

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 November 2021

Public Authority: Department for Work and Pensions ("DWP")

Address: Caxton House
Tothill Street
London
SW1A 9NA

Decision (including any steps ordered)

1. The complainant has requested information on the increase in the base rate for Universal Credit and the decision not to raise particular legacy benefits in line with this increase.
2. The Commissioner's decision is that although the exemptions at FOIA section 35(1)(a) Formulation or development of government policy and section 42(1) Legal professional privilege, are engaged, the public interest favours disclosing the requested information.
3. The Commissioner also finds that DWP breached FOIA section 10(1) by not providing its response within 20 working days.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information requested at the third point of the complainant's request.
5. 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

6. On 17 April 2020, the complainant wrote to DWP and requested the following:

"It was recently announced by the Chancellor that the base rate for Universal Credit would be raised to match Statutory Sick Pay in rate.

Please:

- Advise whether or not this increase was made on the request or advice of the DWP?
 - Advise if the DWP made a similar request for an increase in ESA¹, JSA and/or Income Support?
 - Provide copies of any internal guidance or discussion regarding the increase and the decision not to raise the above legacy benefits in line with Universal Credit."
7. The DWP responded on 22 July 2020. It stated that the requested information was held but was being withheld in reliance of FOIA section 35(1)(a), formulation or development of government policy.
8. Following an internal review the DWP wrote to the complainant on 1 October 2020 maintaining its reliance on section 35(1)(a) to withhold the requested information.

Background

9. In March 2020 the Government introduced a package of temporary welfare measures to help with the financial consequences of the COVID-19 pandemic which included a £20 weekly increase to the Universal Credit Standard Allowance rates as a temporary measure for the 2020/2021 tax year. This was followed by a Government announcement at the Spring budget 2021 that the £20 weekly increase in Universal Credit ('UC') would be extended for a further six months with eligible Working Tax Credit claimants receiving a one-off payment of £500.
10. Subsequently, the Commissioner notes² that the High Court has given two disabled campaigners permission to challenge the DWP over its

¹ ESA Employment and Support Allowance, JSA Jobseekers Allowance

² <https://researchbriefings.files.parliament.uk/documents/CBP-9246/CBP-9246.pdf> (section 7)

<https://www.disabilitynewsservice.com/universal-credit-basic-fairness-20-uplift-case-given-high-court-go-ahead/>

failure to offer recipients of legacy benefits the same £20-a-week increase given to those on UC.

11. The Commissioner further understands that the court will now decide if DWP breached the European Convention on Human Rights by increasing the standard allowance of UC by £20 a week at the start of the pandemic, but not increasing the rate for 1.9 million employment and support allowance ('ESA') recipients by the same amount. Claimants of jobseeker's allowance and income support have also been excluded from the uplift.
12. The House of Commons issued a briefing paper on 28 May 2021 called "Coronavirus: Legacy benefits and the Universal Credit 'uplift'".³ This provides detailed information on the uplift including, at section four, information on the calls to extend the uplift to legacy benefits. Section four explains that there has been:

"a concerted effort by welfare rights groups and other organisations to persuade the Government to extend the uplift to means-tested legacy benefits."

13. The Commissioner notes that some of the statements and reports cited in this notice occur after the date of the internal review. The Commissioner considers that they are nevertheless relevant to her considerations as they relate to the focus of the request, namely the absence of an uplift in legacy benefits, and the consequences of this decision.
14. The Disability Benefits Consortium⁴, a network of over 100 organisations with an interest in disability and social security, issued its report "It would mean not having to skip meals – the emergency need to #IncreaseDisabilityBenefits" on 27 April 2020⁵ and stated:

<https://www.cypnow.co.uk/features/article/universal-credit-uplift-key-questions-on-legal-challenge>

<https://www.dailyrecord.co.uk/lifestyle/money/dwp-legacy-benefit-court-case-25421675>

³ <https://researchbriefings.files.parliament.uk/documents/CBP-9246/CBP-9246.pdf>

⁴ <https://disabilitybenefitsconsortium.com/>

“This emergency increase must be extended immediately to Employment and Support Allowance, on the grounds that anything else would be discriminatory; that disabled people already face additional costs and reduced benefits; and that disabled people in particular are facing increased costs as a result of the Covid-19 emergency.”

15. In this report, the Disability Benefits Consortium sets out the results of its survey into the increased costs faced by disabled people as a result of the Covid-19 emergency:
 - a. 95% of respondents confirmed that their costs had increased as a result of the emergency.
 - b. 92% confirmed that they had encountered additional costs associated with food. These included having to shop at more expensive shops to secure a home delivery or at more expensive local shops to avoid public transport.
 - c. 28% confirmed they had encountered additional costs associated with their utilities. These included increased power and heating as shielding required people to stay at home, and increased water usage to maintain hygiene precautions against the virus.
 - d. 28% confirmed that they had encountered additional costs associated with managing their health. These included buying personal protective equipment, medical equipment and over the counter medication to compensate for cancelled appointments.
 - e. 10% confirmed that they had encountered increased costs due to travel and transport. These included having to take taxis to get shopping or attend essential appointments to avoid public transport.

Scope of the case

16. The complainant first contacted the Commissioner on 27 July 2020 to complain about the way his request for information had been handled. Following the Commissioner's advice the complainant requested an internal review on 7 September 2020. On receipt of the internal review response the complainant remained dissatisfied and contacted the Commissioner on 1 October 2020. The complainant explained:

“The information in question pertains to a policy which has led to claimants of Universal Credit receiving an increase to the rate of their benefit which more than 13,000 disabled and long-term sick claimants

have not. As such I would argue that the public interest in disclosing this information outweighs the public interest in maintaining an exemption.”

17. DWP explained to the Commissioner that it was relying on the section 35 exemption with regard to only the third part of the request. It explained its view that it was not obliged to answer the first and second points of the request as they were phrased as questions. The Commissioner will address this point later.
18. In providing its submissions to the Commissioner, DWP explained that should the Commissioner disagree with the reliance on section 35(1)(a) to withhold the information, it wished to apply further alternative exemptions to withhold the requested information. It went on to cite FOIA section 36(2)(b) & (c), prejudice to effective conduct of public affairs and section 42, legal professional privilege to the legal advice contained in the withheld information.
19. The Commissioner considers the scope of her investigation to be the application of the exemptions at sections 35(1)(a), 36(2)(b) & (c) and 42 to withhold the requested information.

Reasons for decision

Section 35 – Formulation or development of government policy

20. Section 35 states:

“(1) 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,”

21. The Commissioner’s view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
22. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less

robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. Her guidance⁶ advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

23. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.
24. With regard to point 3 DWP explained that Universal Credit and legacy benefits fall under the responsibility of DWP and therefore DWP officials did provide advice to DWP Ministers and to HM Treasury ("HMT"). The withheld information comprises summaries of all the relevant information and advice DWP officials had produced on an uplift in social security benefits.
25. DWP explained its view that although the temporary increase had been implemented at the time of the request whilst the Covid-19 pandemic remained, the policy area also remained active with the potential for further considerations or decisions.
26. DWP added that:

"If the Department were to disclose copies of internal documents relating to decisions regarding uplifting legacy benefits, this could adversely affect future policy and decision making as it could, make the provision of full and frank advice difficult, as well as undermining the process of collective agreement. With the effects of the pandemic still ongoing, ministers and officials still need to develop policy to continue supporting individuals, including how to support those on UC and legacy benefits, in a safe space. This remains an active policy debate in government with the uplift continuing to be in place."
27. DWP advised the Commissioner that discussion of not extending a temporary uplift to legacy benefits has been publicly discussed and it provided links⁷ to debates in Parliament.

⁶ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

⁷ <https://hansard.parliament.uk/Commons/2021-01-18/debates/5D4FD221-2AEE-43AE-874C->

28. The Commissioner considers that the withheld information comprises information relating to the formulation and development of government policy, and observes that the information held was created less than a month prior to the complainant's request. The Commissioner therefore accepts that the exemption at section 35(1)(a) is engaged. She notes that the policy regarding the uplift was already implemented at the time of the request, albeit very recently, with the adjustment of the extension to the uplift contained in the Spring Budget 2021.
29. Having accepted that the exemption is engaged the Commissioner has gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest

30. The complainant has made his view clear. He considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
31. DWP advised the Commissioner that it recognises that there is an inherent public interest in the transparency and accountability of public authorities, including in furthering public understanding of matters such as the policy considerations in implementing welfare reform in the UK. It added that there is a clear public interest in the work of government departments being open to scrutiny. Furthermore it advised:
- "We understand that claimants in receipt of legacy benefits may want to understand the discussions and reasons why they are not benefitting from the uplift, but those on Universal Credit and Working Tax Credits are."
32. DWP stated that balanced against the arguments in favour of disclosure is the public interest in favour of protecting the Government's ability to discuss and develop policies and to reach well-informed conclusions.

[7509E7AEF8D1/UniversalCreditAndWorkingTaxCredit?highlight=uplift&_sm_au=iVVnv5p7J5MLSr1FW2MN0K7K1WVjq#contribution-30FFEB0F-24B6-4FA9-A6A0-DF5E5736E6EF](https://www.ica.gov.uk/7509E7AEF8D1/UniversalCreditAndWorkingTaxCredit?highlight=uplift&_sm_au=iVVnv5p7J5MLSr1FW2MN0K7K1WVjq#contribution-30FFEB0F-24B6-4FA9-A6A0-DF5E5736E6EF)

https://hansard.parliament.uk/Commons/2021-01-25/debates/1B5D2BB1-C1F9-4A3B-AD91-BFA6B1E6C12D/TopicalQuestions?highlight=uplift&_sm_au=iVVnv5p7J5MLSr1FW2MN0K7K1WVjq#contribution-A7530E3C-73F0-47A7-B547-4E0B1632658B

DWP pointed to a strong public interest in protecting information where disclosure:

"... would be likely to have a detrimental impact on the ongoing development of the processes and policies relating to the uplift and continuing to support those on low incomes."

33. DWP expressed concern that disclosure of the requested information could result in further disclosures of the frank conversations between ministers and officials regarding the uplift in UC. This could attract further criticism of the individuals concerned resulting in their reluctance to exchange ideas or suggestions in the future which would not be in the public interest.

34. DWP added:

"If officials could not be sure that their input into the policy formulation process is protected from disclosure, there would be a strong incentive to omit, or to diminish the significance of negative information provided, to minimise the prejudice likely to be caused by disclosure. This would, or would be likely to, weaken the quality of the information being provided to ministers which in turn would damage their ability to make effective and well-informed decisions."

The balance of the public interest

35. The Commissioner agrees with DWP that the large numbers in receipt of legacy benefits would like to understand why these benefits were not treated the same as UC. However, she considers that the public at large would be served in understanding the position taken by government in response to the pandemic in regard to treating individuals equally in this context.

36. The Commissioner accepts that a safe space is needed for discussion and decision making by officials and Ministers, particularly in handling complicated and fast moving situations such as those resulting from the impact of the Covid-19 pandemic. She considers that the need for a safe space will be strongest when the issue is still live. She acknowledges that the decision on the policy in this case was very recent at the time of the request. Her guidance explains that policy can be seen as a framework of 'rules' put in place to achieve a particular objective. The framework will allow for flexibility in implementation. Not every decision or alteration made after a policy is settled will amount to development of that policy. Any adjustment or decision made to better achieve the original goals of the policy might be more accurately seen as decisions on implementation. As such the amendment made to the length of time the uplift would be paid could be considered to be an adjustment rather than a development of the original goals of the policy to help mitigate the impact of the pandemic.

37. The Commissioner does not agree with DWP's view that disclosure of the requested information in this case necessarily leads to further releases of, as yet unrequested, information. Each request must be considered separately on a case by case basis with one disclosure not setting a precedent for another.
38. The Commissioner considers that the arguments advanced by DWP in paragraph 33 above comprise "chilling effect" arguments. DWP argues in general terms that there would be a loss of frankness and candour which would damage the quality of advice and lead to poorer decision making. However, the Commissioner must focus on the information itself and its context on a case-by-case basis. Furthermore, the Commissioner has set out many times previously that she considers that civil servants should not be easily deterred from giving impartial and robust advice by the possibility of future disclosure.
39. In addition, having seen the withheld information she notes that the content is not attributed to specific individuals. The withheld information does not detail a free and frank exchange of views but rather a settled policy position to present to the Minister. Consequently the Commissioner is not convinced that a generalised chilling effect on all future discussions would result from disclosure in this case.
40. Having taken into account the arguments put forward by both parties the Commissioner has considered the balance of the public interest in this case. She accepts that a significant weight should be attributed to the need for a safe space for government discussion on policy decisions relating to uplifting benefits, taken at a time of crisis in the pandemic. Nevertheless the policy was formulated and announced by the Chancellor before the request for information was submitted. The Commissioner considers that there is a very significant and weighty public interest in understanding why the decisions announced were taken. Members of the public are directly impacted by the policy and those not directly affected are nevertheless entitled to be properly informed as to the equality implications of policy questions which are likely to shape British society.
41. The Commissioner believes that disclosure would serve the public interest by providing information on the matters considered before announcing a policy that affects significant numbers of vulnerable people and has led to significant debate around its merits and impact. She does not accept that disclosure would be likely to have a detrimental impact on the development of the processes and policies relating to the uplift or on continuing to support those on low incomes. Her deliberations have taken into account the unprecedented circumstances of the world pandemic and the public interest in understanding decisions taken by government in response to those circumstances. She has concluded that

in the circumstances of this case the public interest favours disclosure of the information.

42. Having found the exemption at section 35(1)(a) engaged the Commissioner cannot make a finding on section 36. Section 36(1) states:

“This section applies to-

- (a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35.”

43. The Commissioner will therefore proceed to consider the application of section 42.

Section 42 – Legal professional privilege

44. Section 42(1) states:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

45. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting legal professional privilege (“LPP”) for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.

46. There are two types of legal professional privilege (LPP); advice privilege and litigation privilege. The Commissioner’s view is that for legal professional privilege to apply, the information must have been created or brought together for the dominant purpose of litigation, or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation

47. DWP advised the Commissioner:

“..we would also look to apply an exemption under section 42 to any and all legal advice provided within those documents [the withheld information].”

48. The Commissioner asked DWP to identify which paragraphs within the documents it sought to withhold under section 42. DWP identified 14 paragraphs in document (a) and 4 paragraphs in document (b) to which DWP stated that it has applied advice privilege.

49. The Commissioner has proceeded to consider legal advice privilege in respect of the specified paragraphs. She reverted to DWP on several occasions as she tried to achieve clarity on why the identified paragraphs were legally privileged. DWP explained that the documents comprising the withheld information were not written by lawyers but contained paragraphs written following several lawyers' advice to policy officials. DWP advised:

"In preparing the documents legal advice was not received separately. Lawyers inputted into the documents with legal advice ...we can confirm that the withheld paragraphs would either have been written by a lawyer, or specifically cleared by a lawyer as being an accurate assessment of the legal issue."

50. Having considered the content of the identified paragraphs it is not clear to the Commissioner how the content of any of the paragraphs – bar one - comprises legal advice. Notwithstanding the positioning of 11 of the paragraphs in document (a), which follow a heading of "Legal considerations", the Commissioner's reading of the information is that the majority of the paragraphs comprise descriptions and circumstances of proposed actions; she is unable to identify specific legal advice. In only one paragraph (number 20) does the Commissioner accept that the content could be read as comprising legal advice and that legal advice privilege attaches to it.

51. In consideration of document (b) and the 4 paragraphs identified by DWP the Commissioner has made the same finding as for the aforementioned 13 paragraphs. They do not clearly present legal advice; rather they describe policy.

52. Nevertheless DWP has specifically confirmed to the Commissioner that the paragraphs identified in both documents were written as a result of taking legal advice. DWP provided arguments regarding why the paragraphs constituted legal advice. It confirmed that:

"...government lawyers inputting into submissions and equality analyses are legal advisers acting in a professional capacity, and their clients are both the policy officials involved with formulating policy, and ministers who make ultimate decisions on such policy."

53. The Commissioner accepts that the identified paragraphs may have been written in accordance with legal advice provided prior to their drafting. However, the Commissioner does not accept that specific legal advice is revealed in the identified paragraphs, save paragraph 20 in

document (a). The Commissioner acknowledges that some or all of the stated paragraphs may have been approved at some point by a lawyer; however, this in itself does not equate to specific legal advice warranting legal professional privilege. DWP has failed to provide evidence that any of the paragraphs were written by a lawyer or were written as a direct result of legal advice. Although DWP advised the Commissioner that the specified paragraphs "revealed legal advice" the information in the paragraphs is factual. In considering the information, the Commissioner would also note that reflecting a legal consideration is not sufficient to engage the exemption.

54. The Commissioner's view is that legal professional privilege does not apply to the withheld information, save the one identified paragraph and therefore the exemption is engaged only in regard to paragraph 20 document (a).
55. Section 42(1) is a qualified exemption and therefore the Commissioner must consider the public interest and whether, in all of the circumstances of the case, the public interest in maintaining the exemption in relation to paragraph 20 document (a) outweighs the public interest in disclosing the information.

The public interest

56. The complainant explained to the Commissioner that the requested information pertains to a policy which has led to claimants of Universal Credit receiving an increase to the rate of their benefit which more than 13,000 disabled and long-term sick claimants have not. As such he considers that the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
57. DWP acknowledged that it is legitimate for the public to be interested in understanding the advice that lawyers provide to ministers and officials, particularly concerning the development of policy. It advised:

"The release of information like this would help to break down barriers and lead to better understanding."
58. DWP added:

"However, it is clearly in the public interest for ministers, their policy officials and lawyers to be able to engage in candid communications to ensure that policy decisions are made in full appreciation of all options and legal implications. The disclosure of frank legal advice on matters of public policy would be contrary to the public interest because the effect may be to hinder the candid nature of such communications in future. This would be damaging to policy making generally and not in the public interest."

The balance of the public interest

59. The Commissioner accepts that it is well established that the public interest in withholding information covered by legal professional privilege is significant. She notes that in relation to the application of the public interest test in section 42 cases, in *DBERR v O'Brien v IC* [2009] EWHC 164 QB, Wyn Williams J gave the following guidance:

"... it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question."

60. Notwithstanding this, the Commissioner also recognises, in *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office* [2017] UKUT 495 (AAC)), the Upper Tribunal noted the following in emphasising that the exemption is not a blanket exemption:

"The powerful public interest against disclosure ... is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute."

61. Therefore the Commissioner does not consider that the public interest considerations need to be exceptional in order to overturn the acknowledged strong public interest in maintaining the exemption.

62. Paragraphs 59 and 60 of *Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030*⁸ make clear that the public interest arguments in favour of maintaining the exemption must relate specifically to the exemption and will therefore be narrow in scope. The tribunal confirms that the public interest arguments in favour of disclosure can be wide ranging and do not need to specifically relate to the exemption which has been engaged.

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<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

63. Although DWP has acknowledged the general public interest in transparency and accountability, as set out above, the Commissioner does not consider that it has sufficiently taken into account the specific circumstances of the request in this case and the significant weight to be attached to those public interest factors in favour of disclosure.
64. The matter of limiting increases to Universal Credit and Working Tax Credits is a controversial one which has resulted in widespread calls for the extension of the uplift to legacy benefits amongst welfare rights groups and others with significant coverage in the media.
65. The House of Commons Briefing Paper referenced above sets out the Government decision to support new benefits claimants and its stated ability to adjust Universal Credit and Working Tax Credit with greater speed than it is possible to increase legacy benefits. Ministers have also noted that legacy benefit claimants could claim for Universal Credit if they were eligible. Notwithstanding the information already in the public domain, disclosure of the requested information will provide greater transparency and help further understanding of the decisions taken.
66. The Commissioner notes that the Social Security Advisory Committee⁹ wrote to the Secretary of State for Work and Pensions on 27 May 2020¹⁰ explaining its "strong view" that it was increasingly indefensible for legacy benefit claimants to be excluded from the uplift and to continue to have a lower level of income than those in receipt of Universal Credit and Working Tax Credit.
67. The following month, on 22 June 2020, the Work and Pensions Select Committee issued a report on DWP's response to the coronavirus outbreak¹¹ which details the actions taken by DWP and the Committee's consideration of those actions. It concluded by suggesting:

"We recommend that, now that the initial surge of Universal Credit claims has mostly been handled, the Department should immediately seek to increase the rates of relevant legacy benefits by the equivalent

⁹ The SSAC is an advisory non-departmental public body sponsored by the DWP

¹⁰

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888504/ssac-letter-to-secretary-of-state-covid.pdf

¹¹ <https://publications.parliament.uk/pa/cm5801/cmselect/cmworpen/178/17806.htm>

amount. This increase should be backdated to April 2020, as recommended by the independent Social Security Advisory Committee.”

68. The Commissioner references the views of the Work and Pensions Committee and the Social Security Advisory Committee to highlight the contentious issues surrounding the requested information in this case to which the legal advice relates. The Commissioner notes that the committees’ views were given before DWP’s final response to the complainant, in the internal review of 1 October 2020.
69. The Government’s decision in this matter impacted on around 1.76 million¹² claimants of legacy benefits. Clearly this is a significant number of affected individuals.
70. The question of whether or not increasing legacy benefits in line with Universal Credit was discriminatory will be decided by the Judicial Review to be heard at the High Court. The Commissioner considers that this will obviously provide the public with further insight and understanding into the nature of the decision by DWP. However, at the time of the request, this Judicial Review had not been brought and therefore this potential insight could not be taken into account.
71. Notwithstanding that, the Commissioner would expect a public authority, in response to a Judicial Review, to obtain detailed legal advice in defence of the specific issue to be considered in court. In the particular circumstances of the decision taken by DWP the risk of contemplated litigation was probably always present. She has considered whether disclosure of the paragraph identified as legal advice in the requested information could undermine or jeopardise DWP’s position at the Judicial Review. She is not persuaded that disclosure would have a detrimental impact on DWP’s defence of its position. She is therefore satisfied that disclosure of the information withheld would not prejudice DWP’s ability to defend its position.
72. The inherent public interest in maintaining the exemption provided at section 42 lies in protecting the confidentiality of communications between client and lawyer. The Commissioner has considered whether disclosure of this information would undermine this confidentiality, leading to future legal advice being guarded or generic.
73. The Commissioner considers that, while the withheld information could be identified as legal advice, it is not of the form or content that would

¹² Taken from the House of Commons briefing paper at footnote 2.

be likely to undermine the inherent confidentiality between a lawyer and their client if disclosed.

74. The Commissioner considers that there is a very strong public interest in disclosure of any legal advice obtained by DWP regarding whether limiting the uplift to Universal Credit and Working Tax Credit claimants could be discriminatory.
75. Disclosure would facilitate the public's understanding and scrutiny of DWP's position. As above, the Judicial Review will provide insight into whether or not the decision not to increase legacy benefit payments was discriminatory. However, disclosure of the requested information would provide illumination on DWP's considerations in making the decision to take this action, the extent to which equality obligations were taken into account and the nature of these considerations.
76. In reaching her conclusion, the Commissioner has considered the number of people affected by the decision and the fact that the majority of those affected are entitled to disability benefits and may be financially dependent upon these benefits in the face of increased costs due to the pandemic. She also notes the active debate around the decisions made and the representations made by various bodies including the Social Security Advisory Committee and the Work and Pensions Committee in relation to this, which increases the case for transparency around the decision making process.
77. Consequently, although the Commissioner has attributed appropriate weight to the in-built public interest in non-disclosure in legally privileged advice, she nevertheless considers that, in this specific case, there is a weightier public interest in allowing the public to examine the information linked to this request which was based on the legal advice given to DWP.
78. The Commissioner therefore considers that in the specific circumstances of this case, there is a compelling public interest in disclosure of the identified paragraph.

Section 10 – Time for compliance with request

79. Section 10(1) states:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

80. DWP apologised to the complainant for the delay in providing its response and explained that due to Covid-19 it was focusing its

resources on frontline high-priority areas and was responding to FOI requests as soon as it is able to do so.

81. Notwithstanding the circumstances at the time of the request, DWP breached section 10(1) by responding outside the statutory timeframe.

Other matters

82. Section 8 of FOIA concerns the definition of a valid request. The Commissioner provides guidance on recognising a valid request including whether questions comprise a valid request¹³. As explained there, provided the elements set out in section 8 are present almost anything in writing which asks for information will count as a request under the FOIA. A request in the form of a question will be valid under Section 8(1)(c), provided it describes distinguishing characteristics of the information required.
83. DWP explained to the Commissioner that as it had not made the requests set out in the first two points of the complainant's request, it does not hold any information in the scope of the two points.
84. The complainant confirmed to the Commissioner that he accepted this position. The Commissioner has therefore not made a formal finding in relation to this aspect of the DWP's handling of the request. However, the Commissioner considers that DWP should have made clear in its responses to the complainant its explanation as to why no information was held.

¹³ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/#2>

Right of appeal

85. 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

86. 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.

87. 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

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF