

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 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 information relating to the end of the £20 uplift to Universal Credit introduced during the Covid-19 pandemic.
2. The Commissioner's decision is that DWP is not entitled to rely on section 36, prejudice to the effective conduct of public affairs, to withhold the information. However, the Commissioner does consider that a small amount of information engages section 42(1), legal professional privilege, and the balance of the public interest favours maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information with the exception of the information identified in the confidential annex.
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 FOIA and may be dealt with as a contempt of court.

Background

5. The following information has been taken from the House of Lords article "Universal credit: an end to the uplift"¹ published on 3 September 2021.
6. On 20 March 2020, the then Chancellor of the Exchequer, Rishi Sunak, announced that the standard allowances of Universal Credit (UC) and the basic element of Working Tax Credit would be increased by £1,000 a year, or £20 a week. He said that this uplift was designed to "strengthen the safety net" during the Covid-19 pandemic and was part of a wider support package for household finances.
7. In November 2020, the Legatum Institute reported that although poverty had risen because of the Covid-19 pandemic, government policy – including the uplift to UC and Working Tax Credits – "has insulated many families" from it. It estimated that the policies had protected 690,000 people from poverty in winter 2020. It also reported that some groups had seen a fall in poverty. For example, it found a reduction of 100,000 in poverty amongst people living in lone-parent families and a reduction of 170,000 amongst people in workless families. However, it also reported that there had been "significant increases in poverty amongst people living in families that were working prior to the Covid-19 crises".
8. The uplift was initially intended to last 12 months and was due to expire in April 2021. However, at the March 2021 budget, the Government announced that it would be extended for a further six months. It also said that it would make a one-off payment of £500 to eligible Working Tax Credit recipients.
9. In July 2021, the Government confirmed that it would withdraw the uplift at the end of September 2021 as planned. Giving evidence to the House of Commons Work and Pensions Committee on 7 July 2021, Therese Coffey, the then Secretary of State for Work and Pensions, said that the uplift was being "phased out, in line with all the other temporary measures that are also being removed". The same day, the then Prime Minister Boris Johnson was questioned on the issue by the House of Commons Liaison Committee. Responding, he said that as

¹ <https://lordslibrary.parliament.uk/universal-credit-an-end-to-the-uplift/#:~:text=In%20response%20to%20the%20Covid-19%20pandemic%2C%20in%20March,confirmed%20that%20it%20would%20not%20be%20extended%20further.>

Covid-19 restrictions eased, the emphasis "has got to be an getting people in work and getting people into jobs, and that is what we are doing".

10. A number of individuals and organisations have raised concerns about the plans and called for the uplift to be made permanent. For example:
 - In June 2021, the Centre for Social Justice called for the uplift to be made permanent. It has argued that although this would not be without cost implications, it believed the costs "are not onerous when compared with areas in which HM Government has been prepared to spend unprecedented amounts". It also argued that the "consequences of removing it would outweigh the benefits from any savings".
 - On 20 July 2021, the chairs of relevant committees in the House of Commons and devolved assemblies – Neil Gray MSP, Stephen Timms MP, Paula Bradley MLA and Jenny Rathbone MS – wrote to the Government calling for the uplift to be made permanent and extended to legacy benefits. They argued that "by spending now on social security, saving people from poverty, you will be saving more money long term on health, education, justice and other social services".
 - Also in July 2021, six former Conservative Work and Pensions Secretaries wrote to the then Chancellor urging him to make the uplift permanent. Amber Rudd, Esther McVey, Damian Green, Stephen Crabb, Sir Ian Duncan Smith and David Gauke argued that "work remains the best way out of poverty for those who can work, but we want to make sure that those who cannot work are supported with dignity".
 - In August 2021, Jonathan Reynolds, Shadow Secretary of State for Work and Pensions, labelled the Government's plan "morally and economically wrong" and argued that "with record levels of in-work poverty, the Prime Minister is completely ignorant when he says it is a choice between work and social security".
 - In September 2021, 100 organisations, including charities, children's doctors, public health experts and think tanks, signed a letter calling on the Government to abandon its plans to remove the uplift. They argued that the decision would "pile unnecessary financial pressure on around 5.5 million families, both in and out of work".
11. Responding to some of the criticisms, a Treasury spokesperson told The Times:

"Throughout this crisis, the Government has spent £400 billion protecting people's jobs, livelihoods and supporting businesses and public services. We went long and extended economic support well beyond the end of the road map, right through to the end of September. That includes unprecedented welfare support.

More than £9 billion will have been spent on the uplift by the time it ends in September. It is right that economic support is wound down as we come out of this crisis and we focus on helping people back into work. We have purposely provided a three-month cushion once restrictions are lifted in order to support those who most need it".

12. There have been calls for the Government to publish any impact assessment or analysis has done on withdrawing the uplift. Katie Schmuecker, Deputy Director of Policy and Partnerships for the Joseph Rowntree Foundation has called on the Government to "publish their analysis on the impact of the cut as soon as possible".
13. In response to a written question on 22 July 2021, which asked the Government if it would publish the impact assessment for the removal of the uplift, Will Quince, then Minister for Welfare Delivery, said "no assessment has been made".
14. The Poverty Alliance submitted a freedom of information request asking the Government to disclose any analysis that it had undertaken. However, it said that DWP had responded to the request saying that it did not deem disclosure of the information to be in the public interest.
15. Several organisations have produced their own analysis of the potential impact. Referring to the plans as "the biggest overnight cut to the basic rate of social security since the foundation of the modern welfare state", the Joseph Rowntree Foundation (JRF) outlined five facts "about the impact of this cut" that it asked the Government and MPs to consider:
 - Half a million more people would be pulled into poverty, including 200,000 children;
 - Working families make up the majority of families who will be affected by the cut;
 - Families with children will be disproportionately impacted; and
 - The impact of the cut will be the greatest across the North of England, Wales, the West Midlands and Northern Ireland.
16. The JRF also conducted an analysis of the number and proportion of families who will be affected by the decision for each UK parliamentary

constituency. It reported that 140 constituencies would see more than one in four of all families (with or without children) affected. It also said:

"Our analysis has shown that 6 million low-income families will lose £1,040 from their annual income, creating serious financial hardship and leave 500,000 people to be swept into poverty – including 200,000 children. Families with children will be disproportionately impacted and, worryingly, 6-in-10 of all single-parent families in the UK will be impacted".

17. Citizens Advice also published analysis of the policy. In August 2021, it estimated that the removal of the uplift will "hit nearly six million people", with more than a third (38%) of those affected already in employment and one-in-six (16%) under 25. It also reported that roughly 1.9 million families with children will see their benefits cut and that London and the North East will be the regions with the biggest proportion of residents impacted.
18. The Trussell Trust also published research on the matter, which was undertaken by YouGov. It found that, without the uplift, people said that they would have to go without essentials or be forced into debt to cover costs.

Request and response

19. On 12 September 2021, the complainant wrote to DWP and requested information in the following terms:

"Full copies of all internal modeling, presentations, briefing materials and impact assessments relating to the end of the £20 per week universal credit uplift".
20. DWP provided its response on 23 September 2021 and confirmed that it held information falling within the scope of the request. DWP confirmed that it was withholding the information on the basis of sections 36(2)(b) and (c).
21. DWP provided generic public interest arguments and confirmed that, on balance, it was satisfied that the public interest lay in maintaining the exemption.
22. DWP provided the following information outside of FOIA as it considered that the complainant may find it useful.

- DWP publishes regular statistics on those on UC through the official statistics and the latest statistics can be found at <https://stat-xplore.dwp.gov.uk/webapi>
 - DWP has not completed a Regulatory Impact Assessment or any other formal assessment of the planned ending of the Universal Credit temporary uplift in October as it was only intended to be introduced as a temporary measure.
23. The complainant requested an internal review of the handling of their request on 23 September 2021. They did not provide any reasons for disputing DWP's response.
24. DWP provided the outcome of its internal review on 15 October 2021 and upheld its original position. DWP repeated the arguments previously set out in its original response.

Scope of the case

25. The complainant contacted the Commissioner on 20 October 2021 to complain about the handling of their request.
26. During the investigation, DWP confirmed that in addition to sections 36(2)(b) and (c), it considered that some of the requested information was exempt by virtue of section 42(1) as it constituted legal advice and the balance of the public interest favoured maintaining the exemption.
27. The Commissioner therefore considers that the scope of this investigation is to determine whether DWP is entitled to withhold the requested information under sections 36(2)(b), (c) and 42(1).

Reasons for decision

Section 36: Prejudice to the effective conduct of public affairs

28. Section 36(2) of the Act provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.
29. In order to establish that the exemption has been applied correctly, the Commissioner considers it necessary to;
- ascertain who acted as the qualified person;

- establish that an opinion was given by the Qualified Person;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
30. DWP provided the Commissioner with the qualified person's opinion and the submission provided to aid this opinion.
31. The submissions and request for opinion was sent on 21 September 2021 and the Parliamentary Under-Secretary of State for Work and Pensions (in the Lords), Baroness Stedman-Scott, provided her opinion on 22 September 2021 which essentially confirmed that she approved the use of section 36 on the basis of the submissions provided. The Commissioner has inspected the submission and accompanying information provided to the qualified person.
32. Section 36(5) of FOIA sets out who may act as the qualified person in relation to a public authority. In the case of a government department, any Minister of the Crown may act as the qualified person.
33. The Commissioner is therefore satisfied that Baroness Stedman-Scott was authorised to act as the qualified person in this case.
34. In determining whether the exemption is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one.
35. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
36. DWP confirmed that it considered that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) were all engaged in relation to the entirety of the requested information.
37. In the submissions to the Qualified Person, DWP included information specific arguments in favour of engaging section 36. These arguments reveal the contents of the withheld information and are therefore

included in a confidential annex in order that DWP's position is not undermined by this notice.

38. DWP confirmed to the Qualified Person in the background section to the submission that it had not conducted a formal Impact Assessment (as confirmed in DWP's refusal notice to the complainant) but it had estimated various scenarios and these estimates have been used to inform discussions about the future of the £20 uplift.
39. DWP explained that disclosure would be likely to have a chilling effect on frank and free discussions and analysis on future policies, damaging the quality of advice and leading to poorer decision-making.
40. For the reasons set out in the confidential annex, DWP considered that the requested information may be taken out of context, misinforming the public. DWP considered that significant resources would need to be diverted to correcting the distortion disclosure would create.
41. DWP also considered that disclosure would set a precedent and disclosure may lead to a chilling effect on frank and free discussions and analysis of this kind of future policy, damaging the quality of advice and leading to poorer decision-making.
42. DWP confirmed to the Commissioner that the Qualified Person did not have access to the withheld information due to the volume of the information but the qualified person was fully versed in this area and the information being requested. DWP stated "[i]t was not felt there was an expressed need to provide all this material to the qualified person".
43. The Commissioner asked DWP if the Qualified Person was provided with contrary arguments supporting the position that the exemption was not engaged, however, DWP omitted this question from its response to the Commissioner. Having reviewed the submissions to the Qualified Person, the Commissioner notes that only arguments supporting the exemption being engaged were provided.
44. As set out above, the Commissioner is of the view that in assessing the qualified person's opinion, 'reasonableness' should be given its plain and ordinary meaning. An opinion that a reasonable person in the Qualified Person's position could hold will suffice. The opinion is not rendered unreasonable simply because other people may have come to a different and equally reasonable conclusion.
45. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focusing only on the content of the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information itself does not necessarily

have to contain views and advice that are in themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.

46. The Commissioner acknowledges that there will be situations where the Qualified Person would not need to review the withheld information in order to come to a reasonable opinion. This is likely to be situations where the nature and contents of the information will be obvious or self-evident.
47. In the specific circumstances of this case, the Commissioner is not persuaded that the Qualified Person could reach a reasonable opinion without sight of the withheld information or a sample of it. The Commissioner notes that DWP's main argument regarding why section 36 is engaged relates to the contents of the withheld information and he considers that the Qualified Person could not form a reasonable opinion without sight of the information to which the arguments relate.
48. The Commissioner is also concerned at the quality of the submissions put to the Qualified Person. With the exception of the reasons set out in the confidential annex regarding why disclosure may be taken out of context and misinform the public, the submissions were generic and simply asserted that disclosure would inhibit the free and frank discussions and the provision of advice.
49. With regards to DWP's arguments that the information could be taken out of context and misinform the public, it is well established that the Commissioner does not accept this argument has particular weight. DWP has not provided any arguments regarding why it would not be possible or reasonable to put the information into context or provide an explanation to ensure the public is not misinformed.
50. DWP also stated that disclosure may lead to increased queries to DWP which would divert significant resources. As set out in the background section of this notice, by the time of this request, DWP had received requests for information on the decision to end the uplift and multiple calls for the uplift to be made permanent. The Commissioner does not accept that the prejudice envisaged would be likely to occur as, in light of the controversial nature of the decision, he does not accept that disclosure would intensify the frequency of queries regarding this subject matter.

51. For the reasons set out above, the Commissioner is not persuaded that the Qualified Person has expressed a reasonable opinion and sections 36(2)(b)(i), (ii) & (c) are therefore not engaged.
52. The Commissioner will therefore go on to consider whether section 42(1) is engaged in relation to the information identified by DWP as legal advice.

Section 42: Legal Professional Privilege

53. 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”.

54. 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.
55. There are two types of legal professional privilege; 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.

56. DWP advised the Commissioner:

“Within the documents there is information that was provided by legal colleagues. This information would constitute legal professional privilege and as such would fall under a Section 42 exemption.

This exemption was not initially applied as the information is not clearly defined as being from a lawyer and forms part of the wider material.

It has only become apparent through this case investigation process, whereby the held information was checked by lawyers, at which point they made it clear that there was legal advice within some of the held information that should be exempt under Section 42”.

57. DWP identified to the Commissioner the specific information that it considered was subject to LPP.
58. The Commissioner has proceeded to consider legal advice privilege in respect of the specified paragraphs.
59. Having considered the contents of the identified information, the Commissioner is not persuaded that all of the information comprises legal advice.
60. The Commissioner accepts that the information specified in the confidential annex reveals the content of legal advice provided and that legal advice privilege attaches to it.
61. With regard to the remaining information, the Commissioner's reading of the information is that it comprises factual information regarding what actions would be required in certain scenarios. He is unable to identify specific legal advice.
62. DWP has failed to provide evidence that any of the remaining information was written by a lawyer or was written as a direct result of legal advice.
63. The Commissioner's view is that legal professional privilege only applies to the information specified in the confidential annex. Section 42(1) is therefore only engaged with respect to that information.

The balance of the public interest

64. 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 the identified information outweighs the public interest in disclosing the information.
65. DWP provided the following public interest arguments:

"The argument in favour of disclosure would be that the public can be interested in understanding the advice that lawyers provide to officials, especially around helping to develop or shape policy. However, it is clearly in the public interest for ministers and policy officials and their 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 legal advice on matters of public policy would be contrary to the public interest because the effect may hinder the candid nature of such communications in the future. This would be damaging to policy making generally and not in the public interest".

66. Although DWP has acknowledged the general public interest in transparency and accountability, 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.
67. As set out in the background section of this notice, the temporary uplift to Universal Credit has been controversial with calls for the increase to be made permanent by welfare rights groups and others with significant coverage in the media.
68. 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.
69. The Commissioner accepts that it is well-established that the public interest in withholding information covered by legal professional privilege is significant. He 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 the Act. Section 42 cases are different simply because the in-built public interest test in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that the legal professional privilege attaches to the document in question”.
70. 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”.

71. Therefore the Commissioner does not consider that the public interest in disclosure needs to be exceptional in order to overturn the acknowledged strong public interest in maintaining the exemption.
72. Paragraphs 59 and 60 of Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 & 30² 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.
73. The Commissioner accepts that there is a strong public interest in seeing the information available to those making the decision to end the uplift and understanding what legal advice was provided during the decision making process on this issue. However, the Commissioner also notes the principle of legal professional privilege is a long standing, fundamental principal of English law. The principle exists to ensure that a legal person, including government departments, may obtain legal advice in confidence.
74. There is, therefore, a strong public interest in maintaining the exemption due to the importance of the principle behind legal professional privilege; safeguarding candidness in all communications between client and lawyer to ensure full and frank legal advice which in turn is fundamental to the administration of justice.
75. In light of the above considerations, and having reviewed the information engaging section 42(1), the Commissioner considers that whilst there is a strong public interest in disclosure of information relating to the uplift, this does not outweigh the substantial public interest in ensuring confidentiality between lawyer and client in the specific circumstances of this case.
76. The Commissioner therefore considers that DWP is entitled to rely on section 42(1) to withhold the information identified in the confidential annex.

77. The Commissioner requires DWP to disclose the requested information with the exception of the information engaging section 42(1), set out in the confidential annex.

Other matters

Internal reviews

78. The Commissioner notes that the complainant requested an internal review without providing any reasoning for their dissatisfaction with DWP's response. It is helpful if requesters set out why they are disputing a public authority's response so that the public authority may focus its review and address the requester's specific concerns. The Commissioner has issued guidance on how to request an internal review, including a template, which the complainant may find helpful for future requests³.
79. Section 5.8 of the Section 45 Code of Practice⁴ states:
- "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 exemption has been used..."
80. DWP's internal review response showed no evidence of a fair and thorough review as it simply repeated the arguments set out in its refusal notice. The Commissioner acknowledges that DWP was not provided with the complainant's reasons for disputing its response, however, he does not accept that this would prevent DWP from undertaking, or evidencing that it had undertaken, a fair and thorough review of its decision.
81. The Commissioner expects DWP to provide more detail regarding its review of the handling of requests in future internal review responses.

Public interest considerations

82. As the Commissioner found that section 36 was not engaged, he was not required to consider the balance of the public interest. However,
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³ <https://ico.org.uk/your-data-matters/official-information/what-to-do-if-youre-unhappy-with-the-response-to-your-request/>

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

having reviewed the withheld information, DWP's arguments and the circumstances at the time of the request, he considers that the balance of the public interest would lie in disclosure. The Commissioner considers that there is a particularly strong public interest in scrutiny and understanding of the information available to those deciding whether to end the uplift and the quality of the information and advice provided.

Right of appeal

83. 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

84. 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.
85. 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
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF