

Our Ref: IR 599

27 December 2012

Dear Mr Slater,

Thank you for your email of 18 September 2012 requesting an internal review of the Department's response to your Freedom of Information request FOI 3712-3229.

For ease of reference I have included the findings of this review under each of your specific questions.

In response to the Department's answer to **Questions 1,2,3,4 and 5 you state:**

*"Thank you for confirming that neither the DWP nor Atos have taken any contractual steps towards normalising the recording of WCA should a claimant requests it. The DWP answer appears to contradict recent political statements. Are the DWP taking action of any kind regarding the normalisation of recording WCA if claimants request it?"*

I can confirm that the Department has not implemented universal recording of assessments. Instead we have asked Atos Healthcare to try and accommodate requests for audio recording where a claimant makes a request in advance of their assessment.

**For the answer to Questions 6 and 7 you state:**

*"The DWP answer contradicts what Atos tells claimants. Are the DWP categorically stating that Atos do not assign or propose to the DM one of the contractual categories to an assessment?"*

Benefit entitlement is determined by DWP Decision Makers, not Atos Healthcare Professionals. In order to make a decision on benefit entitlement the Decision Maker considers all of the available evidence not just the medical reports received from Atos Healthcare; Atos Healthcare provide medical advice only, including if a claimant should be in their opinion placed into the support group, limited capability for work or they are fit for work. The DM is completely independent and does not have to accept the HCPs advice, the DM will consider all of the evidence which may include the claimant's 'self assessment', reports from GPs, hospital doctors and other clinicians.

**For Question 8 you state:**

*“As expected the DWP simply hasn’t answered my question. The contract states that Atos should us ‘reasonable endeavours’ to ensure that WCA are completed, hence my original question asking about reasonableness. You need to refer me to contract clauses, legislation and case law that supports the DWP position here not quote irrelevant (as far as the law is concerned) propaganda. Is there any part of the contract or the law that shows it is reasonable and legal for WCA to be cancelled and claimant’s benefits put at risk because they won’t continue without their WCA being recorded? It is a simple question so please provide me with the data.”*

As previously explained to you, claimants can ask to have their WCA recorded and all requests will be accommodated where possible. Whilst DWP has asked Atos Healthcare to do all that they can to accommodate requests for audio recording, there may be times when this service cannot be offered, for example, where it has not been possible to get access to recording equipment on the date/time of the WCA. WCA appointments may be deferred for up to four weeks for **any** circumstance, which could include the non-availability of recording equipment.

Please see Part 5 19 (8) of the ESA regulations provided below explaining that a claimant should attend an examination periodically to ensure that they meeting the criteria for receiving benefits:

(7) Where a claimant:

- (a) has been determined to have limited capability for work; or
- (b) is to be treated as having limited capability for work under regulations 20, 25, 26, 29 or 33(2),

the Secretary of State may, if paragraph (8) applies, determine afresh whether the claimant has or is to be treated as having limited capability for work.

(8) This paragraph applies where—

- (a) The Secretary of State wishes to determine whether there has been a relevant change of circumstances in relation to the claimant’s physical or mental condition;
- (b) the Secretary of State wishes to determine whether the previous determination of limited capability for work or that the claimant is to be treated as having limited capability for work, was made in ignorance of , or was based on a mistake as to, some material fact; or
- (c) at least 3 months have passed since the date on which the claimant was determined to have limited capability for work or to be treated as having limited capability for work.

Furthermore, I should explain here that if a claimant decides to terminate the WCA because of audio recording reasons it is their decision not the HCPs. The HCP may terminate the WCA if the claimant is being non-cooperative, non-compliant, violent or abusive, or is found to be covertly recording and refuses to cease such activity following a warning by the HCP.

If the claimant refuses to undertake the WCA, or decides to terminate the WCA, it is up to the DM to assess if the claimant had “good cause” to do so. “Good cause” is not defined in legislation but is discussed in a number of Commissioners’ decisions.

In summary, there is a legal requirement for claimants to attend and complete an assessment, as it is the claimants responsibility to comply with the relevant social security legislations (as detailed above) Whilst there is contractual obligation on the supplier to undertake the assessment, there is also a responsibility that the claimant complies in order to maintain entitlement to benefit.

**For Question 9 you state:**

*“As expected the DWP simply hasn’t answered my question and once again it is very simple. Please direct me to the section/clause of the contract (this is required by the ICO) that prevents Atos from postponing WCA due to the claimant wishing for a recording. The fact that the existing contract doesn’t stipulate recording is irrelevant.”*

As explained earlier, under the ESA legislation it is the DWP who request Atos to undertake a WCA assessment. Should a claimant not comply or refuses to undertake the examination the referral is sent back to the Department and it is up to the Decision Maker to decide whether the claimant has been reasonable or not – not Atos Healthcare .

**For Question 10 you state:**

*“As expected the DWP simply hasn’t answered my question and once again it is very simple. Please answer my question.*

*Statement Regarding Domestic Use*

*The DWP statement “However, publishing the recordings e.g. on the internet, or in any other way, is going beyond domestic purposes” is untrue. Under the Carltona Principle this statement means that the Minister of State is actually lying which, constitutionally and legally, is a serious issue. The ICO guidance on this is absolutely clear. The Section 36 exemption is based on the purposes the personal data is being processed for, not the nature of the data itself. The ICO lists the activity that falls within the section 36 exemption:*

- Using an online forum to ‘rant’ about your neighbour or a political figure.*
- Posting comment about a tradesman on a ‘ratings’ site.*
- Leaving a personal review of a product on an e-commerce site.*
- Taking part in a local newspaper discussion forum.*

*Publishing data on a website or discussion form about personal dealings with the DWP and its subcontractors clearly falls within the Section 36 exemption given the constitutional position of the minister and their department. It is also obvious that if recordings of conversations / assessments are uploaded as part of expressing personal views or having a ‘rant’ this is covered by the Section 36 exemption.*

*Please correct the statement you have issued to confirm that the DWP is aware of the true position as I state. If the DWP fail to do so and continue to make untrue statements I will have to complain to the ICO and parliamentary ombudsman.”*

The Data Protection Act is clear that the recording of information is pertinent to who ever is being taped and to publish without the consent of the other party could lead to legal action.

If individuals intend to make use of recorded information beyond domestic purposes they are required to notify the Information Commissioner of their intended actions. The Information Commissioner may take enforcement action to ensure that any intended actions comply with the Data Protection Act. It is important to note that publishing personal information without appropriate clearance from the Information Commissioner may constitute a criminal offence.

DWP is fully aware of the section 36 exemption and the ICO guidance in relation to it; we also apply DWP policy in relation to recordings by claimants.

As previously explained, claimants can ask to have their assessment recorded and all requests will be accommodated where possible. However DWP has the right to impose reasonable conditions on recordings, and does not have any legal obligation to provide recording equipment.

I acknowledge also that in this instance, the Department has failed to respond within the 20 working days. Please accept my sincere apologies for the delay in responding to your request for an internal review. DWP is working to avoid any such delays occurring in the future and will endeavour to answer queries within the specified time limits.

After consideration the internal review has upheld your complaint regarding the delay in responding and added further comments to your original questions.

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

Yours sincerely,

DWP Business Management Team  
Health & Disability Assessments (Operations)

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#### **Your right to complain under the Freedom of Information Act**

If you are not happy with this response you may request an internal review by e-mailing [freedom-of-information-request@dpw.gsi.gov.uk](mailto:freedom-of-information-request@dpw.gsi.gov.uk) or by writing to DWP, Central Fol Team, Caxton House, Tothill Street, SW1H 9NA. Any review request should be submitted within two months of the date of this letter.

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](http://www.ico.gov.uk)