

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 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 Work Capability Assessments used in determining eligibility for state benefits. The Department for Work and Pensions relied on sections 12 and 22 to withhold different types of held information.
2. The Commissioner's decision is that the Department for Work and Pensions has incorrectly applied section 22 to withhold part of the requested information. However it correctly relied on section 12 to withhold a different part of the information requested.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information requested as regards the total number of people who have died within a year of their work capability assessment since May 2010.
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. Work Capability Assessment is a process which is used to assess capability for work and eligibility for state benefits. Within this the service contractor, Atos Healthcare, carries out any face to face assessment. They then make a recommendation for each claimant to the Department for Work and Pensions (DWP) decision maker who in turn makes a decision.

Request and response

6. On 4 March 2014, the complainant wrote to DWP and requested information in the following terms:
 - I request the total number of people who have died within a year of their work capability assessment since May 2010.
 - I also request the number of appeals that have been won after a work capability assessment since May 2010.
7. On 19 March 2014 the DWP responded as follows –
 - “As the statistics are intended for future publication this information is exempt from disclosure under the terms of section 22 (Information intended for future publication) of the Freedom of Information Act (FOIA)”.

And

 - “In response to your second query, section 21 of the FOIA allows us to direct you to information which is already reasonably accessible to you. Her Majesty's Court and Tribunal Service (HMCTS) publish tribunal statistics which can be found here:
<https://www.gov.uk/government/collections/tribunals-statistics>”
8. The complainant requested an internal review on 19 August 2014. The outcome of the DWP's internal review was to uphold its original position as to the first part of the information requested. However it explained that contrary to its previous answer the information provided in the link to the HMCT data table did not contain the information requested. However, whilst it did hold information on appeal outcomes it estimated that the cost of complying with that part of the request would exceed the appropriate limit of £600. Therefore under section 12 of the

Freedom of Information Act (FOIA) it was not obliged to comply with this part of the request.

Scope of the case

9. The complainant contacted the Commissioner (on or about 20 October 2014) to complain about the way his request for information had been handled.

Reasons for decision

10. Section 1(1) of 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.

Request: The total number of people who have died within a year of their work capability assessment since May 2010.

11. In refusing this part of the request the DWP relied on section 22 of FOIA.

12. Section 22 of FOIA states that information is exempt from the duty of communication if;
- a) The information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - b) The information was already held with a view to such publication at the time the request for information was made, and
 - c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

13. The DWP has confirmed to the Commissioner that it holds data on date of death and also on Work Capability Assessments (WCA) but the sources are separate and work is required to combine the sources and then create a methodology to extract the required statistics.
14. DWP further explained that at the time of the initial request 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. However it goes on to say that it does not yet have a settled publication date
15. 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.
16. 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.
17. The DWP 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.
18. The question here, that the Commissioner has to decide, is simply 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.
19. 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 information¹.

20. 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 ample time to prepare matters, to seek further time to provide the information requested. 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.

Request the number of appeals that have been won after a work capability assessment since May 2010.

21. The DWP relies on section 12(1) FOIA not to provide this requested information.

22. Section 12(1) of the FOIA states that:

“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. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”) sets the appropriate limit at £ 600 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work. Accordingly the appropriate limit is equivalent to 24 hours’ work.

24. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:

- determining whether it holds the information;

¹ 1

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

- locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.
25. The Commissioner asked the DWP to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request. It replied as follows
- A Work Capability Assessment (WCA) is carried out on those claiming Employment and Support Allowance (ESA). A WCA is also carried out on those people claiming Incapacity Benefit, who are being reassessed for eligibility, and they are then transferred to ESA if successful at the WCA. These are known as IB Reassessment cases (IBR). If the claimant is declared Fit for Work (FFW) following the WCA then, after the internal reconsideration process (known as Mandatory Reconsideration since 28 Oct 2013), they have leave to appeal against the decision to Her Majesty's Court and Tribunal Service (HMCTS):
 - It had interpreted the request as asking for the number of all appeals won, against a WCA decision, since May 2010, i.e. where the tribunal have found in favour of the claimant.
 - To assist in the production of official statistics for ESA WCA the Department receives a data feed from HMCTS which details completed appeals and the outcomes of those appeals. The appeals data for FFW decisions is added to the corresponding system data and statistics on appeal results for FFW decisions for ESA new claims are published as part of the regular ESA WCA statistics.
 - The structure of the data held for IBR is different to that for ESA and a methodology has not yet been established to incorporate the appeals data for IBRs. Initial investigations have shown that the existing methodology as applied to ESA is not suitable for this data and so to create the required statistics it would have to further investigate the issues, determine a suitable methodology, and fully assure the data and methodology.
 - This would involve consulting data experts in both operational and development areas and iterative rounds of development and testing; based on past experience of similar statistical development we estimate this would take in excess of 5 days.

Days

0.5 - ID relevant data sources

0.5 - Complete necessary work request forms and obtain sign off

0.2 - Apply for permission to use data

1.5 - Develop methodology

1.0 - Receive and prepare data for matching

0.5 - Write necessary code

0.2 - Perform test match

0.1 - Amend code

0.2 - Perform test match

0.5 - Perform data match with benefit data

0.5 - Perform data match with mortality data

= 5.7 (days) Total time

- An alternative data source would be the operational systems within the department which hold the information received from HMCTS when an appeal has been lodged with them which are updated once an appeal decision has been reported back to the Department. There are some differences in the process since Mandatory Reconsiderations were introduced on 28 October 2013 but ultimately the estimate of the time/cost it would take to locate, retrieve, extract and match the data would also exceed the cost limit of £600. The following estimate gives the details of the time it would take to provide the information:

Days

- 0.5 ID - relevant data sources
- 0.5 - Complete necessary work request forms and obtain sign off
- 0.2 - Apply for permission to use data
- 1.0 - Receive and prepare data for matching
- 0.5 - Write necessary code
- 0.2 - Perform test match

- 0.1 - Amend code
 - 0.2 - Perform test match
 - 0.5 - Perform data match with benefit data
 - 0.5 - Perform data match with mortality data
- = 4.2 (days) Total time
26. 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': he expects it to be sensible, realistic and supported by cogent evidence.
27. From the submissions he has considered during the course of his investigation, the Commissioner is satisfied, that the DWP has provided adequate explanations to demonstrate that it would exceed the appropriate limit to locate, retrieve and extract the requested information. Section 12(1) does therefore apply and the DWP is not required to comply with this part of the request.

Right of appeal

28. 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

29. 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.
30. 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
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