

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2015

Public Authority: Department for Work and Pensions

Address: Caxton House, 4th Floor
6 -12 Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information regarding mortality of claimants in the context of Incapacity Benefit and Employment and Support Allowance state benefits. The Department for Work and Pensions relied on section 22 to withhold the requested information.
2. The Commissioner's decision is that Department for Work and Pensions has incorrectly applied section 22 to withhold requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the number of Incapacity Benefit and Employment and Support Allowance claimants who have died since November 2011 until May 2014, broken down into the following categories:
 - Those that are in the assessment phase
 - Those that were found fit for work
 - Those that were placed in the work-related activity group
 - Those that were placed in the support group
 - Those that have an appeal pending
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. Incapacity Benefit (IB) was a state benefit that was paid between 1995 and 2014. The benefit was paid to those below the state pension age deemed not able to work because of illness or disability and had made national insurance contributions. It was administered by Jobcentre Plus (an executive agency of the Department for Work and Pensions). The benefit began to be phased out when the Welfare Reform Act 2007 introduced Employment and Support Allowance (ESA) as a replacement benefit in 2008.

Request and response

6. On 28 May 2014, the complainant wrote to the Department for Work and Pensions ("DWP") and requested information in the following terms:
 - Was the DWP's statement that "statistics on this issue [incapacity benefits: deaths of recipients] will be published in due course" made in error?
 - As at midday on May 28, 2014, what is the date on which it is planned that the DWP will be publishing figures from November 2011 to those which are most up-to-date?
 - Please provide the number of Incapacity Benefit and Employment and Support Allowance claimants who have died since November 2011. Please break that figure down into the following categories:
 - Those that are in the assessment phase
 - Those that were found fit for work
 - Those that were placed in the work-related activity group
 - Those that were placed in the support group
 - Those who have had an appeal completed against a Fit for Work (FFW) decision.
7. The DWP responded on 12 August 2014. It stated that it held requested information however as it intended to publish this information it was

exempt from disclosure under section 22 of the FOIA. It also stated that it did not have a definite publication date at the time.

8. The DWP also confirmed that some of the requested information (i.e. those that have an appeal pending) was exempt from disclosure under section 12 of the FOIA but via section 16 the complainant was offered a way to amend his request so as to bring the request under the cost limit. The advice supplied was to narrow the request so that it only asks for information on those who have an appeal pending against a Fit for Work (FFW) decision.
9. Following an internal review the DWP wrote to the complainant on 25 February 2015. It stated that it upheld its decision regarding sections 22 and 12. It said that the advice it had previously given, pursuant to section 16, was incorrect. It would now advise that the information requested should be for "those who have had an appeal completed against a Fit for Work (FFW) decision." However, it went on to say, that these statistics would form part of the planned publication and therefore this information is exempt under section 22 of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner 9 October 2015 to complain about the way his request for information had been handled.
11. On the 10 March 2015 the complainant informed the Commissioner that he accepted the DWP suggestion to amend his request from "Those that have an appeal pending" to " those who have had an appeal completed against a Fit for Work (FFW) decision."
12. On the same day the complainant also informed the Commissioner that the DWP had previously published data similar to his request and provided the Commissioner with a link to the same¹.

1

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223050/inc_ap_decd_recips_0712.pdf

Reasons for decision

13. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:

- the duty to inform the applicant whether or not requested information is held and, if so,
- the duty to communicate that information to the applicant.

14. Section 22 of the FOIA provides that information is exempt information if, at the time of the request, it is held with a view to its publication at some future date, and if it is reasonable in all the circumstances to withhold it until it is published.

15. The DWP has informed the Commissioner that at the time of the initial request, 28 May 2014, a conversation had already taken place with the then Minister for Disabled People (MfDP) and there was a settled intention to publish these mortality statistics. In July 2014 Mike Penning was replaced as MfDP by Mark Harper who subsequently re-confirmed the Department's intention to publish the statistics and agreed to the proposed publication method. It did not have a settled publication date at this stage but they would pre-announce the agreed date here:

<https://www.gov.uk/government/statistics/announcements>

16. Taking account of the preceding paragraph the Commissioner is satisfied that the withheld information existed at the time of the request with a view to it being published on a date that remained to be determined.

17. The Commissioner next needs to decide whether it was reasonable in all the circumstances that the information, at or around the time of the request, should be withheld from disclosure until a day yet to be determined.

18. The DWP explained to the Commissioner that it had received mortality related requests from several areas with varying reasons for interest and feel it is reasonable to ensure that users can fully understand and use all of the statistics correctly through a properly managed release process.

19. The DWP also informed the Commissioner that the raw information on those who have died is held by the Department but it requires data matching to the relevant benefit data and verifying. As with mortality statistics produced by other government departments, the data then requires additional processing to ensure the data is meaningful and

accurate. In this instance it intends to publish age standardised mortality rates. Due to the additional work required to produce this information it had not yet been able to finalise a publication date.

20. The question here, that the Commissioner has to decide, is whether it was reasonable in all the circumstances to withhold the information until some future date. If it was, the exemption will be engaged. The purpose of the exemption is to ensure that public authorities are not made to publish information ahead of a planned timetable, and avoid unfairly disrupting their need to plan and prepare for the release of the information.
21. The Commissioner notes that incapacity benefit had been payable since 1995 and employment and support allowance since 2008. Given the passage of time and level of interest in the information it is difficult to understand how the DWP could reasonably withhold the requested information, in 2014, by saying that they required an indeterminate amount of time to prepare for publication. The Commissioner accepts that the disclosure of mortality statistics can be a sensitive issue and that the DWP would require time to prepare contextual information to support its disclosure. However, it appears to the Commissioner that the DWP has had reasonable time to prepare for publishing such information and that disclosure was not so novel or unusual given the previous requests and disclosures made. DWP have not supplied any detailed or convincing evidence about the time needed and what preparation would need to be undertaken during this time or what the specific impact of disclosure would be. The Commissioner notes that the DWP has previously published similar information².
22. In the circumstances of this case he does not consider it was reasonable to delay access to the requested information. In that it is not reasonable for the DWP, having had enough time to extract the information and prepare internally for publication, to seek further time to provide the information requested. The Commissioner also finds that delaying publication is not reasonable in light of the requests DWP have received from the public and the fact that the previous statistics published were around 2 years old at the time of the request. Accordingly, the Commissioner does not find the exemption engaged. As he has not found section 22 engaged, the Commissioner has not gone on to consider the public interest test in relation to that exemption.
23. The Commissioner next considered the other request for information ;

² ibid

- Was the DWP's statement that "statistics on this issue [incapacity benefits: deaths of recipients] will be published in due course" made in error?
24. The FOIA covers all recorded information held by a public authority. The Act does not therefore cover unrecorded information. If a member of the public asks for information, a public authority only has to provide information it already has in recorded form. A public authority does not have to create new information or find the answer to a question from staff that may happen to know it. This request is essentially a dialogue question from the complainant to the DWP in which the complainant enquires about the DWP's previous statements on benefits and mortality. As such it is not a request for recorded information, rather a request that seeks information to be generated. The Commissioner notes that the DWP did provide an answer to the question. It was reasonable that the DWP did not proceed to respond to the request under FOIA. The DWP could have explained to the complainant that it could only respond to this question under FOIA if he clarified the recorded information sought.

Right of appeal

25. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.
27. 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

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF