

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 March 2023

Public Authority: Department for Work and Pensions
Address: Caxton House
Tothill Street
London

Decision (including any steps ordered)

1. The complainant has requested information about stats and briefings produced relating to three policy areas. The Department for Work and Pensions ("DWP") disclosed some information but stated that further information could not be provided within the cost limit.
2. The Commissioner's decision is that, in respect of part [1] of the request, DWP has breached section 1(1) of FOIA by failing to confirm what information is held within scope of the request. The Commissioner also finds that DWP has not complied with section 17(5) of FOIA as it did not provide the complainant with a refusal notice stating that it was relying on section 12 to refuse the request. Furthermore, the Commissioner finds that, while the provision is not explicitly stated within DWP's responses to both the complainant and Commissioner, DWP has not sufficiently demonstrated that section 12 applies.
3. The Commissioner requires DWP to take the following steps to ensure compliance with the legislation.
 - Issue the complainant with a fresh response to part [1] of the request that does not rely on section 12(1) as a reason for refusal. If DWP believes that exemptions apply, it must provide the complainant with a valid refusal notice that meets the requirements of section 17(3) of FOIA.

4. 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.

Request and response

5. On 28 December 2021, the complainant wrote to DWP and requested information in the following terms:

“Please could you provide all stats and briefings produced between January 2020 and December 2021 relating to the following:

[1]Policy Group Race Action Group

[2]Policy Group talent programme [NAME REDACTED] Policy Group Director leads

[3]Policy Group Corporate Directorate hold on Policy Group recruitment”

6. DWP responded on 25 January 2022. It stated that it did not hold any recorded information within scope of parts [1] and [2] of the request, and provided the complainant with a narrative response to part [2] outside of its obligations under FOIA. DWP provided the complainant with recorded information held within scope of part [3] of the request.
7. On 28 January 2022 the complainant requested an internal review in the following terms:

“I am writing to request an internal review of Department for Work and Pensions's handling of my FOI request 'Policy Group Statistics and briefings'.

Policy Group Race Action Group have an analysis strand, they have produced statistics and used this for slide packs. They have also shared this information at various meetings. Please could you send me this as well as any other information produced for and by the Policy Group Race Action Group.”

8. Following an internal review DWP wrote to the complainant on 22 February 2022. It stated the following:

“We find that the original decision was not correct and as such your

complaint is upheld. The information that you request is therefore partly attached. The reason behind this decision is as follows:

We can confirm that we do not hold any statistics or briefings relating to this group for the period stated. Where we use Human Resources (HR) information, it is sourced from the DWP HR data owner.

However, you may find the following explanation useful. We have provided this outside our obligations under the Freedom of Information Act.

Within DWP's Policy Group there is a Race Action Group that meets to discuss plans for issues facing ethnic minority staff, but there is no dedicated analytical resource. Supporting data for Race Action Groups is sourced via consultation with HR analysts and is provided for HR operational purposes only. The HR analysts produce summaries for all Groups in the department. However, if you ask for specific breakdowns they may be able to resolve your requests.

Specific requests for HR information must be made to the DWP HR data owner, and requests resolved must be compatible with the General Data Protection Regulation and Data Protection Act. Here, your specific requests may well breach the disproportionate cost threshold, owing to the required checks on personal data identifiers.

In particular, the analyses we produce nearly always include percentages based on very small numbers of individuals. This means there is a high risk of any such analysis breaching confidentiality and data protection rules. In turn, this means any release of information would require a considerable amount of time and resource to identify and remove any figures which could breach such rules. This means the work would incur a disproportionate cost.

We are able to provide briefing material produced by the Policy Group Race Action Group. The following documents are attached:

- People SLT 21 08 24 - Deep dive into the Communications theme.
- People SLT 11.1.22 - Deep dive into the Recruitment & Talent theme.
- SLT paper – Introduction to the Race Programme.
- SLT 28.9.21.
- Shadow SLT 21 6 21 Race Programme Update.
- Shadow SLT 21 8 16 Race Programme Update.

The disclosed documents have where appropriate, been redacted to remove information which is exempt under section 40(2) of the Freedom of Information Act 2000, as personal information belonging to an individual other than the requester.

Section 40(2) exempts information in response to a request if it is personal data belonging to an individual other than the requester and it satisfies one of the conditions listed in the legislation. In this case the condition contained in section 40(3A)(a) applies - that disclosure would breach one of the data protection principles, specifically that "Personal data shall be processed lawfully, fairly and in a transparent manner...".

We do not consider that disclosing this information is necessary or justified in order to satisfy your information request and the requirements of the FoI Act. In relation to this request, we consider that there is no strong legitimate interest that would override the prejudice to the rights and freedoms of the data subject.

Personal data are subject to General Data Protection Regulation (GDPR) and the Data Protection Act 2018."

9. On 26 February 2022 the complainant made a further request for internal review. The complainant commented that the information requested existed in a recorded form and had been disseminated between civil servants. They disputed DWP's claim that the information sought would allow for the identification of individuals based on small numbers, and noted that DWP had elected to neither confirm nor deny whether information was held. Finally, the complainant stated that DWP had not conducted a public interest test in respect of their claims that small numbers would allow for the identification of individuals.
10. On 28 March 2022 DWP responded and maintained its position. It confirmed that the requested data exists, but it was not able to provide it 'because of the disproportionate cost that would be required to ensure compliance with the Data Protection Act (DPA)/GDPR.'

Scope of the case

11. The complainant contacted the Commissioner on 30 March 2022 to complain about the way their request for information had been handled. The complainant outlined their grounds of complaint in the following terms:

"DWP has refused to provide information that it has saved electronically and information that has been shared with staff at all levels of the organisation. They have stated that it would exceed costs to provide it. They have refused to consider public interest test. Publishing the information which relates to the work they are doing to understand the BAME experience and how they are being discriminated against."

12. The Commissioner wrote to the complainant to establish the scope of their complaint. The Commissioner asked the complainant to confirm whether they accepted DWP's responses to parts [2] and [3] of their request, and whether they accepted DWP's reliance on section 40(2) of FOIA to remove personal information from the briefing materials disclosed. The Commissioner explained that he understood the scope of the complaint to be about DWP's handling of part [1] of the request and that he intended to proceed on this basis. As of the date of this notice the complainant had not replied to the Commissioner's correspondence.
13. The Commissioner considers that the scope of his investigation is to determine whether DWP's response to part [1] of the request is compliant with FOIA.

Reasons for decision

14. The Commissioner contacted DWP to establish its position. The Commissioner asked DWP to confirm exactly what information was considered to be held within scope of the request and which of that information had been provided to the complainant. The Commissioner also asked DWP to confirm which exemptions it was relying on, if any, to refuse all or part of part [1] of the request.
15. In respect of DWP's claim that "supporting data for Race Action Groups is sourced via consultation with HR analysts and provided for HR operational purposes only" the Commissioner asked DWP to clarify who holds the data for the purposes of FOIA with reference to section 3(2)¹.
16. In response to the complainant's position that DWP should have conducted a public interest test, the Commissioner asked DWP to provide arguments as to why it believes the public interest in maintaining the exemptions outweigh the public interest in disclosure.

DWP's position

¹ Section 3(2) (public authorities) states:

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

The Commissioner asked DWP to confirm who held the information for the purposes of FOIA as it had claimed that the information was not held by DWP but by the "DWP HR data owner" (see paragraph 8).

17. In response to the Commissioner's questions DWP stated that all information it held within scope of the request had been provided to the complainant. DWP outlined the information as follows:

- People SLT 21 08 24 - Deep dive into the Communications theme.
- People SLT 11.1.22 - Deep dive into the Recruitment & Talent theme.
- SLT paper – Introduction to the Race Programme.
- SLT 28.9.21.
- Shadow SLT 21 6 21 Race Programme Update.
- Shadow SLT 21 8 16 Race Programme Update.
- Shadow SLT 21 10 13.

18. As per DWP's internal review response of 22 February 2022 the Commissioner understands that the documents stated at paragraph 17 above are the briefing materials that were produced by the Policy Group Race Action Group.

19. The Commissioner asked DWP to confirm who holds the requested information for the purposes of FOIA. DWP explained that the related information described as "supporting data for Race Action Groups" is held by the HR analytical function within DWP. It stated that "it is possible to obtain this data from staff records held on the department's HR IT system. To obtain the data would take too much time and staff costs."

20. DWP did not confirm which sections of FOIA it was relying on to refuse to provide the "supporting data for Race Action Groups" however based on the above statements and the calculation provided in its response, the Commissioner infers that DWP are intending to rely on section 12(1) to refuse the request. At no point during the investigation did DWP explicitly state which section of FOIA it was applying to part [1].

21. DWP offered the following calculation in support of its position that obtaining "supporting data for Race Action Groups" would incur significant costs:

We estimate this would take c. 48 hours of staff time (see calculation below) or £1,200, based on a 37 hour week.

0.5 x staff time for 1.5 weeks to deliver packs = 28 hours

0.25 x staff time for 1.5 weeks to quality assure packs = 14 hours

0.1 x staff time for 1.5 weeks to oversee/quality assure = 6 hours

Total = 48 hours

48 x £25 = £1,200

22. The Commissioner contacted DWP and asked it to explain what it meant by 'deliver packs' and 'quality assure packs' with reference to the The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations)².

23. DWP provided the following explanation:

"These estimates were based on my team's previous experience of delivering and quality assurance related analyses. It includes the time it takes to access and process relevant data ('delivering'), preparing relevant outputs and communications (e.g. slides, emails, etc) and quality assuring outputs (e.g. having a second person check numbers and calculations/code is correct)."

24. The Commissioner also asked DWP to explain what is meant by "supporting data for race action groups" and confirm whether it considered this information to fall within scope of part [1] of the request. DWP provided the following response:

"The "supporting data" would be the underlying data that comes from the SOP system, held securely on a protected Unix server and only accessible to a small number of analysts with a business need to access it. It is typically interrogated using statistical software and extracted into Excel to produce insights from it. Although this data in Excel doesn't contain people's names or staff numbers, it could be possible to identify an individual by looking at a combination of the characteristics (e.g. grade, location, ethnicity)."

25. DWP did not confirm whether it considered this information to fall within scope of part [1] of the request.

² <https://www.legislation.gov.uk/uksi/2004/3244/regulation/4/made>

The Commissioner's position

26. The Commissioner's position is that DWP is not entitled to rely on section 12(1) to refuse the request and that it has breached section 1(1) and section 17(5) of FOIA.
27. The response provided by DWP to the complainant and the Commissioner are confusing and contradictory. As the Commissioner understands, information produced by the Policy Group Race Action Group that falls within scope of part [1] of the request has been provided to the complainant, therefore the primary purpose of the present investigation is establishing the nature of the remainder of the information, whether this is held by DWP itself and if it falls within scope of the request, in the first instance. Once established, the second task is to determine whether DWP has issued a refusal to the request that complies with section 17(5) of FOIA. As the complainant has not responded to the Commissioner's correspondence confirming the scope of the investigation he is limited to the information available to him and his own interpretation of the issues.

Section 1 of FOIA – Information held / not held

28. On receipt of the request, DWP first elected to state that the requested information outlined at part [1] was not held, and on review provided a narrative response to the complainant outside of FOIA stating that it held briefing materials produced by Policy Group Race Action Group, but it did not hold any statistics or briefings relating to this group for the period stated.
29. In a further internal review, DWP stated that "supporting data for Race Action Groups" was held. While DWP has not confirmed whether the information described as "supporting data" falls within scope of part [1] of the request, the Commissioner considers that as it has been described by DWP in its response to his investigation as statistical data referring to personal and protected characteristics including ethnicity, it is likely to fall within scope of part [1] of the request. When asked by the Commissioner to confirm who, for the purposes of FOIA, holds the requested information sought by part [1] of the request, DWP stated that the information is held by the analytical function of DWP and that it was possible to retrieve the information from the departments HR IT systems, however the costs associated with doing so are above the appropriate limit.
30. The Commissioner has therefore concluded that the DWP does hold information falling within the scope of part [1]. Firstly, this consists of the briefing information provided to the complainant on 22 February 2022 (and listed at paragraph 17 of this notice). The Commissioner is

unclear whether or not the DWP provided such information to the complainant outside of FOIA, but for the avoidance of doubt, the Commissioner considers that this should have been disclosed under FOIA.

31. Secondly, the Commissioner considers that the DWP holds further information falling within the scope of part [1] the request namely supporting data for Race Action Groups, albeit the Commissioner assumes that DWP's position in respect of such information is that to provide that data would exceed the appropriate cost limit.

Section 12(1) – cost of compliance

32. As explained at paragraph 20 above, the Commissioner has inferred from the responses provided to him that DWP is intending to rely on section 12(1) to refuse part [1] of the request. The Commissioner's decision is that the time/cost estimates and explanation of "deliver packs" provided by DWP, with regards to the activities involved and the actual quantities of data it would be required to search through, are insufficient for the purposes of relying on section 12(1) to refuse part [1] of the request. Furthermore, section 4(3) of the Regulations, which concerns estimating the cost of complying with a request, states:

'(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in –

- (a) determining whether it holds the information
- (b) location the information, or a document which may contain the information
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

33. The Commissioner notes that DWP has stated that it would take 6 hours to 'quality assure outputs' however this is not an activity that can be considered when accounting for the time and costs involved in complying with a request.

34. For the reasons given in above the Commissioner finds that DWP is not entitled to rely on section 12(1) to refuse part [1] of the request.

Procedural matters

Section 17(5) – Refusal of request

35. Section 17(5) states that:

'A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.'

36. The Commissioner further finds that DWP has not provided the complainant with a refusal notice that meets the requirements of section 17(5) of FOIA as it has not provided a notice stating that it is relying on section 12 to refuse the request.
37. Taking the above analysis into account, the Commissioner requires DWP to issue the complainant with a fresh response to part [1] of the request that does not rely on section 12(1). The fresh response must clearly outline what information is considered to be held within scope of the request, and if DWP is seeking to rely on exemptions it must issue a refusal notice that meets the requirements at section 17(3) of FOIA

Other matters

38. The Commissioner wishes to record his disappointment with the quality of DWP's responses to the complainant and to his investigation, which have been contradictory in nature.

Right of appeal

39. 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

40. 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.
41. 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

Jonathan Slee
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