

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

### **Decision notice**

**Date:** 22 May 2024

**Public Authority:** HM Treasury

**Address:** 1 Horse Guards Road  
Westminster  
London  
SW1A 2HQ

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

---

1. The complainant has requested information about the temporary £20-per week benefit uplift put in place at the start of the Covid-19 pandemic. HM Treasury ("HMT") refused to provide it citing section 35 (formulation/development of government policy) and section 40(2) (personal data). The complainant made it clear in their request for internal review that they did not seek access to any personal data. On internal review, HMT introduced reliance on section 42 (legal professional privilege). During the Commissioner's investigation, HMT withdrew reliance on section 42 and introduced reliance on section 36 (effective conduct of public affairs). It maintained reliance on section 35 in respect of a small amount of the requested information.
2. The Commissioner's decision is that HMT is not entitled to rely on section 35 and section 36 as its basis for withholding the requested information.
3. The Commissioner requires HMT to take the following steps to ensure compliance with the legislation.
  - Disclose the information it holds within the scope of the complainant's request, excluding any personal data.
4. The public authority must take these steps within 30 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**

---

5. On 12 July 2023 the complainant requested information of the following description:  
  
"Under the Freedom of Information Act (2000) I request to see the following information:  
  
a) Under the previous government led by Boris Johnson the Treasury and the Department for Work and Pensions introduced a temporary £20-per week uplift at the start of the Covid-19 pandemic in March 2020.  
  
b) Did the Treasury do any impact assessment of removing the support in 2021, including how it would affect poverty levels?  
  
c) If an impact assessment was carried out I would like to see the document in full".
6. On 9 August 2023 HMT responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so: - section 35(1)(a) (government policy) - section 40 (personal data).
7. The complainant requested an internal review on 16 August 2023. They specified that HMT could redact any personal data. This was information relating to junior officials. HMT sent them the outcome of its internal review on 27 September 2023. It revised its position. It upheld the use of section 35 and introduced reliance upon section 42(1) (legal professional privilege) for some of the information.

## **Scope of the case**

---

8. The complainant contacted the Commissioner on 16 October 2023 to complain about the way their request for information had been handled. They disagreed with HMT's reliance on the exemptions it had cited as its basis for withholding the requested information.
9. During the course of the Commissioner's investigation HMT changed its position. It withdrew reliance on section 42(1) and introduced reliance on section 36(2)(b)(i) and section 36(2)(c). It acknowledged that any

statistical information it held within the scope of the request could not be considered exempt under section 35 by virtue of section 35(2).<sup>1</sup>

10. The Commissioner considers that the scope of his investigation is to decide whether HMT is entitled to rely on section 36(2)(b)(i) and section 36(2)(c) in relation to the majority of the withheld information and whether it is entitled to rely on section 35(1)(a) in relation to the remainder.

## Reasons for decision

---

11. As the Commissioner explains in his published guidance:

“Section 36 is available to [a public authority] ... if the information relates to government policy or Ministerial communications but neither section 35(1)(a) nor (b) can apply because of section 35(2) [see Note 1]. In other words, the information consists of statistical information used to inform a policy decision that’s already been taken”.<sup>2</sup>

12. The Commissioner is satisfied that the withheld information contains statistical information relating to a policy decision which has already been taken.
13. HMT described the withheld information and background detail as follows:

“The requested information relates to an impact assessment of the ending of the temporary Universal Credit £20 per week uplift in October 2021. HM Treasury did not conduct a formal impact assessment relating to the conclusion of this temporary policy. However, HM Treasury does hold information that details our analysis of the impacts of further extensions, which can be used to show the impact of not extending the uplift. We have decided that this information is in scope for this request.

The uplift was initially put in place temporarily between April 2020 and March 2021. In March 2021, the Chancellor of the Exchequer announced

---

<sup>1</sup> This states that:

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded for the purposes of subsection (1)(a), as relating to the formulation or development of government policy”

<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#interactionsection36>

it would be extended for a further 6 months. The policy was always designed as temporary so the information in scope entirely relates to analysis completed prior to the 6-month extension”.

14. The Commissioner will deal first with HMT’s reliance on section 36 because this has been applied to the majority of the information.
15. Section 36(2)(b)(i) and section 36(2)(c) of the FOIA state that:  
“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—  
...  
(b) would, or would be likely to, inhibit—  
(i) the free and frank provision of advice, or  
...  
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs”.
16. Section 36(4) of the FOIA states that: “In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of the qualified person.”
17. Having reviewed the withheld information, the Commissioner is satisfied that it is statistical information and therefore he is also satisfied that HMT does not need to obtain the opinion of its Qualified Person in order to engage these exemptions. There is a small section to which section 35 has been applied. This will be addressed later in this notice.
18. The section 36 exemptions relied upon here are prejudice based. This means that in order for HMT to rely on them, it must show that there is a likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemptions protect.
19. In the Commissioner’s view, three criteria must be met in order to engage a prejudice based exemption:
  - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

20. In addition, section 36 exemptions are subject to a balance of public interest test. In other words, even if they are engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **The applicable interests**

21. HMT explained:

"The statistical information was produced to support decision making for ministers. The majority of this information was produced to support decision making of the impacts to temporarily extend the uplift from March 2021 to October 2021".

22. It explained that disclosure would be likely to erode the safe space in which analysis was produced to support decision making. The Commissioner is satisfied that the harm envisaged relates to the interests described in the exemptions. It relates to the chilling effect on the free and frank provision of advice and, more generally, to the effective conduct of public affairs where that advice is given in a safe space.

### **The nature of the prejudice**

23. The Commissioner must now consider if there is a causal link between the withheld information and the prejudice that the exemptions in section 36(2) are designed to protect and whether such prejudice is real, actual or of substance. Although a public authority will not necessarily be able to provide evidence in support of this causal link, the Commissioner must be satisfied that disclosure is practically and logically capable of harming the interest in some way.

24. HMT argued:

"The release of this information could adversely impact the safe space for officials to present ministers with analysis based on the best available information at the time. Officials may be inhibited by this risk that this sort of analysis will be made public. Officials may be less willing to speculate or explore all of the potential impacts and different scenarios. Any reduction in the candid nature of the information provided would hinder analysis on future policies, damaging the quality of advice and leading to poorer decision-making."

25. The need for a safe space is strongest while the issue under discussion is still live. The decision in this case has been made. Where section 36(2)(c) is argued, HMT asserts the importance of protecting the safe space in which a relatively recent policy decision was made to avoid undermining confidence in that space in general terms. This relates more closely to section 36(2)(c).
26. The Commissioner accepts that there is a causal link between disclosure in this case and the potential for undermining the safe space in which matters are discussed. He also accepts that there may be inhibition of the provision of free and frank advice.

### **The likelihood of the prejudice**

27. HMT explicitly stated that release “would be likely” to give rise to the prejudicial outcomes described in the two exemptions it cited. It said:  
  
“Release would be likely to erode the safe space that is required for Government officials to produce analysis for the purpose of informing senior officials and ministers of the impacts of policy options. This analysis was often completed at pace, to support decision making.”
28. In his guidance, the Commissioner defines this lower threshold as “there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%”.<sup>3</sup>
29. In the Commissioner’s view, HMT has satisfactorily explained how and why the prejudicial outcome would be likely to arise. He is also satisfied that such an outcome - prejudice to the safe space in which challenging topics are researched and presented - is more than a remote possibility.

### **Is the exemption engaged?**

30. Having considered HMT’s position (including with reference to the withheld information itself), the Commissioner is satisfied that the three criteria outlined in paragraph 19 have been met and he considers section 36(2)(b)(i) and section 36(2)(c) to be properly engaged. He has therefore gone on to consider the balance of public interest test. The Commissioner will still require HMT to release the requested information

---

<sup>3</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/the-prejudice-test/#prejudice>

if the public interest in doing so outweighs the public interest in maintaining the exemptions.

## **Public interest test**

### **The complainant's arguments**

31. The complainant said:

"I believe there is a clear public interest which outweighs the decision taken by the department not to release the information. It clearly relates to a decision taken around 2 years ago under a previous government on a policy no longer under discussion and which ministers have made categorically clear will not return.

At the time the controversial decision was made six former Conservative Work and Pensions Secretaries urged the government to reconsider along with dozens of charities, MPs, public health experts, and think-tanks.

The public should have a right to know what information the previous government was privy to before making the decision".

32. They added:

"The Scottish Government has previously published information on this nature - examining the withdrawal of the 20-per-week limit. The DWP has also previously published impact assessments in relation to welfare policy, including a report on the effectiveness of benefit sanctions (after being ordered to by the Information Commissioners' Office).

Scottish government:

<https://www.gov.scot/publications/universal-credit-uplift-joint-letter-to-uk-government/>

DWP:

<https://www.gov.uk/government/publications/universal-credit-impact-assessment>

In addition, the former DWP minister Will Quince told the Commons in June 2021 no assessment on removing the £20-per-week uplift was made. This appears to contradict the Treasury FOI provided to me saying information within the scope of the request is held. There clearly needs to be a clarification in this regard.

Hansard record:

<https://hansard.parliament.uk/commons/2021-06-28/debates/3153FE30-53D2-4B08-9E7B-EE8B8B20C9CC/%C2%A320UniversalCreditUplift>

## HMT's arguments

33. HMT recognised a public interest in transparency in the work of the government. It said:

"HM Treasury recognises the public interest in transparency in the work of the Government. There is a clear public interest in the work of government departments being transparent and open to scrutiny to increase diligence. In the case of Universal Credit, we recognise that there is a public interest in government decisions affecting benefit claimants".

34. It added that release of the information "will be limited in helping public understand the information presented to ministers to support decision making on this policy. Ministers consider a range of factors, such as the wider economic and fiscal context, which are not all be presented [sic] within this information. DWP publish annual poverty statistics which show the number of households in poverty before and after the £20 Universal Credit uplift was in place. Statistics on poverty levels relating to this period are therefore already publicly available. The information was also based on incomplete data that did not capture the full effects of the Covid-19 pandemic or subsequent recovery in earnings, and this type of analysis is inherently uncertain. It would therefore not be in the public interest for this data to be used to create a mis-leading narrative."
35. It argued that this factor combined with the erosion of the safe space which is "required by officials to provide robust advice and candidly present information" along with what it referred to as "the subsequent negative impact on policy making" outweighs the public interest in disclosure.
36. In its public interest arguments regarding section 35 (which will be addressed later in this notice), it explained that:
37. "This information does not reference other measures the Government have introduced to support those on welfare benefits and reduce poverty. For example, as the Universal Credit £20 uplift ended, the Government introduced significant changes to Universal Credit through a £500 annual increase to the work allowance and a reduction to the taper rate from 63% to 55% at Autumn Budget 2021. The Government has also recently supported those on means-tested benefits through various Cost of Living Payments over 2022-23 and 2023-24, as well as recently raising the Local Housing Allowance rates to the 30th percentile at Autumn Statement 2023". The Commissioner would note that public



authorities cannot take account of developments which post-date the time for compliance with the request.

38. In its arguments for section 35, it also said:

“HM Government does not publish estimates of the poverty impacts of fiscal events or individual policies. This is because there is a high level of uncertainty in poverty estimates, including in projections of household incomes, which are affected by many factors beyond policy decisions. There is also uncertainty in predicting the poverty line in future years, which is dependent on measured inflation. We consider that the public interest has been met in part by the annual publication of official poverty statistics by the Department of Work and Pensions (DWP) that show the number of individuals in poverty before and after the £20 Universal Credit uplift was in place. These statistics are a more accurate method of estimating the number of individuals in poverty than is available within HM Treasury because it makes use of DWP’s internal survey data, rather than relying on the estimated projections from HM Treasury.”

### **The Commissioner’s decision**

39. The Commissioner is generally of the view that safe space arguments have the greatest weight while a matter is live. In the Commissioner’s view, HMT’s arguments about damage to the safe space in this case include concern about a chilling effect on officials – inhibition on the provision of free and frank advice.

40. The Commissioner believes that once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions – not least because each case has to be dealt with in light of its own particular circumstances. Therefore a decision to disclose information in one case should not establish an expectation that advice and views will automatically be disclosed in response to other requests.

41. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.

42. As the Commissioner explains in his guidance, information rights tribunals are generally sceptical of such arguments. In *Davies v Information Commissioner and the Cabinet Office (GIA)* [2019] UKUT 185 (AAC), 11 June 2019 the Upper Tribunal stated at paragraph 25 that:

“There is a substantial body of case law which establishes that assertions of a ‘chilling effect’ on provision of advice, exchange of views or effective conduct of affairs are to be treated with some caution<sup>4</sup>”.

43. There are two main reasons for such caution. Firstly, since FOIA was introduced in 2005, public officials now recognise that it is not possible to guarantee the confidentiality of their advice or deliberations. Secondly, civil servants and other public officials are expected to be impartial and robust when giving advice, and not be easily deterred from expressing their views by the possibility of future disclosure.<sup>5</sup>
44. Although there are a number of restraints on the chilling effect, such arguments cannot be dismissed out of hand. The real issue is the weight they attract.
45. There are two key public interest factors here. The first factor relates to a government policy which is, strictly speaking, no longer live. In its arguments regarding section 35, HMT explained that “the information relates to the Government’s support for low income households through welfare benefits. The Government considers the overall level of welfare benefits and how the system can support those on low incomes. This continues to be a pertinent issue for the Government, especially in the context of wider concerns to the rise in the cost of living”.
46. The Commissioner recognises that support for low income households will always be a pertinent issue for any government. Just because information falls within the general scope of that issue, does not mean it relates to a live policy. The temporary uplift in Universal Credit was a specific response to the Covid-19 pandemic and it was withdrawn in 2021.<sup>6</sup>
47. Secondly, and this is clearly related to the first factor, the information relates to the period of government decision making, often at pace, in an unprecedented time of national crisis. The information itself relates to the period when government policy was focussing on economic recovery from that crisis. There was clearly a public interest in protecting the safe space in which this information was presented to government decision makers at the time. There is also a public interest in avoiding a chilling

---

<sup>4</sup> <https://www.gov.uk/administrative-appeals-tribunal-decisions/davies-v-1-the-information-commissioner-2-the-cabinet-office-gia-2019-ukut-185-aac>

<sup>5</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#free>

<sup>6</sup> <https://www.bbc.co.uk/news/uk-58812609>

effect generally on the sharing of statistical information as part of that process.

48. However, given that this was a temporary policy which is no longer in place, the public interest in knowing more about what information was considered during the decision making process becomes weightier vis-à-vis the public interest in protecting the safe space for decision making.
49. The Commissioner acknowledges HMT's argument that the information does not necessarily give a full picture of what information is used to inform discussion and ultimately decision making. That does not, in the Commissioner's opinion and in the circumstances of this case, add much weight to the argument in favour of maintaining the exemption.
50. In light of the above, the Commissioner has concluded, that the public interest favours disclosure of the requested information. This conclusion has been reached in respect of the balance of the public interest under the two exemptions both separately and cumulatively. In reaching this view, the Commissioner has given particular weight to the fact that the policy to which the statistics relate is no longer live. He has also given weight to the fact that the policy was one which was developed in the unique circumstances of the Covid-19 pandemic. There is a strong public interest in knowing as much as possible about what information the government was considering in that unprecedented and challenging period.

### **Section 35(1)(a) – formulation/development of government policy**

51. Section 35(1)(a) of FOIA says that information held by a government department is exempt information if it relates to the formulation or development of government policy.
52. Section 35 is a class-based exemption. That means that the information must simply fall within the class of information described. If the withheld information relates to the formulation or development of government policy, it is exempt information.
53. The timing of a request is not relevant. The question is whether the information relates to the activity, irrespective of when the request was made. However, section 35 is a qualified exemption which means that it is subject to the public interest test.
54. HMT explained:  
  
"The information relates to the conclusion of the temporary Universal Credit £20 per week uplift in October 2021. The Government considers the level at which benefits are set as part of the annual uprating review.

This process involves assessing the overall adequacy of benefits, including Universal Credit.

The information relates to the Government's support for low income households through welfare benefits. The Government considers the overall level of welfare benefits and how the system can support those on low incomes. This continues to be a pertinent issue for the Government, especially in the context of wider concerns to the rise in the cost of living".

55. It also explained:

"The £20 Universal Credit uplift was in place between April 2020 and October 2021. It was always designed as temporary during the Covid-19 pandemic and is no longer live Government policy".

56. Having read the information (which is a small part of the withheld information) and having considered the above explanation, the Commissioner is satisfied that it falls within the class of information described in section 35(1)(a).

### **Public interest test**

57. As set out above, section 35(1)(a) is subject to a balance of public interest test.

58. HMT said:

"In favour of release, HM Treasury recognises the public interest in transparency in the work of the Government. There is a clear public interest in the work of government departments being transparent and open to scrutiny to increase diligence. In the case of Universal Credit, we recognise that there is a public interest in government decisions that support those on low incomes".

59. Against disclosure, HMT said:

"We consider that disclosure could undermine the safe space that government and officials require to consider and develop policy in private. The formulation of good public policy requires a degree of freedom to ensure there is space for any and all options to be considered and thoroughly tested. This enables and protects good government, ensuring the policy making process can be as effective as possible. It is important that officials and ministers are not deterred as a result of the release of information from engaging in full, candid and proper deliberation, including the exploration of all options especially when required to take what may be difficult decisions".

60. To explain its position regarding the balance of public interest, it made the following points:

- There is a strong public interest in protecting the safe space in which policies can be developed and discussed.

- Release of this information will be limited in helping public understand the information presented to ministers to support decision making on this policy. It does not include the range of factors, such as the wider economic and fiscal context which Ministers need to consider.

- This information does not reference other measures the Government have introduced to support those on welfare benefits and reduce poverty. For example, as the Universal Credit £20 uplift ended, the Government introduced significant changes to Universal Credit through a £500 annual increase to the work allowance and a reduction to the taper rate from 63% to 55% at Autumn Budget 2021. The Government has also recently supported those on means-tested benefits through various Cost of Living Payments over 2022-23 and 2023-24, as well as recently raising the Local Housing Allowance rates to the 30th percentile at Autumn Statement 2023.

- It would be contrary to HM Treasury's approach to publishing information of this nature.

61. The Commissioner has already set out HMT's more specific arguments on this specific point at paragraph 38. This is because these arguments seemed more relevant to the question of whether or not statistics should be disclosed.

62. The complainant's arguments in favour of disclosure are set out in the above section which addresses section 36.

### **The Commissioner's decision**

63. The Commissioner would note that the information in question is only a small amount compared to the other withheld information to which section 36 has been applied. He recognises that there is considerable cross over between section 35 and section 36 although the two are mutually exclusive.

64. The Commissioner's decision regarding disclosure of this information in response to this request is very informed by the prevailing circumstances. As with his deliberations regarding section 36, he has given consideration to the public interest in protecting the safe space for the conduct of government business. However, for the reasons set out in respect of section 36, the Commissioner has decided that the public interest favours disclosure. He has given particular weight to the timing

of the request. He also thinks there is a strong public interest in knowing as much as possible about what information the government looked at when making decisions about the national economy as it went through the Covid-19 pandemic.

## **Right of appeal**

---

65. 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)

66. 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.
67. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**