

## **Freedom of Information Act 2000 (The Act)**

### **Decision notice**

**Date:** 29 March 2022

**Public Authority:** Department for Work and Pensions

**Address:** Caxton House  
Tothill Street  
London  
SW1H 9NA

#### **Decision (including any steps ordered)**

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1. The complainant has requested information on the increase in the base rate for Universal Credit and the decision not to raise legacy benefits in line with this increase.
2. The Commissioner's decision is that although the exemption at section 35(1)(a) is engaged, the public interest favours disclosure of the majority of the information. The Commissioner has also determined that where the information engages section 42(1), the public interest favours maintaining the exemption.
3. The Commissioner requires the Department for Work and Pensions (DWP) to take the following steps to ensure compliance with the legislation:
  - Disclose the submissions to the Secretary of State with the exception of paragraph 20 of document (a).
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 the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 22 November 2020, the complainant wrote to DWP and requested information in the following terms:

“I wish to request all information held on the decision-making process regarding the £20 Universal Credit increase instituted due to the Covid-19 pandemic. I would especially like to request information held regarding any decisions and reasonings given not to apply a similar temporary increase to legacy benefits including Carer’s Allowance and Income Support during the pandemic”.
6. On 21 December 2020, DWP provided its response. DWP confirmed that it held information falling within the scope of the request and this information was exempt under section 35(1)(a) - formulation or development of government policy. DWP did not explain why the exemption was engaged other to explain that “[t]his exemption protects the private space within which Ministers and their policy advisers can develop policies without the risk of premature disclosure”.
7. DWP provided generic public interest considerations which did not refer to the specific information requested or the circumstances of the request.
8. In favour of disclosure, DWP acknowledged the public interest in greater transparency which makes government more accountable to the electorate and increases trust. DWP also acknowledged the public interest in being able to assess the quality of advice being given to ministers and subsequent decision making.
9. DWP explained that, in favour of maintaining the exemption, good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. DWP considered that if this public interest cannot be protected there is a risk that decision-making will become poorer and will be recorded inadequately.
10. DWP confirmed that it considered the balance of the public interest lay in maintaining the exemption.
11. The complainant requested an internal review of the handling of their request on 21 December 2020. They disputed that the public interest lay in maintaining the exemption, arguing that there is an inherent public interest in understanding why the decision was taken not to apply the same temporary increase to legacy benefits including Carer’s Allowance and Income Support. The complainant explained that the consequences

of the decision have meant that people with the same qualification for benefits have been denied the same level of support as those on Universal Credit. The complainant considered that this is a form of discrimination against those who had not yet been migrated to Universal Credit, in particular, those who are carers. They stated that they believed that it is clearly in the public interest for that group to understand why they have been discriminated against in this instance.

12. The complainant quoted the Chancellor of the Exchequer, the Rt Hon Rishi Sunak as saying<sup>1</sup>:

"I cannot promise you that no one will face hardship in the weeks ahead. So we will also act to protect you if the worst happens.

To strengthen the safety net, I'm increasing today the Universal Credit standard allowance, for the next 12 months, by £1,000 a year".

13. The complainant considered that it is clearly in the public interest to understand why that "safety net" did not apply to those on legacy benefits.

14. The complainant quoted DWP as stating that one of its responsibilities is "understanding and dealing with the causes of poverty rather than its symptoms" and one of its priorities is to "create a fair and affordable welfare system which improves the life chances of children"<sup>2</sup>. The complainant considered that the decision to exclude legacy benefits from the increase ran contrary to DWP's stated aims.

15. The complainant also quoted DWP's equality objectives set out in its departmental plan<sup>3</sup>:

"The Department for Work and Pensions is committed to providing services which embrace diversity and promote equality of opportunity" which includes "ensuring our customers have access to reasonable adjustments or additional support to enable them to access benefits, use our services and meet their individual responsibilities".

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<sup>1</sup> <https://www.gov.uk/government/speeches/the-chancellor-rishi-sunak-provides-an-updated-statement-on-coronavirus>

<sup>2</sup> <https://www.gov.uk/government/organisations/department-for-work-pensions/about>

<sup>3</sup> <https://www.gov.uk/government/publications/department-for-work-and-pensions-single-departmental-plan/department-for-work-and-pensions-single-departmental-plan--2>

16. The complainant also stated that it is in the public interest to understand why this equality objective was disregarded in relation to legacy benefits.
17. DWP provided the outcome of its internal review on 15 January 2021 and upheld its original response.
18. DWP stated that it is not disputed that there is a public interest in understanding how decisions around rates of benefits are arrived at or that reasonable transparency is in the public interest. DWP then stated:  
  
"However, the requested information does relate to the formulation or development of government policy – section 35(1)(a) of the Freedom of Information Act. As previously stated, this exemption protects the private space within which Ministers and their policy advisers can develop policies without the risk of premature disclosure".
19. DWP also repeated its argument that good decision-making is based on the best advice available and a full consideration of all the options without fear of disclosure. DWP added that premature disclosure may lead to a reluctance to do this which risks making decision-making poorer in the future.

## **Background**

20. In March 2020, the Government introduced a package of temporary welfare measures to help with the financial consequences of the Covid-19 pandemic which included a £20 weekly increase to the Universal Credit standard allowance rates as a temporary measure for the 2020/2021 tax year. This was followed by a Government announcement at the Spring budget 2021 that the £20 weekly increase in Universal Credit ('UC') would be extended for a further six months with eligible Working Tax Credit claimants receiving a one-off payment of £500.
21. 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 unlawful<sup>4</sup>.

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<sup>4</sup> <https://www.bailii.org/ew/cases/EWHC/Admin/2022/351.html>

22. The House of Commons issued a briefing paper on 28 May 2021 called "Coronavirus: Legacy Benefits and the Universal Credit 'uplift'"<sup>5</sup>. 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".

23. 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.

24. The Disability Benefits Consortium<sup>6</sup>, a network of over 100 organisations with an interest in disability and social security, issued its report "It would mean not having to skip meals – the emergency need to #IncreaseDisabilityBenefits" on 27 April 2020<sup>7</sup> and stated:

"This emergency increase must be extended immediately to Employment and Support Allowance [ESA], 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".

25. 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.

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<sup>5</sup> <https://researchbriefings.files.parliament.uk/documents/CBP-9246/CBP-9246.pdf>

<sup>6</sup> <https://disabilitybenefitsconsortium.com/>

<sup>7</sup> <https://disabilitybenefitsconsortium.com/dbc-reports/>

- c. 28% confirmed that had encountered additional costs associated with their utilities. These included increased power and heating as shielding required people to stay at home, and increased water usage to maintain hygiene precautions against the virus.
- d. 28% confirmed that they had encountered additional costs associated with managing their health. These included buying personal protective equipment, medical equipment and over the counter medication to compensate for cancelled appointments.
- e. 10% confirmed that they had encountered increased costs due to travel and transport. These included having to take taxis to get shopping or attend essential appointments to avoid public transport.

### Scope of the case

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- 26. The complainant contacted the Commissioner on 17 January 2021 to complain about the handling of their request for information.
- 27. They explained to the Commissioner that they consider there is an inherent public interest in understanding why the decision was taken not to apply the same temporary increase to legacy benefits including Carer's Allowance and Income Support during the pandemic that was applied to Universal Credit. They explained that the consequences of the decision have meant that people with the exact same qualification for entitlements have been denied the same level of support. They consider that this is a form of discrimination against those who have not been migrated from legacy benefits to Universal Credit and it is in the public interest for this group, which includes some of the most vulnerable in society, to understand why they have been discriminated against.
- 28. During the course of the Commissioner's investigation, DWP introduced section 42(1) in relation to some of the withheld information on the basis that it reveals information which is subject to legal professional privilege.
- 29. DWP originally located only two documents falling within the scope of the request. These documents have been the subject of a previous decision notice by the Commissioner, IC-47958-R8L1<sup>8</sup>.

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<sup>8</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019051/ic-47958-r8l1.pdf>

30. At a late stage of the investigation, and only following the Commissioner's specific questioning, DWP located further information which comprises two email chains which DWP stated "included contributions and reviews of the withheld information during the drafting process by lawyers involved at the time. As set out in our letter dated 17 January 2022, we maintain that the final drafts of the withheld information contain all of the information and advice set out in this email correspondence".
31. Having reviewed the additional information located, the Commissioner does not agree that the information contained within the email chains is included in the two previously considered documents. Whilst the information in the two documents may align with the discussions held in the email chain, they clearly contain different information.
32. The Commissioner therefore considers that the scope of this investigation is to determine whether DWP is entitled to withhold the information identified above on the basis of sections 35(1)(a) and 42(1).

## **Reasons for decision**

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### **Section 35: Formulation or development of government policy**

33. Section 35 states:

"(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

(a) the formulation or development of government policy"

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

safe space to consider policy options in private. His guidance<sup>9</sup> advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

36. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.

### **DWP's position**

37. The Commissioner has included the arguments provided in case IC-47958-R8L1 in addition to the further submissions provided in this investigation in his determination.
38. DWP confirmed that the government policy to which the requested information relates is the Government's decision in March 2020 to temporarily increase Universal Credit by £20 per week for one year and to not introduce an equivalent increase in legacy benefits. This decision was officially announced on 20 March 2020 by the Chancellor of Exchequer.
39. DWP explained that at the time of the request, the temporary increase to Universal Credit had been implemented, but it remained an ongoing, active policy development area, for which the withheld documents contained information required to inform further policy decisions. DWP explained that the policy area remained active throughout the duration of the uplift provision (the 2020/2021 tax year) as the Government was waiting for more clarity on the status of the pandemic, and the national economic and social picture, before making any decisions on the future of the uplift for future tax years.
40. DWP set out that at the Spring Budget 2021, after the request and internal review, the Government announced that it would be extending the temporary £20 a week increase in Universal Credit for a further six months, with eligible Working Tax Credit claimants receiving a one-off payment of £500. DWP explained that throughout this time, the policy surrounding the lift was demonstrably subject to active and ongoing consideration by policy officials, Ministers and their legal advisers. DWP further explained that whilst the uplift has ended, for as long as the

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<sup>9</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>



Covid-19 pandemic continues to affect the country, government support measures remain an active policy area.

41. IC-47958-R8L1, DWP explained:

"If the Department were to disclose copies of internal documents relating to decisions regarding uplifting legacy benefits, this could adversely affect future policy and decision making as it could make the provision of full and frank advice difficult, as well as undermining the process of collective agreement. With the effects of the pandemic still ongoing, ministers and officials still need to develop policy to continue supporting individuals, including how to support those on Universal Credit and legacy benefits, in a safe space. This remains an active policy debate in government with the uplift continuing to be in place".

42. The Commissioner has reviewed the withheld information and he is satisfied that it comprises information relating to the formulation and development of government policy, specifically the decision to increase specific benefits by £20 per week. He notes that the policy regarding the uplift was already implemented at the time of the request with the extension to the uplift announced after the request at the Spring Budget 2021. However, the exemption is still engaged as the information clearly relates to the formulation and development of the policy surrounding the uplift.
43. Having accepted that the exemption is engaged, the Commissioner has gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest arguments**

44. The complainant has made their views clear. They consider that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The complainant considers that DWP's decision to not include legacy benefits in the £20 uplift is discriminatory and it is in the public interest to know why this decision was taken.
45. DWP recognised that there is an inherent public interest in the transparency and accountability of public authorities. It also recognised the broad public interest in furthering public understanding of the issues which public authorities deal with such as policy considerations in implementing welfare reform in the UK. DWP acknowledged that there is a clear public interest in the work of government departments being transparent and open to scrutiny to increase understanding of the issues it deals with. DWP also understands 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 Credits did.

46. DWP explained that due to this, it has not been reluctant to publicly talk about this issue. DWP explained that, on many occasions, it has publicly stated its justifications for not extending a temporary uplift to legacy benefits and that the complainant is able to access all of these statements as they are 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%20au%3D%3DiVVnv5p7J5MLSr1FW2MN0K7K1WVjq#contribution-30FFEB0F-24B6-4FA9-A6A0-DF5E5736E6EF>
  - <https://hansard.parliament.uk/Commons/2021-01-25/debates/1B5D2BB1-C1F9-4A3B-AD91-BFA6B1E6C12D/TopicalQuestions?highlight=uplift&sm%20au%3D%3DiVVnv5p7J5MLSr1FW2MN0K7K1WVjq#contribution-A7530E3C-73F0-47A7-B547-4E0B1632658B>
47. DWP explained that balanced against the arguments in favour of disclosure, there are the public interest arguments in favour of protecting the Government's ability to discuss and develop policies and to reach well-informed conclusions. DWP considers that a safe space is needed to freely develop and test policy and it considers that there is a strong public interest in protecting information where release would be likely to have a detrimental impact on the ongoing development of the processes and continuing to support those on low incomes.
48. DWP argued that with the effects of the pandemic still ongoing, Ministers and officials need to develop policy to continue supporting individuals, including how to support those on Universal Credit and legacy benefits. DWP explained that 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, particularly in handling complicated and fast-moving situations such as those which resulted from the impact of the Covid-19 pandemic.
49. DWP explained that if officials could not be sure that their input into the policy formulation process is protected from disclosure, there would be a strong incentive to omit, or to diminish the significance of negative information provided, to minimise the prejudice likely to be caused by disclosure. DWP considers that this would weaken the quality of the

information being provided to ministers which in turn would damage their ability to make effective and well-informed decisions.

50. DWP expressed concern that disclosure of the requested information could result in further disclosures of the frank conversations between ministers and officials regarding the uplift in Universal Credit. DWP considers that this could attract further criticism of the individuals concerned, resulting in their reluctance to exchange ideas or suggestions in the future which would not be in the public interest.
51. DWP provided further arguments in favour of maintaining the exemption which reveal the contents of the withheld information. As reproducing these arguments in this decision notice would negate the purpose of withholding the information, the Commissioner has not included these arguments in this notice but has included them in his considerations.

### **The balance of the public interest**

52. The Commissioner agrees with DWP that the large numbers of people in receipt of legacy benefits would like to understand why these benefits were not treated the same as Universal Credit. However, he considers that DWP has failed to appropriately consider the strength of the public interest in disclosure of information which would aid the general public in understanding the position taken by the Government in response to the pandemic in regard to treating individuals equally in this context.
53. 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.
54. The Commissioner accepts that a safe space is needed for discussion and decision making by officials and Ministers, particularly in handling complicated and fast moving situations such as those resulting from the impact of the Covid-19 pandemic. He considers that the need for a safe space will be strongest when the issue is still live. He notes that the policy in this case was announced on 20 March 2020, nine months prior to this request for information. His guidance explains that policy can be seen as a framework of 'rules' put in place to achieve a particular objective. The framework will allow for flexibility in implementation. Not every decision or alteration made after a policy is settled will amount to development of that policy. Any adjustment or decision made to better achieve the original goals of the policy might be more accurately seen as decisions on implementation. As such the amendment made to the length of time the uplift would be paid could be considered to be an

adjustment rather than a development of the original goals of the policy to help mitigate the impact of the pandemic.

55. The Commissioner does not agree with DWP's view that disclosure of the requested information in this case necessarily leads to further releases of, as yet unrequested, information. Each request must be considered separately on a case-by-case basis with one disclosure not setting a precedent for another.
56. The Commissioner considers that the arguments advanced by DWP in paragraph 49 above comprise "chilling effect" arguments. DWP argues in general terms that there would be a loss of frankness and candour which would damage the quality of advice and lead to poorer decision making. However, the Commissioner must focus on the information itself and its context on a case-by-case basis. Furthermore, the Commissioner has set out many times previously that he considers that civil servants should not be easily deterred from giving impartial and robust advice by the possibility of future disclosure.
57. The withheld information consists of two formal documents which were put to the Secretary of State regarding the policy and two email chains in which the contents of the policy were discussed leading to the two formal documents.
58. Having reviewed the withheld information, the Commissioner notes that the discussions contained in the email chains are informal discussions taking place as part of the early, fast-paced response to the increasing threat of the global pandemic. However, the content of the formal documents is not attributed to specific individuals and does not detail a free and frank exchange of views but rather a settled policy position to present to the minister. Consequently, the Commissioner is not convinced that a generalised chilling effect on all future discussions would result from disclosure of these formal documents. He does, however, accept that disclosure of the informal discussions could prejudice the free and frank nature of early discussions leading to a policy position.
59. Having taken into account the arguments put forward by both parties, the Commissioner has considered the balance of the public interest in this case. He accepts that a significant weight should be attributed to the need for a safe space for government discussion on policy decisions relating to uplifting benefits, taken at a time of crisis in the pandemic. Nevertheless, the policy was formulated and announced by the Chancellor before the request for information was submitted. The Commissioner considers that there is a very significant and weighty public interest in understanding why the decisions announced were taken. A significant proportion of the public were directly impacted by

the policy and those not directly affected are nevertheless entitled to be well informed as to the reasoning behind policy decisions which are likely to shape British society.

60. The Commissioner believes that disclosure of the formal documents would serve the public interest by providing information on the matters considered before announcing a policy that affects significant numbers of vulnerable people and has led to significant debate around its merit and impact.
61. The House of Commons Briefing Paper referenced above sets out the Government's decision to support new benefit claimants and its stated ability to adjust the Universal Credit and Working Tax Credit with greater speed than it is possible to increase legacy benefits. Ministers have also noted that legacy benefit claimants could claim for Universal Credit if they were eligible<sup>10</sup>. Notwithstanding the information already in the public domain, disclosure of the requested information will provide greater transparency and help further understanding of the decision taken.
62. The Commissioner notes that the Social Security Advisory Committee<sup>11</sup> wrote to the Secretary of State for Work and Pensions on 27 May 2020<sup>12</sup> explaining its "strong view" that it was increasingly indefensible for legacy benefit claimants to be excluded from the uplift and to continue to have a lower level of income than those in receipt of Universal Credit and Working Tax Credit.
63. The following month, on 22 June 2020, the Work and Pensions Select Committee issued a report on DWP's response to the Covid-19 outbreak<sup>13</sup> which details the actions taken by DWP and the Committee's consideration of those actions. It concluded by suggesting:

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<sup>10</sup> The Commissioner understands that those entitled to the Severe Disability Premium of ESA are unable to submit a claim for Universal Credit as this premium does not exist in the Universal Credit benefit. New claimants who are entitled to the Severe Disability Premium are required to submit a claim for ESA.

<sup>11</sup> <https://www.gov.uk/government/organisations/social-security-advisory-committee>

<sup>12</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/888504/ssac-letter-to-secretary-of-state-covid.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888504/ssac-letter-to-secretary-of-state-covid.pdf)

<sup>13</sup> <https://publications.parliament.uk/pa/cm5801/cmselect/cmworpen/178/17806.tm>

"We recommend that, now that the initial surge of Universal Credit claims has mostly been handled, the Department should immediately seek to increase the rates of relevant legacy benefits by the equivalent amount. This increase should be backdated to April 2020, as recommended by the independent Social Security Advisory Committee".

64. The Commissioner references the views of the Work and Pensions Committee and the Social Security Advisory Committee to highlight the contentious issues surrounding the requested information in this case to which the withheld information relates. The committees' views were given before the complainant submitted their request.
65. The Government's decision in this matter impacted on around 1.76 million claimants of legacy benefits. Clearly this is a significant number of affected individuals.
66. The question of whether or not increasing legacy benefits in line with Universal Credit was discriminatory has been determined by the High Court with Mr Justice Swift ruling that DWP's decision was 'justified discrimination' and therefore lawful. The Commissioner considers that this ruling will obviously provide the public with further insight and understanding into the nature of the decision by DWP. However, at the time of the request, this Judicial Review had not been brought and therefore this potential insight could not be taken into account. The Commissioner also considers that the public interest considerations in this case are wider than the specific focus of the High Court case.
67. The Commissioner does not accept that disclosure of the formal documents would be likely to have a detrimental impact on the development of the processes and policies relating to the uplift or on continuing to support those on low incomes. His deliberations have taken into account the unprecedented circumstances of the global pandemic and the public interest in understanding decisions taken by the Government in response to those circumstances. He has concluded that in the circumstances of this case, the public interest under this exemption favours disclosure of formal documents containing advice to the Secretary of State.
68. However, he considers that the balance of the public interest lies in maintaining the exemption with regards to the informal discussions contained in the email chains. The Commissioner accepts that disclosure of these informal discussions could result in a chilling effect impacting on the free and frank nature of future discussions and he does not consider that disclosure would add to the insight gained by disclosure of the formal documents.

69. The Commissioner will proceed to consider whether DWP is entitled to rely on section 42 with regards to the formal documents only.

### **Section 42: Legal professional privilege**

70. 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”.

71. 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.
72. There are two types of legal professional privilege (LPP); advice privilege and litigation privilege. The Commissioner’s view is that for legal professional privilege to apply, the information must have been created or brought together for the dominant purpose of litigation, or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
73. The Commissioner has set out his consideration of whether the formal documents include information which is covered by LPP in decision notice IC-47958-R8L1. DWP provided further arguments in its submissions in this case; however, these arguments relate to the specific information being withheld and therefore reveal its contents. The Commissioner has not reproduced these arguments but has included them in his considerations.
74. DWP advised the Commissioner:
- “...we would also look to apply an exemption under section 42 to any and all legal advice provided within those documents [the withheld information]”
75. DWP identified 14 paragraphs in document (a) and four paragraphs in document (b) to which DWP stated that it has applied advice privilege.

76. DWP explained that the documents comprising the withheld information were not written by lawyers but contained paragraphs written following several lawyers' advice to policy officials. DWP advised:

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

77. Having considered the content of the identified paragraphs, it is not clear to the Commissioner how the content of any of the paragraphs – bar one – comprises legal advice. Notwithstanding the positioning of 11 of the paragraphs in document (a), which follow a heading of "Legal considerations", the Commissioner's reading of the information is that the majority of the paragraphs comprise descriptions and circumstances of proposed actions; he is unable to identify specific legal advice. In only one paragraph (number 20) does the Commissioner accept that the content could be read as comprising legal advice and that legal advice privilege attaches to it.
78. In consideration of document (b) and the four paragraphs identified by DWP, the Commissioner has made the same finding as for the aforementioned 13 paragraphs. They do not clearly present legal advice; rather they describe policy.
79. Nevertheless, DWP has specifically confirmed to the Commissioner that the paragraphs identified in both documents were written as a result of taking legal advice. DWP provided arguments regarding why the paragraphs constituted legal advice. It confirmed that:
- "...government lawyers inputting into submissions and equality analyses are legal advisers acting in a professional capacity, and their clients are both the policy officials involved with formulating policy, and ministers who make ultimate decisions on such policy".
80. The Commissioner accepts that the identified paragraphs may have been written in accordance with legal advice provided prior to their drafting. However, the Commissioner does not accept that specific legal advice is revealed in the identified paragraphs with the exception of paragraph 20 in document (a). The Commissioner acknowledges that some or all of the stated paragraphs may have been approved at some point by a lawyer; however, this in itself does not equate to specific legal advice warranting legal professional privilege. DWP has failed to provide evidence that any of the paragraphs, bar paragraph 20, were written by a lawyer or reveal the legal advice provided. Although DWP advised the Commissioner that the specified paragraphs "revealed legal



advice”, the information in the paragraphs is factual with the exception of paragraph 20. In considering the information, the Commissioner would also note that reflecting a legal consideration is not sufficient to engage the exemption.

81. The Commissioner’s view is that legal professional privilege does not apply to the withheld information with the exception of the one identified paragraph. Therefore the exemption is engaged only in regard to paragraph 20 of document (a).
82. The Commissioner is satisfied that the legal professional privilege associated with paragraph 20 has not been waived.
83. Section 42(1) is a qualified exemption and therefore the Commissioner must consider the public interest and whether in all of the circumstances of the case, the public interest in maintaining the exemption in relation to paragraph 20 document (a) outweighs the public interest in disclosing the information.

### **The public interest**

84. DWP acknowledged that it is legitimate for the public to be interested in understanding the advice that lawyers provide to ministers and officials, particularly concerning the development of policy. It advised:

“The release of information like this would help to break down barriers and lead to better understanding”.

85. DWP added:

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

### **The balance of the public interest**

86. Although DWP has acknowledged the general public interest in transparency and accountability, as set out above, the Commissioner does not consider that it has sufficiently taken into account the specific circumstances of the request in this case and the significant weight to be attached to those public interest factors in favour of disclosure.

87. The temporary uplift to Universal Credit has been controversial and resulted in widespread calls for the extension of the uplift to legacy benefits. There has also been calls for the increase to be made permanently by welfare rights groups and others with significant coverage in the media.
88. 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.
89. In decision notice IC-47958-R8L1, the Commissioner sets out at paragraph 73 that:

“The Commissioner considers that, while the withheld information could be identified as legal advice, it is not of the form or content that could be likely to undermine the inherent confidentiality between a lawyer and their client if disclosed”.
90. As the above decision notice makes clear in its consideration of section 42, DWP provided no evidence that the contents of the formal documents reproduced or revealed any specific legal advice obtained by DWP. The additional information located by DWP, as set out in the scope of the case section of this decision notice, was located and provided to the Commissioner **after** decision notice IC-47958-R8L1 was issued.
91. This additional information located includes the specific legal advice that the disputed paragraph of the formal document is based on<sup>14</sup>. Having reviewed this legal advice and the disputed paragraph, the Commissioner is now persuaded that it does reproduce the legal advice received and strengthens the argument in favour of protecting the inherent confidentiality between lawyer and client.
92. 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:

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<sup>14</sup> This additional information comprises the email chains that the Commissioner has already determined are exempt from disclosure under section 35(1)(a).

"...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"

93. 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".

94. 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.
95. Paragraphs 59 and 60 of *Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 & 0030*<sup>15</sup> 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.
96. The Commissioner accepts that there is a strong public interest in seeing the full formal documents and understanding what legal advice was provided during DWP's decision making process on this issue. However, the Commissioner also notes that the principle of legal professional privilege is a long standing, fundamental principle of English law. The

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

principle exists to ensure that a legal person, including government departments, may obtain legal advice in confidence.

97. 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.
98. In light of the above considerations, the Commissioner considers that whilst there is a strong public interest in disclosure of information relating to the uplift, this does not outweigh the public interest in ensuring confidentiality between lawyer and client in the specific circumstances of this case.
99. The Commissioner therefore considers that DWP is entitled to rely on section 42(1) to withhold the remaining information.
100. DWP is not required to disclose paragraph 20 of document (a).

## **Other matters**

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101. The Commissioner is disappointed that DWP's failure to accurately determine what information falls within the scope of the request, and the previous request referenced above, has led to the Commissioner having to issue two partially contradictory decision notices.
102. In addition to the searches DWP should have undertaken at the time of receiving the request, DWP also failed to locate the additional information following detailed questioning by the Commissioner regarding why it considered that the information in the formal documents constituted legal advice.
103. It is not apparent why DWP did not provide this information in response to the investigation of complaint IC-47958-R8L1 or why it excluded the information from the scope of both requests.
104. The Commissioner is concerned at DWP's poor handling of this request, and similar requests, and has previously raised concerns about DWP's inadequate request handling in several areas<sup>16</sup>.

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<sup>16</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019385/ic-73570-v7p3.pdf>

105. 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 a request.

## Right of appeal

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106. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

107. 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.

108. 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**