

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2023

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

Decision (including any steps ordered)

1. The complainant requested a catalogue, index or similar in respect of the formal and informal enforcement work of the Equality and Human Rights Commission (the 'Commission'). The Commission stated that it does not hold this information. The Commissioner's decision is that on the balance of probabilities, the Commission has complied with its obligations under section 1(1) FOIA for the reasons set out in this notice. The Commissioner does not require any steps.

Request and response

2. On 2 October 2022, the complainant wrote to the Commission and requested the following information:

"Please disclose how the public can guess what EHRC can and cannot:

a) retrieve with unknown degrees of ease using unknown terminology,
b) disclose [see below]
c) search for, not just supply, when requested in accessible formats".

3. Following various correspondence between both parties to clarify the nature of the request, the Commission confirmed in its response of 6 January 2023 that it had reached the following final interpretation of the request as:

"...a catalogue, index or similar which incorporates all detailed requirements and summaries of our formal and informal compliance work as referenced in the Report". [Women and Equality Select Committee Report]¹ (henceforth referred to as the Report).

4. It also stated that:

"Whilst we appreciate that this information would be of great assistance to FOI requesters, we do not hold such information."

5. The Commission did however provide a link to its Legal Case Search on its website which it explained provides access to a sample of cases which it has been involved in.
6. Following an internal review, the Commission wrote to the complainant on 16 February 2023. It upheld its original response that it does not hold information relevant to the request.

Scope of the case

7. The complainant contacted the Commissioner on 12 March 2023 to complain about the way their request for information had been handled. They informed the Commissioner that although their request and past requests were quite extensive, they considered the issue to be a simple one, but a conundrum and stated:

"The way that EHRC keeps its records make it almost impossible for them to identify and supply documents within cost limits unless the specific document or terminology is known to the requester. But the requester often cannot reasonably know the specifics. Narrowing the range of dates does not work because the requester does not have enough information..."

¹ <https://publications.parliament.uk/pa/cm201919/cmselect/cmwomeq/96/96.pdf>

1. My request also included 'disclosure' and 'by disabled people'. Please exclude these from the complaint, which is already complicated.
2. Part-way through I narrowed my request to ask about 'formal and informal enforcement' after my attention was drawn to an important exchange between the Women and Equality Select Committee and EHRC but the latter still could not find [or disclose] some of the 250 cases of 'information enforcement'".
8. The scope of the Commissioner's investigation is to consider whether the Commission has complied with its obligations under section 1(1) FOIA.

Reasons for decision

Interpretation of request

9. The Commission's advised the Commissioner that it did not consider the original request dated 2 October 2022 to be a valid request for information as the ability of the public to 'guess' something does not constitute recorded information. As such, the Commission contacted the complainant on a number of occasions following the request to establish the exact nature of their request.
10. During these exchanges, the complainant stated that:

"This is about how outsiders like me can fairly request and receive recorded information in your system...

a] in sufficient detail so that I or any other FOI requester can reasonably identify records which you can then locate.

b] covering all of what the Women and Equality Select Committee describe as:

'enforcement activity, including both formal and informal compliance work. This should include summaries of the facts of cases, along with information on the outcomes in a way that can act as case studies on what compliance looks like and act as a deterrent to discrimination'.
11. The complainant also quoted the following recommendation and response from paragraph 54 of the Report:

"Recommendation:

54. We recommend that the EHRC publish data on its enforcement activity, including both formal and informal compliance work. This should include summaries of the facts of cases, along with information on the outcomes in a way that can act as case studies on what compliance looks like ...

Response: We agree that transparency is important and have developed a case study database for our website which will provide people with a deeper understanding of our enforcement work... It will be available on our website, and promoted as widely as possible, during this year."

12. The Commission's final understanding of the request was outlined in its substantive response of 6 January 2023, and the Commissioner notes that the complainant has not disputed this.
13. It is the Commissioner's view that public authorities must interpret information requests objectively and should avoid reading into the request any meanings that are not clear from the wording. If the request clearly specifies exactly what information or documents the requester wants, the authority will comply by providing this information (unless it is exempt from disclosure). If an authority receives an unclear or ambiguous FOIA request its duty under section 16 of the FOIA to provide advice and assistance will be triggered and it must ask the requester for clarification.
14. The Commissioner would point out that section 1 of FOIA makes it clear that when handling a request, a public authority's primary duty is to consider whether, as a matter of fact, the requested information is held, before going on to consider whether it may be disclosed.
15. In reaching a decision on the interpretation of the request in this case the Commissioner has taken into account the 'header' of the request – "EHRC Ability to Retrieve and Disclose FOI Information". He also notes that in several exchanges with the Commission the complainant stated that they were interested in receiving information which would allow the public to make a more focussed request in the future. The complainant has also suggested that having knowledge of the type of information and records that the Commission holds would make this possible.
16. The Commissioner considers that this request, is not whether the Commission holds information about its enforcement and pre-enforcement work, as this is not in dispute, but whether it holds a catalogue, index or similar which incorporates all the detailed requirements and summaries of its formal and informal compliance work as referenced in the Report, and referred to earlier in this notice.

17. Based on the exchanges between the complainant and the Commission between the date of the request and the Commission's response dated 6 January 2023, the Commissioner is satisfied that the Commission's interpretation of the request, is an objective one.

Section 1 – general right of access

18. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them.
19. In cases where a dispute arises over whether recorded information is held by a public authority at the time of a request, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
20. This will include consideration of the complainant's arguments, and details and evidence of the search conducted by the public authority along with its reasoning as to why it is unlikely that relevant information is held.
21. The complainant has expressed concerns regarding the Commission's record keeping, stating that it makes it impossible for it to identify and supply documents within the appropriate cost limit unless the specific document or terminology is known to the requester.
22. The Commission provided the Commissioner with some background information to this request. It explained that it succeeds a previous request which had focused on disability discrimination and which the Commission had refused on the basis of section 12 FOIA (cost of compliance).
23. In response to the complainant's expectations regarding the case study database referred to in its response to the Report, the Commission informed the complainant in its internal review that following additional enquiries, it could find no database or similar application that provides details of formal and informal compliance work that summarises facts of cases other than the Legal Case Search and 'Our Legal Casework' already referred to.
24. Additionally, the Commission subsequently clarified to the Commissioner that the reference to a case study database, was a

recommendation not a requirement. It further stated that did not undertake to fulfil this recommendation, and explained that the database referred to in its response was the Legal Case Search on its website which it has already signposted the complainant too.

25. The Commission informed the Commissioner that it had discussed the matter with senior members of its legal team in charge of its enforcement work and a legal director. These are the relevant staff who would be aware if the information requested exists. They are very clear that a single document which is a catalogue, index or similar, containing all the relevant information is not held.

26. The Commission added that it had also considered whether information could be extracted into the format desired by the complainant and had concluded that it was not possible for a number of reasons. For example:

"the Request seeks 'summaries of the facts of cases, along with information on the outcomes in a way that can act as case studies on what compliance looks like and act as a deterrent to discrimination', as per the Committee Report, on every single compliance work ever conducted including 'instances say when EHRC think a breach may have been committed' in accordance with the complainant's email of 7 December 2023".

27. The Commission has confirmed that such case summaries (and other information), in such specific detail and purpose does not exist in respect of all formal and informal compliance work it has undertaken, which is what the complainant has indicated they are seeking access too.

The Commissioner's conclusion

28. The Commissioner has considered the complainant's concerns, details of the Commission's searches and its arguments regarding why it does not hold relevant information.

29. In respect of the complainant's concerns regarding the case study database. Whilst he accepts that the recommendations from the WEC report and the Commission's response in respect of the database outlined in paragraph 11 of this notice, give the impression there may be a database of the description anticipated by the complainant, he considers the explanation provided by the Commission that it was not a requirement and it referred to the Legal Casework Search is reasonable.

30. Additionally, he has no reason to doubt the assurances from senior members of the Commission's legal team in charge of enforcement work

and its legal director that they do not hold a catalogue, index or similar containing all the relevant information.

31. Having taken into consideration the facts of this case, and the representations from the Commission, as set out above, the Commissioner is satisfied that, on the balance of probabilities, it does not hold the requested information, namely a catalogue, index or similar incorporating all detailed requirements and summaries of formal and informal compliance work. The Commissioner has therefore concluded that on the balance of probabilities, that it has complied with its obligations under section 1(1) FOIA.

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

Catherine Dickenson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF