

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 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 information that contracted companies supply to the Department for Work and Pensions about their undertaking of Personal Independence Payments assessments. It relies on section 43(2) (commercial interests) to withhold the requested information.
2. The Commissioner's decision is that the public authority failed to respond to the request within the statutory time for compliance, and therefore breached sections 1(1) and 10(1) of the FOIA.
3. The Commissioner's further decision is that section 43(2) is not engaged.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the withheld information
5. 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

6. Disability Living Allowance (DLA) was a tax-free benefit for children and adults who need help with their care and/or their mobility needs. It was introduced in 1992.
7. Personal Independence Payments (PIP)¹ were introduced from 8 April 2013 and replaced DLA for people aged 16 to 64. PIP helps towards some of the extra costs because of a long term ill-health condition or disability. It's based on how a person's condition affects them, not the condition they have.
8. PIP can be claimed whether a person is in or out of work; it is a tax-free benefit and is not affected by income or savings. As part of the claim process, the claimant is required to have an assessment of eligibility through an independent health assessment.
9. The DWP contracted PIP assessments to "specialist" providers. The DWP maintains that the main driver is the need to develop and maintain the quality of services delivered to the public, while simultaneously ensuring best use of public funds. The practice of outsourcing or commissioning services in the public sector has been prompted by pressures for improved efficiency, value for money and cost reductions, arising from the 2004 Gershon Efficiency Review² and similar expressions of government policy.
10. Public procurement law³ regulates purchasing by public sector bodies for goods, works or services. A contract must be awarded on the basis of the most economically advantageous tender. The DWP contracts are awarded by competition between potential suppliers.
11. Following a competitive tendering exercise the successful bidders for the PIP contract were:
 - Lot 1 – Atos Healthcare (Scotland, North East and North West England)
 - Lot 2 – Capita Business Services Ltd (Wales and Central England)
 - Lot 3 – Atos Healthcare (London and Southern England)

¹ <https://www.gov.uk/pip>

² http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/media/C/A/efficiency_review120704.pdf

³ <https://www.gov.uk/guidance/public-sector-procurement-policy#the-legal-framework---international-obligations>

- Lot 4 – Capita Business Services Ltd (Northern Ireland)
12. The DWP awarded the PIP contracts to Independent Assessment Services (IAS) (formerly known as ATOS Healthcare) and Capita based on their ability to implement distinct delivery models to provide PIP assessments. In seeking bids to deliver PIP across the geographic areas, the Department avers it was consciously looking for different delivery models and approaches – subject to the delivery of the assessment in line with the criteria laid down in regulations.

Request and response

13. On 7 December 2016 the complainant requested information of the DWP by saying as follows;

"The contracts between the Secretary of State for Work and Pensions and

- Atos IT Services UK Limited (Lots 1 and 3) ("ATOS");

and

- Capita Business Services Ltd (Lot 2) ("CAPITA")

establishes a requirement for ATOS and Capita to provide regular management information ("MI") to the Department.

The section of said contracts, Service Specification FINAL v2.0, state: "34.2. The Contractor will produce a single report covering all aspects of quality, including performance and complaints, on a monthly basis.

39.1. The Contractor will be responsible for developing management information (MI) reports to support implementation and delivery (see Annex Eight). Please note that additional MI may be included, if required, to cover innovative processes proposed by the Contractor, or if the design of PIP changes.

39.2. The Contractor will supply the Authority with MI monthly (by the 5th working day of each month) and annually (the 5th working day of the next year)."

Request for Information

Therefore, subject to the normal redaction of personal information exempt under the FOIA, please disclose the contractually required monthly reports produced by ATOS and CAPITA for the 3 PIP contracts for the period January 2016 to December 2016 (i.e. the MI reports for the year 2016)."

14. On 30 January 2017, the DWP responded and it denied holding the requested information.
15. The complainant requested an internal review on 30 January 2017. In his request the complainant stated, amongst other things , as follows;

"Thank you for your response which implies that some of the requested information may be held by the Department. Where the information requested covers a range of dates such as this RFI the Department is still required to disclose what is held. For example if it doesn't hold information covering the month of December it must disclose the information for January to November.

I remind the Department of the case "Common Services Agency v Scottish Information Commissioner (Scotland) [2008] UKHL 47 (9 July 2008)⁴" Lord Hope (approving Lord Marnoch) stated that FOIA should be construed in as liberal manner as possible.

Section 1(1)(a) FOIA requires the Department to confirm or deny if any of the requested information is held. This means it should have confirmed if the requested information covering any of the specified time period is held. Please do so".

16. The DWP sent him the outcome of its internal review and it revised its position by saying as follows

"In reviewing the original response I find it to be correct and uphold the decision. You have now requested that information be provided from January 2016 up to the date that it is held.

I can confirm that the information that you have requested is held however the Department has decided not to disclose this information in accordance with Section 43(2) of the Freedom of Information Act 2000; this exemption covers Commercial Interests".

Scope of the case

17. The complainant contacted the Commissioner 22 February 2017 to complain about the time it took for the DWP to reply to his request for information and its decision to withhold requested information under section 43(2).
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⁴ <https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080709/comm-1.htm>

18. The DWP has provided the Commissioner with a sample of the withheld information, which she has read and considered.

Reasons for decision

19. Section 1(1) of FOIA 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"
20. Section (10) (1) of the FOIA 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."
21. In this case, the DWP has breached sections 1(1) and 10(1) of the FOIA by failing to respond to the request within 20 working days. In that the request was received on 7 December 2016 but the DWP took until 30 January 2017 to inform the complainant whether it held the information.
22. Section 43(2) of the Act states that:
- "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)".
23. For the purposes of the Commissioner's decision, 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.
24. In order for the Commissioner to be convinced that disclosure would, or would be likely to, prejudice the commercial interests of any person – and therefore for section 43(2) to be engaged – she 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.
25. Section 43(2) is a qualified exemption as per section 2(2)(b) of the Act. Should the Commissioner find that section 43(2) is engaged she will go on to consider whether the balance of the public interest favours maintaining the exemption, or whether it supports disclosure of the requested information.
 26. The Commissioner lays out below (in paragraphs 27 to 30) the DWPs detailed submissions regarding its reliance on section 43(2).
 27. The complainant "has requested all aspects of quality, including performance and complaints management information that IAS and Capita supply to the Department on a monthly basis.
 28. 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.
 29. There are two Providers that are contracted to deliver PIP assessments, by the very nature that these Providers supply the same service, they are also competitors in the market place. Provider performance is not disclosed to the other and to do so would undermine current commercial confidentiality. In addition, public disclosure of commercially sensitive information regarding performance may result in providers being hesitant when tendering for future contracts.
 30. 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 may also affect their commercial abilities as outlined above."
 31. The Commissioner is not persuaded by the DWP's above submission that releasing the withheld information would be likely to prejudice the commercial interests of any person (including the public authority holding it). In essence the DWP has not supplied her with the necessary detail and particularity to make such a finding.

32. In particular, the Commissioner has not been satisfied that disclosing the withheld information would be likely to damage the commercial standing of Atos and Capita. The withheld information includes to what degree those companies are meeting contractually agreed targets. Given the number and complexity of the assessments undertaken it may well be that a public traded company is bolstered by releasing the withheld information. In any event the DWP has not, despite being invited to, supplied any evidence or submissions from the two companies (other than confirming that both agreed with DWP's response to the complainant) that releasing the information would be likely to cause the harm that section 43(2) seeks to prevent.
33. The Commissioner also considered the DWP further submissions as to why section 43(2) is engaged. These submissions are detailed in paragraphs 34 to 39 below.
34. "As by their very nature, the management information reports contain a vast amount of information about all aspects of the Provider performance and without a detailed understanding of the PIP processes and the operation of the Providers, it will be difficult for any external observers to correctly interpret performance with any degree of accuracy.
35. Releasing the information will give rise to items being taken out of context, making it equally difficult for the Department to set this information in context, it will be misinterpreted in ways that could lead to reputational damage to both the Department and the PIP Providers as well as prejudice the efficient conduct of public affairs by the Department. DWP cannot ensure that the information isn't maliciously misinterpreted to feed the narrative that the Department imposes "targets" for the outcomes of assessments.
36. The Department would not be able to ensure the data, which has not been quality assured to UK Statistical Authority standards, was put into context should it be placed in the public domain.
37. 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, while also potentially misleading the public and financial commentators to the commercial detriment of IAS, Capita and the Department.
38. The Performance Report identifies performance against agreed Service Levels and is a control measure to ensure that potential concerns are investigated and safeguarded against. This methodology is commercially sensitive.

39. Service Level Agreements are published however, the Provider's performance against these levels is not. This information is commercially sensitive as PIP contracts are based on output price and therefore the performance of the Providers affects the price of the Contract."
40. A public authority might argue (as the DWP has done) that the harm the exemption is designed to protect against either exists or is increased because the requested information is misleading or could be misunderstood. The Commissioner's view is that it is generally possible to avoid this perceived difficulty by putting the disclosure into context.
41. On the facts of this matter the Commissioner has not been persuaded by the DWP that it could not provide the necessary explanation, or context, to avoid misunderstandings. The DWP is a large government department and the Commissioner considers it has access to the most capable people to provide the necessary explanations to accompany releasing the withheld information.
42. For the reasons given above the Commissioner cannot find that the exemption relied upon (i.e. section 43(2)) is engaged. The DWP relying on no other exemption, the Commissioner directs that it provides the complainant with the requested withheld information.

Right of appeal

43. 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

44. 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.

45. 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
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