

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 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 a list of the fields in an ESA85 Medical Report¹ completed by an Atos Healthcare professional that are automatically populated or overwritten by the Logical Integrated Medical Assessment (LiMA) system. The Department for Work and Pension (DWP)'s position is that some parts of the requested information are not held, other parts have already been provided, and that any relevant technical information is exempt information under section 43(2) (commercial interests) of FOIA. The Commissioner is satisfied that any relevant information held is covered by section 43(2) of FOIA. He does not therefore require any steps to be taken as a result of this notice.

Request and response

2. On 8 August 2012 the complainant wrote to the DWP and requested information in the following terms:
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¹ An ESA85 medical report forms part of the process by which individuals are assessed for their entitlement to an Employment and Support Allowance (ESA). This offers an individual who is ill or disabled financial support if they are unable to work or personalised help so that an individual can work if he or she is able to. It has contracted Atos Healthcare to provide these assessments.

Please provide a list of fields in the ESA85 Medical Report [sic] completed by the Atos HCP [Healthcare Professional] that are automatically populated or overwritten by the LiMA system. This should include data that LiMA algorithms [sic] derive from data input by the HCP or any other user.

Please don't waste my time by telling me that the HCP can manually input data into the fields populated by LiMA as I already know this.

3. The DWP responded on 6 September 2012. It advised that the department did not hold the list of fields specified in the request before going on to explain the process by which HCPs completed a medical report using the LiMA system. The DWP further informed the complainant that the LiMA ESA Filework Technical Guide, a copy of which was attached, demonstrated the sort of templates that HCPs see when completing their reports. In respect of the data that LiMA algorithms derive from data input by the HCP or any other user, the DWP claimed this information was exempt from disclosure under section 43(2) of FOIA.
4. The complainant wrote to the DWP again on 10 September 2012 challenging the completeness of its response. In particular, the complainant clarified the specific information he was seeking by making the request:
 - a. Which data fields are pre-populated by users other than the HCP carrying out a work capability assessment?
 - b. Radio buttons – What is the default value presented to the user for each of the LiMA fields that are selected via radio buttons?
 - c. Tick-boxes – What is the default value presented to the user for each of the LiMA fields that are selected via tick boxes?
 - d. Text fields – What is the default value highlighted for each of the LiMA fields that are selected via text lists?
5. The DWP subsequently carried out an internal review of its handling of the complainant's request, the outcome of which was provided on 8 October 2012. This found that section 43(2) of FOIA had been correctly applied to some of the requested data and that all other relevant information had been provided.

6. At the complainant's invitation, and after some delay, the DWP completed a final review. This was sent to the complainant on 21 January 2013. The DWP apologised for the delays that had occurred but advised that the particular requested information was either not held or, in respect of technical information, was covered by section 43(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way the DWP handled his request. In particular, he asked the Commissioner to consider the DWP's failure to provide the information described at points a – d above (paragraph 4).

Reasons for decision

8. In its submissions to the Commissioner, the DWP has explained that LiMA is an IT-based system designed to improve the legibility, consistency and accuracy of the medical reports submitted by Atos to the DWP. Using medical protocols to underpin its logic, LiMA provides medical assessors with a framework to record clinical findings.
9. LiMA was designed to run on Atos networked based PCs and has no independent function. The questions and options selections built into the software are the same as those contained in a former clerical Incapacity for Work Medical Report Form IB85. The IB85 form was designed by the DWP.
10. The DWP has further advised that all functionality within the LiMA programme is simply derived from passing data to and from the servers over a secure network. The only printed output is the medical report. There is no print facility of individual screens with the assessment process.
11. The DWP has gone on to provide the Commissioner with some general clarification about the operation of LiMA in the context of the categories of information listed at a – d. A summary of this clarification is set out below.
 - a. Which data fields are pre-populated by users other than the HCP carrying out a work capability assessment?

LiMA data fields are not pre-populated by users other than the HCP undertaking the work capability assessment.

- b. Radio buttons – What is the default value presented to the user for each of the LiMA fields that are selected via radio buttons?

'Radio Buttons' are arranged in groups of two or more and displayed on screen as, for example, a list of circular holes that can contain white space (for unselected) or a dot (for selected). Each radio button is normally accompanied by a label describing the choice that a radio button represents.

- c. Tick-boxes – What is the default value presented to the user for each of the LiMA fields that are selected via tick boxes?

There are no 'tick boxes' but there are options and choices for selection. LIMA provides HCPs with a system of data entry that minimises typing. This is known as 'assisted text control' and allows information to be quickly and easily added to a report. 'Standard phrases' consist of sentences that users can customise by altering variables. Their use is never mandated and the option of 'free text' is always available.

- d. Text fields – What is the default value highlighted for each of the LiMA fields that are selected via text lists?

This information is not held by the DWP or Atos – 'text lists' do not exist. There is a 'Diagnosis list' which refers to the list of diagnoses that Atos enters into the LiMA software application. Further information is contained in the LiMA ESA Filework Technical Guide².

12. Beyond the explanations provided above, however, the DWP has argued that under section 43(2) of FOIA it is not obliged to disclose information that reveals the decision-making 'map' in LiMA, namely LiMA algorithms and other detailed LiMA software programme information. In this regard, the DWP has described algorithms as a set of instructions that takes an

²<https://www.whatdotheyknow.com/request/124797/response/310446/attach/3/LiMA%20ESA%20Filework%20Technical%20Guide%20V4%20Final.pdf>

input, A, and provides an output, B, which changes the data involved in some way.

Section 43(2) – commercial interests

13. Section 43(2) of FOIA 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 the information). The Commissioner considers that 'commercial interests' are those interests that relate to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods and services.
14. 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' plainly imposing a stronger evidential burden than the lower threshold of 'would be likely'. If, and only if, all three conditions are satisfied, a public authority must next apply the public interest test.
15. To support its position in respect of the application of section 43(2) of FOIA, the DWP has directed the Commissioner for the purposes of potential comparison to his previous decision made under the case reference FS50459127³. This concerned a request made on 15 May 2012 to the DWP for the LiMA software; information that had also been withheld by the DWP under section 43(2) of FOIA.
16. In light of the connection made by the DWP, and the similarity of the arguments presented in this case, the Commissioner reproduces below the relevant parts of the FS50459127 decision notice that reflect on the prejudice that could arise through disclosure.

³ http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50459127.ashx

15. The DWP explained that as holders of the Intellectual Property Rights of the LiMA software, it has the right to enter into commercial negotiations with any body with a view to selling LiMA. The DWP also explained that it had licenced a third party (Atos Healthcare) to use, customise, distribute, incorporate, market, maintain, support, sell and sub-licence LiMA in return for a payment of a royalty to the DWP.

16. The DWP further explained that in the licence, it confirms that it will not allow any other third party similar rights. In light of this the DWP argue that disclosure of the information would be likely to place it at a significant disadvantage with third parties in the future

17. The Commissioner is satisfied that the potential prejudice relates to the interest identified in the exemption and has now gone considered the nature of the prejudice and whether the DWP has sufficiently demonstrated a causal link between the potential disclosure and the prejudice [...]

[...]

19. The DWP explained that it would be running a competitive tendering exercise for the award of a new contract with regard to licensees before its contract runs out in August 2015. The DWP therefore argued that disclosure of the LiMA software would be likely to place the DWP at a significant disadvantage when securing licencing arrangements with third parties and would be likely, therefore, to prejudice its own commercial interests.

20. The Commissioner asked the DWP to confirm if this tendering exercise had started considering the passage of time between the request and the previous request. The DWP explained that its contract with Atos Healthcare is still ongoing but it had recently had several private companies compete in a tendering exercise and it considered that had it released the LiMA software, or any information which could have been used to create the software or parts of it, it could have been used by Atos' competitors in the tender process.

17. As the tendering exercise was already underway at the time of the request considered in FS50459127, the Commissioner did not accept that disclosure would have a detrimental effect on the DWP's ability to renegotiate its contract. However, he also found that the existence of a

current contract involving the payment of royalties was sufficient on its own to engage the section 43(2) exemption.

18. The complainant for his part disputes the relevance of FS50459127 to the case under consideration here. This is because the request in this instance does not seek details of the LiMA software itself. Rather, he is simply asking for 'values' that are typically held as data within IT systems. This information is effectively separate from the LiMA software and so, to the complainant's mind, it would be wrong to conflate the two issues.
19. The Commissioner acknowledges that the request itself does not explicitly seek Lima software. However, he considers that information captured by the request and held by the DWP essentially reflects LiMA's decision-making 'map'. In this regard, the Commissioner has reminded himself of the DWP's explanation that each value in a field represents an input that, based on the instructions derived from an algorithm, produces an output. According to the DWP, LiMA algorithms involve a wide variety of applications and are used in the programming itself.
20. The Commissioner has therefore accepted that the same reasons for finding section 43(2) was engaged in FS50459127 similarly extend here. This is because they both concern information demonstrating how LiMA operates, with the DWP demonstrating that disclosure would be likely to have a prejudicial effect to its commercial interests. The Commissioner has therefore gone on to consider the balance of the public interest.

Public interest arguments in favour of disclosure

21. The Commissioner will always place some weight on the inherent importance of transparency and accountability. However, in respect of information relating to LiMA and how it operates, the Commissioner has recognised that the weight is significantly strengthened. This is because of the tremendous impact that decisions about entitlements can have on the wider spectrum of society and the cog that LiMA represents in this decision-making process.
22. The complainant has also powerfully argued that disclosure is necessary because of the absence of information published by the DWP about the testing and validation of LiMA by independent third parties. This, when combined with anecdotal evidence of problems connected to the use of LiMA, has the potential to fatally undermine the public's trust in the reliability and fairness of the process.

Public interest arguments in favour of maintaining the exemption

23. The DWP has argued that that the nature of the severity of the prejudice potentially arising through disclosure is such that the public interest lies

in favour of withholding the requested information. In essence, it is not in the public interest for the DWP to be placed at a commercial disadvantage when seeking to enter into commercial agreements in the future. A corollary of this is the importance of safeguarding the DWP's ability to obtain benefit from its investment in information systems on behalf of the general taxpayer.

24. In FS50459127 the Commissioner also acknowledged as important an argument made on another related case, FS50371026⁴, which likewise concerned a request for LiMA software information. This argument attested to the fact that claimants are given a copy of the completed IB85 form, which they can use to appeal to an independent tribunal about a decision. He also bore in mind that the questions and options built into the LiMA programme are effectively the same as those in the clerical form IB85.

Balance of the public interest

25. The Commissioner recognises that there is considerable disquiet about the DWP's approach to assessing entitlements and its reliance on what critics have described as 'tick box' software. He is also keenly aware that a primary function of FOIA is to promote public trust by making decision-making mechanisms more transparent.
26. However, following the approach adopted on FS50459127, the Commissioner also considers that care must be taken to analyse the contribution that the information in question would make to public debate. This consideration has particular resonance when placed against the acknowledged harm that could result from the release of the information.
27. In this case the Commissioner accepts that disclosure may go some way towards revealing the process by which individual decisions on entitlements are reached. Yet, he has also found it difficult to envisage how the information itself would serve to address any concerns or stimulate further debate about this process. Ultimately, it is down to the user of LiMA to ensure correct information is inputted, with an appeals process in place to ensure that any inaccuracies in the medical report can be remedied. Ultimately, the Commissioner considers that the wider

⁴ http://www.ico.org.uk/~media/documents/decisionnotices/2012/fs_50371026.ashx

questions about the fairness of this process would not be settled by the release of the information.

28. Against this, and again reflecting his considerations on FS50459127, the Commissioner has placed significant weight on the detriment that disclosure could have on the DWP's commercial interests. Similarly, he does not believe that the passage of time between the requests in each of the cases has altered the substantive nature and severity of that harm.
29. For these reasons, the Commissioner has decided that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining section 43(2) of FOIA.

Right of appeal

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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

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

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