

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 January 2020

**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 regarding the Financial Investigation Unit (FIU) of the Child Maintenance Group (CMG).
2. The Department of Work and Pensions (DWP) originally cited section 31 (law enforcement) to withhold the information it held and confirmed that it did not hold further information within the scope of the request. During the course of the investigation, DWP withdrew its reliance on section 31 and disclosed the withheld information.
3. The Commissioner's decision is that, on the balance of probabilities, DWP does not hold information further to that previously disclosed. However, she does find that DWP breached section 10 by not disclosing the requested information within the statutory timeframe.
4. The Commissioner does not require DWP to take any further steps.

#### **Background**

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5. The Child Maintenance Service (CMS) facilitates child maintenance payments for separated families who are unable to make arrangements informally.
6. CMS has a number of enforcement powers to ensure non-resident parents pay the maintenance they owe. Actions include deducting maintenance directly from earnings or from bank accounts, instructing enforcement agents to collect unpaid maintenance or seize goods, and in extreme cases, prison sentences. In addition, CMS has powers to

ensure that the level of maintenance owed is set correctly, and to investigate the paying parent's income levels in cases where this may have been reported incorrectly.

7. CMS enforcement work includes investigations by the FIU into cases of complex earners. Complex earners are those with multiple income streams, including company directors and the self-employed, where the parent has some control over the way in which their income is paid, and are required to complete a self-assessment by HMRC.<sup>1</sup>

## Request and response

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8. On 27 November 2018, the complainant wrote to DWP and requested information in the following terms:

*"Please provide copies of the performance management criteria and appraisal criteria in use by managers and senior managers working within the "Financial Investigation Unit" of the Child Maintenance Group.*

*I have seen a copy of the DWP Fraud Investigations Staff Guide published here:*

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/799788/fraud-guide-part-1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799788/fraud-guide-part-1.pdf)

*Please provide an index of policies and procedures used by members of the Financial Investigation Unit when conducting "Complex Earner Investigations". I am not concerned with policies and procedures for suspected criminal activities so please confine your answer to materials relevant only to activities relevant to procedures used in the non-criminal element of FIU's work."*

9. DWP provided its response on 14 December 2018. DWP explained that the FIU does not operate under any internal policy or guidance. DWP set out that the FIU are governed by criminal statute including "Policy and

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<sup>1</sup> Information taken from:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/668887/child-maintenance-group-financial-investigations-unit-complex-earners-investigations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/668887/child-maintenance-group-financial-investigations-unit-complex-earners-investigations.pdf)

*Criminal Evidence Act (1984)*<sup>2</sup> and the Criminal Procedure and Investigation Act 1996 (CPIA). DWP provided a link to [www.legislation.gov.uk](http://www.legislation.gov.uk) and confirmed that both Acts could be located at this link.

10. DWP further explained that all FIU investigators have completed and passed an Accredited Counter Fraud Specialist Training developed and overseen by Portsmouth University via the Counter Fraud Professional Accreditation Board. DWP provided a link to the qualification<sup>3</sup>.
11. DWP stated that with regards to the request for performance measurement criteria and appraisal criteria, it does not release information in relation to the investigation and detection of fraud under sections 31(1)(a) and (b) of the Act.
12. The complainant requested an internal review on 20 December 2018. The complainant disputed that the FIU does not operate under any internal policies or procedures. He drew DWP's attention to paragraph 1.1 of the CPIA code of practice:

*"Persons other than police officers who are charged with the duty of conducting an investigation as defined in the Act are to have regard to the relevant provisions of the code, and should take these into account in applying their own operating procedures."*

13. The complainant also disputed DWP's reliance on sections 31(1)(a) and (b) to withhold the performance measurement criteria and appraisal criteria. His internal review included the following arguments:

*"1. Section 31(1)(a) and (b) of the FOIA act provide an exemption from disclosure for the "prevention and detection of crime" and the "apprehension or prosecution of offenders".*

*2. I was very specific in limiting the request to "material relevant only to activities relevant to procedures used in the non-criminal element of the FIU's work" Section 31(1) can not be used to prevent disclosure.*

*3. Complex earner investigations are not fraud investigations and are undertaken as a matter of routine.*

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<sup>2</sup> The Commissioner believes DWP are referring to the Police and Criminal Evidence Act [1984].

<sup>3</sup> [https://www.whatdotheyknow.com/request/fiu\\_appraisal\\_criteria#incoming-1287822](https://www.whatdotheyknow.com/request/fiu_appraisal_criteria#incoming-1287822)

*4. Performance measurement and appraisal criteria are not subject to Subject 31(1)."*

14. The complainant also set out that section 31(1) is a qualified exemption but DWP had not performed a test of the public interest.
15. DWP provided the outcome of its internal review on 4 January 2019 and upheld its original response. DWP explained that sections 31(1)(a) and (b) of the Act exempts information whose disclosure would, or would be likely to, prejudice certain specified law enforcement matters including, but not exclusively;
  - the prevention or detection of crime;
  - apprehension or prosecution of offenders;
  - the administration of Justice; and
  - the assessment or collection of any tax or duty.
16. DWP explained that with regards to complex earners investigations, it had confirmed that whilst the FIU investigate suspected criminal activities, it also deals with complicated issues around both employed and self-employed income known as Complex Earners. On receipt of the referral, the FIU will conduct on investigation to test the information provided and will determine whether criminal activities have taken place. Therefore as with all cases referred to the FIU, Complex Earners are investigated within the FIU and sections 31(1)(a) and (b) of the Act provides an exemption of the investigative actions and activities taken on these cases as explained in previous responses in which DWP had provided the complainant with information regarding income considerations.
17. DWP addressed the complainant's point regarding the CPIA Code of Practice by confirming that this applies to criminal investigations and therefore FIU investigations comply with the CPIA.

## Scope of the case

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18. The complainant contacted the Commissioner 29 January 2019 to complain about the way his request for information had been handled.
19. The complainant disputed the application of sections 31(1)(a) and (b) to the performance management and appraisal criteria and confirmed that he considered that DWP held information falling within the scope of his request for an index of policies and procedures of the FIU when conducting Complex Earner Investigations.
20. On review of the case, it became apparent that DWP's interpretation of the request differed from that of the Commissioner. The Commissioner wrote to the complainant to set out what she considered to be the possible objective interpretations of the request and asked the complainant to confirm which was correct<sup>4</sup>.
21. On 25 June 2018, the complainant confirmed to the Commissioner that he was seeking:
  - Performance management and appraisal criteria applied to individual staff members (eg to assess personal effectiveness in their role)
  - Departmental performance management and appraisal criteria (eg to assess the FIU's effectiveness as a team)
  - Criteria applied to incoming cases to set out how they should be handled (eg prioritisation, level of investigation, etc).
22. The Commissioner wrote to DWP on 3 July 2019 and confirmed the interpretation of the request. She invited DWP to review its position in light of this clarification.
23. DWP provided the complainant with a fresh response on 6 August 2019. With regards to the first request, it provided Key Work Objectives and Standards which are applied to FIU staff. It explained that the majority

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<sup>4</sup> In cases where the Commissioner considers that there are multiple objective interpretations of a request, the Commissioner will accept the complainant's interpretation provided that it is an objective reading of the request. Public authorities are able to request clarification under section 1(3) of the Act and should utilise this in cases where a request is unclear or has multiple interpretations.

of these measures also apply generically to the wider enforcement teams, with others applying to all staff in Child Maintenance.

24. With regards to the second request, DWP confirmed that the CMS FIU does not operate under any internal policy or guidance and therefore an index of policies cannot be provided. DWP explained that as each case is different, it is reviewed on a case by case basis and there is no procedure or flowchart available that can be provided. It confirmed that there is no information that it could provide that is specific to a complex earner investigation carried out by the FIU. DWP confirmed that there is general guidance available to all Child Maintenance colleagues and provided this.
25. The complainant wrote to the Commissioner on 23 September 2019 to confirm that he was not satisfied with DWP's response. The complainant confirmed that he believed DWP did hold policies and procedures falling within the scope of his second request. The complainant did not dispute DWP's fresh response to his first request.
26. Section 50(1) of the Act states:  
  
*"Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, **in any specified respect**, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part 1."*  
[emphasis added].
27. As the complainant has specified that he disputes DWP's position that no information is held falling within the scope of his second request, the Commissioner considers the scope of this investigation is to determine whether, on the balance of probabilities, DWP holds information falling within the scope of the complainant's second request.

## Reasons for decision

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### Section 1: Information not held

28. Section 1 of the Act states that a public authority is required to respond to a request for information. The authority is required to confirm or deny that it holds the requested information, and disclose relevant information that it holds, unless an exemption or exclusion applies. If a public authority does not hold recorded information that would answer a request, the Commissioner cannot require the authority to take any further action.

29. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly, her investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held). Finally the Commissioner will consider whether there are any further steps she could require the public authority to take if the complaint were upheld.
30. In this case, the complainant drew the Commissioner's attention to a request made by a third party<sup>5</sup> in which DWP applied section 31(1)(a) and (b) to a request for "*Copies of their [FIU] policies and procedures; including any legal guidance that is routinely relied on during the course of their work.*"
31. The complainant considers that as DWP did not deny holding this information in its response to the previous request, this suggests that the information is in fact held.
32. The complainant explained to the Commissioner that the CMS has a broad list of guidance and procedures called "Policy, Law and Decision Making Guidance" that is used by front line caseworkers. He set out that this set of documents has an index and he is seeking a similar index document laying out processes and policies for Complex Earner Investigations conducted by the FIU.
33. The complainant confirmed to the Commissioner that the documents provided and information in his possession leads him to believe that the FIU does have policies and procedures that are common across the department. He considers that, at the very least, DWP have a standard set of information that they routinely obtain when doing complex earner investigations.
34. The Commissioner requested copies of the information held by the complainant and his reasoning regarding why this means that further information must be held. The Commissioner did not receive a response

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[https://www.whatdotheyknow.com/request/428512/response/1040969/attach/5/3653.pdf?cookie\\_passthrough=1](https://www.whatdotheyknow.com/request/428512/response/1040969/attach/5/3653.pdf?cookie_passthrough=1)

to her request and will therefore focus on the arguments already provided.

35. The Commissioner asked DWP to provide an explanation for its position that the information is not held and for the searches conducted for the requested information.
36. The Commissioner asked DWP to clarify whether it has set information that FIU staff are expected to obtain in the course of an investigation. She also asked DWP to clarify its use of section 31 to a similar request for information in 2017.
37. In its response to the Commissioner, DWP confirmed that it had searched all the relevant files and had not located any information falling within the scope of the request.
38. DWP confirmed that it had performed searches of its intranet using the search terms "FIU complex earner" and "FIU". DWP confirmed that only generic procedures available to all CMS staff were identified and these had been provided to the complainant.
39. DWP explained that it had contacted its Instructions teams and Policy colleagues regarding the request but they were unable to provide any FIU specific policy or procedures.
40. DWP confirmed that staff in the FIU were also contacted and the response provided information regarding the legislation that they operated under.
41. DWP confirmed to the Commissioner that it was unable to provide an index of policies and/or procedures used by the FIU when conducting Complex Earner Investigations as the FIU does not operate under any internal policy or guidance. It cannot therefore provide an index of policies or procedures that do not exist.
42. DWP confirmed that FIU are governed by Criminal Statute, including the two pieces of legislation set out in its response to the complainant.
43. DWP explained that it did not hold information specific to complex earner investigation carried out by the FIU as cases are reviewed on a case by case basis, as all cases differ, and as such there is no standard approach or workflow.
44. DWP confirmed that it does hold general guidance available to all CMS staff and that it had provided the complainant with this.
45. DWP confirmed that there is no statutory requirement or business purpose for which the requested information should be held. It again



confirmed that the FIU operate under powers conferred by the specific legislation and the Fraud Act.

46. DWP explained that the FIU is certified to operate and all its investigators are qualified (or are in the process of qualifying) in the DWP Accredited Counter Fraud Investigation Program via Portsmouth University<sup>6</sup>.
47. The Commissioner asked DWP whether there is specified information that officers in FIU are expected to obtain in the course of an investigation.
48. DWP explained that the FIU assess each case as it is referred and the initial action taken will depend on the following factors:
  - the allegation made;
  - what information is already held by CMG;
  - what type of business activity the person under investigation carries out;
  - if there is anyone else involved in the investigation;
  - the period under investigation;
  - if there is an allegation of a criminal offence within the referral.
49. DWP explained that due to this variable nature, there is no set of information for each case. DWP did confirm that as a minimum, for a purely financial investigation with no allegation of criminal offence, it would expect to have sight of the company, sole trader or partner accounts for the relevant period. However, it also explained that this was not held in a recorded format and the FIU investigators are expected to fully research the CMS system to ascertain what information is already held.
50. DWP also explained that FIU would only gather information required for that specific case, FIU does not use a tick list of evidence that it would

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<sup>6</sup> <http://www.port.ac.uk/centre-for-counter-fraud-studies/counter-fraud-professional-accreditation-board/>

need to gather as this might mean that they collect information that was unnecessary to support them in their investigation.

51. The Commissioner also asked DWP to clarify why it has applied section 31 to a similar request in 2017 but was now stating that the information is not held. DWP confirmed that the scope of the previous request was wider than the request being investigated and that it had applied section 31 to information falling outside the scope of this request.

### **The Commissioner's position**

52. The Commissioner accepts that DWP has undertaken reasonable searches. The Commissioner accepts that these searches ought to have identified the requested information, if it were held by DWP.
53. The Commissioner acknowledges the complainant's reasons for disputing DWP's claim that no recorded information is held. She considers that it is entirely understandable that a member of the public would expect there to be specific policies or procedures on how to perform an investigation.
54. However, the Commissioner also accepts that as each case involves individual circumstances, FIU does not have a set approach or process that can be prescribed in a policy or procedure to be followed in all cases.
55. The Commissioner has also considered the complainant's argument in his internal review that the CPIA Code of Practice refers to internal guidance. The Commissioner considers that the correct interpretation of the quoted paragraph is that any internal guidance should not contradict or take precedence over the Code of Practice. The reference to internal guidance does not appear to require DWP to hold such internal guidance.
56. The Commissioner can only investigate whether or not information is held by a public authority at the time of the request. She cannot consider whether a public authority should hold the information or require a public authority to record specific information.
57. The Commissioner has seen no evidence to suggest that DWP does in fact hold information that it claims not to hold. In addition, the Commissioner is unable to identify any further action that DWP could reasonably be expected to take in order to comply with the request. As has been set out above, if information is not held then it cannot be disclosed in response to a request. In conclusion, the Commissioner has determined that, on the balance of probabilities, DWP does not hold any information further to that already provided to the complainant.

## **Section 10: Statutory Time for Compliance**

58. Section 10(1) of the Act states:

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

59. As set out in the "Scope of the Case" section above, DWP reviewed its interpretation of the request and provided information within the scope of the request during the course of the Commissioner's investigation.

60. The Commissioner therefore finds that DWP has breached section 10(1) by not providing this information within the statutory timeframe.

## Right of appeal

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61. 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](mailto:grc@justice.gov.uk)

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

62. 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.
63. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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