

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

### **Decision notice**

**Date:** 20 November 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 a paper presented to the Serious Case Panel regarding the impact of errors on claimants. The Department for Work and Pensions (DWP) withheld the information under sections 36(2)(b)(i) and (ii), prejudice to the effective conduct of public affairs, and considered that the balance of the public interest lay in maintaining the exemption.
2. The Commissioner's decision is that section 36 is engaged but that the balance of the public interest favours disclosure. However, he finds that a small amount of information engages section 44(1), statutory prohibition on disclosure, and therefore can be withheld. The complainant confirmed that they were content for personal data to be withheld under section 40(2).
3. The Commissioner also finds that DWP has breached sections 10(1) and 17(1) as it failed to adequately respond within the statutory timeframe.
4. The Commissioner requires DWP to take the following steps to ensure compliance with the legislation:
  - Disclose the requested information with the exception of the highlighted personal data and information that engages section 44(1).

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 FOIA and may be dealt with as a contempt of court.

## Request and response

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6. On 6 March 2023, the complainant wrote to DWP and requested information in the following terms:  
  
"Please treat this as a request for information under the Freedom of Information Act. At the 12 October 2022 meeting of the Serious Case Panel, the panel discussed 'a paper detailing the impact of errors on vulnerable customers':  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1116800/dwp-serious-case-panel-minutes-2022-10-12.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1116800/dwp-serious-case-panel-minutes-2022-10-12.pdf)  
Please send me that paper."
7. On 4 April 2023, DWP issued an interim response which confirmed that it held the requested information but required further time to consider the public interest. DWP confirmed that it considered that section 35(1)(a), formulation or development of government policy, section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) were engaged.
8. On 4 May 2023, DWP wrote to the complainant and confirmed that it was withholding the requested information. DWP considered that section 36(2)(b)(ii) was engaged and the public interest favoured maintaining this exemption.
9. The complainant requested an internal review on 4 May 2023 but did not provide details of what they disputed.
10. DWP provided the outcome of its internal review on 5 June 2023 and upheld its position that section 36(2)(b)(ii) was engaged and the public interest favoured maintaining the exemption.

## Scope of the case

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11. The complainant contacted the Commissioner on 15 June 2023 to complain about the handling of their request for information, specifically that DWP is entitled to rely on section 36(2)(b)(ii).

12. Although DWP did not initially cite section 40(2), the complainant confirmed that they were content to exclude personal data from their request.
13. During the investigation, DWP confirmed that a small amount of the requested information would engage sections 40(2) and 44(1) as it revealed personal information about individuals. As the complainant has confirmed that they are not seeking personal data, the Commissioner has not considered whether section 40(2) applies to this information. To the extent that the information is not personal data as defined by the Data Protection Act 2018, the Commissioner has considered whether DWP is entitled to rely on section 44(1).
14. DWP also confirmed during the investigation that it was relying on sections 36(2)(b)(i) and (ii) rather than just section 36(2)(b)(ii) as cited in its refusal notice.
15. The Commissioner considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 36(2)(b)(i), section 36(2)(b)(ii) and section 44(1).

## **Reasons for decision**

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

16. 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.
17. 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 person;
  - c. ascertain when the opinion was given; and
  - d. consider whether the opinion was reasonable.
18. DWP provided the Commissioner with the Qualified Person's opinion and the submission provided to aid this opinion.
19. The submission and request for opinion was sent on 18 April 2023 and Viscount Younger of Leckie, Parliamentary Under-Secretary of State for Work and Pensions in the House of Lords provided their opinion on 21

April 2023 which confirmed that they agreed with the arguments put forward in the submission. The Commissioner has inspected the submission and accompanying information provided to the Qualified Person.

20. 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.
21. The Commissioner is therefore satisfied that Viscount Younger was authorised to act as the Qualified Person in this case.
22. The Commissioner notes that the Qualified Person's opinion was obtained outside of the statutory timeframe prescribed by section 10(1). The Commissioner addresses this issue further in his section 17 considerations below. However, he does not consider that obtaining the opinion late renders the opinion unreasonable in the specific circumstances of this case.
23. The submission to the Qualified Person explained that the requested paper contains a narrow, informal snapshot of information relating to some errors which may impact on the experience of some of its customers as well as case-specific information. DWP further explained that the figures in the paper were approximate calculations and had not undergone the usual analytical rigour to be expected before making such information public. DWP confirmed that the purpose of the paper was to stimulate a discussion at the Serious Case Panel, leading to specific actions for improvement.
24. DWP explained that the minutes of the meeting, published on GOV.UK, give a broad overview of the areas the Department is focussing on and the intention is to publish further details, once improvements have been implemented, through the relevant year's Annual Report and Accounts.
25. DWP stated in the submission to the Qualified Person that it requires time and space to delve deeper into these issues and formulate detailed, comprehensive plans for improvement. DWP explained that this includes impacting possible changes and aligning with government policies and future strategic aims. DWP considered that the disclosure of piecemeal, incomplete information as requested "would, or would be likely to" inhibit the free and frank advice and the exchange of views.
26. DWP explained in the submission to the Qualified Person that the paper in question relates to information which was put together without the intention to circulate wider than the immediate audience, the Serious Case Panel. DWP explained that it was used to instigate a discussion between a senior group of internal stakeholders in a safe and open

environment. DWP stated that these discussions are imperative in its ability to develop and improve the processes and policies within DWP as well as the services that it offers claimants. DWP stated in the submission to the Qualified Person that disclosure would not only inhibit colleagues' willingness to fully engage in these types of discussions but it would also restrain frank and candid exchanges, which are required to develop new ideas and progress existing projects. DWP also considered that some of the information, if presented in its current format, could have a negative reputational impact on DWP.

27. DWP explained to the Commissioner that the document was drafted with the express intent of sparking a free and frank discussion between members of the Serious Case Panel on the issues identified. DWP explained that the informal language and candid tone throughout the document reflect that intention.
28. DWP further explained that the information provided was based on estimates from small samples to illustrate potential risks based on 'worst case scenarios'. DWP explained that there was no provision of balance from data providing a positive perspective and that this was deliberate. DWP set out that the data was provided to support the free and frank exchange of views and encouraged free and frank provision of advice from the panel members in respect of the areas they lead on.

### **The Commissioner's position**

29. 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.
30. Section 36(1) makes clear that section 36 can only be engaged where the information does not also 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.
31. DWP did not confirm whether it was relying on the 'would' or 'would be likely to' threshold of prejudice. The submissions to the Qualified Person uses both terms. The Commissioner has considered the withheld information, and DWP's submission, and he accepts that the Qualified Person's opinion is reasonable on the basis of the 'would be likely to' prejudice threshold.
32. In determining whether the exemption is engaged, the Commissioner must nevertheless consider whether the Qualified Person's opinion was a reasonable one.
33. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, it is

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.

34. 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.
35. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focusing 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 not to 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.
36. 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 exchanging views for the purposes of deliberation, 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 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.

37. The Commissioner is satisfied that DWP is entitled to engage sections 36(2)(b)(i) and (ii) in relation to the withheld information.

### **Public interest test**

38. As mentioned above, this 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 exemption outweighs the public interest in disclosing the withheld information.

### **Public interest in disclosure**

39. 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. DWP explained that this helps increase public trust in 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.
40. DWP set out that it could understand how people may want to understand how the Serious Case Panel operates and how decisions arising from these meetings are taken forward.
41. DWP confirmed that there has been some limited media interest over the years in the work of the Serious Case Panel but nothing recently in the media; the main focus of interest is via FOI requests.

### **Public interest in maintaining the exemption**

42. DWP explained that the withheld information includes details of a sensitive nature and publication of these documents would be likely to inhibit candour and likely prejudice the effective conduct of public affairs.
43. DWP explained that there is a public interest in allowing colleagues to have open and frank conversations where they can engage in discussions which support the development of department and government policies and processes, whereby they are able to freely contribute information and ideas.
44. DWP considered that this is essential to the growth of DWP and it allows DWP to continue to develop and implement new ideas which helps improve the services that it offered its claimants, especially its most vulnerable. DWP also stated that it needed to be mindful that if it has to release information of this type, it could lead to decisions in the future

where such information is not produced in the first place for fear of it being released. DWP considered that there is a chance that action like this could harm the overall working of the Department and lead to poorer outcomes all round.

45. DWP explained that the information that it used in the document is estimated calculations for discussion purposes and was not reviewed by analysts who would validate this before any decisions are made or information published.
46. DWP explained that the withheld information was provided to DWP's Serious Case Panel to allow them to consider complex issues which often require strategic, long-term, or sometimes multiple solutions. DWP stated that, in this instance, those solutions remain in development and so, for the reasons outlined above, the Senior Case Panel needs time and space to engage in free and frank conversations to reach the most effective solutions. DWP considered that maintaining the safe space for free and frank conversations, at the time of the request, outweighed the public interest in disclosure.
47. DWP explained that it intends to publish further details, once improvements are agreed and implemented, but it considered that to do so prematurely risks negatively impacting DWP's response to these issues as a result of the adverse reaction this information may, in isolation, cause.
48. DWP explained that sections 36(2)(b)(i) and (ii) of FOIA are intended to consider the issue of what happens if the information is made public, not what that information is. DWP considered that in, this instance, it is likely to lead to pressure for quick solutions or responses, rather than time and space to implement the most effective changes, which is ultimately in the greater public interest.
49. DWP explained that the paper in question relates to information which was put together without intention to circulate wider than the immediate audience, namely the Serious Case Panel. DWP explained that it was used to instigate a discussion between a senior group of internal stakeholders in a safe and open environment. DWP stated that these discussions are imperative in its ability to develop and improve the processes and policies within DWP as well as the services that it offers its claimants. DWP considered that the disclosure of this paper would not only inhibit colleagues' willingness to fully engage in these types of discussions, but it would also restrain frank and candid exchanges, which are required to develop new ideas and progress existing projects.

50. DWP explained that since the request was made and the response was provided, DWP has published the Annual Report and Accounts 2022-2023<sup>1</sup> with a section on page 66 in relation to the Serious Case Panel.

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

51. If the Commissioner finds that the Qualified Person's opinion was reasonable, he will consider the weight of that 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.
52. The Commissioner accepts that a safe space is needed for discussion and decision-making by the Senior Case Panel, particularly as it handles complicated and sensitive matters such as those relating to welfare and safeguarding. The Commissioner accepts that there is a public interest in allowing DWP the time and space to implement the recommendations made in the paper.
53. However, the Commissioner considers that this is outweighed by the strong public interest in the timely understanding and scrutiny of the recommendations made to the Senior Case Panel. The Commissioner notes the published minutes available at the time of the request and the Annual Report that was subsequently published on 6 July 2023. However, the Commissioner considers that this does not provide the timely understanding and scrutiny of the recommendations and analysis which are DWP's own considerations of where improvements are needed or where policy was not followed. The Commissioner is also not persuaded that it is in the public interest to wait until after these actions have been implemented before publishing information on the recommendations. The Commissioner considers that there is greater understanding to be gained from the timely disclosure of information than retrospective scrutiny.
54. The paper provides insight and understanding of where DWP acknowledges that errors occur or improvements are required. This will also allow scrutiny of whether DWP has taken action to implement these improvements or ensure that the errors reduce. Disclosure would also

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<sup>1</sup> <https://www.gov.uk/government/publications/dwp-annual-report-and-accounts-2022-to-2023>

allow scrutiny of whether the actions taken were sufficient or timely enough to make a difference to the experience of vulnerable customers.

55. The Commissioner considers that there is a strong public interest in understanding DWP's approach to preventing future errors and safeguarding issues.
56. Whilst the Commissioner accepts that there is weight to the public interest arguments regarding allowing DWP the space to discuss improvement 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.
57. The Commissioner does not consider that significant weight should be attributed to the argument that the paper was created with no intention to circulate beyond the Serious Case Panel. FOIA has been in force since 2005 and public authorities are, by now, aware that information may be disclosed.
58. The Commissioner also does not accept DWP's arguments that disclosure could have a negative reputational impact or could provide a skewed or inaccurate picture. The Commissioner's established position is that public authorities would have the opportunity to provide the relevant context or explanations at the time of the disclosure, should it wish.
59. The Commissioner has issued guidance on 'chilling effect' arguments in relation to section 36<sup>2</sup>. 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 a better quality of advice.
60. Chilling effect arguments operate at various levels. Whether it is reasonable to think that a chilling effect would occur would depend on the circumstance 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.
61. Having reviewed the withheld information, the Commissioner notes that it does contain candid analysis of where DWP could make

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

improvements, however, these are not attributable to any individual. The Commissioner is not persuaded that disclosure would cause officials to provide lower quality advice in future is a particularly compelling argument. As set out above, civil servants and officials are required to provide quality advice and the Commissioner does not consider that disclosure would jeopardise this.

62. The Commissioner also considers that there is a strong public interest in disclosing this advice and recommendations to allow scrutiny of the quality of the analysis put to the Serious Case Panel and whether the recommendations are accepted and implemented.
63. The Commissioner recognises that the information was five months old at the time of the request and relatively this is not a significant amount of time since the discussions and therefore this will increase the public interest in protecting the safe space to discuss improvements needed. However, he does not consider that this is sufficient to outweigh the significant public interest in disclosure.
64. The Commissioner therefore finds that DWP is not entitled to withhold the requested information under section 36.

#### **Section 44: Prohibition on disclosure**

65. DWP confirmed that a small amount of the requested information is prohibited from disclosure by section 123 of the Social Security Administration Act 1992 (SSAA). The SSAA makes the unauthorised disclosure of information acquired in the course of employment in social security administration, which relates to a particular person, a criminal offence.
66. As section 44(1) expressly provides that FOIA should be discounted when determining whether disclosure is prohibited, the Commissioner cannot consider that FOIA provides a lawful authority for disclosure.
67. The Commissioner is satisfied that the disclosure of the withheld information, as it is held by DWP, would be disclosure of information that relates to a particular individual(s). The Commissioner cannot provide further details as to do so would risk negating the purpose of the exemption.
68. The Commissioner accepts that disclosure would be made by those 'employed in social security administration or adjudication'.
69. Section 123(3) of the SSAA provides two conditions in which the disclosure of this kind of information by DWP will not constitute an offence. These are that:

- a. The information in question has previously been disclosed to the public with lawful authority.
  - b. If the information in question is disclosed in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.
70. In relation to the first of these, the Commissioner has not been provided with any evidence that the withheld information has been previously disclosed to the public with lawful authority – therefore he does not consider that this condition applies.
71. In relation to the second of these, the Commissioner considers that the requested information cannot be provided in an anonymous manner as it is the personal information of claimant(s).
72. The Commissioner considers that the disclosure of the small amount of the requested information is prohibited by section 123 of the SSAA. As such, he considers that this information is exempt under section 44(1)(a) of FOIA.
73. The exemption is absolute, and is therefore not subject to the public interest test.

## **Procedural matters**

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### **Sections 10 & 17: Procedural issues**

74. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the exemptions:
- a. To be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - b. If that is the case, to have that information communicated to him.
75. Section 10(1) of FOIA provides that public authorities must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
76. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest

considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total.

77. The extension to the statutory timeframe provided by section 17(3) applies only to the consideration of the balance of the public interest. Public authorities must, within the statutory timeframe of 20 working days, confirm that the information is held and confirm what exemption it considers is engaged.
78. The extension to the statutory timeframe cannot be used to determine whether an exemption is engaged.
79. As set out above, DWP initially confirmed that it considered that section 36 was engaged on 4 April 2023, however, it did not obtain the Qualified Person's opinion until 21 April 2023, after it had extended the timeframe to consider the balance of the public interest.
80. It is clear that when extending the statutory timeframe, DWP had not yet ascertained which exemption was engaged. DWP was not therefore entitled to rely on section 17(3) to extend the statutory timeframe.
81. For the above reasons, the Commissioner finds that DWP breached section 10(1) and 17(1) of FOIA by failing to respond adequately within the statutory timeframe.
82. The Commissioner has previously issued a Practice Recommendation regarding DWP's request handling and he expects DWP to take steps to improve its handling of section 36 cases such that its responses represent the quality expected of a large governmental department with the knowledge and expertise available to DWP.

## Other matters

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83. 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 automatically render the opinion unreasonable, he does remind DWP that the Qualified Person's opinion relates specifically 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. DWP should ensure that it does not weaken its position that the Qualified Person's opinion is reasonable by appearing to pre-determine the outcome of the opinion by including the public interest.

## Right of appeal

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84. 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)

85. 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.
86. 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**