

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 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 the Universal Credit Programme Board [UCPB] meeting minutes from February 2020.
2. The Department for Work and Pensions (DWP) originally relied on section 21, reasonably accessible to the applicant, and section 35(1)(a), formulation or development of Government policy.
3. During the course of the investigation, DWP introduced section 31(1)(a), law enforcement, and section 40(2), personal data. The complainant confirmed that they did not dispute the redaction of junior civil servants' personal data under section 40(2).
4. The Commissioner's decision is that section 21 is not engaged, section 31(1)(a) is not engaged, section 35(1)(a) is not engaged for some of the withheld information and where it is engaged the balance of the public interest favours disclosure.
5. The Commissioner requires DWP to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information with the exception of the personal data of junior civil servants.

6. 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

7. On 4 November 2022, the complainant wrote to DWP and requested information in the following terms:

"The UCPB papers for October 2020 were recently deposited in the House of Commons library:

<https://depositedpapers.parliament.uk/depositedpaper/2284676/details>

The minutes for the previous UCPB meeting are unusually [sic] included in the deposited papers. On this occasion the minutes for the previous meeting, which took place in February 2020, have not been included in the deposited papers.

Please provide a copy of the minutes for the February 2020 UCPB meeting. If there is no final version of the minutes then please provide the most recent draft of those minutes".

8. Following the Commissioner's decision notice IC-206199-W8X8¹, DWP provided a revised response and confirmed that it held the requested information.
9. DWP explained that it was withholding the information on the basis of section 21, information reasonably accessible to the applicant, and section 35, formulation or development of government policy.
10. DWP explained that section 21 was engaged as the individual programme board papers have been published and are considered easily accessible and in the public domain. DWP confirmed that they were located within the depository and provided a link².
11. DWP explained that section 35 was engaged as "there are contents of the draft Programme Board minutes that reference to policies in

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023837/ic-206199-w8x8.pdf>

² <https://depositedpapers.parliament.uk/depositedpaper/2284242/files?page=2>

development that may be prejudiced by the publication of any documents that are not finalised”.

12. DWP provided its public interest considerations. It acknowledged that it is well-established that there is an in-built public interest in understanding the policy-making process and the discussions in this.
13. DWP considered that a general public interest in transparency is not sufficient to outweigh the public interest in protecting the policy-making process. DWP stated that this is to protect the integrity of the policy-making process and to prevent disclosures that would undermine this process and result in less robust, well-considered or effective policies. DWP considered that, in particular, it ensures a safe space to consider policy options in private and the formulation of future policy. DWP stated: “There needs to be a clear and compelling justification for disclosure, which in the circumstances is not present”.
14. The complainant requested an internal review of DWP’s response on 1 March 2023. They disputed that section 21 was engaged as the publication of other information did not mean that section 21 applies to the requested information. They also disputed that DWP was entitled to rely on section 35. The complainant considered that DWP’s position was not consistent with its commitment to publish the UCPB papers after two years.
15. DWP provided the outcome of its internal review on 21 March 2023 and upheld its position.

Scope of the case

16. The complainant contacted the Commissioner on 26 March 2023 to complain about the way their request for information had been handled. Specifically, they disputed that DWP was entitled to withhold the requested information.
17. DWP originally provided the Commissioner with a copy of the withheld information which included redactions under section 21, 31, 35 and 40. However, DWP’s submissions referred only to sections 21 and 35.
18. Following the Commissioner’s request for submissions on section 31 and 40, DWP provided the Commissioner with an updated redacted version of the requested minutes. These minutes included information that was no longer being redacted under section 40(2), however, DWP did not confirm whether DWP considers this information exempt under another exemption and had not provided evidence that it has disclosed this information to the complainant. In the absence of any cited exemption,

the Commissioner considers that DWP is not withholding this information and will require disclosure.

19. DWP confirmed that it was withholding the personal data of junior civil servants and the complainant confirmed that they did not dispute this.
20. The Commissioner will determine whether DWP is entitled to rely on sections 21, 31 and 35 to withhold the remaining information within the requested UCPB minutes.

Reasons for decision

Section 21: Information reasonably accessible to the applicant by other means

21. Section 21 of FOIA provides that information which is reasonably accessible to the applicant otherwise than under FOIA is exempt information.
22. In the Commissioner's guidance for section 21³, he explains that in order to be exempt the information must be reasonably accessible to the requester by another route. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular requester can reasonably access the information outside of FOIA.
23. The complainant disputes that the specific information requested, the UCPB minutes, can be considered reasonably accessible on the basis that the papers associated with the meeting have been published.
24. DWP explained that the vast majority of the content of the minutes is merely restating the information contained within the papers from the October meeting. DWP stated that these papers have been published in the House of Commons library and therefore these sections of the minutes are accessible and section 21 is engaged.
25. The Commissioner agrees with the complainant that the requested information was not accessible to them via the published documents DWP provided a link to. The complainant requested "a copy of the minutes for the February 2020 UCPB meeting", that is to say, a record of the discussions and summaries of information presented at the

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-21-information-accessible-to-the-applicant-by-other-means/>

meeting. Whilst the published papers do provide information on what was presented at the meeting, they do not provide the record of these presentations, ie what was deemed important to record, and any discussions held about these papers or if they were, in fact, discussed.

26. The Commissioner's decision therefore is that DWP was not entitled to rely on section 21 of FOIA. The requested information was not reasonably accessible to the complainant via the published documents.
27. The Commissioner requires DWP to disclose the information withheld under section 21.

Section 31: Law enforcement

28. Section 31 of FOIA allows a public authority to withhold information that either might assist someone to commit a crime, or make it more difficult for law enforcement agencies to detect when and by whom a crime had been committed.
29. DWP stated that the exemption was engaged because disclosure would encourage potential probes by malicious individuals or groups intent on conducting identity theft and monetary fraud.
30. DWP also provided very brief arguments which reveal the content of the withheld information. The Commissioner has therefore set these arguments and his analysis out in a confidential annex.
31. Despite the Commissioner making clear that DWP would need to provide full and final submissions on any new exemptions and providing a further opportunity to provide these submissions, DWP has failed to confirm exactly which subsection it was relying on.
32. The Commissioner considers that the only subsection relevant to the withheld information and the arguments provided is section 31(1)(a), prevention or detection of crime.
33. Having reviewed the information and DWP's brief submissions, the Commissioner is not persuaded that disclosure would be likely to prejudice DWP's ability to prevent or detect crime. The information is high level and, at the time of the request, two and a half years old. The Commissioner notes that for the majority of this information, circumstances had changed significantly in these two and a half years and the subsequent decisions made are now in the public domain. DWP has not made compelling arguments regarding why section 31 is engaged.
34. The Commissioner therefore finds that section 31(1)(a) is not engaged.

35. The Commissioner requires DWP to disclose the information withheld under section 31(1)(a).

Section 35: Formulation or development of government policy

36. Section 35 of FOIA states:

“(1) Information held by a government or by the Welsh Assembly Government is exempt information if it relates to –

(a) the formulation or development of government policy”.

37. The Commissioner’s view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
38. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policy-making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered and effective policies. In particular, it ensures a safe space to consider policy options in private.
39. His guidance⁴ advises that often policy formulation will continue until the relevant legislation is passed. Where legislation is not required, a public announcement for the decision is likely to mark the end of the policy formulation process.
40. 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.
41. DWP confirmed that the withheld information relates to the ‘Move to Universal Credit’ policy where it is in the process of moving the remaining legacy⁵ benefit households to Universal Credit.

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

⁵ The benefits that were in place prior to the introduction of Universal Credit

42. As set out above, section 35(1)(a) applies to information if it relates to the formulation or development of government policy.
43. Although 'relates to' is given a wide interpretation, as the Court of Appeal noted in *Department of Health v The Information Commissioner and Mr Simon Lewis* [2017] EWCA Civ 374, of the First Tier Tribunal's findings in that matter, the phrase "should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context" and that a "mere incidental connection between the information and a matter specified in a sub-paragraph of s.35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph".
44. Therefore, there must be a clear and tangible relationship between the content of the information withheld under this exemption and the process that is being protected (ie the formulation or development of policy).
45. The Commissioner's guidance on section 35(1)(a) sets out that information does not need to have been created as part of the formulation or development of government policy. Information may 'relate to' the formulation or development of government policy due to its original purpose when created, or its later use, or its subject matter.
46. This means that information can engage section 35(1)(a) because it was used to inform the policy position, even if in isolation the information does not obviously relate to government policy.
47. Having reviewed the withheld information, the Commissioner is not persuaded that all of the information withheld under section 35(1)(a) relates to the formulation or development of the Move to Universal Credit policy.
48. The Commissioner accepts that the redactions made under section 35(1)(a) in sections 2, 4a, 4b and 5 clearly relate to the development of the Move to Universal Credit policy and therefore section 35(1)(a) is engaged.
49. With regards to the redactions made in sections 3 and 6, the Commissioner is not persuaded that this information relates to the development of the Move to Universal Credit. The majority of the information appears to relate to the operation of the Universal Credit Programme which has been implemented for new claims for several years.

50. The Commissioner therefore finds that section 35(1)(a) is not engaged in relation to this information.
51. With regards to the information that does engage section 35(1)(a), the Commissioner will go on to consider the balance of the public interest.

The balance of the public interest

52. DWP explained that the Move to Universal Credit policy is still under development. It set out that there is a significant challenge to move several million customers from legacy benefits to Universal Credit safely and smoothly. DWP explained that it is vital that various options are trialled and developed to ensure the effective delivery of the Move to Universal Credit. DWP stated that it is confident that the public interest is best served by this information not being put in the public domain.
53. DWP considered that a public debate about the detail of the policy, process, and planning used to move the large numbers of customers from legacy benefits to Universal Credit will constrain DWP's ability to test a variety of options and gather evidence to support the adoption of the optimum approach to transfer customers to Universal Credit. DWP explained that it needs a "safe space" in which to debate these issues away from the public arena. DWP considered that any distraction could lead to reducing the effectiveness of the policy.
54. DWP explained that as a result of feedback from key stakeholders DWP needs a safe space to discuss potential policy options for some of its vulnerable customers.
55. DWP acknowledges that transparency in policy leads to greater public understanding of the process and informs the public debate. DWP considered that it is in the public interest that development of the Move to Universal Credit policy includes detailed consideration of the challenging task of moving legacy benefits over to Universal Credit in the most effective and customer friendly way and that the Universal Credit Programme demonstrates that a variety of potential policy solutions have been explored.
56. However, DWP considers that a public debate about the detail of the policy, process and planning to move the large numbers of vulnerable customers from legacy benefits to Universal Credit will constrain DWP's ability to test a variety of options and gather evidence to support the adoption of the optimum approach to transfer customers to Universal Credit.
57. DWP provided the following reasons for why the public interest in maintaining the exemption outweighs that in disclosing the withheld information:

- "Risk of harming the cross-government review process
- Risk of harming the deep dive process
- The need to protect the safe space in which a review team and stakeholders can identify and look to improve any operational delivery issues.
- Effects on the willingness of operational arms of government to flag issues and proactively raise situations in which they are unable to deliver; this in turn will limit the Government's ability to address delivery issues.
- Disclosure of the material as it is would be likely to cause stakeholders to be unwilling to share insights, which if released prematurely or out of context, may have a negative effect on the quality of the report and consequently the effectiveness of the deep dive process.
- If officials could not be sure that discussions about potential issues dealing with specified groups were protected from disclosure, there would be a strong incentive to omit, or to diminish the significance of negative information, to minimise the prejudice likely to be caused by disclosure.
- Even though civil servants adhere to the Civil Service Code disclosure could create a strong incentive to use more careful language and be less robust about flagging risk. It is reasonable therefore to assume that these conversations would have less value.
- We agree that transparency in policy development is a good thing. However, there is a balance to be struck between transparency around the broad approach to policy development and providing a running commentary on detailed policy approaches, particularly where live testing of delivery mechanisms is being undertaken. We believe that the high-level information we have issued, such as the published updates on the move to UC, illustrates the DPW [sic] commitment to transparency but the release of the detailed discussions of officials, such as those contained in the document in question, could stray into unhelpful detailed discussion that would constrain the effectiveness of this key policy development area. We have therefore concluded that the release of the detailed discusses [sic] within the minutes would not be in the public interest".

58. The Commissioner accepts that significant weight should be given to safe space arguments – ie the concept that the Government needs a safe space to develop areas, debate live issues and reach decisions away from external interference and distraction – where the policy making is live and the requested information relates to that policy making. The Commissioner also accepts that a large scale project such as Universal Credit will have its challenges. However, DWP has not provided sufficiently specific arguments as to why disclosure of the particular minutes would not be in the public interest.
59. 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.
60. The Commissioner's guidance on section 35(1)(a) clearly sets out that the relevance and weight of the public interest arguments depend entirely on the content and sensitivity of the information itself and the effect of its release in all the circumstances of the case. The guidance confirms that the Commissioner's position is that arguments that routine publication of particular types of information are not in the public interest are misconceived as each case must be considered on its individual circumstances.
61. In the specific circumstances of this case, the Move to Universal Credit policy has been in development for several years and the specific information being withheld was two and a half years old at the time of the request. The Commissioner also notes that DWP routinely publishes UCPB meeting minutes after two years but has provided no arguments why the specific set of minutes should not be disclosed. Whilst the Commissioner acknowledges that prior disclosure of similar information does not automatically set a precedent, he considers that if prejudice had occurred following the previous disclosure of this type of information, this would give DWP evidence of the prejudice that may occur which in turn could be used to support its case. In the absence of any specific arguments, the Commissioner does not accept that the general arguments provided carry much weight.
62. The Commissioner acknowledges that the global pandemic immediately after the meeting took place will have prevented progress from occurring as quickly as intended. However, he considers that the two and a half years that had passed are sufficient to address the issues and planning set out within the discussions. The Commissioner considers

whilst the overall policy development may still be live, the stage at which the policy was at by the time of the request had sufficiently moved on such that disclosure of the specific requested information would not damage the safe space required to progress the policy.

63. The Commissioner does not consider officials and ministers are easily deterred from doing the role they are in place to do, especially when the information is over two years old and the need for safe space to debate and consider options within that meeting will have diminished by the time of the request.
64. The Commissioner considers that there is clearly a strong public interest in disclosure of information that would improve the public understanding and allow scrutiny of the Government's approach to migrating legacy benefit claimants onto Universal Credit.
65. The Commissioner considers that there is a very significant and weighty public interest in understanding, and scrutiny 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 reasoning behind policy decisions which affect so many people and involve significant amounts of public funds. Disclosure of this information would allow the public insight into the decision making process and an understanding of the decisions made and challenges overcome.
66. Having reviewed the withheld information, 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 information.
67. The Commissioner requires DWP to disclose the information withheld under section 35(1)(a) in addition to the information withheld under sections 21 and 31(1)(a). DWP is required to disclose the requested minutes with the names and contact details of junior civil servants redacted.

Right of appeal

68. 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

69. 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.
70. 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
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