

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2017

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 an "outcome report" submitted to the Department for Work and Pensions by one of its suppliers. The Department for Work and Pensions relied on section 43 (commercial interests) to withhold the report.
2. The Commissioner's decision is that Department for Work and Pensions reliance on section 43 was erroneous.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To release the withheld information
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. The Department for Work and Pensions (DWP) provides certain benefits for people who are out of work due to long-term illness or as a result of a disability or health condition. As part of the claim process, the claimant is required to have an assessment of eligibility through an independent health assessment.

6. MAXIMUS describes itself as being an established global company and a leading provider to governments and corporate clients around the world. Its operations in the UK include more than 3,500 staff delivering employment, disability and health support and services to more than 1 million people a year¹.
7. On 30 October 2014, MAXIMUS Health and Human Services Ltd was awarded, by the DWP, the Health and Disability Assessment Service (HDAS) contract to undertake health-related assessments of claimants to state benefits.
8. The Centre for Health and Disability Assessments (CHDA²) is the name of the company that MAXIMUS have novated the contract to (and its subsidiary), to provide the services under the HDAS contract.
9. It has been stated by the National Audit Office that the DWP expects to pay £595 million over three years for 3.4 million assessments³.

Request and response

10. On 25 April 2016, the complainant made the following request for information:

"The contract between the Secretary of State for Work and Pensions and CHDA Limited includes a number of service requirements specified in "Schedule 2.1 (Service Requirements). These include the following in ANNEX 5: MEDICAL QUALITY REPORT".

One of these is described as the "WCA⁴ outcome report" and comes with the following instruction:

¹ <https://www.maximusuk.co.uk/about-us>

² <https://www.chdauk.co.uk/>

³ <https://www.nao.org.uk/press-release/contracted-out-health-and-disability-assessments/>

⁴ Work Capability Assessment

“Complete the spreadsheet – comments to be provided for those centres either identified by the Authority or who are outside the agreed range.”

Therefore please disclose:

Request 1

How does the DWP manage the WCA outcome reports? For example does each CHDA assessment centre submit its own report to the DWP or does CHDA collate individual reports and submit a single report to the DWP?

Request 2

What is the frequency of reporting of WCA outcome reports to the DWP (i.e. weekly, monthly, quarterly etc)

Request 3

If a single instance of this spreadsheet is maintained by the DWP please supply me with a copy.

Request 4

The DWP refers to an “agreed range”. What does this mean, what is its value and how it was derived?

Request 5

Please provide the most recent WCA outcome report submitted to the DWP by CHDA (assuming a single collated report is submitted to the DWP). If individual reports per assessment centre are submitted to the DWP then please provide the most recent WCA outcome report for the Leicester assessment centre.

Request 6

The associated “Schedule 2.1 (Service Reqts) Annex 5 WCA Outcome Rept” describes the structure of the WCA outcome report. It states that the WCA outcome report contains the following columns (in the same order)

1. TI referral - TI %
2. Comment
3. PBR - SG %
4. Comment
5. PBR - accept (initial referral) %

6. Comment
7. Consultation - SG %
8. Comment
9. Consultation - Treat as LCW %
10. Comment
11. Consultation - 3 Month Prognosis %
12. Comment
13. Consultation - NFCA %
14. Comment
15. Consultation - Uncontrollable condition NFD % 16. Comment

Please provide the meaning for columns 1, 3, 5, 7, 9, 11, 13, 15 (including definitions for abbreviations used)."

11. The DWP responded on 23 June 2016 and denied holding the requested information.

12. The DWP provided an internal review on 31 August 2016 in which it revised its position to;

"The Medical Quality Report is issued by Centre for Health and Disability Assessments (CHDA) on the last working day of the month in relation to the previous month.

The WCA Outcome report is an attachment within the Medical Quality report. This report is broken down by assessment centre and contains all of the information required as stated within the Contract.

On receipt of the Medical Quality Report from CHDA, the report is monitored by the Department"

13. The DWP refused to disclose the requested information in accordance with section 43(2) of the Freedom of Information Act 2000.

Scope of the case

14. The complainant contacted the Commissioner on 12 September 2016 to complain about the way his request for information had been handled.

15. As part of her investigation the Commissioner has viewed a copy of the withheld information .The withheld information consists of, at the time of the request, the most recent WCA outcome report for the Leicester assessment centre.
16. In reaching her decision the Commissioner has also considered submissions from both parties.

Reasons for decision

17. 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.
18. Section 43(2) provides that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person. A commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.
19. In order for a prejudice based exemption such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would – or would be likely – to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would result in prejudice.

In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

DWP Submissions

20. Disclosure of supplier performance information would, or would be likely to prejudice the commercial interests of DWP and its current supplier CHDA and future suppliers. The commercial interests of the previous supplier, Atos, would or would be likely to be prejudiced, as the combined WCA Outcome report for all Service centres includes historical data from November 2011.
21. Central to effective contract management and operation, is the ability for the parties to converse in an open and constructive manner on the understanding that commercially sensitive discussions including details of supplier performance would remain confidential.
22. Any disclosed information which may result in a perception of under-performance when considered in isolation will not only adversely affect the company's financial standing as a publicly traded company, but also may affect their commercial abilities as outlined above.
23. Management information reports are a summary reflection of a single event, that can give rise to items being taken out of context and can provide a false impression of performance; such an instance would damage the reputation and financial standing of the companies/organisations involved and reduce business confidence accordingly
24. With regard to the commercial impact on the Department; without honest and open discussions in which the Department can best manage its contracts, its ability would be reduced when negotiating contract terms in this instance and in others. Similarly, any 'out of context conclusion' or perceived opinion as to how the Department may operate will reduce its effectiveness in other/future contract discussions. This may arise following, for example, the publication of a single performance snapshot such as any element of the WCA Outcome Report, including the performance of the Nottingham Service Centre, which represents only one element of the overall picture. It is not therefore fully reflective and would mislead the public and financial commentators to the commercial detriment of CDHA and the Department.
25. The WCA Outcome Report identifies outliers in recommendations types and requires the supplier to provide exception reports on why recommendations may not have met statistical expectations. The WCA Outcome Report contains the methodology which determines what

constitutes an outlier – it is not used to mandate proportions of certain recommendation types, instead it is a control measure to ensure that potentially anomalous results are investigated and safeguarded against. This methodology is commercially sensitive.

26. Since 1998, the Department has procured contracts with a number of providers to deliver health assessments on behalf of DWP, so it has knowledge of contractor views.
27. On 8 November 2016, CHDA advised (the DWP) as follows:

'CHDA would argue that Section 43(2) of the Freedom of Information Act (FOIA) applies to the disclosure of the WCA outcome report and underlying data as disclosure of this performance information would, or would be likely to, prejudice the commercial interests of CHDA.
28. The underlying data shows some performance indicators which vary across different areas of the country. DWP apply statistical interpretation which allows them to ask CHDA questions about statistical outliers in certain locations, the responses to which are contained in the WCA Outcome Report. Without knowledge of the service as well as the full facts of our wider operational performance in addition to confidential operational and commercial arrangements with DWP, it is likely that the release of this information would lead to misinterpretation of CHDA's performance which could in turn lead to unwarranted reputational damage to DWP and CHDA. The DWP believe this could affect CHDA's commercial interests and those of the DWP as over-scrutiny or unwarranted scrutiny of CHDA could lead to difficulties for DWP as by their very nature, management information reports are a summary reflection of a single event, they give rise to items being taken out of context and can provide a false impression of performance; such an instance would damage the reputation and financial standing of the companies/organisations involved and reduce business confidence accordingly. The Department would not be able to ensure the data was put into context should it be placed in the public domain.

Complainant's Submissions

29. Atos and CHDA, in the form of its parent company Maximus, are huge companies that have successfully operated within the public sector for many years.
30. A simple online search reveals the level of criticism levelled at Atos for numerous public sector contracts by the media. Despite high profile criticism for its role in the contract currently being run by CHDA, Atos bid for and won 2 of the 3 contracts to deliver the replacement for the benefit Disability Living Allowance known as Personal Independence Payment.

31. Any suggestion that companies such as Atos and CHDA (including its owner Maximus) would be put off tendering for future contracts if the requested information is disclosed is “frankly laughable”. The link below shows the exposure that Atos has to the public sector. The chance that it would walk away from a market of this magnitude simply isn't credible.
32. CHDA is a different proposition. It was created by its owner Maximus solely to deliver the contract with the DWP. Suggestions of threats to it being deterred from bidding for other work, on the face of it, seem rather perverse.
33. Maximus is in a comparable situation to Atos. Its opening statement from the 'about us' section of its web site (URL shown below) is:

“We help government transform public policy into tangible, day-to-day results. Our services address policy initiatives, such as the U.K. government's welfare reform and Universal Credit. We respond to current policy by helping government departments implement programmes effectively and by delivering the best possible results for both the people receiving help through the programmes and the government itself.”⁵
34. The suggestion that a company so fundamentally reliant on public sector work walking away from tendering future contracts if the requested information was disclosed isn't credible. In light of what is already in the public domain the disclosure of the requested information would do very little to prejudice the commercial interests of CHDA and Atos.
35. The issue of disclosed information being misunderstood or being inaccurate is frequently dealt with by Tribunals. Their view mirrors that outlined in the Commissioner's own guidance in the Prejudice test:

“- Information may be misunderstood

Information requested under FOIA may be technical or complex. This is not usually in itself an argument for maintaining the exemption. The obvious solution is for the authority to publish an explanation of the information, rather than withhold it.

It may be argued that the information would be misleading, perhaps because it consists of notes reflecting only part of a discussion or

⁵ <https://www.maximusuk.co.uk/our-expertise>

because it may be inaccurate or out of date. FOIA provides a right to information that public authorities hold; it does not require that information to be complete, accurate or up to date.

In *Home Office v Information Commissioner* (EA/2008/0027, 15 August 2008) the Home Office had argued that data it held on work permits should not be disclosed because it may be inaccurate or incomplete. The Information Tribunal said at paragraph 15 that: "... if the records are faulty or inadequate and the information turns out therefore to be inaccurate that is irrelevant: the right under the Act is to information which is held, not information which is accurate."

36. The public authority should normally be able to publish some context or explanation with the information it releases. The argument that it would not be in the public interest to publish inaccurate or misleading data would usually only carry any weight if the section 22 exemption is claimed (information intended for future publication) and the public authority's publication plans include providing the necessary context or explanation. In any other type of case, the argument may only be used if it is not possible to provide this explanation, or if the explanation would not limit any damage caused."
37. Any analysis must also include a consideration of the likelihood or the severity of any prejudice occurring.
38. A simple online search on CHDA's sole owner Maximus found numerous reports of claims of unlawful activity. An article by a journalist, summarises these and can be found here:

<http://www.disabilitynewsservice.com/incompetence-discrimination-and-fraud-the-us-companythat-could-take-over-from-atos/>
39. Despite problems far more serious than disclosure of the requested information could ever give rise to, Maximus in its own right and using its wholly owned limited company CHDA is successfully bidding for public sector work.
40. As the DWP explained the work currently carried out by Atos now forms part of the contract with CHDA. Atos was regularly criticised by the media, the NAO, the Public Accounts Committee ("PAC") and the Work and Pensions Committee ("WPC") for its performance of the original contract.
41. An article in the Independent titled "Atos contract does not offer value for money, says National Audit Office" discusses the issues and what was published by the NAO. An extract is shown below:

"The NAO said the DWP was failing to seek "adequate financial redress" for underperformance by Atos. "We do not consider that the current

contractual targets are sufficiently challenging, and in our view this allows the contractor to deliver a significant number of assessments before financial penalties become due⁶.”

42. The complainant asserts that a recent report by the PAC published the following conclusions:

- There are unacceptable local and regional variations in the performance of the Department's contractors.
- Claimants are still not receiving an acceptable level of service from contractors, with particular concerns for claimants with fluctuating and mental health conditions.
- Too many assessments do not meet the standard required.
- The unit cost of assessments has increased, but there has been no noticeable benefit for claimants or taxpayers.
- The Department appears to have repeatedly misjudged what contractors can deliver and the uncertainties underlying what can be achieved.
- There is a real risk to value for money if there is not a competitive market for health and disability assessments.

43. The conclusions are highly critical and relate to the commercial activities of Atos and to some degree CHDA.

44. Maximus is in a comparable situation to Atos. Its opening statement from the 'about us' section of its web site:

“We help government transform public policy into tangible, day-to-day results. Our services address policy initiatives, such as the U.K. government's welfare reform and Universal Credit. We respond to current policy by helping government departments implement programmes effectively and by delivering the best possible results for both the people receiving help through the programmes and the government itself.⁷”

⁶

<http://www.independent.co.uk/news/uk/politics/atos-contract-does-not-offer-value-for-money-says-national-audit-office-8056412.html>

⁷ <https://www.maximusuk.co.uk/our-expertise>

45. The suggestion that a company so fundamentally reliant on public sector work walking away from tendering future contracts if the requested information was disclosed is not credible.

Commissioner's Analysis

46. The Commissioner is not satisfied that in the context of this matter the DWP is engaged in a commercial activity. It is concerned with the administration of a social welfare scheme and not a commercial enterprise. This analysis concurs with the Information Appeal Tribunal's and Court of Appeal's ⁸ decisions in Department for Work and Pensions- v- (1) Information Commissioner (2) Frank Zola.
47. The Commissioner next considered whether the actual commercial enterprises (i.e. Atos, Maximus and CHDA) would or would be likely to suffer prejudice to their commercial interests if the withheld information were released.
48. The Commissioner has not been overwhelmed or persuaded by the DWP submissions or evidence on this point.
49. The DWP has stated that releasing the withheld information may result in a perception of under-performance when considered in isolation which will or may adversely affect Maximus and CHDA financial standing as a publicly traded company. However, as considered by the Commissioner, and stated by Information Tribunals, the right under the Act is to information which is held, not information which is accurate or comprehensive.
50. In addition to the above paragraph a solution for the DWP is to publish a contextual explanation of the "snapshot" information sought rather than withholding it.
51. The DWP has asserted that releasing the information would or would be likely to cause reputational damage to the relevant commercial entities. Assuming that this is true, it does not necessarily follow that commercial prejudice will follow. In any event, it is incumbent upon the DWP to show or explain how the reputational damage would (or would be likely to) cause commercial prejudice and it simply has not so done.
52. The Commissioner is not persuaded that there is a real likelihood that disclosure of the withheld information would dissuade these companies from entering into future contracts with the government. In reaching

⁸ <http://www.bailii.org/ew/cases/EWCA/Civ/2016/758.html>

this finding the Commissioner would emphasise that, in her view, there is an inherent on-going commercial benefit to such companies entering into contracts with the public sector and part of doing business with the public sector involves accepting that such clients are subject to FOIA.

53. The Commissioner would have been helped to understand DWP's position if the DWP had explained how and why there was sufficient likelihood of risk of commercial prejudice, resulting from the loss of custom, income or profits for example to engage the exemption . The Commissioner has not had that explanation but has, in truth, been provided with barely explained assertions that releasing the information will, or will be likely to, prejudice the commercial interest of third parties.
54. Unsurprisingly, given the amount of public monies involved and the political discourse regarding commercial third parties undertaking medical assessments for state benefits, there is considerable scrutiny of the DWP and its suppliers. This scrutiny involves parliament, the media and the wider political process. Some of the scrutiny has, rightly or wrongly, been critical of the parties to the varying agreements. In this context, releasing the withheld information is unlikely, in the Commissioner's view, to bring about the prejudice feared.
55. The Commissioner is not persuaded for the reasons discussed above that the DWP has discharged its evidential burden to show that there is a causal relationship between the potential disclosure and the prejudice to be avoided. In particular, it has not persuaded the Commissioner that it has met the de minimis threshold regarding any prejudice that may occur to the relevant robust commercial entities.

Right of appeal

56. 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: GRC@hmcts.gsi.gov.uk

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

57. 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.
58. 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

Gerrard Tracey
Principal Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF