

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2023

Public Authority: Department for Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested a copy of a research report into benefit sanctions. The Department for Work and Pensions (DWP) withheld the information citing section 36(2)(c).
2. The Commissioner's decision is that section 36(2)(c) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the requested report on the effectiveness of benefit sanctions
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 16 August 2022, the complainant wrote to DWP and requested information in the following terms:

"Please provide a copy of "the evaluation of benefit sanctions" report, as referenced on page 5 of the secretary of state's letter to the DWP committee"¹.
6. DWP provided its response on 14 September 2022 and confirmed that it held the requested information but was withholding it under sections 36(2)(b) and 36(2)(c). DWP did not explain why the exemption was engaged and simply quoted the exemption. In particular, DWP failed to specify the nature of the prejudice at section 36(2)(c) "would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".
7. DWP provided its consideration of the public interest. In favour of disclosure, DWP acknowledged only that disclosure could provide a greater understanding of the effectiveness of benefit sanctions.
8. DWP explained that it has to balance this public interest in disclosure against the fact that the withheld documentation includes details of a sensitive nature whose publication would be likely to inhibit candour and be likely to prejudice the effective conduct of public affairs. DWP considered that there is a strong public interest in benefit sanctions remaining effective, however, the 'deterrent effect' is an important element in representing the full picture of sanctions. DWP stated that without this, the research is incomplete and does not reflect the complete picture of the effectiveness of benefit sanctions.
9. DWP confirmed that it was satisfied that the public interest in maintaining the exemption outweighs that in disclosure.
10. DWP maintained this position at internal review.

¹ <https://committees.parliament.uk/publications/23182/documents/169468/default/>

Scope of the case

11. The complainant contacted the Commissioner on 30 September 2022 to complain about the handling of their request for information. Specifically they disputed that DWP could withhold the requested information on the basis of section 36.
12. The Commissioner therefore considers that the scope of the investigation is to determine whether DWP is entitled to rely on section 36 to withhold the requested information.

Reasons for decision

Section 36: Prejudice to the effective conduct of public affairs

13. Section 36(2) of FOIA provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.
14. In order to establish that the exemption has been applied correctly, the Commissioner considers it necessary to;
 - a. ascertain who acted as the qualified person;
 - b. establish that an opinion was given by the person;
 - c. ascertain when the opinion was given; and
 - d. consider whether the opinion was reasonable.
15. DWP provided the Commissioner with the Qualified Person's opinion and the submission provided to aid this opinion.
16. The submissions and request for opinion was sent on 23 August 2022 and the Minister for Pensions provided their opinion on 30 August 2022 which essentially confirmed that they agreed with the points set out in the submissions. The Commissioner has inspected the submission and accompanying information provided to the qualified person.
17. Section 36(5) of FOIA sets out who may act as the qualified person in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the qualified person.

18. The Commissioner is therefore satisfied that the Minister for Pensions was authorised to act as the qualified person in this case.
19. Section 36 specifies that information can be withheld where the Qualified Person is of the opinion that disclosure would or would be likely to prejudice the effective conduct of public affairs. In determining whether the exemption is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one.
20. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject.
21. The Qualified Person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
22. DWP confirmed to the Commissioner that it was relying solely on section 36(2)(c) in relation to the entirety of requested information. DWP did not confirm why it was no longer relying on section 36(2)(b)(i) or (ii). As DWP has withdrawn its reliance on these limbs of section 36, the Commissioner will not therefore consider whether section 36(2)(b)(i) or (ii) is engaged.
23. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
24. In order for the Qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice may arise. In his published guidance on section 36, the Commissioner notes that it is in the public authority's interests to provide him with all the evidence and arguments that led to the opinion in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find the opinion is not reasonable.
25. In the submission DWP provided to the Qualified Person dated 23 August 2022, DWP included: a background to the request, a brief description of the section 36(2)(b) and (c) exemptions, a discussion of the public interest test and a recommendation that the use of sections 36(2)(b) & (c) be approved.

26. The Commissioner has reviewed the submissions, including the background information, and the Qualified Person's confirmation that they approve the use of section 36. He is unable to locate an explanation of the specific prejudice that would or would be likely to occur should the report be disclosed.
27. It is not sufficient for a Qualified Person to simply assert that disclosure would, or would be likely, otherwise to prejudice the effective conduct of public affairs, the opinion must set out what prejudice the Qualified Person considers would occur.
28. In its submissions to the Commissioner, DWP did explain that the prejudice envisaged arises from the publishing of incomplete data which could lead to incomplete or inaccurate conclusions being drawn from the report. DWP considered that this could inhibit candour and prejudice the effectiveness of public affairs.
29. DWP explained that even disclosure of a redacted copy of the report could generate bias leading to inaccurate conclusions being drawn from the report. DWP considers that publishing a redacted report would not provide a full assessment of the policy and is therefore likely to generate a debate based on partial evidence and could result in inaccurate conclusions being drawn. DWP stated that this could inhibit candour and prejudice effectiveness of public affairs as it would be required to devote time and resource responding to and correcting inaccuracies.
30. Whilst the Commissioner acknowledges that DWP has provided him with some detail of the prejudice that could occur, he can find no evidence that the Qualified Person has expressed the opinion that this prejudice would, or would be likely to, occur.
31. The Commissioner therefore finds that section 36(2)(c) is not engaged as the Qualified Person has not specified the prejudice that would or would be likely to occur and therefore the opinion is not reasonable.
32. The Commissioner requires DWP to disclose the requested information.

Other matters

33. The Commissioner has issued a template for recording the Qualified Person's opinion which DWP may find helpful in ensuring that the

opinion includes all the evidence required for the Commissioner to accept that a reasonable opinion has been expressed².

34. As the Commissioner found that section 36 was not engaged, he was not required to consider the balance of the public interest. However, having reviewed the withheld information, DWP's arguments and the circumstances at the time of the request, he considers that the balance of the public interest would lie in disclosure. The Commissioner considers that there is a particularly strong public interest in scrutiny and understanding of the information available to those deciding whether to continue with a controversial policy such as sanctioning benefits.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-record-of-the-qualified-person-s-opinion/>

Right of appeal

35. 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

36. 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.
37. 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