

Sent by email only to:
ostevens@cpag.org.uk

31 March 2020

Dear Mr Stevens

Freedom of Information Act 2000 (the Act)
ICO case reference: FS50890689
Complaint against the Department for Work and Pensions

Further to my correspondence of 9 March 2020, I am now in a position to provide the Commissioner's conclusion regarding this case.

Having reviewed DWP submissions, the Commissioner considers that, on the balance of probabilities, DWP does not hold information falling within the scope of this request. The Commissioner's reasoning is set out below.

The Commissioner does, however, have concerns regarding DWP's handling of this request which are also included below.

Request and response

On 12 September 2019, you wrote to the Department for Work and Pensions and requested information in the following terms:

*"The foreword to the recent ICE annual report states, in relation to the Independent Case Examiner's concerns about DWP following it's safeguarding processes, that "Very recent discussions reassure me that real action is being taken to make sure these vulnerability safeguards do work effectively – and also that my concerns about meeting vulnerable customers' needs are shared at the highest levels in DWP."
Please release any documents which indicate the content of these discussions which have reassured the Independent Case Examiner that real action is being taken."*

On 25 September 2019, DWP responded and stated that it is unable to provide the information requested. It explained that the content of the discussions between the ICE and senior officials within DWP are not documented.

DWP went on to state that any such discussions are generally prompted by and relate to case specific complaint investigations, on which the ICE has adjudicated and reported on. DWP explained that since the case specific investigation reports contain personal data of someone other than the requester, they are withheld in accordance with section 40(2) of the Act.

On 29 October 2019, you requested an internal review of the handling of your request for information. You disputed that the ICE would include the statement in her foreword to the ICE annual report on the basis of undocumented discussions. You considered that in the event that the discussions were not documented, it would be possible to release extracts of the relevant investigation reports from the previous year to indicate the action being taken to make sure the vulnerability safeguards do work effectively while removing any personal information from those extracts.

DWP provided the outcome of its internal review on 11 November 2019. It upheld the original response. DWP explained that case specific investigation reports completed by the ICE contained a history of the events of the case and findings in respect of the complaint elements that were put to the ICE. Specifically, DWP explained, consideration is given to whether the case was administered in accordance with the process and procedures that were in place at the time in question. DWP explained that such reports do not contain general information about action being taken by DWP to make sure vulnerability safeguards work effectively. DWP confirmed that in accordance with Data Protection procedures, the ICE does not release case reports to third parties, either in full or redacted form.

Scope of the case

You contacted the Commissioner on 14 November 2019 to complain about the way your request for information had been handled. In particular, you disputed that the foreword to the ICE annual report was written on the basis of undocumented discussions.

You also disputed that DWP was unable to disclose redacted copies of relevant reports into individual cases.

The Commissioner has considered the request for information and the DWP's response. She considers that DWP's original response stating that section 40(2) would apply to information held in individual complaints brought to the ICE has

unnecessarily confused matters as the information held within the individual complaints does not fall within the scope of the request as it would not indicate the content of the discussions held after the case was closed.

The Commissioner considers that you have clearly requested documentation of the discussions held which led to the ICE's conclusion in her annual report that DWP was taken action to ensure its vulnerability safeguarding process work effectively.

In contrast to DWP's original response, it's internal review states that individual case reports do not contain general information about action being taken by DWP to make sure vulnerability safeguards work effectively, which is the subject of the request. However, DWP did not confirm to you that the original response was incorrect. It is therefore completely understandable that the conclusion was drawn that there is information within the scope of the request in individual case files which could be disclosed in a redacted format. The Commissioner has commented further on this below.

However, as the Commissioner has ascertained that the inclusion of section 40(2) and reference to individual case files was misleading, she considers that the scope of this investigation is to determine whether DWP holds information within the scope of the request.

Reasons for decision

Information not held

Section 1 of the Act says that a public authority is required to respond to a request for information. The authority is required to confirm or deny that it holds the requested information, and disclose relevant information that it holds, unless an exemption or exclusion applies. If a public authority does not hold recorded information that would answer a request, the Commissioner cannot require the authority to take any further action.

In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly her investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the

information is held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps she could require the public authority to take if the complaint were upheld.

DWP explained that Joanna Wallace is the ICE, she is not a civil servant but an independent officer holder contracted by DWP to adjudicate on complaints of maladministration from individuals who have exhausted DWP's complaints process. DWP confirmed that it provides her with an office staffed by DWP employees to support her in discharging her contractual obligations. DWP confirmed that Ms Wallace plays no part in the day to day management of the ICE office.

DWP explained that as the request for information is in response to a statement included in the ICE 2018/19 Annual Report. Ms Wallace provided the following statement to the Head of the ICE office on 21 January 2020 concerning the origins of the comments she made in her Annual Report:

"I was reappointed as ICE from 1st April 2019. At interview I said one of the first things I would do if successful would be to book 'orientation' meetings with DWP Directors to have a general discussion and establish personal links with them, especially as there had been recent changes in post holders. As a result, I met with the following, during which period the ICE annual report was also being prepared:

<i>Peter Schofield</i>	<i>Permanent Secretary</i>	<i>24th May 2019</i>
<i>Richard West</i>	<i>Director Service Design and Transformation</i>	<i>30th May 2019</i>
<i>Emma Haddad</i>	<i>Director General, Service Excellence</i>	<i>6th June 2019</i>
<i>JP Marks</i>	<i>Director General, Work and Health Services</i>	<i>6th June 2019</i>
<i>Richard Brown</i>	<i>Director Disability Services</i>	<i>27th June 2019</i>
<i>Karen Gosden</i>	<i>Work and Health Services Area Director</i>	<i>12th July 2019</i>

As these were orientation discussions I didn't take notes of the meetings; though given that I had produced a report in February 2019 which had been highly critical of DWP's handling of a case which sadly ended in suicide, that case, the learning from it and DWP's approach to vulnerability were referred to in those discussions. The view I expressed in my Annual Report Foreword was my personal opinion, based on my meetings above."

DWP confirmed that records regarding meetings organised, managed and minuted by the ICE Office would be kept in accordance with the ICE office's data retention policy. However, as the above referenced discussions, were organised as part of the ICE's reappointment orientation, they were not organised, attended or minuted by staff from the ICE office.

Following these submissions, the Commissioner returned to DWP and confirmed that she was not persuaded that it had taken all reasonable steps to ensure that information was not held. In particular, she was concerned that DWP has relied solely on the argument that the ICE had not taken any notes of the meeting and had not considered whether any of the other attending parties may have made notes of the meeting. As the attending parties are employees of DWP, any notes made would be held by DWP and would fall within the scope of the request.

DWP responded and confirmed that it had asked the relevant attending parties whether notes had been taken of the meetings held.

The ICE office confirmed that no notes or records were circulated for agreement or comment, primarily because the meetings were one to one orientation meetings and not meetings for which there was an agenda, papers or a required outcome or outputs.

DWP confirmed that the meeting with Ms Gosden was an general introductory chat about Ms Gosden's command and responsibilities and current priorities. DWP confirmed that no one took notes of the discussion.

DWP confirmed that it had also approached all offices of senior officials who the ICE met with in order to establish if anyone took notes. DWP confirmed that all other senior colleagues' offices confirmed that no notes or records of the meetings were taken. However, the Permanent Secretary's office did confirm that a very brief set-up note was taken on the scope and frequency of the meetings . This meeting was only attended by the ICE, the Permanent Secretary and his principle private secretary.

The Commissioner accepts that DWP has undertaken reasonable searches. The Commissioner accepts that these searches ought to have identified the requested information. The Commissioner further notes the ICE's statement that assurances were given verbally and no records were created or retained.

The Commissioner understands your reasons for disputing DWP's claim that no recorded information is held. The Commissioner agrees that it is somewhat surprising that the ICE would make a statement that DWP is taking steps to

protect its vulnerable claimants without any documentation to support this statement. The Commissioner considers it unsatisfactory that the ICE and DWP are unable to provide any recorded evidence of discussions which were used as evidence in the ICE annual report.

The Commissioner notes that in the ICE's statement in relation to this, Ms Wallace states that her statement in the annual report is her personal opinion based on the discussions with DWP Directors. The Commissioner respectfully disagrees that this statement is simply a personal opinion or view, the statement formed part of the ICE's annual report and Ms Wallace provided an opinion in her capacity as ICE. The Commissioner therefore considers that this comprises her professional opinion on the sensitive and important issue of safeguarding vulnerable individuals using DWP's services. The Commissioner therefore considers that it shows a disregard for good records management to include a statement on DWP's steps to ensure its safeguarding procedures without any documentation to support such a statement.

However, the Commissioner can only investigate whether or not information is held by a public authority at the time of the request. The Commissioner has seen no evidence to suggest that DWP does in fact hold information that it claims not to hold.

In addition, the Commissioner is unable to identify any further action that DWP could reasonably be expected to take in order to comply with the request. As has been set out above, if information is not held then it cannot be disclosed in response to a request.

In conclusion, the Commissioner finds, on the balance of probabilities, that DWP does not hold the requested information.

As set out in the scope of the investigation section of this notice, the Commissioner considers that DWP unnecessarily confused matters in its response to you.

The Commissioner asked DWP to explain why it had included section 40(2) in its refusal notice to withhold information which it considered did not fall within the scope of the request. DWP responded and stated:

"Having originally requested documents that indicated the content of any discussions which reassured the requestor that real action was being taken to make sure vulnerability safeguards worked effectively, the requestor subsequently said that if the only available documents were case specific

investigations, they would like extracts from any relevant investigations reports for the past year.

...

The original FOI response explained that discussions between the ICE and senior officials were not "documented", and in order to provide some context for the benefit of the requester, we explained that any such discussion between Ms Wallace and senior officials generally originate from issues arising from case specific investigations – details / records of which could not be shared because they speak to the personal circumstances of the complainant (in the event of a case specific discussion between Ms Wallace and a senior official there would be an audit trail of the issues / outcomes records of the relevant case file".

The Commissioner is concerned that DWP does not understand the confusion it introduced in its response and internal review. The Commissioner considers that DWP led you to believe that there was information held within individual case files by introducing section 40 for these case files. It appears that you only referred to the case information at internal review because DWP introduced it in its original response.

Whilst the Commissioner would encourage public authorities to provide context to requests to aid understanding, in this case DWP's explanation hindered your understanding as it did not make clear that this explanation related to information that did not fall within the scope of the request.

The Commissioner considers that DWP has confused matters and does not appear to be taking responsibility for the misunderstanding caused by its poor wording in the original refusal notice. DWP had the opportunity to clarify matters at internal review and instead simply stated that the case files would not hold the information requested.

The Commissioner will be raising these concerns with DWP and will also log them as part of her ongoing activities to ensure compliance with the Act. Where issues persist, she will consider what further regulatory action may be appropriate.

As the Commissioner has determined that, on the balance of probabilities, DWP does not hold the requested information and therefore does not require DWP to take any further steps, the Commissioner proposes to close this case informally.

Should you wish to challenge the Commissioner's decision at the First Tier Tribunal, please let me know and a decision notice will be issued. However, it may not be possible to issue this decision notice immediately.

In the Covid-19 pandemic climate, many public authorities are facing severe front line pressures and are re-deploying resources to meet those demands. The Commissioner's view is that public authorities therefore require maximum flexibility at this time to deploy their resources to best respond to this national crisis.

As a reasonable and proportionate regulator, the Commissioner has therefore taken the decision to amend her casework approaches to reduce the burden on public authorities in these unprecedented times whilst it is necessary to do so. This means that, whilst we can prepare a decision notice, it may not be issued until such time as the Commissioner considers it appropriate. We will continue to review the situation at regular intervals to ensure that cases are not on hold for longer than is necessary.

If I do not hear from you within 10 working days, that is, by the close of business on 16 April 2020, I shall assume that you are content for the case to be closed informally.

Kind regards

Victoria Parkinson
Senior Case Officer
Freedom of Information Complaints Department

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