

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 June 2024

**Public Authority:** Department for Work and Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1A 9NA

#### **Decision (including any steps ordered)**

---

1. The complainant submitted a two part request to the Department for Work and Pensions (DWP) seeking equalities information in relation to: (1) DWP's proposed policy to remove the Work Capability Assessment and (2) information about DWP's equality publication duties.
2. DWP refused to provide the information for part one of the request arguing it was exempt from disclosure on the basis of section 35(1)(a) of FOIA (formulation or development of government policy) and that the public interest favoured maintaining the exemption. In relation to part two, DWP argued that the information was exempt from disclosure on the basis of section 21 (information accessible to the applicant by other means) and section 22 (information intended for future publication).
3. The Commissioner's decision is that the withheld information in part one of the request is exempt from disclosure on the basis of section 35(1)(a) but the public interest favours disclosure of the information. For part two, the information is exempt from disclosure on the basis of section 21.

4. The Commissioner requires the Department for Work and Pensions (DWP) to take the following steps to ensure compliance with the legislation:
  - Disclose the information falling within the scope of request 1.
5. The public authority must take these steps within 30 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. Section 149 of the Equality Act 2010<sup>1</sup> imposes a duty, known as the public sector equality duty, on public authorities to have due regard to certain equality considerations when exercising their functions. It ensures that those organisations consider how their functions will affect people with different protected characteristics.
7. The general duty is supported by specific duties<sup>2</sup> found in regulations to enable more effective performance of the general duty. An authority's duties depend on how many people it employs. DWP must:
  - Publish one or more equality objectives at least every 4 years
  - Publish information on general duty compliance with regard to people affected by policies and practices every year
  - Publish information on general duty compliance with regard to employees every year
  - Publish gender pay gap data by 31 March every year
8. The principal disability benefits include Employment and Support Allowance (ESA), Universal Credit (UC) and Personal Independence Payments (PIP)<sup>3</sup>. A PIP assessment considers how difficult the claimant

---

<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2010/15/part/11/chapter/1>

<sup>2</sup> <https://www.legislation.gov.uk/ukxi/2017/353/contents>

<sup>3</sup> <https://www.nao.org.uk/reports/transforming-health-assessments-for-disability-benefits/>

finds daily living and mobility tasks. For ESA and UC, a Work Capability Assessment considers how much an illness or disability affects the claimant's ability to work. Claimants who apply for both PIP and ESA/UC currently require two separate assessments.

9. In March 2023, DWP published its health and disability White Paper setting out a new policy approach "to help more disabled people and people with health conditions to start, stay and succeed in work"<sup>4</sup>.
10. The White paper outlines a range of reforms to the support provided to disabled people and other health conditions. This includes phasing out Work Capability Assessments for new UC claims from 2026-27 so in future there is only one functional assessment – the PIP assessment. This will remove the existing UC limited capability for work and work-related activity (LCWRA) element and replace it with a new UC health element.
11. Phasing out Work Capability Assessments will require primary legislation which the government intends to introduce in the next Parliament. The reform would be introduced – to new claims only – on a staged, geographic basis, from no earlier than 2026-27. DWP expects the change for new claims to be completed within three years, by 2029 at the earliest. It will then begin moving existing claimants to the new system.
12. On 29 April 2024, DWP published its Modernising Support Green Paper<sup>5</sup> which relates to the changes to be made to the current PIP system and assessment. This consultation will consider the implications of PIP reform on the gateway to the UC health element.

## Request and response

---

13. The complainant submitted the following request to DWP on 8 September 2023:
- 

<sup>4</sup> <https://www.gov.uk/government/publications/transforming-support-the-health-and-disability-white-paper/transforming-support-the-health-and-disability-white-paper>

<sup>5</sup> <https://www.gov.uk/government/consultations/modernising-support-for-independent-living-the-health-and-disability-green-paper/modernising-support-for-independent-living-the-health-and-disability-green-paper>

"The information sought was as detailed.

1. Your evidence to show your application of s149 EQA 2010 in relation to Work Capability Assessment process which have changed to PIP assessments recently. The legal requirements have been provided to you at length
2. You Special Duties Regulations 2011 & 2017 which require publication at set periods.

In point 1, the information requested will show consideration called due regard under the Act of how policies such as WCAs or PIP assessments have been given consideration as to how groups under s149 will be affected and what mitigations have been included and examined.

In point 2, these regulations 4 & 5 (see the Special Duties Regulations 2017 requirements) should already have been published since 2011 but nothing is available. Your Ministers Stride & Pursglove should have directed their departments to follow the law."

14. On 6 October 2023, DWP wrote to the complainant saying it held information but needed more time to consider the balance of the public interest in relation to section 35 of FOIA (the "PIT extension").
15. On 16 October 2023, the complainant disputed DWP's use of the PIT extension and requested an internal review.
16. DWP provided its substantive response to the complainant on 30 October 2023 and also responded in the same letter to the complainant's request for internal review as regards DWP's use of the PIT extension. DWP upheld its use of the PIT extension in its internal review response.
17. In its substantive response to the request DWP confirmed as follows:
  - a. for part one of the request, it held information falling within scope but considered this information to be exempt from disclosure on the basis of section 35(1)(a) (formulation or development of government policy) of FOIA.
  - b. for part two of the request,
    - i. DWP cited section 21 of FOIA as the information was already in the public domain. DWP said that its Annual Report 2022-

2023 set out the information about the Public Sector Equality Duty (and provided a link<sup>6</sup>).

- ii. In addition, DWP cited section 22(1) of FOIA saying that its duties set out in Section 149 Equality Act 2010 and Special Duties Regulations 2011 & 2017 for future years will be published each year in future Annual Reports. DWP provided its public interest considerations for section 22 and confirmed that it considered that the balance of the public interest lay in maintaining the exemption.
18. The complainant contacted DWP on 29 November 2023 and challenged both the decision to withhold information on the basis of section 35(1)(a) of FOIA and the application of sections 21 and 22 to part two of the request.
  19. DWP completed the internal review on 14 December 2023. It maintained its position.

### **Scope of the case**

---

20. The complainant contacted the Commissioner on 21 December 2023 to complain about DWP's decision to withhold information on the basis of section 35(1)(a) of FOIA and to apply sections 21 and 22 to part two of the request. The complainant's submissions to support this position are set out below.
21. It should be noted that the Commissioner's role is limited to considering the application of any exemptions (including the balance of the public interest test) to the point at which the request was submitted (or at the latest, the time for compliance with the request, ie 20 working days after it was submitted). Therefore, the scope of the Commissioner's investigation is to determine the circumstances as they existed at the time of the request in September 2023.
22. The Commissioner notes that DWP cited section 22(1) of FOIA in relation to part two of the request, saying that equalities information for future years will be published in future DWP Annual Reports. The request makes clear that the information sought is the information that

---

<sup>6</sup> <https://www.gov.uk/government/publications/dwp-annual-report-and-accounts-2022-to-2023>

should already have been published. The Commissioner therefore considers that the information for future years falls outside the scope of the request. He will not therefore consider whether DWP is entitled to rely on section 22(1) to withhold this information.

23. The Commissioner considers the scope of the case is to consider DWP's application of section 35(1)(a) and section 21 of FOIA to the information falling in scope of the request.

## Reasons for decision

---

### Section 35(1)(a) – formulation or development of government policy

24. Section 35(1)(a) of FOIA states that:

“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”

25. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
26. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
27. ‘Development’ may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
28. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
29. The Commissioner's guidance on section 35 includes examples of different processes that might involve formulation of policy including White Papers, bills and the legislative process. It also considers that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
- the Government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

#### DWP's position

30. By way of background, DWP explained that the complainant requested evidence of DWP's application of the public sector equality duty in relation to (using the complainant's own words) "Work Capability Assessment process which have changed to PIP assessments recently."
31. DWP explained that the complainant is referring to the policy reforms announced in March 2023 in the health and disability White Paper and to DWP's intention to remove the Work Capability Assessment (WCA), and to move to one single disability benefit assessment, the Personal Independence Payment (PIP) assessment.
32. DWP stated that the withheld information consists of information relating to the Public Sector Equality Duty, and an equality analysis. DWP explained that the analysis was produced by an economic adviser at DWP as part of modelling of the removal of the Work Capability Assessment and sets out the financial impact of the reforms. DWP further explained that it was part of an internal ministerial submission, not intended for publication, which was drafted by a senior policy official and sent to Ministers on 13 February 2023, summarising the reforms for approval prior to publication of the White Paper.
33. DWP explained that, "the White Paper set out the overarching framework for the policy which is a reform that will span many years. This work is still in the policy development phase and there is currently ongoing work in this space". DWP emphasised that policy making was live and ongoing at the time of the request.
34. DWP further explained that the degree of change in its proposals will require primary legislation, which DWP aim to take forward in a new Parliament when parliamentary time allows. During this process, DWP say there will be an opportunity for scrutiny of the policy.
35. DWP went on to say that there are still a number of policy decisions to be made as well as "test and learn activity" to undertake to develop the policy approach. DWP say they have also committed to rolling out this model with new claims first on a geographical basis to allow DWP to test

and learn. DWP say that all of these decisions will have an impact on equality considerations.

36. DWP said:

“there is still significant development work ongoing to inform the policy in primary legislation to enact this change (Primary Legislation will be brought forward along with equality assessment in a new Parliament when parliamentary time allows giving the public and parliament an opportunity for scrutiny). Following this we will continue the policy development to inform secondary legislation and delivery. We therefore haven't yet decided exactly what this change will look like, how it will operate, and who will be impacted. We do not want to create a situation where incomplete and potentially misleading information is released to the public and to ensure a safe space is protected for this detailed policy-making.”

#### The complainant's position

37. The complainant does not accept that the exemption was engaged because, in their view, the policy making to which the information related - DWP's intention to remove the Work Capability Assessment - was “already decided” at the point that the request was submitted.

#### The Commissioner's position

38. The Commissioner has reviewed the withheld information. As noted above, DWP explained to the Commissioner that the document was from an internal ministerial submission drafted by a senior Policy Official and sent to Ministers on 13 February 2023 summarising the reforms for approval prior to publication of the White Paper.

39. The Commissioner notes that the withheld information in this case is one of the same documents withheld by DWP in an earlier decision notice on a similar issue - see **IC-231088-F8N5**<sup>7</sup>.

40. The Commissioner's guidance<sup>8</sup> on section 35 states that:

---

<sup>7</sup> <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=231088>

<sup>8</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>



“The term ‘formulation’ of policy refers to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister who then decides which options to translate into political action.... The classic and most formal policy process involves turning a White Paper into legislation. The government produces a White Paper setting out its proposals. After a period of consultation, it presents draft legislation in the form of a bill, which is then debated and amended in Parliament. In such cases, policy formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation.”

41. The Commissioner notes that the White Paper at issue is dated March 2023 and that DWP has told the Commissioner that legislation in the form of a bill will be brought forward along with equality assessment in a new Parliament when parliamentary time allows. The Commissioner understands that the reference to a ‘new’ parliament means after the next general election which is scheduled to occur on 4 July 2024.
42. The Commissioner accepts that policy formulation and development can in some cases continue all the way up to the point the bill finally receives royal assent and becomes legislation. In the specific circumstances of this case, he accepts that the withheld information relates to the development of a large package of government policies. This includes removing the Work Capability Assessment and the phasing out of WCAs still needs to be enacted into legislation.
43. The Commissioner is therefore satisfied that the withheld information falls within the scope of the exemption contained at section 35(1)(a). Section 35(1)(a) is therefore engaged and the Commissioner will go on to consider the balance of the public interest.

### **Public interest test**

44. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

### Public interest in favour of disclosing the information

45. As explained above, in the complainant’s view, the policy making process in connection with DWP’s intention to remove the Work Capability Assessment was not live at the time of the request. In support of this position the complainant noted the policy making to which the information related was “already decided” at the point that

the request was submitted. They also advised the Commissioner, "As the policies have all been passed and acted out, s35 cannot apply."

46. For its part, DWP acknowledged there is a public interest in greater transparency which makes government more accountable to the electorate and increases trust. There is also a public interest in being able to assess the quality of advice being given to ministers and subsequent decision making.
47. DWP further acknowledged that the underlying subject matter of the disputed information, namely reform of the way that disability is assessed for benefits purposes, is of public importance.

#### Public interest in favour of maintaining the exemption

48. In support of its position that the public interest favoured maintaining the exemption, DWP noted that it has already put information into the public domain about the changes. It says it published a Green Paper, and information on its extensive consultation process, prior to the White Paper. The policy in the White paper was then debated in Parliament on 16 March 2023. The Secretary of State and Director General Disability, Health and Pensions also attended the Work and Pensions Select Committee and answered questions on the new policy on 29 March 2023. DWP argue that there has accordingly been significant "early scrutiny" of the policy decision. Furthermore, DWP explained that where it has been able to produce reliable data to further inform debate about the new policy, it has done so. DWP stated that, on 20 July 2023, DWP published an ad hoc statistics release on this issue to provide transparency on the latest volumes of people receiving combinations of health and disability benefits. The Commissioner asked DWP to provide him with a link to this and he notes that this states that "The ad hoc statistical release aims to provide sufficient granularity to identify the key groups of claimants within scope of the reform based on recent caseload data."<sup>9</sup>
49. DWP emphasised that it had conveyed to the requester in its initial response that "good government depends on good decision-making, and that this needs to be based on the best advice available and a full consideration of all the options without there being fear of premature

---

<sup>9</sup> <https://www.gov.uk/government/statistics/health-and-disability-benefits-based-on-data-from-2019-to-2022/health-and-disability-benefits-based-on-data-from-2019-to-2022>

disclosure. If this public interest cannot be protected there is a risk that decision making will become poorer and will be recorded inadequately”.

50. DWP explained to the Commissioner that it was very mindful that the premature disclosure of any government policy, procedure or otherwise, could have the potential to lead to the release of incomplete information that could easily change whilst under development and thus have the potential to lead people to draw incorrect conclusions which could lead to unnecessary distress. To do this would not be the actions of a responsible government. DWP therefore argued that it was important to ensure a safe space is protected for this detailed policy making, and to ensure that full equality and impact analysis can be completed before sharing this information more widely.
51. On balance, DWP was therefore satisfied that in this instance the public interest in maintaining the exemption outweighed the public interest in disclosure. This is because while DWP realised that the public would like to see the equality impacts of the policy to remove WCA assessments, it would rather share its equality analysis once the policy is settled as part of the legislative process. DWP state that this will give plenty of opportunity for scrutiny, but prevents misleading information being published in the meantime which is not based on finalised policy decisions. Therefore, DWP argue that the information sought by the requester could not be released at the time of the request in September 2023 and that this decision continues to apply because the policies are still under development by DWP.
52. DWP explained to the Commissioner that it was important to note that the information in the withheld information is incomplete and based on assumptions made at the particular point in time when it was created (February 2023) about issues which Ministers have not decided upon. DWP argued that the equality impacts will be subject to continual revision and further development to reflect both policy decisions which are then made, and other changes which have an impact on these policies.

#### Balance of the public interest test

53. The Commissioner accepts that the disputed information contains analysis and direct assessment of the impact of the policy changes on different groups of benefit recipients and related equality issues.
54. The Commissioner appreciates that decisions around how DWP envisages the policy will impact benefit recipients is a matter of considerable interest to a significant range of stakeholders and one that involves balancing a range of competing demands.

55. The Commissioner also 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 process is live and the requested information relates to that policy making. Officials and ministers therefore need space to consider a range of policy issues, in a free and open way.
56. However, the Commissioner notes his earlier decision notice on a similar issue in IC-231088-F8N5<sup>10</sup> - where the disputed information was identical - and therefore he adopts in full the reasoning in that case. He notes paras 53 & 54 of that decision as follows:

"53. Whilst the Commissioner accepts that the public interest in maintaining the exemption will be strongest while the policy is still being formulated or developed, this does not convert the exemption to an absolute one where information will not be disclosed simply because of the stage that the policy process has reached. There will be occasions where the Government policy is at the formulation or development stage and the public interest in disclosure is sufficiently strong that the public interest in maintaining the exemption will not outweigh this.

57. The Commissioner's guidance on section 35(1)(a) states:

"The relevance and weight of the public interest arguments depends entirely on the content and sensitivity of the information in question and the effect of its release in all the circumstances of the case.

For the same reason, arguments that 'routine' disclosure of a particular type of information are not in the public interest are misconceived. Each case must be considered on its facts. Even if disclosure is ordered in one case, this does not mean that similar information must be disclosed in future.

Arguments must therefore focus on the effect of disclosing the information in question at the time of the request, rather than the effect of routine disclosure of that type of information.

The exact timing of a request is very important. If the information reveals details of policy options and the policy process remains on going

---

<sup>10</sup> <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=231088>

at the time of the request, safe space and chilling effect arguments may carry significant weight.

However, even if the policy process is still live, there may be significant landmarks after which sensitivity of information starts to wane.

For example, once a high-level policy objective has been announced (eg in a White Paper or framework bill), any information about that broad objective becomes less sensitive. The safe space to debate that high-level decision in private is no longer required, even if related debate about the details of the policy remains sensitive.

In some cases, the formulation or development of policy may not follow a linear path (ie where the policy becomes more and more settled as time goes on). There may be several distinct stages of active policy debate, with periods in between where policy is more settled. The importance of a safe space can wax and wane, depending on how fixed the policy is at the exact time in question.

Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy generally starts to wane, and the public interest arguments for protecting the policy become weaker. If the request is made after the policy process is complete, that process can no longer be harmed.

Tackling some policy issues may require a range of initiatives, implemented over a number of years. However, this does not mean that the policy thinking on each, individual initiative can still be considered live until the issue is finally resolved”.

58. The Commissioner also adopts the reasoning in full set out in paras 63 – 78 of his decision notice in IC-231088-F8N5 and, as in that case, the Commissioner requires DWP to disclose the withheld information.
59. In the circumstances of this case, the Commissioner accepts that even though legislation in the form of a Bill to enact the change has not yet been brought before parliament, the policy decision to remove the Work Capability Assessment had been finalised and announced in the White Paper at the time of the request in September 2023. Therefore, there is a particularly strong public interest in disclosure of information relating to this reform. The Commissioner considers that the public is entitled to scrutinise a decision such as this at an early opportunity. As set out above, whilst the policy to remove the WCA was still being developed at the time of the request, the White Paper had already confirmed that this would go ahead. Even though a bill goes through several processes of scrutiny before it becomes law, at the time of the request DWP had not

ever indicated that the decision to phase out the WCA would be reversed.

60. In the Commissioner's view disclosure of the withheld information would provide a direct insight into how DWP took into account the impact of its policy proposals on protected groups as part of the White Paper and in its policy formulation more generally. Furthermore, it would also provide some insight into the information being considered by ministers and officials in relation to the decisions about the implementation of the change. Given the significant public interest in such issues, the Commissioner considers that this factor, namely providing insight into DWP's assessment of equality impacts, attracts weight. As a result in the Commissioner's opinion, disclosure of the withheld information would add to transparency and accountability around this issue, beyond that already achieved by the information to DWP has told the Commissioner is in the public domain.
61. The Commissioner considers that there is a significant public interest in understanding, and scrutiny, of the equalities impact 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 analysis behind a settled policy decision which is 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. In the Commissioner's view there is also merit in the point that disclosure of the withheld information could allow the disability sector to meaningfully respond to current equalities information and make representations.
62. DWP have argued that premature disclosure of the information could lead to the release of incomplete information and therefore potentially "lead people to draw incorrect conclusions which could lead to unnecessary stress". DWP state the equality impacts will be subject to continual revision and further development to reflect both policy decisions which are made, and the legislative process which is yet to commence. DWP also state they will be sharing the final equality analysis once the policy is settled as part of the legislative process.
63. The Commissioner notes DWP's arguments. The Commissioner does accept that given the external attention and scrutiny that the White paper was attracting, disclosure of withheld information –seven months after its creation - would have been likely to have some impact on the safe space associated with this wider, ongoing policy making. However, the Commissioner does not accept DWP's argument that disclosing incomplete information is not in the public interest.



64. The Commissioner's established position is that incomplete information or the potential for misunderstanding is not an argument that carries significant weight. The Commissioner considers that public authorities would have the opportunity to confirm that the information is complete, or put it into context, at the time of disclosure. The Commissioner would only accept this as having weight where the public authority has demonstrated that it would not be possible or reasonable to provide this.
65. Further, DWP has not provided compelling arguments to the Commissioner regarding how the specific policy to remove the WCA would be undermined by disclosure of the disputed information. Having reviewed the information, and as stated in his decision notice in IC-231088-F8N5, it is not apparent to the Commissioner how the specific policy would be undermined other than the general safe space arguments presented. DWP have also not specifically explained to the Commissioner how the disclosure in July 2023 of an ad hoc statistics release on this issue means that the disputed information need not be disclosed.
66. As a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. As the policy in question to remove the WCA was decided, the Commissioner does not accept that the implications of a chilling effect on those ongoing policy discussions carry significant weight. This is because in his view disclosure of the particular information that has been withheld would be unlikely to have a significant impact on the frankness or candour of future contributions by officials or by Ministers.
67. In addition, the Commissioner notes that DWP is under a legal duty to consider equalities impacts and that there are strong safeguards in place to ensure that it fulfils this duty. Disclosure of the information would therefore be unlikely to impact the quality and robustness of equality assessments.
68. Whilst the Commissioner accepts that there is weight to the public interest arguments regarding allowing DWP the space to develop policy away from external interference, the Commissioner is not persuaded that this is sufficient to outweigh the strong public interest in disclosure.
69. While the Commissioner accepts that section 35(1)(a) is intended to protect the policy process as a whole in addition to specific policies, the Commissioner is not persuaded that the public interest arguments presented are sufficient to outweigh the strong public interest in scrutiny of this particular policy decision.

70. Having reviewed the withheld information, and in adopting the same position as he took in his decision notice on IC-231088-F8N5, the Commissioner is not persuaded that DWP's public interest arguments in favour of maintaining the exemption are sufficient to outweigh the public interest in disclosure of the disputed information.
71. The Commissioner requires DWP to disclose the withheld information falling within the scope of request 1.

## Section 21

---

72. The exemption in section 21 provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
73. Information can be said to be reasonably accessible if it has been placed in the public domain and can be obtained by the applicant without the need for a specific request under section 1.
74. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA.
75. Part two of the complainant's request said that the Special Duties Regulations 2017 requirements "should already have been published since 2011 but nothing is available. Your Ministers Stride & Pursglove should have directed their departments to follow the law." In the internal review request, the complainant said that "The link to diversity and equality is insufficient for the specific policies in the request still not answered in 3 years." The complainant did not provide the Commissioner with any further arguments in respect of section 21.
76. As set out above the special duties that apply to DWP are to:
  - a. Publish one or more equality objectives at least every 4 years,
  - b. Publish information on general duty compliance with regard to people affected by policies and practices every year,
  - c. Publish information on general duty compliance with regard to employees every year,
  - d. Publish gender pay gap data by 31 March every year.
77. DWP explained in its response to the complainant that Public Sector Equality Duty information was embedded in its Annual Report 2022-



2023<sup>11</sup>. The response also explained that equality reports from previous years – dating back to 2011 – could be found on GOV.UK<sup>12</sup>.

78. DWP did provide internet links to the complainant as to where the Annual Review and equality information could be found and argued that its response also signposted to the complainant where the information DWP was required to publish could be found.
79. The Commissioner notes that the signposting consisted of the provision of the following as regards its Annual Report:

“DWP Staff, Employment equality for age, ethnic minority and gender please see the Remuneration and staffing report, starting on page 219 and for employment equality relating to disabled people, please see Priority Outcome 2 starting on page 67”
80. The Commissioner notes that this signposting provides the complainant with information about the special duties set out in c & d above.
81. The complainant’s apparent confusion may be around the special duties information set out at a and b above.
82. The Commissioner can see that b is met in the Annual Report at page 14- 15 and in the Performance reports at page 32 onwards but that this information was not specifically signposted to the complainant. In addition via the GOV.UK link, the Commissioner can see that equality information is provided about the equality objective as per the special duty in a above.
83. The Commissioner does consider that it would have been helpful – though by no means a requirement of FOIA - for DWP to have more fully signposted the complainant to the information relating to the special duties (and those at a and b) above by providing some further explanation when it sent him the links as to exactly where the requested information could be found.
84. The Commissioner has nevertheless concluded that DWP correctly applied section 21 to part two of the complainant’s request and complied

---

<sup>11</sup> <https://assets.publishing.service.gov.uk/media/64a576d47a4c230013bba1e7/annual-report-accounts-2022-23-web-ready.pdf>

<sup>12</sup> <https://www.gov.uk/government/organisations/department-for-work-pensions/about/equality-and-diversity>

with its FOIA obligations in respect of it. The Commissioner is not persuaded by the complainant's arguments that DWP has not published information regarding the Special Duties – it clearly has. The Annual Report and equality report set out above do provide the complainant with access to the information he sought about the Special Duties.

## **Procedural Issues**

---

### Time taken to consider public interest and respond to request

85. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions: '(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.'
86. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
87. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. This section only permits extensions for further consideration of the public interest, DWP cannot ask for any additional time to search for information or to determine whether the exemptions themselves are engaged.
88. Any public authority claiming an extension will still be obliged to issue a refusal notice explaining which exemption applies and why, within 20 working days. The notice must explain that it requires more time to consider the public interest test, and provide an estimate of the date on which a final decision is likely to be made.
89. On 6 October 2023, DWP issued a refusal notice confirming that it did hold information falling within the terms of the request. However, it explained that it needed more time to conduct the PIT under the exemption in section 35 FOIA.
90. Once that final decision has been reached, the authority must either disclose the information to the requester or issue a second refusal notice explaining why it has found the public interest to be in favour maintaining the exemption.

91. While FOIA allows a public authority to extend the timeframe up to a 'reasonable' time to consider the PIT, FOIA does not define what might constitute a 'reasonable' extension of time. In his guidance 'Time for compliance under the Freedom of Information Act (Section 10)' the Commissioner explains that he considers that a public authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.
92. 15 working days later, on 30 October 2023, DWP responded to the request by issuing a second refusal notice explaining why it had found the public interest to be in favour of maintaining the exemption.
93. The Commissioner notes that on 16 October 2023, the complainant requested an internal review complaining about DWP's reliance on the PIT extension in this case. However, it is the Commissioner's decision that DWP appropriately relied on section 17(3) of FOIA as far as it allows a public authority more time to conduct a public interest test.

### Other matters

---

94. DWP should note that, for the exemption in section 22 to apply, DWP must, **at the time of the request**, hold the information and intend that it will publish it in future. A general intention to publish some information in future Annual Reports will not suffice.

## Right of appeal

---

95. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

96. 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.
97. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**