

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 May 2013

Public Authority: Department for Work & Pensions
Address: Caxton House
4th Floor
6-12 Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

The complainant has requested information from the Department for Work and Pensions ("DWP") in relation to Atos Healthcare's Fit for Work (FFW) recommendations. The Commissioner's decision is that the DWP has incorrectly applied section 14(2) of FOIA and has breached sections 1(1)(b), 10(1) and 17(5) of FOIA. However, as all information within the scope of the complainant's request which is held by the DWP has now been provided to the complainant, the Commissioner requires no steps to be taken.

Request and response

1. On 18 February 2012 the complainant wrote to the DWP and requested information in the following terms:

In response VTR 0192 you have provided data relating to the Atos FFW recommendations that were subsequently overturned by DWP between Oct 08 and Feb 11. It shows an alarming increase in the percentage overturned to WRAG in the latter part of 2010.

1. *What interpretation did DWP place on this huge increase and what action did it take to address both within DWP & within Atos? This would have been recorded in meeting minutes, emails etc.*

- 2. Is more recent data available to see if this trend continued? If not, when will it be?*
- 3. Does DWP routinely monitor the additional FFW decision reversals made by the Tribunals service?*
- 4. If so, what is the most up to date information available?*
2. The DWP wrote to the complainant on 19 March 2012, stating that it would hope to be in a position to respond fully to his request by 31 March 2012, as the investigation into the issues raised was taking longer than anticipated. The complainant responded to that letter stating that he was not happy with the delays incurred. The DWP treated this as a request for internal review.
3. The DWP responded to the complainant's request on 18 May 2012, providing information in relation to that request.
4. The complainant had further written to the DWP on 28 May 2012, stating that he was not happy with the response he had received and seeking clarification on a number of issues. This was also treated as a request for an internal review.
5. The DWP further wrote to the complainant on 26 June 2012, apologising to the complainant for the delays incurred in responding to his original request and in carrying out an internal review. It subsequently wrote to him on 11 July 2012 with the results of that internal review. It apologised for the delays incurred to date and stated that the issues raised by the complainant in relation to the DWP's original response were being dealt with under a new separate FOI reference.
6. The complainant made a further internal review request on 28 July 2012 expressing his dissatisfaction at his request being 'partitioned' and expressing his intention to complain to the Commissioner.

Scope of the case

7. The complainant contacted the Commissioner on 30 July 2012 to complain about the way his request for information had been handled.
8. The DWP wrote further to the complainant on 14 September 2012, stating that it was now providing responses to the complainant's additional questions of 28 May 2012, which it listed, and provided information in relation to. It stated that, with regard to the delay in responding to the complainant's request, under section 14(2) of FOIA it

was not obliged to comply with a substantially similar or identical request to which it had previously responded.

9. The Commissioner has considered the DWP's handling of the complainant's request.

Reasons for decision

10. One of the issues raised by the complainant was that the DWP had not provided a full response to his request in that the information it provided was incomplete. The Commissioner has therefore investigated whether the DWP holds any further information relevant to the complainant's request.

Does the DWP hold any further information relevant to the complainant's request?

Section 1

11. Section 1(1) of FOIA states 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.
12. The Commissioner has considered whether the DWP has complied with section 1 of FOIA.
13. On 31 October 2012, the Commissioner asked the DWP the following questions to determine what information it held that was relevant to the scope of the request:
 - Was any further recorded information ever held, relevant to the requested information, by the DWP or anyone on behalf of the DWP?
 - If so, what was this information? What was the date of its creation and deletion? Can the DWP provide a record of its deletion/destruction and a copy of the DWP's records management policy in relation to such deletion/destruction? If there is no relevant policy, can the DWP describe the way in which it has handled comparable records of a similar age?

- Is there a reason why such information (if held or ever held) may be concealed?
 - What steps were taken to determine what recorded information is held relevant to the scope of the request? Please provide a detailed account of the searches that you have conducted to determine this.
 - If the information were held would it be held as manual or electronic records?
 - Is there a business purpose for which the requested information should be held? If so what is this purpose?
 - Are there any statutory requirements upon the DWP to retain the requested information?
 - Is there information held that is similar to that requested and has the DWP given appropriate advice and assistance to the applicant?
14. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency*¹ in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is the test the Commissioner will apply in this case.
15. In discussing the application of the balance of probabilities test, the Tribunal clarified that test required consideration of a number of factors:
- the quality of the public authority's initial analysis of the request;
 - the scope of the search that it decided to make on the basis of that analysis and the thoroughness of the search which was then conducted; and the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light.

¹ EA/2006/0072

16. The Commissioner has therefore taken the above factors into account in determining whether or not the requested information is held on the balance of probabilities.
17. The Commissioner is also mindful of *Ames v the Information Commissioner and the Cabinet Office*². In this case Mr Ames had requested information relating to the "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the dossier was "*...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what...*" However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not "*...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one...*" Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.
18. On 5 March 2013 the DWP responded to the questions detailed at paragraph 8 above. It explained that some further recorded information has since been published on the DWP's Research and Statistics website. The hyperlink to that site was provided to the complainant on 18 May 2012. The DWP explained to the Commissioner that the data was created from October 2008 and is updated regularly. The data is regularly published and has never been concealed. The DWP is required under the Welfare Reform Act to retain the information.
19. The DWP has explained to the Commissioner that it does not consider that it has fully addressed the scope of the complainant's original request. It detailed further explanations which should have been provided to the complainant and further advice and assistance which could have been given to him. Therefore, the Commissioner concluded that the complainant had not been provided with all recorded information held by the DWP which is within the scope of his request.
20. Following the Commissioner's intervention, the DWP provided the complainant with all outstanding information held by it within the scope of his request. It confirmed that no further recorded information is held by it which is within the scope of that request. By not providing the complainant with all recorded information held by it which was within the scope of his request within the 20 working day time limit as

² EA/2007/0110

set out in section 10(1) of FOIA, the DWP breached sections 1(1)(b) and 10(1) of FOIA.

Section 14(2) of FOIA

21. Section 14 of FOIA provides that:-

- (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."

Section 17 of FOIA provides that:-

- (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."

22. The complainant's original request was made on 18 February 2012. The complainant sought clarification on 18 May 2012 of some issues raised in response to his original request. The DWP appears to have treated that request for clarification as a "subsequent identical or substantially similar request" to the request of 18 February 2012. The Commissioner considers that section 14(2) of FOIA has been incorrectly applied in this case as a request for clarification in relation to an original request does not amount to an identical or substantially similar request. The DWP made no submissions to the Commissioner on this point. In any case, the Commissioner considers that, even if section 14(2) had been applicable, the DWP did not provide the complainant with a notice stating that fact, therefore it was in breach of section 17(5) of FOIA.

Other matters

23. The Commissioner's guidance states that an internal review should be carried out within 20 working days unless the circumstances are exceptional, in which case it should be carried out no later than within 40 working days. In this case, the DWP has exceeded the 40 working day time limit in which to provide the complainant with the results of its internal review. The Commissioner would remind the DWP that he considers it to be good practice to provide a complainant with the results of an internal review within the appropriate time limit.

Right of appeal

24. 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,
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

25. 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.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
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