



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0021**

**Decided without a hearing**

**Before**

**JUDGE DAVID THOMAS**

**TRIBUNAL MEMBERS DAVE SIVERS AND MALCOM CLARKE**

**BETWEEN**

**MICHAEL WALSH**

**Appellant**

**AND**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**AND**

**THE CABINET OFFICE**

**Second Respondent**

**DECISION AND REASONS**

*NB Numbers in [square brackets] refer to the bundle*

1. This is the appeal by Michael Walsh against the rejection by the Information Commissioner (the Commissioner) on 22 January 2018 of his complaint that the Cabinet Office had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).
2. Mr Walsh initially asked for an oral hearing but later changed his mind. The Commissioner and the Cabinet Office agreed that the appeal could be determined on the papers. The Tribunal is satisfied that it can properly do so within rule 32(1)(b)

### **The issue**

3. The issue is whether the Cabinet Office holds the information requested by Mr Walsh.
4. FOIA creates a qualified right to information held by a public authority. However, it is self-evident that a public authority can only disclose information which it holds. The fact that an authority might be expected to hold particular information is not determinative but could indicate that it does, in fact, hold it.
5. Section 3(2) contains a partial definition of whether information is held:

*'For the purposes of this Act, information is held by a public authority if –  
(a) it is held by the authority, otherwise than on behalf of another person, or  
(b) it is held by another person on behalf of the authority'*

The definition means that mere possession by a public authority of information is not sufficient (if it is held on behalf of someone else) but also that possession is not necessary (if the information is held on behalf of the authority by someone else). An example of the latter would be an archive company.

6. The Cabinet Office's position before the Commissioner had been that information held by a separate entity, MyCSP, was not held on its behalf. It now accepts that MyCSP does hold some information on its behalf. This is because of the terms of the contract between the two entities. The fact that MyCSP is itself not a public authority for the purposes of FOIA does not therefore matter. However, the Cabinet Office says that MyCSP does not possess any information within the scope of Mr Walsh's request, making the section 3(2)(b) question moot.

### **Factual background**

7. MyCSP has administered the Civil Service Pension Scheme (CSPS) since 1 May 2012. The company is a joint venture partnership and is 25% owned by employees (through MyCSP Trust Company Ltd), 24% by the Government and 51% by a private sector partner, Equiniti. It has a contract with the Cabinet Office, which is the scheme manager. The Civil Service Compensation Scheme (CSCS) is part of the pension arrangements. Under the 2010 version, members dismissed on inefficiency grounds may receive a lump sum compensation payment (in addition to their pension) up to a maximum. The maximum varies according to how much service the member has given and is reduced by 1/36<sup>th</sup> for each month a member is within three years of pension age (this is known as 'tapering'). Tapering only applies to

---

<sup>1</sup> SI 2009 No 1976

compensation awards, not pension awards. The amount of compensation also depends on the employer's assessment of the degree to which the inefficiency was beyond the individual's control.

8. The CSCS was amended with effect from 9 November 2016. At the same time, additional guidance explained that the only type of inefficiency dismissal which would in future entitle a member to compensation was medical. The amended scheme was quashed by the High Court on a judicial review because of a failure to consult properly, with the result that the unamended 2010 version has been reinstated since July 2017. However, the new guidance remains in force.
9. Mr Walsh was a civil servant with the Home Office. Unfortunately, he has suffered ill-health, which led to some time off work followed by reduced hours. He was dismissed on medical inefficiency grounds in 2015 at the age of 57. He had returned to work after seven months of no salary after his statutory sick pay ran out and took an advance payment of £3000 from his pension to tide him over. He is not happy with the pension he has now received and has taken the Home Office to the Employment Tribunal and made a complaint to the Parliamentary and Health Service Ombudsman. The Tribunal does not know the outcome of the proceedings or the complaint. Mr Walsh says he has also made a FOIA request of the Home Office but without success [64].
10. Mr Walsh alleges that he has been treated unfairly compared to colleagues. In his Grounds of Appeal [14], he referred to a colleague who was dismissed in identical circumstances but suffered no reduction in pension service or tapering of payments and holds full pension rights. On 4 July 2017 [60], Mr Walsh had told the Cabinet Office that he had been advised by a number of ex-Home Office employees that they had received the full reckonable service terms (between 10 and 27 years) in relation to medical inefficiency and not simply the service accrued after they returned to work. They were not subject to CSCS/pension abatement penalties as he had been.
11. On 29 June 2018, Ms Elizabeth Scully made a witness statement on behalf of the Cabinet Office [116]. She is Head of Scheme Compliance and Customer Relations at MyCSP. Her duties include ensuring that the operational processes in administering the CSCS, the CSPS and associated services comply with legislation and scheme rules. She explained that MyCSP is provided with data on pensionable pay and service by employers on a monthly basis throughout a member's employment. The terms under which a member leaves employment are a matter for the employer and do not involve either MyCSP or the Cabinet Office as scheme manager (save where it is the employer). She said she understood that awards could be challenged by a member through the employer's Internal Dispute Resolution process (as Mr Walsh had sought to do, albeit unsuccessfully [111]). MyCSP's role was administrative in that it calculated the compensation and pension awards on the basis of the information provided to it.

12. Ms Scully also explained in some detail the process for making compensation and other awards. She exhibited the standard Request for Services forms which have been available for employers since December 2017 and mandatory since March 2018 [127] - [129]. For an inefficiency award, the only additional information required is the fact that it is such an award and the percentage of compensation, which is determined based on guidance from the Cabinet Office as scheme manager. Prior to March 2018, employers used a range of forms to request an estimate; a form was often unique to an employer. Some indicated the reason for an inefficiency dismissal (presumably, prior to 9 November 2016). However, MyCSP did not need this information and a MyCSP employee handling the request would not input the information into the computer decision.
13. Again since 4 March 2018, an employer must also use a standard Leaver Notification Form [130] when it has decided the terms under which a member will leave employment. The form includes a field for the percentage of compensation to be paid where a member has been dismissed on medical inefficiency grounds. As with the Request for Services form, prior to this employers used a variety of forms and some gave the reason for an inefficiency dismissal. However, the reason would not be entered into MyCSP's systems.
14. MyCSP typically then issues a Personal Details and Options Form (the Options Form) to a member [131]-[132], but this is not always required. Once a member's benefit has been calculated and the Options Form (if applicable) returned, MyCSP sends a Finalisation Statement to the member with a covering letter detailing the pension and compensation benefits. Those sent to Mr Walsh are at [133]-[136]. Neither the Finalisation Statement nor the covering letter contains the reason for dismissal (the information is not stored on MyCSP's system). MyCSP then pays any compensation or pension payment which is due.
15. The Cabinet Office had explained to the Commissioner that MyCSP provides it with monthly service delivery reports but these do not set out why a member had left his or her employment. The Cabinet Office does not require this level of information to be provided to MyCSP because it itself has no business need for it. MyCSP was, however, given the tapering figure where relevant.
16. The result is that MyCSP will not be aware why an employee is dismissed on grounds of inefficiency unless (i) the employer has given the ground voluntarily or (ii) the dismissal is from 9 November 2016 onwards, in which case any inefficiency dismissal must have been on medical grounds.
17. Ms Scully's account is consistent with the documents relating to Mr Walsh's case, which she exhibits [133] - [157]. For example, although the Home Office volunteered on its Capability/Pension/Compensation Estimate form [137]-[138] that medical retirement was being mooted for Mr Walsh, MyCSP did not use this information in its own documents.

18. Under its contract with the Cabinet Office, MyCSP is required to spend up to a specified amount of time assisting with FOIA requests.

### **The request**

19. In May 2017 [55], Mr Walsh sent the following multi-part request to MyCSP, which forwarded it to the Cabinet Office:

- (a) How many MyCSP pension payments to staff dismissed on Medical Inefficiency grounds were reduced by 22/36<sup>ths</sup> 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 [Government Legal Department] without the use of outside legal firms/barristers?

20. On 1 June 2017 [56], the Cabinet Office told Mr Walsh that it did not hold any of this information. Mr Walsh requested a review but the Cabinet Office maintained its position.

### **The Commissioner's decision**

21. The Commissioner gave her decision on 22 January 2018 [1]. She accepted the Cabinet Office's then case that MyCSP did not hold information on its behalf within section 3(2) FOIA. The fact that MyCSP might hold some information within the scope of the requests was therefore irrelevant. The Cabinet Office did not hold separately any of the requested information

### **The Grounds of Appeal**

22. In his Grounds of Appeal [14], Mr Walsh disputed the claim that MyCSP was not told the reason an employee left the civil service. If that were right, it would not be applying guidelines lawfully. The company should be accountable because it was part owned by the public sector it administered. The rules operated in an arbitrary way; he suggested that MyCSP was profiting as a result.

### **Discussion**

23. As the Commissioner explained in her decision, whether requested information is held within section 3(2) has to be determined on the balance of probabilities.

*Request (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?*

*Request (e) How many senior civil servants have had reduced CSCS payments associated with Medical Inefficiency?*

24. These two requests are linked.

25. Because the Cabinet Office now accepts that information about the CSCP and CSCS in the possession of MyCSP is held on its behalf, the Tribunal's task in effect is to determine whether any of the requested information is in the possession of MyCSP. There is no reason for the Cabinet Office to hold information within the scope of these requests separately from MyCSP.

26. The Tribunal must consider whether, on the balance of probabilities, the information was held on 1 June 2017, when the Cabinet Office issued its initial response to Mr Walsh's request. <sup>2</sup>

27. It is apparent from Ms Scully's account, which the Tribunal broadly accepts, that MyCSP, and therefore the Cabinet Office, did not know on that date how many payments to staff dismissed on medical inefficiency grounds had been reduced by 22/36ths since the company became the administrator on 1 May 2012. This is because, prior to 9 November 2016, inefficiency dismissals could be on a number of grounds and there was no requirement for employers to identify the ground in a particular case. It appears that most did not because the ground for inefficiency dismissal had no bearing on the calculation of compensation. Some employers (including, it seems, the Home Office) did volunteer the information. It would in principle be possible for the Cabinet Office to disclose how many staff MyCSP knew, through such volunteering, had been dismissed on medical inefficiency grounds between 1 May 2012 and 1 June 2017. But that is not the information Mr Walsh has requested. He wants the total figure, not simply the cases MyCSP knew about.

---

<sup>2</sup> Some cases suggest that the relevant date is that of any internal review response. It makes no difference in the present case which is the correct date

28. MyCSP knows the number of employees dismissed on medical inefficiency grounds since 9 November 2017 because this has been the only basis for a compensation payment since then, and it holds tapering information. Ms Scully explains, in paragraph 24 of her witness statement, that it would in principle be possible to find out how many MyCSP pension payments to employees dismissed on medical inefficiency grounds had been reduced by 22/36<sup>th</sup> from 9 November 2016 onwards, by conducting a special exercise to query the company's database. She says that this would require its IT department to create a report of all members subject to inefficiency awards and then administrative staff could manually review the cases identified to establish what (if any) reduction to compensation had been applied. Ms Scully suggests that this information would not be 'held as such'. The Tribunal does not accept that interpretation. The information is clearly available to MyCSP, albeit extraction would be time-consuming: it is not information it would be creating. However, once again it is not the information Mr Walsh has requested. He has asked for information from 1 May 2012.
29. Under section 16(1) FOIA, public authorities have a duty to advise and assist requesters. The Cabinet Office might have offered to inform Mr Walsh how many employees MyCSP knew were dismissed on medical inefficiency grounds in the period in question and how many of those dismissed since 9 November 2016 had had their compensation award reduced by 22/36<sup>ths</sup>. However, that information would not serve his purpose because he wishes to draw conclusions about the total numbers of employees dismissed on these grounds and with a 22/36<sup>th</sup> tapering since 1 May 2012. Snapshots based on the figures which some employers happened to have volunteered and the tapering figures for a part of the period only would not give him the information he wants. The section 16(1) duty is to assist requesters obtain the information they want, insofar as this can be discerned. The Cabinet Office is not in breach of the provision.
30. It is not clear whether Mr Walsh was using the phrase 'senior civil servants' in request (e) as a term of art and whether MyCSP would therefore know to which civil servants he was referring. In any event, for the same reasons as with request (a) the Tribunal accepts that MyCSP does not hold the information: employers were not required to specify the inefficiency reason and it must be assumed, in light of his other requests, that he wanted the information for the same period, from 1 May 2012, such that giving only the post-9 November 2016 figure for compensation award reductions would not meet his needs. Once again, there is no breach of section 16(1).

*Request (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?*

*Request (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?*

*Request (d) Since MyCSP began administering the government pension scheme how many of these cases then had full CSCS severance or compensation payments?*

*Request (f) How many of these cases have been defended by the [Government Legal Department] without the use of outside legal firms/barristers?*

31. These four requests are linked. In relation to requests (c) and (d), the link to request (b) is clear from use of the phrase 'these cases', which refers back to 'Employment Tribunal cases' in that request. It is a little less clear with request (f) because request (e) is interposed. However, it would make no sense for 'these cases' in request (f) to refer to the number of senior civil servants who have had reduced CSCS payments (request (e)), given that the request clearly contemplates legal proceedings.
32. As the Cabinet Office has explained, it does not hold information about Employment Tribunal cases brought against other government departments and there is no reason for it to do so. Neither it nor MyCSP would be a party to tribunal cases unless they were the employer. Mr Walsh has asked for statistical information about cases across government.
33. A MyCSP employee could bring an Employment Tribunal case against the company and the company would then hold information about the case. However, MyCSP is not a public authority for the purposes of FOIA. It is not included in schedule 1; it has not been designated under section 5; and it is not a publicly-owned company under section 6 (because it is part-owned by a private entity). MyCSP does not therefore have to disclose information which it holds in its own right.

### **Conclusion**

34. For these reasons, the appeal is dismissed. The decision is unanimous.
35. The Tribunal appreciates that it is frustrating for Mr Walsh not to be able to access the information he believes he needs to challenge his pension awards. However, under FOIA public authorities only have to disclose information which they hold (in the section 3(2) sense).

Signed

David Tomas  
Judge of the First-tier Tribunal  
Date: 02 January 2019

Date Promulgated: 03 January 2019