

**Department for Work and Pensions (DWP)
Central Freedom of Information Team**

freedom-of-information-request@dwp.gsi.gov.uk

Our reference: IR52

Date: 22 February 2018

Dear Mr Williams,

Thank you for your Freedom of Information (FOI) review request received on 31 January 2018.

You said: [see annex A]

DWP response.

The department is content that it was correct to apply Section 32(1)(b) of the FOI Act to the information you are seeking. This is because:

- The information is only held by virtue of documents being served upon the Department for the purposes of proceedings in a particular matter.
- The information is held only for the purposes of the administration of proceedings.
- Section 32 exempts information contained in (or obtained from) those documents. Paragraph 24 of the Information Commissioner's "Court, inquiry or arbitration records (section 32) guidance" refers on this point.

The Department is also placing reliance on a previous decision of the Information Commissioner which was in favour of the Department relying on S.32 to withhold information contained in or obtained from letters before action. You can find a copy of this decision here:

https://ico.org.uk/media/action-weve-taken/decision-notice/2014/1008880/fs_50508730.pdf

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.org.uk/Global/contact_us or telephone 0303 123 1113 or 01625 545745

Annex A

-----Original Message-----

From: Martin Williams [mailto:request-457842-f31ce101@whatdotheyknow.com]

Sent: 31 January 2018 15:03

To: DWP freedom-of-information-requests

Subject: Internal review of Freedom of Information request - How many letters before action for judicial review concerning issues relating to the administration, entitlement to or payment of benefits were received

Dear Department for Work and Pensions,

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of Department for Work and Pensions's handling of my FOI request 'How many letters before action for judicial review concerning issues relating to the administration, entitlement to or payment of benefits were received'.

Your reply states that the information requested is exempt from disclosure due to s.32 of the Act:

"The information you have requested is exempt under section 32 of the FOI act, which states that:

"Information held by a public authority is exempt information if it is held only by virtue of being contained in—

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter".

The duty to confirm or deny that the information exists does not arise in relation to information which is exempt information by virtue of this section

This is an absolute exemption, so DWP is not required to carry out the Public Interest Test. "

GROUNDINGS FOR REVIEW:

1. It is disputed that the information requested is information "contained in" documents served upon the DWP for the purposes of proceedings. Rather the request concerns the number of pre action protocol letters for judicial review received by the DWP in particular periods. Although each such letter would have had information contained in it which is covered by s.32, the request does not aim to obtain that information but rather the number of pre action letters received- that is a different matter. If anything the relationship of this request to s.32 is that we are asking for the number of correspondences

containing s.32 protected information of a specific sort (threat of judicial review under the pre-action protocol) - that is not the same as asking for the information contained in that correspondence.

2. Furthermore, taking a purposive approach to s.32, it is clear that the intention of the exemption is to prevent an authority from being forced to disclose information contained in Court proceedings (s.32(1)(a) sub head) or pre-litigation proceedings (the s.32(1)(b) sub head). That purpose would not be frustrated by releasing the data we have asked for (numbers of pre-litigation letters received). We note that the Information Commissioner's Office takes a similar view of the purpose of the section:

"We believe that section 32 was drafted to allow the courts to maintain judicial control over access to information about court proceedings. This includes giving courts control to decide what information can be disclosed without prejudicing those proceedings." (<https://ico.org.uk/media/for-organisations/documents/2014222/section-32-court-inquiry-arbitration-records.pdf>)

The construction of s.32 relied upon by the DWP in this case is therefore incorrect as it would result in the use of the exemption for purposes for which it is not intended.

3. Finally, even if you are correct that the information is covered by s.32 then this is not an appropriate case to issue the "neither confirm nor deny" notice. You are correct to say that there is an exemption to the duty to confirm or deny if the information is held in a s.32 case. However, the guidance from the Information Commissioner's Office is that this should not be relied upon in this sort of case- see para 67 of the same commentary referred to above which states:

"Nonetheless, authorities shouldn't issue NCND responses as a matter of routine. Therefore unless there is an obvious need to rely on the NCND exclusion, the authority should consider issuing a 'confirm or deny' response as usual."

A full history of my FOI request and all correspondence is available on the Internet at this address:
https://www.whatdotheyknow.com/request/how_many_letters_before_action_f

Yours faithfully,

Martin Williams