

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 February 2023

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 recommendations from Internal Process Reviews and the resulting tracked actions.
2. The Commissioner's decision is that section 35(1)(a) is not engaged for some of the withheld information and for the information that does engage section 35(1)(a), the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information with the exception of the agreed section 40(2) redactions.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Background

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

Request and response

8. On 9 April 2021, the complainant wrote to DWP and requested information in the following terms:

"Please provide any documents showing a) the recommendations made in Internal Process Reviews which are (or have been) being tracked and b) progress made in implementing those recommendations. My understanding is that the Internal Process Review Group (IPRG), in the Customer Experience Directorate, is responsible for tracking these recommendations".
9. DWP provided its response on 10 May 2021 and confirmed that it held information falling within the scope of the request.
10. DWP confirmed that it was withholding the information under section 35(1)(a), formulation or development of government policy. DWP did not explain why the exemption was engaged other than to confirm that the exemption protects the private space within which Ministers and their policy advisers can develop policies without the risk of premature disclosure. DWP did not provide any information specific reasons explaining why the exemption was engaged.
11. DWP provided its public interest considerations in which it only acknowledged a general public interest in greater transparency which

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

makes government more accountable to the electorate and increases trust.

12. In favour of maintaining the exemption, DWP provided generic template arguments. DWP stated that 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 stated that if this public interest cannot be protected, there is a risk that decision-making will become poorer and will be recorded inadequately.
13. DWP confirmed that, on balance, it was satisfied that the public interest favoured maintaining the exemption.
14. The complainant requested an internal review of the handling of their request for information. They disputed that the IPRs relate to policy formulation as they examine operational or administrative issues.
15. DWP provided the outcome of its internal review on 24 June 2021 and partially upheld the complaint.
16. DWP confirmed that the recommendations that had been fully and finally implemented should have been disclosed.
17. With regards to the request for information relating to progress on implementing recommendations, DWP introduced section 22 (future publication) to withhold this information. DWP explained that it planned to produce a report of the issues explored by the Serious Case Panel in the upcoming Annual Report and Accounts, and this will include those IPR recommendations considered by the Panel.

Scope of the case

18. The complainant contacted the Commissioner on 14 July 2021 to complain about the way their request for information had been handled. They disputed that DWP was entitled to withhold the requested information.
19. During the Commissioner's investigation, DWP confirmed that it had published the Annual Report referenced in the internal review. The complainant confirmed that this did not satisfy their request for information on the progress made to implement the recommendations (request b).
20. After several rounds of correspondence, DWP confirmed to the Commissioner that it held further information falling within the scope of

request b and it considered that this information was also exempt under section 35(1)(a) and the public interest favoured maintaining the exemption.

21. On 23 June 2022, DWP wrote to the complainant and disclosed 20 recommendations that it considered could now be disclosed.
22. DWP confirmed that it also considered that a small amount of the remaining withheld information was exempt under section 40(2), personal information. The complainant confirmed that they did not dispute any redactions made under section 40(2).
23. The Commissioner therefore considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 35(1)(a) to withhold the remaining information.

Reasons for decision

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

24. Section 35 of FOIA 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”.

25. 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.
26. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policy-making 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.

27. His guidance² advises that often policy formulation will continue until the relevant legislation is passed. Where legislation is not required, a public announcement of the decision is likely to mark the end of the policy formulation process.
28. 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

29. DWP explained that there are three government policies to which it considers the disputed information relates. These are:
 - The Vulnerable Customers Policy
 - Paying the customer, the right amount at the right time
 - Shaping future support: the Health and Disability Green Paper
30. DWP explained that all of the recommendations being withheld related to policies that were still being formulated or developed at the time of its submissions to the Commissioner.
31. DWP explained that the 'Vulnerable Customers Policy' comprises government policy as the Minister for Disabled People proposed to develop support for vulnerable claimants as part of the Government's Welfare Reform Package.
32. DWP explained that 'Paying the customer, the right amount at the right time' comprises government policy as DWP has a legal obligation to ensure that claimants are paid the right amount at the right time and that decision making is not limited by challenges faced by claimants when engaging with DWP.
33. DWP explained that 'Shaping Future Support: the Health and Disability Green Paper' is a government policy consultation document as set out in the Government's 2019 manifesto³.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

³ www.gov.uk/government/consultations/shaping-future-support-the-health-and-disability-green-paper/shaping-future-support-the-health-and-disability-green-paper

34. DWP considered that the information detailing the work being taken to implement the recommendations should also be withheld under section 35(1)(a) as the activity detailed is inextricably linked to the recommendation itself.
35. DWP explained that where the information in the update may indicate that operational level work to progress any given single recommendation is advanced or complete. It considers that section 35(1)(a) still applies. This is because that activity is only one part of the ongoing work to formulate and develop the associated government policy that has not yet been implemented and the release of one element would be prejudicial to the overall policy under development.

The Commissioner's position

36. As set out above, section 35(1)(a) applies to information if it relates to the formulation or development of government policy.
37. Although 'relates to' is given a wide interpretation, as the Court of Appeal noted in *Department of Health v The Information Commissioner and Mr Simon Lewis* [2017] EWCA Civ 374, of the First Tier Tribunal's findings in that matter, the phrase "should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context" and that a "mere incidental connection between the information and a matter specified in a sub-paragraph of s.35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph".
38. Therefore, there must be a clear and tangible relationship between the content of the information withheld under this exemption and the process that is being protected (ie the formulation or development of policy).
39. The Commissioner's guidance on section 35(1)(a) sets out that information does not need to have been created as part of the formulation or development of government policy. Information may 'relate to' the formulation or development of government policy due to its original purpose when created, or its later use, or its subject matter.
40. This means that information can engage section 35(1)(a) because it was used to inform the policy position, even if in isolation the information does not obviously relate to government policy.
41. With regards to the withheld recommendations and tracked actions which DWP confirmed relate to the 'Vulnerable Customers Policy' and 'Paying the customer, the right amount at the right time', the

Commissioner considers that these policies do not comprise government policy.

42. FOIA does not define 'government policy'. Section 35(5) states that it will include the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Government, but does not provide any further guidance.
43. The Commissioner's guidance on section 35 states:

"The modernising Government White Paper (March 1999) provided a useful description of policymaking as: "the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world". In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives.

There is no standard form of government policy; policy may be made in various ways and take various forms.

The Cabinets of the UK and Welsh Governments and the Northern Ireland Executive Committee are the ultimate arbiters of their respective governmental policy. Within each administration, significant policy issues or those that affect more than one department are jointly agreed by Ministers. For example, within the UK government such issues are decided in Cabinet or Cabinet committee (although detailed policy proposals may then be developed within one department). See Chapter 4 of The Cabinet Manual (1st edition October 2011)⁴.

However, not all government policy needs to be discussed in Cabinet or Executive Committee and jointly agreed by Ministers. Some policy is formulated and developed within a single government department, and approved by the Minister responsible for that area of government.

It is not only Ministers who are involved in making government policy. Civil servants – and, increasingly, external experts and stakeholders – are also involved at various stages of the policy process. The important point is that government policy is ultimately signed off by the Cabinet or

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf

Executive Committee or the relevant Minister. This is because only Ministers have the mandate to make policy. If the final decision is taken by someone other than a Minister, that decision does not in itself constitute government policy.

However, this does not mean that every decision made by a Minister is automatically a policy decision. Ministers may also be involved in some purely political, administrative, presentational or operational decisions”.

44. With regards to the 'Vulnerable Customers Policy', the Commissioner is not persuaded that this policy is itself government policy as set out by DWP. DWP has confirmed that the Minister for Disabled People proposed to develop support for vulnerable claimants as part of the Government's Welfare Reform package.
45. It appears that the Welfare Reform Package is the government policy and the 'Vulnerable Customers Policy' is an operational policy intended to implement this government policy.
46. With regards to 'Paying the customer, the right amount at the right time', the Commissioner is not persuaded that this relates to the formulation or development of government policy. The Commissioner acknowledges that governments may pass legislation in order to effect change and therefore create legal obligations. However, it appears from DWP's submissions that this is a pre-existing legal obligation that DWP is required to follow.
47. DWP set out to the Commissioner that recommendations that relate to 'Paying the customer, the right amount at the right time' will be used to ensure that policies support claimants being able to access the correct DWP services at the correct time and to make further developments where necessary.
48. It appears that the information relates to the implementation of operational policies and procedures which ensure that access to DWP's services are in accordance with established legal obligations rather than the formulation or development of government policy.
49. The Commissioner therefore considers that the recommendations, and associated tracked actions, which relate to the 'Vulnerable Customers Policy' and 'Paying the customer, the right amount at the right time' do not engage section 35(1)(a).
50. With regards to the recommendations and tracked actions relating to 'Shaping Future Support: the Health and Disability Green Paper' engage section 35(1)(a). This clearly comprises government policy and was at the formulation stage at the time of the request as it was still at green paper stage. The Commissioner is therefore satisfied that the

recommendations which informed this government policy engage section 35(1)(a).

51. With regards to the tracked actions related to the previously disclosed IPR recommendations, DWP has not provided any arguments regarding how these relate to the formulation or development of government policy. The Commissioner therefore has no other option than to find that the tracked actions associated with the disclosed recommendations do not engage section 35(1)(a).
52. The Commissioner requires DWP to disclose the following with the personal data redacted under section 40(2):
 - The recommendations and tracked actions relating to the 'Vulnerable Customers Policy'
 - The recommendations and tracked actions relating to 'Paying the customer, the right amount at the right time'
 - The tracked actions related to the previously disclosed recommendations.
53. With regards to the IPRs that do engage section 35(1)(a), the Commissioner will go on to consider the balance of the public interest.

Public interest test

54. DWP confirmed that it had considered the public interest arguments in favour of disclosing the requested information and that is one of the reasons why some recommendations were disclosed. DWP acknowledged that disclosure of the requested information would promote Government transparency and accountability. DWP also considered that disclosure may also improve public understanding of the role of IPRs and how that fits in with Government policies and processes.
55. DWP explained that the public interest in favour of maintaining the exemption centred on the importance of maintaining the safe space for Ministers and Policy colleagues to have frank discussions, develop ideas, debate live issues, and reach decisions on policies under development away from external interference and distraction.
56. DWP explained that the proposed recommendations will be reviewed and taken into consideration in the ongoing policy development of named policy. DWP set out that withholding the disputed information would allow it to work through the proposed recommendations as opposed to prematurely releasing them into the public domain.

57. DWP considered that disclosure of the withheld recommendations could also inhibit free and frank discussions of such recommendations in the future which could damage the quality of advice and decision making. DWP set out that on balance it believes the disputed information should not be released as it is still being considered in respect of policies under development and has not yet been implemented.
58. DWP considers that the public interest in maintaining the exemption outweighs that in disclosure because although good decision-making should lend itself to transparency and accountability, the information contained in these recommendations is being worked through to promote policy development. DWP explained that IPRs are a source of insight and learning, which can inform operational guidance changes and inform the formulation and development of Government policy. DWP considers that without this freedom of space and learning environment, IPRs would fail to achieve their objective.
59. DWP explained that while it does not routinely publish IPRs due to the personal details and circumstances they contain, it had disclosed information about this process. This had been done through responding to Parliamentary Questions and discussions at the Work and Pensions Select Committee. DWP stated that these responses are published and therefore publicly available.
60. DWP also explained that the Independent Case Examiner and the Parliamentary Health Service Ombudsman look at cases and publish findings following complaints. DWP considers that these factors demonstrate a high level of transparency and information available to the public regarding the IPR process and resulting recommendations.

The balance of the public interest

61. The Commissioner accepts that a safe space is needed for discussion and decision making by officials and ministers, particularly in handling complicated and sensitive matters such as those relating to welfare and safeguarding.
62. The Commissioner considers that the public interest in maintaining the exemption will be at its strongest where the policy process is live. However, this does not mean that the public interest will never favour disclosure when the policy is still live. The public interest in maintaining the exemption must outweigh the public interest in disclosure in all the circumstances of the case in order to withhold the information.
63. The Commissioner also acknowledges that there is a public interest in allowing DWP the time and space to implement the recommendations made in the IPRs.

64. However, the Commissioner considers that DWP has failed to consider the strong public interest in the timely understanding and scrutiny of the recommendations made in the IPRs. The Commissioner notes the information that DWP confirmed was already available regarding the IPRs, however, the Commissioner considers that this does not provide the ability to understand and scrutinise the IPR recommendations which are DWP's own considerations of where improvements are needed or where policy was not followed. The Commissioner also notes that not all cases will be reviewed by a Coroner, the Independent Case Examiner or the Parliamentary Health Service Ombudsman.
65. The IPR recommendations provide insight and understanding of where DWP acknowledges that errors were made or improvements required. The tracked actions also allow scrutiny of whether DWP has taken action to implement these improvements or ensure that the errors do not occur again. Disclosure would also allow scrutiny of whether the actions taken were sufficient or timely enough to prevent the harm identified occurring again.
66. The Commissioner considers that there is a strong public interest in understanding DWP's approach to preventing future errors and safeguarding issues.
67. Whilst the Commissioner accepts that there is weight to the public interest arguments regarding allowing DWP the space to develop policy and implement the recommendations away from external interference, the Commissioner is not persuaded that this is sufficient to outweigh the strong public interest in disclosure of the IPRs.
68. DWP has not provided compelling arguments regarding how the specific policy named would be undermined by disclosure of the IPRs. The Commissioner has reviewed the requested information and it appears to largely relate to operational measures, particularly the tracked actions. Having reviewed the information, it is not apparent to the Commissioner how the specific policy would be undermined other than the general safe space arguments presented. While the Commissioner accepts that section 35(1)(a) is intended to protect the policy process as a whole in addition to specific policies, the Commissioner is not persuaded that the public interest arguments presented are sufficient to outweigh the strong public interest in scrutiny of the IPR recommendations.
69. The Commissioner therefore considers that the balance of the public interest favours disclosure.
70. The Commissioner requires DWP to disclose the requested information with the accepted redactions under section 40(2).

Other matters

71. DWP originally failed to adequately scope the request for tracked actions, request b. DWP stated that this information would be published in the annual report, however, this publication contained only a brief summary of the IPR process rather than the specific actions taken in response to the IPR recommendations.
72. The Commissioner was required to return to DWP on several occasions before DWP confirmed what information was held regarding the tracked actions.
73. The Commissioner considers that a Central Government Department with the resources and expertise available to DWP should not make such basic errors when responding to requests.
74. The Commissioner expects DWP to take steps to improve its request handling and identification of information falling within the scope of the request.

Right of appeal

75. 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

76. 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.
77. 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
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