

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2019

Public Authority: Department for Work and Pensions (DWP)

Address: 4th Floor
Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested, from the DWP, the “packs of information” provided to the Universal Credit programme board members for April, May and June 2017.
2. The DWP relies on sections 43 (commercial interests), 35 (formulation of government policy), 40(2) (personal data) and 31 (the prevention or detection of crime) to withhold some of the requested information.
3. The Commissioner’s decision is that DWP incorrectly relied on sections 43, 35, but correctly relied on section 31, to withhold requested information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Release the information that it had relied on sections 43 and 35 to withhold from the complainant.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. On 5 October 2010 the Secretary of State for Work and Pensions, the Rt Hon Iain Duncan Smith, announced the introduction of a Universal Credit designed to simplify the then benefit system and improve work incentives. The Universal Credit aimed to simplify the benefits system by moving from the then current benefit structure to a simple streamlined payment. People's benefits will also be withdrawn at one unified rate. The plan was to migrate recipients from their current benefits and tax credits systems onto the Universal Credit starting in 2013 and finishing in the next Parliament¹.
7. The DWP set out its plans for UC in a November 2010 white paper. That document envisaged completing rollout to around eight million households by October 2017².
8. The Universal Credit Programme Board acts as the programme's main oversight and decision-making body. The main purpose of the UC Programme Board is to provide advice and support to the Universal Credit Director General, who is accountable for the delivery of Universal Credit.
9. The Board has collective responsibility to:
 - Maintain an overview of the plan to deliver UC including the scope (the requirement), financials (budget and approvals) and the approach and activities to ensure the plan is delivered.
 - Maintain an overview of the systems of programme control and governance including change control, risk management and stakeholder engagement.
 - Take receipt of agreed programme reporting which provides visibility of achieved and predicted progress against the plan, including all work strands, and satisfy themselves of its accuracy and robustness.

Request and response

10. On 19 July 2017, the complainant made the following request for information , of the DWP under the FOIA ,by saying as follows:
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¹ <https://www.gov.uk/government/news/universal-credit-introduced>

² DWP, Universal Credit: welfare that works, Cm 7957, November 2010, p37

"In its response dated 25 April 2017 (FOI ref: FoI 5067, ICO reference – FS50637830) the Department referred to 3 activity streams in respect of the management of the Universal Credit programme ("UC"):

- Governance and Project Management
- Transformation and Planning
- UC Product Development

Request 1 - Please confirm if these constitute all of the activity streams for UC? If there are more than these 3 activity streams please disclose what they are called and their scope?

Request 2 – Who sits on the UC Programme Board and how frequently does it meet?

Request 3 – Please disclose the "pack of information" provided to the UC programme board members for the 3 most recent UC programme board meetings. If available also include any presentations made to the board or documents handed to the board "on the day".

11. The DWP responded on 16 August 2017. It stated that whilst it held the requested information it relied on section 36 (2) (b) and (c) (prejudice to the effective conduct of public affairs) not to provide some of it to the complainant. However, it went on to say, that it needed more time to consider the public interest test. On 3 January 2018, the DWP informed the complainant that it found that the test favoured maintaining the exemption.
12. On 3 August 2018, the DWP informed the Commissioner that it had revised its position. It was to, in autumn 2018, place in the House of Commons Library the requested information save that some information would continue to be withheld.
13. On 1 November 2018 the DWP deposited³ with the House of Commons Library, Universal Credit Programme Board redacted papers (42 documents), dated May 2017, June 2017 and July 2017 and a letter committing to deposit future UC Programme Board papers after two years.

³ https://www.parliament.uk/business/publications/business-papers/commons/deposited-papers/?fd=2018-11-01&td=2018-11-01&search_term=Department+for+Work+and+Pensions&itemId=119004#toggle-1083

14. The DWP then relied on sections 43 (commercial interests) and 35 (formulation of government policy) to make redactions referred to above.

Scope of the case

15. The complainant contacted the Commissioner 9 January 2018 to complain about the way his request for information had been substantively handled, though he did (and does) not complain about the DWP'S reliance on section 40(2) to withhold third party personal data.
16. On the 1 February 2019 the DWP confirmed to the Commissioner that it relied on 43, 35 and 31 to withhold requested information.
17. The Commissioner considers that she has to determine whether the DWP can continue to withhold requested information by relying on sections 43 (commercial interests), 35 (formulation of government policy) and 31 (the prevention or detection of crime).

Reasons for decision

S.43 – Commercial Interests

18. The DWP relies on section 43 to withhold requested information in the following documents deposited in the House Of Commons Library:

May 2017 Programme Board

Paper 1 – Minutes (April 2017)

Paper 8 – Closed Action Points

June 2017 Programme Board

Paper 1 – Minutes (May 2017)

Paper 7 – Programme Decisions Log

Paper 8 – Closed Action Points (page 6)

July 2017 Programme Board

Paper 3 – Programme Progress

Paper 7 – Integrated Programme Decisions Log

Paper 8 – Closed Action Points (page 6);

Paper 10 – Key Case Progression Decisions

19. Section 43(2) of the Act states that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)”.

20. For the purposes of the Commissioner’s decision, a commercial interest relates to a person’s ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.

21. In order for the Commissioner to be persuaded that disclosure would, or would be likely to, prejudice the commercial interests of any person – and therefore for section 43(2) to be engaged – she considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would or would be likely to occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;
- and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority to discharge.

22. Section 43(2) is a qualified exemption as per section 2(2) (b) of the Act. Should the Commissioner find that section 43(2) is engaged she will go on to consider whether the balance of the public interest favours maintaining the exemption, or whether it supports disclosure of the requested information.

23. In order for the Commissioner to evaluate DWP reliance on section 43 the Commissioner asked it a number of probative questions⁴. The questions asked are detailed below.

- Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.
- Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests.
- Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur.
- If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner (EA/2006/0014)*, the ICO does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. Therefore, please clarify on what basis you have established that disclosure of a third party's interests may occur and please provide copies of correspondence the DWP has had with third parties in relation to this request.
- If the information concerns a tendering process, provide a copy of the Invitation to Tender (where appropriate), details of when the tendering process was complete or details of what stage the tendering process had reached when the request for information was made. Please also provide details of when the tendering process is likely to be completed

24. The DWP replied as follows ,

- We have made a number of redactions using Section 43 (2). We have taken the view that any mention of commercial partners in

⁴ Letter, 11 January 2019

these documents could potentially lead to prejudice to third party commercial interests.

25. Taking into account the DWP submissions (given their paucity) and viewing the withheld information the Commissioner cannot find that releasing it would be likely to prejudice the commercial interests of a third party.

Section 35(1) (a) - Formulation of government policy;

26. The DWP relies on section 35 to withhold information contained in the following documents as deposited in the House of Commons Library:

May 2017 Programme Board

Paper 11 – Update on Security Risk Register

June 2017 Programme Board

Paper 7 – Programme Decisions Log

July 2017 Programme Board

Paper 7 – Integrated Programme Decisions Log

27. Section 35(1)(a) states:

‘Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy’.

28. Section 35(1)(a) is a class-based exemption, which means that there is no requirement to show any harm in order to engage the exemption.

29. The information simply has to fall within the class described. The term ‘relates to’ can be interpreted broadly (DfES v Information Commissioner & the Evening Standard [EA/2006/0006, 19 February 2007]). The timing of the request is not relevant – the question is whether the information relates to the activity, irrespective of when the request was made. The activity does not have to be the sole or even the main focus of the requested information, as long as it is one significant element of it.

30. In order for the Commissioner to evaluate DWP reliance on section 35 the Commissioner ask it a number of probative questions⁵. The questions asked are detailed below

- Please clarify exactly which government policy or policies the DWP considers this information to relate to.
- The Information Tribunal has made it clear that in cases where section 35(1) (a) applies, central to the consideration of the public interest test is the timing of any request. This is because once the formulation/development of a policy has been made completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced and so the public interest in maintaining the exemption deserves less weight. (See for example: DFES v Information Commissioner, EA/2006/0006, paragraph 75). Furthermore, the Tribunal has made it clear that policy formulation and development is not one which is a 'seamless web', i.e. a policy cycle in which a policy is formulated following which any information on its implementation is fed into the further development of that policy or the formulation of a new policy.
- It is therefore necessary for the ICO to be able to identify when the policy formulation/development stage to which the withheld information relates ended and the implementation of this policy began. Therefore, please explain when the DWP considers the formulation/development of the policy or policies to which this information relates to have been completed, or indeed confirm why the DWP considers the formulation/development of this particular policy (or polices) to have been ongoing at the time the complainant submitted his request.
- If a decision in relation to the relevant policy has been taken, in line with the requirements of section 35(2) please confirm that any statistical information has not been withheld on the basis of section 35(1)(a).

Public interest test

- In order to determine whether the public interest test have been applied appropriately, the ICO will require answers to the following questions:

⁵ Letter, 11 January 2019

- What public interest arguments in favour of disclosing the information were taken into account?
- What public interest arguments in favour of maintaining the exemption is held were taken into account?
- Please explain why you consider that on balance the public interest in maintaining the exemption outweighs that in disclosing of the withheld information. Please include details of any particular weighting exercise that has been carried out.
- Please ensure that your submissions focus on the content of the information that has actually been withheld rather than simply being generic public interest arguments.

31. The DWP explained that it had applied section 35(1) (a) to sections of the document relating to a number of policy related text as laid out below.

.Policy	Policy formulation stage	Legislation	Implementation
Transitional Protection	Ongoing	In place	pending
18-21 year olds	Complete	In place	ongoing
Managed Migration	Ongoing	In place	pending
Live to digital transfers	Complete	In place	ongoing

32. The Commissioner is satisfied (having viewed the same) that the "section 35(1) (a) withheld information" relates to the development of government policy in relation to the DWP specified areas above.
33. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. Section 35(1)(a) is a qualified exemption, so that, even though the exemption is engaged, the information must nevertheless be disclosed if the public interest in maintaining the exemption does not outweigh that in disclosure.
34. Despite being asked the DWP did not provide the Commissioner with any submissions on the applicability of the public interest test in the context of this exemption. The Commissioner notes there are enduring public interest arguments that favour releasing information. They being the public interest in promoting government transparency and accountability. Additionally, openness will generally allow for more informed debate and increase trust in the quality of policy decision making. However the Commissioner is not able, in the absence of assistance from the DWP, to discern any specific public interest (aside from those inherent in the exemption) arguments in favour of maintaining

the exemption. Accordingly the Commissioner finds that the public interest favours releasing the information.

35. S31 (1) (a) Exemption

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the prevention or detection of crime;

36. The DWP submissions regarding its reliance on section 31 (1) (a) are laid out in paragraphs 37 to 40 below.

Paper L – May 2017

37. The withheld information in Paper L (May 2017) contains an update for the Universal Credit Programme Board on the top security risks to the Programme, specifically the top 5 system vulnerabilities and the steps the Programme is putting in place to address these.

38. Releasing the information required will contain details of identified actual and potential risks in the Universal Credit system and the mitigations being implemented. This may enable a potential threat actor to target the DWP specific identified areas of concern within it. As the Universal Credit system is designed for the assessment and payment of benefits and to work alongside wider government IT systems, this may in turn lead to false claims to benefit being made or payments being inappropriately diverted to fund criminal activity or the cessation of revenue being collected by HMRC.

Paper D – July 2017

39. The redacted information from paper D from the July meeting, was designed to document the Senior Responsible Owners acceptance of the security risks in advance of the October scaling event. The redacted information sets out the specific security risks to the Programme at this point.

40. As above, the DWP believes that the correct threshold of disclosure of this publication is that it would be likely to have a prejudicial effect under section 31 (1) (a).

41. Having considered the DWP submissions and viewed the withheld information the Commissioner accepts that the likelihood of the information in question in this case leading to such a prejudice (i.e. the prevention or detection of crime) is substantially more than remote, and that the identified prejudice is real actual and of substance.

42. Accordingly the Commissioner finds the exemption engaged; section 31(a) is a qualified exemption and is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'.
43. The DWP submissions regarding the public interest test were as follows
 - Whilst there may be a genuine interest from the public that DWP has systems in place to identify and mitigate risks, it is not in the public interest for the information about these risks to be in the public domain as this may enable a perpetrator to attack and attempt to penetrate its IT systems.
 - Its considered view is that providing details of the potential and identified risks with the UC system, which DWP holds about its IT systems, may enable a potential perpetrator to try and affect the way that they work, again this not in the public interest.
44. The Commissioner accepts that there is a public interest in being able to assess the extent and robustness of the DWP approach to, and application of, cyber security.
45. However, in the circumstances, she considers that there is a more significant public interest in maintaining the exemption. There is a significant public interest, in her view, in withholding information that would pose a real and significant risk to the integrity of the public authority's IT system and consequently the information that it holds. There is also a strong public interest in withholding information that would otherwise prejudice the prevention or detection of crime.
46. She has therefore concluded that in all the circumstances the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. The public authority was entitled to rely on the exemption at section 31(1) (a).

Other matters

47. The Commissioner reiterates that it is incumbent on a public authority to provide her with its comprehensive and detailed submissions to substantiate its reliance on exemptions not to meet its duty to provide a complainant with the requested information it holds. In this particular matter the DWP has repeatedly failed to provide such comprehensive and detailed submissions when asked to do so by the Commissioner. In the absence of such submissions the Commissioner cannot usually "fill in" or unfairly surmise for the benefit of a public authority.

Right of appeal

48. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Gerrard Tracey
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