

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 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 a copy of an internal audit report regarding the accidental publication of National Insurance numbers by the Department for Work and Pensions (DWP).
2. DWP withheld the report under section 36, prejudice to the effective conduct of public affairs.
3. The Commissioner's decision is that DWP is entitled to rely on section 36 and the balance of the public interest favours maintaining the exemption.
4. The Commissioner does not require any steps to be taken.

Request and response

5. On 14 January 2022, the complainant wrote to DWP and requested information in the following terms:

"The DWP annual report states that '[t]he Department accidentally published a large quantity of National Insurance Numbers (7,584), in the February, March and June 2018 quarterly transparency publications. The Department was unaware of this until a freedom of information request was received in November 2020. The Department's Data Protection Officer team investigated and immediately reported the breach to the Information Commissioner's Office who formally investigated and in May 2021 informed the Department it was taking no action, mindful of the steps the Department had taken to mitigate the incident and avoid repetition. An internal audit was commissioned by the Department to support remediation action and the recommendations are being implemented'.

Please provide a copy of the internal audit report. If publication depends on the partial redaction of the report then please carry out the appropriate redactions".

6. DWP provided its response on 8 February 2022 and confirmed that it held the requested information. DWP confirmed that it considered the information was exempt under sections 36(2)(b) and (c). DWP did not explain why the exemption was engaged except to cite the exemption itself, in particular DWP did not specify the nature of the prejudice under section 36(2)(c).
7. DWP confirmed that it considered the balance of the public interest lay in maintaining the exemption.
8. DWP upheld its position at internal review.

Scope of the case

9. The complainant contacted the Commissioner on 21 March 2022 to complain about the handling of their request. In particular, they disputed that DWP were entitled to withhold the requested information.
10. The Commissioner therefore considers that the scope of the investigation is to determine whether DWP is entitled to rely on section 36 and where the balance of the public interest lies.

Reasons for decision

Section 36: Prejudice to the effective conduct of public affairs

11. Section 36(2) of FOIA provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.
12. In order to establish that the exemption has been applied correctly, the Commissioner considers it necessary to;
 - a. ascertain who acted as the qualified person;
 - b. establish that an opinion was given by the qualified person;
 - c. ascertain when the opinion was given; and
 - d. consider whether the opinion was reasonable.
13. DWP provided the Commissioner with the Qualified Person's opinion and the submission provided to aid this opinion.
14. The submissions and request for opinion was sent to the Qualified Person on 8 February 2022 and the Minister for Work and Pensions (Lords) Baroness Stedman-Scott provided her opinion on the same day. This essentially confirmed that she agreed with the points set out in the submissions. The Commissioner has inspected the submission and accompanying information sent to the Qualified Person.
15. Section 36(5) of FOIA sets out who may act as the Qualified Person in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the Qualified Person.
16. The Commissioner is therefore satisfied that the Minister for Work and Pensions (Lords) was authorised to act as the Qualified Person in this case.
17. In determining whether the exemption is engaged, the Commissioner must nevertheless consider whether the Qualified Person's opinion was a reasonable one.
18. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The Qualified Person's opinion is not

rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the Qualified Person's position could hold. The Qualified Person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

19. DWP confirmed that it was relying on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c)¹ and that all of the limbs apply to the entirety of the requested information.
20. The submissions to the Qualified Person explained that an effective independent and objective internal audit service is essential to the provision of assurance over the adequacy and effectiveness of a government organisation's risk management, control and governance. The disclosure of detailed findings and assessments would be likely to substantially inhibit the willingness of officials to fully engage with and support their internal audit and investigative services, and the unrestrained, frank and candid exchanges required for the process to remain effective would be likely to be impaired throughout their reviews and investigations.
21. The submission confirmed that the Government Internal Audit Agency, who conducted the audit, supported DWP's position that the information should be withheld.
22. As set out above, the Commissioner is of the view that in assessing the qualified person's opinion, 'reasonableness' should be given its plain and ordinary meaning. An opinion that a reasonable person in the Qualified Person's position could hold will suffice. The opinion is not rendered unreasonable simply because other people may have come to a different and equally reasonable conclusion.
23. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focussing only on the content of the information. The issue is whether disclosure would be

¹ (b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

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

24. The Commissioner considers that the nature of the withheld information is largely as would be expected, varying from factual information to potential issues and concerns. The Commissioner considers that, in relation to the process of giving advice and frank discussions, it is not unreasonable to conclude that there is a real and significant risk that officials would be less candid in future when offering similar information should they consider that this information could be disclosed. The Commissioner also accepts that disclosure would be likely to prejudice the Government Internal Audit Agency's ability to carry out effective audits in the future.
25. The severity and extent of the impact this is likely to have is, however, another matter. This is not significant in assessing the reasonableness or otherwise of the Qualified Person's opinion in the circumstances of this case. They are, however, relevant in assessing the balance of the public interest which the Commissioner has considered below.
26. Section 36(1) makes clear that section 36 can only be engaged where the information does not also engage section 35². Having reviewed the information, the Commissioner accepts that the information does not engage any of the limbs of section 35 and therefore section 36 can be engaged.
27. The Commissioner considers that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) are engaged in relation to the relevant withheld information.

Public interest test

28. As mentioned, the exemption is subject to the public interest test set out in section 2(2)(b) of FOIA. Therefore the Commissioner must also

² <https://www.legislation.gov.uk/ukpga/2000/36/section/35>

consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

29. DWP acknowledged that there is a strong public interest in disclosing information which ensures transparency in the way in which government operates and in increased transparency and accountability of Ministers and public officials, so as to increase public trust in the governmental processes. In particular, the effectiveness with which government works in ensuring the successful delivery of projects and programmes to time, scope and budget as part of the Department's key objectives.
30. However, DWP considers that there is a public interest in maintaining an independent and objective Internal Audit Service which supports the willingness of officials to engage and freely contribute information.
31. DWP explained that maintaining an independent and objective Internal Audit Service, which supports the willingness of officials to engage and freely contribute information, is essential for the Government Internal Audit Agency to provide the requisite independent and objective assurance over the adequacy and effectiveness of risk management, control and governance within DWP as well as across other Government Internal Audit Agency's customers. DWP considers that this outweighs the public interest in transparency around the way the government operates.
32. DWP explained that audit reports are designed for internal consumption only and withholding the report in its entirety would ensure the impartiality of the service. DWP explained that even disclosing a redacted report could potentially provide insight into systems and procedures designed to protect sensitive data.
33. The Commissioner recognises that there is a strong public interest in the disclosure of information which will allow scrutiny of the data breach in question and the actions taken by DWP following this.
34. However, he accepts that disclosure of the requested information would be likely to affect the Government Internal Audit Agency's ability to carry out effective audits in future as disclosure of the requested report would be likely to strongly discourage other government departments from co-operating fully and in a candid manner in future audits as they would be aware the information may be disclosed to the world at large.
35. The public interest in maintaining the Government Internal Audit Agency's ability to carry out audits effectively and therefore assure and improve government departments' outcomes and value for money for the public is significant.

36. For this reason, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in disclosure. DWP was not therefore obliged to disclose the requested information.

Right of appeal

37. 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

38. 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.
39. 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