

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2013

Public Authority: Department of Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant requested legal advice on the right of those attending a medical examination as part of the process for claiming benefits to make audio recordings of those examinations. The request was in two parts. The first sought the legal advice obtained for a particular appeal against a decision to refuse a claim and the second sought the legal advice referred to in a particular document. The Department for Work and Pensions (DWP) initially confirmed it held the advice in respect of both parts but refused to provide it under section 42 (legal professional privilege). The DWP also applied section 35 (formulation and development of government policy) to the legal advice captured by the second part of the request.
2. During the Commissioner's investigation the DWP advised him that in fact it did not hold any legal advice relating to the appeal. However it maintained its reliance on sections 35 and 42 to withhold the information falling within the second part of the request.
3. The Commissioner's decision is that the DWP is correct to state that it does not hold any advice relating to the particular appeal and that it is correct to withhold the other information under section 42. In light of this he has not gone onto consider the application of section 35.
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 24 December 2012, the complainant wrote to the DWP and requested information in the following terms:
 - A. Prior to submitting argument to Wikeley J in the case known as CIB/3117/2008, the DWP will have taken legal advice. This freedom of information request calls on you to produce ALL that legal advice, in full and as originally drafted, please.
 - B. By September 2010 at the latest, DWP was in receipt of legal advice to the effect that its continuing unreasonable obstruction of the recording of sickness/disability assessments was illegal. This was revealed in a document entitled RPF-27 (dated Sept/Oct 2010) in response to [named individual] at the What DO They Know website ("WDTK") on 07 12 2012 – your reference: FOI 3954-3775. This freedom of information request calls on you to produce ALL THE LEGAL ADVICE REFERRED TO in item 1.2 of the document RPF-27, in full and as originally drafted, please.
6. The DWP responded on 28 January 2013. In response to request A it stated that it could not provide the legal advice as to do so would breach the principles of the Data Protection Act. It withheld the advice sought by request B under section 35 (information relating to the formulation or development of government policy) and section 42 (information protected by legal professional privilege).
7. Following an internal review the DWP wrote to the complainant on 14 February 2013. It now stated that it was withholding the information sought by both requests under section 42. In addition the information sought by request B was also being withheld under section 35.

Scope of the case

8. The complainant contacted the Commissioner on 6 March 2013 to complain about the way his request for information had been handled. On 23 May 2013 the complainant contacted the Commissioner and explained that he anticipated that the legal advice might refer to certain provisions of the Data Protection Act 1998 (DPA) which deal with the processing of personal data for an individual's personal, family or household affairs (section 36 of the DPA). He said that he believed that the DWP had in the past provided misleading information on the impact of those provisions. He also argued that in respect of the FOIA exemption relating to the formulation and development of government policy, the policy to allow the recording of medical interviews had

already been taken by the time of the request as evidenced by statements made to Parliament by the then Minister of State for Employment, Chris Grayling.

9. During the course of the Commissioner's investigation the DWP explained to the Commissioner that it had never requested legal advice when dealing with the appeal case that the complainant was interested in and that, therefore, the legal advice sought in request A was not held. It also clarified that it was withholding the information falling within part B of the request under sections 35 and 42.
10. The Commissioner considers that the first matter which needs to be decided is whether the DWP is correct when it says it does not hold the legal advice falling within part A of the request. This will be considered under an analysis of section 1(1)(a) which obliges a public authority to inform a person who has requested information whether or not the information is held.
11. The other issue which needs to be decided is whether the information falling within part B can be withheld under section 42 or 35 of FOIA.

Background

12. Individuals claiming the Employment and Support Allowance are required to undergo a Work Capability Assessment, this can include a medical examination. The responsibility for managing the Work Capability Assessments has been contracted out to a private company, Athos. Concern has been voiced by claimants of that benefit, national charities and MPs over how the medical examinations are conducted and how reliable they are in terms of accurately establishing an individual's fitness for work.
13. As a result of the concern over the fairness of the examinations some individuals have insisted on making audio recordings of those examinations. Originally it is understood that the DWP placed demanding conditions on these recordings, for example the quality of the equipment and the need for that equipment to be operated by a professional engineer. The onus was on the claimant to meet these stringent requirements.
14. If a claimant insisted on recording an examination, but could not satisfy the conditions imposed by the DWP, the examination would be terminated. The claimant could be deemed to have failed to submit to

an examination without good cause. This would affect the payment of their benefit.

15. However the DWP later relaxed the conditions placed on recording examinations and there are now some facilities for recording examinations for those who want to use them. Nevertheless there is a continuing debate about the issue.

Reasons for decision

Request A

16. Section 1(1)(a) of FOIA states that:

Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request.

17. Where there is any dispute over whether the information is held the Commissioner will apply the normal civil standard of proof, ie he will decide whether, on the balance of probabilities, the information is held.
18. The information sought in part A of the request is the legal advice obtained by the DWP when dealing with an appeal to the Upper Tribunal. The appeal related to a medical examination for Incapacity Benefit. Incapacity Benefit was later replaced by Employment and Support Allowance. However the same principles applied to the assessment of an individual's entitlement to Incapacity Benefit as apply to Employment and Support Allowance. The appeal had been brought by an individual who attended a medical examination and attempted to tape record the process. The doctor then terminated the examination as this was not in accordance with what he understood to be the rules regarding the recording of examinations. As a consequence the individual was deemed to have failed to submit to an examination without good cause. The individual appealed that decision to the Tribunal but lost and consequently appealed to the Upper Tribunal.
19. It is understood that the responsibility for handling such appeals rests with the Decision Making and Appeals section of the DWP. The DWP has explained that the Decision Making and Appeals section is staffed by policy officials and not lawyers. Most appeals are routinely dealt with by these officials who only seek legal advice if existing departmental guidance and case law is not sufficient to address the points raised by an appeal. In the case in question, CIB/3117/2008, these officers were satisfied that they could deal with the issue based on such guidance and so no legal advice was sought.

20. The DWP has informed the Commissioner that the appeal was dealt with on paper ie the parties to the appeal submitted their arguments on paper with neither side being represented in person.
21. The Commissioner has considered the judgement in that case. He notes that the DWP supported the claimant's appeal and that this was based on the guidance in existence at that time which made it clear that those who wished to record examinations could do so but needed to be made aware of the conditions placed on making such recordings. The DWP said that natural justice suggested this meant claimants should be made aware of those conditions in advance. As this had not happened the DWP accepted that the individual had not failed to show good cause why he would not submit to an examination. The relevant guidance is quoted in the judgement at paragraph 26.
22. The Commissioner considers that it is entirely plausible that matters of this nature would be dealt with as a matter of routine by policy staff rather than lawyers provided there was sufficient guidance already available. In this case it is apparent that there was relevant guidance in existence at that time. In light of this the Commissioner accepts that it is plausible that the DWP would have dealt with the appeal without needing to refer the matter to lawyers. The Commissioner finds that on the balance of probabilities the DWP does not hold any legal advice falling within the scope of request A.
23. However since the DWP failed to correctly inform the complainant of this he finds that in respect of request A it failed to comply with section 1(1)(a) of FOIA. However as this matter has now been addressed in this decision notice the Commissioner does not require the DWP to take any further steps in respect of request A.

Request B

24. Part B of the request is for the legal advice referred to in a document titled 'RPF 27: Recording Medical Assessments'. The document sets out a proposal to change the contract with Athos in respect of the recording of examinations. Athos is the private contractor which manages the medical examination process on behalf of the DWP. The proposed changes reflect a more relaxed policy on the recording of examinations and requires Athos to facilitate such recording.
25. The document begins by explaining the background to the proposal and at paragraph 1.2 states;

"A number of complaints and enquiries from MPs have been about why medical assessments cannot be recorded. Due to this, Legal advice has been obtained to confirm that recording assessments for the claimant

must be allowed without unreasonable obstructions. The majority of the claimants who request that their medical assessment is recorded, do not have the financial means to provide the specified recording equipment."

Section 42(1)

26. Section 42(1) provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
27. In legal proceedings each party is obliged to share information with the other parties involved. However communications with their legal representative may remain confidential. This is the principle known as legal professional privilege and serves to protect the ability of a client to talk freely and frankly with their legal adviser in order to obtain appropriate legal advice.
28. There are two types of legal professional privilege, litigation privilege and advice privilege. Advice privilege applies where no litigation is in progress or contemplated. It protects confidential communications between a client and their lawyer made for the dominant purpose of seeking or giving legal advice. The legal advice must relate to the clients legal rights, liabilities or obligations.
29. Having viewed the legal advice the Commissioner is satisfied that in this case the client was the DWP and the advice was provided by one of its lawyers. The subject of that advice concerned the extent of the DWP's obligation to allow the audio recording of medical examinations. Although the DWP has published guidance on the recording of medical examinations the Commissioner is satisfied that the actual content of the legal advice remains confidential.
30. The Commissioner finds that the legal advice sought does attract legal professional privilege and so is exempt information under section 42. However section 42 is subject to the public interest test.

Public interest test

31. The public interest test is set out in section 2 of FOIA. The test requires the balancing of all the public interest factors in favour of maintaining the exemption against all the public interest factors in favour of disclosure.
32. The information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

33. As stated in the Commissioner's guidance, the general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege ie safeguarding the confidentiality of communications between a lawyer and their client.
34. As well as the inherent public interest in protecting legal professional privilege the DWP has argued that, in this case, as the advice is still being relied on, there is an additional public interest in maintaining the exemption. The DWP has explained that at the time of the request its policy on recording examinations was being challenged by the Judicial Review process. Therefore although the advice dated back to 2010 it was still very much live in the sense that it was relevant to the legal challenge that had begun.
35. Furthermore the DWP has explained that its policy on recording examinations has not been finalised and the legal advice in question is still being used to inform that policy development.
36. The Commissioner has considered the extent to which the advice is still being used in the development of the DWP's policy on recording examinations. The Commissioner notes the complainant's comments made in respect of the DWP's application of section 35 regarding the policy to allow examinations to be recorded (referred to in paragraph 8). The Commissioner accepts that the decision to allow the recording of examinations had already been taken by the time of the request. However the Commissioner recognises that the practicalities of implementing this policy and the extent to which the DWP and its contractors should provide recording facilities, was still being considered at the time of the request. The Commissioner accepts that the legal advice in question was still relevant to the DWP's policy development in this area.
37. The Commissioner also understands that the DWP has a statutory commitment to independently review the operation of these medical examinations until around 2015. The Commissioner accepts that the legal advice in question was still relevant to the DWP's consideration of the findings of these reviews.
38. In considering the public interest in disclosing the legal advice the Commissioner has taken account of the number of people affected by it. The DWP has informed the Commissioner that in the financial year 2011-2012 there were 1,257,972 individuals claiming Employment and Support Allowance. Approximately 100,000 individuals undergo a Work Capability Assessment every month and although not all of these assessments involve a medical examination, the majority of claimants will undergo an examination at some point during the time they are claiming the benefit. The Commissioner is therefore satisfied there is

large group of people who are potentially affected by the conditions imposed on the conduct of those examinations.

39. However according to the DWP during a period of 17 months from January 2012 to May 2013 only 3,309 individuals requested that the examination was recorded for them by the DWP. This equates to around 195 per month. Therefore although the number of people affected is potentially very large, in practice, the actual number of people for which this is an issue is much smaller. The Commissioner recognises that there is an argument that that number could increase if there were more recording facilities available or the conditions were relaxed further. Even if this was the case, the statistics provided by the DWP suggest that the actual number of individuals who would want to take advantage of the opportunity to have their examinations recorded, and so would be affected by the policy, would be significantly less than the overall number undergoing medical examinations.
40. The DWP has not informed the Commissioner how many individuals actually have examinations terminated because they wish to record the examination but are not prepared to submit to the DWP's conditions on recording. However based on the figures given above the Commissioner does not anticipate the figure will be great.
41. However the Commissioner does recognise that the impact on the individuals concerned would be significant if they were deemed to have failed to submit to an examination without good cause and went on to lose their benefit as a result. Furthermore the Commissioner is aware that those claiming Employment and Support Allowance represent a vulnerable section of our community.
42. The Commissioner also recognises that there is genuine concern over the administration of Work Capability Assessments and the standard of the medical examinations in terms of their accuracy and consistency. Work Capability Assessments have attracted huge criticism from national charities, campaigners and individuals. This issue has also attracted the attention of MPs.
43. The Commissioner can understand that where there is genuine concern over the conduct of these medical examinations, the individuals directly affected may wish protect their interests by recording those examinations in case they later find it necessary to appeal against the decisions based on those examinations. The Commissioner therefore accepts there is public interest in the right to record these examinations being respected.
44. The Commissioner notes that the DWP does currently allow examinations to be recorded so long as certain conditions are complied

with and that it also provides facilities for recording examinations. What seems to be at issue is whether the conditions placed on recording examinations are reasonable. If an individual believes that the DWP is unfairly or illegally restricting their right to record the medical examination in some way they do have the opportunity to challenge the DWP. In pursuing such a challenge, whether this is by means of Judicial Review, or simply lobbying the government, an individual is free to obtain their own legal advice on what restrictions can reasonably be placed on recording examinations. In other words an individual's ability to challenge the DWP's policy on recording examinations is not dependent on the disclosure of the DWP's own legal advice and FOIA should not be used as a means of obtaining free legal advice.

45. If a public authority misrepresented its legal advice or failed to act in accordance with that advice there would be an increased public interest in disclosing that advice. The Commissioner has studied the legal advice falling within part B of the request. Whilst he cannot discuss the detail of that advice he is satisfied that the DWP has not misrepresented or contradicted that advice in the current guidance it has produced on recording examinations.
46. As mentioned at paragraph 8 the complainant has said that he expected the legal advice to refer to section 36 of the DPA. In his view the DWP has misrepresented the correct legal interpretation of this provision. He argued that this raised public interest arguments in favour of disclosing the advice.
47. The Commissioner notes that it is entirely possible for one legal adviser to reach a different view on an issue from another adviser. It is not sufficient for the DWP's stated interpretation of section 36 DPA to be at odds with the interpretation of others, it must differ from that legal advice it received (if indeed that the legal advice in question did refer to section 36 DPA). In any event the complainant has not provided any examples of the alleged misinterpretation of section 36 DPA. Therefore the Commissioner does not attach any weight to this public interest argument.
48. Finally, there is a public interest in openness and transparency. This public interest is particularly marked in this case. There is no doubt that some claimants have a deep mistrust of the whole Work Capability Assessment process. They may suspect the government is not acting to safeguard the interests of those who are genuinely unfit for work and is attempting to frustrate their ability to challenge the fairness of the process. It is absolutely not for the Commissioner to express a view on the whether such suspicions are well founded. However he does recognise that whilst such suspicion exists there is an increased public interest in disclosing the legal advice on which the DWP's policy on this

matter is based. Furthermore, withholding the advice simply deepens that suspicion.

49. Having considered the public interest factors on both sides the Commissioner finds that there is weight to both sides of the argument. In favour of disclosure the Commissioner considers there is a particular public interest in disclosing the advice as it would increase the transparency around the Work Capability Assessments and could help remove the suspicion that exists. However the Commissioner finds that the public interest in preserving the principle of legal professional privilege combined with the fact that the advice is relevant to the on-going Judicial Review outweighs the public interest factors in favour of disclosure.
50. The Commissioner finds that section 42(1) is engaged and that the public interest favours maintaining the exemption. The Commissioner does not require the DWP to take any further steps in respect of request B.

Right of appeal

51. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

52. 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.
53. 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

Pamela Clements
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