

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 requested information about an individual's state of mind at a set time. The Department of Work and Pensions (the "DWP") refused the request under section 14(2) (a repeat request) and maintained its position in its internal review.

The Commissioner asked the DWP to justify its reliance on section 14(2). It was unable to do so. Instead, it argued that it did not hold relevant recorded information and could not therefore provide it.

The Commissioner has determined that on the balance of probabilities the DWP did not hold any relevant recorded information for this request. However, he does find breaches of section 1(1)(a) and 10(1), because the DWP did not tell the complainant in 20 working days. He requires no remedial action to be undertaken 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 can make no comment about the validity or otherwise of the complainant's concerns about overseas benefits claims,

it is necessary to outline the background to the request for information in order to understand its 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. In that judgment, 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 benefit 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.
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 European Economic Area 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
6. The European Commission has exercised its right to challenge the UK Government's interpretation of the judgement and has commenced infringement proceedings. This is 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 the final

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>

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 another interested party.

The Request

8. On 15 November 2010 the complainant made the following request (the Commissioner has redacted names of individual members of staff):

'On 9 October 2009, [Individual redacted] in his capacity of [role redacted] wrote to a DLA Claimant, (the claimant), under the heading of YOUR HARASSMENT OF DWP STAFF.

In his correspondence to the claimant, [Individual redacted] made a number of serious spurious allegations including a totally ridiculous statement that the claimant was making a nuisance of himself.

Of course this is all nonsense and a very poor example of a bureaucrat not knowing his limitations under the law and abusing his position and acting ultra viries [sic] in order to attempt to bully a person into silence.

The claimant sought to advise certain members of the DWP that they were in fact in breach of EU law. Reference was made on a number of occasion [sic] to the ECJ judgement on the exportability of DLA. Case 299/05. Regrettably, despite such advises the DWP continued to abuse the law as [Individual redacted] had caused a substantial conspiracy to defraud expatriate DLA claimants and the staff contact and commented upon by the claimant, were indeed an integral part of this deception.

[Individual redacted] was informed at the time of the clauses contained within Protection from Harassment Act 1997, and told to go away and consider his position as a [role redacted] and perhaps mature as well as no reasonably competent [role redacted] would have send such a letter to a person seeking only to safe guard [sic] the integrity and economic well being of the nation. Unfortunately given the poor quality of [Individual redacted]'s advise to the DWP, the EU did indeed issue infringement proceedings against the UK in this matter.

However, that matter will be dealt with in due course.

My Freedom of Information Request is this:

At the time of writing to the claimant, was [Individual redacted], in his puerile attempts to "frighten the claimant off," from exposing the illegal activities of the DWP, fully aware of the claimants Human Right to participate directly in the government of his country?

UNIVERSAL DECLARATION OF HUMAN RIGHTS Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948. Art 21 (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.'

9. On 7 December 2010 the DWP issued its response. It explained that because it had discussed its position about Disability Living Allowance benefits a number of times with the complainant, this request was a repeat request and it was not prepared to answer it by virtue of the exclusion at section 14(2) of the Act (repeat requests).

10. On the same day, the complainant requested an internal review. She explained:

'This is not covering the same old ground, this is new as I want to know what right any government bureaucrat has to label a person a nuisance when that person only seeks to ensure the full implementation of the law. If indeed there is any nuisance here it is [Individual redacted] for abusing his position.

You may as well stop protecting those who abuse office as I wont stop until I get the truth in the open.

In the long run it's people such as [individual redacted] who corrupt society... I only seek full public accountability for [Individual redacted] for his actions.'

11. On 16 December 2010 the DWP communicated the results of its internal review. It upheld its position.

The Investigation

Scope of the case

12. On 17 December 2010 the complainant contacted the Commissioner to ask him to review how her request had been handled.

13. 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

14. On 17 December 2010 the Commissioner acknowledged the receipt of the new complaint to both the complainant and the DWP. He made detailed enquiries of the DWP about its application of section 14(2).
15. On 12 January 2011 the DWP provided a response. It explained it was withdrawing its reliance on section 14(2) and that it was now going to write to the complainant to confirm that it held no relevant recorded information for this request.
16. On 20 January 2011 the DWP issued a new response to the complainant. It explained that the request was invalid because it held no relevant recorded information. The Commissioner called the DWP to explain that the response was incorrect in law and asked it to issue a new response.
17. On 24 January 2011 the DWP provided its new response to the complainant.
18. On 25 January 2011 the Commissioner wrote to the complainant. He asked whether she wanted the case to continue and if so, to provide her arguments about why further recorded information would be held.
19. On 31 January 2011 the complainant wrote to the Commissioner to tell him that she wanted this case to continue. She explained that she did not believe the DWP.

Analysis

Substantive Procedural Matters

Did the DWP hold further relevant recorded information that is relevant to the request for information?

20. Section 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.
21. It follows that it is necessary for information to be held in recorded form at the date of the request for it to be subject to the Act.

22. It is important to note the standard of proof that the Commissioner uses to determine whether relevant recorded information is held. In *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] (*'Bromley'*), the Information Tribunal (the "Tribunal") confirmed that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The standard of proof has been recently confirmed by the Tribunal decision of *Innes v Information Commissioner* [EA/2009/0046].
23. The Commissioner has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in *Bromley*. It explained that to determine whether information is held requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It also requires considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
24. The Commissioner has considered the arguments of both sides and has looked at the factors specified in *Bromley*.

(I) The public authority's analysis of the request

25. It is noted that the request makes certain allegations and asks the DWP for recorded information about what was happening when the action that led to that allegation occurred. The Commissioner believes that it is possible to isolate what is being asked for without the allegation being commented upon:

1. the request asks what [Individual redacted] knew;
2. when he wrote to a named individual; and
3. and whether it corresponds with Article 21 of the UCHR.

26. The Commissioner is satisfied that the DWP understood what it is being asked for, having discussed it with the members of staff who were responsible for the search.

(II) The scope of the searches that it had conducted

27. The DWP explained that it had discussed the request for information with the correct service area and could confirm that it held no relevant recorded information about what the individual knew when he wrote to a set individual.

28. It also explained that it does not hold specific recorded information about relevant training that the individual undertook (down to the provision of the UCHR) and that it believed that information about training would still not constitute relevant recorded information that would answer the complainant's request.

(III) Any other reasons why the public authority believes it does not hold relevant recorded information.

29. The DWP explained that it had already advised the complainant that Human Rights compliance is an integral part of all the DWP's policies and procedures and that all of its staff were trained appropriately for the job role they hold. It also explained that general guidance on the Human Rights Act and the ECHR was available to its staff (which covers very similar ground to the UCHR).

30. It explained that it had no doubt that the individual staff member would be conversant with the law given his position. However, it did not hold recorded information about what was in his mind when he wrote to a certain individual.

31. The complainant has not offered any arguments about why relevant recorded information would be held for this request, even though the Commissioner asked her for these. Her correspondence is much more concerned with her view that the DWP is acting illegally.

32. It follows due to the nature of the request, that the Commissioner is satisfied that on the balance of probabilities that the DWP did not hold relevant recorded information for this request. The Commissioner is satisfied that the DWP's position now accords with its obligations under section 1(1)(a) of the Act.

Procedural Requirements

33. Section 10(1) requires that, subject to limited exceptions (none which are relevant in this case) that a public authority confirms or denies whether it holds relevant recorded information in 20 working days.

34. The public authority used an exclusion (section 14(2)) and did not confirm or deny whether it held relevant recorded information before the Commissioner's involvement. It therefore took more than 20 working days and breached section 10(1).

35. Section 1(1)(a) requires that a public authority (subject to a number of exemptions none of which are relevant here) confirms or denies what relevant recorded information it holds. The DWP failed to confirm that it did not hold relevant recorded information prior to the Commissioner's involvement and therefore breached section 1(1)(a).

36. The DWP issued a new response on 24 January 2011 that confirmed that it did not hold relevant recorded information. He does not require any remedial steps in respect to this procedural breach.

The Decision

37. The Commissioner's decision is that the DWP did not deal with the request for information in accordance with the Act. This is because:
- It breached section 1(1)(a) by failing to deny that it held relevant recorded information until the Commissioner's investigation; and
 - It breached section 10(1) by failing to confirm that it did not hold relevant recorded information until 24 January 2011.
38. However, the Commissioner does find that on the balance of probabilities the DWP did not hold any relevant recorded information for the request dated 15 November 2010.

Steps Required

39. The Commissioner requires no steps to be taken.

Right of Appeal

40. 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

41. 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.
42. 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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Legal Annex

Section 1 - General Right of Access

Section 1 of the Act provides that:

- (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.”
- (3) Where a public authority –
 - (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”
- (4) The information –
 - (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”
- (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

- (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10 - Time for Compliance

Section 10 of the Act provides that:

(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 14 – Vexatious or repeated requests

Section 14 of the Act provides that:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.