

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 August 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 minutes of meetings taking place between the Department for Work and Pensions (DWP) and its contractors providing Work Capability assessments for Personal Independence Payment benefit.
2. DWP has disclosed the minutes but redacted some information under the exemptions at sections 31, 36, 38, 40 and 43 of FOIA. The complainant does not dispute the redactions made under sections 36, 38 and 40.
3. The Commissioner's decision is that DWP is entitled to withhold some of the requested information as section 31(1)(a) is engaged and the public interest favours maintaining the exemption.
4. With regards to the information withheld under section 43, the Commissioner considers that the exemption is not engaged for the majority of the disputed information. However, for the small amount of information that does engage the exemption, the public interest favours maintaining the exemption.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information currently withheld under section 43(2) with the exception of the information relating to the third party subcontractors.

6. 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.

Request and response

7. On 13 October 2020, the complainant wrote to DWP and requested information in the following terms:

"I refer the Department to my request for information ("RFI") of 08 July 2019 (see URL below)

https://www.whatdotheyknow.com/request/pip_contract_meetings_minutes_ch

Over a year later and after the involvement of the Information Commissioner the Department disclosed the meeting minutes I requested on 01 October 2020.

Please interpret my new RFI (see RFI1 at the bottom of this document) using the following guidance (please do not interpret my critique of the Department's reliance on exemptions in my earlier RFI as a request for an IRR):

*S.40 – Any personal information that is exempt under S.40 FOIA is to be considered out of scope for RFI1.

*S.38 – I consider the Department's reliance on S.38 for its disclosure of 01 October 2020 to be excessive. I accept the redaction of the location of meetings was reasonable. Therefore, the location of any meetings is out of scope for RFI1. Without location information there is no need to redact meeting dates, dates of future meetings and Action Point (AP) reference numbers. Therefore, the Department cannot rely on S.38 to redact this information in disclosures related to RFI1.

*S.43 – I consider the Department's reliance on S.43 for its disclosure of 01 October 2020 to be unjustified. Appendix 14 of the published PIP contract documents list the service credits in detail, including the financial value. Therefore, using the information that is already in the public domain it is possible to calculate an accurate estimate of the redacted information. I also believe it is firmly in the public interest for this type of information to be disclosed. If the Department relies on S.43 to redact the same information for RFI1 I will ask the Information Commissioner to make a decision under S.50 FOIA.

*ICO Guidance on interpretation – Please use the Information Commissioner's interpretation as described in the Department's response FOI2019/30040 (ICO) of 01 October 2020.

I assume that the type of meetings (see below) described in the published PIP contracts or the equivalent in the revised contracts, still take place.

"PART M – ONGOING CONTRACT AND PERFORMANCE MANAGEMENT

47.2 Engagement

47.2.1 Monthly meetings will be held between the representatives of the Authority and the Contractor. The Contractor will ensure that a suitably empowered representative attends these meetings. Such activity will be at no cost to the Authority.

47.2.2 The Contractor will attend strategic meetings to review the overall success of the Contract Lot at the frequency to be determined to discuss:

- operational strategies;
- efficiency opportunities.

47.2.3 The Contractor will attend a monthly contract management meeting to manage this contract and discussions will include but not be limited to:

- agreeing contractual change;
- reviewing contractual performance;
- resolving operational and contractual problems;
- transferring and exchanging information."

RFI1 – Please disclose the meeting minutes for the meetings prescribed in 47.2.1, 47.2.2 and 47.2.3 (or their current equivalent) between DWP and Capita and DWP and Atos that took place in 2019 and between 01 January 2020 to 31 August 2020.

RFI2 – If it is possible within S.12 costs limits please tell me how many change requests were agreed in 2019 & 2020 for the 3 PIP contracts".

8. On 10 November 2020, DWP wrote to the complainant and confirmed that it held information falling within the scope of the request but it needed more time to consider the balance of the public interest. DWP confirmed that it is was relying on section 10(3) to extend the time for

compliance in order to consider this. DWP confirmed that it considered the following exemptions apply to the requested information:

- Section 30 – Investigations and proceedings conducted by public authorities
 - Section 38 – Health and Safety
 - Section 40 – Personal Information
 - Section 43 – Commercial Interests
9. On 8 December 2020, DWP provided its substantive response to the request. DWP provided the "Lot Performance Group" (LPG) minutes for the meetings that took place during the specified time period.
 10. DWP confirmed that it was withholding some of the requested information on the basis of section 30(1) "Investigations and proceedings conducted by public authorities" but did not confirm which subsection of this exemption was engaged. DWP confirmed that it considered the balance of the public interest lay firmly in maintaining the exemption.
 11. DWP confirmed that it was withholding information relating to meeting dates, location(s), other organisations and Action Point reference numbers on the basis on section 38(1) as it considered that its disclosure would, or would be likely to, put the physical or mental health, or safety of any individual at risk or greater risk. DWP confirmed that it considered the balance of the public interest lay in maintaining the exemption.
 12. DWP acknowledged that the complainant was not seeking personal data which would be exempt under section 40(2) of FOIA. DWP confirmed that it had redacted the names and contact details of non-senior civil servant grade staff and equivalent contractor staff on this basis.
 13. DWP confirmed that it was redacting information on the basis of section 43 "commercial interests" but did not specify which subsection it was relying on. It explained that the commercial interests of DWP and its current providers IAS and Capita would be likely to be prejudiced by disclosure of the requested information.
 14. DWP explained that providers develop and deliver initiatives that are unique to their own business strategy to deliver on contractual service level agreements. PIP contracts are output based contracts which include a range of remedies for underperformance against a range of performance measures. Details of the value of any financial remedy applied under the contracts are commercially sensitive and DWP

considered that disclosure of the applied financial remedies is likely to prejudice the providers' commercial interests.

15. DWP explained that placing commercially sensitive financial aspects of the providers' contracts into the public domain, including to competitors, would or would be likely to disadvantage the providers' competitive position in the marketplace.
16. DWP confirmed that it considered the balance of the public interest lay in maintaining the exemption.
17. DWP acknowledged that disclosure would be likely to contribute to its accountability for the spending of public monies and promote increased transparency. DWP explained that to support this transparency, DWP routinely publishes a range of statistics and has a full set of service level agreements setting out the department's expectations for service delivery, including quality of consultations and the number of days to provide advice to the department.
18. DWP considered that countered against this is the public interest in ensuring that there is effective competition for public sector contracts. DWP explained that by protecting the commercial interests of DWP and third parties, it protects the ability of DWP to obtain goods and services on the best possible commercial terms and to protect the legitimate commercial interests of its suppliers.
19. DWP confirmed that, in response to "RFI2", there were 31 change requests in 2019 and 16 in 2020 (as of 16 October 2020).
20. The complainant requested an internal review on 8 December 2020 and disputed that the prejudice threshold had been met to engage the exemptions cited in response to RFI1.
21. DWP provided the outcome of its internal review on 11 January 2021 and upheld its original response.

Background

22. DWP provided the following background information regarding the Personal Independence Payment Contracts.
23. DWP provides certain benefits for people due to long-term illness, or as a result of a disability or health condition. As part of the claim process, the claimant is required to have an assessment of eligibility through an independent health assessment.

24. The assessment providers (APs) conduct the independent health assessments to assist DWP Case Managers (CMs) in determining a claimant's entitlement to PIP.
25. There are three separate contracts for the delivery of PIP. Atos IT Services UK Ltd, trading as Independent Assessment Services (IAS), delivers two of the contracts and Capita delivers the third. The Department for Communities manages the assessment provider's contract in Northern Ireland not DWP.
26. DWP awarded the PIP contracts to IAS and Capita, based on their ability to implement their distinct delivery models to provide PIP assessments as specified. In seeking bids to deliver PIP across four geographic areas, the department was consciously looking for different delivery models and approaches, subject to the delivery of the assessment in line with the criteria laid down in regulations.
27. The role and purpose of IAS is explained here – <https://www.mypipassessment.co.uk>
28. The role and purpose of Capita is explained here – <http://www.capita-pip.co.uk>

Scope of the case

29. The complainant contacted the Commissioner on 19 January 2021 to complain about the handling of their request.
30. During the course of the investigation, DWP reviewed its position and disclosed further information. DWP confirmed that section 30 had been applied incorrectly and it was instead relying on section 31(1)(a), section 31(1)(b) and section 31(1)(g), law enforcement, to withhold this information.
31. DWP introduced section 36(2)(c), "prejudice to effective conduct of public affairs", to redact the internal contact details of its staff members.
32. DWP confirmed that it still considered section 40(2) applied to the personal data of DWP employees in non-senior civil servant roles and section 43 was still engaged to some of the withheld information. However, in light of the passage of time, DWP disclosed some of the information previously withheld under section 43. DWP later confirmed to the Commissioner that it was relying on section 43(2) specifically to withhold the remaining information.

33. DWP did not refer to its reliance on section 38 in its revised response to the complainant but did disclose the previously withheld information with the exception of the meeting location which was specifically excluded from the request by the complainant.
34. The complainant confirmed to the Commissioner that they did not dispute the current redactions made under sections 36, 38 and 40(2).
35. The complainant confirmed that they did dispute DWP's reliance on sections 31(1)(a), (b) & (g) and section 43.
36. The Commissioner therefore considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 31(1)(a), section 31(1)(b), section 31(1)(g) and section 43(2) to withhold the remaining withheld information.

Reasons for decision

Section 31: Law enforcement

37. DWP has withheld information in five paragraphs across the 38 disclosed documents on the basis that sections 31(1)(a), (b) & (g) are engaged and the public interest favours maintaining the exemption.
38. The complainant confirmed to the Commissioner that they did not wish for any information that would assist fraudulent behaviour to be placed into the public domain. They acknowledged that there is a careful balancing process that allows for sufficient information to be disclosed without aiding fraudsters. The complainant asked the Commissioner to review the information redacted under section 31 and decide if the redactions are reasonable and proportionate.
39. The Commissioner will first consider whether section 31(1)(a) applies to these five paragraphs.

Section 31(1)(a): The prevention or detection of crime

40. Section 31(1) of FOIA states:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a) the prevention or detection of crime"

41. In order for a prejudice based exemption such as section 31(1)(a) to be engaged, the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view, this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

DWP's submissions

42. In its revised response to the complainant, DWP explained that three of the redacted paragraphs refer to a security incident and two of the paragraphs include information regarding the detection of crime. DWP explained that the requested minutes include information relating to the nature of the security incident, the potential victims and the location. It added that disclosure has the potential to impact the integrity of the PIP application process and jeopardise future investigations.
43. DWP provided further explanations to the Commissioner regarding how disclosure would be likely to prejudice its ability to prevent or detect the 'security incident' referred to in future. These submissions refer to the content of the redacted information and the Commissioner will not reproduce them in this notice as to do so would undermine the purpose of the exemption. DWP considered that disclosure would be likely to promote the misuse of public funds and make DWP more vulnerable to crime.
44. DWP explained that confirming details of how the fraud operated would assist individuals in testing the effectiveness of DWP's defences against such actions and that this information could be used alongside information already in the public domain.

The Commissioner's position

45. With regards to the first criterion, the Commissioner is satisfied that the harm envisaged relates to the interests that section 31(1)(a) seeks to protect, specifically, the prevention and detection of crime.
46. The Commissioner next considered whether the prejudice being claimed is "real, actual or of substance", not trivial, and whether there is a causal link between disclosure and the prejudice claimed. He is satisfied that the prejudice being claimed is not trivial or insignificant and he accepts that it is plausible to argue that there is a causal link between disclosure of the disputed information and the prejudice occurring. The prejudice in this case would be to DWP's ability to prevent and detect 'security incidents' of the nature that had previously occurred. The Commissioner accepts that in the circumstances of this case withholding information which details the nature of the incident, the potential victims and the location of the incident is itself an activity designed to prevent this reoccurring and prevent insight into its detection.
47. The Commissioner notes that DWP is arguing that the disclosure of the withheld information would be likely to prejudice the prevention or detection of crime. In the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* the Tribunal confirmed that, when determining whether prejudice would be likely, the test to apply is that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote. The Commissioner accepts that disclosure of the withheld information would be likely to prejudice the prevention and detection of crime.
48. The Commissioner finds that the prejudice test has been satisfied in the circumstances of this case and consequently the exemption at section 31(1)(a) is engaged.
49. Section 31 is a qualified exemption. By virtue of section 2(2)(b) of FOIA, DWP can only rely on section 31(1)(a) as a basis for withholding the information in question if the public interest in doing so outweighs the public interest in disclosure.

The balance of the public interest

50. The complainant considered that there is a public interest in disclosure of information which provides insight into any problems relating to DWP's processes and IT systems. They explained that the problems faced by disabled people when claiming Personal Independence

Payments have been regularly and widely reported, and that they believe there is a compelling public interest argument for problems with a claim process and IT systems to be disclosed.

51. DWP acknowledged that there is a legitimate public interest in ensuring that the public can have confidence that the department has controls in place to deter, detect and defend against benefit fraud. However, it considers that it is not in the public interest to provide details of such attacks, as this would enable individuals to use that information to commit fraud themselves.
52. DWP set out that there is a clear public interest in protecting society from the impact of crime and acknowledged that transparency about how it performs its functions builds public trust. DWP stated that it takes its responsibility to prevent, detect and recover benefit fraud very seriously. DWP explained that as the money paid in benefits is taxpayer's money, it considers that it is right that it ensures it is paid correctly and recovers any money that is paid incorrectly. DWP explained that in order to protect the interest of the taxpayer, it tackles benefit fraud efficiently and effectively. It is important that organisations and members of the public know that any doubt over an individual's entitlement to benefit will be robustly investigated. DWP confirmed that, for these reasons, it was satisfied that it was not in the public interest to disclose this information.
53. The Commissioner accepts that there is a public interest in the disclosure of information confirming how DWP responds to 'security incidents' such as that described and how it protects taxpayer funds by preventing criminal activity relating to benefits.
54. The Commissioner acknowledges the difficulties the complainant has when putting forward public interest arguments regarding information they have not seen. The Commissioner has reviewed the withheld information with the complainant's arguments in mind and he does not consider that disclosure would further these public interests or provide insight into difficulties faced by complainants when making claims.
55. The Commissioner is satisfied that there is a strong public interest in withholding information that would be likely to aid those seeking to defraud the benefits system and that, in the specific circumstances of this case, this outweighs the public interest in disclosure of the information.
56. The Commissioner considers that DWP is entitled to rely on section 31(1)(a) to withhold the five paragraphs named in its revised refusal notice.

57. As the Commissioner has determined that DWP is entitled to rely on section 31(1)(a), he will not go on to consider whether sections 31(1)(b) and 31(1)(g) are engaged with regards to the same information as to do so would be academic.

Section 43(2): Commercial interests

58. Section 43(2) of FOIA states:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

59. As set out above, in order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes that three criteria must be met.

DWP's submissions

60. DWP confirmed that it was relying on the lower threshold of 'would be likely to' prejudice.
61. DWP confirmed that the commercial interests of DWP, its current providers IAS and Capita, and future suppliers would be likely to be prejudiced by release of the remaining withheld information. DWP also confirmed that disclosure of a small amount of the disputed information would be likely to prejudice the commercial interests of two third party providers.
62. DWP provided evidence of IAS', Capita's and the third party providers' responses to its consultation regarding this request. The third party providers will not be named in this notice as this would negate the purpose of withholding some of the disputed information.
63. DWP explained that on 5 June 2018, the Minister of State for Disabled People, Health and Work, made a statement¹ to announce the department's intention to explore options to extend current contracts for approximately two years (to July 2021), to enable the move to an integrated service and develop a DWP owned IT system which would open up the market to more providers.

¹ <https://questions-statements.parliament.uk/written-statements/detail/2018-06-05/HCWS733>

64. DWP explained that it had extended the PIP and HDAS contracts to July 2021, so that they are aligned. It further explained that it was seeking to retender its existing PIP and HDAS contracts as a combined single health assessment contract 2021. On 9 July 2020, the Minister of State for Disabled People, Health and Work, made a statement to parliament that due to the uncertainties caused by the Covid-19 pandemic, it was not possible to launch the procurement of the new integrated health assessment contracts at the current time and a further extension to the existing contracts had been granted².
65. DWP explained that the process to “re-let” the assessment service contracts from August 2023 has commenced, which will replace the current health assessment service. DWP has recently issued a notification of its formal intent to appoint supply partners with the prerequisite expertise, resources and capacity to deliver DWP claimant Functional Assessment Services.
66. DWP explained that the current health assessment services are being re-procured with substantially the same service requirement, albeit that the new services will be provided by one supplier rather than by two suppliers in each lot. DWP explained that whilst the financial model will be different under the new contracts, the contracts will assess similar performance measures to those in the current contracts.
67. DWP explained that as there are two providers that are currently contracted to deliver PIP assessments, by the very nature that these providers supply the same service, they are also competitors in the marketplace.
68. DWP explained that the retendering is a competitive process and the providers currently involved in delivering health assessments for PIP are in direct competition. The release of any information on their current performance is valuable to their competitors as service credits will form part of the new contracts and a competitor could use this information to inform their own bid. This would be likely to prejudice the commercial interests of the current providers, and also DWP as the department may not achieve value for money if sensitive information is released prior to the re-tendering process.
69. DWP explained that the unique business innovations of each provider utilised for delivery of the current PIP contract underpins their business

² <https://questions-statements.parliament.uk/written-statements/detail/2020-07-09/HCWS353>

model and competitive advantage. The performance discussed in detail in the minutes may be part of their design for any future service they wish to be considered for. Any competitors would be able to adapt their bids at a time where a public procurement has commenced to replace the service.

70. DWP confirmed that the withheld information falls into two categories, 'service credits' and 'third party information'.
71. DWP explained that, since 1998, it has procured contracts with a number of providers to deliver the health assessment on behalf of DWP and it therefore considers that it has knowledge of provider views on both the commercial interests of providers and DWP.
72. With regards to the withheld information relating to 'service credits', DWP explained that PIP contracts are output based contracts which include a range of remedies for underperformance against a range of performance measures, including financial remedies in the form of service credits which DWP can apply as appropriate.
73. DWP confirmed that detailed financial information relating to the value of service credits is recorded in the majority of the minutes and it is this that has been redacted.
74. DWP explained that the general provisions relating to how service credits are calculated is detailed in the PIP contracts and can be accessed online:
 - Contract with Capita to deliver PIP assessments in Central England and Wales
<https://www.contractsfinder.service.gov.uk/notice/735baefc-0680-4835-aef9-b1bb39b9ba8a>
Service credit information can be found under "Final re-baselined PIP Lot 2 Call of TCs v 9 Dec 2019 Redacted" specifically appendix 4 section 5 and appendix 14.
 - Contract with IAS to deliver PIP assessments in Northern England and Scotland
<https://www.contractsfinder.service.gov.uk/notice/cbf3a4bf-b67a-403b-90bc-7345571cefb9>
Service credit information in appendix 14 of 'Lot1 Redacted Ts&Cs'
 - Contract with IAS to deliver PIP assessments in London, East of England and Southern England
<https://www.contractsfinder.service.gov.uk/notice/b39f93fc-8217-4604-9d11-6a6858612020>

Service credit information can be found in appendix 14 of 'Lot 3 Terms and conditions – Redacted'.

75. DWP explained that the release of the actual 'service credit' amounts stated in the minutes during the procurement period will allow competitors to accurately calculate the average monthly service credit for each of the service level agreements. DWP considers that the bidders could decide it would not be financially advantageous to bid for the contracts and would be likely to not bid or adjust their bid to DWP, by inflating prices to incorporate a margin in respect of potential service credit values. DWP considered that this would directly prejudice its commercial interests as it would not be achieving the best value for money.
76. DWP disputed the complainant's assertion that the withheld information is already in the public domain or could be calculated using information in the public domain.
77. DWP explained that service credit calculations are based on the provider performance but it does consider mitigation submitted by the contractors which may amend the overall service credit.
78. DWP confirmed that appendix 14 of the PIP contracts provides information relating to objectives and general provisions. However, it set out that the actual service credit cost per case, which would be required to accurately calculate the amount of service credits applied, is redacted (column D of appendix 14). DWP also considered that the actual performance per month against each service level would be required for any calculation to be made and that this information is not in the public domain.
79. DWP explained that to meet Cabinet Office transparency requirements, the 'top 3' Key Performance Indicators (KPIs) are published. DWP explained that the KPI description is the same as the service levels within appendix 14. DWP explained that the published performance figures do not give a numerical value, only a general indicator, ie good, approaching target or other. It is also only a 'top 3' and not a full list of every service level within appendix 14. The KPIs for the PIP assessment providers can be viewed via <https://www.gov.uk/government/publications/key-performance-indicators-kpis-for-governments-most-important-contracts>
80. DWP also confirmed that it publishes information at a national, regional and local authority level on PIP claims as part of its quarterly official statistics release <https://www.gov.uk/government/collections/personal-independence-payment-statistics>.

81. DWP explained that the actual financial value of service credits contained in the LPG minutes is also not in the public domain.
82. DWP considers that the information available in the public domain is insufficient to calculate the financial value of any of the service credits.
83. DWP considers that details of the actual financial value of any remedy applied under the contracts and referenced in the minutes is commercially sensitive and disclosure is likely to prejudice both DWP and the providers' commercial interests.
84. DWP explained that placing commercially sensitive financial aspects of the contracts into the public domain, including to the contractors' competitors, would be likely to disadvantage the providers' competitive position in the marketplace.
85. DWP confirmed that its contractors had objected to disclosure of the withheld information and provided statements from the contractors on this matter.
86. DWP explained that central to effective contract management and operation is the ability for the parties to converse in an open and constructive manner on the understanding that commercially sensitive discussions would remain confidential.
87. DWP considers that disclosure of the information which the department and providers consider commercially sensitive, may have commercial implications for a provider outside of their contract with the department. For example, negativity surrounding aspects of their business model which are central to their operational undertaking may unnecessarily give rise to concern by other public and private organisations of their ability to fulfil an existing contract and/or compete fairly in a future contracting exercise.
88. DWP also considers that disclosure of performance/financial information and details of the contractors' business strategy may weaken their position in future commercial undertakings. Any disclosed information which may result in a perception of underperformance when considered in isolation may not only adversely affect the company's financial standing as a publicly traded company, but may also affect their commercial abilities as it would be commercially disadvantageous to providers to highlight to their competitors the steps that they may be willing to take to address a given situation.
89. DWP explained that a small amount of the withheld information related to the performance of two third party companies who were contracted by IAS. Both companies provided their views regarding the withheld

information which related to them individually and objected to the disclosure. For obvious reasons, these companies will not be named in this decision notice.

90. DWP explained that the statements about these companies were made in meetings in which neither company was represented and there was no opportunity for rebuttal or dispute.
91. DWP considers that without this context, disclosure would be likely to have commercial implications with potential customers. DWP explained that any business looking to contract these companies may conclude that these contracts would run the risk of failure and look for alternative companies instead.

The Commissioner's position

92. The Commissioner is not satisfied that disclosure of the disputed information would be likely to prejudice DWP's commercial interests.
93. The Commissioner's guidance on section 43(2)³ states that a commercial interest "relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent".
94. The Court of Appeal in *Department for Work and Pensions v Information Commissioner and Zola* [2016] EWCA Civ 758 ('Zola') considered that whilst the meaning of 'commercial interests' is broad, there is a key distinction between 'commercial interests' and 'financial interests'.
95. The Court of Appeal set out that:

"To my mind, such additional costs incurred by the appellant [DWP] would not be commercial in nature because they are incurred in the administration of a social welfare scheme".
96. DWP has argued that disclosure would be likely to prejudice its own commercial interests regarding contracts to administer benefits assessments. The Commissioner considers that this is not a commercial activity and is clearly the administration of a social welfare scheme as

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

set out in Zola. The Commissioner therefore finds that disclosure would not be likely to prejudice DWP's commercial interests.

97. DWP also included "future suppliers" as parties whose commercial interests would be likely to be prejudiced. The Commissioner confirmed during his investigation that purely speculative arguments regarding as yet unknown parties would not be accepted as sufficient evidence to engage the exemption in this case. The Commissioner is disappointed that DWP has maintained its position that "future suppliers" would be likely to be prejudiced by disclosure.
98. The Commissioner will go on to consider whether disclosure of the withheld information would be likely to prejudice the commercial interests of the named third parties.

Service Credits

99. With regards to the first criterion of the prejudice test, the Commissioner is satisfied that the harm envisaged relates to the interest that section 43(2) seeks to protect, specifically, the commercial interests of the contractors.
100. The Commissioner next considered whether the prejudice being claimed is "real, actual or of substance", not trivial and whether there is a causal link between disclosure and the prejudice being claimed.
101. Having reviewed the withheld information, the Commissioner is not persuaded that there is a causal link between disclosure and prejudice to the contractors' commercial interests.
102. The Commissioner notes that the disclosed minutes do not redact the performance levels of either IAS or Capita. The Commissioner is not therefore persuaded that disclosure of the service credit charges would be likely to prejudice either contractor any more than the already disclosed performance information. The service credit charge amounts are based on the performance and mitigation reported in the minutes. It is not apparent how prejudice would be likely to occur by revealing the financial penalty when the missed target itself has been disclosed.
103. With regards to the ability to accurately calculate the service credit, the Commissioner attempted this and has been unable to do so in the majority of redactions. There are a small number of redactions in which it would be possible to calculate the specific service credit for that performance indicator due to the small number of cases or mitigations.
104. The Commissioner is not, however, persuaded that disclosure of the individual service credits would be likely to prejudice either contractors' commercial interests. As DWP sets out in paragraph 68 of this notice,

DWP has confirmed that the financial model will be different under the re-tendered contracts. The Commissioner also finds it unlikely that the service credit amounts would not be made available to any interested parties until after the tendering exercise has been completed.

105. The Commissioner considers that these financial deterrents will form a key part of the negotiated contract and the Commissioner is not persuaded that a contractor would enter into the expense of bidding for a contract without knowledge of any performance charges or the ability to negotiate these. The Commissioner understands that the procurement process includes the contractual obligation for the incumbent contractor to share information.

106. The Commissioner notes DWP's argument that effective contract management relies on open and candid discussions. The Commissioner understands why maintaining effective contract management is important to DWP and its contractors, however, he does not consider that this argument is relevant to section 43(2).

107. The Commissioner notes that DWP considers that disclosure could reveal the unique business innovations that the contractors have developed. DWP have not provided any further arguments regarding how this would occur and it is not apparent to the Commissioner how disclosure of the service credit amounts would reveal the contractors' unique business practices.

108. The Commissioner does not consider that section 43 is engaged in relation to the service credit redactions.

Third party contractors

109. With regard to the first criterion of the prejudice test, the Commissioner is satisfied that the harm envisaged relates to the interest that section 43(2) seeks to protect, specifically, the commercial interests of the third party contractors.

110. The Commissioner next considered whether the prejudice being claimed is "real, actual or of substance", not trivial and whether there is a causal link between disclosure and the prejudice being claimed.

111. Having viewed the withheld information, the Commissioner is satisfied that there is a causal link between disclosure and the prejudice to the third parties' commercial interests. He is also satisfied that the threshold of "would be likely to" has been reached.

112. The Commissioner cannot provide detailed insight into why the disclosure would be likely to prejudice the third parties' commercial interests as this would reveal the contents of the withheld information

and would therefore negate the purpose of the exemption. However, he notes that the two third parties are referenced briefly in negative terms in a meeting in which there was no representative of either third party or the ability to refute the references.

113. DWP has provided the Commissioner with copies of its correspondence with the third parties in which they object to disclosure. The Commissioner has considered that correspondence and is satisfied that DWP's arguments are not speculative.
114. The Commissioner is therefore satisfied that section 43(2) is engaged with regards to the small amount of information relating to the third party contractors.
115. The Commissioner will proceed to consider the balance of the public interest.

DWP's arguments

116. DWP acknowledged that disclosing this information would be likely to contribute to DWP's responsibility to provide information about how the department and its assessment providers monitor the performance of any third party providers.
117. DWP considered, however, that disclosing this information without the public having the full and proper context to explain both statements would be prejudicial to the companies' commercial interests as it will give a negative impression of their ability to effectively provide their specific services. DWP explained that these companies operate in a competitive environment and would be likely to suffer reputational and commercial damage, as any company considering contracting their services is likely to consider one of their competitors if they decide that the named companies would fail to fulfil their contractual obligations.
118. DWP acknowledged that there is a public interest in ensuring that the department is transparent in its dealing with third party providers and holds ineffective providers to account. DWP considers that it is critical when being transparent with the public that it give the full facts so they can have an informed opinion.
119. DWP explained that the statements about the two companies, taken in isolation, do not present the full facts, and as the companies were not attendees of the meetings, they did not have the opportunity to provide an explanation or any mitigation factors that would have been included in the meeting minutes.
120. DWP considers that the statement without mitigation can be taken out of context and would be likely to give the public an unjustly negative

view of the companies' ability to fulfil their contractual obligations. DWP considers that such a negative view would be likely to prejudice the companies' commercial interests as they could lose out on contracts from other prospective clients.

121. DWP considers that, in light of the above, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The balance of the public interest

122. A public authority is still obliged to disclose commercially sensitive information unless it can demonstrate that the balance of the public interest favours preventing the likely commercial detriment from occurring.
123. Because the Commissioner has accepted that some degree of prejudice is likely to result from disclosure, there will always be some inherent public interest in preventing this from happening. How strong that interest is will depend on the likelihood and severity of the envisaged prejudice.
124. The Commissioner acknowledges the public interest in transparency in how public authorities spend taxpayer funds and how organisations contracted by the public authorities are held accountable for their performance.
125. Having reviewed the information, the Commissioner is not persuaded that disclosure of this information would add greatly to this understanding. The amount of information comprises only a few sentences in two meetings out of 38 falling within the scope of the request. The Commissioner considers that the contents of the information do not reveal a strong public interest in disclosure.
126. The Commissioner is, however, persuaded that disclosure would be likely to have a real and tangible impact on the commercial interests of the third parties.
127. The Commissioner notes DWP's argument that the statements could be taken out of context and prejudice the commercial interests based on a false perception. The Commissioner has issued guidance regarding information that is inaccurate or could be misleading⁴ which sets out

⁴ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/#12>

that public authorities would have the opportunity to provide explanations for potentially misleading information. However, in the specific circumstances of this case, the Commissioner accepts that this argument carries weight in support of maintaining the exemption.

128. The Commissioner considers that the public interest favours maintaining the exemption and protecting the commercial interests of the third parties.

Other matters

129. The Commissioner notes that in DWP's refusal notice, it sets out that disclosure "would or would be likely to" prejudice the interests associated with the relevant exemptions. The Commissioner considers that DWP should specify which of the two threshold levels it is relying on when citing the exemption it believes is engaged as a matter of good practice.

130. DWP should also ensure that it cites the specific exemption subsections that it is relying on.

131. The Commissioner is disappointed that DWP is maintaining its position that its commercial interests would be prejudiced in relation to outsourced tasks. As a party to the Court of Appeal 'Zola' decision cited in paragraph 96, and in light of several decision notices since the Court of Appeal's findings, DWP is fully aware that its activities related to the administration of a social welfare system is not a DWP commercial endeavour. Whilst this will involve commercial activities, DWP's interests that may be prejudiced by disclosure are financial not commercial.

Right of appeal

132. 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

133. 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.

134. 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
Wilmslow
Cheshire
SK9 5AF