

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 October 2007

Public Authority: The Commission for Equality and Human Rights
Address: Kingsgate House
66-74 Victoria Street
London
SW1E 6SW

Summary

The complainant submitted a request for information about the ethnicity of claimants to the Employment Tribunal Service and the outcome of each claimant's case. The public authority refused the request on the basis that it did not hold the requested information. The Commissioner has concluded that the public authority did hold some information which fell within the scope of the complainant's request and by failing to confirm that it held this information it breached section 1 of the Act. However, the Commissioner accepts that to provide this information would have exceeded the appropriate cost limit.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 27 November 2005 the complainant submitted a request to the Commission for Racial Equality ('CRE') for 'any, or all, the researched data on the numbers and outcomes, of unrepresented and represented Black (and not Asian or Caucasian) descent complainants, that have brought complaints of race and disability discrimination and victimisation to the Employment Tribunal and Court'.
3. The CRE responded to this request on 21 December 2005 and informed the complainant that it did not hold the information she had requested and directed her to the websites of the Employment Tribunal Service ('ETS') and the Courts Service who it suggested may have information relevant to her request.

4. The complainant was dissatisfied with this response and requested an internal review of the CRE's decision.
5. The CRE contacted the complainant on 19 January 2006 and confirmed its position that it could not fulfil her request because 'The [CRE] does not collate such information'.

The Investigation

Scope of the case

6. On 8 January 2006 (prior to receiving the outcome of the internal review) the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant argued that the CRE was incorrect to refuse her request on the basis that it did not hold the information she requested. The complainant argued that under the Race Relations Act 1976 and the Race Relations Amendment Act 2000, the CRE had a duty 'to promote good race relations, etc, by monitoring the numbers and outcomes of represented and unrepresented black complainants lodged at employment tribunals and courts'.
7. On 30 September 2007 the CRE was dissolved and replaced with a new organisation the Commission for Equality and Human Rights (CEHR). The CEHR combines the functions and responsibilities of the CRE, the Disability Rights Commission and the Equal Opportunities Commission. The CEHR is a non-departmental public body. In these circumstances the Commissioner considers it appropriate to serve the notice on the CEHR. (However, for narrative purposes the CRE, rather than the CEHR, is referred to as the public authority throughout this decision notice).

Chronology

8. The Commissioner wrote to the CRE on 27 June 2006 and asked it to comment on the complainant's suggestion that under the race relations legislation quoted by the complainant it had a statutory duty to hold the information requested.
9. The Commissioner also asked the CRE to answer a number of general questions in relation to its procedures and practices for recording information about employment tribunal issues. The Commissioner asked:
 - The ETS provides the CRE with copies of judgements in all race discrimination cases. Do the CRE conduct any analysis of the information that is provided by the ETS?
 - How, if at all, does the CRE monitor the ethnicity of complainants that bring cases to the ETS?
 - Do the ETS hold any information similar to that requested by the complainant?

10. The CRE replied to the Commissioner on 3 August 2006. With regard to the duties imposed on the CRE by race relations legislation, the CRE stated that it was under a duty to 'assess and monitor its policies and functions for adverse impact on the promotion of race equality'. However, the CRE confirmed it was not under any legislative duty to hold information of the nature required to answer the complainant's request.
11. In response to the specific questions the Commissioner submitted to the CRE it responded as follows:

'The CRE collects, in a register, the information on race discrimination cases it receives from ETS, this includes the name of the applicant; the name of the respondent; sector; the court reference number; the result and the date it was sent out.

The CRE does not presently monitor the ethnicity of the complainants as the ethnicity is not provided to the CRE by the ETS on a regular basis. Prior to 2002, the CRE did collect ethnic monitoring data, where such information was available, on the cases received from the Employment Tribunal Service in order to pursue "follow-up" work.

The CRE does not hold any information similar to that requested by [the complainant]'
12. Having considered the CRE's response the Commissioner contacted the CRE on 15 August 2006 and asked for clarification on two points. Firstly, the Commissioner asked the CRE to clarify whether it retained any of the inconsistently supplied information it received from the ETS and furthermore, whether this information may fall within the scope of the complainant's request.
13. Secondly, the Commissioner asked the CRE to confirm whether it still held the information about the ethnicity of complainants it had collected prior to 2002 and whether this information could fall within the scope of the complainant's request.
14. A representative of the CRE called the Commissioner's office on 18 August 2006 and confirmed receipt of the letter of 15 August, but explained that the CRE's response may be delayed due staff taking annual leave.
15. Having received no response from the CRE, the Commissioner wrote to the CRE on 22 September 2006 and asked for a response to his letter of 15 August 2006 within ten working days.
16. On 5 October 2006 a representative of the CRE emailed the Commissioner and informed him that because of the absence of staff on sick leave, it's response to the letter of 15 August 2006 had been further delayed, but hoped to respond as soon as possible.
17. A representative of the CRE called the Commissioner's office on 24 October 2006 and confirmed that it would be sending a response to the Commissioner's letter of 15 August 2006 as soon as possible. During this telephone call, the

representative of the CRE informed the Commissioner that they had spoken to the complainant about information which was in the CRE's annual report which might be in the scope of her request. The CRE confirmed that it was sending the complainant a letter with a website link to its annual report and confirmed that it would copy this letter to the Commissioner.

18. The CRE wrote to the Commissioner on 25 October 2006 with a response to the points raised in his letter of 15 August 2006.
19. On 27 October 2006 a representative of the CRE called the Commissioner's office and stated that the responses contained within its letter of 25 October were in fact based upon the wrong file and therefore were not an accurate response to the points raised in the Commissioner's letter of 15 August 2006. The CRE's representative confirmed that she would now prepare a response based upon the correct file and write to the Commissioner once again.
20. The Commissioner received a further letter from the CRE on 3 November 2006 in response to his letter of 15 August. The CRE stated that with regard to the first query the Commissioner had (see paragraph 12), it did not hold the inconsistently supplied information. With regard to the second query the Commissioner had, the CRE stated that:

'any work done prior to 2002 regarding ethnicity and follow-up is recorded in our Annual Reports which is on our website. [the complainant] is aware of this'.

21. The Commissioner contacted the CRE again on 10 November 2006 in order to clarify a number of further points. Firstly, the Commissioner asked the CRE to explain why, if it believed that the information contained within its annual reports contained information covered by the scope of the request, did it not inform the complainant of this fact in its responses of 21 December 2005 and 19 January 2006 instead of confirming that it did not hold any information relevant to her request.
22. Secondly, the Commissioner suggested to the CRE that he had reviewed the information contained within the annual reports and in his opinion this information did **not** answer the complainant's request. However, the Commissioner suggested that the raw data used to create the tables in the annual report could be used to fulfil the request and asked the CRE to consider this point.
23. On 13 December 2006 the CRE wrote to the Commissioner again. The CRE informed the Commissioner that its previous suggestion that the information contained within its annual reports could be used to answer the complainant's request was incorrect. The CRE explained that this confusion and inconsistency was due to the fact that it had 'four separate files' relating to correspondence from this complainant and this led to the CRE inaccurately informing the Commissioner its annual reports could have been used to answer this particular request.
24. On 17 January 2007 the Commissioner wrote to the CRE again and asked for clarification on three points:

25. Firstly, the Commissioner asked the CRE to provide it with a sample of the register of information it compiled on race discrimination cases based upon data it received from the ETS.
26. Secondly, the Commissioner explained that it was his understanding that under section 66 of the Race Relations Act, the CRE received applications from individuals who wanted advice and assistance in relation to matters of racial discrimination. The Commissioner suggested that it was also his understanding that the CRE monitored the ethnicity of the applicants who applied for section 66 assistance. The Commissioner suggested to the CRE that as some of the section 66 applications it received were likely to be in connection with employment tribunal cases, it may be possible to use this information to answer, at least in part, the complainant's request.
27. Thirdly, the Commissioner informed the CRE that it had reviewed information contained on the CRE website about employment case law. The Commissioner highlighted to the CRE a section of the website which contained several case studies which analysed the cases brought by complainants before the ETS and the fact that the majority of these case studies identified the ethnicity of the applicant. The Commissioner informed the CRE that in his opinion this information clearly fell within the scope of the complainant's request and should therefore have been provided to the complainant.
28. On 30 January 2007 the CRE provided the Commissioner with a sample of the register it held containing details of race discrimination cases brought before the Employment Tribunal. The CRE also provided the Commissioner with a copy of the section 66 application form. In response to the Commissioner's suggestion that the CRE clearly held information on its website which could be used to fulfil the complainant's request the CRE stated that:

'Yes, your [the Commissioner's] argument is correct; but only because the applicants in those case studies applied to us first (for advice and assistance).'
29. The CRE also informed the Commissioner that 'I have told [the complainant] repeatedly that all the information we hold that falls within the scope of her request is in our annual report on our website. Here it is again - http://www.cre.gov.uk/downloads/ar05_main.pdf page 22!'
30. The CRE did not provide a clear response to the Commissioner's suggestion that information contained on the section 66 application forms could have been used to respond to the complainant's request.
31. Consequently, the Commissioner wrote to the CRE once again on 6 February 2007. The Commissioner explained to the CRE that whilst he was satisfied that the CRE did not hold a complete list of **all** applicants who have taken cases of race discrimination to the Employment Tribunal, he did believe that the CRE was likely to hold **some** information covered by the scope of the complainant's request

and under the terms of the Act this information should be supplied to her, subject to any of the exemptions contained within the Act.

32. The Commissioner asked the CRE to confirm whether the information it received on the section 66 application forms was transferred to a database and if this was the case, would it be possible to search this database in order establish the ethnic origin of each applicant and then correlate this with the reason the applicant applied for assistance, i.e. for help with their employment tribunal case.
33. A representative of the CRE called the Commissioner's office on 15 March 2007 and explained that having reviewed the Commissioner's latest letter she was unsure as to what the CRE had to do. The case officer at the Commissioner's office clarified the contents of the letter of 6 February 2007; namely that although the Commissioner was satisfied that the CRE did not hold a complete list of all employment tribunal cases ever brought, it was likely that information held on some of the section 66 application forms could fall within the scope of the request. The case officer explained why. The CRE's representative explained that she was not aware of how the information contained on the section 66 applications forms was held, however she envisaged that to conduct such an analysis was likely to be a laborious and time consuming process. The Commissioner's case officer briefly explained that public authorities could refuse to answer a request if the cost of complying with the request exceeded the appropriate limit prescribed in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). The case officer suggested that the CRE review the relevant legislation and guidance in relation to the application of section 12 before responding to the Commissioner's letter of 6 February 2007.
34. The CRE wrote to the Commissioner on 5 April 2007. In this letter the CRE confirmed that although it did hold some information on the section 66 application forms which would fall within the scope of the complainant's request, 'to extract this information would take approximately 1 month (working on it every day). This would, of course, well and truly exceed the 18 hour limit and will be in excess of £450.00 and therefore we have to refuse [the complainant's] request'.
35. The Commissioner contacted the CRE once again on 26 April 2007. The Commissioner explained that when considering public authorities' application of section 12 he needed to be provided with a detailed breakdown of the estimated cost of responding to the request. The Commissioner therefore asked the CRE to provide this breakdown with reference to the four activities the Regulations state that public authorities can charge for when fulfilling a request, namely:
 - Determining whether the information is held
 - Locating the information
 - Retrieving the information
 - Extracting the information
36. Over the next few months the Commissioner's case worker and representatives of the CRE exchanged correspondence and had a number of telephone calls in relation to the issues outlined in the preceding paragraphs.

37. The CRE finally provided the Commissioner with a detailed breakdown of the cost of providing the information contained on the section 66 application forms and the applicant files ('the section 66 files'). The CRE explained that for the period 1 January 2005 to 31 July 2007 it had received 2562 applications for assistance from individuals throughout the England, Wales and Scotland. These applications could be broken down as follows:

January 2005 to December 2005 – 1028
January 2006 to December 2006 – 1120
January 2007 to July 2007 – 414

38. The CRE explained that although it retained copies of the 2562 applications forms these were distributed across various offices around the UK and in addition some of the forms had been placed in storage because the files had been closed. The CRE estimated that to gather the information contained on the case files needed to respond to the complainants request would take approximately 427 hours. This estimate was based upon the following breakdown:

39. Determining whether the information is held –

The CRE would need to ascertain whether or not the files have been closed by checking the database, checking the archive records manually to see if the files are stored off-site or on-site, checking with the relevant case officers in relation to the open files – 1 hour

40. Locating the information –

The CRE will have to contact the various countries and regional offices to determine exactly where the closed and open files are held – 2 hours 30 minutes.

41. Retrieving the information –

The CRE will then have to physically retrieve the files from storage from the on-site and off-site locations. It is estimated that there are approximately 10 boxes in storage in London and 12 boxes in total in storage in the other countries and regions. The files would need to be sent to the London office for extracting.

42. Extracting the information –

The data contained on the 2562 files will then have to be extracted. This essentially involves searching each of the files and reviewing each of the section 66 forms for details of the applicants' ethnicity, whether the matter relates to employment or non-employment matters, whether the matter relates to disability discrimination, race discrimination and/or victimization, and if held extracting the outcome of the applicants' case.

43. The CRE estimated that it would take 10 minutes to review each file which equated to 427 hours in total.
44. The CRE also explained that some of the information contained on the section 66 application forms it received was entered on to a database. However, the CRE suggested that the information contained on the database could not be used to fully answer the complainant's request and more information could be supplied if the paper files were analysed. The CRE noted that the only information contained on the database which contained details of the section 66 forms was the applicants' ethnic origin and whether the matter was an 'employment' or 'non-employment' matter.

Findings of fact

45. As has been outlined above, when responding to the complainant's request in December 2006 the CRE's position was that it did not hold any information covered by the scope of the complainant's request. When the Commissioner contacted the CRE in June 2006 to begin investigating the complainant's request this remained the CRE's position. However, during the course of the Commissioner's investigation the CRE acknowledged that it may hold a number of pieces of information which may fall within the scope of the complainant's request. The remainder of this decision notice considers whether the CRE should have provided the complainant with these various pieces of information in line with its duty under section 1 of the Act.

Analysis

Procedural matters

Section 1

46. Section 1 of the Act creates a general right of access to information held by public authorities. Section 1 states that:

'1(1) Any person making a request for information to a public authority is entitled to –

- (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 the information communicated to him'.

(2) Subsection (1) has effect to the following provisions of this section and to the provisions of sections 2, 9, 12, and 14.'

Register of race discrimination cases

47. The Commissioner has established that the CRE maintains a register of race discrimination cases brought before the employment tribunals. The Commissioner has reviewed a copy of the register for the period January 2006 to December

2006. The Commissioner has established that the information contained on the register are details of the name of the applicant, the name of the respondent, the court reference number, the result of the case, the date the result was sent to the parties, details of any award and the location of the court.

48. In the Commissioner's opinion the information contained on the register could not be used to fulfil the complainant's request either in full or in part. This is because the register does not include information about the ethnicity of the applicant. It is clear from the complainant's original request that information she was seeking focused on a link between the ethnicity of applicants (and only those who were 'Black and not Asian and Caucasian') who brought cases to the employment tribunals. As the information contained on the register makes no reference to the ethnicity of the applicants then the data it contains cannot be used to answer the complainant's request

Information contained within the CRE's annual reports

49. In correspondence with the Commissioner the CRE suggested that information published in its 2005 Annual Report contained information which fell within the scope of the complainant's request. The CRE explained that this information was on page 22 of its 2005 Annual Report.
50. The Commissioner has reviewed this section of the 2005 Annual Report and understands that it contains information about applications the CRE has received from members of the public under section 66 of the Race Relations Act. Under section 66 of the Race Relations Act the CRE has a duty to consider applications for assistance from individuals who have suffered racial discrimination.
51. The information the CRE believes answers the complainant's request is contained in two tables in the 2005 Annual Report. The first table of data details the number of applications for 'employment', 'non-employment' and 'out of scope' matters the CRE received. The second table lists the total number of applications received by the CRE broken down by ethnic group.
52. However, in the Commissioner's opinion the data contained within these two tables (and furthermore data contained elsewhere in the Annual Report) cannot be used to either answer the request completely or even partly. This is because the tables do not show the ethnic origin of the individuals who made applications to the CRE for assistance with 'employment' matters. Furthermore, there is no way to establish this information by analysing the data contained within the tables. Consequently, despite the CRE's suggestions to the contrary, in the Commissioner's opinion the information contained within the 2005 Annual Report does not fall within the scope of the complainant's request.

Case law examples on CRE website

53. During the course of the Commissioner's investigation he reviewed a section of the CRE's website entitled 'Employment case law database' (<http://www.cre.gov.uk/legal/casedatabase.html>). This database contains summaries of significant cases that have shaped the law relating to race

discrimination in employment and defined the role of employment tribunals in arbitrating such cases. The Commissioner has established that this database includes examples of cases which clearly fall within the scope of the complainant's request. For example, the following case study: http://www.cre.gov.uk/legal/direct/case_033solowo.html analyses the details and the outcome of a case brought before an employment tribunal by an applicant of 'black African origin'.

54. Therefore, the Commissioner believes when responding to the complainant's request the CRE should have confirmed information contained on its website fell within the scope of the request and furthermore provided the complainant with a website link to this information. By failing to do so, the Commissioner considers that the CRE breached section 1 of the Act. (During the course of this investigation, the Commissioner provided the complainant with a link to the 'Employment case law database' on the CRE's website).

Information contained on section 66 application forms

55. The Commissioner has established that the CRE enters some of the information contained on the section 66 application forms it receives onto a database. This database has a field which records the applicants' ethnicity and a further field which records whether the application is about an 'employment' or 'non-employment' matter. The Commissioner has considered whether the CRE could interrogate this database to provide information which could be used to answer the complainant's request.
56. The database can be interrogated in order to establish the number of applicants falling within the scope of the complainant's request, i.e. 'Black (and not Asian or Caucasian)' and how many of these applicants applied to the CRE for assistance with 'employment' matters.
57. However, the Commissioner understands that simply because that database records whether an applicant has applied to the CRE in relation to an employment matter, this does not necessarily mean that their application relates to an employment matter which they have taken to an employment tribunal. Therefore, if the database was used to establish how many applicants of a Black origin had applied to the CRE for assistance with employment matters this would not accurately reveal the number of applicants of Black origin who had applied to the CRE for assistance with complaints which they had taken to an employment tribunal.
58. However, the Commissioner considers that the information contained on the hard copies of the section 66 files does fall within the remit of the complainant's request. This is because more information is contained on these files than is held on the database, and vitally the files include a record of whether the complaint was taken to the employment tribunal rather than simply relating to general employment matters. Furthermore, the CRE has suggested that by analysing the information contained on the hard copies of the section 66 application forms and case files it would be able to also identify why these complaints had been brought to the

employment tribunal, i.e. reasons suggested in the complainants request, namely 'race and disability discrimination and victimisation'.

59. Consequently, the Commissioner believes that when responding to the complainant's request in December 2005 the CRE should have confirmed that it held information on its section 66 case files which fell within the scope of her request and by failing to inform the complainant of this fact the CRE breached section 1(1)(a) of the Act.

Section 12

60. The Commissioner has also considered whether the CRE should now provide the complainant with this information. As is detailed in paragraphs 37 to 44, the CRE has argued that to provide this information would exceed the appropriate cost limit.
61. The appropriate limit, as prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, is £600 for Central Government and £450 for other public authorities, with staff costs calculated at a rate of £25 per hour. When calculating whether the appropriate limit is exceeded, authorities can take account of the costs of determining whether the information is held, locating and retrieving the information, and extracting the information from other documents. They cannot take account of the costs involved with considering whether information is exempt under the Act.
62. Therefore, for the CRE to legitimately cite section 12 in this case it needs to demonstrate that the time needed to provide the complainant with relevant information contained within the section 66 case files would exceed 18 hours.
63. The CRE has provided the Commissioner with a breakdown of the number of section 66 applications it has received for 2005, 2006 and for January to July 2007. However, the Commissioner notes that the complainant submitted her request on 27 November 2005. Therefore, when considering whether at the time of the request section 12 would have provided a basis for refusing to the request, the Commissioner has only considered whether the cost of gathering the relevant information from the applications received in 2005 would have exceeded the appropriate limit rather than the obviously higher cost of analysing all the forms up to and including those received in July 2007.
64. The Commissioner has established that in 2005 the CRE received 1028 section 66 application forms. The CRE has suggested that it would take approximately 10 minutes to review the case file associated with each application in order to extract the relevant data needed to answer the complainant's request, namely, whether the applicant had marked the ethnic origin as Black, whether they had taken their case to the employment tribunal, why they had taken their case to the employment tribunal, whether the applicant had legal representation and the outcome of the case. The Commissioner accepts that 10 minutes to review the necessary information on each case is an appropriate time estimate. Therefore, the total time taken to extract the relevant information from these case files would

exceed the cost limit by a substantial margin – 10 minutes per case file x 1028 files = 10280 minutes or 171.33 hours.

65. Furthermore, the Commissioner notes that the CRE have estimated that there would be a number of additional, although by comparison significantly lower costs, it would incur before it would be able to begin extracting the information from the files. Namely, determining whether the CRE still held all of the 1028 files, physically locating these files and retrieving these files from storage if necessary.
66. Consequently, the Commissioner is satisfied that the CRE could have refused to answer the complainant's request of November 2005 on the basis that to provide the relevant information contained within section 66 files would have exceeded the cost limit of £450, albeit that the request only covered an 11 month period.

Section 17

67. As noted in paragraph 59, the Commissioner considers that the CRE breached section 1 of the Act because it failed to confirm to the complainant that it held information on the section 66 case files which was within the scope of the request. Nevertheless for the reasons outlined above the Commissioner accepts that the CRE could have relied on section 12 as a basis to refuse to provide this information.
68. However, if a public authority relies on section 12 of the Act as a basis to refuse to answer a request it must provide the complainant with a refusal notice compliant with section 17 of the Act. As the CRE is now effectively relying on section 12 to refuse to answer this request, the Commissioner considers that it had breached section 17 of the Act by failing to provide the complainant with a refusal notice.

The Decision

69. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
70. The Commissioner has established that at the time of the complainant's request the CRE held the following pieces of information which fell within the scope of her request:
71. Information contained on the 'Employment case law database' section of its website.
72. Information contained on the hard copies of the section 66 application forms and associated case files.
73. By failing to inform the complainant that it held the above pieces of information the Commissioner believes that CRE breached section 1 of the Act.

74. However, the Commissioner is satisfied that that the CRE could have relied on section 12 as a basis to refuse to provide the information contained on the section 66 case files. Nevertheless, as the CRE failed to provide the complainant with a refusal notice citing section 12, the CRE breached section 17 of the Act.

Steps Required

75. In light of the above, the Commissioner does not require the CRE to take any steps to ensure compliance with the Act.

Right of Appeal

76. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 16th day of October 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 1(1) provides 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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 12(1) provides 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.”

Section 17(5) provides that -

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact"