

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 2021

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 about the application of the Public Sector Equality Duty to university enterprise departments. The Equality and Human Rights Commission ("EHRC") denied holding information within the scope of the request.
2. The Commissioner's decision is that EHRC does not hold information falling within the scope of the request and, as it informed the complainant of this fact within 20 working days, it has therefore complied with its obligation under section 1(1)(a) of the FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 8 September 2020, you requested information of the following description:

"I am writing this freedom request to ask for information (in the form of documents or other media) which outline what the position is of your organisation and the government with respect to whether enterprise departments within universities which can be either public or hybrid authorities have to comply with the public sector equality duty."
5. On 29 September 2020, EHRC responded. It denied holding the requested information.

6. The complainant requested an internal review on the same day. EHRC sent the outcome of its internal review on 23 October 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 28 October 2020 to complain about the way his request for information had been handled. He considered that, as the regulator of equality legislation, EHRC should hold relevant information.
8. The Commissioner considers that the scope of here investigation is to determine whether, on the balance of probabilities, EHRC holds any information within the scope of the request.

Reasons for decision

9. Section 1(1) of the FOIA states 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.*

10. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
11. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
12. Following the lead of the Tribunal in *Bromley v Information Commissioner & Environment Agency* (EA/2006/0072), the Commissioner is entitled to make such a judgement based on the:

"the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted."

The complainant's position

13. The complainant argued that university enterprise departments were "hybrid" public authorities and that they were thus required to comply with the Public Sector Equality Duty. He put forward several documents to support this view.

14. In particular, he drew the Commissioner's attention to correspondence he had engaged in with the Equality Advisory Support Service which, he argued, stated that a particular university enterprise department did have to comply with the Public Sector Equality Duty. He noted that

"The EASS must be basing its advice upon the law which the EHCR [sic] oversees. They should thus be able to state whether the advice which has been given by the EASS is correct and provide documentation to that effect."

15. He also argued that the EHRC was "biased" because it was headed by individuals who had studied at Cambridge and he had made a complaint about an organisation associated with that University.

EHRC's position

16. Through its solicitors, EHRC noted that it was not required to create information in order to satisfy an information request. It must already hold the information in recorded form at the point the request is received.

17. EHRC explained that it had consulted various members of its staff who would be aware of relevant information. These had included its Inquiries and Intelligence team – who noted that the topic had not been mentioned in the recent Higher Education report; the Principal, Human Rights Monitoring – who also held no relevant information; and the Education lead – who advised that it was unlikely that they held information because their work is mainly focused on schools. None of the staff reported back that either they or their teams held relevant information.

18. In addition, EHRC noted that it had attempted to carry out some electronic searches. By using keyword searches, it had narrowed down 4,500 emails to just 120 by using the terms "PSED" AND "University" where used NEAR "Enterprise" for a two year period – but none of those emails had turned out to be relevant.

19. EHRC explained that:

"There was a total of 60,219 results from the G Drive comprising 26,258 items containing the phrase PSED; 26,841 containing the phrase University and 7,120 containing the phrase Enterprise. Considering the lack of relevant information found in the email exchange and the comments from members of staff, the Commission determined that it was unlikely that any of these results would be relevant information and so closed their searches.

"The Commission's ICT service desk confirmed that the G Drive only has a basic search capability and that it is not possible to do logic searches using AND/OR terms as is the case for the email exchange: only individual words or a string of words can be searched against. The Commission therefore searched for the above three terms individually."

20. As well as electronic searches, EHRC also explained that this was an area of the law that was untested. Whilst it did hold some information about the application of the Public Sector Equality Duty to hybrid public authorities in general, it did not consider that this would satisfy the complainant's more specifically-worded request. It also noted that, even if the information were within scope it would be considered to be legally-privileged.
21. Finally, EHRC confirmed that it was not aware of any relevant information that had been deleted or destroyed.

The Commissioner's view

22. The Commissioner is satisfied that EHRC has carried out reasonable searches to establish the information that it holds. On that basis, she is satisfied that, on the balance of probabilities, EHRC holds no information within the scope of the request.
23. It is not the role of the Commissioner to determine whether university enterprise departments (or indeed any other organisation) are, or are not, subject to the Public Sector Equality Duty – nor whether they should be. Her role is to consider whether EHRC holds, as a matter of fact, information showing its position on this particular matter.
24. The Commissioner has reviewed the documents provided by the complainant but, in her view, nothing in those documents would suggest that EHRC holds further information.
25. The correspondence exchanged, with the Equality Advisory Support Service does not provide the unequivocal statement that the complainant has suggested it does. The responses were much more nuanced and stressed that, whilst the Service can state what the law says, they cannot provide a bespoke interpretation of how it applies to every individual situation. However, even if the Commissioner were to

accept that an unequivocal statement had been provided, the Equality Advisory Support Service is a completely separate entity from EHRC and therefore any information it holds would not be held by EHRC.

26. It is apparent that no definitive view is held by EHRC on the question posed by the complainant. Resolving the matter is likely to involve work by EHRC and (most probably) by the courts, before a substantive response is possible.
27. Notwithstanding that, it is evident that EHRC has made reasonable searches to establish whether it does hold relevant information. Whilst it has not searched the twenty six thousand documents it holds containing the search term "PSED", the Commissioner considers that there is no other evidence to suggest such a search would identify anything of relevance. In addition, she notes that EHRC would have to search in excess of a thousand documents per hour if it were to complete such a search without exceeding the FOIA cost limit – a feat which she considers implausible.
28. The Commissioner accepts that the complainant's request sought information relating to the position of university enterprise departments specifically – not hybrid public authorities in general. Therefore more general guidance would not fall within scope
29. The fact that the complainant appears to believe that EHRC *ought* to hold information of this type does not mean that it does, as a matter of fact, hold that information.
30. The Commissioner struggles to see why the education of the most senior officials at the EHRC would affect how likely (or unlikely) it would be that the organisation, as a whole, holds information of this (or indeed any other) description.
31. The Commissioner is therefore satisfied that EHRC has complied with its duty under section 1(1)(a) of the FOIA to inform the complainant that it holds no information within the scope of his request.

Right of appeal

32. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

33. 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.
34. 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

Roger Cawthorne
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