

Freedom of Information Act 2000 (the Act)

Decision notice

Date: **5 December 2018**

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

Decision (including any steps ordered)

1. The complainant has requested information regarding the Department for Work and Pensions' (DWP's) expenditure defending its employees in legal actions.
2. DWP initially informed the complainant that it did not hold the requested information, however, it subsequently amended its position and relied on section 12 of the Act as identifying and collating the information would exceed the appropriate limit.
3. The Commissioner's decision is that DWP is entitled to rely on section 12(1) of the Act to refuse to comply with the request.
4. The Commissioner considers that DWP has breached section 10(1) as it did not confirm that it held information within the statutory time frame. It has also breached section 17(5) as it did not provide the complainant with its refusal notice within the statutory timeframe.
5. The Commissioner does not require DWP to take any steps.

Request and response

6. On 14 January 2017, the complainant wrote to DWP and requested information in the following terms:

"So far the DWP has spent over £3200 in legal cases trying to interject itself into my private legal action taken against a DWP employee.

Please provide the total amount the DWP has spent in the last fiscal year or the calendar year 2016 acting or trying to act on behalf of DWP employees in any legal action.

In these times of fiscal austerity it seems like an irresponsible waste of tax payers money and a rather expensive favour to employees to be providing a free legal service to DWP employees involved in private legal action.

Are these costs recoverable from DWP employees if a court decides the legal action is a private matter and if so how much has been paid back by employees to the DWP in the last fiscal year or the calendar year 2016."

7. On 1 February 2017, DWP responded and stated:

"DWP has spent no money acting or trying to act for employees in private legal action; nor would it do so."

8. On 2 February 2017, the complainant wrote to DWP and requested an internal review. He stated that he had an ongoing civil claim against an employee of the local Jobcentre in which DWP was trying to substitute itself as defendant.

9. On 3 March 2017, DWP provided the outcome of its internal review. It explained that, under the Carltona Principle¹, civil servants act on behalf of the Secretary of State when carrying out official duties. DWP explained that legal action would therefore be against the Secretary of State rather than the individual civil servant. DWP also explained that it

¹ *Carltona Ltd v Commisioners of Works and Others [1943]2 All ER560*

Determined that where civil servants are delegated to act on behalf of a Minister, the action is deemed to be that of the Minister and not that of the individual civil servant.

would not spend any money defending any litigation that was genuinely about an official's private conduct.

Background

10. Chapter 12.2 of the Civil Service Management Code², entitled "*Legal Representation at Public Expense*" sets out when government departments have discretion to provide legal representation and when they are obliged to do so.

11. Section 12.2.1 states:

"Civil servants may be involved in legal proceedings or formal enquiries as a consequence of their employment. Unless the circumstances are covered by the rules set out in paragraphs 12.2.2 to 12.2.5 below, departments and agencies have discretion to grant civil servants so involved some or all of their legal costs. In deciding whether to exercise this discretion, departments and agencies must take into account the following considerations:

- a. whether or not it is in their interest to grant assistance*
- b. whether the action in question was committed or suffered within the scope of the civil servant's employment."*

12. Section 12.2.2 sets out where government departments are obliged to provide representation and states:

"Departments and agencies must provide legal representation for civil servants who are sued for damages as a result of actions carried out in the course of their employment. This representation will be by the solicitor acting for the Crown. Any damages and/or liability for the other sides costs must also be met from public funds. This right does not apply if:

- a. the department or agency consider that the civil servant was acting outside the scope of his or her employment; or*
- b. the civil servant refuses to instruct the solicitor in terms required by the solicitor."*

²

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/566900/CSMC_November_2016.docx

Scope of the case

13. The complainant contacted the Commissioner on 17 May 2017 to complain about DWP's request handling in general. The Commissioner confirmed that under section 50, she could only consider individual requests for investigation and asked the complainant to set out which requests he wished to proceed to investigation. On 28 September 2017, the complainant confirmed that he wished to complain about the request made on 14 January 2017.
14. The Commissioner notes that DWP initially stated that it did not hold information of the description specified in the request. During the course of the investigation, it became apparent that DWP's interpretation of the request was for private legal action rather than "*any legal action*" as stated in the request.
15. The Commissioner acknowledges DWP's position that it would not provide legal representation to employees in truly private matters. DWP confirmed that where legal representation has been provided, it is regarding actions or decisions taken in the course of the individual's employment and is, therefore, not a private action against the individual. DWP consider that in these cases the defendant is incorrectly named as the individual and should instead be named as the Secretary of State.
16. The Commissioner considers that as the first part of the request states "*acting or trying to act on behalf of DWP employees in any legal action*", the correct interpretation of the request is the amount spent by, and paid back to, DWP whilst providing legal representation to its employees, regardless of the case type.
17. The Commissioner does not consider that this implies that individual civil servants are solely responsible for decisions and actions taken in the course of their official duties. She considers it is a simple and logical conclusion that by providing legal representation to employees named as defendants in legal action, DWP is acting on the employee's behalf as specified in the request.
18. The Commissioner confirmed her interpretation to DWP and invited DWP to reconsider its response. DWP confirmed that it wished to rely on section 12 of the Act refuse to comply with the request and wrote to the complainant on 9 November 2018 to inform him of this. DWP subsequently informed the Commissioner that it was unable to respond directly to the complainant as the email provided was no longer in use.

The Commissioner therefore forwarded a copy of the fresh response to the complainant's known correspondence address on 19 November 2018.

19. The Commissioner considers that the focus of her investigation is to determine whether DWP are entitled to rely on section 12 to refuse to comply with the request. She will also consider whether DWP has provided adequate advice and assistance as required under section 16 of the Act.

Reasons for decision

Section 12(1) – Cost of compliance exceeds the appropriate limit

20. Section 12(1) of the Act states:

"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."

21. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004³ (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that DWP may refuse to comply with a request for information if it estimates that it will take longer than 24 hours to comply.
22. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in;
 - Determining whether it holds the information;
 - Locating the information, or a document containing it;
 - Retrieving the information, or a document containing it; and
 - Extracting the information, or a document containing it.

³ <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

23. 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'; she expects it to be sensible, realistic and supported by cogent evidence.

DWP's position

24. DWP set out to the Commissioner that it considered legal action to fall into three categories:
- Entirely public;
 - Entirely private; and
 - Defendant is an employee acting under the Carltona principle.
25. DWP considers that claims that are entirely public do not fall within the scope of the request as DWP would not be acting on behalf of an employee. DWP confirmed that entirely private legal action would fall within the scope of the request but no records would be held as DWP would not act on behalf of, or fund the legal costs of, an employee in an entirely private matter.
26. DWP set out that the final category would be where an employee is incorrectly named as the defendant where DWP or the Secretary of State should have been named.
27. DWP explained that in a case where legal action was taken against an employee due to actions they carried out in their official role, DWP would regard that as a matter it would be duty bound to answer. DWP confirmed that it could not envisage a situation where an employee would personally defend decisions or actions undertaken in their official role. DWP would instead consider this to be a situation where DWP would act to defend decisions and actions which it was ultimately responsible.
28. DWP also explained that there are occasions where DWP would represent an employee in employment tribunal cases. These are usually cases that involve allegations of discrimination where the claimant brings proceedings against DWP and a named individual.
29. DWP explained that in these circumstances, it would investigate the allegation and an offer of legal representation would be dependent on the outcome. If DWP concluded that the employee was culpable, they would be invited to seek their own legal representation. If DWP concluded that the employee had acted properly, the employee would be offered representation as part of DWP's defence against the action.

30. DWP explained that, in employment tribunal cases, it can only defend itself by showing that the employee has acted properly, regardless of whether or not an employee is also named as a respondent.
31. DWP explained that the Government Legal Department (GLD) acts for DWP in litigation and it would therefore be GLD's records that would require searching as DWP does not keep records of which staff members have required representation in their HR file.
32. DWP explained that GLD does not have separate records detailing which cases involve a staff member wrongly named as defendant. DWP explained that this information would only be ascertainable by looking at the full file for each case undertaken by GLD on behalf of DWP.
33. DWP confirmed that the case management system is searchable by case type but not in any way that would reduce the number of cases that would need to be reviewed. DWP confirmed that the parameters that GLD's case management system could be searched by were:
 - Case type
 - Client code
 - Date to/from
34. DWP explained that, in 2016, GLD provided legal representation to DWP in 3086⁴ cases and provided a breakdown as follows:

• Commercial advisory:	3
• Commercial litigation:	10
• Damages:	302
• Debt recovery/cost enforcement:	3
• Employment:	299
• European:	5
• Inquiry:	1
• Other:	2143

⁴ The Commissioner notes that the breakdown of cases creates a total of 3088 cases.

- Property and CPO: 1
 - Public law – JR: 97
 - Public law other: 106
 - Public law – tribunals: 118
35. DWP explained that it was not possible to identify whether an employee was named as the defendant on the GLD case management system as the Secretary of State would always be listed as the defendant in cases brought against DWP or its employees.
36. DWP confirmed that of the 2143 “Other” cases, 1452 could be reasonably exempted as these were cases where DWP had initiated the action and so would not involve an employee being represented. However, DWP went on to explain that it was possible that a claimant could erroneously counterclaim against an individual within these cases.
37. DWP explained that cases logged as “public law” cases would need to be reviewed as employees may have been wrongly named as the defendant instead of the Secretary of State. DWP set out that, as in the complainant’s legal action, it would be handled by the public law team despite being brought against a specified individual.
38. DWP explained that in order to ascertain whether an employee has been named as defendant or respondent, the following steps would need to be taken:
- Identify DWP cases within the GLD case management system. Additional time would be required for closed cases as they require authorisation to be re-opened.
 - The identified cases would each have to be searched for, opened and the correct document subfolder located and opened. The claim form, or relevant document, may be filed in different subfolders dependant on the age of the case and the team who handled the case.
 - Once the claim form, or relevant document, identifying the initial defendant has been located, the result would be recorded.
39. DWP confirmed that GLD had estimated 10 minutes per file to undertake these actions and considered this to be a “modest” estimate.

The Commissioner's position

40. The Commissioner accepts that the information is held by GLD on behalf of DWP for the purposes of the Act by virtue of section 3(2)(a)⁵. The Commissioner accepts that as DWP would have to search a large number of cases to ascertain whether the original legal action has been brought against DWP, one of its employees or both.
41. The Commissioner is not persuaded that all of the categories set out above would need to be searched as it is not apparent why some of the categories would involve an employee (for example "Debt recovery"). However, the Commissioner does accept that, as a minimum, DWP would need to search the following categories:
- Damages: 302
 - Employment: 299
 - Other: 691⁶
 - Public law other: 106
42. This leaves a minimum of 1398 cases that would need to be reviewed in order to ascertain whether an employee was named as a defendant or respondent to the legal action.
43. DWP's arguments focus on the time spent identifying these cases and sets out that it would require 10 minutes per file to do this. The Commissioner is not persuaded that DWP would require 10 minutes per file to ascertain whether an employee was named as a defendant. However, in order to review the minimum number of cases identified above, DWP would be required to undertake this task in a little over one minute per file⁷.
44. In addition to this, DWP would then be required to calculate the costs incurred in each case that was identified as falling within the scope of the request and then ascertain whether DWP sought to recoup the costs from the employee.

⁵ "it is held by another person on behalf of the authority."

⁶ 2143 – 1452 as set out in paragraph 36

⁷ 24 hours is 1440 minutes.

45. The Commissioner considers that it would not be possible to perform a thorough and robust search of the required files and undertake the tasks necessary to calculate the requested information within the appropriate limit of 24 hours.
46. The Commissioner considers that DWP is entitled to rely on section 12(1) of the Act to refuse to comply with this request.

Section 16: Duty to provide advice and assistance

47. Section 16 of the Act states:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

48. DWP advised the complainant in its fresh response that it did not believe the request could be refined as it would require the manual examination of almost every case in the specified time period.
49. The Commissioner has considered whether the request could be refined by the time period itself and she is of the opinion that it is likely that the refined time period would have to be refined to such an extent as to become meaningless.
50. Section 16 does not require public authorities to provide in depth calculations or detailed estimates of what information could be provided within the appropriate limit. It requires public authorities to provide such advice and assistance as it reasonable to expect. The Commissioner considers that DWP has provided reasonable advice and assistance by confirming to the complainant that it does not consider it is possible to comply with a refined version of the request.
51. The Commissioner therefore considers that DWP has complied with section 16 of the Act.

Section 10(1) – Time for compliance

52. Section 1(1) of the Act 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."*

53. Section 10(1) of the Act 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."

54. As set out above, DWP originally denied holding the information but issued a fresh response on 9 November 2018 confirming that it did hold information but was relying on section 12 to refuse to comply with the request. As DWP did not confirm that it held the requested information within the statutory timeframe, the Commissioner considers that it has breached section 10(1) of the Act.

Section 17(5): Refusal notice

55. Section 17(5) of the Act states:

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

56. As DWP did not provide the complainant with its refusal notice within the statutory timeframe, it has breached section 17(5) of the Act.

Right of appeal

57. 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

58. 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.
59. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF