

To Mr J Otram
C/o xxxxxxxxxxxxxxxxxxxxxxxxx@xxxxxxxxxxxxxxxxxxx

DWP Central Freedom of Information Team

e-mail: freedom-of-information-xxxxxxx@xxx.xxx.xx

Our Ref: VTR 2978-IR122

DATE 19 April 2012

Dear Mr Otram,

Thank you for your letter dated 1 March 2012 that was received by Department for Work and Pensions (DWP) Adelphi and forwarded to the DWP Medical Services Contracts Correspondence Team (MSCCT) to respond to.

As DWP MSCCT Freedom of Information Internal Reviewing Officer, I have read your letter and accepted this as a request for an Internal Review of FOI reference 2851-412 dated 28 February 2012.

I have therefore conducted a full investigation into your original request to check that the information previously supplied to you, clearly and accurately answered your request. I have also reviewed any decisions to withhold information and in doing so I have fully considered the public interest in disclosure.

In your email you asked to be provided with information answering the following questions:-

I am writing to request an internal review of Department for Work and Pensions' handling of my FOI request 'Audio recording of work capability assessments'. Your response was dated 28 02 12 with reference: VTR 2851-412

Summary

A. Your reference to the unamended para.4.1.3 in the WCA Handbook (and unamended, since October 2011) is irrelevant. My questioning related to the subsequently revised and CURRENT arrangements minister Grayling has been obliged to admit in parliamentary responses (during February 2012) are CURRENTLY in operation where a claimant wants to be provided with a recording, and have been so for the past 3 months

B. The purported CURRENT 'rules' (and current since December 2011) do not exist in some record-less vacuum: they are RECORDED; and claimants and the balance of the public have the right to know what these supposed rules say, AS CURRENTLY RECORDED.

C. I don't accept for one moment that the fact that the DWP may one day get round to producing yet further paperwork on these issues at wholly unspecified dates in the future can possibly outweigh the public interest in seeing the detailed, recorded and currently operated 'rules' ,NOW.

Detail

I asked to be provided with:

..."copy DETAILS of the way in which claimants ARE advised of this important entitlement."

You have not complied with that request. So now:-

I'll try to make this simple for you. Yes, your department has had the gall to confirm that it is not even telling claimants in advance e.g. on their obtaining a form ESA 50 with which to commence a claim, that they do have the right to obtain a recording of the forthcoming WCA. That contempt for benefits claimants must be assumed to reflect the specific and considered will of the department's political masters, and is an issue to be taken forward through constituency offices and the press and other media.

However, as you well know, if or when a claimant nevertheless wants to be provided with a recording by the DWP or Atos there are specific (and recorded) 'rules' CURRENTLY operated. These details you have wholly failed to supply and that is a matter for FOIA.

The details concerned cover or INCLUDE, do they not, such matters as:-

- is it sufficient for a claimant merely to tell his or her jobcentre that a recording is required or must e.g specific written steps be taken? Addressed to whom? And by when?*
- what the position is if the claimant's ESA 50 form makes no mention of this perhaps because at the time that form was submitted, the claimant was unaware either of the right itself or how to claim such right?*
- what delay is deemed acceptable for a claimant to have to encounter in the processing of his or her claim if Atos is not in fact 'ready' to organise a recorded WCA on the date on which it would otherwise have been scheduled?*
- what, if any ,legally drafted paperwork, e.g affecting Data Protection and copyright matters between the DWP atos and the claimant, is a claimant asked to sign before being given any copy recording and when? – who is holding any such text, and if exists, what is IT LINE BY LINE? – when does a claimant first see any such documentation? – is it provided to claimants sufficiently far in advance to allow a claimant a reasonable opportunity to obtain legal advice on a legally-intentioned document?*
- who stores and keeps any copy recording retained by Atos?- who has access to it? - for how long?*

I emphasise that I asked you to provide copy details of the way in which claimants are advised of such very important matters relating to their current entitlements. It may well be that the DWP is busy trying to devise further and fresh strategies to sabotage the right to a recording in the future, and I will question you on those as and when they materialise. But I have asked you for details of the CURRENT 'rules' as now being deployed. You have failed to comply with this request and that is a Fol and thus legal issue not a political or 'deabting' one. I wish to interest the ICO as soon as possible in the department's (in my view, I must baldly say, disgraceful) contention that the Fol Act entitles it to decline to to inform the sick and disabled of detailed rules potentially of high significance in their lives, and rules currently recorded and in force.

That sort of evasion and protraction on such a matter of intense public interest and immediate practical relevance is not what section 22 of the Fol Act was intended to produce, and section

22(c) renders the contention risible; no purposive construction of the statute would support such an idea.

You might well imagine that in addition to the presentation of your no doubt cynically-delayed response to this request for internal review to the ICO in due course, I would think to add, now, the situation, as it stands here with this request, to the case for consideration by the ICO as regards the other matter to date you have declined to deal with properly on internal review, and already submitted to the Commissioner's Office. It is evidential as regards the behaviour of the DWP's Fol response team which I consider to be highly obstructive, and I think it is very much in the public interest that these matters should be thoroughly aired.

The Revised Work Capability Handbook ESA(LCW/LCWRA) Amendment Regulations 2011 Version 4, paragraph 4.1.3 details the current procedure that Atos Healthcare should follow upon a request by the claimant for the audio recording of an assessment. This procedure remains in place until it is replaced. The 1 February 2012 Official Report explained that DWP have not implemented universal recording for claimants going through the Work Capability Assessment. However, claimants can request an audio recording by contacting the Benefit Centre which administers their claim or Atos Healthcare directly. In these circumstances, Atos Healthcare will, where possible, endeavour to provide the requisite audio recording equipment which will give each party a CD recording of the assessment.

A process guide is currently being agreed by Atos Healthcare and the Department for Work and Pensions to improve claimant awareness of the steps they should take if they wish to request audio recording of their assessment.

I am unable to provide you with information relating to the use of the recording devices including the technical aspects relating to data storage and retention. Although the pilot has been concluded, the final evaluation report still remains under production and is therefore exempt for release under Section 22 of the Freedom of Information Act as it is due for future publication. A copy of the report will, on its release, be available on the DWP website.

This exemption is qualified, and is therefore subject to a public interest test. The public interest test is where the Department considers whether the balance of the public interest falls in favour of withholding or disclosing the information requested.

Arguments in favour of disclosure: There are public interest arguments in favour of disclosure of this information at the present time. Disclosure would for example improve transparency in the operations of the Department.

Arguments against disclosure: It is in the public interest to ensure that the publication of official information is a properly planned and managed process, to ensure that the data is accurate once placed into the public domain. It is also in the public interest to ensure that the information is available to all members of the public at the same time, and premature publication could undermine the principle of making the information available to all at the same time through the official publication process.

In applying this exemption, the Department has balanced the public interest in withholding the information against the public interest in disclosing the information and consider there is no

overarching public interest argument in favour of releasing this information to you, ahead of its official release. The Department intends to publish the pilot evaluation report in the near future.

The Data Protection Act places certain obligations on data controllers (DWP is a data controller) with regard to the recording of interviews, telephone conversations etc, individuals such as DWP customers are not bound by any such legal expectations. You are within your rights to use any record of your business with DWP for **domestic purposes**, that is your personal, family, or household affairs (including recreational purposes), however, publishing the recordings on the internet, or in any other way, is going beyond domestic purposes and may indicate that you may be acting as a data controller. In addition, HCPs are not obliged to agree to the recording of a Work Capability Assessment (WCA) and may terminate a WCA if covert recording is discovered.

If you intend to make the contents of your recording publicly available you need to notify the Information Commissioner of your actions. The Information Commissioner may take enforcement action to ensure your compliance with the Data Protection Act. **It is a criminal offence for a data controller to process personal information when he has not registered with the Information Commissioner.**

In reviewing your request I uphold the decision of the Freedom of Information Officer dated 28 February 2012 in part and have added information where appropriate. I am therefore satisfied now that all the information that DWP are able to supply to you has been supplied.

If you have any queries about this letter please contact me quoting the reference number above.

Yours sincerely,

DWP Central Fol Team

Your right to complain under the Freedom of Information Act

If you are not content with the outcome of the internal review you may apply directly to the Information Commissioner's Office for a decision. Generally the Commissioner cannot make a decision unless you have exhausted our own complaints procedure. The Information Commissioner can be contacted at: The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow Cheshire SK9 5AF www.ico.gov.uk