

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

### **Decision notice**

**Date:** 10 August 2023

**Public Authority:** Department for Work and Pensions  
**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

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

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1. The complainant has requested unredacted versions of published Universal Credit Programme Board Papers from October 2020.
2. The Department for Work and Pensions (DWP) relied on sections 31, law enforcement, 42, legal professional privilege, and 43, commercial interests, to redact the information. The complainant does not dispute the redactions made under section 31 and during the course of the investigation, DWP disclosed the information redacted on the basis of section 43.
3. The Commissioner's decision is that section 42(1) of FOIA is engaged with regards to the disputed information and the public interest favours maintaining the exemption.
4. The Commissioner does not require DWP to take any steps.

#### **Request and response**

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5. On 3 November 2022, the complainant wrote to DWP and requested information in the following terms:

"Re: Universal Credit Programme Board Papers Deposited 18 October 2022

Yet again the DWP has redacted some of the deposited papers without any attempt to justify them.

RFI1: Please disclose the redacted information within the following documents (please note that any information exempt under Section 40 FOIA is to be considered outside the scope of my request):

- D-UCPB\_27.10.20-3-Next\_Phase\_Product\_Development.pdf
- F-UCPB\_27.10.20-5-Help\_to\_Claim-Options\_for\_2021-beyond.pdf"

6. DWP provided its response on 1 December 2022 and confirmed that it held the requested information.
7. DWP confirmed that it was withholding the redacted parts of the named documents under section 31(1)(a), section 42 and section 43. For all three exemptions, DWP confirmed that it considered the public interest lay in maintaining the exemption.
8. The complainant requested an internal review of the handling of their request for information on 4 December 2022. They disputed that DWP was entitled to rely on the cited exemptions to withhold the redacted information.
9. DWP provided the outcome of its internal review on 23 December 2022 and upheld its original position.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 19 January 2023 to complain about the handling of their request for information. They initially disputed that all three exemptions, sections 31, 42 and 43, were engaged.
11. During the course of the investigation, DWP wrote to the complainant and confirmed that, due to the passage of time, it could now disclose more information and provided this.
12. Following this, the complainant contacted the Commissioner and confirmed that they would be willing to accept the remaining section 31 redactions if the Commissioner believed they were justified. The Commissioner confirmed to the complainant that this was the case and advised that he would therefore proceed with the investigation solely on the basis of section 42. The complainant did not dispute this approach.

13. The Commissioner considers that the scope of this case is to determine whether DWP is entitled to rely on section 42(1) to withhold the disputed information.

## **Reasons for decision**

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### **Section 42: Legal Professional Privilege**

14. Section 42(1) states:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information”.

15. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting legal professional privilege (“LPP”) for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
16. There are two types of legal professional privilege; advice privilege and litigation privilege. The Commissioner’s view is that for legal professional privilege to apply, the information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.

### **DWP’s position**

17. DWP confirmed that it was relying on section 42(1) as the information attracts advice privilege.
18. DWP explained that it considers that section 42(1) is engaged because the information consists of advice provided by in-house lawyers representing DWP’s interests that was presented to the Universal Credit Programme Board in order to inform their decisions on behalf of DWP. DWP confirmed that the withheld information itself had been written by its lawyers and added directly into the submission and was therefore the original advice provided by the in-house lawyers.

19. DWP confirmed that the withheld information itself specifically notes that legal privilege applies to the information.
20. DWP confirmed that it was satisfied that privilege had not been lost as the content of the withheld material is a confidential communication between the client and lawyers for the purpose of giving legal advice. DWP confirmed that this advice had not been made available to the public or shared more widely.
21. DWP explained that the UCPB members who come from outside DWP are key partners and stakeholders who work closely with DWP on the implementation of Universal Credit. DWP explained that they are full members of the UCPB and have the same responsibilities and duties as UCPB members from DWP. DWP does not consider that they can be said to be third parties.
22. DWP explained that the legal advice provided to the UCPB was clearly marked as subject to legal privilege and UCPB members would have been aware that it was not to be shared outside of the UCPB.
23. DWP explained that even if they were considered to be third parties, any disclosure made to them was therefore not made without restriction and does not change the fact that this information falls within the section 42(1) exemption.

### **The complainant's position**

24. The complainant accepted that the redacted information would fall within the definition of legal advice, however, they consider that section 42(1) cannot apply as it does not constitute a communication between a client and their lawyer.
25. The complainant disputed that the members of the UCPB constitute an "emanation of the client" or that they were tasked with seeking and receiving legal advice.
26. The complainant quoted "The Civil Aviation Authority v Jet2.com Ltd, R. (on the Application of) [2020] EWCA Civ 35 ("CAA")"<sup>1</sup> at paragraph 58:  
  
"But, as I have indicated, we do not have that power. In Three Rivers (No 5), this court held that communications between an employee of a corporation and the corporation's lawyers does not attract LAP<sup>2</sup> unless

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<sup>1</sup> <https://www.bailii.org/ew/cases/EWCA/Civ/2020/35.html>

<sup>2</sup> Legal advice privilege

that particular employee was tasked with seeking and receiving such advice on behalf of the client; and, as confirmed in *Three Rivers (No 6)* at [47] per Lord Scott and *Eurasian*, that is binding on this court. As Hildyard J succinctly put it in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch); [2017] 1 WLR 1991:

"...[T]here can be no real doubt as to the present state of the law in this context...: *Three Rivers (No 5)* confines legal advice privilege to communications between lawyer and client, and the fact that an employee may be authorised to communicate with the corporation's lawyer does not constitute that employee the client or a recognised emanation of the client".

27. The complainant set out that a published agenda from October 2020 showed an attendee list from across DWP and external organisations including:
- The Cabinet Office
  - HMRC
  - Department for Communities Northern Ireland
  - London Borough of Hillingdon
  - HM Treasury
  - Department for International Trade<sup>3</sup>
  - Department for Health and Social Care
28. The complainant stated that while they applaud anyone leading change programmes who encourage wide-ranging engagement, they disputed that it is possible for DWP to claim that all those privy to the legal advice could possibly be considered the client or a recognised emanation of the client. The complainant considered that it is not credible for DWP to claim that all of the attendees were tasked with seeking and receiving the legal advice concerned on behalf of the client.
29. The complainant quoted DWP's response to their request where it states:

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<sup>3</sup> Now Department for Business and Trade

"Similarly, the Department reviewed the material previously withheld under section 42(1) Legal professional privilege, and we maintain that this information still falls under the exemption in section 42.

This is because the information consists of advice provided by in-house lawyers representing DWP interests that was presented to the Universal Credit Programme Board in order to inform their decisions on behalf of DWP. Paragraph 14 specifically notes that legal privilege applies to the advice".

30. The complainant considered that this explanation is misleading and weakens DWP's position. The complainant stated that the UCPB does not make decisions on behalf of DWP and it exists solely to assist the Senior Responsible Owner (SRO). The complainant stated that the SRO may consider the advice given by the UCPB but they make the final decisions and the SRO could disband the UCPB at any time.
31. The complainant considered that regardless of whether sharing legal advice with the UCPB might have been considered useful by the SRO, it is not credible to consider the members of the UCPB as emanations of the client for the legal advice being withheld. The complainant considered that by sharing the advice so widely, DWP has breached legal advice privilege and section 42(1) cannot apply.
32. The complainant directed the Commissioner to Annex A of the policy paper "The Universal Credit (Transitional Provisions) Amendment Regulations 2022: report by SSAC and statement by the Secretary of State for Work and Pensions" published on 4 July 2022<sup>4</sup> and set out that this explains the Governance Structure for the Universal Credit Programme.
33. The complainant set out that this explains that the key responsibilities of the UCPB are:

"The Board has collective responsibility to:  
maintain an overview of the plan to deliver UC including the scope (the requirement), financials (budget and approvals) and the approach and activities to ensure the plan is delivered  
maintain an overview of the systems of programme control and governance including change control, risk management and stakeholder engagement  
take receipt of agreed programme reporting which provides visibility of

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<sup>4</sup> <https://www.gov.uk/government/publications/the-universal-credit-transitional-provisions-amendment-regulations-2022>

achieved and predicted progress against the plan, including all work strands, and satisfy themselves of its accuracy and robustness”.

34. The complainant considered that this makes it obvious that the key responsibilities do not include forming or making decisions on behalf of DWP. They set out that the Secretary of State goes on to explain that an entirely separate body known as the Universal Credit Programme Delivery Executive has the following purpose:

“The Universal Credit Programme Delivery Executive (PDE) is the principal decision making body that is accountable for the successful delivery of the Universal Credit Programme. The PDE will be accountable for delivering the strategic intent of Universal Credit and the transformation of the Department, welfare system and labour market securely”.

35. The complainant considered that the contrast between the role of the UCPB and the PDE in respect of decision making on behalf of DWP supports their position that section 42(1) is not engaged. The complainant considers that this policy document demonstrates that the UCPB has no role or authority to do any of the following on behalf of DWP:

- Take decisions
- Seek/obtain legal advice
- Instruct DWP or the SRO to do anything

### **The Commissioner’s position**

36. The Commissioner acknowledges the complainant’s detailed arguments regarding whether the UCPB can be considered the ‘client’ with regards to the legal advice that engages legal professional privilege. Having carefully considered these arguments, the Commissioner does not consider that they undermine DWP’s ability to engage section 42(1).
37. The Court of Appeal in the cited case confirmed that whilst the same court had found in ‘Three Rivers’ that legal advice privilege could only apply where the employee in question had been tasked with seeking or obtaining legal advice, this was regarding external lawyers and it therefore deferred from this judgement as the case before it was relating to in-house lawyers.
38. The Court of Appeal went on to find that:
- Legal advice privilege applies to communications with in-house lawyers and does not only cover the immediate communications

with a lawyer but also any further communications passing on or discussing that advice, even if with third parties.

- Legal advice privilege only applies where the purpose of the communication was to obtain or give legal advice and does not apply where the purpose was to obtain professional or commercial advice.
  - Internal employees are entitled to correspond with the in-house lawyers on a privileged basis as long as the lawyer is providing legal advice as opposed to commercial advice.
  - Legal advice privilege will only not apply where there is a clear separation between the legal advice and other professional advice being provided.
39. The exemption at section 42(1) sets out that information to which a claim of legal professional privilege could be maintained is exempt information. Essentially if the information is subject to legal professional privilege then section 42(1) is engaged.
40. The Commissioner's guidance on section 42(1) states that the exemption "applies whenever complying with a request would reveal information that is subject to 'legal professional privilege' (LPP)". The Commissioner does not consider that only the specific communication between the client and lawyer would engage section 42(1). Where this legal advice is reproduced and reveals the contents of the legal advice, the Commissioner considers that this information would also engage section 42(1) provided that LPP has not been waived.
41. In the case of in-house lawyers, the client will generally be the organisation employing the lawyers. In this case, DWP has confirmed that it has in-house lawyers representing DWP's interests. The Commissioner therefore considers that the client is DWP itself or the Secretary of State for Work and Pensions who has ultimate responsibility for this government department.
42. Having reviewed the withheld information, the Commissioner is satisfied that it represents legal advice between DWP's in-house lawyers and DWP as the client.
43. Section 42(1) cannot be engaged where LPP has been waived. The Commissioner's guidance states:
- "In a freedom of information context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential".



44. In the circumstances of this case, the Commissioner does not consider that disclosure of the legal advice to the UCPB could be considered to be disclosure to the world at large. Disclosure of information in a restricted manner to a specified group of trusted individuals, regardless of whether they are DWP employees, does not constitute disclosure into the public domain and LPP is not therefore waived.
45. The Commissioner accepts that the withheld information represents the legal advice provided to DWP by its in-house lawyers and that legal advice privilege attaches to it. The Commissioner is therefore satisfied that section 42(1) is engaged.

### **Public interest test**

46. Section 42(1) is a qualified exemption and therefore the Commissioner must consider the public interest and whether in all of the circumstances of the case, the public interest in maintaining the exemption in relation to the identified information outweighs the public interest in disclosing the information.

#### Public interest in disclosure

47. DWP acknowledged that there is a general public interest in releasing material about what information and advice the UCPB considered when making its decision. DWP considered that the release of the information would increase government transparency and inform the public about how the UCPB reached conclusions in order to advise the Universal Credit Director General, who is accountable for the delivery of Universal Credit, on key decisions.

#### Public interest in maintaining the exemption

48. DWP explained that it is well established that there is an in-built public interest which carries significant weight in light of the protection it provides for the lawyer-client relationship.
49. DWP considered that this applies to the withholding of the disputed material. DWP considered that the release of this advice would set a precedent which goes against this well-established principle.
50. DWP considered that a general public interest in transparency is not sufficient to outweigh the public interest in protecting that relationship. DWP stated that there needs to be a clear and compelling justification for disclosure and it considers that in the circumstances of this case it is not present.
51. DWP explained that there is a public interest in the programme boards of major government programmes receiving full and frank legal advice

in order to inform their decision making and ensure they are complying with the law.

52. DWP considered that exposing such advice to the public risks limiting the extent to which such frank advice is likely to inform decision making by Boards running major government programmes in future. DWP considered that this would be likely to impact the quality of decision making and assessment of risks in respect to delivery options, thereby affecting the quality of the service provided to citizens.
53. DWP considered that there is no suggestion that there has been any selective disclosure or misrepresentation of the advice or a wider lack of transparency of the UCPB. DWP stated that given the lack of any specific factors in favour of disclosure, it was satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### The balance of the public interest

54. The inherent public interest in maintaining the exemption provided at section 42 lies in protecting the confidentiality of communications between client and lawyer. The Commissioner has considered whether disclosure of this information would undermine this confidentiality, leading to future legal advice being guarded or generic.
55. The Commissioner accepts that it is well-established that the public interest in withholding information covered by legal professional privilege is significant. He notes that in relation to the application of the public interest test in section 42 cases, *DBERR v O'Brien & IC* [2009] EWHC 164 QB, Wyn Williams J gave the following guidance:

"... it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under the Act. Section 42 cases are different simply because the in-built public interest test in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that the legal professional privilege attaches to the document in question".

56. Notwithstanding this, the Commissioner also recognises, in *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office* [2017] UKUT 495 (AAC), the Upper Tribunal noted the following emphasising that the exemption is not a blanket exemption:

"The powerful public interest against disclosure... is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour

of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute”.

57. Therefore the Commissioner does not consider that the public interest in disclosure needs to be exceptional in order to overturn the acknowledged strong public interest in maintaining the exemption.
58. Paragraphs 59 and 60 of Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 & 30<sup>5</sup> make clear that the public interest arguments in favour of maintaining the exemption must relate specifically to the exemption and will therefore be narrow in scope. The Tribunal confirms that the public interest arguments in favour of disclosure can be wide ranging and do not need to specifically relate to the exemption which has been engaged.
59. The Commissioner accepts that there is a public interest in seeing the information available to those making decisions regarding the future claimant support via 'Help to Claim'<sup>6</sup>. However, the Commissioner also notes the principle of legal professional privilege is a long standing, fundamental principle of English Law. The principle exists to ensure that a legal person, including government departments, may obtain legal advice in confidence.
60. There is, therefore, a strong public interest in maintaining the exemption to the importance of the principle behind legal professional privilege; safeguarding candidness in all communications between client and lawyer to ensure full and frank legal advice which in turn is fundamental to the administration of justice.
61. The Commissioner also notes that at the time of the request, DWP had published the options paper for the future of Help to Claim which included detailed reasonings for each option which goes a significant way towards fulfilling the public interest in understanding the decision making process.
62. In light of the above considerations, and having reviewed the information engaged section 42(1), the Commissioner considers that whilst there is a public interest in disclosure of information relating to

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<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

<sup>6</sup> Support for people making Universal Credit claims is provided by Citizens Advice and Citizens Advice Scotland via 'Help to Claim'.

the decision on the future of Help to Claim, this does not outweigh the substantial public interest in ensuring confidentiality between lawyer and client in the specific circumstances of this case.

63. The Commissioner therefore considers that DWP is entitled to rely on section 42(1) to withhold the redacted information.

## Right of appeal

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64. 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)

65. 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.
66. 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**