

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 February 2013

**Public Authority:** Department for Work and Pensions

**Address:** Caxton House  
Tothill Street  
London  
SW1H 9DA

#### **Decision (including any steps ordered)**

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1. The complainant has requested, among other things, copies of the minutes and agenda of a meeting between the Department for Work and Pensions (DWP) and Atos, a private provider of services. The DWP disclosed most of the contents of these papers but considered that parts were exempt information under section 43(2) (commercial interests) of FOIA. The Commissioner's decision is that section 43(2) of FOIA is not engaged. He therefore requires the DWP to disclose all the information to which the exemption had originally been applied to ensure compliance with the legislation.
2. 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.

#### **Request and response**

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3. On 22 February 2012 the complainant requested information in the following terms:

*The management of the contract with Atos includes:*

*1) Periodic formal performance reviews. Please provide a copy of the agenda and minutes from the latest meeting, suitably redacted to avoid Data protection/commercial complications.*

*2) Claimant surveys. Atos's own surveys take place before claimants know the WCA result. Does DWP itself undertake any survey pre or post decision and if so, where can the summaries be found?*

*3) "Mystery shopping". Please provide*

*a. a copy of the "template" for these exercises – there must be one to ensure consistency.*

*b. A summary of the latest results and conclusions available.*

*c. Details of how they are undertaken – with or without knowledge of Atos etc. Do "shoppers" actually go through a WCA without the HCP knowing who they are?*

4. In the absence of a reply, the complainant asked the DWP on 22 March 2012 for an update. The DWP wrote to the complainant on 23 April 2012 and apologised for the delay. It explained that this was due to the time needed to locate and consider relevant information. The DWP also advised that it should have issued an extension letter because there were considerations under section 43 that involved the public interest test.
5. The DWP provided its substantive response to the requests on 30 May 2012. In relation to request 1), the DWP provided redacted versions of the minutes and agenda. For the remaining requests, the DWP either disclosed the information or otherwise pointed out that the information was already reasonably accessible and thus was exempt under section 21 of FOIA.
6. The complainant wrote to the DWP again on 31 May 2012 challenging the extent of the redactions of the agendas and minutes provided in response to request 1). In addition, he queried the completeness of the DWP's responses to the other requests.
7. The DWP subsequently carried out an internal review, the outcome of which was sent to the complainant on 10 September 2012. The DWP upheld the decision to redact the minutes and agenda covered by request 1). It explained that it had removed the names of staff below Senior Civil Service and text that it considered to be exempt from disclosure under section 43(2) of FOIA. The review went on to expand on certain points in relation to the remaining requests.
8. A final review was later carried out by the DWP and its findings sent to the complainant on 31 October 2012. This accepted that the DWP had failed to comply with FOIA due to the delay in responding to the requests. It also clarified that the DWP was withholding parts of the

information described by request 1), namely the minutes and agenda, under sections 40(2) and 43(2) of FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 5 September 2012 to complain about the DWP's handling of his requests. Specifically, he has asked the Commissioner to consider the DWP's application of section 43(2) of FOIA to information covered by request 1).
10. This means it has not been necessary for the Commissioner to make a decision on the DWP's reliance on section 40(2) nor the appropriateness under the legislation of the DWP's responses to the other requests.
11. It is also noted that during the course of the investigation the DWP has informed the Commissioner that it is no longer seeking to rely on an exemption to withhold two sentences which had originally been redacted.

## **Reasons for decision**

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### **Section 43(2) – commercial interests**

12. Section 43(2) states that information is exempt information if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
13. The exemption is a prejudice-based exemption, which means that it will only be engaged if three criteria are met. First, the harm that is envisaged would, or would be likely to, occur relates to the applicable interests described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure. Specifically, the public authority must be able to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'. The Commissioner addresses each of these points in turn.
14. The DWP has argued that the release of the information would damage its ability to obtain goods or services on the best possible terms. In addition, for Atos disclosure could weaken its bargaining position in

subsequent negotiations. The Commissioner accepts that the prejudice being claimed is relevant to the exemption and is neither trivial nor insignificant.

15. The Commissioner's next step is therefore to decide whether a link has been made between disclosure and a detriment to the commercial interests of the DWP, or Atos, or both. Where it is claimed that the commercial interests of a third party are at stake, the Commissioner does not consider it appropriate to take into account speculative arguments but would need evidence that the third party had actually raised concerns.
16. The DWP's arguments regarding the potential consequences of disclosure can be summarised as followed:
  - (a) It would reveal a negotiating position employed by Atos, which could be used against the company in future commercial relationships.
  - (b) There is a reputational risk to Atos.
  - (c) It would be commercially disadvantageous to Atos to highlight the steps it is willing to take in order to meet its contractual requirements.
  - (d) It would give rise to items relating to the relationship between Atos and the DWP being taken out of context.
  - (e) It may weaken the DWP's negotiating position both when re-tendering the contract and when the terms of the contract have been newly-let.
  - (f) It would inhibit the open and candid dialogue between the DWP and Atos, which would prevent the effective management of this and other contracts.
17. The DWP has advised the Commissioner that it does not have evidence of Atos' involvement in the original decision to apply section 43(2) of FOIA. This is because the relationship operated on both an informal and formal platform; from ad-hoc telephone discussions through to formal meetings. It has, however, supplied the Commissioner with copies of two emails sent in December 2012 and January 2013 which expressed Atos' agreement with the substance of the redactions made by the DWP.
18. The Commissioner has firstly observed that the arguments outlined at (d) and (f) are not ones which fall within the prejudice set out by section 43(2) of FOIA. He has therefore decided that these arguments can be

disposed of because they have no bearing on the question of whether the exemption is engaged.

19. For the remaining arguments, the Commissioner recognises that the potential severity of the prejudice described is significant. Yet, the test for a public authority is to match the arguments, and the prejudice cited, with the withheld information itself. On this basis, the Commissioner has found that the DWP has failed at the second stage of the three listed previously.
20. It is acknowledged that in many cases the withheld information refers to the terms of the contract between DWP and Atos and to performance statistics. Furthermore, the Commissioner recognises that in principle information of this nature may become more sensitive the closer it gets to the time for the re-tender of a contract. The current contract is due to run until 2015 but the Commissioner has been informed that the tendering process for the new contract is due to begin shortly.
21. From an analysis of the disputed information, however, the Commissioner considers that it does not contain the level of detail required to result in any of the instances of prejudice described above. For example, in some areas the information does not depart from a standardised reporting on the progress of the arrangements between the parties, which diminishes the possibility that the information will have commercial currency in a competitive environment. Even where the information relates specifically to the performance of Atos, to which arguments (a) – (c) relate, the Commissioner has not been provided with cogent arguments that explain how the information in question could have a detrimental effect on Atos or, equally, be used by its competitors. Nor is this obvious from an inspection the withheld information.
22. It therefore follows that the Commissioner has been unable to envisage how disclosure could disadvantage either the DWP or Atos. In this regard, the Commissioner has found that Atos' input on this matter sheds little light on the specific harm it felt could arise through disclosure. For completeness, however, the Commissioner has gone on to consider the third stage of the prejudice test as if the second stage had been met.
23. The third stage of the test requires the consideration of the likelihood that the argued prejudice will actually happen. The DWP has claimed in this instance that the release of the disputed information 'would be likely' to have a prejudicial effect. As stated, this places a weaker evidential burden on a public authority than the alternative limb of the exemption which says that disclosure 'would' have a prejudicial effect. Nevertheless, 'would be likely' means that there must be a significant

risk of the prejudice occurring and more than simply a hypothetical possibility. In other words, there must be a real possibility that the circumstances giving rise to prejudice would occur and the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.

24. Again, the Commissioner considers that the cogency of the DWP's arguments falls down for similar reasons as set out previously, with the result that the applicable threshold of prejudice has not been shown to been met. In particular, he considers that even if a link had been made between the withheld information and the prejudice, there are insufficient grounds upon which to find that there is a 'real' risk of the prejudice occurring.
25. It is the position of the Commissioner that a public authority must be able to give specific examples of how disclosure could lead to the prejudice described in the exemption. Yet, having had the benefit of seeing this information, the Commissioner has been unable to reconcile the general arguments advanced for the engagement of the exemption with the nature of the information itself.
26. Building on this point, the Commissioner has reminded himself that the onus of FOIA is ultimately on disclosure. It is therefore the responsibility of a public authority to demonstrate fully the particular reasons why the provisions of the legislation militate against the release of information in the circumstances. The Commissioner has decided in this case that the DWP has failed to support a link between the prejudice described by section 43(2) of FOIA and the contents of the withheld information.
27. As section 43(2) has not been found to be engaged, the Commissioner has been under no obligation to assess the public interest test attached to the exemption.

## **Procedural issues**

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### **Section 10 - time for compliance**

28. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
29. In this case the DWP has admitted to breaching the provisions of the legislation by failing to provide its response to the requests within the statutory timeframe.

## Right of appeal

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30. 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: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

31. 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.
32. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**