

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2017

Public Authority: Department for Work and Pensions (DWP)
Address: 4th Floor
Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information about Employment and Support Allowance First Tier Tribunal appeals.
2. The DWP relied on section 22 (future publication) and section 12 (costs) not to provide the requested information.
3. The Commissioner's decision is that DWP's reliance on the said sections was correct.

Background

4. Employment and Support Allowance (ESA) is a benefit for people of working age who cannot work because of illness or disability.
5. A refusal to be granted ESA can be appealed to Her Majesty's Courts and Tribunals Service (HMCTS). The appeal would be heard by an independent tribunal called the First-Tier tribunal.

Request and response

6. On 24 April 2107, the complainant wrote to DWP and requested information in the following terms:

Between January 2016 and end of June 2016

1. How many ESA First Tier Tribunal appeals did you have from the Liverpool Tribunal area (ie Liverpool, Manchester, Lancaster etc)?
2. How many of these had a DWP Presenting Officer attend?
3. How many had more than one DWP Presenting Officer attend?
4. How many ESA First Tier Tribunal appeals did you have nationally?
5. How many of these had a DWP Presenting Officer attend?
6. How many had more than one DWP Presenting Officer attend?

Between January 2016 and end of December 2016

7. How many ESA First Tier Tribunal appeals did you have from the Liverpool Tribunal area (i.e. Manchester, Liverpool, Lancaster etc.)?
 8. How many of these had a DWP Presenting Officer attend?
 9. How many had more than one DWP Presenting Officer attend?
 10. How many ESA First Tier Tribunal appeals did you have nationally?
 11. How many of these had a DWP Presenting Officer attend?
 12. How many had more than one DWP Presenting Officer attend?
7. On 11 May 2017, DWP responded by saying as follows;
- Regarding questions 1, 4, 7 and 10, the information is exempt as 2016 data will be published in the future (section 22)
 - The remaining information was exempt by virtue of section 12 (cost)
8. DWP sent the complainant the outcome of its internal review on 30 May 2017. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 7 July 2017 to complain about the way his request for information had been handled.

Reasons for decision

10. Section 1(1) states that any person making a request for information is entitled to be informed by the public authority whether it holds the information, and if so, to have that information communicated to them. This is subject to any exemptions or exclusions that may apply.

Requests 1, 4, 7 and 10

11. Section 22 states that:

- (1) Information is exempt information 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 when 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).

12. The DWP position is that the information requested is regularly published by it as part of the "Employment and Support Allowance: outcomes of Work Capability Assessments" package of statistical releases (on a roughly quarterly basis).
13. The DWP has stated that at the time of the request, data was not available for the time periods the complainant specified (January to December 2016) but that it provided him with the location of the most recent publication at that time (released on 9th March 2017) which covered data up to December 2015.
14. On 8 June 2017, a further release was published which covered the period up to March 2016. On 14 September 2017¹, a further release was published which covered the period up to June 2016. The next release

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644494/esa-wca-summary-sept-17.pdf

would cover the period up to September 2016 and is expected to be released according to schedule on 14 December 2017. The release of the data to cover up to December 2016 was expected to follow the quarterly timetable and would be due in March 2018. Note an exact date had yet to be confirmed. (The Commissioner notes that the December 2017² and March 2018³ releases occurred as intended.)

15. Taking into account its regular publication of this data on an established quarterly basis, the DWP believes in these circumstances that its application of the exemption was reasonable.
16. The Commissioner's guidance states that although a public authority must hold the information at the time of the request with a view to its publication, the exemption does not require a set publication date in place. A public authority may still be able to apply section 22 if:
 - there is a publication deadline, but publication could be at any date before then;
 - publication will take place once other actions have been completed;
 - publication will take place by reference to other related events; or
 - there is a draft publication schedule that has not been finalised.
17. Therefore as long as the public authority has decided that it or another person will publish the information at some time in the future, the exemption may apply. The Commissioner notes that the request was made in April 2017 and the intended dates for publication being, in the then, near future. Therefore in all the circumstances, the Commissioner is satisfied that it was reasonable for DWP to withhold the information (requests 1,4,7 and 10) from disclosure until some future date. It being reasonable given the short-time scales involved
18. The exemption at section 22(1) is qualified by a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure at the time of the request.

² <https://www.gov.uk/government/statistics/esa-outcomes-of-work-capability-assessments-including-mandatory-reconsiderations-and-appeals-december-2017>

³ <https://www.gov.uk/government/statistics/esa-outcomes-of-work-capability-assessments-including-mandatory-reconsiderations-and-appeals-march-2018>

19. The Commissioner considers that there is a general public interest to disclose information, as it increases transparency and accountability of public authorities. The Commissioner though, struggles to identify reasons as to why this particular information should be put into the public domain in advance of the scheduled .However she is satisfied that the public interest favoured maintaining the exemption at the time of the request. In that publishing the information at a future date as it had planned, rather than disclosing it early in response to an FOI request allows the DWP to maintain its planning of disclosure. The Commissioner is also swayed (to maintain the exemption) that it is important for the DWP to ensure that all the information is correctly verified and collated before publication.

Requests 2, 3,5,6,8 and 9

20. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("Fees Regulations").
21. This limit is set at £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12 effectively imposes a time limit of 24 hours in this case.
22. When estimating whether complying with the request would exceed the appropriate limit, a public authority may take into account the costs it reasonably expects to incur to comply with the request.
23. The estimate must be reasonable in the circumstances of the case. It is not necessary to provide a precise calculation.
24. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
- determining whether the information is held;
 - 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 precis below the DWP's submissions regarding its reliance on section 12.

- The information requested regarding presenting officers attendance at tribunals, although held by the Department, is recorded in such a way that it would not be a simple task to collate that information without significant clerical work.
- The cost of complying would exceed the appropriate limit of £600, as specified in regulations and which represents the estimated cost of locating, retrieving and extracting the relevant information. Some of the information is held on a software application known as DMACR.
- However, this is an incomplete record for the time period and would still have to manually check all the files as it cannot determine how incomplete the information is.
- This is due to the system not originally being used for this purpose on the scale that it is currently required to do so. The only accurate record would be in its clerical files which would require a manual check to provide the information requested. The department is considering improvements to the system to allow in the future for this information to be centralised.
- To retrieve the requested information relating to Presenting Officers attending ESA tribunals, it would require the DWP to retrieve the case files for all ESA appeals heard between 1st January and 31st December 2016 (in excess of 65,000 cases) from remote storage and manually check the files for Presenting Officer notation.

The breakdown is as follows:

- Requesting circa 65,000 files from remote storage (based on 30 requests processed per hour) – 542 hours
- Checking files for Presenting Officer notation (also based on 30 files checked per hour) – 542 hours
- Compiling results into a data table – 4 hours
- A total of 1088 hours or 147.03 days
- The content of each file varies according to the case. The size of a file can range from approx. 50 documents to 300. In order to find the information required a Case Manager would need to locate the appeals papers within the file to determine if a Presenting Officer did attend the tribunal. The estimation of 30 files an hour is based on an average of 2 minutes for a Case Manager to locate the information within the file.

- In order to request a file the department is required to retrieve the file from its storage provider as files are not held on site. To do this, a work order is completed and sent to the provider who then locates the file. The estimation of 542 hours is based on the average request each file taking 2 minutes to be completed by a Case Manager.

26. The Commissioner reminds herself, as re-iterated by the Upper Tribunal (Reuben Kirkham v Information Commissioner [2018] UKUT 126 (AAC)), that,

"The issue is whether or not the appropriate limit would be reached. The estimate need only be made with that level of precision. If it appears from a quick calculation that the result will be clearly above or below the limit, the public authority need not go further to show exactly how far above or below the threshold the case falls".

27. After considering the DWP's explanations set out above, the Commissioner accepts that it is necessary for the DWP to review the manual files/contact personnel in order to respond to the request. The Commissioner is therefore satisfied that the above estimate is sufficiently reasonable enough to persuade her that section 12 was properly relied on. That even if it took half of the time that the DWP had estimated, it would still take well in excess of the appropriate limit of 24 hours, under section 12. The Commissioner has therefore concluded that the cost estimate was reasonable and therefore section 12(1) of FOIA was engaged.

Other Matters

28. The investigation of this matter took longer than originally anticipated due to its complexity and an unsuccessful attempt to resolve this matter without the need for this Decision Notice.

Right of appeal

29. 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

30. 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.
31. 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

Andrew White
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