



Neutral citation number: [2023] UKFTT 00822 (GRC)

Case Reference: EA/2022/0328; EA/2023/0034; EA/2023/0036

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by CVP on 22-23 June 2023 (and further written submissions thereafter considered on 19 July 2023)

Decision given on: 09 October 2023

Before

TRIBUNAL JUDGE Stephen Cragg KC

TRIBUNAL MEMBER Jo Murphy

TRIBUNAL MEMBER Dan Palmer-Dunk

Between

DEPARTMENT FOR WORK AND PENSIONS

Appellant

-and-

INFORMATION COMMISSIONER

1st Respondent

-and-

JOHN SLATER

2nd Respondent in EA/2022/0328

Decision: The appeal EA/2022/0328 is allowed to the extent set out below. The appeals in EA/2023/0034; EA/2023/0036 are dismissed.

Substituted Decision Notice: A substituted decision notice in the terms set out at the end of this decision in appeal EA/2022/0328 is made. There is no substituted decision notice in appeals EA/2023/0034; EA/2023/0036.

Department of Work and Pensions were represented by Ewan West

The Commissioner was represented By Remi Reichhold.

Mr Slater represented himself.

The complainants in the other two appeals (John Pring EA/2023/0034 and Owen Stevens EA/2023/0036) have not been joined as parties.

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
2. The Tribunal considered an agreed open bundle of evidence comprising 800 pages, a closed bundle, written submissions from both parties and a bundle of authorities.

BACKGROUND

3. This case concerns three appeals brought by the Department for Work and Pensions (DWP) against decision notices concerning requests for information made under the Freedom of Information Act 2000 (FOIA):

Appeal 1: DWP's appeal against Decision Notice IC-145903-X8D9 (EA/2022/0328) dated 28 September 2022 (DN1) concerning three requests for information (RFIs) made by Mr John Slater;

Appeal 2: DWP's appeal against Decision Notice IC-151479-QQW3 (EA/2023/0034) dated 15 December 2022 (DN2) concerning a RFI made by Mr John Pring; and

Appeal 3: DWP's appeal against Decision Notice IC-151084-P9G3 (EA/2023/0036) dated 15 December 2022 (DN3) concerning a RFI made by Mr Owen Stevens.

4. On 21 April 2023, the Registrar ordered that the three appeals should be heard together. As summarised in the Commissioner's skeleton argument these appeals now come down to two issues: -

(a) Appeal 1 concerns the interpretation and application of s.22 FOIA which is the exemption relating to information intended for future publication. At the time of the RFI, DWP sought to rely on s.22 FOIA on the basis that it intended to publish the requested information in the future. However, DWP also anticipated that, at some future date before publication, it would consider whether any other exemptions apply, such that some of the requested information may be withheld from publication. In DN1, the Commissioner did not accept that: -

46...a general intention to publish information with a caveat that other exemptions may apply at the time of publication is sufficient to engage section 22. Whilst there is no requirement to have set the publication date by the time of the request, the Commissioner is not persuaded that a timeframe dictated by the expiration of another exemption constitutes a settled intention to publish the information.

DWP further argues that if -contrary to DN1- the Tribunal finds that s.22 FOIA is engaged, the balance of the public interest lies in favour of maintaining the exemption in any event.

(b) Second, in all three appeals DWP challenges the Commissioner's application of the public interest balancing test in relation s.35(1)(a) and s.36 FOIA.

CONTEXT

5. All the RFIs in these appeals concern the Universal Credit (UC) programme, which replaces six separate legacy benefits with a single scheme. UC is ‘the main source of income for people out of work or on a low income and includes elements for children, housing and disability’. As described in Neil Couling’s witness statement for DWP, when it is fully rolled out, Universal Credit is expected to account for around £60 billion per year to roughly 6.5 million households across the UK.
6. Mr Couling is the Senior Responsible Owner (SRO) for UC, responsible for leading, and being personally responsible to Parliament for all aspects of the implementation of UC. Mr Couling has provided open and closed versions of a witness statement in this appeal and also gave evidence in person.
7. The Universal Credit Programme Board (UCPB) meets bi-monthly, providing advice and support to Mr Couling in his role as SRO. On 1 November 2018, DWP adopted a ‘publication strategy’ in relation to UCPB papers. DWP resolved to make publicly available UCPB papers ‘after two years’, to be deposited in the House of Commons Library ‘twice yearly, in 6 monthly batches’. Following an initial release in November 2018 in response to a FOIA request, UCPB papers have been deposited in the House of Commons Library and published online. As a result of the ‘twice yearly’ publication schedule, UCPB papers are made public about 24-30 months after the meetings to which they relate (for instance, the papers for the UCPB meeting in April 2019 were published on 28 October 2021).
8. Mr Couling states that DWP applies redactions to some UCPB papers deposited in the House of Commons Library. Mr Couling further states that: -
 - (a) in the ‘first month’s’ UCPB papers published in October 2022, 10.3% of the words were redacted (2,416 out of 23,497); and
 - (b) during the period 2021-2022, 2.9% of the words contained in the ‘first month’s’ UCPB papers were redacted (2,698 out of 86,197 words).

THE REQUESTS AND DECISION NOTICES

Appeal 1

9. The following is relevant to **Appeal 1** where the issue is whether s22 FOIA applies. Thus on 14 November 2021, Mr Slater made three RFIs as follows: -

- (a) RFI1 - Mr Slater requested unredacted copies of two papers which had been included in the agenda of the UCPB meeting on 22 October 2019 (RFI1). These were a paper entitled 'How Effective is Support' (Paper 7a); and a report of the Prime Minister's Implementation Unit (PMIU) titled 'How effective is support for vulnerable Universal Credit claimants' (Paper 7b). Mr Couling describes Paper 7b as a 'deep dive' to better understand the claimant experience 'with a focus on vulnerable groups'.

Paper 7a and Paper 7b fell within the batch of UCPB papers deposited in the House of Commons Library on 28 October 2021. However, as described by Mr Couling:-

The majority of the 'summary' section of Paper 7a was redacted under section 36 of FOIA. The entirety of Paper 7b was withheld under the same section. I have included unredacted copies of both papers as exhibits to my closed witness statement.

- (b) RFI2 - Mr Slater also requested unredacted copies of three further UCPB papers (RFI2). All three papers had also been deposited in the House of Commons Library and published online. However, the versions published online contained redactions in reliance on s.43 FOIA (commercial interests).
- (c) RFI3 - Mr Slater requested UCPB papers 'covering the period 01 January 2021 to 31 August 2021' (RFI3). At the time of RFI3, these papers had not yet been deposited in the House of Commons Library (although some of the relevant papers were made public on 20 April 2023)

10. DWP did not initially respond to Mr Slater's RFIs. On 14 December 2021, Mr Slater requested an internal review. On 17 January 2022, DWP responded as follows: -

- (a) RFI1: The redactions to Paper 7a and Paper 7b were maintained in reliance on s.36(2)(b) FOIA and s.40(2) FOIA [301].
- (b) RFI2: Redactions to the three papers sought were maintained in reliance on s.43 FOIA.

(c) RFI3: DWP withheld the requested information based on s.22 FOIA (information intended for future publication), s.31, s.35, s.36 and s.40 FOIA.

11. On 6 June 2022, Mr Slater informed the Commissioner that, due to the passage of time, DWP no longer sought to rely on s.43 FOIA in relation to RFI2 [366]. On 8 June 2022, Mr Slater also confirmed that DWP had disclosed the information previously withheld on the basis of s.43 FOIA. As a result, RFI 2 is not in issue in this appeal.

12. Following Mr Slater's complaint, the Commissioner carried out an investigation and issued a decision notice (DN1) on 28 September 2022. This reached the following conclusions: -

(a) The Commissioner determined at §45 that **s.22 FOIA** was not engaged with respect to RFI3 because 'DWP has not identified what information will be published, only that information may be published after two years provided that it is not exempt under another exemption'. As set out above, DN 1 further records at §46 that the Commissioner 'does not accept that a general intention to publish information with a caveat that other exemptions may apply at the time of publication is sufficient to engage section 22'.

(b) The Commissioner accepted, at §58, that **s.31(1)(a) FOIA** was engaged with respect to RFI3 as claimed by DWP, and that the public interest fell in favour of withholding the information.

(c) The Commissioner accepted, at §82, that **s.35(1)(a) FOIA** was engaged in respect of RFI3. However, the Commissioner noted, at §98, that DWP had only advanced 'generic and superficial arguments regarding the balance of the public interest'. The Commissioner was 'not persuaded that DWP's generic public interest arguments in favour of maintaining the exemption are sufficient to outweigh the public interest in disclosure of the requested information': §102.

(d) The Commissioner accepted, at §127 and §163, that **s.36(2)(b)(i) and s.36(2)(b)(ii) FOIA** were engaged with regard to RFI1 and RFI3. The Commissioner further accepted that **s.36(2)(c) FOIA** was engaged in respect of RFI3. However,

the Commissioner decided, at §193, that the public interest in disclosure outweighed the public interest in maintaining the exemption, save for the information contained in Confidential Annex B to DN 1.

13. This is what the Commissioner said about the public interest issue in the 22 September 2022 decision notice in relation to s35 FOIA: -

83. The complainant explained that there is considerable weight in the public knowing about the activities of DWP and Universal Credit. The complainant referred to critical reports in the media and “damning reports” by the Work and Pensions Committee and the Public Accounts Committee (PAC).

84. In particular, the complainant provided a link to a report detailing how some women have to resort to “survival sex” to get enough money to live. The complainant considers that the conclusions and recommendations of the Work and Pensions Committee are damning and show the mindset and culture which operates within DWP. The complainant directed the Commissioner to paragraphs 16 and 17 of this report:

16. The Department’s initial written evidence submission to our inquiry sought to disprove the presence of a “direct causative link” between Universal Credit and “survival sex”. In taking this approach, it missed the wider point. The fact that people with complex needs and precarious financial situations turned to sex work before Universal Credit does not mean that the design of Universal Credit does not present additional problems for people who are already vulnerable.

17. The Department’s initial submission displayed little interest in the lived experience of claimants and would be claimants. People with first hand, personal experience told us and widely available media sources that Universal Credit was a factor in their decisions to turn to, or return to, sex work. The Department also chose not to make use of the expertise and experience of multiple support organisations. Its initial written response was defensive, dismissive, and trite”.

85. The complainant drew the Commissioner’s attention to a report by the Committee of Public Accounts dated 17 November 2021 on fraud and error in the benefits system. The complainant stated that this report is highly critical of DWP in general and quoted the report in respect of Universal Credit:

“4. The Department has lost a grip of Universal Credit overpayments which account for most of the £3.8 billion increase in fraud and error and are now at the highest overpayment rate of any benefit. The Department estimates it overpaid £5.5 billion of Universal Credit in 2020-21, which is equivalent to 14.5% of its overall Universal Credit expenditure and £3.8 billion more than 2019-20. This compares to the previous peak of 9.7% overpayments in Tax Credits in 2003-04”.

88. The complainant stated that a reduction in fraud is one of the items in the Universal Credit business case. The complainant considered that if DWP has lost its grip of this element of its business case, then it should be queried as to what else DWP is failing to deliver.

87. The complainant considered that one area where there is ever growing concern is claimants that are sick and/or disabled. The complainant stated that for more than three years, DWP has been talking about “managed migration” of people onto Universal Credit. The complainant set out that some organisations, such as Child Poverty Action Group (CPAG), had expressed serious concerns about the process. The complainant provided a CPAG briefing document from March 2019 which called for migration to Universal Credit to be suspended.

88. The complainant explained that DWP had “rebranded” managed migration as ‘Move to UC’ and ran a pilot in Harrogate. The complainant stated that:

“Despite years of work and planning by the DWP the pilot only involved 80 people and according to the Minister for welfare reform only around 13 people actually ‘moved’ onto Universal Credit”.

89. The complainant explained that Universal Credit is running seven years later than the original completion date and stated that problems are still regularly reported in the media about it and other benefits such as ESA and Personal Independence Payments (PIP).

90. The complainant directed the Commissioner to an article which reports that DWP wants to merge PIP with Universal Credit. The complainant considers that those in receipt of PIP would want to know if this is planned before it becomes a fait accompli.

91. The complainant explained that DWP has been working on Universal Credit for more than 10 years and there are still stories in the media, critical reports from respected charities (eg CPAG and the Trussell Trust) and “damning” reports from select committees such as the Work and Pensions Committee and the Committee for Public Accounts. The complainant considers that the rising levels of fraud suggest that DWP still has not got basic requirements such as claimant identity verification resolved.

...

93. DWP recognised that transparency in policy leads to greater public understanding of the process and informs the public debate. It is in the public interest that development of the ‘Move to Universal Credit’ policy includes detailed consideration of the challenging task of moving legacy benefit customers over to Universal Credit in the most effective and customer friendly way and that the Universal Credit Programme demonstrates that a variety of potential policy have been explored.

Public interest in maintaining the exemption

94. DWP explained that a public debate about the detail of the process used to move the large numbers of vulnerable customers from legacy benefits to Universal Credit will constrain DWP's ability to test a variety of options and gather evidence to support the adoption of the optimum approach to transfer customers to Universal Credit. DWP explained that there is a significant public interest in the policy working effectively given it impacts on vulnerable people.

95. DWP explained that the Move to UC policy is still under development. It set out that there is a significant challenge to move several million customers from legacy benefits to Universal Credit. DWP explained that in these circumstances, it is vital that various options are trialled and developed to ensure the effective delivery of the Move to UC policy.

96. DWP stated that it is confident that the public interest is best served by this information not being in the public domain.

The balance of the public interest

97. The Commissioner is disappointed at DWP's generic and superficial arguments regarding the balance of the public interest.

98. The Commissioner accepts that significant weight should be given to safe space arguments – ie the concept that the government needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction – where the policy making is live and the requested information relates to that policy making. The Commissioner also accepts that a large scale project such as Universal Credit will have its challenges. However, DWP has not provided sufficiently specific arguments as to why disclosure of the particular requested information would not be in the public interest.

99. The Commissioner is mindful that Universal Credit has been in the public consciousness since its announcement in 2010 and concerns have been raised by charities and in media coverage including:

- “Universal Credit: What is it and what exactly is wrong with it?” 25 January 2018, The Guardian
- The Trussell Trust has issued several reports, including its analysis of the link between the roll out of Universal Credit and increased foodbank use.
- The Work and Pensions Select Committee report on Universal Credit and ‘survival sex’
- “Effects on mental health of a UK welfare reform, Universal Credit: a longitudinal controlled study” Sophie Wickham PhD et al.

100. The Commissioner considers that there is clearly a strong public interest in disclosure of information that would improve the public understanding and allows scrutiny of the government's approach to migrating legacy benefit claimants onto Universal Credit.

101. The Commissioner considers that there is a very significant and weighty public interest in understanding, and scrutiny of, a policy that will affect millions of people, including the most vulnerable in society. The Commissioner considers that the public is entitled to be well informed as to the reasoning behind policy decisions which are likely to shape British society. Disclosure of this information would allow the public insight into the decision making process and an understanding of the decisions made and challenges overcome.

102. Having reviewed the disputed information, the Commissioner is not persuaded that DWP's generic public interest arguments in favour of maintaining the exemption are sufficient to outweigh the public interest in disclosure of the requested information.

103. The Commissioner requires DWP to disclose the information withheld under section 35(1)(a).

14. In relation to the public interest arguments which related to s36(2)(b)(i) and (ii) FOIA and the contents of RFI1 and RFI3, the Commissioner noted that the 'complainant's public interest arguments set out in section 35 are also relevant to the public interest considerations here' and so were not repeated. The Commissioner also noted that there were two opinions from a Qualified Person (which is necessary if s36(2) FOIA is to apply). One related to the material covered by RFI1 (for the purposes of s36(2)(b)(i) and (ii)) and the other related to the material in RFI3 (for the purposes of s36(2)(b)(i) and (ii), and s36(2)(c) FOIA). The Commissioner accepted in both cases that the Qualified Person's opinion was reasonable and that the exemption in s36(2) FOIA was therefore engaged.

15. The relevant parts of the decision notice which relate to the public interest and s36(2) FOIA for the purposes of the information in RFI1 are as follows: -

131. ...DWP considered that disclosure of the information would risk harming the deep dive process. If officials could not be sure that discussions about potential issues around dealing with vulnerable claimants were protected from disclosure, there would be a strong incentive to omit, or to diminish the significance of negative information, to minimise the prejudice likely to be caused by disclosure.

132. DWP explained that even though civil servants adhere to the Civil Service Code, disclosure creates a strong incentive to use more careful language and be less robust about flagging risk. DWP considers that it is reasonable to assume that these conversations would have less value.

133. ...DWP considers that it would be likely to make stakeholders reluctant to share insight into any aspect of the subject, which released prematurely or out of context, may have a negative effect on the quality of the report and consequently the effectiveness of the deep dive process.

Balance of the public interest

134. If the Commissioner finds that the Qualified Person's opinion was reasonable, he will consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would be likely to occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test favours disclosure.

135. ...

136. As set out in the section 35 public interest considerations, the Commissioner is mindful that Universal Credit has been in the public consciousness since its announcement in 2010 and the concerns that have been raised regarding its implementation.

137. The withheld information is a report, and part of the covering paper, on how effective Universal Credit support is for vulnerable claimants. The Commissioner considers that there is a strong public interest in scrutiny of the analysis of support for vulnerable claimants and DWP's actions in light of this.

138. The Commissioner considers that the public interest in disclosure is particularly strong in the circumstances of this case. In order for the Commissioner to determine that DWP is entitled to withhold the information, he must determine that the public interest in maintaining the relevant exemption outweighs the strong public interest in disclosure.

139. The Commissioner considers that DWP has failed to provide persuasive public interest arguments in favour of maintaining the exemption.

140. With regards to DWP's chilling effect arguments, having considered the withheld information, the Commissioner is not persuaded that disclosure of the majority of the information would cause this effect to a significant degree.

141. The Commissioner has issued guidance on 'chilling effect' arguments in relation to section 3618. Civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality of advice.

142. Chilling effect arguments operate at various levels. Whether it is reasonable to think that a chilling effect would occur would depend on the circumstance of each case including the timing of the request, whether the

issue is still live, and the actual content and sensitivity of the information in question.

143. The Commissioner notes that, at the time of the request, the report was over two years old.

144. Having reviewed the withheld information, the Commissioner considers that a significant proportion of the withheld information includes fairly high level recommendations, overall findings and factual statements which are not attributable to any individual. For this reason, and those set out in the preceding paragraphs, the Commissioner is not persuaded that disclosure of this information would cause officials to provide lower quality advice in future is a particularly compelling argument.

145. The Commissioner also considers that there is a strong public interest in disclosing these findings and recommendations to allow scrutiny of the quality of the research and report and whether, two years following the report, any progress on the recommendations had been made.

16. The Commissioner did not take the same approach to a small amount of the material:-

146. The Commissioner does accept that a small amount of the withheld information would be likely to cause a chilling effect as it names individuals, directly quotes contributors and gives case studies related to specific job centres. This information is set out in Part B of the confidential annex. For this small amount of information, the Commissioner is satisfied that the public interest in preventing this prejudice is sufficient to outweigh the strong public interest in disclosure.

17. This is not in dispute in this case. For the remaining information, the Commissioner considered that the public interest in maintaining the exemption does not outweigh the strong public interest in disclosure and required DWP to disclose the report and covering paper with the exception of the information set out in Part B of the confidential annex to DN1.

18. In relation to the public interest arguments and s36(2) FOIA for the purposes of RFI3, the Commissioner said:-

166. DWP's submissions regarding the public interest in disclosure were as follows:

“There is a public interest in demonstrating that the allocation of limited development resources is planned to achieve the optimal design solutions and that these decisions are carefully considered”.

167. Despite the Qualified Person’s opinion only relating to whether section 36 is engaged and not the balance of the public interest, DWP set out its public interest considerations in the submission to the Qualified Person.

168. The Commissioner has included the public interest arguments set out in DWP’s submission to the Qualified Person in his considerations.

169. DWP recognised that transparency in the way in which government operates, and increased accountability of Ministers and public officials, increases public trust in the governmental processes. In particular, there is a public interest in understanding the effectiveness with which government works and the successful delivery of key projects and programmes to time, scope and budget.

170. DWP recognised a public interest in the governance of major government programmes being transparent.

171. The submissions also included a short public interest consideration which reveals the contents of the withheld information. As above, this will not be reproduced in this notice.

Public interest in maintaining the exemption

172. DWP provided the Commissioner with a brief explanation that revealing the details of future operational plans presents a significant risk of industrial action. DWP stated that maintaining effective delivery in light of the increasing pressure on the Universal Credit system is clearly in the public interest.

173. DWP considered that any disruption to the service provided to Universal Credit claimants caused by industrial action, eg payment timeliness would not be in the public interest.

174. The Commissioner has also considered the public interest arguments set out in DWP’s submission to the Qualified Person.

175. DWP considered that the release of the individual papers or packs of papers would not serve the public interest in transparency. Rather, disclosure would risk harming the Universal Credit Programme as the papers that were presented to the Programme Board at the January, March, May and July 2021 meetings considered highly sensitive issues.

176. DWP considered that if officials could not be sure that discussions were protected from disclosure before the planned publication date, there would be a strong incentive to omit, or to diminish the significance of negative information, to minimise the prejudice likely to be caused by disclosure. DWP explained that even though civil servants adhere to the Civil Service Code, disclosure could create a strong incentive to use more careful language and be less robust about

flagging risk. DWP considered it reasonable to assume that if there was an expectation of imminent publication, these conversations would have less value.

177. DWP considered that premature release of the detailed metrics contained in the Programme Board dashboard would not be in the public interest as exposure of this data, in the dashboard format, would not be likely to provide useful insight into the delivery of the Universal Credit Programme. DWP was of the view that there is also a significant risk that selective presentation of the detail provided could be used to misrepresent the progress of the Universal Credit Programme.

178. DWP explained that the prioritisation of system development resource requires careful balancing of the benefits of delivering various new policy initiatives whilst ensuring that the system maintains its efficient performance and continuing to improve its effectiveness at reducing fraud and error. DWP considers that revealing the detail of these discussions before the planned publication date, when these issues are still live, would be highly likely to reduce the free and frank exchange of views required to reach optimal outcomes on these sensitive decisions.

Balance of the public interest

179. There will always be a general public interest in transparency. In particular, there is a significant public interest in understanding how governmental projects are implemented. However, the Commissioner considers that DWP has again failed to acknowledge the strong public interest in disclosure of information relating to the Universal Credit roll out.

180. As set out above, the Commissioner is mindful that Universal Credit has been in the public consciousness since its announcement in 2010 and various charities and media coverage have raised serious concerns regarding increases in poverty in areas in which it has been implemented. The Commissioner is also mindful that the implementation of Universal Credit not only affects a significant proportion of the population, including the most vulnerable in society, it could potentially affect any member of the public below pensionable age should they need to submit a claim during their working life.

181. The Commissioner therefore considers that the public interest in disclosure is particularly strong in the circumstances of this case. In order for the Commissioner to determine that DWP is entitled to withhold the information, he must determine that the public interest in maintaining the relevant exemption outweighs the strong public interest in disclosure.

182. DWP's arguments largely relate to the 'chilling effect' of disclosure. Paragraphs 141 & 142 above confirm the Commissioner's position on 'chilling effect' arguments.

183. The Commissioner notes that at the time of the request, Universal Credit had been implemented for all new claims and for people needing to make a new claim due to a change in circumstances.

184. The minutes falling within the scope of the request were between four and eleven months old.

185. DWP's arguments regarding the chilling effect are fairly generic and simply state that if officials thought that the information may be disclosed, they may not have been as robust in their advice. DWP did not explain why disclosure of the specific information would cause a chilling effect, instead relying on the generic arguments that disclosure would lead to a reduction in frankness.

186. The Commissioner does not accept DWP's argument that disclosure of dashboard metrics could be used to misrepresent the progress of the Universal Credit Programme. It is well established that the Commissioner does not accept arguments that information may be misunderstood or misinterpreted by the public; DWP would have the opportunity at the point of disclosure to put the withheld information into context and DWP has not provided any explanation why it would be unable to do so in this case.

187. The Commissioner also does not consider that DWP's arguments regarding industrial action carry much weight. DWP has not provided any detail regarding why this disclosure would lead directly to industrial action or why it would not be possible to, for example, liaise with the relevant trade unions prior to any ballot for industrial action.

188. DWP's generic arguments are not sufficient to persuade the Commissioner that the public interest favours maintaining the exemption. The Commissioner has considered the withheld information itself and he has not identified any information for which the public interest would clearly favour maintaining the exemption.

189. As set out above, the Commissioner is mindful of the high profile of the Universal Credit programme and its potential to affect millions of individuals. He recognises that this creates conditions where frank analysis and the identification of risks need to be protected whilst they are being addressed. However, he is also mindful of the accountability and transparency that is important with such a programme, especially one that has been subject to a number of high profile concerns.

190. The Commissioner notes that the Universal Credit Programme has been subject to scrutiny from the National Audit Office and the Work and Pensions Select Committee. However, it is clear that the requested information provides valuable information on the implementation of the Universal Credit programme. The minutes and reports go beyond what is already available in the public domain and provide useful information about the Universal Credit programme, which allows for greater transparency into the workings of the programme and greater understanding of the difficulties that are encountered.

191. The Commissioner recognises that some of the information will have been only four months old at the time of the request and that this will increase the public interest in protecting the safe space to discuss the project. However, he does not consider that this is sufficient to outweigh the significant public interest

in disclosure, particularly when considered alongside DWP's generic public interest arguments.

192. The information withheld under section 36 in "RFI3" provides a much greater and up to date insight than the information already available about the Universal Credit programme; there are strong arguments for transparency and accountability for a programme which may affect millions of UK citizens and process billions of pounds.

19. The Commissioner's decision was that the balance of the public interest favours disclosure of the information withheld under section 36 FOIA, and the Commissioner required DWP to disclose the information withheld under section 36 FOIA which falls within the scope of RFI3.

20. The DWP appeal advances four grounds of appeal with respect to DN1, summarised here:-

- (a) Ground 1: The Commissioner should have found that s.22 FOIA was engaged and that the balance of the public interest favoured maintaining the exemption.
- (b) Ground 2: DN1 erroneously states that DWP sought to withhold 'some individuals' names, stakeholder comments on Universal Credit and information referring to its fraud and error measures' in reliance on s.31 FOIA. As a result, paragraph 59 of DN1 is based on an incorrect premise.
- (c) Ground 3: The Commissioner unlawfully applied the public interest balancing test with regard to s.35(1)(a) FOIA insofar as RFI3 is concerned.
- (d) Ground 4: The Commissioner unlawfully applied the public interest balancing test with regard to s.36 FOIA insofar as RFI 1 and RFI3 are concerned.

Appeal 2

21. On 11 November 2021, Mr Pring made a RFI to DWP, requesting Paper 7b. As such, Mr Pring's RFI mirrors (in part) RFI1 in Appeal 1. As set out above, Paper 7b was withheld from publication in reliance on s.36(2)(b) FOIA.

22. On 7 December 2021, DWP wrote to Mr Pring maintaining the exemption contained in s.36(2)(b) FOIA and relying on s.40(2) FOIA. On 9 December 2021, Mr Pring requested an internal review. On 18 January 2022, DWP upheld its refusal following internal review. Following Mr Pring's complaint, the Commissioner carried out an investigation a decision notice on 15 December 2022: DN2. For the same reasons as are set out in DN1, the Commissioner determined that s.36(2)(b) FOIA was engaged with respect to Paper 7b, but that the balance of the public interest fell in favour of disclosure, save for a small amount of information contained in the attached confidential annex to DN2 (not in dispute in this case). DN2 further notes at §54 that the information engaging s.40(2) FOIA falls within the information that the Commissioner considers can be withheld pursuant to s36 FOIA, therefore he did not need to consider the applicability of s.40(2) FOIA.
23. DWP's grounds of appeal relating to DN2 mirror Ground 4 in Appeal 1 insofar as these relate to RFI1.

Appeal 3

24. On 8 November 2021, Mr Stevens made a RFI to DWP requesting Paper 7a and Paper 7b. As such, Mr Stevens's RFI mirrors RFI1 in Appeal 1. Paper 7a was heavily redacted and Paper 7b was withheld, both in reliance on s.36(2)(b) FOIA. On 7 December 2021, DWP wrote to Mr Stevens maintaining the exemption contained in s.36(2)(b) FOIA and relying on s.40(2) FOIA.
25. Following Mr Stevens' complaint, the Commissioner carried out an investigation and issued a decision notice on 15 December 2022: DN3. For the same reasons as are set out in DN1 (and DN2), the Commissioner determined that s.36(2)(b) FOIA was engaged with respect to Paper 7a and Paper 7b, but that the balance of the public interest fell in favour of disclosure, save for a small amount of information contained in the attached confidential annex to DN (not in dispute in this case). DN3 further notes that the information engaging s.40(2) FOIA falls within the information that the Commissioner considers can be withheld pursuant to s.36(2)(b) FOIA and therefore he did not need to consider the applicability of s.40(2) FOIA.

26. DWP's grounds of appeal against DN3 mirror Ground 4 in Appeal 1 insofar as these relate to RFI1.

27. As the Commissioner notes in submissions for the appeal hearing, while all three appeals need to be determined on their individual merits, (a) the RFIs in Appeal 2 and Appeal 3 were made at 'materially the same time' as the RFIs in Appeal 1; (b) the requested information in Appeal 2 and Appeal 3 overlap (to some extent) with the requested information in Appeal 1 (RFI1); (c) the decision and reasoning of the Commissioner in DN2 and DN3 is materially the same as the decision and reasoning adopted in DN1; and (d) the grounds of appeal in Appeal 2 and Appeal 3 mirror Ground 1 in Appeal 1.

28. Thus there are two broad issues to be determined in relation to the three appeals: -

(a) insofar as RFI3 in Appeal 1 is concerned, the proper interpretation and application of s.22(1) FOIA (Appeal 1, ground 1); and

(b) in all three appeals, the application of the public interest balancing test, primarily concerning s35 and s36 FOIA (Appeal 1, grounds 3 and 4).

29. There is a further issue to be resolved in relation to ground 2 of Appeal 1 which will be considered below when the main issues have been decided.

THE LAW

Section 22

30. By virtue of s.2(1), the general duty to disclose information under s.1(1)(b) will not arise where the information is exempted under Part II of FOIA. Section 22 FOIA is one such exemption which may enable a public authority to refuse to provide information. Section 22(1) FOIA states as follows: -

22.— Information intended for future publication.

(1) Information is exempt information if—

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

31. Surprisingly, there is little case law which discusses when the exemption in s22 FOIA applies, and what there is can be found in FTT decisions which are not binding on us. Thus, a number of cases have said that s22 FOIA should be interpreted to mean that there must be an ‘intention’ to publish: *Queen Mary University London v IC & Courtney* (Decision of 22 May 2013, EA/2012/0229), *Love v IC* (Decision of 8 April 2014, EA/2014/0286), and *Cross v IC & Cabinet Office* (Decision of 14 August 2015, EA/2015/0320) (this last case referred to a ‘clear and settled’ intention). On this particular issue, the Commissioner’s guidance (at paras 5 and 9-11) states: -

5. For the exemption in section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it ...will publish it in future. This means that it must have a settled expectation that the information will be published at some future date.

9. A general intention to publish some information will not suffice. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.

10. The information that the public authority intends to be published must be the specific information the applicant has requested.

11. If, in the course of preparing information for publication, some information is discarded or rejected, the exemption under section 22 will not cover that rejected material. Clearly, at the time the decision is made to discard that material, the public authority no longer holds the information with a view to its publication.

Section 35

32. Section 35 is intended to protect good governance and preserves a space for the government to consider policy options in private. Section 35(1)(a) FOIA states that:-

“(1) Information held by a government department or by the Welsh Government is exempt information if it relates to—

(a) the formulation or development of government policy.”

33. Section 35 is a class-based exemption and it does not matter whether harm will result from disclosure of the requested information (although the question of harm may be relevant to a consideration of the public interest).

Section 36

34. Section 36 provides that:

(1) This section applies to—

(a) information which is held by a government department or by the Welsh Government and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

[...]

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

35. Section 36 FOIA is a prejudice-based exemption, which is only applicable if disclosure would, or would be likely to, prejudice the effective conduct of public affairs in any of the ways specified in s.36(2).

Public interest test

36. In all three appeals (DN1, DN2 and DN3), the Commissioner found that s.35 and s.36 FOIA were engaged. DWP's appeal is limited to the application of the public interest balancing test (grounds 3 and 4 in Appeal 1; Appeal 2; Appeal 3). The public interest test also applies if the DWP is correct and s22 FOIA applies as claimed.

37. The Tribunal should weigh the public interest in maintaining the exemption against the public interest in disclosing that information. Only if this weighing process favours maintenance of the applicable exemption(s) is the duty to communicate the requested information disapplied.

38. The Upper Tribunal in *Montague v Information Commissioner and Department of International Trade* [2022] UKUT 104 (AAC) has recently held that:

(a) FOIA does not permit aggregation of the separate public interests in favour of maintaining different exemptions when weighing the maintenance of the exemptions against the public interest which favours disclosure of the information sought; and

(b) the public interest is considered with reference to how matters stood at the time of the public authority's original decision.

THE APPEAL AND THE HEARING

39. Mr Couling gave evidence to the Tribunal in both open and closed. He explained that he had implemented a disclosure system for UCPB papers so that documentation could be disclosed after two years, and there were two rounds of disclosure a year. His rationale for that was that by that time it was unlikely that FOIA exemptions under, for example, s35 or s36, would still apply and therefore there could be publication with few redactions. He accepted that even with that time lapse there would sometimes be the need for redactions, but they would be used sparingly.

40. Mr Couling accepted that the statistics in his statement which supported an argument that there was a low percentage of redacted words in these disclosures, was based on a 'dip sample' of the documents rather than a granular review of all the documents.

41. Mr Couling's statement is dated March 2023. He explained at the time of his statement the next publication of documents would have been April 2023, but at the time of his statement decisions had not been made about possible exemptions to be applied to the documents. This decision was left to very shortly before disclosure. He confirmed that decisions had not been made about exemptions to be applied, if any, to the publication due to be made in October 2023. He had seen those documents and some redactions were possible. Mr Couling referred to paragraphs 47 and 48 of his statement in which he set out the publication strategy and his view that this was a sensible and efficient way to deal with the dissemination of information about UC:-

47. In my opinion, it is reasonable to uphold the publication strategy. As I indicated (in paragraph 17) above, even two years after being presented to the UCPB, a lot of work goes into preparing UCPB papers for publication. The process is as follows:

- Identification of the relevant papers
- Review of papers
- Discussion of publication with responsible Senior Civil Servants
- Redaction of names of junior staff members
- Redactions based on the feedback from Subject Matter Experts and papers' owners
- Transfer of documents to PDF format
- Work with press office to agree a grid slot
- Submission to minister to approve publication
- Clearance through Senior Civil Servants
- Ministerial agreement
- Liaison with DWP Parliamentary to publish through House of Commons library
- Transfer of files to Parliamentary via Sharepoint
- Publication

48. Without the publication strategy in place, much of this work would be required on an ad hoc basis as and when requests for disclosure came in, particularly if the requested information relates to live issues which are more likely to require redaction. This has the potential to be inefficient and result in a diversion of resources. Following the publication strategy means

that much of the administrative burden is removed because it allows the documents to be prepared in batches at regular intervals. Because of the two-year deferral of publication, documents tend not to require such a granular review as my colleagues know that only a small quantity of information will need redaction.

42. As a result of this strategy, he confirmed that when FOIA requests are received, although they would be looked at, the usual response would be to rely on s22 FOIA as in his experience a very large proportion of the documentation would be published even if FOIA exemptions would apply at the time of the requests.

43. Mr Couling referred to his statement at paragraph 22 which explained the working of the Prime Minister Information Unit (PMIU) and its work: -

22. The PMIU was established in 2012, sitting within the Cabinet Office. It worked to an agenda set on a quarterly basis by the Prime Minister and Deputy Prime Minister. Its main work was to undertake “deep dives” – a six-to-eight-week process which aimed to report on complex implementation issues across government to offer different perspectives and advice to those responsible for implementation. It was dissolved in 2021 and replaced by the Prime Minister’s Delivery Unit, which now sits within No 10.

44. In relation to the public interest issue, Mr Couling spoke at some length about the need for a safe space for discussions on the implementation of UC, especially in relation to documents which described a deep-dive into the process. These included paper 7b and selected parts of Paper 7a. He said this in his statement: -

63. Central government officials who previously worked in the PMIU have objected to the disclosure of Paper 7b and selected parts of Paper 7a.

64. They have advised that the PMIU did not routinely publish deep dive reports and that it is their view that releasing this type of report, or information about its content, would be likely to have a chilling effect on the willingness of operational arms of government to flag issues and proactively raise situations in which they are unable to deliver. This in turn would limit the government’s ability to address delivery issues. They have further advised that releasing this information would harm the trust on which central policy/delivery teams rely on to honestly and accurately advise the Prime

Minister and other Ministers. The deep dive process relies on the cooperation of wider government in collecting data, as well as the free and frank views of those on the front line of delivery. They believe that a commitment to confidentiality is essential to the review process and to identifying the root cause of delivery issues.

65. I agree with that assessment. By design, the deep dive process selects complex projects with delivery challenges that are a high priority for the government. Therefore deep dives require a safe space in which departments can candidly discuss sensitive and high profile matters with central government policy/delivery teams. Without that safe space, officials would likely be more cautious about flagging risk and proactively raise difficult situations. This would undermine the effectiveness of deep dives and therefore the effectiveness of government and the delivery of vital government projects. It is noticeable that since this FOI request No. 10 has not proposed any further scrutiny of Universal Credit by the PMIU's successor (PMDU).

66. The Disputed Information within scope of RFI1 relates to vulnerable claimants and it is clear that they contain a number of candid expressions of opinion, which are important for central government to hear. However, if this information was released into the public domain in an uncontrolled way, it would be likely to lead to public confusion and unfair criticism of the Universal Credit programme.

67.By design, the deep dive process selects complex projects with delivery challenges that are a high priority for the government. Therefore deep dives require a safe space in which departments can candidly discuss sensitive and high profile matters with central government policy/delivery teams. Without that safe space, officials would likely be more cautious about flagging risk and proactively raise difficult situations. This would undermine the effectiveness of deep dives and therefore the effectiveness of government and the delivery of vital government projects. It is noticeable that since this FOI request No. 10 has not proposed any further scrutiny of Universal Credit by the PMIU's successor (PMDU).

45. Mr Couling said it was important that officials could be frank with him about the implementation of UC without thinking that their views might be represented in the media and themselves identified. He did not want his officials to be careful about what they said, they were there to provide frank advice and not to become part of what he called 'the political waft'. He wanted staff to feel confident to be able to provide advice. Without this safe space a fortress mentality could develop.

46. There was a closed session in this case and the gist from that hearing is included at Annex A. In relation to Mr Couling's evidence the gist records as follows: -

Counsel for the Commissioner asked Mr Couling questions concerning:

- the documents falling within the scope of RFI3, which are being withheld on the basis of s.22; One of the main themes from Mr Couling was that the majority of any exemptions which may be applicable would fall away by the time of publication and
- the specific public interest factors relied upon by DWP in relation to the documents falling within the scope of RFI1 and RFI3, including the three documents provided to the Tribunal this morning. One of Mr Couling's main concerns was in preserving a safe space for free and frank discussions.

Counsel for DWP asked Mr Couling a small number of questions in re-examination concerning the public interest factors.

47. DWP's arguments in relation to the application of the public interest test for the purposes of s35(1)(a) FOIA are set out in the skeleton argument for the appeal as amplified in oral submissions by Mr West. These arguments relate to the information within the 2021 Meeting Papers which is concerned with the Department's 'Move to UC' strategy.

48. DWP argue that the Move to UC strategy was (as the Commissioner found in the decision notice) still under development at the time of the request. This is a sensitive process, as Mr Couling explained, because the migration of often vulnerable claimants requires very careful handling, both in terms of providing transitional protection and communication. Therefore, it is argued that there is a strong public interest in not constraining the Department's ability to test a variety of options and gather evidence to support the adoption of the optimum approach to transfer customers to Universal Credit. A public debate about the detail of the process used to move the large numbers of vulnerable customers from legacy benefits to UC would constitute such a constraint. There is, additionally, a significant public interest in the strategy working effectively given that it impacts upon vulnerable people.

49. Further, there is currently a significant volume of information already in the public domain, much of it made available proactively by the Department, which contributes to public understanding and scrutiny of the 'Move to UC' strategy. As the 2021

Meeting Papers are concerned with operational – rather than policy – matters they are therefore of less significance in scrutinising a high-profile and controversial policy than the Commissioner assumed in paragraph 101 in the first decision notice (see above). In particular, it is said that the Commissioner was wrong to uncritically rely on the evidence produced by Mr Slater (paras 83-92 and 99, DN1 (see above)) which were of little relevance to the public interest in disclosure of the 2021 Meeting Papers.

50. Moreover, it is argued that the majority of this information can reasonably be expected to be published in any event, in accordance with the public strategy, which tends to reduce the strength of the public interest in favour of disclosure at this time.

51. In relation to the public interest test for the purpose of s36(2)(b)(i) and s36(2)(c) FOIA, DWP notes that this relates to the balance of the information within the 2021 Meeting Papers (to which section 35(1)(a) did not apply) and to Paper 7a and Paper 7b.

52. In relation to the 2021 Meeting Papers, the DWP submitted that the Commissioner reached the wrong outcome on his application of the public interest test given the high-profile of Universal Credit, it was reasonable for the Department to argue that there was a likely risk of information and advice provided to the UCPB being sanitised, to the detriment of the UCPB's ability to monitor the delivery of Universal Credit. For instance, the Department highlighted – and the Commissioner appeared to accept (paragraph 154, DN1) – the potential for “optimism bias” which could mean that an inaccurate portrayal of project progress was presented.

53. Further, the disclosure of detailed metrics, such as those contained in the “Programme Dashboards”, would not provide useful insight into the delivery of Universal Credit. As Mr Couling explained in his evidence, there would be a significant risk of misreporting – and therefore public misunderstanding of – the content of these internal documents.

54. In relation to Paper 7a and Paper 7b, DWP again submitted that the Commissioner reached the wrong outcome on his application of the public interest test as “deep dive” reports issued by the PMIU were not routinely put into the public domain and

therefore releasing this type of report, or information about its content, would be likely to have a chilling effect on the willingness of operational arms of government to flag issues and proactively raise situations in which they are unable to deliver.

55. It is said that there was and would be a chilling effect on the reporting of delivery issues which would limit the government's ability to address those issues. DWP argued that the free and frank exchange of views from those on the front line of delivery, as well as policy and delivery teams, is essential to the deep dive process. A commitment to confidentiality is central to ensuring the effectiveness of the review process and to identifying the root cause of delivery issues. By their nature, deep dives concern complex projects with delivery challenges that are a high priority for the Government. Therefore, this context in particular requires a safe space for candid discussions internally.

56. After considering oral and written evidence, the position of the Commissioner is largely to support the position set out in DN1 and to wholly support the position in DN2 and DN3.

57. However, after hearing the evidence, the Commissioner considered his position and produced a further closed note in which he confirmed that for two documents falling within RFI3 and covered by DN1, he now accepted that they should indeed be withheld applying the public interest test consequent on finding that s36 FOIA applied. These documents are considered further in the Closed Annex to this decision.

58. Mr Slater made written submissions which supported the upholding of the decision in his case (DN1) and the arguments made by the Commissioner.

DISCUSSION

Section 22

59. It seems to us that that the key words in s22 FOIA which give rise to a difference of approach between the parties are the words 'with a view to its publication'. On the

one hand the Commissioner argues that when seen in the context of s22(1)(a) FOIA as a whole, these words essentially mean there must be a fixed intention that the actual information requested will be published at some point in the future, whereas the DWP argues that the words amount to more of an aspiration which fits in with its publication policy: it is hoped and expected that by the time of publication, there will be no need to apply any exemptions to the information (or the vast majority of it) even if at the time of the request those exemptions might be applicable.

60. We have been referred to a number of first-tier tribunal decisions which have interpreted the words in s22(1)(a) (and (b)) as meaning that there must be an ‘intention’ or a ‘clear and settled intention to publish the information (at the time of the request).
61. DWP point out that the Cambridge Dictionary defines this idiom (‘with a view to’) as meaning ‘with the aim of doing something’. The Oxford English Dictionary provides a similar definition: ‘With the aim or object of; with the intention to’. DWP state that therefore, applying the ordinary meaning of this statutory phrase, it requires that the authority is aiming to, or intends to, publish the requested information, and that any requirement for a ‘settled’ intention is a gloss on both the statutory language and ordinary meaning of “with a view to”.
62. It seems to us that we do not need to engage in a debate as to whether ‘with a view to’ means more or less than an actual (or settled) intention to publish.
63. The ‘information’ referred to in s22(1)(a) and (b) FOIA must, in context, be the information requested for disclosure (for example, paper 7a or 7b). It is that information which must be ‘held’ with a view to ‘its’ publication, and it is that information which must be ‘already held with a view to such publication’ at the time of the request.
64. In his witness statement and in his oral evidence, Mr Couling candidly accepted that it was not until close to the date of actual publication that it was possible to say whether and what exemptions would be applied to the information before publication occurred. Thus, in a publication scheme such as that of the DWP (where a period of about two years is expected to elapse before publication) it would not be until

towards the end of that two year period that an actual decision on publication would be made. In his witness statement at paragraph 48 (see above) and in evidence, Mr Couling explained the various stages which were applied before a publication decision was made. As well as a review and discussion with senior civil servants, the process also includes ‘submission to minister to approve publication and clearance through Senior Civil Servants’.

65. Taking the process as a whole, we do not see how it can be said that, at the time of the request, the information is held ‘with a view to its publication’ because it simply cannot be said at that time whether the information will be published or not – the stage has not been reached where it can be said that publication is ‘intended’ or even ‘expected’ or that there is an ‘aim’ to publish. That stage and the decision on publication will come much further down the line and close to the date of publication.
66. In essence, we accept the Commissioner’s submissions on this issue, and that as a matter of statutory interpretation there is no room to imply a further caveat into s22 FOIA (there are already caveats as to the identity of the publisher and time of publication), which means the information is held with a view to its publication ‘unless a further exemption under FOIA applies’.
67. Section 22(1)(b) FOIA provides an additional hurdle for DWP. Not only must the information be held with a view to its publication, this must also have been the case at the time of the request. It seems to us that the intention behind s22(1)(b) FOIA is to prevent a public authority making a decision that information is to be published at some point in the future *after* a request has been received, such that responding to the request is effectively artificially postponed.
68. The fact that DWP already had a publication scheme at the time of the request means that s22(1)(b) FOIA is less relevant in the present case. But, contrary to the argument of the DWP, simply because there is a publication strategy in place at the time of the request, does not necessarily mean that the requirements in s22(1)(a) FOIA are met, if that scheme is so vague (as we have found) as to make it impossible to say that the information requested is held ‘with a view to its publication’.

69. DWP should be applauded for having a publication scheme and recognising the importance of transparency and accountability in doing so. However, the current publication scheme, in our view, where actual decisions might be taken about publication months or years after a request is made, does not meet the requirements for s22 FOIA to apply.

70. As the Tribunal has found that s22 FOIA does not apply to the withheld information, we have not gone on to consider whether the public interest favours or disfavors disclosure for the purposes of that section.

S35(1)(a) FOIA – Public interest

71. As a recap, in what is described above as RFI3 Mr Slater requested UCPB papers ‘covering the period 01 January 2021 to 31 August 2021’. At the time of RFI3, these papers had not yet been deposited in the House of Commons Library (although some of the relevant papers were made public on 20 April 2023). Ground 3 of DFW’s appeal is that the Commissioner unlawfully applied the public interest balancing test with regard to s.35(1)(a) insofar as RFI3 is concerned, and we have set out the detailed arguments for this above (and also see the excerpts from DN1 set out above). It is accepted that the exemption in s35(1)(a) FOIA applies to this material and therefore, unless the public interest favours disclosure, the information is exempt information because it relates to ‘the formulation or development of government policy’.

72. DWP’s case as set out above is that disclosure of the sensitive ‘Move to UC’ strategy while it was still under development (at the time of the request), would lead to a public debate which would constrain the testing of options and the gathering of evidence and may have an adverse effect on the vulnerable people the strategy was meant to serve. DWP argues that the material withheld dealt mostly with operational matters and a lot of material is already in the public domain. DWP say that the Commissioner was wrong to put so much weight on the evidence from Mr Slater in paragraphs 83-92 and 99 of DN1, as this evidence has little impact on what has been

withheld and the benefit in disclosure. Most of the information will be published in due course in any event.

73. Like the Commissioner, we accept that significant weight should be given to the approach that the government needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction – where the policy making is live and the requested information relates to that policy making, and this must be the case in relation to a large scale project such as the implantation of UC. However, we also accept that there is considerable weight in the public knowing about the activities of DWP and UC, and there has been considerable interest and trenchant criticism (as set out in DN1) as to how UC has been implemented. Although Mr Couling criticises the reliance of the Commissioner on this material, and the failure as he says to recognise positive coverage of the policy, in our view the material relied upon by the Commissioner does underline just how important it is to the public that DWP has disclosed the fullest information possible under the auspices of FOIA, for the debate to be as best informed as it can be.
74. As the Commissioner says, DWP recognised (as it was bound to do) that transparency in policy leads to greater public understanding of the process and informs the public debate. It is in the public interest that development of the ‘Move to Universal Credit’ policy includes detailed consideration of the challenging task of moving legacy benefit customers over to Universal Credit in the most effective and customer friendly way and that the Universal Credit Programme demonstrates that a variety of potential policies have been explored.
75. Ultimately, as the move to UC (and the benefit payments involved) is about such a large amount of public money, and of importance to 6.5 million households (and many vulnerable people), the Tribunal agrees with the Commissioner that for the public interest in withholding the information to prevail the strongest justification is necessary. As Mr Couling says in his witness statement ‘20% of working-age individuals will receive Universal Credit by the time the Move to UC process has concluded’. We note all the points raised by the DWP and we are sure that it has a strong preference, for good reasons, for the material not to be disclosed. But we agree with the Commissioner that the public ‘is entitled to be well informed as to the

reasoning behind policy decisions which are likely to shape British society. Disclosure of this information would allow the public insight into the decision-making process and an understanding of the decisions made and challenges overcome’.

Section 36(2)(b) and (c) FOIA – public interest

76. By way of recap in RF1 Mr Slater requested unredacted copies of two papers which had been included in the agenda of the UCPB meeting on 22 October 2019. These were a paper entitled ‘How Effective is Support’ (Paper 7a); and a report of the Prime Minister’s Implementation Unit (PMIU) titled ‘How effective is support for vulnerable Universal Credit claimants’ (Paper 7b). Mr Couling describes Paper 7b as a ‘deep dive’ to better understand the claimant experience ‘with a focus on vulnerable groups’ ..
77. Paper 7a and Paper 7b fell within the batch of UCPB papers deposited in the House of Commons Library on 28 October 2021. However, as described by Mr Couling ‘the majority of the ‘summary’ section of Paper 7a was redacted under section 36 of FOIA. The entirety of Paper 7b was withheld under the same section’.
78. As already described in RFI3 Mr Slater requested UCPB papers ‘covering the period 01 January 2021 to 31 August 2021’ which had not already been deposited in the House of Commons Library. In relation to the public interest test for the purpose of s36(2)(b)(i)(ii) and s36(2)(c) FOIA, DWP notes that this relates to the balance of the information within the 2021 Meeting Papers (to which section 35(1)(a) did not apply)
79. The Commissioner accepted that s.36(2)(b)(i) and s.36(2)(b)(ii) FOIA were engaged with regard to RFI1 and RFI3. The Commissioner further accepted that s.36(2)(c) FOIA was engaged in respect of RFI3. Therefore, unless the public interest favours disclosure, the information requested in RFI1 and RFI3 is exempt information because in the reasonable opinion of a qualified person, disclosure of the information under this would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation;

or would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs (RFI3 only).

80. In relation to the 2021 Meeting Papers, the DWP argued that given the high-level profile of Universal Credit, there was a likely risk of information and advice provided by officials to the UCPB being sanitised, if it was thought that the information would or could be disclosed under FOIA, and the Commissioner was wrong to find otherwise. DWP was of the view that the disclosure of detailed metrics, such as those contained in the 'Programme Dashboards', would not provide useful insight into the delivery of Universal Credit, and there would be a significant risk of misreporting – and therefore public misunderstanding of – the content of these internal documents.

81. DWP recognised that transparency in the way in which government operates, and increased accountability of Ministers and public officials, increases public trust in the governmental processes. In particular, there is a public interest in understanding the effectiveness with which government works and the successful delivery of key projects and programmes to time, scope and budget. DWP recognised a public interest in the governance of major government programmes being transparent. We note that the information withheld under section 36 FOIA in RFI3 provides a much greater and up-to-date insight than the information already available about the UC programme. There are strong arguments for transparency and accountability for a programme which may affect millions of UK citizens and process billions of pounds. The minutes and reports go beyond what is already available in the public domain and provide useful information about the UC programme, which allows for greater transparency into the workings of the programme and greater understanding of the difficulties that are encountered.

82. In relation to Paper 7a and Paper 7b, DWP said that 'deep dive' reports issued by the PMIU were not routinely put into the public domain and therefore releasing this type of report, or information about its content, would be likely to have a chilling effect on the willingness of operational arms of government to flag issues and proactively raise situations in which they are unable to deliver. The free and frank exchange of views from those on the front line of delivery, as well as policy and delivery teams,

is essential to the deep dive process. A commitment to confidentiality is central to ensuring the effectiveness of the review process and to identifying the root cause of delivery issues.

83. The Tribunal recognises the strength of these arguments, and also the view of the Qualified Person(s) in relation to the section 36 FOIA exemption (we accept, as did the Commissioner that both opinions were reasonable), which must be given weight in the process of considering the public interest for and against disclosure.

84. Many of the same arguments which we have expressed in relation to the strength of the public interest in disclosure in relation to s35 FOIA also apply here.

85. In relation to the ‘chilling effect’ arguments, we understand the fears that civil servants may be reluctant to provide full and robust advice if it is thought that this may be disclosed under FOIA. Civil servants and other public officials should not be easily deterred from expressing their views by the possibility of future disclosure. In any event, there can never be a guarantee that the public interest in disclosure will not outweigh these concerns in particular cases, and in our view, for the reasons set out in relation to the public interest and s35, FOIA, this is one of those cases. As the Commissioner says, there is a strong public interest in disclosing these findings and recommendations to allow scrutiny of the quality of the research and report and whether, two years following the report, any progress on the recommendations had been made. The same applies to the material covered by RFI3, even if that material was more recently produced.

86. In line with the Commissioner, we do not accept DWP’s argument that disclosure of dashboard metrics could be used to misrepresent the progress of the UC Programme. The Commissioner notes that he does not accept arguments that information may be misunderstood or misinterpreted by the public. DWP would have the opportunity at the point of disclosure to put the withheld information into context.

87. We have seen the withheld material in RFI1 and RFI3. We agree with the Commissioner that a significant proportion of it includes fairly high level recommendations, overall findings and factual statements which are not attributable

to any individual. It does not seem to us likely that disclosure of this information would cause officials to provide lower quality advice in future.

88. We agree with the Commissioner ‘that a small amount of the withheld information would be likely to cause a chilling effect as it names individuals, directly quotes contributors and gives case studies related to specific job centres’. This information is set out in Part B of the confidential annex to DN1, and we agree that the public interest in preventing this prejudice is sufficient to outweigh the strong public interest in disclosure.

Additional issues

89. Ground 2 in Appeal 1 relates to s.31(1)(a) FOIA. DWP argues that paragraph 59 of DN1 is ‘based on an incorrect premise’. In his Response, the Commissioner has conceded that he erred due to a misunderstanding relating to the colour coding used in the disputed information: see paragraph 34]. Therefore, the Commissioner has invited the Tribunal to substitute DN1 to the following limited extent: striking out the whole of paragraphs 56 and 58 and the first 15 words of paragraph 61. We agree with this submission and the passages to be struck out are as follows:-

56. Having reviewed the information withheld under section 31(1)(a), the Commissioner notes that it is not restricted to information held within the Fraud and Error update as set out by DWP. DWP has also withheld some individuals’ names, stakeholder comments on Universal Credit and information referring to its fraud and error measures.

...

58. The Commissioner next considered whether the prejudice being claimed is “real, actual or of substance”, not trivial and whether there is a causal link between disclosure and the prejudice claimed. In relation to the information identified within the Fraud and Error update and the information that directly references the counter-fraud measures taken by DWP, the Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant and he accepts that it is plausible to argue that there is a causal link between disclosure of the disputed information and the prejudice occurring. The prejudice in this case would be to DWP’s ability to prevent and detect fraudulent activity within its systems and claims. There is a clear causal link between the disclosure of the specified withheld information and an increased risk of fraud.

61. With the exception of the information set out in part A of the confidential annex...

90. The Tribunal also accepts the Commissioner's view, formulated after the hearing the evidence that in relation to two documents covered in RFI3, and referred to in the CLOSED annex to this decision, the public interest (considered for the purpose of s36 FOIA is in fact in favour of non-disclosure, and these documents can be excluded from the information disclosed by DWP.

91. Thus, to the extent only as explained above the appeal against DN1 is upheld.

DN2 and DN3

92. As set out above the issues in DN2 and DN3 and the appeals in those cases, overlap with the decisions made in DN1 in relation to RFI3. The Tribunal applies the reasoning set out above in relation to RFI3 (which is to uphold the decisions made by the Commissioner in relation to disclosure) and the appeals in these cases are dismissed.

CONCLUSION

93. To the extent discussed above, this appeal is allowed in relation to DN1. A substituted decision notice is issued. The contents of the original decision notice will stand, save that, as described above, the whole of paragraphs 56 and 58 and the first 15 words of paragraph 61 will be struck out. In addition, as explained in the closed annex to this decision, the public interest is in favour of not disclosing the two documents referred to therein.

94. No substituted decision notice is issued in relation to DN2 and DN3, and the appeal in each of those cases is dismissed.

Recorder Stephen Cragg KC

Sitting as Judge of the First-tier Tribunal

Date: 5 October 2023