

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2013

Public Authority: Department for Work and Pensions
Address: Caxton House
6 – 12 Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested from the Department of Work and Pensions (DWP) a copy of the legal advice supporting its position that publishing recordings of Work Capability Assessments (WCAs) may not be covered by section 36 of the Data Protection Act 1998 (DPA). This section relates to personal data processed by an individual for domestic purposes. The DWP claimed that the legal advice was exempt from disclosure under section 42(1) (legal professional privilege) of FOIA. The Commissioner's decision is that section 42(1) is engaged and that, in all the circumstances, the public interest in disclosure is outweighed by the public interest in maintaining the exemption. The Commissioner does not therefore require the DWP to take any steps as a result of this notice.

Request and response

2. On 29 August 2012 the complainant wrote to the DWP and requested the following information relating to Work Capability Assessments (WCAs):

The DWP has mentioned in several responses to FOIA requests about recording that publishing recordings on the internet may not be treated as a domestic purpose [...]

[...]

Please provide the data (i.e. legal opinions, guidance for the ICO, case law etc) that supports the DWP position that publishing recordings may not be treated as domestic purposes.

3. The DWP responded on 26 September 2012 and advised that it was unable to provide copies of legal opinion because this information was subject to the exemption set out at section 42 of FOIA. Among other points, the DWP also informed the complainant that relevant case law was already available to him and so was also exempt information under section 21 (information accessible by other means) of FOIA.
4. The complainant wrote to the DWP later the same day and challenged the reliance on section 42 of FOIA to legal advice. The complainant also clarified that the request should have said "from the ICO" rather than "for the ICO". The DWP subsequently carried out an internal review, the outcome of which was provided to the complainant on 22 October 2012. This upheld the DWP's application of section 42 to the relevant legal advice in its possession, disagreeing with the complainant that the confidentiality of the information had been lost. The DWP also confirmed that it did not hold any bespoke guidance from the Information Commissioner in this context.

Scope of the case

5. The complainant contacted the Commissioner on 30 October 2012 to complain about the way his request had been handled. In particular, the complainant has asked the Commissioner to consider whether the DWP's decision to refuse disclosure of the legal advice described in the request properly complied with the provisions of FOIA.
6. To do this, the Commissioner has had sight of the withheld information and has considered the submissions provided by both the DWP and the complainant.

Reasons for decision

Section 42 – legal professional privilege

7. Section 42(1) of FOIA provides that information is exempt from disclosure if it is protected by legal professional privilege. As a qualified exemption, the provision is subject to the public interest test.
8. There are two types of privilege within the concept of legal professional privilege; litigation privilege and advice privilege. The category of

privilege which the DWP considers applies is advice privilege. This will cover communications between a client and lawyer, made for the dominant purpose of seeking or giving legal advice, where no litigation is in progress or contemplated. Advice privilege will also extend to any part of a document which evidences the substance of such a communication. However, the fact that information once attracted privilege does not mean that this privilege cannot subsequently be lost. This could occur where a client has shared the information with third parties on an unrestricted basis, thereby stripping it of its confidential nature.

9. The disputed information comprises a letter from a legal adviser within the DWP to Jobcentre Plus, acting as the client. The DWP has been unable to establish the exact date and recipient of the advice but has confirmed that the advice was sought following an incident sometime around the end of 2009. The Commissioner has studied the disputed information and is satisfied that it reflects advice given by a lawyer in their professional capacity. He therefore agrees with the DWP that the information was subject to advice privilege. The Commissioner must next consider whether privilege was still in place at the time the request was made.
10. As already mentioned, information may no longer be protected by legal professional privilege where its quality of confidence is lost owing to an unrestricted disclosure. In his guidance¹ on section 42 of FOIA, the Commissioner explains the concept of an unrestricted disclosure at paragraph 29:

"This refers to a disclosure of information made to the world at large or without any restriction on its future use. This would mean that it is capable of entering the public domain [...]. As a result, the original holder or owner of the information (eg the legal advice) can no longer expect it to remain confidential. An unrestricted disclosure can be made either inside or outside the context of litigation [...] Where confidentiality is lost, the authority cannot claim that s42 applies.

11. The guidance continues at paragraph 32:

¹http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/legal_professional_privilege_exemption_s42.ashx

Where legal advice is disclosed outside litigation without any restrictions, it is no longer protected by LPP. If only part of the advice is disclosed outside litigation without restrictions, it is possible for the remaining information to keep its LPP protection, depending on how much the disclosed information revealed about it. If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege.

12. The complainant, has argued that any confidentiality the requested information may originally have possessed has been lost as a result of the following factors:

- *Effectively losing control over the information by sharing it with the broader DWP organisation and the private company Atos It Services UK Limited (Atos) such that it was capable of and has entered the public domain (see below).*
- *Disclosing to the 'world at large' a substantive part of the Advice, divulging the essence of the remaining Advice and exposing the reasoning behind said Advice.*
- *By losing control of the Advice the Client no longer has control of what further portions could enter into the public domain and when this could happen.*

13. The Commissioner, however, respectfully disagrees with this analysis. Firstly, the DWP has confirmed that as far as it is concerned the legal advice has not been shared with Atos or any third party and the Commissioner has not been provided with any evidence to the contrary. Secondly, the Commissioner is satisfied from what he has seen that the DWP's references to the legal advice in previous communications did not reveal the full advice, or anything approaching that. Thirdly, the Commissioner is not aware of anything concrete that would indicate the DWP has 'lost control' of the advice, with the result that the advice had inadvertently been shared with the wider world.

14. For these reasons, the Commissioner has decided that legal professional privilege applied to the disputed information and that privilege was still intact at the time of the request. Thus, he has found that section 42 is engaged and has gone on to consider the balance of the public interest.

Public interest arguments in favour of disclosure

15. The complainant has powerfully argued for disclosure in this case, advancing arguments that go beyond the general argument for

transparency that will always hold some weight. The Commissioner outlines these arguments below:

- Disclosure is necessary to allow the public to make an informed judgement on the propriety of the DWP's actions. This is in the context of the public's growing suspicion that the DWP is acting unlawfully in respect of the restrictions placed on the recording of WCAs. This feeling is reinforced, in the view of the complainant, by the findings of the Upper Tribunal (formerly the Social Security Commissioner) in CIB/3117/2008. This concerned the appellant's insistence on recording a medical examination and the termination of the examination on this basis. The Upper Tribunal determined that it had not been established that the appellant failed to show 'good cause' for not submitting himself to a medical examination for the purposes of incapacity benefit. The Tribunal therefore remitted the case back to the Secretary of State so that (i) the appellant could be provided with details of the conditions under which an interview or examination may be tape-recorded, and (ii) the appellant could be offered a further appointment for a medical examination.
- The possibility of the public challenging the DWP's policy on WCA recording is hampered by the lack of access to information upon which the policy is based. Firstly, from the complainant's own experience, informal approaches to the DWP about the policy have proven unsuccessful. Secondly, allowing that people claiming employment and support allowance (ESA) will often be seriously ill, it would be disproportionate to expect claimants to pursue legal avenues when seeking to understand the DWP's justification for imposing conditions on WCA interviews. Implicit in the argument, is the recognition of the significant number of people directly affected by the government's policy on ESA and its approach to WCA interviews.

Public interest arguments in favour of maintaining the exemption

16. In its submissions, the DWP has emphasised the importance that the Information Tribunal has repeatedly placed on the concept of legal professional privilege. These arguments are now well-trodden. Among other decisions cited, the DWP has quoted *Calland vs Information Commissioner & Financial Services Authority* (EA/2007/0136)², where the Tribunal remarked at paragraph 37 that "some clear, compelling and

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i31/Calland.pdf>

specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.” In addition, the DWP has also referred to the case of *Fuller vs Information Commissioner and the Ministry of Justice* (EA/2008/0005)³, in which the Tribunal confirmed that:

[...] The most important principle emerging from [Bellamy vs the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023)⁴] is that the very fact that a document is privileged is of significant weight in the balancing exercise. That is because the justification for privacy, recognised by the court for centuries, is the need for candour, for a free flow of information, for a dispassionate review of strengths and weaknesses and for uninhibited advice in the relationship between lawyer and client [...]” (paragraph 12)

17. The DWP has argued that it is firmly in the public interest that a public authority is not deterred from seeking legal advice for fear that the content of potentially frank exchanges may become public knowledge. Ultimately, it is only proper that a public authority should seek to test the strengths and weaknesses of a position or proposed course of action. Furthermore, it is the DWP’s view that it has not misrepresented or ignored that legal advice – actions which if they had occurred would likely add to the weight for disclosure.
18. Leading on from these arguments, the important point for the DWP is that there is nothing in the legal advice itself, that is of a critical nature, which would justify privilege being overridden on this occasion.

Balance of the public interest arguments

19. The Commissioner understands that the complainant has specific, and entirely legitimate, reasons for wanting the disputed information put in the public domain. He is also prepared to accept that a greater emphasis should be placed on transparency in respect of the way that the DWP operates, given the serious and far-reaching effects that its decision-making will have on the wider population. Building on this point, the Commissioner acknowledges that the issue of recording WCA interviews

³ http://www.informationtribunal.gov.uk/DBFiles/Decision/i35/Fuller_05Aug08.pdf

⁴ http://www.informationtribunal.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

has inherited considerable importance because it signifies the efforts of prospective claimants to ensure they are fairly represented.

20. However, the Commissioner also considers that care must be taken not to assume the vocal and widespread criticism of, and general concerns about, the DWP's approach to the testing of benefit-claims necessarily translates into a significant public interest in the requested information itself. In this case, the request is directed towards a fairly tangential aspect of the issue of WCA recordings- namely the publishing of those recordings – and, as such, is not as central to the debate about the DWP's strategy. This would weaken to an extent the public interest argument in disclosure.
21. Furthermore, the Commissioner is conscious of the weight invested in legal professional privilege, which is predicated on the faith that a client and legal adviser have that their frank discussions will be kept private. On this point, the Commissioner has considered whether there is any evidence that the DWP had misrepresented the advice, a factor that as mentioned may greatly add to the case for disclosure. In the Commissioner's view, there is not.
22. From his analysis, the Commissioner has decided that in all the circumstances the public interest in maintaining the exception outweighs the case for disclosure. Coming back to the test set out by the Tribunal in *Calland*, the Commissioner considers there is an absence of clear, compelling and specific justification for disclosure.

Right of appeal

23. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

24. 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.
25. 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

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