not envisage that it would have been appropriate to disclose it to the world at large in response to a FOIA request.
50. Following further correspondence with the Commissioner the EHRC accepted that it should have formally considered whether the personal information of staff was disclosable in response to a FOI request. It therefore undertook formal consideration of the matter.
51. The EHRC explained that the members of staff were all junior members of staff in correspondence, admin or support roles and that publishing their names would be in breach of the first data protection principle. The EHRC considered that the information was exempt by virtue of section 40(2) of the FOIA. The Commissioner considered this in the same way as that detailed above at paragraph 34 and for brevity has not repeated these considerations here.
52. The Commissioner's conclusion is that this information is also exempt from disclosure by virtue of section 40(2).

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53. The complainant further considered that other information withheld in response to his SAR should have been disclosed to him under his FOI request. For example, an email relating to accessing documents.
54. The complainant has further stated that ECHR '*claims there is no record of a reply and it is likely that any reply was given verbally. It is especially hard to assess the likelihood of this when both the sender and recipient of the email are redacted*'. As detailed above, this information is considered to be third party personal data and therefore not disclosable under FOIA.
55. The Commissioner is satisfied that there is no additional information held by ECHR that should have been provided to the complainant under the FOIA.

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Right of appeal

56. 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

57. 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.
58. 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

Andrew White
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