

Freedom of Information Act 2000

Decision notice

Date: 11 June 2013

Public Authority: Department for Work and Pensions
Address: Caxton House
4th Floor
6 -12 Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information about the testing of the Logical Integrated Medical Assessment (LiMA) system used by the Department for Work and Pensions (DWP). The DWP stated that information for items 2 and 3 of the request were not held, and withheld relevant information for the first item as it considered that disclosure would prejudice its commercial interests (section 43).
2. The Commissioner's decision is that the DWP correctly stated that information was not held for item 3, and that section 43 was correctly applied to the information withheld in relation to item 1. However, the Commissioner requires the DWP to issue a fresh response to item 2 of the complainant's request as the DWP was incorrect to state that no relevant information was held.
3. 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.

Background

4. The DWP determines the amount of benefits to be paid to individuals who might be unfit to work using Work Capability Assessments (WCA). It has contracted Atos Healthcare (AH) to provide these assessments, which it carries out using the LiMA system.

Complainant's previous request

5. One of the items within the request dealt with in this decision originates from a previous request submitted by the complainant to the DWP.
6. On 5 December 2011 the complainant wrote to the DWP and requested information in the following terms:

"1. Please confirm that the LiMA system has been rigorously tested such that it has been proven to have zero bugs or other defects and complies absolutely with the approved system specification."

7. The DWP responded on 12 January 2012 with:

"LiMA is subject to extensive testing by technical teams and by expert medical users prior to deployment. This testing ensures that LiMA performs to its specifications. Presently there are no known outstanding defects."

8. This response was the reason behind for the third item of the complainant's request covered in this decision notice.

Request and response

9. On 24 April 2012, the complainant wrote to the DWP and requested information in the following terms (numbers added by the Commissioner for reference):

"1. You claim that LiMA is extensively tested therefore please provide supporting documents such as

- Requirements specification
- Test Plan
- Test Specification
- Test / Use Cases etc

Given that user documentation has been made available in the public domain you cannot claim commercial confidence to refuse this request as these documents will not infringe any further on commercial interests.

2. In answer to Q3, you stated that LiMA is subject to continuous updating by a dedicated team of expert medical professionals. This statement is clearly at odds with your answer regarding testing. If LiMA is subject to continuous updating then how are

- requirements documentation managed?*
- test documentation managed?*
- release versions arranged?*
- releases rolled out to users?*
- user notified of updates and given appropriate training?*

Please provide documentary evidence in response to my request rather than statements of opinion.

3. Your answer to my question 1 is very impressive. I must congratulate your engineers in achieving something that I have never come across in nearly 30 years experience in the IT industry (working as an engineer and manager) - a bug free system. Given that it has long been shown that it is mathematically impossible to prove that a complex system such as LiMA is bug free please provide documentation showing how you achieved it."

10. The DWP responded on 13 July 2013. Its response was as follows:

1. For item 1, the DWP disclosed a list of documents that it claims is used by AH for testing LiMA.
2. For item 2, the DWP stated that the LiMA system is not updated. Instead, the medical information repository that supports LiMA is updated. As such, the DWP stated that the information relevant to the complainant's request was not held.
3. For item 3, the DWP stated that it had never claimed that its system was "bug free" but rather there were "no known defects at the time". It stated that no information was held that was relevant to the request.

11. Following an internal review the DWP wrote to the complainant on 5 November 2012. It upheld the original decision for items 2 and 3, but stated that further information for item 1 – beyond that already provided – was exempt under section 43 of the Act.

Scope of the case

12. The complainant contacted the Commissioner on 23 August 2012 to complain about the way his request for information had been handled.
13. The Commissioner considers the scope of the case to be whether the relevant information for item 1 of the request – that has not already been disclosed – can be withheld under section 43(2), and whether any relevant information is held for items 2 and 3 of the request.

Reasons for decision

Section 1

14. Section 1 of the Act states:

"(1) Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Item 2 of the request

15. In instances where there is a consideration about the amount of information held by a public authority, the Commissioner – in accordance with a number of First-Tier Tribunal cases – uses the balance of probabilities.
16. In its refusal notice the DWP stated that it held no information for item 2 because:

"[T]he LiMA software utilises evidence based medical protocols which contain up-to-date medical knowledge relating to medical assessment technique and in the assessment of the effects of medical conditions. It is this repository of medical information that is continuously updated rather than the system itself. Therefore the documentation that you have requested is not available."
17. However, in its response to the Commissioner the DWP stated that the medical information repository was part of the LiMA system. This suggests that the DWP was incorrect to conclude that the documentation was not held because the complainant requested information relating to

the LiMA system rather than specifically about the medical information repository.

18. Furthermore, the DWP also stated that AH has a Continuing Medical Education programme designed to update the LiMA repository. This programme is designed to adapt the LiMA repository to internal and external factors, such as new research findings, changes to legislation, or results from internal audits.
19. The complainant asked for how these updates are tested and communicated to the healthcare professionals who use the LiMA system. Given the DWP's explanation the Commissioner considers that it would be likely that the DWP would hold information relevant to item 2 of the request. As such, he requires the DWP to produce a fresh response to item 2 of the complainant's request.

Item 3 of the request

20. When considering whether any relevant information is held by the DWP for item 3 of the request, the Commissioner has focussed upon the wording of the request itself. This explicitly asks for documents that show that the LiMA system is "bug free". The DWP in its response stated that it has never claimed that the system was bug free but rather that there were no known defects at the time.
21. The Commissioner asked the DWP about its records. In response the DWP confirmed that it held no information which would show that LiMA was bug free. The Commissioner considers that this is reasonable and that on the balance of probabilities it is highly unlikely that *any* information relevant to item 3 of the complainant's request is held.

Section 43(2)

Item 1 of the request

22. The Commissioner has not considered the information disclosed to the complainant on 13 July 2012 in his section 43 analysis. However, he has seen both the withheld and disclosed information, and does not consider that the disclosed information has any bearing on the information that has been withheld.

23. Section 43(2) of the Act states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Section 43(2) is a qualified exemption, and is therefore subject to the public interest test.

24. The term 'commercial interests' is not defined within the Act. However, the Commissioner has produced guidance on the application of section 43 which established a reasonable definition:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

25. When considering the exemption for this decision the Commissioner has been mindful that he recently issued a decision notice for a similar request.¹ The request in this decision was for a copy of the LiMA software, and the Commissioner found that section 43(2) applied and that the public interest test favoured maintaining the exemption.
26. However, it is important to note that there is a distinct difference between the requested information. The fact that disclosing a copy of the LiMA software would prejudice DWP's commercial interests does not guarantee that disclosing any information relating to the LiMA system would do likewise.
27. To explain how the disclosure of the requested info would prejudice its commercial interests, DWP stated that it holds the intellectual property rights for the LiMA software. As such it has the right to enter into commercial negotiations with a party with a view to selling LiMA.
28. The DWP has a royalties agreement with Atos Healthcare (AH), which licences AH to "use, customise, distribute, incorporate, market, maintain, support, sell and sub-licence" LiMA. Under the terms of the licence agreement DWP will not allow any other party similar rights.
29. The Commissioner considers that the requested information relates to the LiMA software which has been licenced out through a royalties agreement. The Commissioner accepts that the information does relate to a commercial interest which would be prejudiced through its disclosure.
30. However, for section 43(2) to apply it is necessary to determine the likelihood of this prejudice occurring should the information be disclosed. The wording of the exemption covers instances where disclosure "would" or "would be likely" to prejudice commercial interests.

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

31. In its submissions to the Commissioner the DWP explained that for each functional change to the LiMA system AH goes through a process which generates information explaining what has been tested, how it was tested and the changes to be implemented. This information gives details on how the LiMA system is designed, how it works, and how it has been developed by AH.
32. It was argued by DWP that to disclose this information would allow rival companies to use it to design a similar system which could be used for commercial purposes at a detriment to the DWP and AH. Given the time, effort, resource and cost put in by both DWP and AH into developing the LiMA system, the DWP argued that disclosure of the relevant information would prejudice both its and AH's commercial interests and should therefore be withheld.
33. The Commissioner accepts this argument and considers that the evidence provided shows that disclosure would be likely to prejudice the commercial interests of both DWP and AH. Therefore, the Commissioner is satisfied that section 43 is engaged and proceeded to consider the balance of the public interest in the circumstances of the case.

Public interest arguments in favour of disclosure

34. As with all instances of public expenditure, there is an inherent argument for transparency to promote greater accountability for the spending of public money. This is given greater weight considering the size of the expenditure, as in 2011-12 the DWP paid AH £112.4 million to carry out assessments.²
35. Both the DWP and AH have come under severe opposition and criticism for the way in which the WCA have been conducted. As the LiMA system is used to conduct these assessments, it has also been the subject of severe criticism. The complainant has argued that disclosing the requested information would confirm that DWP and AH put the system through extensive testing or would confirm that a widely-criticised system had not been sufficiently checked.
36. The Commissioner accepts that by releasing the request information it would increase the public's understanding of the LiMA system and the scrutiny to which it was subjected.

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<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/744/74403.htm>

Public interest arguments in favour of maintaining the exemption

37. There is a strong public interest argument for allowing public authorities to conduct themselves freely in commercial activities in order to allow them to maximise the income generated from tendered contracts. The Commissioner considers that this is applicable for the DWP and the future tendering process it may conduct for WCA contract.
38. The Commissioner has given significant weight to the fact that the DWP and AH had an on-going contract at the time the request was made. This contract included AH paying a royalty fee for use of the LiMA system to allow it to carry out WCA.
39. The Commissioner does not consider that releasing information relating to the technical testing of the system would do much to inform public debate over the issues. The relevant information is of a specialist nature. The Commissioner does not consider that it provides insight into the reasons why certain claimants were rejected for incapacity benefits, which is the primary concern of much of the scrutiny directed at WCA. This diminishes the weight afforded to the argument that disclosure would inform the public debate and the public's understanding of how LiMA works.
40. The Commissioner notes that the government has responded to the criticism against WCA. This has resulted in an independent review³ as well as a report by the Public Accounts Committee.⁴ This shows that the issues over WCA are being addressed through official channels, which reduces the weight afforded to the public interest in disclosing the information.

Balance of the public interest arguments

41. The Commissioner is aware of the high-profile criticisms directed at the DWP and AH over the implementation of WCA. However, he does not consider that the requested information would do much to address these criticisms.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70123/wca-review-2012.pdf

⁴ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/contract-management-of-medical-services/>

42. The Commissioner has afforded significant weight to the arguments for transparency and accountability, especially given the size of the contract between DWP and AH. However, the Commissioner considers that this is outweighed by the arguments for maintaining the exemption such as the existence of the contract with its royalties agreement, and the commercial prejudice that would be likely to occur to DWP and AH based on the resources both parties have put into producing and maintaining the LiMA system.
43. Based on this, the Commissioner's decision is that the balance of the public interest favours maintaining the exemption. He considers that the DWP has correctly applied section 43(2) and that the information was correctly withheld.

Right of appeal

44. 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

45. 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.
46. 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

Alexander Ganotis
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