

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 16 July 2015

Public Authority: Department for Social Development
Address: Lighthouse Building
Gasworks Business Park
2-4 Cromac Avenue
Belfast
BT7 2JB

Decision (including any steps ordered)

1. The complainant has requested information relating to the Department for Social Development's (DSD) legal authority to conduct interviews under caution. The Commissioner's decision is that DSD does not hold any recorded information that has not been provided to the complainant. No further steps are required.

Request and response

2. This decision notice relates to a complaint made about a request handled by DSD. The complainant made his original request to the Department of Justice (DOJ) on 17 November 2014:

"Apart from PSNI staff, can you inform me please who may conduct interviews under caution under The Police and Criminal Evidence (Northern Ireland) Order 1989? [PACE] For example can HMRC staff do it or Department of Social Development staff or Social Security Agency staff or any civil servant? Thank you."

3. DOJ responded to the complainant on 19 November 2014, and the complainant submitted a further request to DOJ on the same day:

"From my reading of The Police and Criminal Evidence (Northern Ireland) Order 1989, apart from the PSNI only HMRC officers may conduct Interviews Under Caution using PACE(NI) 1989 as HMRC were afforded these powers by virtue of an Application of Order to Revenue

and Customs as per PART XI, MISCELLANEOUS AND SUPPLEMENTARY, Article 85 of the Order.

However, I am not aware that the Department of Social Development (DSD) or the Social Security Agency (SSA) has received a similar Application of Order. Can you inform me if either government body has, like HMRC, been afforded an Application of Order? If not, my question is this – does DSD or SSA staff have the statutory authority to conduct IUCs under PACE(NI) 1989 in the absence of the Application of Order?"

4. The complainant wrote to DOJ on 20, 21 and 22 November 2014, requesting a response to his email of 19 November 2014.
5. On 25 November 2014 DOJ confirmed to the complainant that it had transferred the second part of his request to DSD on 21 November 2014. DSD wrote to the complainant on 1 December 2014 to advise that it had received his request on 26 November 2014.
6. DSD provided a substantive response to the complainant on 17 December 2014. DSD advised that:

"Social Security Administration (Northern Ireland) Act 1992 empowers officers of the Department to detect and secure evidence of the commission of benefit offences and to ascertain whether provisions of social security legislation are being or have been contravened."

7. DSD further commented:

"Whether the Social Security Administration Act (Northern Ireland) 1992 makes express reference to interviews under caution or PACE does not detract from the direction given in Article 66(8) of the Police and Criminal Evidence (Northern Ireland) Order 1989. It cannot be set aside simply because the empowering legislation does not contain specific references."

8. The complainant wrote to DSD on 23 December 2014. He made extensive comment on DSD's response and asked a number of questions (numbered by the Commissioner for reference):
 - i. *By virtue of the fact that, using your words, The Department for Social Development has not sought similar powers as the modifications, it is my contention that DSD and SSA staff do not possess the statutory authority to conduct IUC using PACE(NI). Do you agree? If not, please substantiate your reasoning by citing a piece of legislation, not simply comments which lack any substance whatsoever.*

- ii. *It is my contention that DSD and SSA staff do not possess the statutory authority to conduct IUC using PACE(NI) by virtue of the very fact that HM Treasury sought an amendment to the PACE Order by introducing section 83 of the Finance Act 2007 to facilitate the making of modifications to PACE, by order, for the purposes of Revenue and Customs. HM Treasury sought the latter to allow its staff to conduct Interviews Under Caution (IUC) etc using The Police and Criminal Evidence (NI) Order 1989 (PACE(NI)). However, DSD has not sought a similar amendment and therefore, unlike HMRC staff, they do not possess an Application of Order to conduct IUC using PACE(NI).*

Do you now agree with me?

- iii. *Can you now PROVE to me UNEQUIVOCALLY that DSD/SSA staff possess the statutory authority to conduct IUC using PACE(NI)?"*

13. DSD acknowledged receipt of the request on 5 January 2015.
14. The complainant wrote to DSD on 5, 7, 13 and 16 January 2015, complaining that he had not yet received a substantive response to the questions he put to DSD on 23 December 2014.

Scope of the case

15. Since 1 January 2015 the complainant has provided the Commissioner with several email threads containing correspondence with various different public authorities. The Commissioner has gone through the information provided to identify the relevant correspondence, although he would point out that he is not required to do this. It is for the complainant to set out his grounds for complaint when making an application to the Commissioner.
16. The Commissioner wrote to the complainant on 15 January 2015 in an effort to clarify his complaint. On 16 January 2015 the complainant clarified his complaint about DSD as follows:
- "Can DSD PROVE to me UNEQUIVOCALLY that DSD/SSA staff possess the statutory authority to conduct Interviews Under Caution using The Police and Criminal Evidence Order (Northern Ireland) 1989?"*
17. The Commissioner has interpreted this to mean that the complainant wishes to know what recorded information DSD holds which gives it authority to conduct interviews under caution.

Reasons for decision

Is recorded information held by the public authority?

18. The Commissioner has explained to the complainant that the FOIA only provides for recorded information to be disclosed into the public domain. This means that a public authority is only required to provide recorded information that it holds at the time of the request. Public authorities are not required to provide commentary or explanations that are not already recorded. In addition the Commissioner has stressed to the complainant that the FOIA does not in itself require public authorities to hold information, it merely provides for access to information that is already held. The Commissioner cannot comment on whether a public authority ought to hold certain information, he can only decide whether or not, on the balance of probabilities, it does hold that information.
19. The Commissioner's published guidance states that when considering whether information is held, the Commissioner uses the civil standard of proof, i.e. whether it is likely or unlikely on the balance of probabilities.¹ In assessing such cases the Commissioner will consider the extent and quality of the authority's search for the requested information, any other explanations provided, and the complainant's reasons for believing that the information is held.
20. DSD has maintained to the Commissioner, as it did to the complainant, that it does not hold any recorded information that constitutes statutory authority to conduct interviews under caution. The Commissioner asked DSD how it was satisfied that it did not hold any recorded information.
21. DSD has explained to the Commissioner that it has specific investigatory powers, as well as the power to prosecute certain offences. In particular The Social Security Administration (Northern Ireland) Act 1992 provides DSD with the statutory authority to conduct criminal investigations. Section 67 of PACE says that persons who have authority to conduct criminal investigations are required to have regard to the codes of practice produced under PACE, which includes guidelines for conducting interviews. However PACE itself does not provide or require statutory

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Practical_application/determining_whether_information_is_held_foi_eir.ashx

authority in order for an organisation to conduct an interview under caution.

22. The Commissioner also asked DSD whether it had conducted a search for relevant information. DSD confirmed that it had consulted with senior managers in business areas including fraud operations, but that no recorded information had been located that would comprise the statutory authority requested by the complainant.
23. The Commissioner is satisfied that DSD has provided the complainant with an explanation and clarification of its position, ie that it does not hold the requested information because it has no need to create or generate it. However the complainant has refused to accept this and has subsequently asked DSD a number of times to provide evidence or justification as to its powers.
24. Having considered the lengthy correspondence between the complainant and DSD the Commissioner accepts that DSD has clearly explained its position to the complainant on several occasions. DSD has also checked with relevant business areas that it does not hold any recorded information which could be interpreted as comprising the statutory authority requested.
25. The Commissioner has seen no evidence to suggest that DSD sought to conceal any relevant information, and he notes that DSD has even provided the complainant with a copy of legal advice it obtained which confirms that DSD does not require statutory authority to conduct interviews under caution. As indicated above it is not for the Commissioner to comment on DSD's powers, he is merely required to decide whether or not a particular request for information has been handled in accordance with the FOIA. If the complainant wishes to challenge DSD's assertions as to its powers then he may wish to seek advice on other routes open to him.
26. On the balance of probabilities the Commissioner is satisfied that DSD does not hold any recorded information which is relevant to the request. The Commissioner has also considered whether, if he were to uphold the complaint, he could specify any steps that DSD could be required to take. However, given that DSD has provided a clear and robust explanation of its position, the Commissioner is of the view that there is nothing more he can require DSD to do in relation to the complainant's request.

Right of appeal

27. 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 123 4504
Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
29. 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

Alexander Ganotis
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Wycliffe House
Water Lane
Wilmslow
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SK9 5AF