

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 17 November 2008

Public Authority: Department for Work and Pensions
Address: 2nd Floor
The Adelphi
1-11 John Adam Street
London
WC2N 6HT

Summary

The complainant requested information from the Department for Work and Pensions ("DWP") as to whether there were any compliments or complaints recorded about a doctor employed by a third party. The DWP initially stated that it held no such information and later added that even if it were held by the third party on their behalf it would be exempt from disclosure by section 40(5) of the Act. The Commissioner finds that due to the contractual relationship between the DWP and the third party any relevant "complaints" (but not "compliment") information held by the third party, if it existed, would be held by them on behalf of the DWP, by operation of section 3(2) of the Act. However, in accordance with section 40(5) of the Act, the DWP was correct to neither confirm nor deny the existence of the requested information as to do so would contravene data protection principles, but it was in breach of section 1(1)(a) in that it failed to inform the complainant of that.

The Commissioner's Role

1. The Commissioner's role 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. In a letter dated 6 October 2006, the complainant asked the DWP for information, via Atos Origin IT Services UK Limited ("Atos"), regarding a

Dr X. The information sought was the details of any complaints, compliments, or any other reported information generated by Dr X's medical examination and assessment of people seeking (or in receipt of) disability living allowance or similar state benefits during his employment with Atos.

3. In the DWP's substantive reply of 19 October 2006 it stated that it did not hold the requested information. On 21 October 2006 the complainant sought a review of that decision. The DWP undertook the requested review and concluded that it did not hold the sought information as it constituted a type "of personal information about Atos Origin employees". The outcome of the review was communicated to the complainant in a letter dated 3 November 2006.

The Investigation

Chronology

4. On 7 November 2006, the complainant contacted the Commissioner to complain about the way his request for the information had been handled.
5. The Commissioner acknowledged the complaint and commenced his investigation. The Commissioner, on the 29 March 2007, requested that the DWP provide him with a copy of their agreement with Atos. A copy of the agreement (minus some non-relevant commercial details) was provided to the Commissioner by the DWP on the 8 May 2007.
6. The DWP, primarily in correspondence dated 28 August 2007, expanded upon their reasons why the information sought by the complainant was neither held physically by them nor by Atos (Dr X's employer) on their behalf. The DWP also maintained that they had no control over the sought information. The DWP stated that even if, by operation of section 3(2), it were the case that Atos held the information on their behalf that in any event it could not be disclosed by virtue of section 40 of the Act. It would be neither fair nor lawful to process the data (i.e. the requested information) by either communicating it or the fact of its existence to the complainant.

Findings of fact

7. The Secretary of State determines awards of, amongst other benefits, disability living allowance (sections 8 and 11, Social Security Act 1998). By section 19 of that Act the Secretary of State is empowered to refer a relevant benefit seeker to a medical practitioner in order to obtain information to be used in the determination of the benefit claim.

8. By December 2005, the task of examining claimants to obtain the medical evidence required to evaluate a claim for disability living allowance was contracted to Atos. The Secretary of State, however, retains sole responsibility for determining entitlement to disability living allowance.
9. The complainant claimed disability living allowance that required him to undergo a medical examination in December 2005. A Dr X (an employee of Atos) conducted the examination in accordance with the contract between Atos and the DWP.
10. The Commissioner finds as a fact, and as maintained by the DWP, that they would not themselves physically hold the requested information regarding Dr. X.

Analysis

11. The Commissioner has considered the public authority's response to the complainant's request for information and in particular, whether the requested information, if it exists and if held by Atos, would it be held by Atos on behalf of the DWP.
12. Section 3(2) of the Act states:

“For the purposes of this Act, information is held by a public authority if –
(b) it is held by another person on behalf of the authority.”
13. The phrase “on behalf of” the authority is not defined in the Act. In defining the phrase the Commissioner does so to ascertain the intention of Parliament (*Viscountess Rhondda's Claim [1922] 2 AC 339 at 397, HL*). The Commissioner therefore attributes to the phrase “on behalf of” its plain meaning, namely, for another.
14. The Commissioner notes, having regard to *Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42* that the Lords Hansard records the following:-

“I say immediately that we agree that the usual situation will be that the basis on which information is held by a third party on behalf of a public authority will be contractual or as an agent”

(Lord Bach, Lords Hansard 17 Oct 2000: Column 937)
15. The relationship between the DWP and Atos is governed by the contract between the parties entitled “Medical Services Agreement”. The Commissioner notes that under the terms of this agreement that:

- a) Atos must maintain systems that can provide full details of complaints and enquiries that can be used by the DWP.
 - b) Atos must inform the DWP of all serious complaints (as defined in the agreement) made against Atos doctors.
 - c) Atos must keep the DWP informed of the progression of serious complaints through Atos's complaints procedure.
 - d) In specified circumstances Atos shall inform the DWP of all the circumstances of particular non-serious complaints upon request.
 - e) Only the DWP can revoke the required approval needed by doctors to undertake examinations.
 - f) Atos is, upon the DWP's request, to furnish the DWP with information relating to the rights of data subjects including but not limited to subject access rights.
16. The DWP position was that they themselves would not hold information of the type requested and neither would Atos hold such information on their behalf. In correspondence with the Commissioner the public authority states "Atos, as a contractor and business, needs to hold information for its own purposes. To enable the Department to effectively manage the performance of the contract some information can be called for as part of the contract management process. However the requested information is not that of the Department which is held by the contractor in performance of a statutory function"
17. It is clear that the DWP can contractually expect Atos to furnish it with information regarding any serious complaints against doctors employed by Atos. The DWP can, at its complete discretion by virtue of the agreement, direct Atos to furnish it with any complaints against Atos doctors. There are no such contractual terms relating to the recording or communication of compliments made about doctors employed by Atos.
18. The agreement stipulates that Atos employees can only undertake medical examinations, for the purposes of determining state benefits, if they remain approved for such by the DWP. In order to determine this approval the DWP will, amongst other things, have recourse to the type and frequency of complaints collated by Atos. In this regard, the information collected and organised by Atos is in effect for the benefit (i.e. on behalf) of the DWP to enable them to make a determination regarding approval. The fact that Atos also hold the information for their own purposes does not prevent them also holding it on behalf of the DWP.
19. On the findings of fact and considerations above the Commissioner finds that the "complaint" information requested, if it exists, would be held by Atos on behalf of the DWP by operation of section 3(2) of the Act. The Commissioner also finds that the requested "compliment"

information, if it exists, would not be held by Atos on behalf of the DWP.

Exemption

Section 40 'Personal information'

20. Section 1(1)(a) of the Act imposes a duty on public authorities to inform the applicant whether it holds the requested information, this duty is known as the duty to confirm or deny.
21. The duty to confirm or deny does not apply if the confirmation or denial would itself contravene any of the data protection principles (Section 40(5)(b)(i) of the Act). The Commissioner has to consider if informing the complainant whether any complaints or compliments had been made regarding Dr X would contravene any of the data protection principles.

Would the confirmation or denial that the information requested is held in itself constitute 'personal data'

22. The first issue to determine is whether, if such exists, information on any complaints or compliments recorded about Dr X would constitute his personal data.
23. 'Personal data' is defined in section 1 of the Data Protection Act 1998 as:
 - a) data which relate to a living individual who can be identified – from those data, or
 - b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.
24. The Commissioner is of the view that any complaints or compliments would plainly be an expression of an opinion about Dr X and therefore would constitute his personal data. In addition, any information as to whether or not a complaint had been received against a particular doctor would equally constitute his personal data, as confirming or denying the complaint's existence would in itself reveal significant information about him.

Would confirming or denying the existence of the information breach any of the data protection principles?

25. The Commissioner next considered whether to confirm or deny to the complainant that this personal data of Dr X., if it exists, is held by Atos on behalf of the DWP would itself be a breach of the data protection principles.
26. The data protection principles are a statutory code for the processing of personal data. They are set out in Part I of Schedule 1 to the Data Protection Act 1998. The first data protection principle requires personal data to be fairly and lawfully processed. In order to determine whether it would be fair to process the personal data the Commissioner considered the following factors:
 - The likely expectations of the data subject regarding the disclosure of the information. Would he or she, for example, expect that their personal information would be disclosed to others?
 - The effect which disclosure would have on the data subject, for example, would the disclosure cause unnecessary or unjustified distress or damage to him or her?
 - The type of the information
27. In considering fairness, the Commissioner takes the view that of prime consideration must be the consequences of processing the data to the interests of the data subject.
28. The Commissioner's decision is that to communicate to the complainant whether any complaints or compliments have been made about Dr X would be unfair to Dr X. There would be a reasonable expectation that the existence and details of complaints might be provided to the public authority or those reviewing complaints, but there is nothing to suggest that Dr X would expect that his personal data would be communicated to the general public without his consent. Such a communication would be likely to cause unnecessary distress to Dr X. The type of information requested is that which ordinarily remains confidential between an employee, his employer and possibly a regulatory professional body.
29. The Commissioner's view is that the DWP should have refused to confirm or deny that the requested information was held by them (or by Atos on their behalf), by virtue of section 40(5)(b)(i).

Procedural matters: Section 17 'Refusal of request'

30. In failing to advise the complainant that it was not obliged to comply with section 1(1)(a) because section 40(5) applied, the public authority breached section 17(1) (b) and (c).

The Decision

31. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. It failed to state that by operation of section 40(5)(b)(i) it could neither confirm nor deny whether it, or Atos on its behalf, held the information requested, thereby breaching section 1(1)(a).
32. The public authority also breached section 17(1)(b) and (c) as it failed to advise the complainant that it was not obliged to comply with section 1(1)(a) by virtue of section 40(5)(b)(i). There is a further breach of section 17(1) in that it did not undertake this within the time for complying with section 1(1).

Steps Required

33. The Commissioner requires no steps to be taken.

Right of Appeal

34. 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 17th day of November 2008

Signed

**Anne Jones
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 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”
- (c) may be granted subject to conditions.”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”