

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2018

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking a range of data about pension payments and payments made under the Civil Service Compensation Scheme. The Cabinet Office responded by stating that it did not hold any of the requested information. The Commissioner is satisfied that on the balance of probabilities that the Cabinet Office does not hold any information falling within the scope of the request.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 9 May 2017:

'[a] How many MyCSP pension payments to staff dismissed on Medical Inefficiency grounds were reduced by 22/36ths since MyCSP took control of public pension administration.

[b] How many Employment Tribunal cases where Medical Inefficiency was used as the dismissal reason were brought against MyCSP and associated government departments from 2012 through 2016.

[c] How many of these cases where there was Partial Retirement, reduced hours and pension sums paid through MyCSP then went on to be dismissed for Medical Inefficiency resulting in a lump sum significantly less than associated CSCS reckonable service payment.

[d] Since MyCSP began administering the government pension scheme how many of these cases then had full CSCS severance or compensation payments.

[e] How many senior civil servants have had reduced CSCS payments associated with Medical Inefficiency.

[f] How many of these cases have been defended by the GLD without the use of outside legal firms/barristers'.¹

3. The Cabinet Office responded on 1 June 2017 and explained that it did not hold any information falling within the scope of the request.
4. The complainant contacted the Cabinet Office on 13 June 2017 and asked for an internal review to be conducted. In a further email to the Cabinet Office on 4 July 2017 he explained why he believed that the details of settlements on the grounds of medical inefficiency grounds would be held by MyCSP. In doing so the complainant highlighted what he considered to be discrepancies between the settlements given to Home Office staff on the grounds of medical inefficiency.
5. The Cabinet Office informed him of the outcome of the internal review on 27 July 2017. The review concluded that the Cabinet Office did not hold any information falling within the scope of his request for the purposes of FOIA. The Cabinet Office explained that it had considered the points the complainant had made about the settlement made to Home Office. However, the Cabinet Office explained that this was not something that either it or MyCSP, the pensions administrator, holds information on. The Cabinet Office suggested that information about these aspects of his request may be held by the Home Office and the complainant may wish to make a FOI request to them. The Cabinet Office also made the following points: *'Dismissal for inefficiency, whether on medical grounds or not, is an employer decision. If employers consider that compensation is appropriate in these circumstances then they instruct MyCSP to pay it. There are a number of reasons why an employer may consider dismissing a member on grounds of inefficiency, medical, performance, personal etc. Employers do not provide MyCSP with the reasons for the inefficiency compensation payment just that the award is on inefficiency grounds.'*

¹ MyCSP is the pensions administrator for the civil service pension scheme.

Scope of the case

6. The complainant contacted the Commissioner on 28 July 2017 in order to complain about the Cabinet Office's handing of his request. He disputed the conclusion that it did not hold information falling within the scope of his request.

Reasons for decision

7. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
8. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
9. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, or as in the circumstances of this complaint, other explanations offered as to why the information is not held.

The Cabinet Office's position

10. The Cabinet Office explained that MyCSP is not subject to FOIA. As a matter of course they refer any FOI requests they receive to the Cabinet Office as it is the scheme manager of the civil service pension scheme. (The Cabinet Office is, of course, a public authority for the purposes of FOIA). The Cabinet Office argued that the information held by MyCSP is only subject to FOIA if it is held on behalf of the Cabinet Office.
11. The Cabinet Office explained that although MyCSP provide it with monthly service delivery reports; these reports do not include the information that the request covers. For example for the month of October 2017, MyCSP reported that they processed 2192 leaver awards. But there is no indication of the reason a leaver award was processed, and this could fall into a number of categories including resignations, medical related dismissals, performance related dismissals or retirements. The Cabinet Office explained that it does not require this level of information to be provided by MyCSP, as the Cabinet Office do not require it for its own business purposes and it is not necessary to ensure performance of the contract between the Cabinet Office and MyCSP.

12. The Cabinet Office explained that dismissal on the grounds of inefficiency, whether on medical grounds or for another reason, is an employer decision. If an employer considers that compensation is appropriate in these circumstances, they instruct MyCSP to pay an amount of compensation. The Cabinet Office explained that the employer is not required to provide the reasons for the inefficiency payment, e.g. medical, misconduct or disciplinary or failure of probation. The Cabinet Office therefore argued that MyCSP does not hold this information and does not require it in order to administer payments.
13. In terms of the part of the request about pension payments to staff dismissed on medical inefficiency grounds that were reduced by 22/36, the Cabinet Office understood that this was a reference to the 'tapering' of a member's pension. The Cabinet Office explained that MyCSP calculate compensation payments, which would include tapering if required. Therefore, the Cabinet Office explained that MyCSP would hold information on the tapering applied in the individual case. However, for the reasons explained above, the Cabinet Office argued that MyCSP would not have been supplied with information on the type of inefficiency dismissal that the tapering applied to. Furthermore, the Cabinet Office explained it does not require MyCSP to report on the amount of awards that have been tapered, or if tapering applied to a certain type of dismissal. This is not required by the Cabinet Office to meet its obligations as scheme manager and therefore there is no business purpose for the Cabinet Office to hold this information or for MyCSP to report or hold the information on the Cabinet Office's behalf
14. With regard to the parts of the request which sought information about employment tribunal cases, the Cabinet Office explained that the employment tribunal is an independent judicial body established to resolve disputes between employers and employees over employment rights. The Cabinet Office noted that it was of course the scheme manager of the civil service pension scheme, and MyCSP are the pensions administrator. However, this did not mean that either the Cabinet Office or MyCSP would be party to employment tribunal proceedings, unless they are the employer, even if the matter is related to benefits under the civil service pension scheme. If the employer is another government department, then proceedings would be brought against that specific government department. Consequently, the Cabinet Office explained that it does not hold information on employment tribunal proceedings brought on the grounds of medical inefficiency.
15. Finally, in relation to the part of the request which sought information about the Government Legal Department (GLD), the Cabinet Office explained that this is a distinct government department. Furthermore, as explained above, the Cabinet Office emphasised that it would not be party to any employment tribunal proceedings that may involve GLD. Therefore, the Cabinet Office explained that it did not hold any

information relating to the number of cases defended by GLD without the use of outside legal firms of barristers.

The complainant's position

19. The complainant argued that it was unacceptable to suggest that MyCSP are not subject to FOI requests, but not altogether surprising considering it was part owned by a private company.
20. He argued that it was disgraceful to suggest that the Cabinet Office did not require details of why awards are made specifically in relation to medical dismissals as this would mean that MyCSP would be answerable to nobody when administering government pensions. The complainant argued that it was also very strange for the Cabinet Office to argue that MyCSP would not hold details of the reason for dismissal, the associated awards or the records kept in relation to these. The complainant explained that his award letter from MyCSP specifically detailed the medical inefficiency aspect and the associated 'tapering' penalty. The complainant explained that a colleague of his had a similar letter from MyCSP also setting out the same level of details. He therefore argued that it was inconceivable that MyCSP did not hold the information which he had requested.

The Commissioner's position

21. Having considered the submissions provided by both parties the Commissioner has concluded that on the balance of probabilities the Cabinet Office does not hold any information falling within the scope of the complainant's request. Her basis of reaching this conclusion is set out below.
22. For the avoidance of any doubt, the Commissioner is satisfied that MyCSP is not a public authority for the purposes of FOIA. Section 3(1) of FOIA defines public authorities as follows:

*'In this Act "public authority" means—
(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—
 (i) is listed in Schedule 1, or
 (ii) is designated by order under section 5, or
(b) a publicly-owned company as defined by section 6.'*

23. MyCSP is not listed in schedule 1 of FOIA nor has it been designated as a public authority under section 5 of FOIA.
24. In terms of section 3(1)(b), section 6(1) of FOIA defines publicly-owned company as follows:

*'(1) A company is a "publicly-owned company" for the purposes of section 3(1)(b) if—
(a) it is wholly owned by the Crown,
(b) it is wholly owned by the wider public sector, or
(c) it is wholly owned by the Crown and the wider public sector.'*

25. MyCSP is mutual joint venture partnership with shares held by the government, a private sector partner and MyCSP staff. As a result MyCSP does not fall within the definition of a publicly-owned company and is not a public authority via section 3(1)(b) of FOIA.
26. However, as the Cabinet Office's submissions suggest, under section 3(2)(b) of FOIA, even if a public authority does not physically hold information, it can still be said to hold that information for the purposes of FOIA if that information is held on its behalf by another party.
27. Taking this into account, in determining whether the Cabinet Office holds any of the requested information the Commissioner has given consideration to whether the Cabinet Office physically holds any of the requested information and whether any of the requested information is held on its behalf by MyCSP.
28. In terms of part (e) of the request ('How many senior civil servants have had reduced CSCS payments associated with Medical Inefficiency), the Commissioner notes that the Cabinet Office's submission suggests that whilst employers instruct MyCSP to pay compensation payments under the CSCS, including inefficiency payments, the employer is not required to provide the reasons for that inefficiency payment be it medical or otherwise to MyCSP. The Cabinet Office explained that nor does MyCSP need this information in order to administer the payments.
29. Similarly, in terms of part (a) of the request, ('How many MyCSP pension payments to staff dismissed on medical inefficiency grounds were reduced by 22/36ths since MyCSP took control of public pension administration.') The Commissioner notes the Cabinet Office's submission suggests that whilst MyCSP would administer any tapered pension payments, the individual employers would not have provided information to MyCSP as to the reasons for the inefficiency dismissal that the tapering applied to. The Commissioner also notes the Cabinet Office's view that MyCSP would not therefore hold information that would allow it to determine how many staff received tapered pension payments because of dismissal on medical inefficiency grounds.
30. The Commissioner recognises that in the complainant's case, and indeed in the case of his colleague, it would appear that MyCSP did hold information about the reasons for the inefficiency payments. In the Commissioner's opinion it therefore appears likely that in some cases, or least in these two cases, employers were providing MyCSP with the

reasons why an individual was being awarded an inefficiency payment and/or the reasons for any tapering of pension payments. It could potentially be the case therefore that MyCSP holds *some* information relevant to parts (a) and (e) of the request; even if employers do not actually have to provide MyCSP with this information, some may still have done so. However, the Commissioner does not accept that it necessarily follows that MyCSP would hold information about all such cases. In any event the relevant question is whether such information would be held by MyCSP on behalf of the Cabinet Office. The Cabinet Office has explained that as scheme managers of the civil service pension schemes it does not require this detailed level of information from MyCSP for its own business purposes and in order to ensure performance of the contract. In light of this position, the Commissioner is satisfied that even if MyCSP held some information falling within the scope of parts (a) and (e) of the request then this information is not held on behalf of the Cabinet Office for the purposes of section 3(1)(b) of FOIA.

31. In terms of part (b) of the request, ('How many Employment Tribunal cases where medical inefficiency was used as the dismissal reason were brought against MyCSP and associated government departments from 2012 through 2016. '), the Commissioner notes that the Cabinet Office explained that neither it nor MyCSP would be party to an employment tribunal even if the case related to benefits under the civil service pension scheme. Given this position, the Commissioner considers it reasonable to conclude that the Cabinet Office would not hold information that would answer part (b) simply because it has no need to record or monitor the outcome of employment tribunal cases of the nature described in this part of this request.
32. The information sought by the parts of the request (c) and (d) are contingent on the Cabinet Office holding the information sought by part (b) of the request as they seek to establish how many of these employment cases meet particular criteria. Given that the Commissioner is satisfied that the Cabinet Office does not hold the information sought by request (b) it follows that she also accepts that it does not hold the information that would allow it to answer parts (c) and (d) of the request.
33. Finally, the Commissioner notes that the Cabinet Office explained the GLD is a separate government department and the Cabinet Office has no business need to know how many cases, defended by the GLD, were with (or without) the use of external legal firms/barristers. The Commissioner considers this to be a reasonable and logical explanation as to why it would not hold information falling within the scope of part (f) of the request.

Reference: FS50693517

Right of appeal

34. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF