

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 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 'data and insight into customers' top areas of concern'.
2. The Department for Work and Pensions (DWP) withheld some of the requested information under section 36, prejudice to the effective conduct of public affairs. DWP confirmed that within the withheld information there was personal data that would also be exempt under section 40(2) and 44(1)(a). The complainant confirmed that they were content for DWP to redact the personal data.
3. The Commissioner's decision is that section 36, prejudice to the effective conduct of public affairs, is engaged but that the public interest favours disclosure.
4. The Commissioner requires DWP to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information with the exception of the information highlighted as being exempt under section 40(2) and 44(1)(a).
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 2 February 2022, the complainant wrote to DWP and requested information in the following terms:

“This written question states that the department has gathered ‘data and insight into customers’ top areas of concern:

<https://questions-statements.parliament.uk/written-questions/detail/2022-01-17/hl5430>

Please provide these data and insights into customers’ top areas of concern. If a paper, briefing, or other documents has been written with the aim of explaining or summarising the data and insights then please provide this”.

7. Following a complaint to the Commissioner, the Commissioner issued a decision notice¹ on 23 March 2023 which found that DWP had failed to fully consider all of the information falling within the scope of the request. This decision required DWP to issue a fresh response which considered all of the information falling within the scope of the request.
8. On 24 April 2023, DWP provided its fresh response and disclosed a data table from its ACSSL² trackers 2021/2022.
9. DWP also provided the complainant with an explanation of the information gathered from ACSSL activity. DWP stated that central to the ACSSL role is work they take forward with external partners and organisations, creating relationships to support citizens and providing the critical link into external agencies’ escalation routes and enabling cross-agency case collection.
10. DWP explained that since their introduction, the ACSSL role has developed with their support built into processes to ensure that vulnerable customers’ needs are considered, for example, in relation to making large payments to customers. DWP set out that this is in addition to building the capability and confidence of frontline teams to

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024739/ic-162284-m3n9.pdf>

² Advanced Customer Support Senior Leaders

understand the existing tools, support, and processes available to help support customers.

11. DWP explained that across 2021/22, ACSSLs supported on approximately 900 cases each month, received from both internal and external sources. It set out that the support customers may require can have arisen for numerous reasons, which can also be separate from the DWP services they use. It considered that most important is that it identifies customers where support is required and that customers receive the help and support they need.
12. DWP explained that ACSSLs do support DWP in gathering data and insight in relation to their work and that they do this by recording the cases they help support, whilst undertaking their responsibilities. DWP set out that this allows: 1) ACSSLs to feed into their local meetings and discussions to provide an understanding of the activities they are taking forward to support customers in their geographic area, and 2) Central collation, from across the national ACSSL network, providing the ability to gather data on the national picture.
13. DWP explained that the data table provided was the national information recorded in relation to ACSSL activity across 2021/22 which provides data in relation to:
 - Number of ACSSL referrals recorded on ACSSL trackers
 - Concern Categorisation used in relation to these referrals.
14. DWP explained that the data supplied is derived from unpublished management information based on manually recorded information which was collected for internal Departmental use only. DWP confirmed that the data had not been quality assured to National Statistics or Official Statistics publication standard and, as such, should therefore be treated with caution.
15. DWP explained that information on the Serious Case Panel, and minutes of the meetings are available at:
<https://www.gov.uk/government/groups/dwp-serious-case-panel>. DWP also explained that further information has been published in its Annual Report and Accounts, which is available at:
<https://www.gov.uk/government/publications/dwp-annual-report-and-accounts-2021-to-2022>.
16. The complainant requested an internal review on 28 April 2023 and confirmed that their request had included “[i]f a paper, briefing, or other documents has been written with the aim of explaining or summarising the data and insights then please provide this”. They considered that

more information was likely to be held regarding this element of the request.

17. DWP provided the outcome of the internal review on 3 July 2023 and partly upheld the complaint. DWP set out that it had not confirmed that there is recorded information in relation to 'insight' falling within the scope of the request.
18. DWP confirmed that this was being withheld from disclosure under sections 36(2)(b) and (c), prejudice to the effective conduct of affairs.
19. DWP provided its public interest arguments and found that the public interest lay in maintaining the exemption.

Scope of the case

20. The complainant contacted the Commissioner on 3 July 2023 to complain about the way their request for information had been handled. Specifically, they disputed that DWP was entitled to rely on section 36 to withhold the requested information.
21. DWP confirmed that it considered that some of the information was also exempt under section 40(2), personal data, and section 44(1)(a), statutory prohibition on disclosure. DWP has confirmed that it is relying on section 44(1)(a) as the information is prohibited from disclosure under section 123 of the Social Security Administration Act 1992. This makes any unauthorised release of information relating to particular persons gathered for Social Security purposes a criminal offence. The complainant confirmed that they were content for information that may identify individuals to be excluded from disclosure.
22. The Commissioner therefore considers that the scope of his investigation is to determine whether DWP is entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold the remaining information.

Reasons for decision

Section 36: Prejudice to the effective conduct of public affairs

23. 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.

24. In order to establish that the exemption has been applied correctly, the Commissioner considers it necessary to;
 - ascertain who acted as the qualified person;
 - establish that an opinion was given by the person;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
25. DWP provided the Commissioner with the qualified person's opinion and the submission provided to them to aid this opinion.
26. The submissions and request for opinion was sent on 20 June 2023 and the Parliamentary Under-Secretary of State for the Department for Work and Pensions (in the Lords), Viscount Younger of Leckie, provided their opinion on 26 June 2023 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.
27. Section 36(5) of the 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.
28. The Commissioner is therefore satisfied that Viscount Younger of Leckie was authorised to act as the qualified person in this case.
29. The Commissioner notes that the Qualified Person's opinion was obtained significantly after the request. In the circumstances of this case, the Commissioner is satisfied that this does not undermine the reasonableness of the opinion.
30. In determining whether the exemption is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one.
31. 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. 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; it only has to be a reasonable opinion.

32. DWP confirmed that it was relying on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
33. In its submission to the Qualified Person, DWP explained that since the introduction of ACSSLs it had looked to capture data and information on the cases they help support. It confirmed that it had explained to the requester that whilst ACSSLs do support DWP in gathering data and insight in relation to their work, they do this by recording the cases they help support whilst undertaking their responsibilities. DWP set out that this allows the ACSSLs to feed into their local meetings and discussions to provide an understanding of the activities they are taking forward to support customers in their geographic area and also allows central collation from across the national ACSSL network, providing the ability to gather data on the national picture.
34. DWP explained that the withheld information contains a narrow, informal snapshot of information relating to issues and circumstances which may impact on the experience of some of its customers, as well as case-specific information. DWP set out that this is information captured purely from cases referred for ACSSL support and so it will be in relation to cases where it has identified additional support needs, and therefore not reflective of all customers within the relevant product line.
35. DWP explained that the purpose of collecting this information was to provide evidence and insight in respect of cases requiring ACSSL support, which can then be considered alongside evidence, data and insight from the broader customer groups to understand the scale and impact. DWP explained that these can then be taken through the correct governance routes to consider in their entirety with the wider qualitative and quantitative evidence and data, ultimately leading through to the Serious Case Panel and Risk Team.
36. DWP explained that the insight gathered from ACSSL activity is intended to stimulate discussion to understand the scale and impact of issues and circumstances identified, and it requires time and space to delve deeper into these issues and formulate detailed, comprehensive plans for improvement. DWP set out that this includes impacting possible changes and aligning with government policies and future strategic aims of DWP.
37. DWP considered that the disclosure of piecemeal, incomplete information in the way requested would, or would be likely to, inhibit the free and frank advice and the exchange of views (sections 36(2)(b)(i) &(ii)).
38. The submissions included some information specific arguments that have been included in the confidential annex as reproducing them in this decision would negate the purpose of the exemption.

39. DWP explained that the data and insight in question relates to information based upon operational management information which was put together without the intention to circulate wider than the immediate audience – namely teams working within governance systems, such as the Serious Case Panel.
40. DWP explained that the data and insight were used to instigate a discussion between a senior group of internal stakeholders in a safe and open environment. DWP explained that these discussions are imperative in its ability to develop and improve the processes and policies within DWP as well as the services that it offers its claimants. It considered that the disclosure of this information would not only inhibit colleagues' willingness to fully engage in these types of discussions, but it would also restrain frank and candid exchanges, which are required to develop new ideas and progress existing projects. DWP also considered that some of the information in question, if presented in its current format could have a negative reputational impact on DWP as it is not reflective of the broader customer group within each Service Line.
41. In its submissions to the Commissioner, DWP explained that the withheld documents all contain information, or insight, derived from data provided by the work of ACSSLs. It set out that they summarise information in relation to the most prevalently used categorisation that exists to understand the work that ACSSLs take forward, providing top areas of concern for DWP, for the purposes of providing this information into different forums.
42. DWP confirmed to the Commissioner that the nature of the prejudice under section 36(2)(c), otherwise prejudice the effective conduct of public affairs, was that information and insight gathered from ACSSL activity is intended to stimulate discussion in order to understand the scale and impact of issues and circumstances identified. DWP explained that it needs time and space to delve deeper into these issues and formulate detailed, comprehensive plans for improvement.
43. DWP stated that this information is also not reflective of the wider DWP customer base in relation to any of the services, as it is based purely upon those cases where additional support was needed, therefore any impacting of possible changes would be required to take this into account along with aligning with government policies and future strategic aims of DWP.

The Commissioner's position

44. As set out above, the Commissioner is of the view that in assessing the qualified person's opinion, 'reasonableness' should be given its plain and ordinary meaning. An opinion that a reasonable person in the Qualified

Person's position could hold will suffice. The opinion is not rendered unreasonable simply because other people may have come to a different and equally reasonable conclusion.

45. The Commissioner considers that the exemptions at section 36(2) are about the process that may be inhibited, rather than focussing only on the content of the information. The issue is whether disclosure would be likely to inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information itself does not necessarily have to contain views and advice that are themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that disclosure could inhibit the provision of advice or the exchange of views. Therefore, although it may be harder to engage the exemption if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order to not inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.
46. The Commissioner considers that the nature of the withheld information is largely as would be expected, varying from factual information to potential issues and concerns. The Commissioner considers that, in relation to the process of giving advice and frank discussions, it is not unreasonable to conclude that there is a real and significant risk that officials would be less candid in future when offering similar information should they consider that this information could be disclosed.
47. The severity and extent of the impact this is likely to have is, however, another matter. This is not significant in assessing the reasonableness or otherwise of the Qualified Person's opinion in the circumstances of this case. They are, however, relevant in assessing the balance of the public interest which the Commissioner has considered below.
48. Section 36(1) makes clear that section 36 can only be engaged where the information does not also engage section 35³. In the specific circumstances of this case, the Commissioner is satisfied that section 35 does not apply to the requested information and therefore section 36 can be engaged.
49. Having reviewed the withheld information and the submissions provided by DWP, the Commissioner is satisfied that the qualified person's opinion is reasonable. The Commissioner therefore considers that

³ <https://www.legislation.gov.uk/ukpga/2000/36/section/35>

sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) are engaged in relation to the relevant withheld information.

50. DWP did not confirm whether it was relying on the 'would' or 'would be likely to' threshold of prejudice. The submissions to the Qualified Person uses both terms. The Commissioner has considered the withheld information, and DWP's submission, and he accepts that the Qualified Person's opinion is reasonable on the basis of the 'would be likely to' prejudice threshold.

Public interest test

51. As mentioned, the exemption is subject to the public interest test set out in section 2(2)(b) of FOIA. Therefore, the Commissioner must also consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

The public interest in disclosure

52. In the complainant's original request for internal review, they stated:

"ACSSLs are presumably flagging these systemic concerns to inform the work of the Serious Case Panel. ACSSLs and the Serious Case Panel were introduced by DWP following the deaths of Alexander Boamah, Errol Graham, Jodey Whiting, and Phillipa Day. These deaths led DWP to make changes to legislation and guidance to address what DWP must have recognised were systemic problems affecting those individuals. There is a public interest in knowing what issues are now being flagged up as systemic problems.

There is also a public interest in knowing whether the introduction of ACSSLs is an effective feedback mechanism for DWP. DWP does not appear to have done any form of evaluation regarding the introduction of ACSSLs, and seems to collect very few stats about their work, and so the means we have for judging whether their introduction is effective is to request the feedback they are providing to DWP".

53. DWP acknowledged that there is a strong public interest in disclosing information which ensures transparency in the way in which government operates and in increased transparency and accountability of Ministers and public officials. DWP considered that this helps increase public trust in the governmental processes, in particular, the effectiveness with which government works in ensuring the successful delivery of projects and programmes to time, scope and budget as part of DWP's key objectives. It recognised that people may want to understand how information in relation to the activity taken forward by ACSSLs is acted

upon, how this feeds into DWP's governance routes and how decisions arising from these meetings are taken forward.

54. DWP stated that there has been some limited media interest in the work of the ACSSLs and the Serious Case Panel, the ultimate audience of this insight material, but nothing recently.

The public interest in maintaining the exemption

55. DWP explained that the withheld information includes details of a sensitive nature and publication of these documents would be likely to inhibit candour and likely prejudice the effective conduct of public affairs. It considered that there is a public interest in allowing colleagues to have open and frank conversations where they can engage in discussions, of a sensitive nature, which support in the development of DWP and government policies and processes whereby they are able to freely contribute information and ideas without fear of the information being released prematurely or out of context. DWP considered that this is essential to the growth of DWP and it allows DWP to continue to develop and implement new ideas which helps improve the services that it offers to its claimants, especially the most vulnerable.
56. DWP considered that it needed to be mindful that if it has to release information of this type, it could lead to decisions in the future where such information is not produced in the first place for fear of it being released. DWP considered that there is a chance that action like this could harm the overall working of the Department and lead to poorer outcomes all round.
57. DWP reiterated that the documents were drafted with the express intent of sparking a free and frank discussion between members of various governance groups, up to and including the Serious Case Panel on the issues identified. It considered that the informal language and candid tone throughout the documents reflect that intention.
58. DWP explained that the data in the documents is of narrow scope and only reflects the experiences of a small subsection of DWP customers. DWP set out that there was no provision of balance from data providing a positive perspective and this was deliberate. DWP explained that the data was provided to support free and frank exchange of views and encourage free and frank provision of advice from the various panel members in respect of the business areas they represent.
59. DWP explained that the withheld information was provided to allow the consideration of complex issues which often require strategic, long-term, or sometimes multiple solutions. DWP explained that those solutions remain in development and so, for the reasons outlined in favour of

maintaining the exemption, the Panel and other colleagues need time and space to engage in free and frank conversations to reach the most effective solutions. DWP considered that for these reasons maintaining the safe space for free and frank conversations outweighs the public interest in disclosure.

60. DWP confirmed that it intends to publish further details, once improvements are agreed and implemented, but to do so prematurely risks negatively impacting DWP's response to these issues as a result of the adverse reaction this information may, in isolation, cause. DWP considered that disclosure is likely to lead to pressure for quick solutions or responses, rather than time and space to implement the most effective changes, which is ultimately in the greater public interest and more effective for its most vulnerable customers who could be impacted by these changes.
61. DWP considered that disclosure of the withheld information would allow members of the general public to circumvent the well-established processes put in place to protect and support the most vulnerable. DWP therefore determined that it is in the public interest to withhold this information as its release would otherwise prejudice the effective conduct of public affairs. The Commissioner has set out the detailed arguments regarding this in the confidential annex as it reveals the contents of the withheld information.
62. DWP considered that this is strengthened by it having published further information in relation to Advanced Customer Support in this year's Annual Report and Accounts. DWP stated that this had been published since the request was made and the response was provided. DWP confirmed that this is available from page 67 of the Annual Report and Accounts⁴.

The balance of the public interest

63. If the Commissioner finds that the Qualified Person's opinion was reasonable, he will consider the weight of the opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would be likely to occur but he will go on to consider the severity, extent

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1167946/annual-report-accounts-2022-23-web-ready.pdf

and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest favours disclosure.

64. *Montague v Information Commissioner and Department for International Trade* [2022] UKUT 104 (AAC) states that the correct point at which to assess the balance of the public interest is the point at which the public authority issued its refusal notice, or was required to issue a refusal notice if this was provided outside the statutory timeframe. In the specific circumstances of this request, whilst a significant period of time has passed since the request was made, the time at which the Commissioner is required to consider the balance of the public interest is as it was at February 2022.
65. There will always be a general public interest in transparency. In particular, there is a significant public interest in understanding how government works and scrutiny of Ministers' and public officials' decisions, as DWP has recognised.
66. The Commissioner considers that some of the arguments advanced by DWP comprise "chilling effect" arguments. DWP argues that there would be a loss of frankness and candour which would damage the quality of advice and discussions. However, the Commissioner must focus on the information itself and its context on a case-by-case basis.
67. The Commissioner accepts that a safe space is needed for discussion and decision making by officials, particularly in handling complicated and sensitive matters such as those relating to welfare and safeguarding.
68. The Commissioner acknowledges that there is a public interest in allowing DWP the time and space to implement improvements from the discussions which the requested information informed.
69. However, the Commissioner considers that there is a stronger public interest in the timely understanding, and scrutiny of, the issues raised by the ACSSLs as concerns. The Commissioner notes that the minutes of the Serious Case Panel are published⁵. However, the Commissioner considers that this does not provide the ability to understand and scrutinise the insight and issues raised by the ACSSL team which are DWP's own considerations of where issues are found, improvements are needed, and recommendations for improvements. The Commissioner considers that there is greater understanding to be gained from the timely disclosure of information than retrospective scrutiny.

⁵ <https://www.gov.uk/government/groups/dwp-serious-case-panel>

70. The withheld information provides insight and understanding of where DWP acknowledges that improvements are required and the recommendations also allow scrutiny of whether DWP has taken action to implement these or ensure that the issues do not keep occurring. It also provides insight into the quality of the information used to inform these discussions and improvements.
71. This public interest in disclosure is further strengthened by the fact that these issues impact on some of the most vulnerable members of society. The Commissioner considers that the public is entitled to scrutinise the steps DWP is taking to improve its processes for these individuals at an early opportunity rather than waiting for the improvements to be fully implemented. The Commissioner considers that there is a strong public interest in understanding DWP's approach to preventing future safeguarding issues.
72. The Commissioner does not accept DWP's argument that this scrutiny would be based on incomplete, narrow or unbalanced data. The Commissioner's established position is that incomplete information or the potential for misunderstanding is not an argument that, in itself, carries weight. The Commissioner considers that public authorities would have the opportunity to confirm that the information is incomplete, 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. The Commissioner notes that DWP was able to provide such an explanation in its correspondence with the complainant regarding the data that was disclosed.
73. Whilst the Commissioner accepts that there is weight to the public interest arguments regarding allowing DWP the space to have free and frank discussions to develop and implement the improvements away from external interference, the Commissioner is not persuaded that this is sufficient to outweigh the strong public interest in disclosure of the information.
74. The Commissioner does not consider that significant weight should be attributed to the argument that the information was created with no intention to circulate beyond the intended audience. FOIA has been in force since 2005 and public authorities and their officials are, by now, aware that information may be disclosed.
75. The Commissioner considers that officials should not be deterred from giving impartial and robust advice by the possibility of future disclosure. Having viewed the withheld information, the Commissioner is not persuaded that a generalised chilling effect on all future similar discussions would result from disclosure in this case.

76. The Commissioner also considers that it is possible that the threat of future disclosure could actually lead to better quality of advice.
77. The Commissioner is not persuaded that disclosure would be likely to cause officials to provide lower quality advice in future is a particularly compelling argument. As set out above, civil servants and officials are required to provide quality advice and the Commissioner does not consider that disclosure would jeopardise this.
78. For the reasons set out above, and in the confidential annex, the Commissioner considers that the balance of the public interest lies in disclosure of the information with the exception of the identified personal data as accepted by the complainant.

Other matters

79. The Commissioner reminds DWP again that the balance of the public interest does not form part of the Qualified Person's opinion. Once DWP is satisfied that section 36 is engaged, it is at this point that the balance of the public interest should be considered. Including the public interest considerations in the submissions to the Qualified Person risks the impression that the decision has been pre-determined and that the Qualified Person has not come to an independent opinion.

Right of appeal

80. 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

81. 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.
82. 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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