

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2022

Public Authority: Department for Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested the Internal Process Reviews (IPRs) carried out by the Department for Work and Pensions (DWP).
2. DWP disclosed some of the information but withheld the remainder on the basis of section 35(1)(a) (formulation or development of government policy).
3. During the Commissioner's investigation, DWP disclosed further information. At this stage, DWP confirmed that it was redacting the IPRs on the basis of section 40(2) (third party personal data) and section 44 (statutory prohibition). The complainant confirmed that they did not dispute the redactions made under sections 40(2) and 44(1) but did dispute that DWP was entitled to rely on section 35(1)(a) to withhold the non-personal information.
4. The Commissioner's decision is that section 35(1)(a) is not engaged for some of the disputed information and for the information that does engage section 35(1)(a), the balance of the public interest favours disclosure.
5. The Commissioner also considers that DWP did not comply with section 17(1)(b) as it failed to inform the complainant that it was relying on sections 40(2) and 44(1)(a) within the statutory timeframe.
6. The Commissioner requires DWP to take the following steps to ensure compliance with the legislation:

- Disclose the withheld IPRs with redaction of the information engaging sections 40(2) and 44(1)(a).
7. 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 FOIA and may be dealt with as a contempt of court.

Background

8. Where it is alleged that DWP's actions may have had a severe negative impact on a claimant, DWP conducts a review of its claim handling and interactions in the individual's case. These are called Internal Process Reviews (IPRs).
9. The IPR considers the detailed chronology of the individual's case and makes recommendations where it finds that DWP's policy or case handling could be improved.
10. On 14 July 2021, BBC News reported that 124 IPRs had been conducted since July 2019 with 97 concerning people who had died¹.

Request and response

11. On 2 September 2020, the complainant wrote to DWP and requested information in the following terms:

"In May 2016, the department released redacted copies of 49 peer reviews which were carried out following serious incidents and deaths of benefit claimants. Here is the link to that release:

<https://www.gov.uk/government/publications/dwp-foi-releases-for-may-2016>

Although the link still works, none of the PDFs can be extracted from the folder. I have tried using two different laptops.

Please send me fresh copies of the 49 files which I am able to open in a suitable format (PDF or word).

¹ <https://www.bbc.co.uk/news/uk-57726608>

Please also send me copies of all Peer Reviews/Internal Process Reviews – redacted in line with the guidance provided by the Information Rights First Tier Tribunal – from:

- 1 2016
- 2 2017
- 3 2018
- 4 2019
- 5 2020”

12. On 30 September 2020, DWP wrote to the complainant and confirmed that it held the requested information. DWP explained that it considered the information was exempt under section 35(1)(a) but it required additional time to consider the balance of the public interest. DWP explained that it was relying on section 10(3) to extend the statutory timeframe and it would provide its response no later than 28 October 2020.
13. On 28 October 2020 and 25 November 2020, DWP wrote to the complainant to extend the statutory timeframe again as it required further time to consider the balance of the public interest.
14. On 30 November 2020, DWP provided its substantive response. DWP confirmed that it held the requested information.
15. With regards to the first request for the previously published peer reviews, DWP explained that the information was exempt under section 21 as the information was reasonably accessible to the complainant. DWP confirmed that it had worked with Government Digital Services to ensure that the web address where this information is stored was working correctly. DWP confirmed that the information could be accessed via <https://www.gov.uk/government/publications/dwp-foi-releases-for-may-2016>.
16. In response to the second request for copies of all Internal Process Reviews (IPRs) completed between 2016 and 2020, DWP disclosed redacted versions of IPRs completed between January 2016 and March 2019.
17. DWP confirmed these reports had been redacted to protect the identities of the customers detailed within them but did not confirm what exemption it was relying on. DWP explained that it had shared information where this does not risk unintentionally disclosing information that is about a person or might identify any person, including identification from other relevant documents.

18. DWP explained that the IPRs completed from April 2019 were being withheld under section 35(1)(a), formulation or development of government policy. DWP stated that this exemption protects the private space within which ministers and their policy advisors can develop policies without the risk of premature disclosure.
19. DWP explained that, on balance, it was satisfied that in this instance the public interest in maintaining the exemption outweighs the public interest in disclosure.
20. The complainant requested an internal review of the handling of the request on 30 November 2020 and disputed that DWP was entitled to withhold the IPRs. The complainant explained that the Information Rights Tribunal had previously found that IPRs should be disclosed and they considered that "it cannot be right" that DWP was now refusing to disclose them.
21. The complainant also disputed that disclosure would have an impact on the formulation of government policy and therefore considered that the exemption was not engaged.
22. DWP provided the outcome of its internal review on 9 March 2021. DWP confirmed that it was satisfied that the request was handled properly and its original response was correct.
23. DWP repeated the explanations provided in its refusal notice.

Scope of the case

24. The complainant contacted the Commissioner on 22 April 2021 to complain about the handling of their request, specifically, DWP's refusal to disclose the IPRs from April 2019.
25. During the Commissioner's investigation, DWP wrote to the complainant on 26 April 2022 and disclosed 21 IPRs for which DWP considered that section 35(1)(a) was no longer engaged.
26. DWP redacted these IPRs on the basis of sections 40(2) and 44(1)(a) as the redacted information could identify the individuals involved.
27. The complainant confirmed to the Commissioner that they did not dispute the redactions made under section 40(2) (personal data of third party) and section 44(1)(a) (statutory prohibition).

28. The Commissioner therefore considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 35(1)(a) to refuse to disclose the remaining IPRs.

Reasons for decision

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

29. 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”.

30. 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.
31. 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 and effective policies. In particular, it ensures a safe space to consider policy options in private.
32. His guidance² advises that a public announcement of the decision is likely to mark the end of the policy formulation process.
33. 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.

² <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

DWP's position

34. DWP explained to the Commissioner that 51 IPRs were completed between April 2019 and November 2020. As set out above, 21 were disclosed with redactions during the investigation.
35. DWP explained that there are four government policies to which it considers the withheld information relates. These policies are:
 - The National Data Strategy
 - The Vulnerable Customers Policy
 - Paying the customer, the right amount at the right time
 - Shaping Future Support: the Health and Disability Green Paper.
36. DWP explained that 'The National Data Strategy' is a government policy presented by the Secretary of State for Digital, Culture, Media and Sport³.
37. DWP explained that 'The Vulnerable Customers Policy' comprises government policy as the Minister for Disabled People proposed to develop support for vulnerable claimants as part of the Government's Welfare Reform package.
38. DWP explained that 'Paying the customer, the right amount at the right time' comprises government policy as DWP has a legal obligation to ensure that claimants are paid the right amount at the right time and that decision making is not limited by challenges faced by claimants when engaging with DWP.
39. DWP explained that 'Shaping Future Support: the Health and Disability Green Paper' is a government policy consultation document as set out in the Government's 2019 manifesto⁴.
40. DWP provided explanations of how each IPR related to the formulation or development of the relevant government policy. The Commissioner

³ <https://www.gov.uk/guidance/national-data-strategy>

⁴ www.gov.uk/government/consultations/shaping-future-support-the-health-and-disability-green-paper/shaping-future-support-the-health-and-disability-green-paper

will not reproduce these explanations as they reveal the nature of the withheld information.

41. DWP confirmed that at the time of its submissions to the Commissioner, the policies were still being formulated or developed and had not yet been implemented.

The Commissioner's position

42. As set out above, section 35(1)(a) applies to information if it relates to the formulation or development of government policy.
43. Although 'relates to' is given a wide interpretation, as the Court of Appeal noted in *Department of Health v The Information Commissioner and Mr Simon Lewis* [2017] EWCA Civ 374, of the First Tier Tribunal's findings in that matter, the phrase 'should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context', and that a 'mere incidental connection between the information and a matter specified in a sub-paragraph of s.35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph'.
44. Therefore, there must be a clear and tangible relationship between the content of information withheld under this exemption and the process that is being protected (ie the formulation or development of policy).
45. The Commissioner's guidance on section 35(1)(a) sets out that information does not have to have been created as part of the formulation or development of government policy. Information may 'relate to' the formulation or development of government policy due to its original purpose when created, or its later use, or its subject matter.
46. This means that information can engage section 35(1)(a) because it was used to inform the policy position, even if in isolation the information does not obviously relate to government policy.
47. The Commissioner has considered DWP's submissions and is satisfied that the IPRs that relate to 'The National Data Strategy' and 'Shaping Future Support: the Health and Disability Green Paper' engage section 35(1)(a). Both of these policies are clearly government policy and were at the development stage at the time of the request. The Commissioner is also satisfied that the IPRs were used to inform the development of these policies.
48. DWP has confirmed that 14 of the IPRs relate to two or more of the named policies. Where an IPR relates to either the Health and Disability

Green Paper or the National Data Strategy, the Commissioner is satisfied that section 35(1)(a) is engaged.

49. Seven of the withheld IPRs relate only to one or both of the 'Vulnerable Customers Policy' and 'Paying the customer the right amount at the right time'.
50. The Commissioner considers that these policies do not comprise government policy.
51. FOIA does not define 'government policy'. Section 35(5) states that it will include the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Government, but does not provide any further guidance.
52. The Commissioner's guidance on section 35 states:

"The Modernising Government White Paper (March 1999) describes policymaking as the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world". In general terms, governmental policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high level objectives and more detailed proposals on how to achieve those objectives".
53. The guidance explains that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms.
54. The Cabinet is the ultimate arbiter of all government policy. Significant policy issues or those which affect more than one department will be jointly agreed by ministers in Cabinet or Cabinet committees. However, not all government policy will need to be discussed in Cabinet and jointly agreed by ministers. Some policies will be formulated and developed within a single government department and approved by the minister responsible for that area of government.
55. Government policy will ultimately be signed off either by the Cabinet or the relevant minister. This is because only ministers have the mandate to make policy on behalf of government. If the final decision is taken by someone other than a minister, that decision will not in itself constitute government policy. However, this does not mean that every decision made by a minister is automatically a policy decision. Ministers may also be involved in some purely political, administrative, presentational or operational decisions.

56. With regards to 'The Vulnerable Customers Policy', the Commissioner is not persuaded that this policy is itself government policy as set out by DWP. DWP has confirmed that the Minister for Disabled People proposed to develop support for vulnerable claimants as part of the Government's Welfare Reform package.
57. It appears that the Welfare Reform package is the government policy and 'The Vulnerable Customers Policy' is an operational policy intended to implement this government policy.
58. With regards to 'Paying the customer, the right amount at the right time', the Commissioner is not persuaded that that this constitutes the formulation or development of government policy. The Commissioner acknowledges that governments may pass legislation in order to effect change and therefore create legal obligations. However, it appears from DWP's submissions that this is a pre-existing legal obligation that DWP is required to follow.
59. DWP set out to the Commissioner that IPRs that relate to 'Paying the customer the right amount at the right time' will be used to ensure that policies support claimants being able to access the correct DWP services at the correct time and to make further developments where necessary.
60. It appears that the information relates to the implementation of operational policies and procedures which ensure that access to DWP's services are in accordance with established legal obligations rather than the formulation or development of government policy.
61. The Commissioner therefore considers that the IPRs which relate only to 'The Vulnerable Customers policy' and 'Paying the customer, the right amount at the right time' do not engage section 35(1)(a).
62. The Commissioner requires DWP to disclose these IPRs with the accepted redactions under section 44(1)(a) and 40(2).
63. With regards to the IPRs that do engage section 35(1)(a), the Commissioner will go on to consider the balance of the public interest.

The public interest

64. DWP provided the following considerations in favour of disclosing the requested information:

"The Department has considered public interest arguments in favour of releasing information in this request and that is one of the reasons why many reports are now being released. Some of these reports only have personal information redacted. Transparency is one of the public interest issues that has been considered in making this release, together with

improving public understanding of the role of IPRs and how that fits in with Government policies and processes”.

65. In favour of maintaining the exemption, DWP explained that its public interest consideration centred on whether maintaining the safe space for ministers and policy colleagues to have frank discussions were valid, in light of working through recommendations from these reports as opposed to prematurely releasing them into the public domain. DWP considers that the recommendations should not be released as, at the time of DWP's submissions to the Commissioner, they are still being considered and have not yet been implemented.
66. DWP considers that disclosure of the withheld IPRs could also inhibit free and frank discussions of recommendations in future which could damage the quality of advice and decision making.
67. DWP explained that the public interest in maintaining the exemption at section 35(1)(a) outweighs that in disclosure because, although good decision-making should lend itself to transparency and accountability, the information contained in these reports was being worked through to promote policy changes. DWP confirmed that IPRs are a source of insight and learning, which can inform operational guidance changes and inform the formulation and development of government policy. DWP considered that without this freedom of space and learning environment, IPRs would fail to achieve their objective.
68. DWP confirmed that the proposed recommendations will be reviewed and taken into consideration in the ongoing policy development of the named policies.
69. DWP explained that while it does not routinely publish IPRs due to the personal details and circumstances they contain, it has disclosed information about this process. This has been done through responding to Parliamentary Questions and discussions at the Work and Pensions Select Committee. DWP explained that these responses are published, satisfying many aspects of the public interest criteria relating to the broader discussions around IPRs.
70. DWP considers that, regarding the individual cases themselves, an independent and transparent system for investigating cases where a death has occurred already exists through Coroners' investigations. Their investigations and conclusions are made at public hearings and where they issue a Prevention of Future Deaths report; this is published on the Judiciary website.

71. DWP explained that both the Independent Case Examiner⁵ and the Parliamentary and Health Service Ombudsman⁶ look at cases and publish findings following investigations.
72. DWP considers that all these factors demonstrate a high level of transparency and information available to the public and it is therefore appropriate that these further policy matters are considered and discussed with freedom and in a learning environment to achieve the objectives of the IPRs.

The balance of the public interest

73. The Commissioner accepts that a safe space is needed for discussion and decision making by officials and ministers, particularly in handling complicated and sensitive matters such as those relating to welfare and safeguarding.
74. The Commissioner considers that the public interest in maintaining the exemption will be at its strongest where the policy process is live.
75. The request was made on 2 September 2020 and responded to on 20 November 2020.
76. The Health and Disability Green Paper was published in July 2021 with the public consultation running from 12 July 2021 to 11 October 2021.
77. The National Data Strategy, stage one, call for evidence opened in June 2019. In September 2020, the strategy was published and stage two consultation opened.
78. The Commissioner therefore accepts that the policies were still being developed at the time of the request.
79. The Commissioner acknowledges that there is a public interest in allowing DWP the time and space to implement the recommendations made in the IPRs.
80. However, the Commissioner considers that DWP has failed to consider the strong public interest in the timely understanding, and scrutiny of, the recommendations made in the IPRs. The Commissioner notes the information that DWP confirmed is already available regarding the IPRs,

⁵ <https://www.gov.uk/government/organisations/independent-case-examiner>

⁶ <https://www.ombudsman.org.uk/>

however, the Commissioner considers that this does not provide the ability to understand and scrutinise the review recommendations which are DWP's own considerations of where improvements are needed or where policy was not followed. The Commissioner also notes that not all cases will be reviewed by a Coroner, the Independent Case Examiner or the Parliamentary Health Service Ombudsman.

81. The IPRs provide insight and understanding of where DWP acknowledges that errors were made or improvements are required. They would also allow scrutiny of whether DWP has taken action to implement these improvements or ensure that the errors do not occur again. Disclosure would also allow scrutiny of whether the actions taken were sufficient or timely enough to prevent the harm identified occurring again.
82. The Commissioner considers that there is a strong public interest in understanding DWP's approach to preventing future errors and safeguarding issues.
83. Whilst the Commissioner accepts that there is weight to the public interest arguments regarding allowing DWP the space to develop policy and implement the recommendations away from external interference, the Commissioner is not persuaded that this is sufficient to outweigh the strong public interest in disclosure of the IPRs.
84. DWP has not provided compelling arguments regarding how the specific policies named would be undermined by disclosure of the IPRs. Having reviewed the information, it is not apparent to the Commissioner how the specific policies would be undermined other than the general safe space arguments presented. While the Commissioner accepts that section 35(1)(a) is intended to protect the policy process as a whole in addition to specific policies, the Commissioner is not persuaded that the public interest arguments presented are sufficient to outweigh the strong public interest in scrutiny of the IPR recommendations.
85. The Commissioner therefore considers that the balance of the public interest favours disclosure.
86. The Commissioner requires DWP to disclose the withheld IPRs with the agreed redactions under sections 40(2) and 44(1)(a).

Section 17: Refusal Notice

87. Section 17(1) of FOIA states:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that

information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies”.

88. As set out in paragraph 17 of this decision notice, DWP confirmed that the IPRs originally disclosed had been redacted to protect the identities of the customers detailed within them but did not confirm what exemption it was relying on.
89. The Commissioner therefore finds that DWP breached section 17(1)(b) as it failed to specify that it was relying on sections 40(2) and 44(1)(a) within the statutory timeframe.

Other matters

90. In 2016, the First Tier Tribunal issued a decision that the Internal Peer Reviews from a specific timeframe should be disclosed with personal information redacted⁷.
91. As part of their complaint, the complainant asked the Commissioner to confirm to DWP that the Tribunal’s decision applies to all IPRs undertaken. Whilst the Commissioner understands the complainant’s frustration that they must raise a complaint on a matter that appears to have been settled, the Commissioner cannot issue a blanket finding that all information of a specified type should be disclosed.
92. When making a decision, the Commissioner must do so on a case by case basis which takes into account the specific information and circumstances at the time of the request. As with section 35(1)(a), exemptions may be engaged based on how the information was used rather than solely on the nature of the information. The exemptions may

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1778/Pring,John%20EA-2015-0237\(12-04-16\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1778/Pring,John%20EA-2015-0237(12-04-16).pdf)

also be time sensitive and information may be exempt for a period of time while the public authority undertakes a specific task.

93. The Commissioner cannot require disclosure of information without consideration of the specific information requested and the facts surrounding the request.
94. Although the complainant did not dispute the application of section 21 and DWP ensured that the IPRs were available on the specified webpage by the time of its response, the Commissioner reminds DWP that section 21 is only applicable where the information was reasonably accessible at the time of the request.
95. Paragraph 16 of the Commissioner's guidance on section 21 states:
- "Information is regarded as being in the public domain if it is reasonably accessible to the general public at the time of the request".
96. There is no statutory timeframe in which a public authority must provide the outcome of its internal review of the handling of the request. However, the section 45 Code of Practice⁸ states:

"5.4 Requests for review should be acknowledged and the applicant informed of the target date for responding. This should normally be within 20 working days of receipt.

5.5 If an internal review is complex, requires consultation with third parties or the relevant information is of a high volume, public authorities may need longer than 20 working days to consider the issues and respond. In these instances, the public authority should inform the applicant and provide a reasonable target date by which they will be able to respond to the internal review. It is best practice for this to be no more than an additional 20 working days, although there will sometimes be legitimate reasons why a longer extension is needed

...

5.8 The internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the Act. This includes decisions taken about where the public interest lies if a qualified

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

exemption has been used. It might also include applying a different or additional exemption(s)".

97. In this case, DWP took in excess of four months to provide the outcome of its internal review, at which point it simply repeated the arguments set out in its original refusal notice and provided no evidence of a fair and thorough review of the handling of the request.
98. The Commissioner therefore considers that DWP's handling of this internal review was not in accordance with the section 45 Code of Practice.

Right of appeal

99. 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

100. 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.

101. 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

Victoria Parkinson
Senior Case Officer
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