

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2014

Public Authority: Department for Work and Pensions (DWP)
Address: Caxton House
4th Floor
6 -12 Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information about a named company's involvement in the mandatory work activity scheme (MWA). The Department for Work and Pensions (DWP) refused to confirm or deny whether it held the information under section 36(3), section 43(3) and section 29(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the DWP incorrectly applied section 36(3), section 43(3) and section 29(2) to neither confirm nor deny whether the requested information is held.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Confirm or deny whether the requested information is held.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 May 2013 the complainant requested information of the following description:

"I know [named organisation] are a work placement provider of 4 week placements for the Mandatory Work Activity (MWA) scheme

Could you please provide me with the following information:

1) The number of MWA placements at [named organisation] over the last 2 years (they are in MWA region CPA3, London)

2) If possible, a breakdown by time of the number of MWA placements at [named organisation] over the last two years. This could be done either by giving the number of placements at [named organisation] per smallest unit of time you have records for (e.g. months), or by giving me the date of each placement start – whichever is easier for you;

3) If possible and within the cost limit, the fees paid to [named organisation] for each MWA placement by the MWA provider (in this case [named contractor]); or, if this is not possible

The total amount in fees paid to [named organisation] over the last 2 years by the MWA provider; and if possible, a breakdown of this total amount by time, by giving me the amount of fees paid to [named organisation] per smallest unit of time you have records for."

6. On 12 August 2013 the DWP responded. It refused to confirm or deny whether the requested information was held under section 36(3) and section 43(3) FOIA.
7. The complainant requested an internal review on 2 September 2013. The DWP sent the outcome of its internal review on 24 September 2013. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 10 October 2013 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the DWP also applied section 29(2) FOIA in support of its position to neither confirm nor deny whether the requested information was held.
10. The Commissioner has considered whether the DWP was correct to neither confirm nor deny whether the requested information was held under section 36(3), section 43(3) or section 29(2) FOIA.

Reasons for decision

Section 29

11. Section 29 (1)(a) is engaged if disclosure would, or would be likely to, prejudice the economic interests of the United Kingdom or of any part of the United Kingdom, as defined by section 28(2).
12. Section 29 (1) (b) is engaged if disclosure would, or would be likely to, prejudice the financial interests of any administration in the United Kingdom, as defined by section 28(2).
13. The DWP considers that, under section 29(2) FOIA, confirming or denying whether the information requested is held, would, or would be likely to result in the prejudice defined at section 29(1)(a) and (b) above in a number of different ways, but including in particular the following:
 - If placement hosts withdrew from the scheme due to being targeted by campaign groups, the DWP would have to spend more on benefits to jobseekers and have less to spend on 'commercial' activities, e.g. contracts with providers to assist jobseekers back to work.
 - In the face of a hostile campaign placement hosts who do not currently seek payments from providers may begin to seek payments from providers to offer placements or those that already seek payments may seek payments of a higher value. These increased costs to providers would be likely to lead to DWP having to pay higher costs for contracting the same service.
 - Having to pay more in benefits to jobseekers and pay more to support them into work (including paying more to providers for

assisting claimants into work), would lessen the extent to which the government is able to exercise proper control over the economy in order to maintain sound public finances and would slow the progress of fiscal consolidation which risks damaging the wider economy.

14. As the DWP has not confirmed whether it considers the prejudice would or would be likely to occur, the Commissioner has looked at the arguments under the lower threshold and considered whether confirming or denying whether this information is held, would be likely to have the prejudicial affect described under section 29(1)(a) and (b).
15. The Commissioner does not consider that the DWP has provided sufficient evidence to demonstrate that the pressure being exerted by campaign groups is the reason why organisations choose to leave the MWA scheme. Furthermore campaign groups appear to be unofficially aware of many of the organisations involved in the scheme and are targeting organisations they believe to be involved without official confirmation. It appears that the company named in this request is considered to be involved by campaign groups and furthermore the DWP has not demonstrated a satisfactory link between the targeted pressure of campaign groups and organisations choosing to leave the scheme as a result of this. The Commissioner does not therefore consider that the DWP has provided a sufficient link with the consequences of disclosure and the prejudice claimed. The Commissioner does not therefore consider that this would be likely to prejudice the economic interests of the UK by undermining a scheme designed to assist unemployed individuals back into the workplace and also the financial interests of the DWP and Her Majesty's Revenue & Customs by increasing the costs of running the scheme.
16. As the Commissioner does not consider that the prejudicial effects described at section 29(1)(a) and (b) would be likely to occur if the DWP were to confirm or deny whether the information is held under section 29(2) FOIA, this exemption was incorrectly engaged in this case.

Section 36

17. Section 36(2) provides that, "Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-
 - (a) would, or would be likely to, prejudice-
 - i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

- ii. the work of the Executive Committee of the Northern Ireland Assembly, or
- iii. the work of the executive committee of the National Assembly for Wales,

(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.

18. Section 36(3) goes on to say that, "The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2)."
19. The DWP has argued, under section 36(3), that to confirm or deny whether the requested information is held would or would be likely otherwise to prejudice, the effective conduct of public affairs as set out in section 36(2)(c).
20. In determining whether this exemption was correctly engaged by the DWP the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
21. The DWP explained that this case is substantially similar to that of IA/2560/2013, GIA/2568/2013, GIA/2569/2013: DWP v Information Commissioner's Office & Zola. In that case the ICO ruled against the DWP and the First-tier Tribunal upheld the ICO's decision. DWP have been granted permission to appeal to the Upper Tribunal. It explained that in the case referred to above the DWP refused to disclose the identities of companies involved in the MWA scheme, however in this

case a company is named in the request which is why the DWP refused to confirm or deny whether the information was held as to do so would have the same prejudicial affect as described in the Zola case. It said that as well as the request in this case it has received other requests seeking information about companies involved in the scheme. It therefore explained that the qualified opinion was sought for all of these requests at the same time as disclosure in the other cases would have the same effect as confirming or denying whether the requested information was held in this case.

22. The DWP explained that at the time of the request it relied on the submission dated 12 July 2013 (and the Minister's response of 15 July) as authority to apply section 36(2)(c) FOIA. Following the Zola rulings, as stated above, the DWP has continued to receive a number of look-alike requests for similar information. It said that in the DWP's view, the facts and relevant factors in the Zola case were still pertinent to these cases, and therefore a blanket section 36 ruling in these circumstances was appropriate.
23. However it went on to explain that a further submission was put to the then new Minister for Employment on 6 December 2013 updating her on the Zola case. It confirmed that the DWP took the opportunity to seek the Minister's agreement to apply section 36 to the information sought in this case. It said that the Minister responded on 12 December 2013.
24. The following submissions were put to the qualified person in this case:
 - It is clear that a minority of people appear to be seeking to undermine the goodwill of employers who are prepared to offer opportunities to unemployed people by attempting to damage the reputation and standing of those companies. The use of the earlier (now outdated) lists of MWA organisations by these websites in this way is evidence of the need to protect this information in this instance.
 - Release of an updated list of MWA, or similar employment programme, organisations (it changes over time as some leave and others join) runs the risk of campaign groups targeting afresh these placement organisations, including new ones, to cause them to withdraw from the scheme. The websites make it clear that these actions aim to create a climate which also discourages other organisations from joining the scheme with the intention of disrupting the delivery of the Government's employment programme.
 - This risk, if realised, would be prejudicial to a policy which is designed to move more jobseekers into sustainable work. Thwarting the delivery of the policy in this way would be likely to undermine the benefits to the wider economy of moving more jobseekers off benefit into

employment. Such disruption is also detrimental to the job prospects of individual jobseekers who will not benefit from the disciplines and work experience that the MWA or similar employment programmes/schemes offer.

25. The qualified person's response agrees that the prejudice set out in section 36(2)(c) FOIA would be likely to occur if the identity of the organisations involved in MWA were disclosed (in this particular case by confirming or denying whether the information is held.)
26. The Commissioner is mindful that he has already considered the suggestion that placement providers are likely to withdraw from the MWA programme when assessing the section 29 exemption, albeit in relation to potential prejudice to the UK economy and the financial interests of an administration in the UK, and has not found the argument persuasive. However, the Commissioner wishes to clarify that the qualified person's opinion is not rendered unreasonable simply because others may come to a different (and equally reasonable) conclusion. In his view the opinion would only be unreasonable if it was one that no reasonable person in the qualified person's position could hold. He therefore finds the exemption at section 36(2)(c) to be engaged and has proceeded to consider the public interest test in relation to the exemption.
27. The Information Tribunal¹ has considered that whilst it is not for the Commissioner to form an independent view on the likelihood of prejudice as adjudged by the opinion in respect of section 36(2)(c), when it comes to the public interest test it is necessary to form a view on that likelihood in order to make the required judgement.
28. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest

¹ EA/2006/0011; EA/2006/0013

arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

29. The Commissioner considers that this is a highly sensitive issue in which there is significant public interest. It potentially has a direct affect upon unemployed individuals relying upon Government support which is not an insignificant number of the UK population. There is therefore a strong public interest in confirming or denying whether or not this information is held.
30. The DWP argued that it is not significantly in the public interest to know which particular organisations were participating in each area. Such identifying information does not significantly enhance the transparency of the MWA scheme or add to the public debate around mandatory or even voluntary placements. Instead, it allows campaign groups to target those employers and pressurise them into withdrawing from MWA or other schemes/programmes like Work Experience (WE).

Public interest arguments in favour of maintaining the exemption

31. The DWP provided the following arguments in support of the public interest in favour of maintaining the exemption:
 - Disclosure is likely to diminish the MWA scheme and it is possible it could eventually lead to its collapse, with incalculable losses to the taxpayer and many thousands of persons in long-term unemployment who are currently supported by the scheme. It said that this would not be in the public interest.
 - There is potential for other schemes, such as WE or the Work Programme, to be threatened in a similar way; as opponents of 'workfare' do not differentiate between the different schemes. It said that it would not be in the public interest to damage other 'workfare' schemes.
 - As MWA placements have to be of benefit to the local community, MWA placement providers tend to be charitable organisations, some of which could be small and local and therefore be particularly vulnerable to pressurisation from aggressive campaign groups. Disclosure of the names of placement hosts provides no information for the public to be

able to scrutinise performance of the schemes. In fact, disclosure of the requested information is likely to seriously harm, if not completely undermine, one of the Government's key tools used to tackle unemployment. The costs to society of unemployment are a heavy factor weighing against disclosure. Again the DWP concluded that this would not be in the public interest.

Balance of the public interest

32. As stated above, due to the strong public opinion and significant public debate surrounding the MWA scheme, the Commissioner does consider that there is a strong public interest in disclosure of information relating to this issue to promote transparency, accountability and to inform public debate.
33. The Commissioner has taken into account the DWP's public interest arguments surrounding the affect that confirming or denying whether the company named in this request is involved in the MWA scheme would have. However the Commissioner has reduced the weight attributed to these arguments, in doing so the Commissioner reiterates his conclusions set out in case reference FS50438502:

"The extent to which campaigns organised by a few fringe groups have discouraged employers from participating in the government's mandatory work programme is arguable. There is little evidence that the campaign websites are viewed by a significant number of people and indeed most members of the public are likely to be unaware of the particular charges that have been levelled by these sites. On the basis of the evidence supplied he does not consider that the harm would occur frequently, that it would be extensive or severe. In view of this, whilst he acknowledges the importance of the effective delivery of the MWA policy, particularly in the context of high unemployment, he has attributed limited weight to the arguments in favour of maintaining the exemption."

The Commissioner does not consider that the DWP has provided any further evidence that would alter this position.

34. Furthermore, it would appear that individuals or groups opposed to the scheme already seem to be suggesting this organisation may be involved. Whilst the Commissioner appreciates that this hasn't been officially confirmed or denied, this does not appear to be preventing these individuals or groups from targeting these companies within campaigns against the scheme.
35. Due to the strong public interest in disclosure, the Commissioner considers that the public interest in favour of maintained the exemption

is outweighed by the public interest in favour of confirming or denying whether the information is held. The DWP was therefore incorrect to apply section 36(2)(c) by virtue of section 36(3) FOIA to neither confirm nor deny whether the requested information is held in this case.

Section 43

36. Section 43(2) FOIA states that, "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."
37. Section 43(3) FOIA goes on that, "The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."
38. The DWP considers that confirming or denying whether the organisation named in the request hosts MWA placements would be likely to harm that organisation's commercial interests as well as the contract provider, their subcontractors, and the commercial interests of the DWP.
39. The DWP has explained that in the face of a hostile campaign, placement hosts on MWA, and any other scheme where claimants are hosted by organisations, would be likely to have their commercial interests prejudiced, and so would any contracted providers that are paid by DWP to source these placements. The DWP argued that if the organisation named in this request was targeted with a hostile campaign it may make those who support them, both financially and in other ways, be less inclined to continue to do so. It said DWP's commercial interests would be likely to be harmed if host organisations became more reluctant to participate in such back-to-work schemes in the face of a hostile campaign. This would increase the likelihood of providers having to pay hosts for placements or pay more to hosts they already have had to pay for placements. This would lead to increased costs for DWP as providers would seek higher unit costs for procuring the same service.
40. The Commissioner considers that the prejudice claimed in this case does relate to the DWP's and the contract providers commercial interests. However the organisation named in this request is a charitable rather than a commercial organisation. The Commissioner does not consider that the DWP has explained how the prejudice claimed in this case would relate to a commercial interest of this organisation.
41. The DWP explained that it considers that confirming or denying whether the named organisation is involved in MWA would, or would be likely to

result, in prejudice to its own and the contractors commercial interests in a number of different ways, but including in particular the following:

- If this information was used to create a list of placement hosts and they subsequently withdrew their involvement, then the contractor and their sub-contractors could lose some or all the money they had invested in sourcing those hosts and require them to invest more in finding replacements.
- If a host or hosts withdraw the campaign would be likely to spread and gain momentum, leading to further withdrawals. This would affect multiple providers and their subcontractors in multiple locations.
- If placement hosts withdrew, DWP would have to spend more on benefits to jobseekers and have less to spend on 'commercial' activities, e.g. contracts with providers to assist jobseekers back to work.
- In the face of a hostile campaign, placements hosts who do not currently seek payments from providers may begin to seek payments from those providers to offer placements or those that already seek payments may seek payments of a higher value.
- These increased costs to providers would be likely to lead to DWP having to pay higher costs for contracting the same service.

42. The DWP provided the Commissioner with examples of what has happened to hosts that have been identified. It is the DWP's view that this is an accurate marker for what would happen if DWP confirm or deny whether the organisation named in this request is involved in the scheme.

43. It said that the decision to withhold the information in this instance was made by DWP following evidence of the actual impact on participating companies, as detailed throughout this response. It reiterated that the DWP is not using speculative arguments. One concrete example is that a protest organised by protestors against DWP's sector-based work academy scheme meant that an express supermarket in Westminster had to temporarily close because they were not able to continue operating in the face of such demonstrations. It provided examples of the media interest and evidence of companies choosing to withdraw their support for the Government's employment programmes as a direct result of the media interest generated by the campaigning activities of protest groups.

44. It explained that given the DWP's experiences around the Zola case and the anti-workfare campaign, it believes that the prejudice would be highly likely to occur. There is evidence on a number of websites of threats to compromise the delivery of Government employment programmes, including Mandatory Work Activity. The tactics, which include protestors taking part in demonstrations both inside and outside retail outlets and fast food restaurants, threats of boycotts and numerous internet campaigns both on social networking sites and sites set up specifically to incite such behaviour, e.g. 'Boycott Workfare', have caused some employers to withdraw their active support for the Government's employment programmes. This has caused commercial detriment to the relevant providers under contract to DWP and compromises the Department's ability to secure best value for money for the taxpayer when these contracts are re-tendered or varied.
45. The Commissioner does not consider that the DWP has provided sufficient evidence to demonstrate that the pressure being exerted by campaign groups is the reason why organisations choose to leave the MWA scheme. Furthermore campaign groups appear to be unofficially aware of many of the organisations involved in the scheme and are targeting organisations they believe to be involved without official confirmation. It appears that the company named in this request is considered to be involved by campaign groups and furthermore the DWP has not demonstrated a satisfactory link between the targeted pressure of campaign groups and organisations choosing to leave the scheme as a result of this. The Commissioner does not therefore consider that the DWP has provided a sufficient link with the consequences of disclosure and the prejudice claimed. The Commissioner does not therefore consider that this would be likely to prejudice the commercial interests of the DWP or the contract providers.
46. As the Commissioner does not consider that the prejudicial affects described at section 43(2) would be likely to occur if the DWP were to confirm or deny whether the information is held under section 43(3) FOIA, the exemption was incorrectly engaged in this case.

Right of appeal

47. 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

48. 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.
49. 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

Pamela Clements
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF