

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

### **Decision notice**

**Date:** 18 May 2023

**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 unredacted versions of published Universal Credit Board Papers.
2. The Commissioner's decision is that DWP is entitled to rely on section 31(1)(a) to withhold the information relating to Transaction Risking.
3. However, the Commissioner finds that whilst section 35(1)(a) and 36(2)(b)(i) are engaged in relation to the remaining withheld information, the balance of the public interest favours disclosure.
4. The Commissioner requires DWP to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under sections 35(1)(a) and 36(2)(b)(i).
5. 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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6. On 2 May 2022, the complainant wrote to DWP and requested information in the following terms:

"In respect of the Universal Credit Programme Board papers deposited on 26 April here:

<https://depositedpapers.parliament.uk/depositedpaper/2284242/files?page=1>

Please disclose the unredacted versions of the following documents that have been listed beneath the statutory exemption being relied on by the DWP.

Section 36

<https://data.parliament.uk/DepositedPapers/Files/DEP2022-0377/2-UCPB12-11-19-Paper1-Final PB Mins-Oct2019 R.pdf>

Section 35

<https://data.parliament.uk/DepositedPapers/Files/DEP2022-0377/6-UCPB12-11-19-Paper5-MovetoUC UpdatePilotEvaluation R.pdf>

Section 43

<https://data.parliament.uk/DepositedPapers/Files/DEP2022-0377/7-UCPB12-11-19-Paper6-Help to Claim Progress Update R.pdf>

Section 31

<https://data.parliament.uk/DepositedPapers/Files/DEP2022-0377/15-UCPB 10-12-19 - Paper 5 - Transaction Risking R.pdf>

<https://data.parliament.uk/DepositedPapers/Files/DEP2022-0377/19-UCPB 18-02-20-Paper1-Final PB Mins-Dec2019R.pdf>"

7. On 27 May 2022, DWP wrote to the complainant and confirmed that it held the requested information but it required further time to consider the balance of the public interest associated with sections 31, 35, 36 and 43.
8. DWP provided its substantive response on 28 June 2022. In relation to the first request, DWP confirmed that this relates to the minutes of the October 2019 Universal Credit Programme Board (UCPB). DWP explained that the redacted information relates to a summary and discussion of the contents of the Prime Minister's Implementation Unit

(PMIU) review of vulnerable claimants by the UCPB and was being withheld on the basis of section 36(2)(b) as it would inhibit the free and frank provision of advice or exchange of views.

9. DWP explained that if UCPB officials could not be sure that discussions about potential issues were protected from disclosure, it would create a strong incentive to omit or diminish the significance of the discussion, to minimise the prejudice likely to be caused by disclosure.
10. DWP confirmed that there have been several requests for the PMIU report and it had carefully considered the public interest in releasing this report and related information. It acknowledged that there is a public interest in the central government review of important projects and of being transparent. However, it considered that there is also a need to ensure that the review process is comprehensive and effective. DWP stated that the publication of reports or information about them would be likely to inhibit the discussions around project progress. DWP confirmed that it therefore considered that the public interest was best served by withholding details from the UCPB minutes relating to the PMIU report content.
11. In relation to the second part of the request, DWP confirmed that this refers to the 'Move to UC' paper from the November 2019 UCPB meeting and that it was withholding this under section 35(1)(a), the formulation or development of government policy.
12. DWP explained that the redacted material relates to specific detailed elements of the Move to UC approach that are sensitive and are still being considered. DWP acknowledged that transparency in the development of policy is in the public interest, however, it considered that where there is ongoing consideration and testing of the detail of a particular policy, it is important that the safe space for this development is maintained to ensure that the optimum approach is identified to maximise the effectiveness of the policy outcome.
13. In relation to the third request, DWP confirmed that this relates to a single figure in the November 2019 UCPB papers regarding Help to Claim and it relates to the estimated cost of the Help to Claim evaluation report. DWP confirmed that it was withholding this information on the basis of section 43.
14. In relation to the fourth request, DWP confirmed that this relates to the December 2019 UCPB paper 'Enabling Transaction Risking' and associated meeting minutes. DWP explained that the paper and minutes set out the broad approach to the development of the Universal Credit Transaction Risking functionality and approach.

15. DWP explained that the broad principle of Transaction Risking had been announced by Ministers and there is a range of material in the public domain relating to DWP and Transaction Risking.
16. DWP explained that the material redacted from the published documents relates to specific Transaction Risking methodologies. It considered that putting the detail of Transaction Risking into the public domain would be likely to equip fraudulent actors with information to evade these checks and enable targeted attacks on the Universal Credit system which would be likely to increase the risk of losses due to fraudulent cyber-attack.
17. DWP confirmed that section 31(1)(a), prevention or detection of crime, was engaged in relation to this information. DWP acknowledged that it is in the public interest that DWP is transparent about the types of checks it has built into its systems to prevent fraud, however, publishing the precise detail of what these checks are and how they operate will increase the likelihood of criminals successfully defrauding the Universal Credit system.
18. DWP considered that the public interest is best served by DWP being transparent about its broad Transaction Risking approach but withholding the detail of specific Transaction Risking interventions.
19. The complainant requested an internal review on 28 June 2022 and disputed that DWP was entitled to rely on the cited exemptions to withhold the information. In particular, they considered that the age of the information meant that the public interest favoured disclosure.
20. DWP provided the outcome of its internal review on 20 July 2023 and upheld its original response.

### **Scope of the case**

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21. The complainant contacted the Commissioner on 14 August 2022 to complain about the way their request for information had been handled, in particular, DWP's use of the cited exemptions.
22. The published information included a small amount of redactions under section 40(2) as it comprises personal data. The complainant did not dispute these redactions.
23. During the course of the investigation, DWP confirmed that due to the passage of time, the information redacted under section 43 could now be disclosed. On 25 November 2022, DWP provided the complainant with this information.

24. The Commissioner considers that the scope of his investigation is to determine whether DWP is entitled to rely on section 31(1)(a), 35(1)(a) and 36(2)(b) to withhold the remaining redacted information.

## Reasons for decision

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### Section 31: Prejudice to the prevention or detection of crime

25. Section 31(1) of FOIA states:

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

(a) the prevention or detection of crime".

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

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

### DWP's submissions

27. DWP explained that Transaction Risking is a key tool that DWP plans to use to combat and reduce Fraud and Error within Universal Credit.

28. DWP confirmed that information about Transaction Risking is already in the public domain, including broad information from Ministers about how Transaction Risking will be used within DWP. DWP explained that the focus is on developing pre-payment risking techniques that will provide an intervention against fraud before high-risk cases move to payment.
29. DWP confirmed that the redacted information relates specifically to the approach, functionality and methodologies that were being considered at the time. DWP explained that providing further details of its plans and intentions would compromise the effectiveness of its response to fraud. DWP considered that disclosure would also be likely to encourage and equip criminal gangs and individuals to attack DWP systems either in person or via cyber technology.
30. DWP confirmed that it was relying on the threshold of 'would be likely to' prejudice the prevention or detection of crime. DWP provided some examples which the Commissioner will not reproduce in this decision notice as they reveal the contents of the withheld information.
31. DWP considers that there is a clear connection between methodologies aimed at detecting fraud and the effectiveness of investigating or prosecuting fraud.
32. The Commissioner asked DWP to explain why the information still engaged section 31(1)(a) two years after its creation. DWP explained that the minutes and the "Enabling Transaction Risking" paper were presented to the UCPB on 10 December 2019, however, progress on the activities required were paused in March 2020, when the country experienced the impact of the Covid pandemic. DWP explained that it changed focus and concentrated on paying money to the millions of customers who required assistance because of the Covid pandemic.
33. DWP explained that while this work was ongoing, it was observed that criminal gangs and individuals, national and international, sought to exploit the accelerated processes introduced and abused the Universal Credit system. DWP explained that attacks on the UC system do not diminish with the passage of time. There will always be risks to the Universal Credit system and revealing any of its countermeasures would reduce their effectiveness.
34. DWP set out that it is acting to defend the Universal Credit system and it considers that placing this material in the public domain would be likely to equip fraudsters with information that will enable them to claim benefits to which they are not entitled.
35. DWP explained that the 'Fighting Fraud in the Welfare System' paper points out that 'fraud is not a victimless crime'. DWP set out that fraud

impacts individuals as well as private and public sector organisations. It considered that divulging the detail of DWP's counter fraud method and measures will allow fraudsters to successfully attack the Universal Credit system impacting the public sector and individuals.

36. DWP explained that providing specific information would enable a perpetrator to understand its services, the way its IT systems work as well as where and how they can gather information. DWP explained this would enable a perpetrator to make false claims to benefit, divert public funds, affect the way the Government pays benefits to claimants or collect taxes. DWP considered that revealing details of system processes could enable malicious actors to compromise DWP systems and potentially inhibit DWP's ability to make payment.
37. DWP explained that the papers concerned were prepared for the UCPB prior to the Covid pandemic and much of the information it contained was released to the complainant. However, DWP explained that while the fundamentals of Transaction Risking remain, the fraud landscape has grown significantly and it anticipates will continue to do so. DWP considers that disclosing this information into the public domain will allow potential fraudsters to understand even more about DWP's systems and the changes being made. DWP confirmed that disclosure of this information could be added to information already in the public domain and create a mosaic effect providing criminals with insight into its counter measures.
38. DWP explained that there will always be a need to redact specific details in the transaction risking area to prevent fraudulent attacks on the Universal Credit system. DWP directed the Commissioner to the disclosed information which provides evidence that the transaction risking capability is being developed and set out that only selected operational details have been redacted.

#### The complainant's position

39. The complainant confirmed to the Commissioner that they had no wish for any information to be disclosed which assists malicious actors to defraud DWP. The complainant therefore requested that the Commissioner review the information and provide his independent view.
40. The complainant raised concerns that DWP may be exaggerating the prejudice that could occur in order to prevent disclosure of potentially embarrassing information. They also considered that the age of the information reduced the credibility of section 31(1)(a) being engaged.

#### The Commissioner's position



41. The Commissioner has reviewed the information being withheld under section 31(1)(a).
42. With regards to the first criterion, the Commissioner is satisfied that the harm envisaged relates to the interest that section 31(1)(a) seeks to protect against, specifically, the prevention or detection of crime.
43. The Commissioner next considered whether the prejudice being claimed is "real, actual or of substance", not trivial and whether there is a causal link between disclosure and the prejudice claimed. The Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant and he accepts that it is plausible to argue that there is a causal link between disclosure of the disputed information and the prejudice occurring. The prejudice in this case would be to DWP's ability to prevent and detect fraudulent activity within its systems and claims. There is a clear causal link between the disclosure of the specified withheld information and an increased risk of fraud.
44. The Commissioner notes that DWP is arguing that disclosure of the withheld information would be likely to prejudice the prevention or detection of crime. In the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* the Tribunal confirmed that, when determining whether prejudice would be likely, the test to apply is that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
45. The Commissioner acknowledges the complainant's concerns. However, having reviewed the information, he is satisfied that even in light of the passage of time, disclosure of the information would be likely to prejudice the prevention or detection of crime.

### **Public interest test**

46. DWP acknowledged that it is in the public interest for DWP to demonstrate that processes are in place to prevent fraud in the Universal Credit system and ensure that public finances are protected. It also considered that it is in the public interest to protect the ability of government to enforce the law.
47. DWP considered that there is a public interest in assuring claimants that their personal data is being robustly protected while claiming Universal Credit and that DWP is using their information legitimately, to check accuracy and eligibility, when awarding and paying benefits.



48. DWP also explained that it had considered the impact that releasing this information would have against the background of increasing fraud. DWP set out that, in 2020-21, 3.9% of benefit expenditure was overpaid due to fraud and error, an increase from 2.4% in 2019-20. It confirmed that the monetary value of fraud and error overpaid was £8.4 billion, an increase of £4.6 billion.
49. DWP considers that it is in the public interest not to encourage criminal activity, protecting individuals and organisations from the social and psychological impacts of fraud.
50. The complainant considers that given the problems that Universal Credit is experiencing with fraud, they consider that there is considerable value in understanding what actions DWP did or did not take to prepare for attacks by malicious actors. The complainant provided an example that it was reported in the UCPB minutes from 10 December 2019 that:

“Transaction risking was initially prioritised in Phase 8 but subsequently deprioritised, and continues to be deprioritised it will cause issues moving forwards”
51. The complainant considers that given the scale of fraud being experienced by UC, it is only right and proper that the public, media and bodies such as the Work and Pensions Committee, and Public Accounts Committee are given access to the withheld information so that questions can be asked about decisions taken by DWP about detecting and preventing fraud.

#### The balance of the public interest

52. Having reviewed the disputed information, the Commissioner considers that in the circumstances of this case, there is a strong public interest in ensuring that DWP is able to prevent and detect fraud within its systems. As DWP set out in its prejudice arguments, the cost of fraud to the public purse is significant and it is in the public interest to prevent this increasing and reduce it. The Commissioner also considers that vulnerable claimants may also be victims of fraud and there is a public interest in preventing potential exploitation and distress.
53. Whilst the Commissioner accepts that there is a public interest in the disclosure of information demonstrating the measures DWP has taken to prevent and detect fraud, he considers that the public interest in maintaining the integrity of these measures by withholding the information outweighs this.

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

54. Section 35(1)(a) of FOIA states that:

"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".

55. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of section 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
56. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process - where options are generated and sorted, risks are identified, consultation occurs and recommendations/submissions are put to a Minister or decision makers.
57. 'Development may go beyond this stage to the processes involved in improving or altering existing policy, such as piloting, monitoring, reviewing, analysing or recording the effect of existing policy.
58. Whether information is related to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focusing on the content of the information in question and its context.
59. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - the final decision will be made either by Cabinet or the relevant Minister;
  - the Government intends to achieve a particular outcome of change in the real world;
  - the consequences of the decision will be wide-ranging.

#### DWP's arguments

60. DWP confirmed that the government policy concerned is Move to UC.
61. DWP set out that the Commissioner's guidance recognises that policy making is not always straightforward and that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process by preserving a safe space for policy options to be considered in private. DWP stated that early disclosure of information can undermine this process and ultimately lead to poor decision making.
62. DWP explained that in this case, the Move to UC phase of the programme involves moving all existing legacy benefit claimants over to Universal Credit. DWP explained that to test the policy potential and

approach to be taken, it set out a small pilot, commonly known as the Harrogate pilot. DWP explained that it was due to report back to Parliament but, due to the Covid pandemic, work on the Harrogate pilot was paused. DWP explained that this enabled it to respond effectively to the millions of customers making claims to Universal Credit during the Covid pandemic.

63. DWP explained that at the time of the request, there was information in the public domain about Move to UC, however, a redaction was made under section 35(1)(a) of FOIA in relation to a specific part of Move to UC policy, where the approach to assist legacy benefit customers to move to Universal Credit is still in the process of being developed. DWP confirmed that the final approach will require Ministerial sign off.
64. DWP confirmed that the Move to UC paper was published with only one paragraph redacted.
65. DWP explained that the detailed approach for how all of the elements of the Move to UC processes and legal provisions are used and in what circumstances they will be used is obviously sensitive. DWP stated that it will be for Ministers to decide exactly how this happens and the process was under development. DWP confirmed that this was a live issue at the time of the request and remains under development as at the time of DWP's response to the Commissioner.

#### The Commissioner's position

66. Having reviewed the withheld information and DWP's submissions, the Commissioner accepts that the 'Move to UC' policy was still being developed at the time of the request and the withheld information relates to the development of this policy.
67. The Commissioner accepts that a large scale project such as Universal Credit will have different phases of the project at implementation, development and formulation stages. Therefore, whilst Universal Credit had been implemented for new claimants, the Commissioner accepts that at the time the update was provided, DWP was still developing its policy on how and when legacy benefit claimants should be migrated to the new system.
68. The Commissioner notes that the decision to move claimants on to Universal Credit had been made, however, he accepts that the policy was still in development. His guidance on section 35 states:

"In some cases the government announces a high-level policy, or passes a 'framework' bill into law, but leaves the finer details of a policy still to be worked out. The high-level policy objective has been finalised, but detailed policy options are still being assessed and debated. Later

information about the formulation of the detailed policy will still engage the exemption.”

69. The Commissioner accepts that, in the specific circumstances of this case, whilst a high level decision had been made to move claimants on to Universal Credit, the decision on how claimants will be moved had yet to be taken at the time of the Move to UC update.
70. The Commissioner is therefore satisfied that the withheld information related to the development of government policy and section 35(1)(a) is engaged.

### **Public interest test**

71. DWP stated that it is in the public interest that the development of the Move to UC policy includes detailed information about the task of moving legacy benefit customers on to Universal Credit. It acknowledged that it was in the public interest to have an awareness of the policy solutions that have been explored by DWP.
72. DWP stated that there is public interest in the Move to UC policy and the approach that will be taken to move all legacy benefit claimants to Universal Credit, particularly vulnerable claimants. DWP therefore considers that it is important that it has the safe space to consider a number and variety of options, thoroughly testing them to gather evidence to support their final approach.
73. DWP explained that at the time of the request, the Move to UC policy was being developed. It involved the challenge of moving several million customers from legacy benefits to Universal Credit. DWP considers that in these circumstances, including the variety and vulnerability of customers involved, it was vital to explore a variety of options privately. DWP considers that early disclosure of options being trialled to identify the optimum approach to move vulnerable customers to UC would inevitably constrain the testing required to inform options. DWP stated that it needs the freedom to explore the full range of delivery options without ongoing media commentary. DWP set out that it believes that publishing early details of ongoing trials including the sensitive issue of stopping legacy benefits, would result in sub optimal delivery of Universal Credit to vulnerable people.
74. The Commissioner asked DWP to explain why the public interest favours maintaining the exemption two years after the update was provided. DWP stated only:  
  
“The Commissioner will observe that the majority of Move to UC Programme Board paper has been disclosed. The only paragraph that has not been disclosed relates to live policy development”.

The balance of the public interest

75. The Commissioner accepted that significant weight should be given to safe space arguments – ie the concept that the government needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction – where the policy making is live and the requested information relates to that policy making. The Commissioner also accepts that a large scale project such as Universal Credit will have its challenges.
76. However, the Commissioner is not persuaded that disclosure of the specific disputed paragraph will have the impact on DWP's ability to discuss options privately that DWP has advanced.
77. Having reviewed the requested information, the Commissioner notes that the paragraph in question comprises fairly high level considerations.
78. The Commissioner also notes that on 25 April 2022, prior to the request being made, DWP published its paper 'Completing the Move to Universal Credit'<sup>1</sup>. Having reviewed this paper, it is not apparent to the Commissioner how disclosure of the disputed paragraph would cause any further impact on the safe space than the information included in the paper.
79. In addition to this, the Commissioner considers that there is clearly a strong public interest in disclosure of information that would improve the public's understanding and allows scrutiny of the government's approach to migrating legacy benefit claimants onto Universal Credit.
80. The Commissioner considers that there is a very significant and weighty public interest in understanding, and scrutiny of, a policy that will affect millions of people, including the most vulnerable in society. The Commissioner considers that the public is entitled to be well informed as to the reasoning behind policy decisions which are likely to shape British society. Disclosure of this information would allow the public insight into the decision making process and an understanding of the decisions made.

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<sup>1</sup> <https://www.gov.uk/government/publications/completing-the-move-to-universal-credit>

81. The Commissioner considers that the public interest lies in disclosure of the disputed paragraph and he requires DWP to disclose this information.

**Section 36: Prejudice to the effective conduct of public affairs**

82. 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.

83. In order to establish that the exemption has been applied correctly, the Commissioner considers it necessary to;

- ascertain who acted as the qualified person;
- establish that an opinion was given by the qualified person;
- ascertain when the opinion was given; and
- consider whether the opinion was reasonable.

84. DWP provided the Commissioner with the qualified person's opinion and the submissions provided to aid this opinion.

85. The submissions, dated 14 February 2022, and request for opinion was sent on 22 February 2022 and the Minister for Work and Pensions (Lords), Baroness Stedman-Scott provided her opinion on 3 March 2022 which essentially confirmed that she agreed with the points set out in the submissions. The Commissioner has inspected the submissions and accompanying information provided to the qualified person.

86. 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.

87. The Commissioner is therefore satisfied that the Minister for Work and Pensions was authorised to act as the qualified person in this case.

88. The Commissioner notes that the Qualified Person's opinion was obtained prior to the request being made on 2 May 2022.

89. Section 36 specifies that information can be withheld where the Qualified Person is of the opinion that disclosure would or would be likely to prejudice the effective conduct of public affairs.

90. Shortly before the complainant submitted their request, DWP published Universal Credit papers in line with its publication schedule. DWP treated this publication in the same way as a request under FOIA. As DWP did

not intend to publish the disputed information, it proactively obtained the Qualified Person's opinion and confirmed in the publication its reasoning for not disclosing the disputed information.

91. The complainant used their right of access under FOIA to request the information that DWP did not publish and disputed DWP's reasoning for not publishing, ie that section 36 was engaged.
92. DWP has relied on the proactively obtained Qualified Person's opinion rather than seeking another opinion following the receipt of the request.
93. In the very specific circumstances of this case, the Commissioner is satisfied that section 36 can be engaged on the basis of this opinion. The Commissioner notes that the opinion was obtained two months prior to the request. Whilst in this case he has accepted that this can still be considered a reasonable opinion, he would set out that this period of time may be considered too long an interval in other cases. In this case, DWP has a two year publication schedule and the requested information was created in October 2019. The Commissioner therefore considers that in the context of the age of the information, a timeframe of two months is not unreasonable and the circumstances of the report are unlikely to have changed substantially in this time.
94. He also considers that as the request is for the information that was not published on the basis of this proactive opinion, it would be appropriate to accept this original opinion as the complainant has disputed its use.
95. In determining whether the exemption is engaged, the Commissioner must nevertheless consider whether the qualified person's opinion was a reasonable one.
96. 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.
97. In its submission to the Qualified Person, DWP explained that it routinely publishes UCPB papers two years after the relevant batch of meetings and it was in the process of preparing the November 2019-April 2020 papers for publication in April 2022.



98. DWP explained that the qualified person had previously provided their opinion that section 36(2)(b)(i) was engaged for the full PMIU report and selected information in the covering paper.
99. DWP confirmed that the minutes of the 22 October 2019 UCPB capture a discussion related to the PMIU report and that these papers were scheduled to be published in April 2022.
100. The submission recommended that the qualified person provide an opinion that section 36(2)(b)(i) is engaged as disclosure would be likely to inhibit the free and frank provision of advice.
101. The submission explained that the Delivery Unit deep dive reports or material pointing to the content are not routinely published. It stated that releasing this type of report or material risks having an impact on the willingness of operational arms of Government to flag issues and proactively raise situations, in which they are unable to deliver. It considered that this in turn would limit the Government's ability to address delivery issues. Further, it explained that release of information which refers to the report content would be likely to harm the trust on which the Delivery Unit relies to honestly and accurately advise the Prime Minister and other Ministers. The submission set out that the deep dive process relies on the cooperation of wider Government in collecting data, as well as the free and frank views of those on the front line of delivery. It stated that a commitment to confidentiality of views is needed as part of the review process. DWP stated that these issues are instrumental in identifying the root cause of delivery challenges.
102. The submission provided the qualified person with copies of the information being withheld.
103. 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.
104. 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 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 in 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 its 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.

105. The Commissioner considers that the nature of the withheld information is largely as would be expected, varying from fairly anodyne information to potential issues and concerns. The Commissioner considers that, in relation to the process of giving advice and having 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 severity and extent of the impact that this is likely to have on the quality of such advice 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.
106. Section 36(1) makes clear that section 36 can only be engaged where the information does not engage section 35. Having reviewed the information, the Commissioner accepts that the information does not engage section 35 and therefore section 36 can be engaged.
107. The Commissioner considers that section 36(2)(b)(i) is engaged to the relevant withheld information.

### **Public interest test**

108. 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 consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.
109. DWP considered that disclosure of the references to the content of the PMIU report in the October minutes would not serve the public interest. It set out that disclosure of the information would risk harming the PMIU process if officials could not be sure that discussions about potential issues were protected from disclosure. This would create a strong incentive to omit, or to diminish the significance of negative information, to minimise the prejudice likely to be caused by disclosure.
110. DWP acknowledged that transparency in the way in which government operates and increased accountability of Ministers and public officials increases public trust in the governmental processes. DWP considered

that, in particular, there is a public interest in understanding the effectiveness with which government works and the successful delivery of key projects and programmes to time, scope and budget.

111. DWP considered that even though civil servants adhere to the Civil Service Code, disclosure could create a strong incentive to use more careful language and be less robust about flagging risk. It stated that it is reasonable to assume that these conversations would have less value.
112. DWP set out that there is merit in greater transparency within government but the need to protect the safe space in which PMIU and its stakeholders can contribute to the deep dive process is fundamental to the effectiveness of this process. DWP explained that the need to identify and look to improve any operational delivery issues, outweighs the public interest in disclosure because it would be likely to make stakeholders reluctant to share insight into any aspect of the deep dive process. DWP considered that if the information was disclosed directly, indirectly or out of context, this may have a negative effect on the quality of such reports and consequently the effectiveness of the deep dive process.
113. DWP acknowledged that there is a public interest when central government decides to review important projects, like Universal Credit. However, DWP considered that the public interest needs to be balanced against ensuring that the review process is honest, comprehensive and effective.
114. DWP set out that in this case, there was a need to protect a safe space for the PMIU and its stakeholders to participate and contribute to the deep dive process. DWP considers that candid discussion was important as the aim of the review was to identify and look at ways of improving operational delivery issues.

#### The balance of the public interest

115. If the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of the opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would be likely to occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test favours disclosure.
116. There will always be a general public interest in transparency. In particular, there is a significant public interest in understanding how government projects are implemented, as DWP has acknowledged. However, the Commissioner considers that DWP has failed to

acknowledge the strong public interest in disclosure of information relating to the Universal Credit roll out and implementation.

117. The Commissioner is mindful that Universal Credit has been in the public consciousness since its announcement in 2010 and concerns have been raised by charities and in media coverage including:

- "Universal Credit: What is it and what exactly is wrong with it?" 25 January 2018, The Guardian<sup>2</sup>
- The Trussell Trust has issued several reports, including its analysis of the link between the roll out of Universal Credit and increased foodbank use<sup>3</sup>
- The Work and Pensions Select Committee report on Universal Credit and 'survival sex'<sup>4</sup>
- "Effect on mental health of a UK welfare reform, Universal Credit: a longitudinal controlled study" Sophie Wickham PhD et al<sup>5</sup>

118. The withheld information is extracts from the minutes of the October 2019 meeting in which the attendees discuss the results of the PMIU report on how effective Universal Credit support is for vulnerable claimants. The Commissioner has already ordered disclosure of this report<sup>6</sup> and the associated covering paper.

119. The Commissioner considers that there is a strong public interest in scrutiny of the analysis of support for vulnerable claimants and DWP's actions in light of this.

120. The Commissioner considers that the public interest in disclosure is particularly strong in the circumstances of this case. In order for the Commissioner to determine that DWP is entitled to withhold the information, he must determine that the public interest in maintaining

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<sup>2</sup> <https://www.theguardian.com/society/2018/jan/25/universal-credit-benefits-scheme-iain-duncan-smith>

<sup>3</sup> <https://www.trusselltrust.org/what-we-do/research-advocacy/universal-credit-and-foodbank-use/>

<sup>4</sup> <https://publications.parliament.uk/pa/cm201919/cmselect/cmworpen/83/8302.htm>

<sup>5</sup> [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30026-8/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30026-8/fulltext)

<sup>6</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023422/ic-151479-q9w3.pdf>

<https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023426/ic-151084-p9g3.pdf>

<https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021931/ic-145903-x8d9.pdf>

the relevant exemption outweighs the strong public interest in disclosure.

121. The Commissioner considers that DWP has failed to provide persuasive public interest arguments in favour of maintaining the exemption.
122. With regards to DWP's chilling effect arguments, having considered the withheld information, the Commissioner is not persuaded that disclosure of the information would cause this effect to the significant degree that DWP claims.
123. The Commissioner has issued guidance on 'chilling effect' arguments in relation to section 36. Civil Servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality of advice.
124. Tribunals are generally sceptical of such arguments. In *Davies v Information Commissioner and the Cabinet Office (GIA)* [2019] UKUT 185 (AAC), 11 June 2019 the Upper Tribunal stated at paragraph 25 that,  
  
"There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of affairs are to be treated with some caution".
125. Chilling effect arguments operate at various levels. Whether it is reasonable to think that a chilling effect would occur would depend on the circumstances of each case including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
126. The Commissioner notes that at the time of the request, the information was over two and a half years old.
127. Having reviewed the withheld information, the Commissioner does accept that some of the withheld information could cause a chilling effect as the considerations and contributions to the discussions are attributed to the individuals giving them. However, the Commissioner also notes that the individuals in question are senior members of staff who, he considers, should not be dissuaded from providing their candid opinions by the prospect of disclosure more than two years after the meeting.
128. DWP's arguments regarding the chilling effect are fairly generic and simply state that if officials thought that the information may be disclosed, they may not be as robust in their advice. DWP did not

explain why disclosure of the specific information would cause a chilling effect, instead relying on the generic arguments that disclosure would lead to a reduction in frankness.

129. DWP's generic arguments are not sufficient to persuade the Commissioner that the public interest favours maintaining the exemption. The Commissioner has considered the withheld information itself and he has not identified any information for which the public interest would clearly favour maintaining the exemption.
130. As set out above, the Commissioner is mindful of the high profile of the Universal Credit programme and its potential to affect millions of individuals. He recognises that this creates conditions where frank analysis and the identification of risks need to be protected whilst they are being addressed. However, he is also mindful of the accountability and transparency that is important with such a programme, especially one that has been subject to a number of high profile concerns.
131. The Commissioner notes that the Universal Credit Programme has been subject to scrutiny from the National Audit Office and the Work and Pensions Select Committee. However, it is clear that the requested information provides valuable information on the efforts of DWP to support vulnerable claimants. The minutes go beyond what is already available in the public domain and which allows for greater transparency and greater understanding of the work DWP is undertaking and whether this is sufficient.
132. The Commissioner's decision is that the balance of the public interest favours disclosure of this information.
133. The Commissioner requires DWP to disclose the information withheld under section 36.

## **Other matters**

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134. DWP's submissions to the qualified person, when obtaining their opinion, included the consideration of the public interest. While the Commissioner does not consider that this inclusion would render the opinion unreasonable, he does remind DWP that the qualified person's opinion relates solely to whether section 36 is engaged. The public interest should be considered **after** the qualified person has given their opinion that section 36 is engaged.

## **Right of appeal**

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135. 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)

136. 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.

137. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**