



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0027V

**Before
Judge Stephen Cragg Q.C.**

Heard via the Cloud Video Platform on 12 November 2020

Between

Mohammad Chamani

Appellant

-and-

The Information Commissioner

Respondent

The Appellant was not represented

The Commissioner was not represented

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The proceedings were listed for an oral hearing to be held via the Cloud Video Platform. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. The Commissioner chose not to attend, but provided a written response to the appeal. The Appellant did not attend at the time of the hearing. I am satisfied from the documents that I have seen that the Appellant was aware of the listing details for the hearing, and that it is in the interests of justice to hear the case in his absence and in the absence of the Commissioner, as the papers contain both the grounds of appeal and the Commissioner's response.
3. Effectively, then, I am considering this appeal on the papers, having heard no oral representations at the listed hearing. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 331.

THE REQUEST AND THE DECISION NOTICE

4. The Appellant requested information related to benefit claimants who had committed suicide. On 8 October 2018, he wrote to the Department of Work and Pensions (DWP) and requested information as follows:-

1- Considering a shift in number of statistically expected self inflicted death amongst whom one way or another have been affected directly by implementation of welfare reform in capacity of benefit claimants, if you may forward any information held in view of or with regard to the impact of the FES's interactions with claimants while DWP carries out implementation of welfare reform

, e.g. by way of FES talking to those effected about changes that may would have had affected their benefit payments ever more had they had not shorten their lives.

2- Any statistics data or report held on number of self inflicted death of deceased social welfare benefit claimants who had records of correspondence with FES or so called Local Services Compliance in the last year of their life.”

5. DWP responded on 6 November 2018 to explain that the Fraud and Error Service (FES) had been renamed the Counter Fraud and Compliance Directorate (CFCD), and was responsible for the prevention, detection and, where appropriate, investigation of fraud and error against all benefits administered by and on behalf of DWP. DWP said that that it did not hold the specific information requested, but that the GOV.UK website held some statistical information regarding mortality rates for some of the “out of work” benefits between May 2010 and February 2014. A link was provided to the Appellant.
6. The Appellant requested an internal review and disputed DWP’s assertion that it did not hold the requested information. He explained that the then Secretary of State for DWP had responded to Select Committee questions to the effect that DWP held peer reviews of cases falling within the scope of the request. The Appellant considered DWP could review these cases for interaction of the FES with claimants.
7. On 28 November 2018 DWP upheld its original response to the request, and provided a link to information regarding the peer reviews. DWP explained that it had conducted reviews of cases where it is alleged DWP’s actions are linked to the death of a benefit recipient. DWP explained that it was not clear from the report whether these deaths were suicides or whether they were associated with the FES or CFCD.

8. The Appellant contacted the Commissioner on 12 January 2019 to complain about the way his request for information had been handled. He disputed DWP's assertion that it did not hold information falling within the scope of his request.
9. In the decision notice of 17 December 2019 the Commissioner re-calibrated the requests as follows:-

Request 1

Any information related to the impact of FES/CFCD's interaction with claimants regarding welfare reform which might or could have cut their benefit. The specific claimants are those whose suicide is directly attributed to distress regarding benefit.

Request 2

Any statistics, data or report(s) regarding claimants known to have committed suicide who had recorded communication with FES/CFCD or Local Services Compliance in the last year of their life.

10. The Commissioner explained that during the course of the investigation, DWP revised its position and 'confirmed that it had located some, albeit incomplete, information falling within the scope of the requests'. As the Commissioner explains it, from paragraph 11 of the decision notice:-

11. DWP wrote to the complainant on 12 September 2019 and explained that its original response was based on the grounds that DWP does not record a cause of death for benefit claimants as this piece of information is not required for the assessment and processing of benefit claims. DWP explained that it had not originally considered that it may have become aware of the cause of death via correspondence from the family and apologised for this oversight.

12. DWP confirmed that there is no specific impact assessment on CFCD's involvement in claimants' cases but it could provide general information around its policy for safeguarding vulnerable claimants during the course of any investigation if this would be helpful to the complainant.

13. DWP confirmed that if it is made aware that a claimant has committed suicide, an Independent Peer Review will be conducted into this case. DWP explained that it had reviewed all cases where an IPR was conducted since the start of Welfare Reform (2013) and found 96 cases that related to claimants who had committed suicide. DWP confirmed that of these 96 cases, it had found that CFCD had been involved in four cases in the last 12 months of those claimant's lives.

14. DWP explained that due to its document retention policies, specific records of CFCD involvement are no longer stored and it is not therefore possible to indicate the extent to which CFCD was involved in these cases.

11. The Commissioner considered whether, on the balance of probabilities, DWP held information further to that already provided. In addition to the explanation set out above DWP also said that its retention period for cases dealt with by its Investigations teams was five years after the date the case is closed, and that cases dealt with by the Compliance team are stored for 14 months after the date the case is closed. DWP also explained that there had not been a specific impact assessment regarding adverse effects on claimants following contact by FES and/or CFCD, and that it had a general policy for safeguarding vulnerable claimants who are subject to investigation.

12. Since 2014, it has been mandatory to conduct an Independent Peer Review in all cases where the DWP becomes aware that a claimant has, or is alleged to have, committed suicide, although there is no statutory duty for DWP to be informed about the death of a claimant, and information about a cause of death would not be stored with a claimant's pre-existing records.

13. DWP confirmed to the Commissioner that searches for the information requested were conducted of each of the Independent Peer Review case files held to identify any information relating to claimants who had or were alleged to have died as a result of suicide. These cases were then passed to

CFCD who cross checked these against records of people subject to investigations during the last 12 months of their life (see the Appellant's request). DWP confirmed to the Commissioner that Independent Peer Reviews are stored centrally for six years and deleted records are not retrievable. Due to this retention period, records for Independent Peer Reviews conducted prior to 2013 are no longer stored.

14. In relation to the searches carried out by DWP, the Commissioner found that they were adequate and proportionate in view of how such records would have been retained and archived by DWP, and said:-

34. The Commissioner considers that, during the investigation, DWP undertook reasonable and logical searches to locate information falling within the scope of the request. As Independent Peer Reviews were mandatory for cases in which DWP became aware of a claimant's suicide, it is reasonable for DWP to use these peer reviews as its starting point for searches. In the Commissioner's view, she would expect these searches to have returned information relating to the request.

15. The Commissioner said that she understood why the Appellant thought that there must be more information 'given the sensitivity of the requested information and the potential distress and impact of an investigation on the specified claimants in the period before their death'. However, she concluded that she could not require a public authority to hold information it does not hold.

16. The Commissioner was disappointed, though, that the DWP had not initially recognised the peer reviews as a starting point for its searches until the Commissioner had started her investigation, and drew DWP's attention to the fact that the Appellant had raised the peer reviews in his request for internal review.

THE APPEAL

17. The Appellant appealed the decision notice on 13 January 2020. His essential complaints are set out as follows:-

Error of law. I am not satisfied that ICO is certain that on the balance of Probability DWP does not hold information on the impact of the FES's interactions with claimants while DWP carries out implementation of welfare reform.

ICO has erred in applying FOI provisions.

ICO erred in assuming that " information " is not held beyond the scope of facts disclosed whereas inaccurate quasi-information released proves otherwise.

18. Other matters referred to were as follows:-

(a) The Commissioner should have used her powers under s77 FOIA and has not investigated this issue properly.

(b) The Commissioner erred in her reasoning as to whether DWP's approach to its search was reasonable and logical.

(c) The DWP's retention policy means that relevant documents are destroyed.

(d) The DWP does not comply with the law governing information processing.

19. The Commissioner responded to the Appellant's appeal by seeking to uphold the decision notice. The Commissioner suggested joining the DWP to the proceedings, but that was subsequently resisted by DWP, and the Registrar decided that joining the DWP was not necessary.

20. The Appellant then suggested that the Commissioner use powers of entry, search and inspection to test the 'knowledge management equipment' found there. Section 77 of FOIA refers to the 'Offence of altering etc. records with intent to prevent disclosure' and states that:-

(1) Where—

(a) a request for information has been made to a public authority, and

(b) under section 1 of this Act the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

21. Only the Commissioner or the Director of Public Prosecutions (DPP) can institute proceedings.

DECISION

22. Public authorities are under a general duty to disclose information they hold where it is requested: section 1 FOIA. By s1(1)(a) FOIA 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. By section 1(4) FOIA the information is the information in question held at the time when the request is received, and information itself means information recorded in any form: see section 84 FOIA.

23. When a public authority says that it does not hold the information requested (or any further information), the Commissioner (and now this Tribunal) has to consider the searches made by the public authority and the explanations given and decide, on the balance of probabilities, whether the public authority is holding the information requested.

24. The Commissioner in the decision notice was satisfied on the balance of probabilities that the information was not held.
25. It is clear in this case that the DWP did not approach this request in the way that it should have done. If the Appellant had not pursued this matter to the Commissioner then none of the information later disclosed would have been provided at all. The Commissioner was right to criticise DWP for its approach in this case. If public authorities do not carry out proper searches when FOIA requests are made, there will be an unnecessary use of resources when the Commissioner and the Tribunal need to become involved to resolve the issues that arise.
26. That said, in my view DWP has now carried out proportionate and reasonable searches for the information and it was sensible to use the peer reviews as the starting point for obtaining the information that the Appellant sought. Thus, some relevant information has now been disclosed, and on the balance of probabilities it is my view that no further information is held by DWP within the scope of the request. Now that a source of information has been identified I cannot think of a reason why DWP would withhold information if it were held. As is well known the FOIA contains exemptions from disclosure that could be relied on if the information was sensitive or there were other genuine reasons not to disclose it. The Commissioner is entitled to accept at face value the response of a public authority, where there is no evidence of an attempt to mislead the Commissioner, or of a motive to withhold information actually in its possession.
27. Likewise DWP is entitled to have a retention policy which means that information which might be relevant has already been destroyed before a request is made. The application of a retention policy can therefore also mean that a public authority does not hold the information at the time it is sought.

28. In relation to the exercise of powers under s77 FOIA (to bring a prosecution) that is something for the Commissioner (or the DPP) to consider, but this Tribunal has no powers to interfere if the Commissioner decides not to instigate proceedings.

29. Thus on the basis of the available evidence I am satisfied that, on the balance of probabilities, the DWP does not hold the information sought within the scope of the request, and therefore this appeal must be dismissed as there is no error of law by the Commissioner that can be identified in the decision notice.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 13 November 2020

Promulgated: 16 November 2020