

## Freedom of Information Act 2000 (FOIA)

**Date:** 5 March 2012

**Public Authority:** Equality and Human Rights Commission  
(the 'EHRC')

**Address:** 3<sup>rd</sup> Floor,  
Lancaster House,  
67 Newhall Street,  
Birmingham  
B3 1NA

### Decision (including any steps ordered)

---

1. The complainant asked the Equality and Human Rights Commission ('the EHRC') for information about the number of 'requests for assistance' made by Irish people and their outcome.
2. The EHRC explained that they could not work out this information without doing work beyond the costs limit and applied section 12(1) of FOIA ['the costs limit']. The complainant referred a complaint to the Information Commissioner ('the Commissioner').
3. The Commissioner's decision is that the EHRC applied section 12(1) appropriately in this case. However, it failed to offer reasonable advice and assistance and so breached the requirements of section 16(1).
4. The Commissioner has considered what would constitute reasonable advice and assistance and has concluded that there are only two possible options. He has elected to say what they are in this decision notice and therefore used his discretion not to order any remedial steps in this case.

### Request and response

---

5. On 17 June 2011 the complainant requested the following information from the EHRC:
  - a. *'How many requests for assistance from Irish people has the EHRC dealt with since their creation in 2006?; and*

*b. How many of those requests resulted in the Commission siding with those who requested assistance?*

6. The Commissioner has clarified with the complainant what he meant by 'requests for assistance' and he told the Commissioner that he meant any request for assistance that the EHRC received.
7. The EHRC responded on 8 July 2011. It explained the nature of the requests for assistance that it received and confirmed that it did not always ask for an individual's ethnicity (either because the individual did not want to say or they were not asked). It explained that it called its main source of assistance as being requests for legal assistance under section 28 of its legislation. It explained that this information was kept by its Casework and Litigation Team. However, it explained that it would have great trouble locating and extracting the requested information and it estimated that it would take more than 5 working days to find the information just for the section 28 cases. It explained that it was therefore relying on section 12(1) of FOIA.
8. Following an internal review the EHRC wrote to the complainant on 3 October 2011. It maintained its position.
9. The Commissioner asked for detailed explanations about how it held the relevant information and for a proper explanation about why finding this information would exceed the costs limit. This explanation can be found in the 'reasons for decision' section of this Notice. He considers it is not helpful to provide more detail about their original responses in this section because it would lead to confusion.

### **Scope of the case**

---

10. The complainant contacted the Commissioner on 17 August 2011 to complain about the way his request for information had been handled. At that stage, he had not received an internal review and the Commissioner contacted the EHRC to chase this up.
11. On 14 November 2011 the complainant then asked the Commissioner to consider the complaint substantively.
12. On 4 January 2012 the complainant agreed that the scope of the Commissioner's investigation would be to determine:
  - Whether the EHRC applied section 12(1) appropriately to the request that he made on 16 June 2011.

13. On 17 January 2012 the complainant confirmed to the Commissioner that 'requests for assistance' meant any request whatsoever for assistance that EHRC receives and the Commissioner has considered this complaint on that basis.
14. The Commissioner has also proactively considered whether appropriate advice and assistance has been provided because he considers that when the cost limit is applied, the public authority has a duty to offer advice and assistance where it is reasonable to do so.

### Reasons for decision

---

15. The exclusion that is being relied on in this case is found in section 12(1) of FOIA which states that:

*'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'*

16. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations") provide that the cost limit for non-central government public authorities is £450. This must be calculated at the rate of £25 per hour, providing an effective time limit of 18 hours.
17. If a public authority estimates that complying with the requests would exceed 18 hours, or £450, section 12(1) provides that the request may be refused.
18. The Commissioner will now consider whether the EHRC was entitled to apply section 12(1) to the two requests. What the Commissioner must initially consider is whether the EHRC is entitled to combine the work together for these two requests, or whether each request should be considered individually.
19. When considering whether requests can be aggregated or need to be considered individually the Commissioner is guided by Regulation 5 of Fees Regulations that states:

*'5. - (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority -*

- (a) by one person, or  
(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*

*the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.*

*(2) This regulation applies in circumstances in which-*

*(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and*

*(b) those requests are received by the public authority within any period of sixty consecutive working days.'*

20. In order to aggregate the two requests for the purposes of section 12(1) the Commissioner must determine whether they relate to any extent, to the same or similar information.<sup>1</sup>
21. The Commissioner considers that both requests concern the EHRC's handling of requests for assistance by Irish people. The Commissioner considers that the two requests are to some extent similar to one another and this part of the test is therefore satisfied.
22. As well as the two requests being similar it is also necessary for them to be submitted within 60 working days and made by the same person. In this case the two requests were submitted by the complainant at the same time and he considers that the EHRC can aggregate the costs for the two requests.
23. The Commissioner's subsequent analysis into the operation of section 12(1) will have two parts, which are:
- To explain EHRC's relevant estimate; and
  - To consider whether that estimate only related to the relevant prescribed activities and whether it is reasonable.
24. The Commissioner will consider each part in turn:
- 

<sup>1</sup> This has been considered by the Information Tribunal in *Ian Fitzsimmons v Department for Culture, Media and Sport* - [EA/2007/0124](#). It emphasised that the words in Regulation 5(2)(a) should be given their natural meaning (at paragraph 43).

## What was the EHRC's relevant estimate?

25. The EHRC provided the Commissioner with its detailed estimate. While providing its estimate, it explained that it understood that it could only include the work that was outlined in Regulation 4(3) of the Fees Regulations, which allows only the following four activities to be considered:

*"(a) determining whether it holds the information,*

*(b) locating the information, or a document which may contain the information,*

*(c) retrieving the information, or a document which may contain the information, and*

*(d) extracting the information from a document containing it."*

26. It also understood that the onus was on it to prove that the work required to process the requests would take longer than 18 hours and provided the Commissioner with a detailed explanation about what work would need to be done.

27. To find all the 'requests for assistance' the EHRC explained that it would need to check the records in three teams:

1. **Its Helpline (GB)** – this deals initially with all the cases from England and Wales;
2. **Casework and Litigation (England);** and
3. **Legal (Scotland).**

28. It explained that the majority of cases start life with its Helpline. They are then referred to one of the teams that follow when they are eligible to be considered more substantively.

29. It then explained the nature of the electronic databases that it had in each team, whether they can be used to address the requests and these explanations are below:

**The Helpline (GB)** – there are two relevant databases:

◇ 1 October 2007 to 9 December 2007 – the EHRC used a database inherited from the Equal Opportunities Commission called 'Chalice'. 'Chalice' does include monitoring questions as standard. However, it did not record 'Irish' as a distinct ethnic group (although it was possible to note it manually by clicking on 'Other' as the ethnic group before noting 'Irish' in the additional notes section); and

◇ 10 December 2007 – its transition team<sup>2</sup> implemented a new database called ORACLE Siebel Customer Relationship Manager ('CRM'). It is now used by the Helpline team to record all enquiries. CRM does have a field for monitoring ethnicity and it does have a special category for 'White-Irish'. However, the database was connected to the primary strands (such as protected characteristics and themes (such as employment and education) and not to client information. This means that it is not possible to run a report on the CRM to link the ethnicity to case outcomes. In addition, it noted that the recording of ethnicity was not mandatory and only about 12% of those fields were occupied by data. It explained that it can also search for a key word such as 'Irish', but this would only look at the description and comments part of the database and would not bring up references to this matter in the key documents in the case.

**The Casework and Litigation (England)** team has two databases:

◇ The first is called Legal Information System ('LIS'). This is used by the Casework and Litigation team to record the details of section 27 and 28 referrals. One of the fields does record ethnicity in a combination of drop down lists and free text. However, when the database was designed a reporting function was not included. It bought the database from a third party and its own ICT team have not been able to create a new reporting function. Consequently, the only way to extract information would be to do so manually.

◇ The second is called Access. This database was set up in June 2009 to overcome the lack of a reporting function on LIS. It does record the ethnicity of complainants (when recorded) and this data is used to create Equal Opportunities monitoring reports to its Business Planning team. It can therefore see how many cases where the complainant was of a given ethnicity from June 2009. However, it does not record the outcome information and it would need to cross refer the report on Access with the data it holds manually to find this out. It also doesn't record information about cases that have been referred to it but not yet considered (characterised below as Enquiry cases).

**Legal (Scotland)** uses a database called 'Scotland Legal Database'. It does contain equality monitoring information and outcomes. A report can be used on this particular database to bring the two together.

---

<sup>2</sup> Which was responsible for transferring the functions from the three bodies that were amalgamated to form it - the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission.

30. It then detailed the searches that it would need to undertake for each team to find what has been requested . The Commissioner will consider each team in turn and explain his view after considering the EHRC's submissions:

31. For the **Helpline (GB)**, the EHRC explained it would need to do the following:

◇ The first job would be to identify 'all requests for assistance'. The majority of calls on its Helpline are likely to be requests for assistance of some sort, but it is not clear that every call would be. It explained that the only way it could be sure that only the 'requests for assistance' were identified would be to check every file.

◇ Even if it assumed that every case may be relevant, it would be required to check that the request came from an Irish person. This would be very difficult for the reasons outlined above. The only way to be sure would once again be a manual check all its files.

On the Commissioner's invitation, it explained the searches it could do to try and gather the relevant information and explained why they would prove inadequate:

- As noted above, it could do a word search on the database but this would only pick up some of the relevant cases. This is because it would not pick up any case where the information was mentioned in the attachments and not directly on the database;
- It could focus on only those who identified themselves as 'White-Irish' on its database and look for those noted as such in the 'Other' section of the database. This would also only pick up some of the records (potentially less than 12%); or
- It could focus purely on those cases that were formally identified as requests for assistance by the Helpline (ie those passed on to Casework and Litigation (England) team). It would immediate be limited because those cases the Helpline dealt with itself wouldn't be caught. It explained for the referred cases, the Helpline team fills out a referral form that includes the monitoring data on CRM and this would need to be transcribed when gathered. However, the downsides are that this part of the form is not always filled out (even when the data was on the database) and so for those where it was not, it would still need to check the CRM and there would still be problems in not getting all the relevant data. It explained that it had considered whether it could search the forms where they were saved directly, but this would lead to wrong positives (such as individuals who had mentioned the Irish, but weren't Irish) and wouldn't identify

those forms where the 'Other' box that was ticked, but 'Irish' wasn't transcribed.

◇ It would then need to find the outcome of the case. The only way it could do this would be to check the individual files. It could not check the monitoring data because that doesn't consider the outcomes of cases. It considered whether it could focus on just those referred through to casework, which would lead to a minimum of advice and assistance. However, this would not provide a complete record and would still need the records in Casework and Litigation (English) to be interrogated for every referred case.

32. Given the explanation above about its Helpline, the Commissioner considers that the only way to find all the information that has been requested is to manually check every single electronic Helpline file. However, the Commissioner considers that on the facts of this case that it was reasonable for the ECHR to: (1) assume for this case's purpose that all requests to the Helpline were requests for assistance; and (2) limit the search to those records identified by the word search on the database. He has considered the estimate on that basis.

33. For the **Casework and Litigation (England)** team, the EHRC explained it would need to do the following:

◇ It explained that there are two categories of cases held by this department; 'case files' and 'enquiries':

(1) 'Case files' are created when an issue is brought to the EHRC's attention which leads it to consider providing support with a legal case (section 28 cases) or access to our mediation system (section 27 cases).

(2) 'Enquiry' files are created when an issue has been brought to the EHRC's attention and it has not yet decided whether to consider providing support, or those that have been evaluated when it has decided not to offer further assistance.

◇ As noted above, LIS cannot be used because it has no reporting function so it cannot identify Irish complainants and Access cannot be used (for the data gathered from June 2009) because it does not contain information about the results for requests for assistance.

◇ Different manual systems are in place for each of the two categories of case:

(1) For the 'case files', the only way therefore to gather the requested data would be to check the manual files to identify Irish complainants, then use LIS to work out the outcomes of the cases. After obtaining

the manual 'Case files', the monitoring information (where provided) could potentially be extracted from the Equality Monitoring Scheme proforma that is on the fly leaf on each case. However, the proforma doesn't have a specific category for Irish – instead it would be discretionary for the case officer to record this as part of the 'Other category'. This would mean that the whole manual file would still need to be checked for those files where the proforma wasn't filled in or where 'Other' was marked, yet left undefined. The number of pages varies depending on the nature of case and the issues that are raised, but average numbers are:

- Section 27 files – 20 to 50 pages;
- Pre-assistance section 28 files – 30 pages; and
- Post-assistance section 28 files – several lever arch files.

(2) 'Enquiry' cases are not made into case files and do not have the Flysheet. The only way to see if the issues related to Irish individuals and what the outcomes of the cases were would be to read all the information in the file. They vary from between 10 to 60 pages.

34. Given the explanation above, the Commissioner is content that the only way to get the information requested would be:
- For 'Case files' to obtain the files and look at the flysheets to count some cases in and some out; then interrogate manually those files where the flysheets are inconclusive and then check LIS; and
  - For 'Enquiry' cases to obtain the files and look through all the manual files.
35. Finally, for the **Legal (Scotland)** team, the EHRC confirmed that its Scotland Legal Database meant it had no problem finding the relevant information for this team. However, it could confirm that there were zero responses for either 'Other – Irish' or 'Other – Northern Irish' categories.
36. Given the explanation above, the Commissioner is content that there is no relevant recorded information held in the Legal (Scotland) team and this department can be discounted from the investigation.
37. It then detailed the number of records that would need to be checked in each team and its estimate of the amount of time it would take to process the request.

38. For the **Helpline (GB)** – taking into account the approach advocated by the Commissioner in this case – it explained that the following amount of time would need to be spent on the relevant activities:

- 20 minutes to undertake key word searches to find those where Irish ethnicity was noted;
- 6 minutes per record to find the relevant file and locate information about the outcome of the case;
- 4 minutes per record to retrieve and extract the relevant information.

39. On the Commissioner's instruction it conducted a trial run and found that it was likely to hold 211 records of interest. For the **Helpline**, its estimate for the work required to process the request would be:

20 minutes (for the search) + [211 records x 10 minutes a record]  
= c. **35 hours' work.**

40. For **Casework and Litigation (England)** it explained that there was a large disparity between cases where the flyleaf was filled in (which would take under 1 minute to check) and those where it was not (which would take approximately 10 minutes). It explained that given about 12% of cases definitely had flysheets, it estimated that five minutes was a fair amount of time to attribute to one file. It explained that it would also need to check records from its archives and that would take more time. However, the very minimum number of records for 2010 and 2011 [up to the date of the request] (noting the request stretches further back to September 2007) would be :

a. For 'Case files':

2011 – 173 files at 5 minutes per file = 14 hours; and

2010 – 289 files at 5 minutes per file = 24 hours.

b. For 'Enquiries':

2011 – 119 files at 4 minutes per file = 8 hours; and

2010 – 260 files at 4 minutes per file = 17 hours.

41. For **Legal (Scotland)** – the whole process took 12 minutes.

42. In conclusion, its overall estimate for the work required (even making the assumptions noted above) was:

35 hours (for the Helpline) + 63 hours (for Casework and Litigation (England) – not including 2007, 2008 or 2009) + 12 minutes (for Legal Scotland) = **98 hours and 12 minutes.**

43. It explained that this is well in excess of the 18 hour limit imposed by FOIA and for the reasons outlined above there was no way to reduce the estimate using the search tools that it had.
44. It also conducted a trial run for the Commissioner concentrating on five records in each team outlining exactly what it did and how long it took. This trial run supported the calculations for the time that it provided the Commissioner.
45. The estimate greatly exceeds the 18 hour limit. The Commissioner will now explain why he considers the estimate is reasonable.

***Was the estimate reasonable?***

46. The issue of what constitutes a reasonable estimate was considered in the Tribunal case *Alasdair Roberts v the Information Commissioner* [EA/2008/0050] and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:
  - *“Only an estimate is required”* (i.e. not a precise calculation);
  - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
  - Time spent considering exemptions or redactions cannot be taken into account;
  - Estimates cannot take into account the costs relating to data validation or communication;
  - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
  - Any estimate should be *“sensible, realistic and supported by cogent evidence”*.
47. Following those points, the Commissioner is satisfied that the EHRC has only included the activities that are specified in Regulation 4(3) in its estimate. He is also satisfied that it hasn't included any time for considering redactions or any time taken to consider validating the information (indeed the information would be likely to remain inaccurate in this case).
48. He is satisfied that the estimate is based on the circumstances of this case. Indeed, the EHRC conducted a detailed trial run explaining to the Commissioner every stage of the extraction process and how long it took to undertake that process. This trial run offers strong support for the estimate being reasonable.

49. The Commissioner has also considered whether or not there are reasonable alternatives in this case. When considering this issue the Commissioner has been guided by the Information Tribunal in the case *Alasdair Roberts v the Information Commissioner* [EA/2008/0042] which provided some general comments on alternative methods of extraction such as whether there is an alternative so obvious to consider that disregarding it renders the estimate unreasonable.
50. The complainant has argued that the EHRC as the body who is responsible for advocating and assisting bodies to comply with their diversity obligations (to help eliminate discrimination), ought to easily be able to assess their own compliance with the same. He explained that he anticipated that the information would be easy to generate electronically.
51. The Commissioner initially considered that there would be strength in this argument. For the EHRC to be the beacon of best practice, it would be reasonable to anticipate that it would be able to generate this information with little difficulty.
52. However, this is not so. As noted above, for its two main departments the **Helpline (GB)** and **Casework and Litigation (England)** departments it has no dataset with a reporting function that records both ethnicity and outcomes. This means that the data cannot be taken from any single dataset.
53. The EHRC is able to report on the matters that interest it without being able to know the individual outcomes of requests for assistance that it receives. It does monitor the following:
  - a. It uses Access to provide monthly reports of the ethnic makeup of its case files from June 2009 (although not for enquiry cases and not the outcomes of any case); and
  - b. It uses the information recorded on the Helpline database – CRM – to keep information about characteristics (such as disability) and the theme of the complaint (such as employment). This broad information is also reported to its Business Management team on a monthly basis.
54. It also explained that it does undertake general monitoring, but that is focussed on the 'protected characteristics' outlined in the Equality Act 2010. Race is a protected characteristic, but ethnicity is not. It therefore undertakes its monitoring looking at race rather than ethnicity. This means that its general monitoring data cannot be used to identify the complaints it has received from the Irish.

55. The Commissioner also considered whether the process could be automated – for example the running of a report using SQL or something similar. This was not possible because one main database (LIS) has no reporting functions, while for the others the components of what was required are held on different systems and the work that is mentioned above is that required to cross reference between them.
56. The Commissioner is content that the EHRC has used all the tools that are available to it to narrow down the search. In this case, they do not enable the Trust to find all the requested recorded information within the cost limit. Having considered all the relevant evidence above, the Commissioner is satisfied that there are no reasonable alternatives to the work specified above.
57. He is satisfied that the EHRC has evidenced that to answer the request it would take more than 18 hours' work and that this estimate is based only on a reasonable assessment of the activities that are allowed by Regulation 4(3) of the Fees Regulations. He is satisfied that this estimate is *'sensible, realistic and supported by cogent evidence.'* He finds therefore that the Trust has applied section 12(1) correctly and thus no information needs to be provided to the complainant.

## **Procedural Requirements**

### *Section 16(1)*

58. Section 16(1) imposes an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
59. Whenever the costs limit has been applied correctly, the Commissioner must consider whether it would be possible for the EHRC to provide advice and assistance to enable the complainant to obtain information without attracting the costs limit in accordance with paragraph 14 of the Code. In this case the Commissioner has considered whether it would have been reasonable for the EHRC to have advised the complainant to reduce the scope of his request.
60. The EHRC in its original response invited the complainant to narrow the date range of his request as potential advice and assistance. The complainant refused to do so and the EHRC said on reflection that it would not be able to process even a narrowed request within the costs limit given the scope of the work that would be required.

61. This was because it originally considered the work required would have been less and thus believed it could offer more. However, the complainant has not been amenable to narrowing his request because he may consider that it would deprive him of information that he was entitled to. The Commissioner having spoken to the complainant and having tried to proactively enable him to receive some information has been told by the complainant that anything less than what he requested would not enable him to use the information for reasons that he requested it.
62. Overall, the Commissioner considers that the EHRC did not offer reasonable advice and assistance in this case. This was because it suggested that the complainant narrowed the request down in a manner that would not assist it and because it did not offer the narrower datasets that it could provide within the costs limit.
63. The narrower datasets that could be provided within the costs limit were identified by the EHRC as the following:
  - a. The number of Helpline enquirers who have identified themselves as Irish through the Helpline monitoring process; or
  - b. The number of claimants with a section 27 or section 28 case file who have identified themselves as Irish (from June 2009 onwards).
64. The Commissioner finds a breach of section 16(1) of FOIA in this case because the EHRC did not provide the advice and assistance that the complainant was entitled to.
65. However, he has chosen not to order any remedial steps in this case, because he agrees with the EHRC that it has identified the only ways it could narrow down the request and it is now open to the complainant to consider whether either of the smaller subsets of information are of interest. If they are, the complainant is welcome to make a new request and this will need to be considered by the EHRC under the terms of FOIA.

## **Other matters**

---

66. The Commissioner has noted another matter of concern that is not strictly a requirement of FOIA and considers it appropriate to mention it now.

67. During the course of his investigation, the Commissioner noted that the request had two objective readings and from the EHRC's response it was apparent that the complainant and the EHRC were at cross purposes.
68. The two objective readings focus on the meaning of 'requests for assistance' which could mean either:
  - Any 'request for assistance' received by the EHRC however it has characterised it (the complainant's meaning); or
  - The EHRC's internal view about what a 'request for assistance' is – an official request for legal representation (a section 28 case).
69. The Commissioner clarified with the complainant that he meant the first objective reading of the request and considered the case on that basis.
70. However, in these kind of circumstances, he would expect the EHRC to clarify what was requested when it was not clear. Section 1(3) of FOIA allows the public authority to clarify a request for information before it answers it. The section 45 Code of Practice provides more detail about how to go about clarifying a request for information. The Commissioner considers that the EHRC should have reverted back to the complainant before it answered the request in this case. This would have allowed it to issue a better refusal notice and/or internal review response. In this case, the refusal notice and internal review would have been difficult to understand for the complainant given that he considered the request for information he made clearly asked for different information than that which was discussed. He hopes the EHRC will learn from how it handled this request in the future.

## Right of appeal

---

71. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

72. 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.

73. 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  
Group Manager – Complaints Resolution  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**