

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 March 2013

**Public Authority:** Department for Work and Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

#### Decision (including any steps ordered)

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1. The complainant has requested the DWP's LiMA software. The DWP stated the software itself could not be provided and technical data about the software was being withheld on the basis of section 43(2).
2. The Commissioner's decision is that section 43 is engaged and, after considering the public interest arguments, the DWP has correctly withheld the information.

#### Request and response

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3. The complainant had made earlier requests for information around the use of the LiMA software and, in correspondence with the DWP regarding one of these earlier requests, the complaint asked the DWP on 15 May 2012 to "*provide the LiMA software as originally requested.*"
4. The DWP responded on 14 June 2012 and explained that the LiMA software only functions as an interactive process during a medical assessment and is designed to run on Atos Healthcare networked based PCs and could not therefore be provided. In addition to this, the DWP explained it would not be providing any technical data relating to the software as it considered it exempt under section 43(2) of the FOIA.
5. To further explain its application of section 43(2) the DWP explained that it holds the copyright and intellectual property rights for the software and has licenced a third party to use, sell and sub-licence LiMA in return for payment of a royalty to the DWP. The DWP acknowledged

that should the information be provided to the complainant it would still be protected by the Copyright, Designs and Patents Act 1988 prohibiting certain commercial re-use of the information, but it still considered there would be a likely prejudice to the DWP's commercial interests and that of the licensee.

6. The complainant requested an internal review of this decision on the 14 June 2012 and the DWP responded on 12 July 2012. In this response the DWP upheld its application of section 43(2) stating that it considered disclosure would, or would be likely to, prejudice the commercial interests of the DWP and a third party licensee of DWP and the public interest favoured maintaining the exemption.

### **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular the complainant did not consider that the commercial interests exemption could be engaged as the DWP had not provided sufficient evidence to demonstrate there would be any real or significant prejudice to any party's commercial interests should the information be disclosed.
8. During the course of the Commissioner's investigation he looked to establish that the information was held for the purposes of the FOIA given that the DWP had explained that the LiMA software does not exist in a working format that could be sent to an individual as it is designed to run on Atos Healthcare networked PCs.
9. In response the DWP highlighted a previous decision notice issued by the Commissioner<sup>1</sup> in which he had considered a request for "*a working copy of the LiMA software*". In this decision the Commissioner had accepted that the request was a valid request for information held by the DWP but that section 43(2) was engaged and the information should be withheld. The Commissioner has looked again at whether this request would be for information held and reiterates the view that the information is held by the DWP even if it is likely there would be technical issues with providing a copy of it.
10. The complainant was directed to view the previous decision notice as the Commissioner considered it to be relevant to his consideration of this request in that the information requested was the same albeit the public interest arguments may have changed over time. However, the complainant raised concerns about whether this previous decision was

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<sup>1</sup> FS50371026

relevant as it related to a request for a working copy of the LiMA software and his request was for the LiMA software. The complainant went on to state that he did not understand why the DWP would believe someone would request data that is only readable by Atos networked PCs and his request was for the text based files that contain the software for LiMA.

11. The Commissioner has considered the complainant's point and does not believe there was any misinterpretation of the complainant's request. At no point during the DWP's handling of the request did the complainant indicate his request was for the text based files containing the software for LiMA and the Commissioner considers the DWP were correct to interpret the request as a request for the LiMA software as it would have been unreasonable to expect it to know the request was for other information without this having been made clear.
12. As such the Commissioner has gone on to consider the application of section 43(2) to the request for the LiMA software.

### **Reasons for decision**

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13. Section 43(2) of the FOIA states that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."*

14. In determining whether this exemption has been applied correctly the Commissioner has first considered whether the potential prejudice argued by the DWP relates to the interest identified in the exemption. When considering this the Commissioner has looked at whether, if the prejudice occurred, it would relate to the DWP's or its licensees commercial interests.
15. The DWP explained that as holders of the Intellectual Property Rights of the LiMA software, it has the right to enter into commercial negotiations with any body with a view to selling LiMA. The DWP also explained that it had licenced a third party (Atos Healthcare) to use, customise, distribute, incorporate, market, maintain, support, sell and sub-licence LiMA in return for a payment of a royalty to the DWP.
16. The DWP further explained that in the licence, it confirms that it will not allow any other third party similar rights. In light of this the DWP argue that disclosure of the information would be likely to place it at a significant disadvantage with third parties in the future.

17. The Commissioner is satisfied that the potential prejudice relates to the interest identified in the exemption and has now considered the nature of the prejudice and whether the DWP has sufficiently demonstrated a causal link between the potential disclosure and the prejudice. When evidencing a causal link between the potential disclosure and the prejudice a public authority should be able to demonstrate that the prejudice would be "real, actual or of substance"<sup>2</sup>.
18. The Commissioner, taking into account the above, has gone on to consider the potential prejudice to the DWP and its licensee and the arguments put forward by the public authority to support the view that disclosure, in this case, "would be likely to" prejudice its commercial interests.
19. The DWP explained that it would be running a competitive tendering exercise for the award of a new contract with regard to licensees before its current contract runs out in August 2015. The DWP therefore argues that disclosure of the LiMA software would be likely to place the DWP at a significant disadvantage when securing licencing arrangements with third parties in the future and would be likely, therefore, to prejudice its own commercial interests.
20. The Commissioner asked the DWP to confirm if the tendering exercise had started considering the passage of time between this request and the previous request. The DWP explained that its contract with Atos Healthcare is still ongoing but it had recently had several private companies compete in a tendering exercise and it considered that had it released the LiMA software, or any information which could have been used to recreate the software or parts of it, it could have been used by Atos' competitors in the tender process.
21. After further enquiries with the DWP the Commissioner established that the tendering exercise began on 2 May 2012, before the date of the request. However, the tendering process was still in its early stages and the Commissioner therefore accepts that at the time of the request there was still an ongoing contract with a third party licensee (Atos Healthcare) who had paid a royalty fee to use the LiMA software.
22. However as the tendering exercise had begun when the request was made and bids had been received the Commissioner does not accept that disclosure would have had a detrimental effect on the DWP's ability to renegotiate its contract as this process was already underway. Despite this the Commissioner considers the existence of a current contract involving the payment of royalties on its own is sufficient to

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<sup>2</sup> Hansard HL (VOL. 162, April 20, 2000, col. 827)

engage the section 43(2) exemption. He has next gone on to consider the public interest test in relation to this exemption.

*Public interest arguments in favour of disclosure*

23. The Commissioner accepts there is a strong public interest in transparency and accountability. He also accepts there is a strong public interest in knowing how LiMA software works as it has an impact on people's lives by assisting in determining entitlements. He also notes that there has been public concern about how the LiMA software works.
24. The Commissioner considers that disclosure would increase public understanding of the way in which the LiMA software works. It may also allow the public to enter into a more informed debate about the way in which the LiMA software is used.

*Public interest arguments in favour of maintaining the exemption*

25. The Commissioner when making a decision in the previous case recognised the argument that claimants are given a copy of the completed IB85 form which they can use to appeal to an independent tribunal about a decision. An appeal covers both the decision maker's decision on entitlement to benefit and the process by which that decision was arrived at. The Commissioner also previously noted that the DWP has confirmed that the questions and options built into the LiMA programme are exactly the same as those in the clerical form IB85. Although the DWP has not specifically advanced this argument in this case he does consider this is still a relevant argument to be considered when weighing the public interest in this case.
26. The Commissioner also affords significant weight to the fact that the DWP had a contract with Atos Healthcare at the time of the request which included paying a royalty fee for using the LiMA software and that disclosure of this information would be likely to prejudice the DWP's commercial interest and that of the licensee.

*Balance of the public interest arguments*

27. The Commissioner is mindful of the amount of public concern and media attention the issue of medical assessments has generated and how better understanding the ways in which decisions are made will lead to better informed debate and potentially increased confidence in the process. However, balanced against this he has had to consider whether release of the LiMA software would address these concerns and assist the public's understanding. In order to do this the Commissioner has disregarded the potential technical issues there may be with providing a copy of the software and has considered whether knowing how the LiMA software operates would be in the public interest.

28. LiMA is designed to be interactive and the DWP provided the following example to illustrate how it works:

*"the phrase 'The condition started several months ago' is constructed by the LiMA system as follows:*

*The user is presented with the Standard phrase – The condition started*

*The system will then prompt the user to select the appropriate option i.e. a few, several, many or since (x) or from birth."*

The DWP also made it clear that there are free text options and customisable phrases which all make up part of the final report and the phrases used in LiMA are regularly updated.

29. The Commissioner therefore does not consider that disclosing the LiMA software would assist in increasing the public's understanding of the process beyond that which is already known about how LiMA operates as it would appear to be only providing a snapshot of the LiMA software at that time as it is continuously being updated and the DWP have been open about how the software works and the fact that it utilises assisted text control i.e. a data entry system.
30. Balanced against is the significant weight afforded by the Commissioner to the likely prejudice to the DWP and Atos Healthcare's commercial interests that disclosure may cause. The Commissioner has considered his previous decision and does not feel the passage of time has significantly altered the arguments he considered relevant in that case other than the argument that disclosure may hinder any future contract renegotiation as this was already underway at the time of this request.
31. Taking into account all of the above factors the Commissioner's decision is that the public interest in favour of maintaining the exemption outweighs the public interest in disclosing the information and as such he considers the DWP have correctly applied the section 43(2) exemption to withhold the requested information.

## Right of appeal

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32. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

33. 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.
34. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
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**Wilmslow**  
**Cheshire**  
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