

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 October 2024

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 guidance regarding 'Managed Migration'.
2. The Commissioner's decision is that, on the balance of probabilities, the Department for Work and Pensions (DWP) has identified all of the information falling within the scope of the request. For the information that DWP has withheld, he finds that whilst section 35(1)(a), formulation or development of government policy, 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.

Background

5. Following the implementation of Universal Credit for all new benefit claims, DWP undertook the process of moving pre-existing claimants of legacy benefits onto Universal Credit, known as "Move to UC". Pre-existing claimants were initially required to apply for Universal Credit

where their circumstances changed and required a re-evaluation of their benefit entitlement. Managed migration is the process by which claimants on legacy benefits are moved onto Universal Credit¹.

Request and response

6. On 7 February 2024, the complainant wrote to DWP and requested information in the following terms:

“Please provide internal DWP guidance for use by teams working on managed migration.

The response should include, alongside any new guidance, the updated versions of annexes A-J here:

https://www.whatdotheyknow.com/request/guidance_for_teams_working_on_ma#incoming-2346967

I am aware of another request for updated guidance, there is no need to provide guidance already provided in response to that request: https://www.whatdotheyknow.com/request/updated_guidance_for_teams_working”

7. DWP provided its response on 8 March 2024 and confirmed that it held the requested information. DWP provided 19 documents to the complainant. DWP confirmed that it held further documents but it was withholding these on the basis of section 35(1)(a), formulation or development of government policy. DWP provided its public interest considerations and confirmed that it was satisfied that the public interest lay in maintaining the exemption.
8. The complainant requested an internal review of the handling of their request for information on 8 March 2024. They disputed that the correct guidance had been provided as it included information that had previously been removed and was now included again. They also considered that the withheld information should be disclosed as section

1

https://ucmove.campaign.gov.uk/?gclid=c01dc85144bc149479d6aea01da68317&gclsrc=3p_ds&msclkid=c01dc85144bc149479d6aea01da68317&utm_source=bing&utm_medium=cpc&utm_campaign=03343858_DWP_DWP_MOVE%20TO%20UC_C2DE_AWARE_NONE_W01_03_5Y-HMG23-047_Paid%20Search_SE_GCS-Y_Changes%20to%20Benefits%20System&utm_term=managed%20migration&utm_content=Changes%20to%20Benefits%20System_Moving%20to%20UC#jump

35(1)(a) was not engaged and, in the event that it was, the balance of the public interest favoured disclosure.

9. DWP provided the outcome of its internal review on 5 April 2024 and maintained its position. It confirmed that the most up to date versions of the 19 guidance documents had been provided. DWP also maintained that section 35(1)(a) was engaged in relation to the withheld information and that the balance of the public interest favoured maintaining the exemption.

Scope of the case

10. The complainant contacted the Commissioner on 8 April 2024 to complain about the way their request for information had been handled. Specifically, they disputed that DWP had identified the correct information falling within the scope of the request and that section 35(1)(a) was engaged in relation to the withheld documents.
11. The Commissioner considers that the scope of his investigation is to first determine whether, on the balance of probabilities, DWP holds further information to that located. He will then determine whether the withheld information engages section 35(1)(a) and, if so, whether the balance of the public interest favours disclosure or maintaining the exemption.

Reasons for decision

Section 1: General right of access to information

12. Section 1(1) of FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information falling within the scope of the request, and if so, to have that information communicated to them. This is subject to any procedural sections or exemptions that may apply. A public authority is not obliged under FOIA to create new information in order to answer a request.
13. Where there is a dispute between the information located by a public authority and the information a complainant believes is held, the Commissioner follows the lead of a number of First Tier Tribunal decisions and applies the civil standard of proof – ie on the balance of probabilities.
14. In the specific circumstances of this case, the Commissioner will determine whether, on the balance of probabilities, DWP has identified

the correct recorded information that falls within the scope of the request.

The complainant's position

15. In their request for internal review, the complainant stated:

"I do not accept that the correct information has been provided. It appears that some out of date guidance may have been included in the response. The 'exclusions and deferrals' guidance appears not to be the most recent version of the guidance. A more recent version (which does not include 'claimants who require a home visit' in the list of deferrals) was provided in response to another request here:

https://www.whatdotheyknow.com/request/updated_guidance_for_teachers_worki.

While I had asked that the response to the request not duplicate the provision of information which had already been provided in response to that other recent request, the provision of the same information in an out of date version makes me doubt whether the other information provided in response to this request may also be out of date".

16. In their complaint to the Commissioner, the complainant stated:

"I am concerned about DWP's explanation for the discrepancy between previously released guidance and the guidance provided in response to this request. I don't understand why the previously released guidance (which was version 5) would even exist if people requiring home visits had not, in fact, been removed from the list of deferred groups – if they have been removed from the list then that suggests that version 5 is the most recent version rather than the version provided in response to this request (no version number provided)."

17. The complainant also provided a link to a further request which they considered indicates that the information provided is out of date². This request has also been brought to the Commissioner and has been considered under IC-302601-P3X2³.

²

https://www.whatdotheyknow.com/request/managed_migration_claimants_who#incoming-2615888

³ <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=&f.By+authority|publicAuthority=Department%20for%20Work%20and%20Pensions>

DWP's position

18. DWP explained that its Universal Credit guidance is held on the departmental Intranet platform. It stated that it performed key word searches to identify any relevant content and it liaised with the subject matter experts to ensure that business knowledge was applied to the search.
19. DWP explained that the guidance provided in response to a previous request was version 5.0 of the guidance. DWP acknowledged that version 5.0 of the guidance did not include Home Visits in the reasons for deferral.
20. DWP confirmed that the most up to date version of the guidance at the time of this request was version 9.0 which was provided to the complainant. DWP confirmed that whilst version 5.0 did not include Home Visits in the deferral category, version 9.0 did. The Commissioner's decision on IC-302601-P3X2 provides more detail on this.

The Commissioner's position

21. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check what information was held and any other reasons offered by the public authority to explain why no further information is held.
22. For clarity, the Commissioner is not expected to decide categorically whether information is held, he is only required to make a judgement on whether further information is held on the civil standard of the balance of probabilities. That is, whether it is more likely than not that DWP holds further information. He is not required to determine whether information is accurate or should be held.
23. On the balance of probabilities, the Commissioner is satisfied that DWP does not hold further information within the scope of the request. The Commissioner accepts DWP's explanation that the version provided in response to this request superseded that provided in response to the previous request. He also considers that DWP has performed proportionate searches as the guidance in use by staff will most likely be the guidance available on DWP's intranet.

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

24. 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”

25. 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 those purposes.
26. 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.
27. ‘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.
28. 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, focusing on the content of the information in question and its context.
29. 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.
30. 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”.

31. 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).
32. 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.
33. 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

34. DWP confirmed that the government policy in question was 'Move to Universal Credit', where DWP is migrating benefit claimants from the old benefits systems to Universal Credit.
35. DWP explained that there is a significant challenge to move several million customers from legacy benefits to Universal Credit. DWP stated that this work is driven by long-standing government policy and it considers the work to align with both government and departmental policy.
36. 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 stages the policy had reached.
37. DWP explained that the guidance in question relates to the formulation and development of the Move to UC policy. It stated that the Department does not make a specific distinction.
38. DWP explained that it is 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.
39. DWP explained that the information related to the formulation or development of this government policy as the implementation of policy into its working practices is fast moving and adjustments are regularly made. DWP set out the withheld products were still being developed at the time of this request.

40. DWP stated that each section of content is regularly reviewed in line with government and departmental policy. DWP set out that when it is satisfied that the content is in a 'steady state', the exemptions from release will no longer apply.

The Commissioner's position

41. 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.
42. 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 benefit claimants should be migrated to the new system.
43. The Commissioner notes that the decision to move claimants to Universal Credit had been made, however, he 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.
44. The Commissioner's guidance on section 35 states:
- "For complicated policies, it is possible that formulation may continue even after this point⁴. 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".
45. 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.
46. 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".

⁴ The announcement of a policy

47. 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

48. In its initial response, DWP acknowledged 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 also a public interest in being able to assess the quality of advice being given to Ministers and subsequent decision making. DWP set out that it understood that people are interested in how claimants will be moved to Universal Credit and that they may be wondering when this will happen and if their benefit entitlement may change.
49. In its submissions to the Commissioner, DWP simply acknowledged that disclosure would increase transparency.

Public interest in maintaining the exemption

50. DWP explained that it wished to ensure that confidence is maintained and that undue concern is not experienced by claimants, should this information be disclosed. DWP stated that if this information was released it may have changed by the time a requester had had the opportunity to review it. DWP stated that this may cause concern that was no longer relevant as the guidance had changed.
51. DWP considered that it is imperative that Ministers and their policy advisers can develop policies without the risk of premature disclosure. DWP confirmed that when these policies and processes are established they will be disclosed into the public domain via the House of Commons Library in line with DWP's approach in respect of its Universal Credit guidance content.
52. DWP explained that a public debate about the detail of the process used 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. DWP stated that there is a significant public interest in the policy working effectively given it impacts on vulnerable people.
53. DWP considered that in these circumstances, it is vital that various options are trialled and developed to ensure the effective delivery of Move to Universal Credit. DWP stated that it is confident that the public interest is best served by this information not being put into the public domain at this time.

54. DWP stated 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.
55. DWP set out that it did not engage in public debate around the processes being developed for moving customers across to Universal Credit.
56. DWP considered that there is also a risk that discussion of potential approaches will sow confusion among the claimants that these policies are designed to serve.
57. DWP confirmed that the guidance was in use at the time of the request.
58. The Commissioner asked DWP to explain why the specific information being withheld should be withheld compared with the guidance that was disclosed in response to this request.
59. DWP explained that different sections of guidance are at different stages of development. DWP explained that the withheld content related to guidance that it did not feel is in the public interest to disclose. DWP stated: "When content reaches the point that it is no longer related to the formulation of policy, there will be no restrictions applied to its release".

The balance of the public interest

60. 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.
61. 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.
62. 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.

63. 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.
64. The Commissioner considers that whilst the overall policy development may still be live, DWP has not provided persuasive arguments that the public interest in withholding the specific information outweighs that in disclosure.
65. 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.
66. The Commissioner considers that there is a significant and weighty public interest in understanding, and scrutiny of, a policy that will affect millions of people⁵ including the most vulnerable in society. The Commissioner considers that it is important for the public 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.
67. The Commissioner acknowledges that DWP has disclosed some of the guidance falling within the scope of the request and has explained that the withheld information is not yet 'stable' and is subject to change.
68. However, the Commissioner notes that this is not draft guidance which has not yet been implemented or signed off. DWP has confirmed that the withheld guidance is in use and therefore affecting the outcomes of claimants in the process of being migrated at the time of the request.
69. Having reviewed the withheld information, the Commissioner notes that it is largely operational 'How-to' guidance rather than policy options or

⁵ As at 11 March 2024, 1.66 million people were still on legacy benefits
<https://commonslibrary.parliament.uk/research-briefings/cbp-9984>

advice. It is not apparent how this guidance would reveal or undermine the advice provided to Ministers.

70. The information does, however, provide insight and understanding of how the policy is being developed. 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.
71. 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.
72. 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 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'."
73. 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 in this case.

74. 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.
75. The Commissioner therefore requires DWP to disclose the withheld information.

Right of appeal

76. 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

77. 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.
78. 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