

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2024

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 information regarding an internal audit of Universal Credit claimants. The Department for Work and Pensions (DWP) withheld the requested information on the basis of section 35(1)(a), formulation or development of government policy.
2. The Commissioner's decision is that DWP is entitled to rely on section 35(1)(a) to withhold the majority of the information, however, the balance of the public interest favours disclosure for the information that is in the public domain.
3. The Commissioner requires DWP to take the following steps to ensure compliance with the legislation:
 - Disclose document 6 which is already in the public domain
4. The public authority must take these steps within 30 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

5. On 19 October 2023, the complainant wrote to DWP and requested information in the following terms:

"I understand that the Department has conducted an internal audit of cases in which Universal Credit claimants have been placed in the Limited Capacity for Work-Related Activity on the basis of substantial risk. Please provide me with any documentation, emails, or other material held about this exercise. A non-exhaustive list of the type of information I am requesting is below:

- The aims of the exercise
 - Who commissioned the exercise
 - Who conducted the exercise e.g. job titles, a summary of relevant professional experience
 - Instructions or supporting material given to those conducting the exercise, in particular regarding the definition and interpretation of 'substantial risk'
 - The date of the exercise
 - How the cases were selected
 - The Methodology of the exercise
 - The results of the exercise and any subsequent analysis or interpretation of those results
 - How the Act informed the development of recent proposals regarding the Work Capability Assessment"
6. DWP provided its response on 15 November 2023 and confirmed holding the requested information. DWP withheld the information on the basis of section 35(1)(a), formulation or development of government policy. DWP upheld this position at internal review.

Scope of the case

7. The complainant contacted the Commissioner on January 2024 to complain about the way their request for information had been handled. Specifically, they disputed that DWP was entitled to rely on section 35(1)(a) to withhold the requested information.
8. The Commissioner therefore considers that the scope of this case is to determine whether DWP is entitled to rely on section 35(1)(a) to withhold the requested information.

Reasons for decision

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

9. 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”

10. Section 35 is a class based exemption therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt, there is no need for the public authority to demonstrate prejudice to these purposes.

11. 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.

12. ‘Development’ may go beyond this stage to the process involved in improving or altering existing policy, such as piloting, monitoring reviewing, analysing or recording the effect of existing policy.

13. 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, focussing on the content of the information in question and its context.

14. 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 by the 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.

15. Although ‘relates to’ is given a wide interpretation, as the Court of Appeal noted in *Department for Health v The Information Commissioner and Mr Simon Lewis* [2017] EWCA Civ 374, of the First Tier Tribunal’s findings in that matter, the phrase “should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context” and that a “mere

incidental connection between the information and a matter specified in a subparagraph of s.35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph”.

16. Therefore there must be a clear and tangible relationship between the content of the information withheld under this exemption and the process that is being protected (ie the formulation or development of government policy).
17. The Commissioner’s guidance on section 35(1)(a) sets out that information does not need to have been created as part of the formulation or development of government policy. Information may ‘relate to’ the formulation or development of government policy due to its original purpose when created, or its later use, or its subject matter.
18. The exemption is not limited to information that contains policy options, advice or decisions. Pre-existing information about the history or factual background of a policy issue is also covered.

DWP’s arguments

19. DWP confirmed that the requested information relates to the changes made to the Work Capability Assessment (WCA) Activities and Descriptors as announced in November 2023 following public consultation. DWP explained that the WCA assesses entitlement to Employment and Support Allowance and the additional health-related amount of Universal Credit.
20. DWP set out that the request was received on 19 October 2023, at which point the Government was consulting on changes to the Activities and Descriptors of the WCA. DWP explained that the information requested specifically relates to the changes to the Substantial Risk rules in the WCA, which are currently still in development. DWP explained that as part of this policy development, it has been working with clinical stakeholders to define the criteria for the Substantial Risk rules and the medical evidence requirement.
21. DWP explained that the policy in question is currently in the development stage. DWP explained that while it announced the intention to change the Substantial Risk Criteria in November 2023 to realign it with the original policy intent of only applying in exceptional circumstances, the preferred option for giving effect to that change needed further policy consideration. DWP explained that engagement with expert stakeholders is a critical component in ensuring that any changes provide the appropriate safeguards for the most vulnerable. DWP explained that as part of this policy development, it has been

working with clinical stakeholders to define the criteria for the Substantial Risk rules and the medical evidence requirement. DWP considered that until this work is complete, it will not have certainty over the policy on Substantial Risk.

22. DWP directed the Commissioner to the wording within the Government's response to the consultation pertaining to Substantial Risk:

"Amending the LCWRA [Limited Capability for Work Related Activity] Substantial Risk with its original intention of only applying in exceptional circumstances. We will specify the circumstances, and physical and mental health conditions, for which LCWRA Substantial Risk should apply. This will include protecting and safeguarding the most vulnerable, including people in crisis and those with active psychotic illness. We will work with clinicians to define the criteria and what medical evidence is required from claimants and people involved in their care, to ensure the process is safe, fair, and clear".

23. DWP considered that this makes clear that when the Government published its response to the consultation, the policy detail on the changes to Substantial Risk was not settled and no decisions had been reached. DWP confirmed that at the time of the request, 19 October 2023, the consultation was ongoing and Ministers had not yet been advised nor taken a final decision on the shape of the Substantial Risk policy changes in line with Gunning Principle 1¹ "proposals [were] still at a formative stage". DWP explained that a decision at this stage would have meant that the consultation was illegitimate and risked the safe space of policy development.

24. DWP confirmed that it is still working through the detail of the policy changes, including how it defines eligibility for LCWRA Substantial Risk and the medical evidence requirement. DWP considered that until these policy decisions are taken, and it has identified a preferred option for the change to the Substantial Risk rules, it will not have policy certainty. DWP explained that Ministers have not yet been advised nor taken a final decision on the shape of the Substantial Risk policy changes and therefore it does not have policy clarity to move to implementation and operationalising the change.

The Commissioner's position

25. Having reviewed the withheld information and DWP's submissions, the Commissioner accepts that the specified withheld information relates to

¹ <https://www.local.gov.uk/sites/default/files/documents/The%20Gunning%20Principles.pdf>

the development of government policy, that being reform to the Work Capability Assessment.

26. The Commissioner notes that the request was made on 19 October 2023 and DWP provided its response on 15 November 2023. The consultation ran from 5 September 2023 to 30 October 2023 with the Government's response published on 22 November 2023². Therefore, at the time of the request and response, the Government had not yet announced its position on the changes to WCA.
27. The Commissioner therefore accepts that the information withheld under section 35(1)(a) relates to the development of this policy and section 35(1)(a) can be engaged.
28. Section 35(1)(a) is a qualified exemption and the Commissioner will therefore proceed to consideration of the balance of the public interest.

Public interest in disclosure

29. In its response to the request, DWP acknowledged that there is a public interest in how the WCA policy is being developed and that disclosure would provide greater transparency on how the policy is being developed. DWP recognised that this makes government more accountable to the electorate and increases trust. DWP considered that there is also a public interest in being able to assess the quality of advice being given to ministers and subsequent decision making.
30. DWP repeated these arguments in its submissions to the Commissioner.
31. The complainant set out that due to the lack of detail in DWP's response on how it applied the public interest test, it is difficult to divine and respond to its reasoning. The complainant considered, however, that there is a considerable public interest in disclosure of the information.
32. The complainant explained that the outcome of a Work Capability Assessment can have a significant impact on a claimant and being awarded LCWRA status has two impacts:
 - It provides an additional amount of means-tested Universal Credit, which in 2023/24 is £390. This is a more than doubling of the Standard Allowance for a single person, and increases the Standard Allowance for a couple by two-thirds.

² <https://www.gov.uk/government/consultations/work-capability-assessment-activities-and-descriptors#full-publication-update-history>

- It exempts the claimant from any work-related requirements or conditionality, meaning that they are not at risk of having their benefits reduced by a sanction.
33. The complainant explained that the 'substantial risk' criteria enables a claimant to be granted LCWRA status if they do not meet any of the fundamental criteria that are otherwise necessary to receive that status. They further explained that it is a backstop provision to protect the most vulnerable claimants who would otherwise be at risk of harm. The complainant considered that this is often, although not exclusively, used in relation to claimants who would be at risk of self-harm or suicide if they were exposed to mandatory requirements and conditionality.
34. The complainant stated that there is considerable public interest in the operation of the WCA. They set out that the Work and Pensions Select Committee report into disability benefit assessments, including the WCA, found that³:
- "We are deeply concerned that nearly five years after our predecessor's Report, people are still experiencing psychological distress as a result of undergoing health assessments. In some cases, issues or errors in the system are associated with or have been found at Coroner's Inquest to have contributed to the deaths of claimants".
35. The complainant explained that more recently, the same Committee launched an investigation into how well DWP safeguarded vulnerable claimants, noting⁴:
- "Over the three years from July 2019 to July 2022 the number of Internal Process Reviews (IPRs) – DWP's internal investigations into allegations of DWP case handling which have fallen short of expected standards, with a severe negative impact on a claimant – has more than doubled. 140 IPRs were conducted into claimant deaths over this period compared with 64 reviews carried out between 2016 and 2019".
36. The complainant directed the Commissioner to an oral evidence session with the Secretary of State for Work and Pensions where a member of the Committee also raised DWP's refusal to disclose the information that is the subject of this complaint⁵.

³ <https://committees.parliament.uk/publications/34727/documents/191178/default/>

⁴ <https://committees.parliament.uk/work/7866/safeguarding-vulnerable-claimants>

⁵ <https://committees.parliament.uk/oralevidence/13961/pdf>

37. The complainant raised that the WCA and government's proposals has also attracted considerable media attention including a three part BBC radio 4 documentary⁶ and coverage on the BBC News website⁷.
38. The complainant explained that the cohort of claimants who are currently eligible for LCWRA, particularly on the basis of substantial risk, are especially vulnerable. They considered that "many of the tragic cases about which information is publicly known about claimants who have died relates to claimants who were in receipt of LCWRA (or its predecessor within ESA, the Support Element). In some cases, the refusal of LCWRA or its predecessor benefit appears to have been a relevant factor in the death"⁸.
39. The complainant explained that the changes will mean that some claimants who today would fall under the 'substantial risk' criteria would not if they made a claim in future. The complainant stated that, as a result, these future claimants will be required to have some degree of interaction with a Work Coach, or face being sanctioned and having their benefits lowered. The complainant considered it relevant that there is no minimum qualification requirement for a Work Coach⁹ and that this adds to the risk that this policy will expose some claimants to.
40. The complainant set out that analysis published by the Office for Budget Responsibility suggests that by 2028/29, over 370,000 people would not receive LCWRA as a direct result of the changes to the WCA¹⁰. The complainant considered that this demonstrates that this is a substantial policy change that there is considerable public interest in fully understanding the basis for.
41. The complainant considered that the 'safe space' argument put forward by DWP is highly flawed in relation to the specific information requested. The complainant accepted that the information may have been used in the development of policy, however, they stated that the outcome of the

⁶ <https://www.bbc.co.uk/programmes/m001mcjz>

⁷ <https://www.bbc.co.uk/news/uk-67385385>

⁸ <https://www.theguardian.com/politics/2023/may/12/erroll-graham-missed-chances-man-who-starved-nottingham-report>, <https://www.disabilitynewsservice.com/dwp-hounded-disabled-woman-for-years-before-her-starvation-death-papers-show/> & <https://www.disabilitynewsservice.com/mother-of-fit-for-work-victim-calls-for-ministers-to-face-criminal-charges/>

⁹ <https://www.disabilitynewsservice.com/work-coaches-with-no-gcses-could-decide-on-fit-for-work-activity-dwp-admits/>

¹⁰Table 3.4 https://obr.uk/docs/dlm_uploads/E03004355_November-Economic-and-Fiscal-Outlook_Web-Accessible.pdf

consultation it may have been prepared for has now been announced, in which DWP set out its next steps¹¹.

42. The complainant also directed the Commissioner to the Chancellor's speech at the 2023 Autumn Statement which included the following line¹²:

"We will reform the Work Capability Assessment to reflect greater flexibility and availability of home working after the pandemic".

43. The complainant considered that these prepared public announcements are clear and precise about the proposals DWP will be taking forward. They believed that there were clearly no further substantive policy development to be done and that the WCA policy was no longer being developed and was now in a stage of implementation.
44. The complainant stated that DWP's position implies that internal research or analysis conducted in support of policy development is deserving of the same protection as advice. They considered that this is a "specious argument" and that a safe space for research and analysis is qualitatively different from a safe space for advice from officials and amounts to policy making taking place without public accountability and scrutiny.
45. The complainant also explained that DWP disclosed the existence and broad findings of the research during the consultation period. They stated that if DWP truly considered this research to be deserving of the strong protection it is now claiming, they believed that it is highly unlikely that a senior official would have felt able to publicly reference it during the consultation.

Public interest in maintaining the exemption

46. DWP confirmed that it had taken the following public interest considerations into account:
- The Government need a safe space to develop policy ideas, debate live issues, and reach decisions away from external interference and distraction.

¹¹ <https://www.gov.uk/government/consultations/work-capability-assessment-activities-and-descriptors/outcome/government-response-to-the-work-capability-assessment-activities-and-descriptors-consultation>

¹² <https://www.gov.uk/government/speeches/autumn-statement-2023-speech>

- If the safe space of policy making is not protected, the decision-making risks becoming poorer.
 - DWP regularly takes action to determine whether policy is being applied correctly. It considered that this process does not need to be accomplished by public scrutiny.
 - Despite the high level of public interest in policy that relates to financial matters of claimants, it is essential to make correct decisions and engage properly with disability and clinical stakeholders. In order to do this effectively, the safe space of policy development must be protected.
47. DWP explained that disclosing the information at this stage would risk poor policy-making and decision-making as the policy itself is still within its development stage.
48. DWP explained that it is still working through the detail of the policy changes, including how it defines eligibility for the LCWRA Substantial Risk and the medical evidence requirement. DWP considered that until these policy decisions are taken, and it has identified a preferred option for the change to the Substantial Risk rules, it will not have policy certainty.
49. DWP explained that Ministers have not yet been advised nor taken a final decision on the shape of the Substantial Risk policy changes and therefore a safe space for them to do this is essential to the policy's success.
50. DWP explained that the information requested was collected as part of early stage thinking on changes to the WCA. It considered that the information is still relevant now and it is imperative it is protected.
51. DWP considered that the Government response to the public consultation in November 2023 makes clear that the policy detail on the changes to the Substantial Risk was not settled and no decisions had been reached. DWP confirmed that this is still the case now.
52. DWP acknowledged that there is a desire of the public to understand and have a say in welfare policy, especially if that policy affects benefits entitlement, and DWP stated that the Government welcomes collaborative policy-making.
53. DWP considered, however, that the safe space for Ministers to develop policy is essential to enable an impartial and appropriate decision, away from public interference.

54. DWP recognised that disclosure would allow the public to have transparency on how the policy is being developed but considered that this risks poor decision-making and a lack of safeguards for vulnerable people.
55. DWP confirmed that it had already committed to publishing an Equality Impact Assessment in due course and set out that this will give the opportunity to assess whether the policy has a disparate impact on persons with protected characteristics.
56. DWP stated that this is a positive opportunity to ensure that it makes sound decisions based on robust evidence and until this time, it is essential that the Government is allowed to explore policy options free from public scrutiny.
57. DWP confirmed that, on balance, it was satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The balance of the public interest

58. The Commissioner accepts 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.
59. Whilst the Commissioner accepts that the public interest in maintaining the exemption will be strongest while the policy is still being formulated or developed, this does not convert the exemption to an absolute one where information will not be disclosed simply because of the stage that the policy process has reached. There will be occasions where the government policy is at the formulation or development stage and the public interest in disclosure is sufficiently strong that the public interest in maintaining the exemption will not outweigh this.
60. The Upper Tribunal in *Montague v Information Commissioner and Department for International Trade* [2022 UKUT 104 (AAC)] found that the correct point at which to assess the balance of the public interest is the point at which the public authority issued its refusal notice, or should have issued this if this occurred outside of the statutory timeframe of 20 working days.
61. This ruling is binding on the Commissioner and he is therefore required to consider the balance of the public interest on the basis of the circumstances at 15 November 2023. At this point, whilst the consultation had ended, DWP and the Government had yet to announce its policy decision which would later occur on 22 November 2023.

62. The Commissioner's guidance on section 35(1)(a) clearly sets out that, in addition to the timing of the request, the relevance and weight of the public interest arguments will depend on the content and sensitivity of the information itself and the effect of its release in all the circumstances of the case.
63. As set out above, the Commissioner notes that, at the time of the request, the Government had not yet responded to the consultation and was still developing this response.
64. The Commissioner acknowledges the public interest in understanding and scrutinising how the Government has come to its decision regarding the WCA. However, having reviewed the withheld information, he is not persuaded that disclosure would further this public interest sufficiently to outweigh the strong interest in allowing the Government the safe space to develop its policies.
65. The Commissioner has found that the public interest in maintaining the exemption outweighs the public interest in disclosure for the majority of the information. In reaching this finding, the Commissioner has placed particular weight on the timing of the request – ie that disclosure would have resulted in information relating to the Government's policy development being placed into the public domain before the Government had announced its policy decision.
66. However, DWP has confirmed that one of the documents falling within the scope of the request, document 6, is publicly available.
67. When asked to confirm its position regarding this information, DWP simply directed the Commissioner to the fact that it is publicly available.
68. DWP has not provided any arguments why this information cannot be provided to the complainant in response to this request. The Commissioner therefore requires DWP to disclose "document 6" to the complainant.

Other matters

69. DWP should ensure that future requests for this, or similar information, are handled on the basis of the circumstances at the time of the request. The Commissioner's decision in this specific case does not set a precedent that any requests made after the Government's announcement should automatically be withheld under section 35(1)(a).

Right of appeal

70. 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

71. 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.
72. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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