

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2025

Public Authority: Department for Work and Pensions
Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested the Equality Impact Assessment associated with the Government's intended changes to the Work Capability Assessment.
2. The Commissioner's decision is that section 22(1) is not engaged and while section 35(1)(a) is engaged, the balance of the public interest favours disclosure.
3. The Commissioner requires the Department for Work and Pensions (DWP) to take the following steps to ensure compliance with the legislation:
 - Disclose the requested 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. On 15 March 2023, the Secretary of State for Work and Pensions published the "Transforming Support: The Health and Disability White Paper" after presenting it to Parliament. This paper set out various policies intended to reform the support available to disabled people and people with health conditions to find and maintain employment. This included the proposal to remove the Work Capability Assessment (WCA) for disability benefits.
6. The White Paper can be found on the GOV.UK website¹.

Request and response

7. On 21 May 2024, the complainant wrote to DWP and requested information in the following terms:

"I wish to make a Freedom of Information Request. Could you kindly provide a copy of any Equality Impact Assessment (or other documentation of equality considerations) relating to the proposed changes to the Work Capability Assessment. The Government's consultation response of 22 November refers, along with subsequent announcements of the planned changes."
8. DWP provided its response on 7 June 2024 and confirmed that it held the requested information but was withholding it on the basis of section 22(1), information intended for future publication.
9. DWP upheld this position at internal review but also introduced section 35(1)(a), formulation or development of government policy to withhold the information.

Scope of the case

10. The complainant contacted the Commissioner on 6 October 2024 to complain about the handling of their request for information.

¹ <https://www.gov.uk/government/publications/transforming-support-the-health-and-disability-white-paper>

Specifically, they considered that the balance of the public interest favoured disclosure of the requested information.

11. The Commissioner therefore considers that the scope of his investigation is to determine whether DWP is entitled to rely on section 22 and 35(1)(a) to withhold the requested information.

Reasons for decision

Section 22: Information intended for future publication

12. Section 22(1) of FOIA states that:

"Information is exempt information if –

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)".

13. Section 22(1) is qualified by a public interest test.

14. Therefore, there are four questions to consider:

- Is there an intention to publish the requested information at some future date?
- Was the information already held with a view to publication at the time the request was made?
- Is it reasonable to withhold the information from disclosure until the intended date of publication?
- Does the public interest favour maintaining the exemption or disclosing the information?

Was there an intention to publish the requested information at some future date? Was the information already held with a view to publication at the time the request was made?

15. In order to correctly rely on section 22, there must have been a settled intention to publish the requested information prior to the request being received.
16. DWP confirmed that the requested information was due to be published as part of an Impact Assessment of the WCA changes. DWP explained that this had been confirmed via several Parliamentary Questions between November 2023 to April 2024.
17. DWP stated that the intended publication date would be when the regulations are laid Parliament.
18. The Commissioner is therefore satisfied that there was an intention to publish the requested information before the request was made.

Is it reasonable to withhold the information from disclosure until the intended date of publication?

19. A public authority must consider whether it is reasonable, in all the circumstances of the request, to withhold the information until the intended date of publication.
20. The Commissioner asked DWP to explain why, in this case, DWP had concluded that delaying disclosure was reasonable. DWP's response was as follows:

"We are satisfied that it is reasonable to withhold disclosure at this time and instead keep to the publication schedule in order to avoid premature disclosure that pre-empts the processes of consideration and scrutiny that the drafted regulations, and accompanying Equality Analysis, need to go through".
21. There is some overlap between the factors to consider when deciding what is reasonable and those relevant to the public interest test. The Commissioner has therefore included some of DWP's public interest considerations where they are relevant to the question of whether it is reasonable to withhold the information until the intended date of publication.
22. DWP explained that it is important to take into account the timing of the publication and allow government departments to publish information in a planned and managed way at a time of their own choosing. DWP explained that the timetable for this information requires internal consideration prior to its public release.

23. In coming to his conclusion, the Commissioner has considered DWP's submissions and his own guidance on section 22².
24. The Commissioner's guidance provides the following advice on assessing whether delaying disclosure until the intended publication is reasonable.
- "24. When doing so, a public authority should first consider whether or not it is:
- sensible;
 - in line with accepted practices; and
 - fair to all concerned.
25. A public authority may also wish to give thought to whether:
- it is the right decision to manage the availability of the information by planning and controlling its publication;
 - it is necessary to avoid the possibility of the requester gaining any advantage in obtaining the information prior to general publication;
 - the timetable properly requires internal or limited consideration of the information prior to its public release;
 - having decided to disclose the information, there would be real difficulties in extracting it prior to publication; and
 - this information should instead be available through the authority's publication scheme.
26. The closer to the date of publication, the more reasonable it is likely to be for the public authority to withhold the information until publication has taken place".
25. The Commissioner acknowledges DWP's arguments that, in the specific circumstances of this case, it is reasonable to delay disclosure until the regulations have been passed as this is the usual working practice of government departments when passing legislation.

² <https://ico.org.uk/media2/xnkbxjwg/s22-and-22a-info-intended-for-future-publication-v-1-2.pdf>

26. However, in the specific circumstances of this case, the Commissioner considers that delaying the disclosure of this information until after the new regulations have passed is not reasonable. The Commissioner notes that the decision to remove the WCA is a controversial one which will affect a significant proportion of the population and directly impact people with disabilities.
27. The Commissioner considers that in the specific circumstances of this case, it is not reasonable to withhold this information as this will hinder public scrutiny and debate until after the regulations have been passed. Withholding the Equality Impact Assessments will mean that the public is unable to consider whether the impact of the planned changes have been adequately considered and informed.
28. As the Commissioner considers that it is not reasonable to delay the disclosure of this information until after the regulations have passed, he finds that section 22(1) is not engaged.
29. The Commissioner will therefore go on to consider whether section 35(1)(a) is engaged in relation to the information.

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

30. Section 35(1)(a) of FOIA states:

“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”

31. 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.
32. 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 or submissions are put to a Minister or decision makers.
33. ‘Development’ may go beyond this stage of the process involved in improving or altering existing policy, such as piloting, monitoring, reviewing, analysing or recording the effect of existing policy
34. 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.

35. 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 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.
36. 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 further 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 subparagraph".
37. Therefore there must be a clear and tangible relationship between the content of the information withheld under this exemption and the process that is being protected (ie the formulation or development of policy).
38. 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.
39. The exemption is not limited to information that contains policy options, advice or decisions. It can include pre-existing information about the history or factual background of a policy.
40. DWP explained that the requested information relates to the early development of the policy to change the Work Capability Assessment descriptor changes as announced on 22 November 2023.
41. DWP confirmed that it is currently in the process of obtaining ministerial agreement to, and decisions on the next steps to the proposed changes. It explained that the relevant regulations are currently at an early draft

stage and likely to be changed as ministers consider the impacts and evidence.

42. Having reviewed the withheld information and DWP's submissions, the Commissioner is satisfied that the withheld information relates to the development of the government's policies regarding the WCA.
43. Section 35(1)(a) is therefore engaged and the Commissioner will go on to consider the balance of the public interest.

The public interest test

44. As the Commissioner has determined that section 35(1)(a) is engaged in relation to the requested information, he will now go on to consider whether the balance of the public interest favours maintaining the exemption or whether it favours disclosure.

Public interest in disclosure

45. DWP explained that while responding to the request, it had considered the level of public interest in how the policy on the WCA is developed. It also acknowledged that disclosure of the information would improve transparency in the policy-making process and that there is a need for transparency in policy development.
46. The complainant considered that the public is entitled to have an expectation of transparency about how the Government will take decisions on DWP policy as it is contentious and will inevitably have equality impacts.
47. The complainant explained that there is a pressing public interest in how the policy on the WCA is being developed. They considered that public understanding and debate is being undermined by the absence, in their view, of information on DWP's consideration of the equality impacts.
48. The complainant stated that it would be considered good practice for public authorities to provide a draft Equality Impact Assessment alongside the initial consultation to further inform any decisions made.
49. The complainant considered that the changes proposed to the WCA are far reaching and can be expected to have a significant adverse impact on many disabled people. They stated that those affected by the decision should have access to DWP's analysis of those impacts and the chance to challenge it.

Public interest in maintaining the exemptions

50. DWP explained that it considered the public interest in ensuring that policy making is robust and thorough before information is published. It stated that there is a need for governments to publish information in a planned and managed way, allowing time for the required examination and scrutiny, for example, by the Social Security Advisory Committee, prior to wider release.
51. DWP set out that there is a publication timeline for this type of evidence and the government has publicly committed to publishing the Equality Analysis as part of the wider Impact Assessment alongside the regulations once finalised. DWP considered that this will provide transparency and the opportunity for public scrutiny; however, it is important to adhere to the publication schedule to allow for internal consideration prior to wider release.
52. DWP explained that as the policy has not been fully developed or finalised, premature disclosure would compromise the sanctity of the development process and the safe space for ministers to develop policy away from external interference, while Parliamentary Committees engage with Ministers on the impact and content of the policy. If information is published prematurely, there is a risk of decision making becoming poorer as a result.
53. DWP explained that it considered the balance of the public interest favours withholding the information as it is important that space is given to develop this policy and set its direction with Ministers without premature disclosure of information that may still change.
54. DWP stated that good decision making is based on the best advice available and a full consideration of all options without fear of premature disclosure. The Government needs safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction.
55. DWP considered that if this public interest cannot be protected, there is a risk that decision making will become poorer and will be recorded inadequately.

The balance of the public interest

56. The Commissioner notes that the disputed information contains analysis and direct assessment of the impact of the policy change on different groups of benefit recipients and related equality issues.
57. 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.

58. 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.
59. The Commissioner's guidance on section 35(1)(a)³ states:

"The relevance and weight of the public interest arguments depends entirely on the content and sensitivity of the information in question and the effect of its release in all the circumstances of the case.

For the same reason, arguments that 'routine' disclosure of a particular type of information are not in the public interest are misconceived. Each case must be considered on its facts. Even if disclosure is ordered in one case, this does not mean that similar information must be disclosed in future.

Arguments must therefore focus on the effect of disclosing the information in question at the time of the request, rather than the effect of routine disclosure of that type of information.

...

The exact timing of a request is very important. If the information reveals details of policy options and the policy process remains on going at the time of the request, safe space and chilling effect arguments may carry significant weight.

However, even if the policy process is still live, there may be significant landmarks after which the sensitivity of information starts to wane.

For example, once a high-level policy objective has been announced (eg in a White Paper or framework bill), any information about that broad objective becomes less sensitive. The safe space to debate that high-

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

level decision in private is no longer required, even if related debate about the details of the policy remains sensitive.

In some cases, the formulation or development of policy may not follow a linear path (ie where the policy comes more and more settled as time goes on). There may be several distinct stages of active policy debate, with periods in between where policy is more settled. The importance of a safe space can wax and wane, depending on how fixed the policy is at the exact time in question.

Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy generally starts to wane, and the public interest arguments for protecting the policy become weaker. If the request is made after the policy process is complete, that process can no longer be harmed.

Tackling some policy issues may require a range of initiatives, implemented over a number of years. However, this does not mean that the policy thinking on each, individual initiative can still be considered live until the issue is finally resolved”.

60. In the specific circumstances of this case, the Commissioner notes that the request was made more than a year after the “Transforming Support” White Paper was published announcing the removal of the Work Capability Assessment.

61. The White Paper states that the Government will:

- “Legislate to remove the existing Work Capability Assessment so that in future there is only one health and disability functional assessment – the PIP assessment – improved by the changes we set out in chapters 2 and 3.
- Remove the existing Universal Credit limited capability for work and work-related activity (LCWRA) element and replace it with a new Universal Credit health element. This means that there will be no need to be found to have limited capability for work and limited capability to prepare for work to get additional income-related support for a disability or health condition.
- Introduce more personalised levels of conditionality and employment support.”

And

“We will transform the benefits system by removing the Work Capability Assessment. This will ensure that those who are able to, can progress in or towards work, without the worry of being reassessed

and losing their benefits. The system will focus on what people can do, rather than the limitations of a disability or health condition”.

62. In a similar case, IC-231088-F8N5⁴, DWP set out that the policy will require primary legislation which was being developed and was not due to be implemented before 2026. However, the Commissioner considers that, in line with his guidance set out above, this does not automatically mean that information about the decision to remove the Work Capability Assessment should be withheld until the legislation is passed. Information about different stages of the policy development will wax and wane in sensitivity as the policy progresses.
63. At the time of the request, the decision to remove the Work Capability Assessment had been taken and announced.
64. The Commissioner notes that between the time of DWP's response and internal review, the current Labour Government was elected and was in the process of reviewing and amending the previous Conservative Government's position. However, the Commissioner is required to consider the balance of the public interest at the time of the request and initial response. At this time, the removal of the Work Capability Assessment was established Government policy.
65. The Commissioner considers that DWP has failed to sufficiently consider the strength of the public interest in the timely understanding and scrutiny of the development of the policy to amend and remove the WCA.
66. In addition to the general arguments in favour of transparency in policy making, the Commissioner considers that there is a particularly strong public interest in disclosure of information relating to disability benefits reform.
67. The Institute for Fiscal Studies (IFS) issued a report on “The effects of reforms to the Work Capability Assessment for incapacity benefits” on 26 October 2023⁵. The IFS set out that the key findings were:

“1. More than 3 million working-age adults in the UK receive health-related benefits. The government has announced plans to first tighten,

⁴ <https://ico.org.uk/media2/migrated/decision-notice/4027283/ic-231088-f8n5.pdf>

⁵ <https://ifs.org.uk/publications/effects-reforms-work-capability-assessment-incapacity-benefits>

and then scrap entirely, the Work Capability Assessment – one of the two assessments used for determining eligibility to those benefits.

2. The short-term reform to tighten the Work Capability Assessment will mean some individuals who would previously have been judged as unable to work will lose out on £390 a month and have to carry out work-related activities to keep receiving benefits. This may deliver some savings for the government, although previous reforms of a similar nature have been less effective at doing this than expected.

3. The proposal to scrap the Work Capability Assessment entirely is a more radical change. It would mean moving to a system without a benefit explicitly related to an individual's capacity to work. The idea is that breaking the link between ability to work and benefit entitlement will encourage individuals with health conditions to move into employment.

4. As a result of this second reform, some working-age people currently receiving health-related benefits of having limited capability to work would lose them if they are not judged to have a disability that leads to extra costs associated with their daily living. Others who can work and are already receiving health-related benefits because they are judged to have such costs could qualify for additional benefits under the changes.

5. We estimate that, before accounting for any change in behaviour, 320,000 individuals will see their entitlements rise, typically by £390 per month (£1.5 billion a year additional spending), and 520,000 will see them fall by the same amount (£2.4 billion a year less spending). Overall, this would be a £900 million spending cut. For context, official figures suggest that, in real terms, spending on benefits for working-age individuals with health conditions is forecast to rise by £11.9 billion from £61.6 billion in 2023-24 to £73.5 billion in 2027-28.

6. Scrapping the Work Capability Assessment would change people's financial incentives to work – with 1.8 million seeing their incentives strengthened and 440,000 seeing them weakened. Within Jobcentres, work coaches would need to decide the extent to which individuals should engage in work-related activities as a condition of receiving their benefits. This could help more people into paid work, but it comes with the risk of requirements being inconsistently applied and the potential for hardship if they are applied inappropriately.

7. The reform would base benefit entitlement on the assessment of mobility and ability to do daily living tasks that is used for PIP eligibility – the part of the system that has been growing most quickly for years. This runs the risk of faster growth in spending on health-related benefits in the future”.

68. The Commissioner considers that this report's findings demonstrate the importance of the public being able to better understand the policy and being able to engage with it.
69. The disputed information provides insight and understanding of how the decision to reform and remove the WCA will affect those in receipt of disability benefits, the factors being considered and the quality of the information used to inform the decisions during the development of the policy. This public interest in disclosure is further strengthened by the fact that this decision will impact on those applying for and in receipt of disability benefits. This will impact on millions of people, including some of the most vulnerable in society. The Commissioner considers that the public is entitled to scrutinise a decision such as this at an early opportunity. As set out above, whilst the policy was being developed at the time of the request, the White Paper has already confirmed that this would go ahead.
70. Whilst the Commissioner accepts that there is 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.
71. DWP has not provided compelling arguments regarding how the specific policy named would be undermined by disclosure of the disputed information. Having reviewed the information, it is not apparent to the Commissioner how the specific policy would be undermined other than the general safe space arguments presented. While the Commissioner accepts that section 35(1)(a) is intended to protect the policy process as a whole in addition to specific policies the Commissioner is not persuaded that the public interest arguments presented are sufficient to outweigh, in the specific circumstances of this case, the strong public interest in scrutiny of the equality considerations influencing this policy position.
72. The Commissioner does not consider that officials and Ministers are easily deterred from doing the role they are in place to do, especially if disclosure occurs once the policy has been announced.
73. This legislation change will affect a significant portion of the population and, in the circumstances of this case, the Commissioner considers that it is important that the public is able to scrutinise the equality considerations that fed into the decision.
74. The Commissioner is not persuaded that disclosure of the equality analysis after the legislation has been passed will allow that to occur in a meaningful way. The Commissioner acknowledges DWP's position that the process of drafting the regulations was at an early stage, however,

as above he notes that the decision to remove the WCA had been taken a year earlier. The Commissioner considers that the complainant's argument that it would be good practice to disclose the draft equality impacts at the time of the consultation carries significant weight.

75. Having reviewed the withheld information, the Commissioner is not persuaded that DWP's public interest arguments in favour of maintaining the exemption at section 35 outweigh the strong public interest in disclosure.
76. The Commissioner requires DWP to disclose the requested information.

Right of appeal

77. 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

78. 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.
79. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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