

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 August 2011

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

Summary

The complainant made seven requests for information to the Department of Work and Pensions (the "DWP") concerning its alleged failure to pay disability benefits to UK citizens living elsewhere in the European Economic Area and about other related matters. The DWP attempted to answer some of those requests and applied various exemptions to others. It then aggregated the requests and applied section 12(1) to them all together.

The Commissioner has found that the DWP was entitled to aggregate the work required for the seven requests and that the total work required to find all the relevant recorded information would exceed the costs limit. He therefore upholds the application of section 12(1). He has also found that the DWP complied with its obligations to provide reasonable advice and assistance in line with section 16(1).

However, he has found a procedural breach of section 17(5) of the Act, as the DWP failed to issue a refusal notice citing section 12(1) in relation to the aggregated requests. He requires no remedial steps to be taken in this case.

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.

Background

2. While the Commissioner cannot comment about the validity or of the complainant's concerns about overseas benefits claims, it is necessary to outline the background to the requests for information to understand their nature.
3. The complainant is concerned about the DWP's position in respect of the exportability of disability benefits (particularly Disability Living Allowance) to UK citizens who live in other members of the European Union. This concerns her interpretation of the European Court of Justice ("ECJ") Decision C-299/05¹ (promulgated on 18 October 2007) and the DWP's actions both before and after it. Both parties agree that the ECJ decided that the disability benefits Disability Living Allowance care component, Attendance Allowance and Carer's Allowance are sickness benefits under European law. This meant that these benefits are exportable to other member states of the European Economic Area ("EEA") and Switzerland in certain circumstances.
4. The UK Government believes that it is complying fully with the judgment and is now paying benefits to persons living in other member states in accordance with it. It has explained that over 2,000 people are now receiving the benefits abroad. The DWP is responsible for when the UK Government pays benefits.
5. The DWP has published guidance on its interpretation of the judgment on its website. It has openly published the eligibility criteria for payment of the disability benefits in another EEA Member State on the Directgov website² and also placed its guidance to departmental Decision Makers (Memos DMG 14/08, 17/09 and 28/10) on its website.³

¹ The full judgment can be found at the following link: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-299/05&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit>

² The relevant links are: www.direct.gov.uk/takingbenefits and www.direct.gov.uk/claimingbenefits

³ Links to the relevant memos are: **DMG 14/08**: <http://www.dwp.gov.uk/docs/m-14-08.pdf>
DMG 17/09: <http://webarchive.nationalarchives.gov.uk/+http://www.dwp.gov.uk/docs/m-17-09.pdf>

DMG 28/10: <http://www.dwp.gov.uk/docs/m-28-10.pdf>

6. The European Commission has exercised its right to challenge the UK Government's interpretation of the judgement and has commenced infringement proceedings (the method for the Commission to establish whether a member state is complying with Community law). If the matter is not resolved the Commission can ask the ECJ to decide whether there has been an infringement or not. The ECJ is therefore the final forum to judge whether or not the UK Government's current position is legal.
7. The complainant has made a number of requests both on her behalf and on behalf of another interested party. These requests were not the first to be received by the DWP.

The Requests

8. There are seven requests for information in this case. The full wording of those and how they were individually responded to is in Appendix A of this Notice. The requests were made between 3 August 2010 and 21 September 2010.
9. On 23 November 2010 the DWP provided the Commissioner with its opening submissions, but explained that it now believed it could be entitled to aggregate the work required to answer all the requests and rely on the exclusion at section 12(1) of the Act. A full copy of the relevant sections of the legislation is in the Legal Annex attached to this Notice.

The Investigation

Scope of the case

10. The complainant contacted the Commissioner a number of times to complain about the way her requests for information had been handled. She remained particularly concerned about the behaviour of the DWP in relation to overseas benefit claims.
11. On 24 November 2010 the Commissioner and the complainant agreed that the scope of his investigation would be to determine:
 - (1) *Whether section 12(1) can be applied appropriately to requests 1 to 7;*
 - (2) *If not, whether any other exclusions apply to requests 1 to 7;*

(3) If not, whether relevant recorded information is held for requests 1 to 7;

(4) If so, whether any further exemptions have been applied appropriately to any of that information; and

(5) To note any procedural breaches of the Act in this case.

12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. The Commissioner cannot say whether the complainant's allegations are founded in fact.

Chronology

13. The Commissioner, the DWP and the complainant have exchanged considerable correspondence about these matters. This chronology is only a summary of the key correspondence.
14. On 3 November 2010 the Commissioner wrote to the complainant and the DWP, asking the DWP to explain its position.
15. On 8 November 2010 the DWP explained that there was a considerable volume of requests between it and the complainant and asked the Commissioner to explain the nature of the complaint.
16. On 12 November 2010 the Commissioner called the DWP to clarify matters.
17. On 23 November 2010 the DWP provided detailed comments about the requests. It explained its belief that a number of exemptions could be applied to them, but said it would begin by citing section 12(1) for the aggregated work required to answer them.
18. Later that day the Commissioner wrote to the complainant about the scope of his investigation and to explain how the costs limits operated. The complainant replied the next day, confirming the scope of the investigation and providing arguments that will be considered below.
19. The Commissioner then made detailed enquiries of the DWP about its reliance on section 12(1). On 20 December 2010 the DWP provided its arguments.

Analysis

20. The DWP originally tried to answer the complainant's questions without determining whether it held relevant recorded information that covered them. It did this to be helpful and because it had the expertise to do so. However, the complainant would not accept the answers. Therefore the Commissioner asked the DWP to reconsider its position under the Act. That meant it was required to consider all the relevant recorded information that may be covered by the requests. The DWP said that this would be a big undertaking and explained that the costs limit excluded it from doing this work. The Commissioner has therefore considered the operation of the costs limit first.

Exclusion – section 12(1)

21. Under section 12(1) a public authority is not required to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate limit.

22. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") provide that the cost limit for central government public authorities is £600. This must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours. If a public authority estimates that complying with a request would exceed 24 hours, or £600, section 12(1) provides that the request may be refused.

23. The Information Tribunal (the "Tribunal") in *Quinn v Information Commissioner & Home Office* [EA/2006/0010] ("*Quinn*") explained this point in this way (at paragraph 50):

'The fact that the rules drafted pursuant to s.12 have the effect of defining what is a reasonable search and the amount of time and money that a public authority are [sic] expected to expend in order to fulfil their obligations under the Act, serves as a guillotine which prevents the burden on the public authority from becoming too onerous under the Act.'

24. The Commissioner has split his analysis of section 12(1) into two parts. The first part considers whether the requests should be aggregated or considered individually for the purposes of section 12(1). The second part will carefully discuss the estimate provided in this case and whether it was reasonable and related to the activities that are allowed to be included in the estimate.

Should the requests be aggregated or considered individually for the purposes of section 12(1)?

25. When considering whether requests can be aggregated or need to be considered individually the Commissioner applies regulation 5, which states that:

'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.'*

26. In order to aggregate the requests for the purposes of section 12(1) the Commissioner must determine whether they relate to any extent, to the same or similar information. This has been considered by the Tribunal in *Ian Fitzsimmons v Department for Culture, Media and Sport* [EA/2007/0124]. The Tribunal made the following general observation at paragraph 43:

*"The test in Regulation 5 of the Fees Regulations seems to us to be very wide; the requests need only relate to any extent to the same **or similar** information [the Tribunal's emphasis]"*.

27. The Commissioner invited the DWP to make its submissions concerning this point. It replied that it believed that all the requests were all similar since they all focus on a disagreement about the interpretation of the ECJ judgment and whether disability benefits can be and are claimed abroad.

28. It indicated it could come to this conclusion by considering the information that would be caught by each request. For example, request one relates to the people involved in an alleged conspiracy against disability benefit claims, associated costs of that alleged conspiracy and costs of 'ignoring the ECJ judgment'. This makes it about the handling of disability benefit claims. Request two also asks for the same costs and request three appears to ask what aspect of the judgment is being ignored. The Commissioner is satisfied that looking at the seven requests that they are all similar to some extent as they all relate to the disagreement about the interpretation of the ECJ judgment and the claim of related benefits.
29. As well as the seven requests being similar it is also necessary for them to be submitted within 60 working days. The first and last of the seven requests were separated by less than 60 working days in this case. The Commissioner has therefore determined that the DWP is able to aggregate the costs for all seven requests in this case.
30. The Commissioner notes that the DWP is not taking into account earlier requests made by the complainant and [Individual D redacted] which were also for similar information and may have been within a reasonable timeframe. The Commissioner has therefore not taken the handling of these requests into account in his analysis either. He is therefore focussing on the aggregate costs for only the seven requests that have been specified in the requests in Appendix A.

Was the estimate reasonable in this case and was section 12(1) therefore applied correctly?

31. The issue of what constitutes a reasonable estimate was considered in the Tribunal case *Alasdair Roberts v the Information Commissioner* [EA/2008/0050] ("*Roberts*"). The Tribunal made the following points 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.*"

32. The activities referred to in Regulation 4(3) are:

"(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."

(1) What is the DWP's estimate of the work required in this case?

33. The DWP has provided the Commissioner with a detailed and reasoned estimate about why it believed that the processing of these seven requests would exceed the costs limit.

34. The DWP understood that the onus was on it to prove that the work required to process the seven requests would take longer than 24 hours. It concentrated its arguments on the work required to gather all the relevant recorded information that would be held that would fall within request 1.

35. It explained that it did not agree with the complainant that there was a "conspiracy", that it was "ignoring the ECJ court decision" or that it was "withholding rightful legal benefits". However, the only way to be certain that there was no relevant recorded information that could be said to fall in the request (and work out associated costs) would be to consider all the information it holds about its response to the ECJ judgment and the way it adapted its policy in light of it. The Commissioner accepts it is reasonable that the DWP checks all the records which might contain information that is relevant to the request; although he will carefully consider whether there are reasonable alternatives to narrow down the search in the next section of his analysis.

36. The DWP explained that it was important to understand the scope of the searches that would need to be conducted to look at all the information about its handling of the ECJ judgment dated 18 October 2007. It explained that it would be necessary to check three years of files across a large number of its departments. This was an issue that was a core part of its duties and the ECJ judgment was a matter that directly concerned it.

37. The DWP explained that there were a considerable number of teams that were involved in considering its handling of the ECJ judgment and where relevant recorded information, if held, could be located. They were:

[1] Policy officials in the 'Disability and Carers Benefits Division' in the 'Work and Welfare Group' based in Caxton House, London.

[2] Policy officials in its 'Joint International Unit' who act as its liaison with the European Commission also based in Caxton House, London.

[3] The Pensions, Disability and Carers Service – an executive agency of the Department that is based in Norcross, Lancashire.

[4] The Legal Group at the Adelphi building, London; and

[5] It should also check with other departments such as the Treasury, Foreign Office, Cabinet Office and Government Legal Advisers in case information is held on the department's behalf.

38. It explained that relevant information was likely to be held in the four locations above and that it would be held in a variety of different formats. It explained that it held its records as follows:

(1) In paper record format, including:

(i) Personal and business files located with the teams outlined in points [1] to [4] of paragraph 37; and

(ii) Formal registered files many of which will be held in the central file storage in Heyward, Lancashire.

(2) In electronic record format, including:

(i) Shared files (known as 'Team Rooms'); and

(ii) Electronic personal files and folders.

39. The DWP also explained that the breadth of what would need to be checked caused the main concern. To search for relevant information would require considered checking of everything it holds in connection with the judgment. Much of this would be likely to be irrelevant. It provided an example of the work required to check the electronic files in the first location noted in paragraph 37. Its electronic system contains a number of folders and hundreds of subfolders. Some of the information will be about its view of the judgment, other information will solely be about exporting benefits. It could not possibly successfully differentiate the files without checking every one. Overall, it would be necessary to check many thousands of computer files across the areas outlined above to be certain that any and all potentially relevant recorded information was located.

40. It estimated from experience it would take on average ten minutes to check a file. While some may take only seconds, others would be more voluminous and take considerably longer. While it was not possible to confirm the number of files to be checked to provide a direct estimate – it could amount to more than 1,000 hours work. The breadth of what would need to be checked is so great that even a comprehensive estimate could not be provided, although it could be certain that it would amount to many times the 24 hour limit.
41. The Commissioner is satisfied that all the work mentioned above relates to an activity that is allowed by the Fees Regulations (part (a) determining whether it holds the information).

(2) *Are there any reasonable alternatives in this case?*

42. The complainant has argued that the reliance on the costs limit was neither credible nor well considered. She also believed that the information would be known and would not necessitate a search through all of the records.
43. When considering this issue the Commissioner has been guided by the Tribunal in *Roberts*. In this case, the complainant offered a number of suggestions as to how the requested information could be extracted from a database that contained the elements of what was requested. The Tribunal concluded that none of the ways suggested would have brought the request under the costs limit. However, at paragraph 15, the Tribunal also made the following more general comments on alternative methods of extraction:

“(a)...the complainant set the test at too high a level in requiring the public authority to consider all reasonable methods of extracting data;

(b) that circumstances might exist where a failure to consider a less expensive method would have the effect of preventing a public authority from relying on its estimate...”

44. Those circumstances were set out at paragraph 13 where it was said:

“...it is only if an alternative exists that is so obvious to consider that disregarding it renders the estimate unreasonable that it might be open to attack. And in those circumstances it would not matter whether the public authority already knew of the alternative or had it drawn to its attention by the requestor or any other third party...”

45. The Commissioner has therefore considered whether there is an alternative that exists that is so obvious to consider that it renders the estimate unreasonable in this case.
 46. The DWP explained that due to the disparate locations, the amount of time and the sheer scale of what was held; that there was no methodology or approach that would lend itself to it being able to obtain the requested information within the costs limits.
 47. The Commissioner accepts that the sheer volume is problematic in this case. It would not be possible to print everything in the time limit and there is nothing that would be held that could circumvent the need to check all the records. He is satisfied that there are no reasonable alternatives in this case other than the individuals at the DWP checking a considerable quantity of records in line with the request. There would also be no way of searching electronically for the information requested due to the nature of what is being asked and no report function would assist in narrowing the search either.
 48. The Commissioner has considered whether it would be possible to narrow down the search by document type or destination. The Commissioner can understand that given that each side disagrees about the fundamental properties of the information that has been requested that there was no possibility of narrowing it down to document type in this case.
 49. The Commissioner has considered the complainant's view that it was obvious what she wanted and someone would know where to find the information within the costs limit. On the facts of this case the Commissioner considers that this is incorrect. The requests are not drafted narrowly as the complainant claims. For example, she asks for 'full details' of the DWP's legal position and 'full costs' of its actions. In the Commissioner's view, the breadth of the requests would necessitate full searches of all the records that may contain relevant information.
 50. Having considered all the relevant evidence above, the Commissioner is satisfied that there are no reasonable alternatives to checking all the records that may contain relevant information in this case.
- (3) *Has the DWP proved that a reasonable estimate for the required work would exceed 24 hours in this case?*

51. The Commissioner is satisfied that the DWP has evidenced that to answer request 1 alone would take more than 24 hours work. This is because it would require the careful consideration of three years worth of records from at least four different departments. He is satisfied that this estimate is '*sensible, realistic and supported by cogent evidence.*' He relies on the Tribunal's decision in *Quinn* to accept this estimate in this case. He therefore determines that section 12(1) was applied correctly in this instance.
52. As section 12(1) can be applied correctly to request 1 alone and the Commissioner has found that the DWP is entitled to aggregate the work needed to be done for requests 1 to 7 altogether, it follows that section 12(1) can be applied correctly to all seven of the requests that have been considered in this case.

Procedural Requirements

Section 16(1)

53. Section 16(1) provides 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.
54. Whenever the cost limit has been applied correctly, the Commissioner must consider whether it would be possible for the public authority 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 DWP to have advised the complainant to reduce the scope of her request.
55. The DWP has explained that in its view it was unable to offer further advice and assistance in this case. It explained that it had clearly explained its position to the complainant and assisted her in explaining its view and interpretation of the ECJ judgment. The information that it has provided is detailed in the background section of this Notice.
56. In addition it explained that the context of this request must be taken into account. It concerns a long-standing matter and one where both sides genuinely have different views about the complainant's underlying concerns. It believed that any request from the DWP to ask the complainant to narrow down her requests would have been met by an adversarial and hostile approach, and it provided evidence to this effect.

In addition, it would be likely to be used to imply that there was something correct about her allegations. It explained that the majority of the requests that have been asked were already answered in private correspondence before being asked again on the 'What Do They Know' website. It explained that any response that does not accord exactly with what the complainant wants precipitates further emails and requests. It explained that it continued to receive large numbers of similar requests from the complainant.

57. The DWP indicated that it believed that the complainant would not have been amenable to the provision of advice and assistance as it would have been misinterpreted as an attempt to avoid providing relevant information. It said that given its history, any attempts to provide advice and assistance would be futile and would lead to the further complaints. It also explained that it had a duty of care to its staff and that it regarded the approach of [Individual D redacted] and the complainant as being bullying.
58. The Commissioner has carefully considered whether the complainant's comments that she would accept work being done up to the 24 hour limit (stated on 1 September 2010 in relation to requests 2 – 5) makes a difference to the amount of advice and assistance that can be expected from the DWP.
59. The Tribunal in *Cooksey v Information Commissioner and Greater Manchester Police ("Cooksey")* [EA/2010/0113] explained in paragraph 36 of its decision that:

'The Appellant argued that there could reasonably have been a search up to the costs limit and that any information found in relation to her original request, even if only partial, would be useful. The Tribunal sympathises with this sentiment, however it does not seem to the Tribunal that this is a correct approach to section 12 FOIA. If the costs limit is engaged, the Tribunal finds that the effect of section 12 is to disapply the duty to comply with the information request. The Tribunal does not consider that the margin of difference between the compliance estimate and the costs limit is a relevant consideration in these circumstances.'

60. In *Cooksey* the public authority was not able to locate specific information from a number of boxes without checking them all. The Commissioner accepts that this case is simply a more extreme example of where there is no possibility for the request to be satisfied without doing work beyond the costs limit. If the public authority had, for example, undertaken a review of the first, say 20 or 30 files, it seems unlikely that it would have satisfied the Appellant's requests in any

meaningful way and there would be no way for the public authority to select the files in order for them to amount to representative sample.

61. The Commissioner has decided that given the information above, it was reasonable for the DWP not to offer further advice and assistance in this case. He has found that it has therefore complied with section 16(1). His reasons for this view are that the structure and nature of the requests makes advice and assistance difficult to provide, there is clear evidence of disharmony in the correspondence as it relates to an ongoing grievance and, finally the complainant could make a fresh request after this notice, narrowing the information requested, should she choose to do so.

Other procedural matters

62. Section 17(5) states that any public authority relying on section 12(1) must within the time limit for complying with section 1(1) give the applicant a notice stating that fact. The time limit for complying with section 1(1) is found in section 10(1). This states that a response should be issued as soon as possible and in 20 working days in any event.
63. The DWP failed to explain that it was relying on section 12(1) for the work required to answer all seven of the requests until during the Commissioner's investigation. Its failure to do this was a breach of section 17(5). The Commissioner does not require any remedial steps for this breach as the content of any new refusal notice would be upheld by this Decision Notice.

The Decision

64. The Commissioner's decision is that the DWP dealt with the following elements of the request in accordance with the requirements of the Act:
- It applied the costs exclusion (section 12(1)) correctly to the seven aggregated requests that the Commissioner has considered in this case.
 - It complied with its obligations to provide reasonable advice and assistance under section 16(1).
65. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- It breached section 17(5), as it failed to issue a section 12(1) notice in 20 working days for all of the requests.

Steps Required

66. The Commissioner requires no steps to be taken.

Right of Appeal

67. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

68. 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.
69. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 23rd day of August 2011

Signed

**Faye Spencer
Group Manager
Information Commissioner's Office
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Wilmslow
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Appendix A – the requests

1. This Appendix contains the seven requests considered in this case and a summary of the DWP's previous interaction with the complainant in respect of them. For clarity, the Commissioner has numbered and listed them in chronological order.

Request 1

2. On 3 August 2010 the complainant made a request for the following relevant recorded information:

'[Individual A redacted], in his capacity of [rank redacted] Conspired with senior executives in the DWP such as [Individual B redacted], [Individual C redacted] etc, in order to purposely defraud "ex-pat" DLA claimants out of their legal benefit rights.

My request under the FOI Act fall into two parts

[1] Please provide a full list of all those DLA senior executives involved with [Individual A redacted] in the conspiracy to defraud DLA claimants.

[2] Please provide full details of the cost to the public purse of the above conspiracy and the cost to the public purse of defending EU infringement proceedings against such illegal activities of the DWP.

I should add that in these times of enforced austerity and cut backs the public has a right to know. Therefore please for a change be honest and not hide behind the law as it is your custom to do!'

3. On 1 September 2010 the DWP issued its response. It stated:

'I understand from your recent correspondence with the Department that you are making this request (and others) on behalf of [Individual D redacted]. This correspondence includes your emails of 8 June 2010 (headed '[Individual D redacted] FoI Requests'), 22 June 2010 (concerning [Individual D redacted]'s entitlement to DLA) and 1 July 2010 (concerning a formal complaint made 'on behalf of [Individual D redacted]').

Amongst earlier FoI requests received from [Individual D redacted], there are two (our ref 1044/10 and 494/10) where the same questions were asked as in the present request. In particular a request was made for 'the names of all senior DWP executives that [Individual A redacted] instructed concerning the ruling of the ECJ in Case C-299/2005' and 'whether [Individual A redacted] has considered the cost ... upon the public purse of the DWP's activities in response to the ECJ judgement of 18 October 2007'.

The reply to [Individual D redacted] dated 7 May 2010 dealt in full with both requests.

In addition, a further FoI request to DWP dated 16 August 2010 (our ref: 2246/10) asked,

'Furthermore, I would like to know the cost of the DWP's ignoring EU law upon the UK taxpayers'.

A full reply was sent to this request on 19 August 2010.

As the present request is a repeat of those previously made and answered (our ref: 494/10, 1044/10 and 2246/10) the Department will not be meeting it, there clearly being no duty to do so under section 14 (2) of the Freedom of Information Act.'

4. On the same day the complainant explained that the responses referred to failed to answer the requests for information and that it was necessary to place those requests on a public forum. This was followed on 6 September 2010 with a request for an internal review. She explained that she wished [Individual A redacted] to answer for his actions.
5. On 28 September 2010 the DWP communicated the results of its internal review to the complainant. It said:

'[1.] On 1 September the DWP Central FoI Team sent you a letter via the "Whatdotheyknow" website explaining that this question had been answered in a letter dated 7 May 2010 to [Individual D redacted]. Given that you have now clarified that the request is made in you own name, I can reply as follows:

So far as concerns the number and names of officials who have been involved over the years in considering and advising on the implications of ECJ Case C-299/2005, various aspects of the case will have been considered at various times by many officials, and this is an ongoing process. Third party personal information is

exempt from disclosure by virtue of section 40(2) of the Freedom of Information Act. It falls instead to be treated under the provisions of the Data Protection Act. We do not release the names of officials who are not senior civil servants and who do not have customer-facing roles, since to do so would breach their right to privacy, contrary to the Data Protection Act.

[2.] Our reply of 1 September refers you to your own FoI request dated 16 August 2010 (our ref: 2246/10) where you ask for the same information as that requested above. A full reply to this question was sent to you via the Whatdotheyknow website on 1 September 2010. I am therefore unclear as to why you state in your request for internal review that no reply was received to this question.

As stated in our letter of 1 September, under section 14 (2) of The Freedom of Information Act, a public authority has no duty to comply with a repeated request for the same information. In view of the fact that you had already received a reply to your request of 16 August, I agree with the decision in our letter of 1 September to apply section 14 (2) of the Freedom of Information Act to this particular request.'

Request 2

6. On 11 August 2010 the complainant made a request for the following recorded information:

'I WANT TO KNOW THE "TOTAL COST" TO THE UK TAXPAYERS FOR THE DWP IGNORING THE ECJ COURT DECISION OF OCTOBER 18 2007 ON THE EXPORTABILITY OF DLA.

In these times of enforced austerity and cut backs the public has a right to know. Therefore please for a change be honest and not hide behind the law as it is your custom to do!'

Request 3

7. On 12 August 2010 the complainant also made the following request for recorded information:

*'Under the FOI Act I would like to know what the DWP refuses to recognise [sic *in] the ruling on DLA of the ECJ October 2007 and the cost to the UK taxpayers of such a blatant disregard for settled law.*

In these times of enforced austerity and cut backs the public has a right to know. Therefore please for a change be honest and not hide behind the law as it is your custom to do!

Request 4

8. On 16 August 2010 the complainant also made the request for recorded information outlined below:

'Under the FOI Act I would like to know upon what legal basis the DWP is withholding DLA payments to legally entitled persons, despite a European Court Decision which states that the DWP must pay this entitlement.

Also I would like to know why the DWP has blatantly failed to comply with the ECJ and if it was the intention of the DWP to set a precedent where by all and sundry can, like the DWP, stick two fingers up at the ECJ which is the highest court in the EU.

Furthermore, I would like to know the cost of the DWP's ignoring EU law upon the UK taxpayers.'

Request 5

9. On 18 August 2010 the complainant also asked for the following recorded information:

'I would like to know under the FOI Act, what is the legal basis for the DWP withholding DLA payments to "ex pat" British citizens who chose to live within the EU. Baring in mind many chose to move to sunnier climates for health reasons and in fact save the British social services substantial amounts of other extra payments and services.'

10. On 1 September 2010 the DWP issued a response to the four requests (2 to 5) together. It explained:

'In October 2007 the European Court of Justice decided that the disability benefits Disability Living Allowance care component, Attendance Allowance and Carer's Allowance are sickness benefits under European law. This means that these benefits are exportable to other member states of the European Economic Area (EEA) and Switzerland in certain circumstances. Over 2000 people are now receiving these benefits abroad. The European Commission has written to the department to challenge our interpretation of the

judgment for those people who wish to claim a disability benefit from another EEA state and the department will reply within the required deadline.

We estimate that the cost of complying with your request would exceed the appropriate limit specified in regulations and for central government set at £600. This represents the estimated cost of one person spending 3½ working days in determining whether the Department holds the information, and locating, retrieving and extracting that information. Under section 12 of the Freedom of Information Act, the Department is not obliged to comply with your request for this data, and we will not be processing this particular aspect of your request any further.'

11. On 1 September 2010 the complainant asked for an internal review. She explained that £600 was 'peanuts to what has been wasted by the DWP covering up this matter', that the 'DWP is hiding behind the law', that she was prepared to limit her request for now to what £600 work would secure and that it was likely that the court costs about this matter would far exceed £600 if the public authority did not provide the information. She reiterated her request for an internal review for these requests on 16 September 2010.
12. On 24 September 2010 the DWP issued its response. It stated:

'You originally asked in those e mails for the total cost to the UK taxpayer for the DWP ignoring the ECJ court decision of October 2007. As you know the department's position is that we consider we are complying with, rather than ignoring, the Judgment as we are paying the disability benefits to people resident in other European countries. We have also reinstated benefits for people who moved abroad after 8 March 2001 but before the judgment who lost their benefits when they moved but who have now been found to be eligible for the benefits under European and the appropriate parts of domestic law.

The Department responded that the estimated cost of complying with your request would exceed the limit specified in regulations set at £600 ...

The Freedom of Information Act provides that information should be provided unless an exemption applies or costs would be breached, I therefore cannot accept your assertion that the department is hiding behind the law. I notice that you have made a number of similar allegations which I consider to be unreasonable in the circumstances as the department is following the Freedom of information legislation.

You have not specified the costs you are interested in but have asked in general terms. To try and establish costs relating to the European court judgment of three years ago would undoubtedly exceed £600. The costs relating to implementation of the Judgment would fall to many areas of the Department including work in relation to parliamentary activity, liaising with the European Commission, policy development and legal advice etc.

You have also requested that we provide you with information up to the £600 cost limit. This is not something we are able to do based on your current request. I agree that the estimated cost would indeed be in excess of £600.

I am satisfied that the Department's response was compliant with its obligations under the Act. I therefore uphold the Department's original handling of your request.'

Request 6

13. On 18 August 2010 the complainant also requested the following recorded information:

'On its forms EXP2, the DWP, notwithstanding a person's right to privacy and the Data Protection Act, illegally requests that "expat" DLA claimants sign away "ALL" their rights to privacy contained within UK and EU law.

Under the FOI Act, I wish to ask the DWP upon what legal basis are such requests contained within their forms EXP2 made.

Having made this request directly to [Individual E redacted] of the DWP, three times, only to be completely ignored, it is now deemed only proper to make further requests in this manner, in order to ensure that the DWP does not continue to act Ultra Viries [sic], also that the DWP complies with the law and that such FOI Act requests are placed firmly within the public domain.

We are all subject to the Rule of Law, including the DWP.'

14. On 26 August 2010 the DWP issued the following response:

'You do not make it clear in your question which part of the form you believe has these effects or in what way, however I should explain that the Secretary of State has the power to ask any questions that are relevant to a person's claim to benefit. These are contained in the Social Security (Claims and Payments) Regulations 1987 (see regulations 7(1) and 32, enclosed).

The EXP2 form is designed to collect information for decision makers to consider customers' entitlement to have benefit reinstated following the European Court of Justice (ECJ) Judgement in C299/05. It asks for information essential to be able to decide on someone's entitlement to receive payment of DLA (Care component), AA or CA for periods spent in another EEA country or Switzerland. These include things like whether customers or their relevant family members worked or received benefits whilst abroad and also about whether the customer spent time outside of the EEA. These are factors which may effect entitlement.

Depending on individual circumstances the form may also ask about other changes that may affect entitlement to these benefits, for example if a DLA or AA customer's needs have changed or if they have spent time in hospital or a care home.

The form asks for the customer's consent to seek further information about the claim, including medical information, from third parties. Customers have the right to withhold their consent although this may mean we are unable to establish their entitlement to benefit in consequence.

Customers who are able to have their benefit reinstated may also receive an ex-statutory payment for the period from the ECJ Judgement, 18th October 2007 and the date their reinstated entitlement starts. The EXP2 also contains a declaration relating to this payment, asking the customer to recognise it as settlement for entitlement during that period and to waive rights to any payment at the same rate, if a later decision gives rise to entitlement for the same period.

This is so that the Department can be assured that customers do not receive duplicated payments of the same benefit for the same period.'

15. On 26 August 2010 the complainant told the DWP that she disagreed that it was entitled to ask for the specified information on the form and on 21 September 2010 asked for an internal review to be conducted for this request.
16. On 18 October 2010 the DWP communicated the results of its internal review to the complainant. It confirmed that it was satisfied that the above answer was clear and correct.

Request 7

17. On 21 September 2010 the complainant made the following request:

'[Individual E redacted] has been asked many time [sic] to provide the legal basis for requiring DLA claimants subject to the ECJ Ruling on the exportability of DLA of October 2007 to complete form EXP2.

To complete form EXP2 would means that claimants would be signing away their right to privacy enshrined under the Data [sic] Protection Act and Human RIGHT [sic] LEGISLATION.

I don't want anymore gobbledegook answers please, just provide in clear pain [sic] English the legal basis for the DWP making such erroneous demands on British Citizens which would comprise their rights to privacy.'

18. On 18 October 2010 the DWP issued its response. It explained that it regarded this request as being a repeat of request 6 and provided a copy of what it said in that response. The complainant requested an internal review on the same day because she believed:

'The forms EXP2 are not specific and you are hiding behind a ridiculous and wrongful explanation. All the DWP have to do is to ask specific questions which you have refused to do. WHY? The DWP wants a carte Blanche authority to meddle and abuse a person's right to privacy. Yet when questioned over other issues the DWP are happy to use the same right to privacy in order to evade lawful questions... This is crooked government at its best!'

19. On 11 November 2010 the DWP communicated the results of its internal review. It maintained its position but provided a further explanation to respond to the internal review request. It said:

'I have reviewed the responses you have received and am satisfied that the responses answered the questions asked clearly. However in your latest request for review you also say:

"The forms EXP2 are not specific and you are hiding behind a ridiculous and wrongful explanation. All the DWP have to do is to ask specific questions which you have refused to do. WHY? The DWP wants a carte Blanche authority to meddle and abuse a person's right to privacy."

It may be useful if I explain that someone's eligibility to export entitlement to a UK disability benefit whilst living outside of the UK in another EEA state or Switzerland depends on whether they or a family member (their spouse, civil partner or a parent on who they depend) gets or is able to claim certain benefits from the UK but could also be affected if they or their family member worked or

received other benefits from another EEA member state, or Switzerland.

The questions on form EXP 2 are designed to collect information on these subjects as well as capturing changes which may have occurred since someone seeking reinstatement moved abroad which could affect their entitlement to benefit, such as any periods in hospital or a care home and an increase or decrease in the amount of help needed by the person asking for reinstatement.

Article 8 of the European Convention on Human Rights concerns the right to respect for private and family life, home and correspondence. Even if there is an interference with this right (which we do not accept), it is important to note that this is a qualified right. It is permissible for public authorities to carry out actions which might otherwise be regarded as interfering with individuals' privacy if it is in accordance with the law and is a proportionate way of achieving certain objectives. The information requested on the EXP2 form is necessary in order to decide a person's entitlement to a social security benefit and accordingly, there is no breach of Article 8.'

Legal Annex

Freedom of Information Act 2000

Section 1 General Right of Access

(1) 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.”

(2) 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 10 Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

(2) Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

(3) If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later

than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations."

- (5) Regulations under subsection (4) may –
- (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner."

- (6) In this section –
"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

Section 12 Exemption where cost of compliance exceeds appropriate limit

(1) 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."

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit."

(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases."

(4) The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information 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 estimated total cost of complying with all of them."

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Section 16 Duty to provide advice and assistance

(1) "It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

Section 17 Refusal of request

(1) 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.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) 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.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.'

Statutory Instrument 2004 No. 3244

The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

...

The appropriate limit

3. (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

Estimating the cost of complying with a request - general

4. - (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act^[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(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.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.'