

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 July 2024

**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 guidance in use by staff at the Department for Work and Pensions (DWP) when migrating ESA<sup>1</sup> claimants to Universal Credit.
2. The Commissioner's decision is that whilst section 35(1)(a) is engaged, the balance of the public interest favours disclosure.
3. The Commissioner requires DWP to take the following steps to ensure compliance with the legislation:
  - Disclose the withheld information.
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.

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<sup>1</sup> Employment Support Allowance

## Request and response

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5. On 20 October 2023, the complainant wrote to DWP and requested information in the following terms:

“As part of Managed Migration process some ESA claimants will have their claims closed if they do not claim UC by their ‘deadline’. Please can you provide the guidance that staff use when deciding to close an ESA claim and safeguarding vulnerable claimants. Additionally, if it is not mentioned in that guidance can you provide guidance on how staff know that a claimant is vulnerable and will need safeguarding.”

6. DWP provided its response on 7 November 2023 and provided the complainant with five sections from its “Operational Instructions/Guidance”.
7. The complainant contacted DWP on 4 December 2023 and disputed that it had provided the information requested. The complainant confirmed that they were seeking guidance on where ESA claims are closed due to a claim for Universal Credit or the claimant has missed their claim deadline. The complainant further clarified that this would be where a ‘stop notice’ has been sent.
8. DWP handled this as a fresh request and provided its response on 4 January 2024. DWP provided further guidance to the complainant.
9. On 5 January 2024, the complainant requested an internal review of the handling of their request in the following terms:

“Following my response to the initial answer, it was brought to my attention that the DWP have previously released ‘Claimant journey overview and no claim scenarios: Move to UC (managed Migration)’. In my opinion this clearly answers the question I asked and should have been given in response to the FOI. However, the version of that document available refers to an automatic deadline extension and staff making attempts to contact claimants as standard practise as part of the Managed Migration process. I believe that this no longer happens and so the document is out of date. Presumably this document has been replaced by guidance more appropriate for the current Managed Migration process and this should have been provided in response to my question. Please provide this document.

Additionally, the document ‘identifying enhanced support needs for Move to Universal Credit’ clearly answers my question and I am not sure why it was not provided”.

10. DWP provided the outcome of its internal review on 25 January 2024 stating:

“As a result of this review your complaint is partially upheld. We previously stated we do not hold the information you have requested; upon further investigation we have been able to identify the requested documents within our records”.

11. DWP confirmed that it was relying on section 35(1)(a), formulation or development of government policy, to withhold the located information.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 25 January 2024 to complain about the way their request for information had been handled. Specifically, they disputed that DWP was entitled to rely on section 35(1)(a) to withhold the information located during the internal review. They also raised concerns regarding the handling of the request as they were dissatisfied with the quality of the responses.
13. The Commissioner considers that the scope of his investigation is to determine whether DWP is entitled to rely on section 35(1)(a) to withhold the requested information.
14. The Commissioner will address the concerns regarding the quality of the responses in the 'Other Matters' section of this notice.

### **Reasons for decision**

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#### **Section 35(1)(a): Formulation or development of government policy**

15. Section 35(1)(a) of FOIA states that:

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

(a) the formulation or development of government policy”

16. Section 35 is a class-based exemption therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt, there is no need for the public authority to demonstrate prejudice to these purposes.
17. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are

generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers.

18. 'Development' may go beyond this stage to the process involved in improving or altering existing policy, such as piloting, monitoring, reviewing, analysing or recording the effect of existing policy.
19. Whether information is related to the formulation or development of government policy is a judgement that needs to be made on a case-by-case basis, focussing on the content of the information in question and its context.
20. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy;
  - the final decision will be made by the Cabinet or the relevant minister;
  - the Government intends to achieve a particular outcome of change in the real world;
  - the consequences of the decision will be wide-ranging.
21. Although 'relates to' is given a wide interpretation, as the Court of Appeal noted in *Department for 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 subparagraph 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".
22. 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 government policy).
23. 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.

24. The exemption is not limited to information that contains policy options, advice or decisions. Pre-existing information about the history or factual background of a policy issue is also covered.

### **DWP's arguments**

25. DWP confirmed that the government policy in question was 'Move to Universal Credit', where DWP is migrating benefit claimants from the old benefit systems to Universal Credit.
26. DWP explained that the requested information was interim guidance based upon government policy still being formulated.
27. The Commissioner asked DWP to explain why it considered that the information related to the formulation or development of this policy and to confirm which of the formulation or development stage the policy has reached. DWP responded:

"The guidance in question relates to the formulation and development of the Move to UC policy. The department does not make a specific distinction".

28. The Commissioner also asked DWP to explain why it considers that the government policy had not yet reached the implementation stage. DWP responded:

"DWP are taking a tried and trusted test and learn approach to developing the detailed policy required to support an effective and sensitive move of a large volume of claimants to Universal Credit".

29. DWP also provided the following explanation:

"We recognise that there is significant interest in the Move to Universal Credit migration plans. The implementation of policy into our working practices is fast moving and adjustments are regularly made. We acknowledge that releasing this content would be a more transparent approach. However, we wish to ensure that confidence is maintained and that undue concern is not experienced by claimants should this information have been released. Put simply, if this information was released it may well have changed by the time a requestor has had the opportunity to review, causing confusion. It's imperative that Ministers and their policy advisers can develop policies without the risk of premature disclosure. When these policies / processes are established they will be released [sic] into the public domain via the House of Commons Library in line with our approach in respect of our Universal Credit guidance content".

### **The Commissioner's position**

30. Having reviewed the withheld information and DWP's submissions, the Commissioner accepts that the 'Move to UC' policy was still being developed at the time of the request and the withheld information forms part of the development of this policy.
31. The Commissioner accepts that a large-scale project such as Universal Credit will have different phases of the project at implementation, development and formulation stages. Therefore, whilst Universal Credit has been implemented for new claimants, the Commissioner accepts that DWP is still developing its policy on how and when different demographics of existing legacy benefit claimants should be migrated to the new system.
32. The Commissioner notes that the decision to move claimants on to Universal Credit had been made, however, he accepts that the policy was still in development. The Commissioner's guidance on section 35 states:

"For complicated policies, it is possible that formulation may continue even after this point. In some cases, the Government announces a high-level policy, or passes a 'framework' bill into law, but leaves the finer details of a policy still to be worked out. The high-level policy objective has been finalised, but detailed policy options are still being assessed and debated. Later information about the formulation of the detailed policy will still engage the exemption".
33. The Commissioner accepts that in the specific circumstances of this case. Whilst a high-level decision had been made to move claimants on to Universal Credit, the policy on how to move all claimants was still being developed.
34. The Commissioner accepts that whilst the requested guidance was in use, the operation and effectiveness of the guidance would still be feeding into the development of the policy as "lessons learned".
35. The Commissioner therefore considers that section 35(1)(a) is engaged in relation to the specific withheld information. As section 35 is a qualified exemption, the Commissioner will now consider the balance of the public interest.

### **Public interest in disclosure**

36. DWP acknowledged in its internal review that there is a public interest in greater transparency which makes government more accountable to the electorate and increases trust. DWP recognised that there is a public interest in being able to assess the quality of advice being given to ministers and subsequent decision making. As above, DWP

acknowledged the significant interest in the Move to Universal Credit migration plans.

37. The complainant provided the following arguments in favour of disclosure:

"I do not agree that the given exemption applies in this case. See para 75 of *DWP v IC & Anor* [2023] UKFTT 822 (GRC). The DWP have clearly not provided 'the strongest justification necessary'. The given paragraph refers to the number of people affected and I think in my case there is the added imperative that the guidance relates to the most vulnerable legacy benefit claimants. The closure of a claimants IR-ESA claim could lead to a significant drop in income for very vulnerable claimants and therefore it is in the public interest for the DWP to share when they will do this. On one hand, so people can be proactive to protect people's benefit income and on the other, so that they know when to challenge if the DWP have incorrectly closed a claim and caused hardship. I cannot see any justification for the DWP not releasing this - Move to UC is happening and IR-ESA claimants will have received Migration Notices. This is not a hypothetical situation or something happening in the distant future. The DWP has produced this guidance before and it will be being used by staff."

### **The public interest in maintaining the exemption**

38. As set out above, DWP explained that it's Move to UC working practices are adjusted regularly. DWP explained that it wishes to ensure that confidence is maintained, and that undue concern is not experienced by claimants should this information have been disclosed. DWP stated that if this information was disclosed it may well have changed by the time a requester has had the opportunity to review it and this could cause confusion.
39. DWP considered that it is imperative that Ministers and their policy advisers can develop policies without the risk of premature disclosure. DWP stated that when these policies and processes are established, they will be released into the public domain via the House of Commons Library in line with its approach in respect of its Universal Credit guidance content.
40. DWP considered that there is a significant risk that live debate around the detailed processes being tested to discover the optimum approach to moving customers over to Universal Credit will undermine the space needed for officials to test and develop effective policies.
41. DWP stated that it did not engage in public debate around the processes being developed for moving customers across to Universal Credit. DWP

explained that there is also a risk that live discussion of potential approaches will sow confusion among the claimants that these policies are designed to serve.

### **The balance of the public interest**

42. 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 ideas, 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.
43. 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.
44. 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.
45. 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 is case handling guidance in use by DWP staff at the time of the request.
46. The Commissioner considers that whilst the overall policy development may still be live, DWP has not provided persuasive arguments that the public interest in maintaining the exemption outweighs that in disclosure.
47. 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.
48. The Commissioner considers that there is a significant and weighty public interest in understanding, and scrutiny of, a policy that will affect



millions of people<sup>2</sup> including the most vulnerable in society. The Commissioner considers that the public is entitled to be able to scrutinise the information feeding into decisions which affect so many people and involve significant amounts of public funds. The Commissioner considers that there is greater understanding to be gained from the timely disclosure of information than retrospective scrutiny.

49. The disputed information provides insight and understanding of how the policy is being developed, the factors considered and the quality of the information used to inform the policy process. The public interest in disclosure is further strengthened by the fact that this decision will impact on those in receipt of legacy disability benefits. As the withheld information is guidance which was in use by DWP staff when migrating claimants from legacy benefits to Universal Credit, the Commissioner considers that there is a particularly strong public interest in claimants being able to understand and scrutinise the processes and procedures that they are subject to. Without this information, appealing against procedural errors or understanding how a decision was made will be more difficult.
50. The Commissioner acknowledges DWP's argument that the guidance is subject to regular changes, however, he is not persuaded that this strengthens the public interest in withholding the information. Guidance such as this is generally not static and will be updated in line with case law, policy changes and lessons learned. DWP would also have the opportunity to explain that it is subject to change and the Commissioner does not accept that because the guidance is likely to be updated, it should not be disclosed at all.
51. The First Tier Tribunal in *Department for Work and Pensions v Information Commissioner & Slater EA/2022/0328* stated at paragraph 75:

"Ultimately, as the move to UC (and the benefit payments involved) is about such a large amount of public money, and of importance to 6.5 million households (and many vulnerable people), the Tribunal agrees with the Commissioner that for the public interest in withholding the information to prevail the strongest justification is necessary. As Mr Couling says in his witness statement '20% of working-age individuals will receive Universal Credit by the time the Move to UC process has concluded'. We note all the points raised by the DWP and we are sure

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<sup>2</sup> As at 11 March 2024, 1.66 million people were still on legacy benefits  
<https://commonslibrary.parliament.uk/research-briefings/cbp-9984/>

that it has a strong preference, for good reasons, for the material not to be disclosed. But we agree with the Commissioner that the public 'is entitled to be well informed as to the reasoning behind policy decisions which are likely to shape British society. Disclosure of this information would allow the public insight into the decision-making process and an understanding of the decisions made and challenges overcome'."

52. Whilst the Commissioner accepts that there is some weight to the public interest arguments regarding allowing DWP the space to develop policy away from external interference, the Commissioner is not persuaded that this is sufficient to outweigh the strong public interest in disclosure.
53. 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 strong public interest in disclosure of the information.
54. The Commissioner therefore requires DWP to disclose the withheld information.

### **Other matters**

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55. DWP acknowledged that the complainant's correspondence of 4 December 2023 should have been handled as a request for internal review as they were disputing that the correct information had been provided. DWP also acknowledged that it should have confirmed that the information "Identifying enhanced support needs for Move to Universal Credit" was being withheld.
56. DWP acknowledged that the wording of the internal review was unclear as it had not stated that it did not hold the information originally.
57. The Commissioner expects a government department with the knowledge and experience of FOI that DWP has to get the procedural basics right. The Commissioner expects DWP to take appropriate steps to ensure that these errors do not occur again.

## **Right of appeal**

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58. 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)

59. 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.
60. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Victoria Parkinson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**