

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 July 2016

**Public Authority:** The 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 information on how Department for Work and Pensions (DWP) staff were able to make decisions on Employment and Support Allowance (ESA) on the basis of information provided by a healthcare professional.
2. The Commissioner's decision is that, on the balance of probabilities, DWP is unlikely to hold the information requested.
3. The Commissioner does not require DWP to take any steps.

#### Request and response

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4. On 22 September 2015, the complainant wrote to DWP and requested information in the following terms:

*"Please may I follow up an enquiry originally made to you by the MP Hilary Benn. I have a copy of your letter to him dated 24.08.15, your ref POS(1)10981/345.*

*I am trying to find an explanation of how it was possible for DWP DMs (Decision Makers) to make a decision about LCW (limited capability for work) without applying regulation 19 (of the ESA regulations 2008) as they should have done. Your letter says that a "national easement" allowed them to do this. But I don't understand how this (or anything else for that matter) can over-ride what it says in legislation that the Secretary of State must do. What is the exact legal status of this "national easement"? When was it issued and by who? Can I see a copy of it?*

*Also: DWP DMs stated in their decisions that they had scored points (as per regulation 19) when they had not. Was it the "national easement" that instructed them to do this?"*

5. DWP responded on 28 October 2015. It confirmed the "easement" had no defined legal status and had been in existence for many years. It denied holding the information stating "we have no record of whether the easement was included in written instructions" and therefore could not answer when the easement was issued and by who.
6. Following an internal review, DWP wrote to the complainant on 11 February 2016. It upheld its original position stating "we have no record of the original easement and therefore are not able to provide a copy".

## **Background**

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7. The complainant made his request to DWP following a letter from Iain Duncan Smith MP to Hilary Benn MP in which Mr Duncan Smith explained how 'decision makers' at DWP were instructed to record ESA decisions on incapacity reassessment cases.
8. As part of its submission to the Commissioner, DWP explained that the 'easement' pre-dated the introduction of ESA 2008 and was a continuation of an approach adopted as part of the decision making process relating to awards of Incapacity Benefit. DWP informed the Commissioner that this potentially means the approach dates from some time after 1995 and before 2008.
9. DWP provided the Commissioner with a background description of the 'easement' and explained that it was an operational practice applied to the Decision Makers' Guide which advises DWP decision makers to identify which descriptors had been satisfied and the number of points that had been scored. It provided for decisions made on paper evidence to be made by decision makers without actively scoring the claimant against each descriptor. Consequently, a decision could be based on a consideration of the advice supplied by the healthcare professional. This was only intended to be accepted in cases where the healthcare professional's advice was to accept that the claimant would score at least 15 points and was not capable of work.
10. During the investigation, DWP explained to the Commissioner that the term "national easement" had been used incorrectly and a more suitable term would be "operational practice".

11. In order to avoid confusion, the above practice adopted by DWP Decision Makers will continue to be referred to as an 'easement' in this Decision Notice.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 12 February 2016 to complain about the way his request for information had been handled.
13. The Commissioner considers the scope of the case to be whether, on the balance of probabilities, DWP holds the information requested.

### **Reasons for decision**

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14. Section 1(1) of the FOIA 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.*

15. In cases where there is some dispute between the amount of information disclosed by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
16. In its original reply to the complainant dated 28 October 2015, the DWP Ministerial Correspondence Team informed the complainant that the 'easement' referred to in the letter at point 4 had no defined legal status and represented an interpretation of the law at that time.
17. DWP explained that the 'easement' had been in existence for many years and had been applied to claims for Incapacity Benefit, ESA and Incapacity Benefit reassessment. DWP set out that the 'easement' had been subject to judicial review on two occasions.
  - AC v SSWP (ESA) [2013] UKUT 229 (AAC) determined that the easement did not detract from the Secretary of State's duty to make a decision on a claim.

- (SSWP v RD & RW (ESA) [2015] UKUT 235 (AAC) again reflected on the impact of the easement on the decision making process and in this case the Upper Tribunal Judge determined that the decisions were not legally valid.
18. DWP set out that after the initial judicial review in 2013, it instructed the healthcare provider to change the way it recorded recommendations based solely on paper evidence and in 2014 it removed the effect of the 'easement' and therefore the impact of the second judicial review in 2015 was limited.
  19. DWP confirmed that no instructions relating to the 'easement' had been issued in recorded form since the introduction of ESA in 2008.
  20. DWP provided a submission to the Commissioner and stated that the searches below had been conducted and that it considered that it held no documentary evidence in terms of the content, methodology or date of communication of this easement to staff at that time.
  21. The searches confirmed to the Commissioner included:
    - A search of the Decision Makers' Guide for Employment Support Allowance and Incapacity Benefit back to the earliest electronic version – 2008. DWP confirmed that the guidance was the same in every version and did not give any information about an 'easement'.
    - An electronic search using a search engine for guidance held on the DWP intranet.
    - A search of electronic files held within the DMA Central Team.
  22. DWP confirmed to the Commissioner that its formal Records Management Policy states that official instructions to staff are part of its corporate memory and therefore covered by the Public Records Act.
  23. It also confirmed that the department operates a print to paper policy and therefore any official instructions should be printed to paper and retained on a registered file for 20 years.
  24. DWP explained to the Commissioner that it did not believe the 'easement' was an official instruction and therefore it would not be retained in line with its Record Management Policy.
  25. DWP also explained that there may have been a physical document at some point but was only able to identify anecdotal evidence of its existence.

26. DWP set out to the Commissioner that the use of the 'easement' had been the subject of appeals heard by the Upper Tribunal (paragraph 17) and that in preparation for the hearing, DWP had made various investigations into the practice of decision makers.
27. DWP confirmed that, as far as they could ascertain from their investigations, employees joining DWP after 2008 would have been informed verbally by other colleagues of this 'easement' and this would have varied from site to site.
28. DWP also set out that an internal investigation was carried out following a complaint to the Civil Service Commission.
29. In its submission to the Commissioner, DWP stated that whilst it believed it did not hold the information requested, in order to "*conclusively determine*" whether the information was held, it would need to search all relevant registered files within its paper storage.
30. With reference to the searches which would be required in order to establish with certainty whether the information is held, DWP estimated the cost of this exercise would exceed the appropriate limit of £600 as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.
31. The Commissioner considers, however, that the FOIA does not require public authorities to "*conclusively determine*" whether they hold information. As explained at paragraph 15, his remit is to apply the civil standard of the balance of probabilities when reaching a decision as to whether information is held. It is the Commissioner's view that the DWP would only be required to undertake the extensive searches described at paragraph 29 if it has a reasonable belief that it holds the requested information and that it would be located within the registered files held in paper storage. In reality, it is the DWP's view that it does not hold the requested information in recorded form.
32. The Commissioner notes that the DWP has confirmed the 'easement' is no longer an approach used in its decision making processes, and therefore it does not form part of its current procedures. It has also explained its understanding that the instruction was passed on verbally within its offices. The Commissioner is also mindful that the 'easement' has been the subject of two judicial reviews, and that investigations were made to identify relevant information at the time of those formal proceedings but did not identify recorded information which is relevant to this request. Having reviewed all the circumstances of this case, the Commissioner is satisfied that, on the balance of probabilities, the information requested is not held by DWP.

## Other matters

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33. During the investigation, the complainant made various arguments falling outside of the FOIA.
34. The complainant argued that the Commissioner was *"OK with the Department saying that the easement.....wasn't an official instruction. I think the fact is that it was an official instruction (it can't really have been anything else)"*.
35. The Commissioner's remit when issuing a decision on the handling of a request under FOIA does not extend to commenting on the integrity or otherwise of a public authority's internal policies or operational procedures. The Commissioner can only investigate whether the public authority has complied with the appropriate legislation, in this case the FOIA.
36. Whether the instructions described in the 'Background' section of this decision notice were issued as official instructions is not a matter for the Commissioner's consideration.
37. The complainant also states:  
*"There is also the fact that not only were DWP staff making decisions without applying the relevant regulation but that they were, at the same time, saying that they were applying that regulation. That too must have been part of the instructions"*.
38. The operational practices of DWP do not fall within the scope of the Commissioner's investigatory powers under the FOIA. However he does note that the issue of DWP's 'easement' has been the subject of judicial reviews (paragraph 17) and DWP had already taken action in 2014 to cease the 'easement' previously used.
39. The Commissioner has concerns regarding the handling of this request.
40. The complainant initially made his request directly to the DWP Ministerial Correspondence Team and received a response as normal course of business.
41. The complainant expressed his dissatisfaction at the response on 8 November 2015 to which the DWP Ministerial Correspondence Team replied:  
*"Whilst I have noted your continuing concerns I am afraid there is nothing further I can add to my colleague's detailed response of 28 October."*

42. Following the Commissioner's intervention, an internal review was completed by the FOI team at DWP.
43. Whilst the Commissioner appreciates that responding to requests for information as business as usual can sometimes be an appropriate course of action, this should not prevent a valid request being handled correctly under the FOIA. In this case, the complainant was not provided with an internal review following a clear expression of dissatisfaction of the handling of his request.
44. The Commissioner would, therefore, make clear that he would expect staff members of a public authority to recognise a request for recorded information and should an applicant express dissatisfaction at the handling of their request, accept this as a request for an internal review.

## Right of appeal

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45. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**