

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 19 April 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 legal advice obtained by the Department for Work and Pensions (DWP) regarding whether applying an increase to Universal Credit benefit payments but not other benefits was discriminatory.
2. The Commissioner's decision is that section 42(1) of the Act is engaged with respect to the information falling within the scope of the request and the public interest favours maintaining the exemption.
3. The Commissioner does however find that DWP breached section 17(1) by providing its refusal notice outside of the statutory timeframe.
4. The Commissioner does not require DWP to take any steps.

Background

5. In March 2020, the Government introduced a package of temporary welfare measures to help with the financial consequences of the COVID-19 pandemic. It included a £20 weekly increase to the Universal Credit standard allowance rates for the 2020/2021 tax year. This was followed by a Government announcement at the Spring budget 2021 that the £20 weekly increase in Universal Credit would be extended for a further six months with eligible Working Tax Credit claimants receiving a one-off payment of £500.
6. In 2021, the High Court gave two disabled campaigners permission to challenge DWP's decision to exclude legacy benefits from the £20 a week increase given to those on Universal Credit. The case was heard in November 2021 and in February 2022, Mr Justice Swift issued his decision that DWP's decision was not unlawful¹.
7. The House of Commons issued a briefing paper on 28 May 2021 called "Coronavirus: Legacy Benefits and the Universal Credit 'uplift'"². This provides detailed information on the uplift including, at section four, information on the calls to extend the uplift to legacy benefits. Section four explains that there has been:

"a concerted effort by welfare rights groups and other organisations to persuade the Government to extend the uplift to means-tested legacy benefits".
8. The Commissioner notes that some of the statements and reports cited in this notice occur after the date of the internal review. The Commissioner considers that they are nevertheless relevant to his considerations as they relate to the focus of the request, namely the absence of an uplift in legacy benefits, and the consequences of this decision.
9. The Disability Benefits Consortium³, a network of over 100 organisations with an interest in disability and social security, issued its report "It

¹ <https://www.bailii.org/ew/cases/EWHC/Admin/2022/351.html>

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

³ <https://disabilitybenefitsconsortium.com/>

would mean not having to skip meals – the emergency need to #IncreaseDisabilityBenefits” on 27 April 2020⁴ and stated:

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

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

Request and response

11. On 9 June 2020, the complainant wrote to DWP and requested information in the following terms:

“Please kindly provide a copy of the legal advice the department sought to check it was ok to increase Universal Credit payments during the

⁴ <https://disabilitybenefitsconsortium.com/dbc-reports/>

lockdown period but leave those on Personal Independence Payment (PIP) and Employment & Support Allowance (ESA) with no extra financial support during the very same period.

The documents, if they exist, may for instance warn of potential discrimination claims against the department for helping one group of claimants but not the other groups who would be equally entitled to the same difference in payment”

12. On 3 August 2020, the complainant chased a response and requested an internal review of the delayed handling of the request.
13. On 5 August 2020, DWP provided its response to the request and the outcome of its internal review. DWP apologised for the delay in providing its response and explained that this was due to it focussing its resources on “frontline high-priority areas”. DWP acknowledged that it had breached section 10(1) of the Act as it had not provided its response within 20 working days.
14. DWP confirmed that it held information falling within the scope of the request. DWP confirmed that it was withholding the information under section 42(1) as it was subject to legal professional privilege. DWP explained that this exemption protects confidential communications between lawyers and clients.
15. DWP confirmed that the exemption is subject to the public interest test and that it had assessed the public interest in disclosure and maintaining the exemption.
16. DWP acknowledged the public interest in greater transparency which makes government more accountable to the electorate and increases trust. DWP also acknowledged that there is a public interest in being able to assess the quality of the advice being given to ministers and subsequent decision making. DWP explained, however, that good government depends on good decision making and this needs to be based on the best advice available, including legal advice, and a full consideration of all of the options without fear of premature disclosure.
17. DWP considered that there is a public interest in safeguarding candidness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. DWP explained that disclosure of legal advice has a significant potential to prejudice the Government’s ability to defend its legal interests – both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour.

18. DWP explained that its legal colleagues must be able to provide full and frank advice without the fear that this information could be provided externally, potentially without the proper context. DWP considered that if such information was taken out of context, then the reputational damage would be such that future legal advice could be affected.
19. DWP confirmed that, on balance, it was satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.
20. On 5 August 2020, the complainant requested an internal review of DWP's substantive response. They disputed that DWP could not provide a redacted version of the legal advice which withheld the areas of concern. They confirmed that they were seeking any legal advice which warns of the potential discrimination of increasing Universal Credit but leaving those on ESA and PIP with no extra financial support during the same period of lockdown.
21. DWP provided the outcome of its internal review on 30 September 2020 and upheld its original response. DWP explained that the request relates to the legal advice given in the context of DWP's response to the ongoing Covid-19 pandemic. DWP considered that as this was a live issue, it was very important that the process whereby legal advice is sought and given is protected. DWP explained that if confidence could not be maintained over privileged legal advice, this may potentially undermine its ability to make fully informed and robust legal decisions.
22. DWP explained that it could not disclose a redacted version of the legal advice as the entirety of the requested information is subject to legal professional privilege and it would not be possible to apply redactions in any meaningful way.

Scope of the case

23. The complainant contacted the Commissioner on 20 September 2020 to complain about the handling of their request for information. Specifically, they disputed that DWP is entitled to rely on section 42(1) to withhold the requested information.
24. DWP confirmed to the Commissioner that if he were to determine that section 42(1) is not engaged, it would amend its position to state that no information is held. This is because the request specifically requests "legal advice".
25. Having reviewed the information initially identified by DWP as falling within the scope of the request, the Commissioner determined that

section 42(1) was not engaged as the information was not identifiable as legal advice.

26. The Commissioner confirmed DWP's amended position to the complainant. The Commissioner directed the complainant to a decision notice⁵ regarding a similar request which set out his position regarding whether the information identified by DWP was recognisable as "legal advice".
27. The complainant set out that if DWP had not obtained legal advice regarding its policy decision, they would accept the position that no information was held. The Commissioner confirmed that DWP's position was that it had obtained legal advice and this was in the form of legal advisers drafting and reviewing the documents set out in the decision notice provided to the complainant.
28. The complainant confirmed that in light of DWP's position that it had obtained legal advice, they wished to proceed to investigation of whether DWP holds information that would be identified as legal advice.
29. The Commissioner requested detailed submissions from DWP regarding how it had obtained and recorded any legal advice received relating to legacy benefits and what searches had been made.
30. During the course of the investigation, DWP provided the Commissioner with an email chain relating to legacy benefits from a DWP legal adviser. DWP explained that it had not previously provided this as it considered that the originally identified documents contained the information held within this email chain. It also confirmed that it still considers that the previously identified documents comprise legal advice.
31. The Commissioner therefore considers that the scope of this case is to firstly determine what information is held by DWP that falls within the scope of the request and secondly whether DWP is entitled to rely on section 42(1) to withhold that information.

Reasons for decision

Section 1(1): General right of access to information

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019051/ic-47958-r8l1.pdf>

32. Section 1(1) of the Act states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request and, if so, to have that information communicated to them. This is subject to any procedural sections or exemptions that apply. A public authority is not obliged to create new information in order to answer a request.
33. Where there is a dispute between the information located by a public authority and the information the complainant believes should be held, the Commissioner follows the lead of a number of First-Tier Tribunal decisions in applying the civil standard of the balance of probabilities.
34. In the circumstances of this case, the Commissioner will determine whether, and to what extent, DWP holds recorded information that falls within the scope of the request, namely legal advice relating to the decision not to extend the £20 uplift to legacy benefits.
35. DWP confirmed that the request specifically requests "the legal advice the department sought to check it was ok to increase Universal Credit payments during the lockdown period but leave those on Personal Independence Payment (PIP) and Employment & Support Allowance (ESA) with no extra financial support during the very same period". DWP explained that it had therefore interpreted this as requesting DWP to disclose the legal advice provided to the Department in advance of introducing the temporary Universal Credit uplift in March 2020.
36. DWP explained that Universal Credit, PIP and ESA fall under the responsibility of DWP and therefore DWP's legal advisers did provide advice on this matter to DWP Ministers.
37. DWP confirmed that the information originally located comprises extracts from two internal documents created for the Secretary of State prior to the Secretary of State's approval for the Social Security (Coronavirus)(Further Measures) Regulations 2020 to be laid before Parliament.
38. DWP explained that whilst the documents are not expressly correspondence between a professional legal adviser and client, it considers that the specified extracts from the documents comprise legal advice for the following reasons:
 - The recipient of both documents (the Secretary of State and her policy officials) is clearly a client of DWP legal advisers
 - One of the documents was drafted and cleared by DWP legal advisers in their capacity as professional legal advisers prior to its submission to the Secretary of State.

- DWP policy officials asked DWP legal advisers to consider the documents in their capacity as professional legal advisers and they did so for the dominant purpose of obtaining legal advice. DWP confirmed that its legal advisers considered the documents for the dominant purpose of giving that advice.
39. DWP provided arguments regarding why the specified extracts constituted legal advice. The Commissioner will not repeat these arguments as to do so would reveal the contents of the disputed information.
 40. Having considered the content of the identified paragraphs, it is not clear to the Commissioner how any of the paragraphs, bar one⁶, comprises legal advice. The Commissioner's reading of the information is that the majority of the paragraphs comprise descriptions and circumstances of proposed actions; he is unable to identify specific legal advice contained therein.
 41. In only one paragraph does the Commissioner accept that the content could be identified as comprising legal advice. However, this paragraph does not relate in any way to the decision not to extend the uplift to legacy benefits.
 42. The Commissioner therefore considers that none of the information contained within the two documents falls within the scope of the request.
 43. In order to determine whether, on the balance of probabilities, DWP holds further information which could be considered legal advice, DWP was asked to provide submissions regarding its searches and how it had recorded the legal advisers input.
 44. DWP explained that upon receipt of the request, it contacted the Freedom of Information lead lawyer within DWP's Legal Advisers and asked them to conduct a search in tandem with policy officials. DWP confirmed that the lead lawyer in turn contacted all of the lawyers who had been advising on the uplift and asked them to search for any and all legal advice they had provided in relation to this issue. DWP confirmed that policy officials who had been involved in the policy consideration also carried out a similar search.

⁶ Paragraph 20 of document (a)

45. DWP explained that having reviewed the collated material, both policy officials and lawyers agreed that the official documentation sent to Ministers⁷ contained all of the information and advice that had been set out in email correspondence and earlier drafts of the documents.
46. DWP explained that in accordance with its information management policy, data and records must be retained only for as long as there is a business need. DWP confirmed that it believed that the final documents contained the information that needed to be retained.
47. DWP confirmed to the Commissioner that in addition to the formal documents, it had located two email chains containing legal advice and provided the Commissioner with a copy. Only one of these emails relates to legacy benefits and the specific issue to which the request relates.
48. Having reviewed the email, the Commissioner is satisfied that this can be identified as legal advice.
49. The Commissioner disagrees with DWP that this information is replicated in the final documents. Whilst the final documents may align with the advice provided in this email, the specific information held within this email is not contained within the final policy documents which were provided to ministers.
50. The Commissioner therefore considers that DWP does hold information falling within the scope of the request.
51. The Commissioner is satisfied that, on the balance of probabilities, this information is all that falls within the scope of the request. The Commissioner considers that as the request is very specific, DWP's searches by its legal advisers and policy officials would be most likely to locate any information falling within its scope.
52. The Commissioner will therefore go on to consider whether DWP is entitled to rely on section 42(1) to withhold this information.

Section 42(1): 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".

⁷ The information identified in decision notice IC-47958-R8L1

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 for it to be exempt. There is no need to consider the harm that would arise by disclosing this 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 or 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 confirmed that it considers the withheld information is subject to legal advice privilege.
57. The Commissioner has reviewed the information falling within the scope of the request and is satisfied that it comprises a communication between legal adviser and client for the dominant purpose of obtaining legal advice.
58. DWP confirmed that the privilege attached to the withheld information has not been lost as it has not been made available to the public or to a third party without restriction.
59. The Commissioner is satisfied that the withheld information is subject to legal professional privilege and that section 42(1) is engaged.

The public interest

60. The complainant considers that the public interest lies firmly in disclosure. They stated that they wish to access material which shows that the government was warned that there could be legal consequences from increasing Universal Credit payments during lockdown but not legacy benefits.
61. The complainant stated:

"The public interest in this matter is huge because we believe voters armed with this information will make different choices at election time so that disabled people in the legacy benefit groups will no longer be discriminated against"

62. DWP acknowledged the arguments in favour of disclosure and that the public can be rightly interested in understanding the advice that lawyers provide to ministers and officials, especially around helping to develop and shape policy.
63. DWP recognised that there is an inherent public interest in transparency and accountability of public authorities. It acknowledged the clear public interest in the work of government departments being transparent and open to scrutiny to increase understanding of the issues it deals with in implementing welfare reform in the UK.
64. DWP acknowledged that claimants in receipt of legacy benefits may want to understand the discussions and reasons why they did not benefit from the uplift, but those on Universal Credit and Working Tax Credit did benefit.
65. DWP stated that to demonstrate this understanding, it has not been reluctant to publicly talk about this issue. DWP considers that it has, on many occasions, publicly stated its justifications for not extending a temporary uplift to legacy benefits. DWP stated that the complainant is able to access all of these statements, which are already in the public sphere. DWP provided two examples where Ministers have discussed the uplift and legacy benefits in Parliament:
 - https://hansard.parliament.uk/Commons/2021-01-18/debates/5D4FD221-2AEE-43AE-874C-7509E7AEF8D1/UniversalCreditAndWorkingTaxCredit?highlight=uplift&sm_au=iVVnv5p7J5MLSr1FW2MN0K7K1WVjq#contribution-30FFEB0F-24B6-4FA9-A6A0-DF5E5736E6EF
 - https://hansard.parliament.uk/Commons/2021-01-25/debates/1B5D2BB1-C1F9-4A3B-AD91-BFA6B1E6C12D/TopicalQuestions?highlight=uplift&sm_au=iVVnv5p7J5MLSr1FW2MN0K7K1WVjq#contribution-A7530E3C-73F0-47A7-B547-4E0B1632658B
66. DWP considers that it is clearly in the public interest for ministers, their policy officials and lawyers to be able to engage in candid communications to ensure that policy decisions are made in full appreciation of all options and legal implications. The disclosure of 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 future. This would be damaging to policy making generally and not in the public interest.
67. DWP explained that with the effects of the pandemic still ongoing, ministers and officials still need to develop policy to continue supporting

individuals, including how to support those on Universal Credit and legacy benefits. The withheld information relates to policies that affect many millions of people and the economic impacts of changes in benefit rates are substantial. Ministers and officials therefore need a safe space for discussion and decision making in full appreciation of all options and legal implications, particularly in handling complicated and fast moving situations such as those which result from the impact of the COVID-19 pandemic, or future emergencies.

68. DWP considers that if lawyers could not be sure that their advice is protected from disclosure, there would be a strong incentive to omit advice setting out the potential legal risks of any given policy option. DWP considers that if this were to occur, lawyers would unwittingly invite litigation on the very grounds hypothesised as part of their legal risk assessment. DWP considers that if lawyers were unable to hypothesise in this manner, ministers would not have full appreciation of the legal risks associated with making different policy choices, for example, arguable potential unfairness within a given policy that they had not thought of. DWP considers that this would clearly not be in the public interest as it would weaken the quality of the advice being provided to ministers which in turn would damage their ability to make effective and well-informed decisions.
69. The Commissioner accepts that it 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 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 & 30⁸ make clear that the public interest arguments in favour in 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 acknowledges that there are strong arguments in favour of disclosure. The temporary uplift to Universal Credit has been controversial and resulted in widespread calls for the extension of the uplift to legacy benefits by welfare rights groups, parliamentary committees, backbench MPs⁹ and others, with significant coverage in the media.
74. The Commissioner notes the links provided by DWP to demonstrate the information available to the complainant and the public regarding the decision. He also notes that both parliamentary debates occurred after DWP had issued its internal review and therefore were not available to the complainant at the time of the request.
75. The Commissioner accepts that there is a strong public interest in understanding what advice was provided to DWP prior to its decision to apply the uplift only to those on Universal Credit and Working Tax Credits. This strong public interest has resulted in the Commissioner ordering disclosure¹⁰ of the formal documents presented to the

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

⁹ <https://news.sky.com/story/chancellor-rishi-sunak-under-pressure-to-increase-legacy-benefits-for-two-million-people-12206986>

¹⁰ IC-82880-S7K3: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020053/ic-82880-s7k3.pdf>

Secretary of State prior to the relevant regulations being laid before Parliament.

76. However, the Commissioner notes that the principle of legal professional privilege is a long-standing, fundamental principle of English law. The principle exists to ensure that a legal person, including a government department, may obtain legal advice in confidence.
77. There is, therefore, a strong inherent 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.
78. The Commissioner notes the complainant's belief that DWP received advice that its actions were discriminatory. However, he also notes the High Court's decision of 18 February 2022 which found that DWP's decision to limit the uplift to specific benefits was not unlawful discrimination on the grounds that the intention of the uplift was to aid new claimants who required Universal Credit due to the pandemic.
79. In the specific circumstances of this case, the Commissioner considers that the balance of the public interest lies in withholding the information and protecting the confidentiality between client and lawyer. The Commissioner acknowledges that there is a public interest in understanding the reasoning behind DWP's decision. However, he considers that this is best served by disclosure of the formal documents identified in IC-82880-S7K3 rather than the specific, confidential legal advice obtained during the decision making process.
80. The Commissioner therefore considers that DWP is entitled to rely on section 42(1) to withhold the information falling within the scope of the request.

Section 17: Refusal Notice

81. Section 17(1) of the Act requires a public authority wishing to rely on an exemption to withhold information to issue a refusal notice, citing that exemption, within 20 working days of the date the request was received.

82. The request was made on 9 June 2020 and DWP provided its refusal notice on 5 August 2020.
83. DWP therefore breached section 17(1) by failing to provide its refusal notice within the statutory timeframe of 20 working days.

Other matters

84. The Commissioner is disappointed in DWP's failure to accurately determine what information falls within the scope of the request.
85. As set out above, DWP considered that the information falling within the email from its legal adviser was contained within the final documents provided to the Secretary of State. The Commissioner considers that it is clear that this information was not replicated within the final documents and it is not apparent why DWP failed to consider the specific information rather than whether the final documents aligned with the legal advice.
86. The Commissioner is concerned at DWP's shortfalls in its handling of this request, and similar related requests, and has previously raised concerns about DWP's inadequate request handling in several areas.
87. The Commissioner has raised these concerns separately with DWP and he expects to see an improvement in DWP's handling of requests, in particular, how it determines the scope of the request.

Right of appeal

88. 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

89. 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.
90. 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
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