

Freedom of Information Act 2000 (the Act)

Decision notice

Date: **3 March 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 information on the scope and results of a review into safeguarding from the Department for Work and Pensions (DWP).
2. DWP disclosed some information regarding the scope of the review and withheld information regarding the results of the review under section 35(1)(a). DWP also withheld the personal data within the scope of the request on the basis of section 40(2). The complainant has not disputed the redactions made on the basis of section 40(2).
3. The Commissioner's decision is that, on the balance of probabilities, DWP does not hold any further information relating to the scope of the review. He considers that section 35(1)(a) is not engaged in relation to the withheld information regarding the results of the review.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 35(1)(a) with the exception of the information exempt under section 40(2).
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.

Request and response

6. On 24 January 2020, the complainant wrote to DWP and requested information in the following terms:

"This FOI refers to reporting here:

<http://www.disabilitynewsservice.com/the-death-of-errol-graham-man-starved-to-death-after-dwp-wrongly-stopped-his-benefits/>

The story reports various comments by an assistant coroner, including the following:

The assistant coroner said: "There simply is not sufficient evidence as to how he was functioning, however, it is likely that his mental health was poor at this time – he did not seek help from his GP or support agencies as he had done previously".

[...]

But she decided not to write a regulation 28 report demanding changes to DWP's safeguarding procedures to "prevent future deaths" because the department insisted that it was already completing a review of its safeguarding, which was supposed to finish last autumn.

Please send me:

- a) The terms of reference or any similar document setting out the scope of the review referred to in that news story
 - b) The results of the review referred to in that news story."
7. DWP denied holding any information in its response dated 20 February 2020 and upheld this position in its internal review dated 17 March 2020.
8. The complainant contacted the Commissioner to dispute this position and, following an investigation, the Commissioner issued decision notice IC-48363-C8Q5¹ on 22 March 2021. This decision notice found that, on the balance of probabilities, DWP did hold information falling within the

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619540/ic-48363-c8q5.pdf>

scope of the request and ordered DWP to issue a fresh response which did not deny that the information was held.

9. On 26 April 2021, DWP issued its revised response and confirmed that it held information falling within the scope of the request.
10. In response to request "a" for information on the scope of the review, DWP explained that the review of safeguarding cited in this request referred to ongoing conversations within DWP to develop its approach to improving safeguarding measures to support vulnerable claimants. DWP explained that internal stakeholder groups taking part in these discussions participated without formal review roles and no terms of reference, scoping paper or plan was created or used.
11. DWP confirmed that following the decision notice, it had looked again at the request to supply *"any information setting out the scope of the review"*. DWP provided a meeting invitation from December 2018 which invited departmental stakeholders to a series of meetings to review policy and instructions for customers who declare an intention to attempt suicide or self-harm. DWP explained that the ensuing conversations aimed to identify areas for improvement and included participants' perspectives and experiences. DWP confirmed that it had redacted the identities of the civil servants invited to the meetings under section 40(2) as it considered disclosure was not necessary or justified in order to satisfy the request for information. DWP considered that there was no strong legitimate interest that would override the rights and freedoms of the data subjects.
12. In response to request "b", DWP explained that the disclosed invitation mentions two pieces of work, the conversations mentioned above and putting in place policy and instructions around safeguarding arrangements for citizens who DWP staff feel may be at risk of harm.
13. DWP explained that the conversations regarding improving DWP's safeguarding measures initiated by the email invitation were still ongoing. DWP explained that the invitation refers to the two pieces of work as "separate but linked" as there is a clear overlap between reviewing all current policy and instructions and the task of putting in place policy and instructions for staff who have concerns about a customer's safety.
14. DWP provided the complainant with a document titled '*Guidance – Helping Customers Who Require Additional Support*' and explained that this is an internal guidance document which was developed during 2020 and shared on its staff intranet on 24 March 2021. DWP confirmed that it was not in existence at the time of the original request. DWP explained that this guidance draws together and updates previous policy

and instructions on advanced customer support, and that the prominence of certain themes within its structure was partly determined by the work initiated by the invitation provided.

15. DWP confirmed that it holds summaries of the ongoing discussions on advanced customer support, and other pieces of work currently under development which have arisen from them. DWP confirmed that it was withholding this information under section 35(1)(a) and that this exemption protects the private space within which ministers and their advisers discuss policy.
16. DWP acknowledged the public interest in transparency which makes government more accountable to the electorate and increases trust. DWP also acknowledged the public interest in being able to assess the quality of advice being given to ministers and the subsequent decision making.
17. DWP considered that good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. DWP considered that disclosure would risk decision-making becoming poorer and inadequately recorded.
18. DWP confirmed that it was satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.
19. On 17 May 2021, the complainant requested an internal review of the handling of their request. Regarding request "a", they disputed that the series of meetings was the limit of the review and that the disclosed invitation was the *"best way of answering this request"*.
20. The complainant set out that DWP's original response dated 20 October 2020 stated that DWP officials had conducted case research, considered coroners' reports and engaged with local networks in DWP operations. They considered that these were not insignificant pieces of work and the individuals carrying out this work must have had some sort of brief or parameters for the work that they were doing and that presumably this was based on some form of brief or parameters for the overall review.
21. The complainant disputed that DWP did not hold any information, such as meeting papers, which would indicate the areas for discussions at these meetings.
22. Regarding request "b", the complainant considered that the guidance provided does not answer the request as it appeared to be one of the results of the further work being carried out by DWP rather than the results of the review.

23. On 16 June 2021, DWP provided the outcome of its internal review. With regards to request "a", DWP explained that it had reviewed the complainant's comments and the information available, and it had not been able to locate additional documents that outline anything similar to a scope or terms of reference. DWP explained that there is no information to suggest these meetings developed the scope of the work beyond that which it had already advised the complainant existed.
24. With regards to request "b", DWP acknowledged that the decision notice had drawn the distinction between the further work undertaken and the original review and that it had also concluded that the identification of the further work was within request "b". DWP confirmed that following the decision notice, it had provided all documents within the scope of the requests "a" and "b" that are not exempt under section 35.

Scope of the case

25. On 21 June 2021, the complainant contacted the Commissioner to complain about the handling of their request for information.
26. During the investigation, DWP confirmed that if the Commissioner were to determine that section 35 is not engaged, it would rely on section 40(2) to redact the personal data within the withheld information.
27. The complainant confirmed that they disputed DWP's position that no further information is held regarding request "a" and DWP's reliance on section 35 to withhold the information falling within request "b". The complainant confirmed that they did not dispute DWP's reliance on section 40(2) to redact personal data.
28. The Commissioner therefore considers that the scope of this case is to determine whether DWP holds any further information in relation to request "a" and whether DWP is entitled to rely on section 35 to withhold the information falling within the scope of request "b".
29. The Commissioner notes that DWP has provided the complainant with a copy of guidance created following the review. As DWP has confirmed, this was created after the request was made and therefore does not fall within the scope of this request.

Reasons for decision

Section 1(1): General right of access to information

30. Section 1(1) of the Act states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request and, if so, to have that information communicated to them. This is subject to any procedural sections or exemptions that may apply. A public authority is not obliged to create new information in order to answer a request.
31. Where there is a dispute between the information located by a public authority and the information the complainant believes should be held, the Commissioner follows the lead of a number of First-Tier Tribunal decisions in applying the civil standard of the balance of probabilities.
32. In the circumstances of this case, the Commissioner will therefore determine whether, on the balance of probabilities, DWP holds further information falling within the scope of the request.

DWP's position

33. DWP again confirmed that a formal review was never commissioned, planned or took place.

34. In response to the Commissioner's questions, DWP stated:

"There may be an issue with what the Coroner believed we meant by a review and what happened.

We were clear in our original response that no formal review was undertaken but our honest and factually correct response appears to have not been accepted and then challenged".

35. DWP confirmed that it does not hold any information that refers to a specific decision to undertake a review or the creation of a policy. DWP explained that the issue of needing a policy stemmed from internal concerns and support needs expressed from engagement with various parts of DWP.
36. DWP explained that its Chief Psychologist concluded that there was a policy gap that required attention and therefore began a piece of work to consider what was in place where that gap existed.
37. DWP confirmed that its Chief Psychologist was not asked by DWP to undertake a review and no information was provided to him regarding the scope of this review. DWP explained that the need for a policy arose from engagement with various parts of DWP where it became apparent that DWP needed to strengthen its support to vulnerable claimants.

38. DWP explained that the disclosed invitation and the information withheld under section 35(1)(a) provide an indication of the scope of the work it was doing to help inform policy development. DWP explained that the policy process in this instance was an organic process informed by the forum. DWP explained that the scope for the policy development became clearer over time leading to early drafting and subsequent work undertaken by the Customer Experience Directorate to produce the guidance.
39. DWP confirmed that it does not hold any information regarding the decision to issue the invitation provided to the complainant. DWP confirmed that it had previously provided the complainant with a list of business areas which provided some indication of the scope through the range of stakeholders. DWP explained that this was a stakeholder forum to help get a sense of the issues in each DWP business area. DWP explained that the original invitation which was disclosed to the complainant provided information about the objectives which was to inform the development of policy.
40. DWP confirmed that it holds brief summaries of the discussions undertaken at the meetings in the disclosed invitation and that these could provide insight into the scope of the review. DWP confirmed that this information falls within the scope of request "b" and considers the information to be exempt under section 35(1)(a).
41. DWP confirmed that the meetings had no formal agenda as it was a forum for individual business areas to raise issues and get an update on the development work to produce a policy.
42. DWP confirmed that it had contacted its Chief Psychologist and a colleague who worked with them on the project. DWP also asked the Advanced Customer Support Strategy team to search their electronic files related to the piece of work.
43. DWP provided an explanation directly from its Chief Psychologist, who had confirmed to the Assistant Coroner that a review was in progress. They explained that the work in question began in December 2018, prior to the inquest referred to in the request, and that the 'review' was not a formal review in any way, nor was this work formally commissioned, rather, it was more a series of very broad conversations focusing on the subject to inform policy making. They stated: *"It was a 'review' in the very broadest sense"*.
44. They explained that the work came about as part of their role. Out of concern, they had taken leadership for reviewing the existing policy and instructions for identifying and assisting vulnerable customers and this led to a draft set of principles or policy. They explained that this work

originated from their business as usual job role, there was no formal commissioning document and the formal output was the draft policy.

The Commissioner's position

45. Having considered DWP's submissions, the Commissioner accepts that, on the balance of probabilities, DWP does not hold any further information falling within the scope of the request.
46. The Commissioner understands why the complainant would believe that information is held, particularly in light of the serious nature of the subject matter. However, in light of DWP's explanations regarding how the review came about, he is satisfied that there is no recorded scope or terms of reference related to the review.
47. The complainant set out in their complaint to the Commissioner that they believed that information relating to the scope of the review may be found in records kept following the meetings included in the disclosed invitation. DWP has confirmed that this recorded information falls within the scope of request "b" and is withheld under section 35(1)(a). The Commissioner has reviewed the information located within the scope of request "b" and accepts DWP's interpretation.
48. Regarding DWP's statement set out at paragraph 34 regarding the Coroner's interpretation of "review", the Commissioner considers that this is irrelevant to this request. DWP's representative at the hearing stated that a review was in process and the request related to that.
49. The Commissioner accepts that DWP has undertaken reasonable searches. As the work originated with the Chief Psychologist, the Commissioner is satisfied that if information were held, it would be most easily located by this DWP officer.
50. The Commissioner is satisfied that, on the balance of probabilities, DWP does not hold any further information relating to the scope of the review.

Section 35: Formulation or development of government policy

51. 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"

52. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the government policy making process, and to

prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. The Commissioner's guidance² advises that a public announcement is likely to mark the end of the policy formulation process.

53. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.

DWP's position

54. The Commissioner asked DWP to clarify exactly which government policy DWP considers the information relates to and how this represents **government policy** rather than DWP operational or administrative policy.
55. DWP explained that the email invitation that was disclosed highlighted the two linked pieces of work being undertaken by DWP's Chief Psychologist. DWP explained that these two pieces of work were to review its policy and instructions for customers who declare an intention to take their own life or to self-harm and to put in place a policy and instructions around safeguarding arrangements for claimants who DWP staff felt may be at risk of harm.
56. DWP explained that the withheld information comprises the summaries of ongoing discussions on providing customer support. DWP confirmed that these summaries are the only items that it has from the Chief Psychologist's work.
57. DWP explained that the work is about how DWP might better support vulnerable customers who might be at risk of harm. DWP explained that as it gives effect to government social policy, it is important that the whole process operates to achieve these outcomes. DWP stated that this is a policy matter and it is linked to legislative policy to ensure that claimants are paid the right amount at the right time and that its decision making is not limited by challenges faced by claimants at the times they may be engaging with DWP.

² <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

58. DWP explained that the ongoing work of the Customer Experience Directorate is being carried out through Internal Process Reviews, the Serious Case Panel, and a Strategy team.
59. DWP reiterated its explanation that the 'review' was not a formal review and nor was it commissioned. DWP explained that the work was a series of very broad conversations focussing on the subject, to inform policy making. DWP confirmed that it was a 'review' in the very broadest sense and came about as part of the Chief Psychologist's role.
60. DWP explained that as part of this role, the Chief Psychologist received feedback regarding DWP's policies and procedures around vulnerable claimants and felt that it would be beneficial for DWP to develop an overarching policy for vulnerable customers. DWP explained that its Chief Psychologist took the lead on this because there was no central area that held this responsibility at this time.
61. DWP explained that due to the nature of the Chief Psychologist's work, this quickly became visible to Ministers as collectively they are involved in policy development in areas where policy issues exist and may escalate. DWP explained that trying to cover all categories of vulnerable people is complex and cuts across the responsibility of several portfolios, local authorities and even the Police. DWP explained that detailed policy development in relation to providing support to potentially vulnerable clients was believed to be the way to ensure that these issues were addressed, and the Minister for Disabled People, Health and Work led discussions on how DWP could develop support to vulnerable claimants.
62. DWP reiterated that its Chief Psychologist never gave or intended to give an undertaking that DWP would produce a formal written report following its review. DWP explained that its intention was to consider the issues and introduce improved practices and policies, rather than to produce a specific report.
63. DWP explained that the work on the review concluded with responsibility for providing further support to vulnerable customers being passed on to its Customer Experience Directorate and that the discussions referred to informed the work carried out by this directorate.
64. DWP explained that the guidance supplied to the complainant in its response dated 26 April 2021 was drafted by the Customer Experience Directorate rather than the Chief Psychologist who initiated the review. However, it considered that it is the closest product in terms of time and content to the items considered by the review.
65. DWP explained that it, and its Ministers, have a commitment to supporting vulnerable people and developing general and overarching

approaches across portfolios. This includes ensuring that it understands vulnerable customers' circumstances as well as possible, despite any barriers that vulnerability may create. DWP stated that hopefully this will reduce cases where it does not pay the correct amount of benefit to the customer at the right time across the schemes that it operates. DWP considered that this is important to achieve the correct legislative policy and social outcomes that government intends. DWP stated that paying the correct amount of money also reduces additional concerns for vulnerable people who may be at risk. DWP considers that this is an example of the extent that officials support government in delivering social and legislative policy and the levels of active interest Ministers take to ensure this occurs.

66. DWP explained that while the Customer Experience Directorate is taking account of the different benefits, they are looking at a general overarching approaches across benefits. This involves considering different options and outcomes and understanding the consequences across all people and benefits impacted.
67. DWP explained that there continues to be ministerial oversight over aspects of this work including Secretary of State involvement in complex cases and the development of the Serious Case Panel which feeds into policy in this area.

The Commissioner's position

68. As set out above, section 35(1)(a) is a class-based exemption and therefore the information simply has to fall within the description set out in the exemption for it to be engaged.
69. The Act does not define 'government policy'. Section 35(5) states that it will include the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Government, but does not provide any further guidance.
70. The Commissioner's guidance on section 35 states:

"The Modernising Government White Paper (March 1999) describes policymaking as "the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world". In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high level objectives and more detailed proposals on how to achieve those objectives".

71. The guidance explains that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms.
72. The Cabinet is the ultimate arbiter of all government policy. Significant policy issues or those which affect more than one department will be jointly agreed by ministers in Cabinet or Cabinet committee. However, not all government policy will need to be discussed in Cabinet and jointly agreed by ministers. Some policies will be formulated and developed within a single government department and approved by the minister responsible for that area of government.
73. Government policy will ultimately be signed off either by the Cabinet or the relevant minister. This is because only ministers have the mandate to make policy on behalf of government. If the final decision is taken by someone other than a minister, that decision will not in itself constitute government policy. However, this does not mean that every decision made by a minister is automatically a policy decision. Ministers may also be involved in some purely political, administrative, presentational or operational decisions.
74. 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. '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. At the very least, 'formulation or development' suggests something dynamic, ie something that is actually happening to policy. Section 35(1)(a) cannot apply to information relating to the later stages of policy making, ie the implementation stage onwards.
75. Having reviewed the withheld information and DWP's submissions, the Commissioner is not persuaded that the withheld information relates to the formulation or development of government policy. Whilst the withheld information contains discussions relating to the creation of a DWP safeguarding policy, the Commissioner is not persuaded that this represents the formulation or development of **government policy**.
76. In his request for submissions, the Commissioner specifically asked DWP to set out which government policy the information related to. DWP did not confirm a specific policy to which the information related. Instead, it explained that the review was one of the ways in which it "gives effect" to the government's "social policy". As set out above, the exemption specifies that the information must relate to the formulation or development of government policy and information relating to the

implementation of an existing policy will not be caught by the exemption.

77. DWP's explanation of the information's relation to the government's "social policy" makes clear that the review has no input into the "social policy" but instead is implementing and delivering it. The Commissioner is therefore not persuaded that the withheld information can be considered as relating to the formulation or development of government policy.
78. The Commissioner notes that DWP has explained that ministers have oversight of some of the areas touched on by the review and that the Minister for Disabled People, Health and Work led discussions on how DWP could develop support to vulnerable claimants. The Commissioner is not persuaded that the involvement of Ministers in the review or areas considered by the review is sufficient to render the information as relating to the formulation or development of government policy. Having reviewed the withheld information and DWP's submissions, the Commissioner can find no evidence that the final decision with regard to the review, or its resulting policy, was taken by a Minister.
79. For the above reasons, the Commissioner is not persuaded that the withheld information relates to the formulation or development of government policy and consequently section 35(1)(a) is not engaged.
80. As the complainant has confirmed that he does not dispute DWP's reliance on section 40(2), the Commissioner requires DWP to disclose the withheld information with the exception of the information exempt under section 40(2).

Other matters

81. In this investigation, and the investigation for IC-48363-C8Q5, DWP repeatedly asserted that it gave no commitment to create a formal report regarding its safeguarding review. The request does not specify that the complainant is seeking a formal report; it refers to the "safeguarding review" as described by DWP's Chief Psychologist and requests the scope and results of this review. DWP has introduced the idea of a formal report itself and proceeded to deny its existence.

Right of appeal

82. 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

83. 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.
84. 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
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