

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 May 2014

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested a copy of any reviews into Universal Credit that were carried out and/or completed by the Major Projects Authority (MPA) in the first three months of 2013. The Cabinet Office has confirmed that it held a Project Assessment Review (PAR) matching the description of the information included in the request. However, it considered the PAR was exempt from disclosure under sections 36(2)(b) and (c) (prejudice to the effective conduct of public affairs) of FOIA or, in the alternative, section 35(1)(a) (government policy). The Commissioner's decision is that each of the exemptions in section 36(2) cited by the Cabinet Office is engaged and that, in all the circumstances, the public interest in disclosure is outweighed by the public interest in maintaining the exemption. The Commissioner does not therefore require any action to be taken as a result of this notice.

Request and response

2. On 5 April 2013 the complainant made the following request for information:

Please disclose under the FOI act, copies of all unpublished (ie not already in the public domain) reviews carried out and/or completed by the Major Projects Authority into Universal Credit in January, February and March 2013.

We are interested in seeing any "gateway review reports" carried out during these 3 months, including the RAG (red, amber, green) ratings.

3. The Cabinet Office responded on 3 May 2013 and confirmed that it held information covered by the scope of the request; specifically a PAR report carried out between 28 January 2013 and 5 February 2013. However, the Cabinet Office advised that this information was exempt from disclosure under sections 33(1)(b), 33(2) and 35(1)(a) of FOIA, finding that the balance of the public interest favoured maintaining the exemptions.
4. The complainant contacted the Cabinet Office again on 9 May 2013 and challenged the decision to refuse disclosure of the PAR. In light of this dissatisfaction, the Cabinet Office carried out an internal review of its handling of the request and provided the complainant with the outcome on 15 July 2013. This upheld the original decision that the PAR was exempt from disclosure.

Scope of the case

5. The complainant contacted the Commissioner on 18 September 2013 to complain about the Cabinet Office's decision to withhold the PAR report.
6. The Commissioner notes that the complainant made the same request for information to the Department for Work and Pensions (DWP), on the same date. The DWP acknowledged holding the PAR report and similarly refused its disclosure, albeit it originally cited a different exemption as its basis for doing so. A separate complaint was subsequently made to the Commissioner about the DWP's response, which has been addressed under the case reference FS50513390.

7. During the course of the Commissioner's investigation of both complaints, the Cabinet Office and the DWP adopted matching arguments for the non-disclosure of the PAR report; with both claiming a reliance on sections 36(2)(b) and (c) of FOIA or, if these were not found to be engaged, section 35(1)(a).

Reasons for decision

Background

8. The Information Tribunal has recently considered three separate appeals concerning requests for information relating to the implementation of Universal Credit – Slater v The Information Commissioner and DWP (EA/2013/0145), DWP v The Information Commissioner and Slater (EA/2013/0148) and DWP v The Information Commissioner and Collins (EA/2013/0149). The decisions were made on 19 March 2014 and promulgated on 24 March 2014¹.
9. As these appeals relate to the same underlying issue – Universal Credit – the Commissioner has found it instructive to refer to the Tribunal's findings. However, he has also had to bear in mind that the disputed information in this case and the circumstances at the point the request was made differ and so the considerations will not all be the same.
10. The Tribunal helpfully set out the framework in which Universal Credit was proposed and the status of the programme. For completeness, extracts from the background explanation are reproduced below.

3. On 8th. March, 2012 the Welfare Reform Act ("the 2012 Act") received the Royal Assent. It followed public consultation on universal credit from July to October, 2010, the publication of a White Paper "Universal Credit: welfare that works" in November, 2010 and the publication of the Welfare Reform Bill on 16th. February, 2011. It introduced the framework of Universal Credit, which will replace working age benefits and tax credits currently provided by central and local government. Its primary purpose is to "make work pay", that is to say, to encourage people to obtain employment, whether full – time or

¹[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1239/Slater,%20John%20EA.2013.0145%20\(24.03.14\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1239/Slater,%20John%20EA.2013.0145%20(24.03.14).pdf)

part – time, by ensuring that that they will always be better off working than drawing benefits. The statute created a framework to be filled out by subordinate legislation.

4. A single credit, related to the recipient's circumstances and responsibilities, will replace the existing complex range of benefits, allowances and tax credits. Ultimately, this should simplify the whole social security system [...].

[...]

9. Within the DWP a Universal Credit team was created to deliver the project over a four – year period. The management and progress of the UCP were, not surprisingly, the subject of scrutiny by the National Audit Office ("the NAO"), which reported on "early progress" on 5th. September, 2013. That report was highly critical of a number of central elements in the DWP's performance. Failings post – dating the various "qualified opinions" provided by the minister to which we refer [...] are not material to our decision but the NAO referred to reviews in mid – 2012 by the Major Projects Authority [...] and by suppliers, citing problems with staff culture, including a "fortress mentality" and a "good news culture". The same or similar reviews identified a failure by the DWP to match systems and processes design to the objectives of the programme or as the NAO put it, there was no "detailed view of how Universal Credit is meant to work."

13. [...] On the one hand, the intended benefits both for recipients of the Universal Credit and for the exchequer are immense. The DWP, in its December, 2012 business case, estimated the net benefit between 2010 – 2011 and 2022 – 2023 at £38 billion and at £7 billion per year thereafter. On the other, considerable risks are involved, both in the short and long terms. The widespread anxiety and hardship, that would result if the highly complex calculation of entitlement or the delivery of payments broke down through a failure of technology or human error, would pose a major threat to the success of the whole venture. Likewise, the possibilities for fraud on a vast scale require robust counter – measures, if public confidence in these changes is to be preserved. The electorate needs to be reassured as to budgetary control, efficient management and timely delivery of such an ambitious project, involving costs estimated in 2012 at £2.4 billion up to 2023.

Section 36 – prejudice to the effective conduct of public affairs

11. Sections 36(2)(b) and (c) state that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. Section 36(2) and section 35, the other exemption referred to by the DWP, protect many of the same interests. However, the exemptions are mutually exclusive. This has the effect that if any limb of section 36(2) is engaged with respect to the requested information, section 35 cannot also apply.

13. To find that any part of section 36(2) of FOIA is engaged, the Commissioner must be able to establish that a qualified person gave an opinion which found the exemption applied and that the opinion was reasonable.

14. The Cabinet Office has advised that it is relying on the same arguments as the DWP for applying the exemptions in section 36(2). For its part, the DWP has confirmed that the qualified person consulted about the request was the Parliament Under-Secretary of State for Work and Pensions (Minister for Welfare Reform). He gave his opinion on the inhibitory and prejudicial effects of disclosure on three separate dates: 15 May 2013, 15 July 2013 and 27 February 2014. The first two dates related to the application of section 36(2)(c), with the third confirming that the qualified person agreed that sections 36(2)(b) and (c) applied.

15. The Commissioner is satisfied that the Under-Secretary meets the specification of a 'qualified person' set out at section 36(5) of FOIA. Unusually though the public authority that received the request in this case did not obtain the qualified person's opinion. Rather, the Cabinet Office has used the opinion obtained by the DWP as the justification for applying the exemption. The immediate question that therefore presents itself is whether the Cabinet Office was entitled to rely on section 36(2) in this situation.

16. The Commissioner perceives that the wording of section 36(2) only refers to the opinion of *a* qualified person; it does not specify the circumstances in which an opinion must be obtained. Crucially, the requests made to the DWP and the Cabinet Office were identical. The Commissioner therefore considers that the qualified person's opinion would apply equally to the positions of the DWP and the Cabinet Office with regard to the PAR report. It has therefore been left for the Commissioner to determine whether the opinion given was reasonable.
17. The Commissioner has had sight of the submissions produced by officials at the DWP and put before the qualified person, upon which the qualified person's opinions were based. These included a summary of the relevant issues, an explanation of the section 36 exemption and a recommendation of the preferred position. The earliest submissions also invite the qualified person to familiarise himself with the withheld information itself, a copy of which was already retained by his office.
18. The test of whether an opinion is 'reasonable' is based on the plain meaning of the word. Put simply, an opinion will be considered reasonable if it is an opinion that a reasonable person could hold. This only requires that it is *a* reasonable opinion and not necessarily the *most* reasonable opinion.
19. As a prejudice-based exemption, section 36(2) of FOIA necessitates that a decision is made about whether there '*would*' be a harmful effect as a result of disclosure or whether it '*would be likely*' that the harmful effect would occur; '*would*' imposing a stronger evidential burden than the lower threshold of '*would be likely*'. In this case the level of prejudice to which the qualified person's opinion refers has not been made clear. Where there is any doubt about the level of prejudice being designated, the Commissioner will proceed on the basis that the lower threshold of prejudice applies. This still requires that there is a real and significant risk of prejudice.
20. With respect to sections 36(2)(b)(i) and (ii), the Commissioner considers that they are about the processes that may be inhibited, rather than what is necessarily contained within the information itself. A key issue is whether disclosure could inhibit the processes of providing advice or exchanging views. Section 36(2)(c), on the other hand, refers to the prejudice that would be likely *otherwise* to apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption.

21. In *McIntyre v Information Commissioner and the Ministry of Defence* (EA/2007/0068)², the Tribunal considered that section 36(2)(c) could apply to cases where “disclosure would prejudice the public authority’s ability to offer an effective public service or meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure” (paragraph 24).
22. The qualified person, by virtue of accepting the arguments put before him, has acknowledged that the success of the PAR process is dependent upon the confidence of reviewers and interviewees to be candid with each other. This confidence, in the qualified person’s opinion, derives from the expectation of the interviewees that any frank comments made will be treated in confidence and the report findings would not be attributable. It is argued that if interviewees felt that what they said was liable to be published, even on a non-attributable basis, they would be far less likely to be forthright about problems and solutions. This, in turn, would make the PAR process more difficult to carry out and potentially undermine its effectiveness.
23. The qualified person also agreed that disclosure could have the effect of diverting resources from the management of the Universal Credit programme to fielding enquiries and addressing any potential misunderstandings. This could therefore impact on the government’s ability to deliver Universal Credit on time and within budget.
24. As mentioned, the test to be applied in connection with section 36(2) is whether the qualified person’s opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. Reflecting on the purpose for which the PAR was produced, the Commissioner is prepared to accept the opinion which states that disclosure would be likely to have an inhibitory effect. This is because the value of a PAR’s findings will in no small way be dependent on the frank contributions of interviewees; something it is possible to imagine could be constrained if views were made available to public criticism. Similarly, the publicised problems afflicting the development of the policy means that any review, and particularly a PAR, will attract considerable public scrutiny. In the Commissioner’s view, it is reasonable to argue that a likely consequence of disclosure would be an increased volume of enquiries that would need to be handled.

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

25. The Commissioner has therefore found that the qualified person's opinions are reasonable and thus that each limb of section 36(2)(b) and section 36(2)(c) of FOIA are engaged. He has therefore gone on to consider the balance of the public interest test. In doing so, the Commissioner will form his own view as to the severity of, and the extent and frequency with which, the detriment specified by the qualified person might occur.

Public interest arguments in favour of disclosure

26. There is no doubt that the strength of the public interest in disclosure is extremely strong. This reflects the magnitude of the effects that Universal Credit will have on the benefits, allowances and tax credit system and is borne out by previous decisions of both the Commissioner and the Information Tribunal. For example, the Commissioner considers that the Tribunal's considerations in the context of the public interest test in the recent *Slater* and *Collins* appeals will have some relevance here:

56. [...] there is a particularly strong public interest in up to date information as to the details of what is happening within the programme, so that the public may judge whether or not opposition and media criticism is well – founded.

57. The very great costs involved and the development of a huge complex IT interface with local authority systems are further features underlining that interest.

27. Critically, changes to the welfare system are likely to have an effect on the most vulnerable members of society. This would serve to reinforce the need for accountability and transparency in this policy area. Combined with this is the awareness that governments have repeatedly failed to deliver on large projects, with previous reviews into Universal Credit already highlighting significant problems associated with its development. Considering the circumstances at the time of this request the Commissioner finds that the level of public interest is likely to have heightened since the *Slater* and *Collins* requests.
28. Whilst noting these arguments the Commissioner has also focused on the content of the PAR report requested in this case, which he has inspected. He finds that there is a strong public interest in disclosing the report in question, having considered its content alongside the wider, strong, public interest in general transparency around the whole programme.

29. The Cabinet Office has acknowledged that there is a strong public interest in ensuring that the public are able to scrutinise large government programmes so as to provide reassurance that value for money is being secured. However, it considers that there is already a large amount of information published on the Universal Credit programme. This includes summaries of project activity and previous reviews, with the DWP also committed to provide Parliament with updates on a regular basis. In the Cabinet Office's view, the availability of this information would reduce the weight of the public interest in the release of the disputed information itself, particularly when placed against the severity of the harm that is likely to arise through disclosure.

Public interest arguments in favour of maintaining the exemption

30. In making the case for withholding the requested information, the Cabinet Office has highlighted what it considers to be the considerable benefits attached to the successful launch of Universal Credit. Not only should it reduce the cost of welfare benefits but, the Cabinet Office has claimed, it will make benefits more effective in supporting employment and promoting prosperity.
31. The Cabinet Office considers that the importance of the project means that every effort should be made to preserve the integrity of a process designed to provide oversight of the delivery of the project with the aim of achieving its effective implementation. The audit tool represented by the PAR report represents a crucial part of this process. In this context, the DWP has advised that the development and implementation of Universal Credit is not complete and therefore the harm arising from disclosure at this critical juncture would be heightened.

The balance of the public interest

32. The Commissioner considers that the public interest arguments in this case are finely balanced.
33. On the one hand, the nature of the reforms proposed in Universal Credit and the large number of people potentially affected by the changes, taken together with the problems already identified with its delivery, means that the arguments for disclosure are very strong. This is displayed in the Tribunal's finding on the *Slater* and *Collins* cases, which considered that although the disclosure of Universal Credit information may not be painless, the public interest required it. On the other hand, the Commissioner recognises that a PAR report will only be a useful tool insofar as it takes account of a realistic picture of the risks and problems associated with a project and provides an opportunity for a department to rectify any issues that have been identified.

34. The Commissioner has noted the findings of the Tribunal in *Slater and Collins* related to maintaining the exemption. In general, the Tribunal considered that the public was entitled to expect from senior officials a "large measure of courage, frankness and independence in their assessment of risk and provision of advice" (paragraph 63). The Tribunal was therefore not convinced by the DWP's arguments concerning the so-called chilling effect of disclosure and the extent to which the frankness of future discussions would be inhibited as a result of disclosure. Equally, the Tribunal did not find compelling the DWP's argument that disclosure would require the diversion of resources to explain risks or assumptions referred to in the information. This is because it considered those individuals involved in delivering Universal Credit should have anticipated the need for a clear public relations strategy and sufficient staff to handle the inevitable flow of concerns about the programme.
35. The Commissioner has noted the Tribunal's findings and drawn some general guidance from them, but it is important that he considers the specific circumstances of the case. Whilst the Cabinet Office did not focus its case on specific arguments, or back its more general arguments with compelling evidence, the Commissioner has found that the timing of the request is a decisive factor when deciding where the balance of the public interest lies.
36. As part of his submissions to the Tribunal in the *Slater and Collins* appeals, the Commissioner made reference to the MPA's Transparency Policy. This stated that a six-month interval between the submission of a PAR to the DWP and first publication was sufficient to enable it to take action in response to MPA ratings. The Tribunal also remarked that "Reports published a year later, however authoritative, are not sufficient substitutes [to documents that are critical indicators of the state of a programme]. Publication of registers, PARs and schedules upon completion of the programme would be a wholly inadequate answer to the demands for transparency" (paragraph 58). This would therefore lend weight to the view that not only will there be a public interest in the disclosure of the PAR but that the timing of disclosure should be gauged, considering its worth to the public.
37. Disclosure at the time of the request in the present case would have added significant information to a current debate, rather than retrospectively, which also strengthens the public interest in disclosure.

38. The Commissioner recognises that the circumstances in this case differ from those being considered by the Tribunal. Significantly, the Tribunal's decision concerning the disclosure of the PAR report was guided by the expectation that the recommendations in the PAR should have been implemented by the time of the request. This contrasts with this case, where the request was made only a short time after the PAR was produced, just over two months, and within the six-month interval referred to in the MPA's Transparency Policy.
39. The Commissioner accepts that the concept of 'safe space' is an important one; allowing public authorities some time and room in which to explore options and potentially act on recommendations away from the public glare. It will, however, only hold weight in the context of the public interest where the issues under consideration remain live. The Commissioner accepts that the complexity of the project, and range of stakeholders involved, meant that issues in the report would still have been live, to a significant extent, at the time of the request.
40. In the Commissioner's view, the immediate weeks and months following the receipt of the PAR represented a vital time for the government to review and confirm its approach to the implementation of Universal Credit in light of the PAR's findings. At the time of the request, the government would not have had a reasonable opportunity to complete its consideration and response to the PAR's findings, given the complexity of the programme. The Commissioner therefore finds that inhibition to providing advice and exchanging views was likely, and could be severe, given the impact disclosure would have on the safe space needed.
41. The other prejudice to the effective conduct of public affairs arising from disclosure would also be severe - presenting a strong risk that it would interrupt the government's management of the project.
42. The negative impact would therefore be greater than in the *Slater and Collins* cases.
43. The Commissioner finds that the timing of the requests would be likely lead to severe effects under both section 36(2)(b) and (c). Given the strong public interest in the MPA process being effective, and in particular related to the Universal Credit Programme, the Commissioner does accept strong weight should be placed on maintaining both exemptions, whilst still having some scepticism about the broader and more general effects argued by the Cabinet Office in relation to disclosure of PARs as a category of information.

44. The Commissioner has concluded that the public interest in maintaining both the section 36(2)(b) and (c) exemptions outweighs the public interest in disclosure. In forming this view, the Commissioner has had regard to the significance of the PAR report itself and the wider need for transparency with regard to the implementation of Universal Credit. However, he considers that the impact of disclosure at the time of the request is the crucial factor.

Right of appeal

45. 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: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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