

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2020

Public Authority: The Department for Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information on DWP's external legal costs. DWP has refused to comply with the request on the basis that to do so would exceed the appropriate limit.
2. The Commissioner's decision is that the Department for Work and Pensions (DWP) is entitled to rely on section 12(1) to refuse to comply with the request. However, the Commissioner finds that DWP has breached section 10(1) as it failed to confirm that it held the requested information within the statutory timeframe and section 17(5) as it failed to provide its refusal notice within the statutory timeframe.
3. The Commissioner does not require DWP to take any steps.

Request and response

4. On 1 October 2019, the complainant wrote to DWP and requested information in the following terms:

"Please supply under Freedom of Information Act details of External Legal Services Costs (Solicitors) hired through Tax Year 2018 (06 April) to end of Tax Year 2019 (05 April) inclusive by the Department of Work and Pensions."

5. On 2 October 2019, the complainant wrote to DWP and made another request in the following terms:

"Supply data on External Legal Services contracted with DWP 06 April 2018 to 06 April 2019 inclusive, all financial data paid for External Legal Services.

AIR-SG612-18 Airdrie Sheriff Court

[complainant] v DWP. DWP hired [external solicitor] Senior Associate, Harper McLeod Glasgow at cost to the Public Purse."

6. On 21 October 2019, prior to DWP's response, the complainant wrote to DWP and amended his request for information in the following way:

"This is a reduction in scope of the request from 02/10/2019 to Scotland only, excluding England, Wales and Northern Ireland."

7. Later the same day, the complainant contacted DWP again and further refined the request to:

"Please reduce the freedom of information request 02/10/2019 in scope to:

North Lanarkshire, South Lanarkshire, Renfrewshire, East Dunbartonshire, West Dunbartonshire, East Lothian and West Lothian."

8. DWP combined the refined request of 21 October 2019 with the request of 1 October 2019 and provided a single response on 29 October 2019. DWP stated that it did not hold the requested information broken down into individual Scottish regions as set out in the refined request. DWP provided details of its spend on external law firms and barristers for the year ending 31 March 2019, although it set out that it was providing these outside of the Act.
9. On 5 November 2019, the complainant requested an internal review. He disputed that the regional costs could not be provided in light of the reduction in scope of the request.
10. On 29 November 2019, DWP provided the complainant with the outcome of its internal review. DWP confirmed that it considered the original response was handled correctly and the outcome of the request was correct. DWP explained that the information requested in the original FOI request was provided in its response, namely the external legal spend for the 2018/2019 tax year.
11. DWP explained that it had not provided the regional costs as it does not hold this information broken down by specified regions.

12. On 29 November 2019, the complainant contacted DWP to dispute that the information could not be provided and made a further request in the following terms:

"Therefore the primary information I'll require, compliant with the requested data is the cost of the Solicitor in case AIR-SG612-18 Airdrie Sheriff Court."

13. On 6 December 2019, DWP wrote to the complainant and provided a revised response. DWP confirmed that having reviewed the handling the request, it considered that it had not responded in full. DWP confirmed that it was withholding the legal costs relating to the complainant's own case under section 40(1) of the Act as it was his own personal data. DWP confirmed that it had passed the request to its Subject Access team for consideration under Data Protection legislation. DWP again confirmed that it does not hold the requested information broken down into Scottish regions and provided overall details of expenditure on external legal services.

Scope of the case

14. The complainant originally contacted the Commissioner on 23 November 2019 to complain about the handling of his request for information dated 2 October 2019. The Commissioner experienced difficulties obtaining the required information from the complainant and the complaint was accepted on 20 December 2019.
15. The Commissioner asked the complainant and DWP to confirm their interpretations of the request. Both parties confirmed that they considered the requests were for the individual costs attributed to the complainant's court case and DWP's external legal costs for the specified regions.
16. During the investigation, the Commissioner reminded DWP of the following:
- Information does not need to be held in a specific format to be held for the purposes of the Act. If the information can be collated from various sources, it is likely to be held for the purposes of the Act.
 - If information is held by a third party on behalf of a public authority, that information is held for the purposes of the Act in accordance with section 3(2)(b).

- In line with *Wilby v Information Commissioner & Police and Crime Commissioner for North Yorkshire EA/2017/0076* a public authority's costs associated with legal action is not the personal data of the individual involved in the legal action.
17. The Commissioner explained to the complainant that disclosure under the Act is essentially disclosure into the public domain. She asked the complainant to carefully consider whether he wished to receive the information regarding his specific case under the Act as to do so, DWP would have to confirm that he was involved in the specified legal action publicly. The complainant confirmed that he would consent to this disclosure and the Commissioner advised DWP of this.
 18. Following the Commissioner's intervention, DWP provided the complainant with a fresh response on 13 November 2020. DWP provided the complainant with the costs associated with the legal action named in the request, however, it relied on section 12 to refuse to comply with the regional costs element of the request as to do so would exceed the appropriate limit.
 19. On 16 November 2020, the complainant confirmed to the Commissioner that he was not satisfied with the response provided by DWP as he had not received the regional cost of external legal services.
 20. The Commissioner therefore considers that the scope of this case is to determine whether DWP is entitled to rely on section 12(1) of the Act to refuse to comply with the complainant's request for information on the cost of regional external legal costs. She will also consider whether DWP provided sufficient advice and assistance in accordance with its obligations under section 16.

Reasons for decision

Section 12(1): Cost of compliance exceeds the appropriate limit

21. Section 1(1) of the Act states:

"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"*

22. Section 12(1) of the Act states:

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

23. This limit is set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004¹ (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that DWP may refuse to comply with a request for information if it estimates that that it will take longer than 24 hours to comply.
24. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in;
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information, or a document containing it.
25. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. In the Commissioner's view, an estimate for the purposes of section 12 has to be “reasonable”: she expects it to be sensible, realistic and supported by cogent evidence.

DWP's position

26. DWP explained the arrangements for external solicitors and barristers engaged in DWP work in Scotland are managed by the Office of the Advocate General (OAG). OAG manages a series of contracts let under a Scottish Government Framework for the provision of legal services. The contracts offer Scots Law services for all UK Government departments in Scotland in relation to property work, litigation and employment law work, debt recovery work and contract/commercial work.
27. DWP explained that the contracts are held by a variety of firms. Solicitors engaged via the framework contracts involve DWP directly and others invoice various teams within the Government Legal Department.

¹ <https://www.legislation.gov.uk/uksi/2004/3244/contents/made>

28. DWP explained that invoices received by DWP Legal Advisers Division (DWPLA), part of the Government Legal Department, in relation to the above contracted work do not record any data as to the geographical area where the case took place, nor does it log individual case names.
29. DWP explained that in relation to the Scottish contracted work, it simply logs a legal service charge for the relevant period of time and an invoice number, under the description "agent solicitors".
30. DWP explained that neither OAG nor the contracted solicitors themselves hold costs information broken down by region, therefore, the contracted solicitors would need to review every case record between 06 April 2018 and 06 April 2019 to identify where the claimant lived. DWP confirmed that in the requested period of time, it had contracted out 3980 cases and reviewing each case would not be possible within the appropriate limit.

The Commissioner's position

31. The Commissioner accepts that the requested information is held on behalf of DWP by OAG, GLD and the contracted external solicitors for the purposes of the Act by virtue of section 3(2)(b). Therefore any actions taken by the above third parties to collate the requested information are taken to be the actions of DWP collating the information.
32. The Commissioner accepts that in order to provide the external legal costs attributed to the named regions, DWP would be required to review the individual files of 3980 cases where external legal services were acquired.
33. As set out above, the appropriate limit for Central Government departments is 24 hours, or 1440 minutes. In order to be able to comply with this request, DWP would be required to locate each case file and then ascertain both the geographical location and the external legal costs associated with each file in less than 22 seconds per case. The Commissioner is satisfied that this is not possible and therefore compliance with the request would exceed the appropriate limit.
34. The Commissioner's decision is that DWP are entitled to rely on section 12 of the Act to refuse to comply with the complainant's request.

Section 16: Duty to provide advice and assistance

35. Section 16(1) of the Act states:

"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do

so, to persons who propose to make, or have made, requests for information to it."

36. The Commissioner has published guidance on providing advice and assistance when refusing to comply with a request on the basis of section 12. Paragraph 59 of the guidance states:

"In cases where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:

- either indicate if it is not able to provide any information at all within the appropriate limit;*
 - provide an indication of what information could be provided within the appropriate limit; and*
 - provide advice and assistance to enable the requestor to make a refined request."*
37. DWP explained to the complainant that due to the broad nature of his request, it was unable to provide adequate advice on how to narrow his request to a point where the complainant might reasonably be expected to receive a response. DWP advised that, due to the reasons set out above, any refined request relating to any particular category of externally contracted Scottish legal services is unlikely to fall within the appropriate limit.
38. In light of DWP's explanation regarding how costs are invoiced and the fact that individual case files would need to be scrutinised in order ascertain the circumstances of the specific legal service, the Commissioner accepts that in the specific circumstances of this case DWP has complied with section 16 by advising that it cannot aid the complainant in refining his request.

Section 10 & 17: Time for compliance

39. Section 1(1) of the Act 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."*

40. Section 10(1) of the Act states that a public authority must respond to a request promptly and *"not later than the twentieth working day following the date of receipt"*.
41. Section 17(5) of the Act states that:
"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."
42. As DWP failed to confirm that it held the requested information and that it was relying on section 12 within the time for compliance, it has breached section 10 and 17(5).

Other matters

43. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She also acknowledges the disproportionate impact it has had on certain public authorities, including DWP. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the Act.
44. However, the Commissioner has concerns regarding the handling of this request for information which occurred before the pandemic. In addition, whilst the Commissioner understands why DWP required additional time to provide its submissions, she was required to return to DWP several times before it was able to form the position that the information was held on its behalf. This is despite the Commissioner providing DWP with a previous decision notice² at the start of the investigation which she considered to be a similar set of circumstances. The Commissioner would expect a public authority with DWP's resources and expertise to understand the basic principles of the Act, particularly that collation of information does not constitute creation of information and that information can be held on its behalf by a third party.
45. The Commissioner expects DWP to take steps to ensure that it is not disadvantaging requesters by misapplying the procedural sections of the

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2553962/fs50712364.pdf>

Act. DWP should ensure that its staff are familiar with her guidance on [Determining whether information held](#).

46. This inadequate handling of the request and subsequent investigation will be logged by the Commissioner and will be used to consider whether future regulatory action is required to improve DWP's practices.
47. Before she could start her investigation, the Commissioner experienced difficulties obtaining the required information from the complainant. This resulted in a delayed acceptance of the complaint and the investigation had to be started again following DWP providing the correct information during the Commissioner's investigation.
48. The Commissioner expects complainants to provide the relevant correspondence and evidence at the time of the complaint. The Commissioner may not accept future complaints which do not provide the information requested by her officers.
49. During her investigation, the complainant used an unhelpful tone and made demands that the decision notice should be issued before the investigation was complete. The complainant contacted the investigating officer approximately 50 times during the investigation and made threats to complain to external parties, including the DCMS Select Committee and his MSP, and then offered to refrain from doing so if a decision notice was issued immediately.
50. Whilst the Commissioner understands the complainant's frustration at the length of this investigation, this was due in part to the failure of the complainant to provide the required information at time of submitting his complaint. The investigation was then further delayed by the global pandemic that severely affected DWP, a situation that was explained to the complainant.
51. The Commissioner acknowledges the complainant's right to complain about her service, both internally and externally, however, she does not accept this as a negotiation tactic to expedite the outcome of an investigation that has not been completed.
52. The complainant provided numerous submissions in support of his complaint. The complainant's arguments were duplicated across submissions, and on more than one occasion the complainant emailed the investigating officer up to five times in the space of 24 hours.
53. The Commissioner considers it important that complainants provide relevant information in support of their complaint, since it is important to understand each party's position. However she would respectfully comment that frequent and repeated correspondence often has the

detrimental effect of distracting time and resource away from the substantive investigation.

Right of appeal

54. 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@justice.gov.uk

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

55. 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.
56. 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

Victoria Parkinson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
SK9 5AF