

David Gale
request-689212-b76b66c3@whatdotheyknow.com

FOI Reference: 705912

Date: 3 December 2020

Dear David Gale

Your Freedom of Information Request

Thank you for your email dated 3 November 2020 in which you requested an internal review of our response dated 2 November 2020. Please accept apologies for the delay in responding – we have recently moved to a new case management platform which has caused some teething problems.

You state in your request for review the following:

I am writing to request an internal review of Equality and Human Rights Commission's handling of my FOI request 'Student disability discrimination by UK universities'.

1. The email information sent to Universities UK in 2017 is contradicted by written responses sent by the EHRC to students suffering disability discrimination in later years. Given that, in later years, university students were discriminated against as a group by EHRC policy, can the EHRC confirm that it did not amend its 2017 advice and that no queries were received as to why that advice had been amended to cover only those education sectors that were prioritised by EHRC policy and strategy?

2. The FOI request makes specific reference to communications with SASC:

a) there is a public interest in providing sight of documents that relate to issues with university testing methodologies for Specific Learning Disabilities in cases where students have suffered disability discrimination,

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b) both the EHRC and SASC will have been communicating in their professional capacities and therefore the related communications are not covered by professional privilege,

c) the provided reasons for refusal to disclose do not prevent the EHRC from stating if and when communications with SASC took place.

It appears from your review request that you are referring to particular correspondence which was not mentioned previously, regarding EHRC policy and strategy. This cannot be considered within your review as it did not form a part of your original request. However, if you would like to make a new request for further information, we need a description of the information requested please. Unfortunately, it isn't clear to me from the information provided at paragraph 1 above, what is being referred to. For example, you ask that we confirm the EHRC did not amend its 2017 advice - please explain which advice you are referring to. You also ask for conformation that the EHRC did not amend that same advice and whether any queries were received about it being amended. We will need further information to be in a position to respond to these requests.

Response Approach

I have conducted a full and impartial review which includes consideration of the information released against the information requested.

I also conducted a full review of the papers associated with the original application, including:

- 1.FOI request received 9 October 2020;
- 2.FOI response sent 2 November 2020;
- 3.Review request received 3 November 2020; and
- 4.EHRC's guidance for conducting FOIA Internal Reviews.

I have also read:

- the relevant sections of the Freedom of Information Act;
- ICO guidance on Determining whether information is held;
- ICO guidance on Legal professional privilege (section 42);
- ICO guidance on Personal information (section 40 and regulation 13);
- ICO guidance on Court, inquiry or arbitration records (section 32); and
- ICO guidance on Interpreting and clarifying requests.

I have also discussed the decisions made with the staff member who dealt with the original request in order to build a full picture as to how decisions were made.

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Response

In handling your request I have considered it afresh against the information you originally requested which was:

“Please provide sight of all communications involving the EHRC and Universities UK or SASC on the issue of disability discrimination by UK universities against students.”

I can confirm that our ICT Team conducted a back-end search of our email system using the following search criteria:

- Emails between EHRC and @universitiesuk.ac.uk or @sasc.org.uk AND
- includes 'disability' AND 'discrimination' in the content or subject line.

This retrieved:

- a number of out of scope email conversations (circulars and the like);
- 2 in scope email conversations which were disclosed to you;
- 2 exempt email conversations which were withheld under section 42 (Legal professional privilege).

No emails involving SASC were located by the search.

A small number of the emails which were considered as ‘out of scope’ (as they were circulars) did contain information about disability discrimination. I consider that these should have been disclosed and they are now attached.

In conducting this review I have considered whether:

- our original searches were adequate; and
- the section 42 (Legal professional privilege).exemption was correctly applied.

Original searches

You asked for sight of all communications involving the EHRC and Universities UK or SASC on the issue of disability discrimination by UK universities against students. Having spoken to the request handler, I understand that this was analysed as **correspondence between** EHRC and Universities UK or SASC. However, I am of the view that this could be interpreted a lot more widely both in meaning (a communication

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being the exchange of information by speaking, writing, or using some other medium) and in scope (communications could be recorded by way of hard copy letters or telephone attendance note). I understand why a back-end email search was considered the most logical option, however, I am of the view that the searches were not as thorough as they could have been and am upholding this aspect of the request.

Whilst, I am happy to ask for further searches to be conducted, I would flag that due to the Covid Pandemic, our offices are currently shut. We would therefore be unable to conduct a physical search of hard copy folders. If you would rather wait until we return the offices, I can place a note on the file to conduct further searches then.

If you would rather we conduct further searches now, I am of the view that the Information Governance Team will need to clarify what exactly you are looking for. This is particularly evident from the extra information flagged in your review request which references further background information and context and also appears to request new information that would not have been covered by the original request (i.e. whether queries were received as to why certain advice had been amended to cover only those education sectors that were prioritised by EHRC policy and strategy).

Whether the section 42 (Legal professional privilege) exemption was correctly applied

The withheld information comprised a series of two email trails from a private individual to both the Commission and the individual's legal advisor but copying in a Universities UK account which is why they were captured by the backend search. The details of the email trails are as follows:

- (i) First email in the conversation 24 July 2019 06:38 and last email in the conversation Email Thu 15/08/2019 15:04; and
- (ii) First email in the conversation 24 July 2019 06:38 and last email in the conversation Mon 05/08/2019 12:44.

I consider that the section 42 exemption was correctly applied in this case however the information can also be considered to be personal data and this should have been explained.

As part of my review, I conducted a new public interest test and am still of the view that the public interest in favour of withholding the information is stronger than the public interest in disclosure to the world at large. In reaching my conclusion, I note that the information contains third party personal data and am minded of the Commission's responsibilities

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under data protection legislation and the fact that the section 40 exemption relating to personal data could also have been applied in this case.

I am not upholding this aspect of the case.

Information Commissioner's Office

If following the review you are not content with the outcome you may apply directly to the Information Commissioner's Office (ICO) at:

The Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Generally the ICO will not provide a decision until you have exhausted the review process within the Equality and Human Rights Commission. If the Commission can be of any further assistance please contact us using the details provided below.

Yours sincerely

A Bennett
Legal

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