

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2022

Public Authority: Department for Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested a copy of a report prepared by the Prime Minister's Implementation Unit (PMIU) for the Department for Work and Pensions (DWP).
2. DWP withheld the requested information citing section 36(2)(b) and section 40(2).
3. The Commissioner's decision is that section 36(2)(b) is engaged in relation to the requested information but the balance of the public interest favours disclosure of the majority of the information. The balance of the public interest favours maintaining the exemption for a small amount of the requested information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information with the exception of the information set out in the confidential annex.
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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 11 November 2021, the complainant wrote to DWP and requested information in the following terms:

"Among the papers from the 22 October 2019 meeting of the Universal Credit Programme Board, a report was considered that had been prepared by the Prime Minister's Implementation Unit:

http://data.parliament.uk/DepositedPapers/Files/DEP2021-0836/55H-UCPB_22-10-19-Paper7b-PMIU_Report.pdf

Please provide a copy of that report.

Now that two years have elapsed since the report as considered, the public interest in releasing the report must surely outweigh any risk to the conduct of public affairs.

In the event that DWP believes that parts of the report should still be protected, please provide those parts of the report that would not pose a risk to the conduct of public affairs".

7. DWP provided its response on 7 December 2021 and confirmed that it held the requested information. DWP confirmed that it was withholding the requested information on the basis of section 36(2)(b) and it considered that the balance of the public interest lay in maintaining the exemption. DWP also confirmed that some of the information was exempt under section 40(2) as it relates to personal information about junior civil servants.
8. Following an internal review, DWP upheld this position.

Scope of the case

9. The complainant contacted the Commissioner on 21 January 2022 to complain about the handling of their request for information.
10. The Commissioner considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 36(2)(b)(i), section 36(2)(b)(ii) and section 40(2) to withhold the requested information.

Reasons for decision

Section 36: Prejudice to the effective conduct of public affairs

11. The Commissioner has previously considered DWP's reliance on section 36 in relation to the PMIU report in decision notice IC-145903-X8D9¹. In light of the very similar circumstances of both cases, the Commissioner proposed to DWP that it could rely on the submissions provided in IC-145903-X8D9 in this case. DWP accepted this approach and the Commissioner has therefore based his decision on this previously provided information.
12. Section 36(2) of the Act provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.
13. In order to establish that the exemption has been applied correctly, the Commissioner considers it necessary to;
 - a. ascertain who acted as the qualified person;
 - b. establish that an opinion was given by the person;
 - c. ascertain when the opinion was given; and
 - d. consider whether the opinion was reasonable.
14. DWP provided the Commissioner with the qualified person's opinion and the submission provided to aid this opinion.
15. The submissions and request for opinion was sent on 24 September 2021 and the then Secretary of State for Work and Pensions, Therese Coffey, provided her opinion on 4 October 2021 which essentially confirmed that she agreed with the points set out in the submissions. The Commissioner has inspected the submission and accompanying information provided to the qualified person.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4021931/ic-145903-x8d9.pdf>

16. Section 36(5) of the Act sets out who may act as the qualified person in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the qualified person.
17. The Commissioner is therefore satisfied that the Secretary of State was authorised to act as the qualified person in this case.
18. The Commissioner notes that the Qualified Person's opinion was obtained prior to the request being made on 11 November 2021.
19. Section 36 specifies that information can be withheld where the Qualified Person is of the opinion that disclosure would or would be likely to prejudice the effective conduct of public affairs.
20. Shortly before the complainant submitted their request, DWP published Universal Credit papers in line with its publication schedule. DWP treated this publication in the same way as a request under FOIA. As DWP did not intend to publish the disputed information, it proactively obtained the Qualified Person's opinion and confirmed in the publication its reasoning for not disclosing the disputed information.
21. DWP has relied on the proactively obtained Qualified Person's opinion rather than seeking another opinion following the receipt of the request.
22. In the specific circumstances of this case, the Commissioner is satisfied that section 36 can be engaged on the basis of this opinion. In light of the short period of time between the proactive opinion being sought and the request being made, he accepts that this opinion can be used as evidence of the Qualified Person's opinion on disclosure of the information at the time of the request.
23. In determining whether the exemption is engaged, the Commissioner must nevertheless consider whether the qualified person's opinion was a reasonable one.
24. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

25. DWP confirmed that it was relying on both section 36(2)(b)(i) and section 36(2)(b)(ii).
26. In its submission to the Qualified Person, DWP explained that it had contacted 'Delivery Unit' colleagues² who advised that they do not routinely publish deep dive reports. DWP stated that it was the Delivery Unit's 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 which in turn would limit the Government's ability to address delivery issues.
27. The submissions also set out that the Delivery Unit believe that releasing this information would harm the trust on which the Delivery Unit relies to honestly and accurately advise the Prime Minister and other Ministers. The submission stated that the deep dive process relies on the co-operation of wider government in collecting data, as well as the free and frank views of those on the front line of delivery. The submission explains that a commitment to confidentiality of views is needed as part of the review process. The submission states that both of the above are instrumental in identifying the root cause of delivery issues.
28. The submission advised that the whole of the PMIU report and selected parts of the covering paper should be withheld under section 36(2)(b)(i), the free and frank provision of advice and section 36(2)(b)(ii), the free and frank exchange of views for the purposes of deliberation. The Qualified Person was provided with the withheld information.
29. As set out above, the Commissioner is of the view that in assessing the qualified person's opinion, 'reasonableness' should be given its plain and ordinary meaning. An opinion that a reasonable person in the Qualified Person's position could hold will suffice. The opinion is not rendered unreasonable simply because other people may have come to a different and equally reasonable conclusion.
30. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focussing only on the content of the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order

² The Commissioner notes that the report and covering paper were authored by the Prime Minister's Implementation Unit (PMIU) and understands that this refers to the same team.

to engage the exemption, the information itself does not necessarily have to contain views and advice that are in themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.

31. The Commissioner considers that the nature of the withheld information is largely as would be expected, varying from fairly anodyne information to potential issues and concerns. The Commissioner considers that, in relation to the process of giving advice and having frank discussions, it is not unreasonable to conclude that there is a real and significant risk that officials would be less candid in future when offering similar information should they consider that this information could be disclosed. The severity and extent of the impact this is likely to have on the quality of such advice is, however, another matter. This is not significant in assessing the reasonableness or otherwise of the Qualified Person's opinion in the circumstances of this case. They are, however, relevant in assessing the balance of the public interest which the Commissioner has considered below.
32. Section 36(1) makes clear that section 36 can only be engaged where the information does not also engage section 35³. Having reviewed the information, the Commissioner accepts that the information does not engage section 35 and therefore section 36 can be engaged.
33. The Commissioner considers that section 36(2)(b)(i) and 36(2)(b)(ii) are engaged in relation to the relevant withheld information.

³ Section 35 states:

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

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

Public interest test

34. As mentioned, the exemption is subject to the public interest test set out in section 2(2)(b) of the Act. Therefore, the Commissioner must also consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.
35. DWP acknowledged 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, DWP considers that 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.
36. DWP explained that the release of this report would not serve the public interest. 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.
37. 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.
38. DWP explained that, although there is merit in greater transparency within government, the need to protect the safe space in which the Delivery Unit and its stakeholders can identify and look to improve any operational delivery issues outweighs the public interest in disclosing the material. 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

39. 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.

40. There will always be a general public interest in transparency. In particular, there is a significant public interest in understanding how government projects are implemented, as DWP has acknowledged. However, the Commissioner considers that DWP has failed to acknowledge the strong public interest in disclosure of information relating to the Universal Credit roll out and implementation.
41. 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:
- a. "Universal Credit: What is it and what exactly is wrong with it?" 25 January 2018, The Guardian⁴
 - b. The Trussell Trust has issued several reports, including its analysis of the link between the roll out of Universal Credit and increased foodbank use⁵.
 - c. The Work and Pensions Select Committee report on Universal Credit and 'survival sex'⁶
 - d. "Effects on mental health of a UK welfare reform, Universal Credit: a longitudinal controlled study" Sophie Wickham PhD et al⁷
42. The withheld information is a report 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.
43. 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.

⁴ <https://www.theguardian.com/society/2018/jan/25/universal-credit-benefits-scheme-iain-duncan-smith>

⁵ <https://www.trusselltrust.org/what-we-do/research-advocacy/universal-credit-and-foodbank-use/>

⁶ <https://publications.parliament.uk/pa/cm201919/cmselect/cmworpen/83/8302.htm>

⁷ [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30026-8/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30026-8/fulltext)

44. The Commissioner considers that DWP has failed to provide persuasive public interest arguments in favour of maintaining the exemption.
45. 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.
46. The Commissioner has issued guidance on 'chilling effect' arguments in relation to section 36⁸. 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.
47. 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.
48. The Commissioner notes that, at the time of the request, the report was over two years old.
49. 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.
50. 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.
51. 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 the confidential annex.

⁸ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

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.

52. For the remaining information, the Commissioner considers that, having reviewed the information and in light of DWP's generic public interest arguments, the public interest in maintaining the exemption does not outweigh the strong public interest in disclosure.
53. The Commissioner requires DWP to disclose the report with the exception of the information set out in the confidential annex.
54. The information engaging section 40(2) falls within the information that the Commissioner considers can be withheld under section 36. The Commissioner has not therefore gone on to consider section 40(2) as to do so would be academic.

Right of appeal

55. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

56. 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.
57. 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

Victoria Parkinson
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