

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2013

Public Authority: Department for Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested a copy of the Department for Work and Pension's (DWP's) business case for the universal credit programme. The DWP refused to provide this information on the basis of section 36(2)(b) and (c).
2. The Commissioner's decision is that the DWP correctly engaged the exemption and after considering the public interest arguments the DWP were correct to withhold the business case and a number of the annexes. The Commissioner found that the exemptions were not correctly applied to annexes I and L.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose annexes I and L
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 12 June 2012, the complainant wrote to the DWP and requested information in the following terms:

"A copy of the DWP's business case for the universal credit programme."

6. The DWP responded on 10 July 2012. They withheld the information from disclosure, relying upon the section 36(2)(b) and (c) exemptions.
7. Following an internal review the DWP wrote to the complainant on 13 August 2012. It stated that it upheld its original decision to withhold the information on the basis of section 36(2)(b) and (c).

Scope of the case

8. The complainant contacted the Commissioner on 21 August 2012 to complain about the way his request for information had been handled. In particular the complainant raised concerns that the universal credit programme was running late and over budget and public interest in the project was high so there was a need for transparency.
9. The Commissioner considers the scope of his investigation to be to establish if the DWP has correctly applied section 36(2)(b) and (c) to withhold the requested information.

Background

10. Universal credit is a new single payment scheme to replace substantial parts of the existing social security system. The DWP carried out a consultation exercise in relation to universal credit between July and October 2010 and the White Paper 'Universal credit: welfare that works' was published in November 2010. Following this the Welfare Reform Bill was published on 16 February 2011 and the Welfare Reform Act received Royal Assent on 8 March 2012. This Act set out the framework for universal credit and draft secondary legislation was sent to the Social Security Advisory Committee in October 2012.
11. The request was made to the DWP on 12 June 2012, after the Welfare Reform Act had received Royal Assent but before the publication of the main scheme regulations on 10 December 2012 which contained many supporting regulations and an Impact Assessment.

Reasons for decision

12. Section 36(2) of the FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information –

(b) would, or would be likely to, inhibit –

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

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

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

13. The exemptions listed in section 36(2) are qualified exemptions so are subject to public interest tests. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
14. For any of the exemptions listed at section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for the DWP is the Minister for Welfare Reform, Lord Freud. The DWP has provided the Commissioner with evidence to demonstrate that the opinion has been sought and provided. The Commissioner has next gone on to consider whether the opinion of the Minister was a reasonable one.
15. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following: *"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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."*¹
16. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:

¹ Information Commissioner's section 36 FOIA guidance, http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx, November 2011, page 6.

- whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
17. The DWP explained that there are parts of the business case which are already public knowledge. For example, much of the strategic case and details of the governance of the programme and its management are public and even where they are not they may not be particularly contentious. Other parts of the business case contain information to which Ministers have already considered the application of exemptions under the FOIA such as the risk logs. The business case also contains what the DWP considers to be sensitive information such as commercial arrangements, estimates of headcount reductions, provisions for redundancies and estimates of costs and savings.
18. The DWP has argued that the business case should be considered as a whole rather than in a piecemeal fashion by looking at each piece of information or categories of information because all of the elements, whether likely to be more contentious or not, form part of a complete assessment of the costs and benefits of the universal credit programme. The DWP considers the intention of business case is to set out the full range of information about an initiative and this is intended to be seen as a whole picture rather than in individual pieces.
19. The Commissioner has considered this argument and does accept that it was reasonable for the qualified person to consider the business case as a whole when forming the opinion rather than in individual parts as it is intended to be considered as an entire document in order to provide full information and the logic for the decision.
20. In addition to this, the DWP has stated it considers disclosure would also have a chilling effect on the provision of advice by officials. The DWP argues that disclosure of the business case would be likely to inhibit staff from providing free and frank advice in the future as the business case was developed with no expectation that it would be made available to the public whilst the programme was on going. Had officials known that the business case would be widely disclosed; the advice provided may have been more measured and would not have allowed for objective decisions to be made regarding the programme. As such, the DWP considers disclosure of the business case would be likely to impact on the free and frank provision of advice in the future.
21. The DWP has further explained that the business case contains the full range of variables that are necessary to take objective decisions on the

delivery of the universal credit programme. Disclosure of the business case, containing as it does projected staff savings and commercially sensitive information, would risk diverting staff resource and management time from delivery of the Programme to dealing with questions and correspondence from people looking for clarification and reassurances. The DWP argues that this would therefore be likely to otherwise prejudice the effective conduct of public affairs.

22. The timing of the request has also been considered and in particular the fact that the request was made at a point when draft secondary legislation had not been submitted regarding the programme and the main scheme regulations had not been published. The DWP has stated that the universal credit programme used the business case throughout its various stages and it was in a constant state of evolving. Throughout the programme and particularly at the time the request was made there would have been a need for a safe space for officials to make changes to the business plan and to evolve the business case as the programme progressed through its various stages. This would have required the input of officials and a safe space in which to provide advice.
23. The DWP has provided sufficient evidence to illustrate that the Minister was provided with information explaining that he was required to form a reasonable opinion in relation to the application of section 36(2) of the FOIA to the information withheld by the DWP in this case. It is clear having reviewed this information the Minister formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank provision of advice and the effective conduct of public affairs.
24. For the reasons outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. Therefore, he considers that sections 36(2)(b)(i) and (ii) and (c) are engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

25. The DWP acknowledged the strong public interest in the disclosure of information which ensures transparency in the way in which government operates and in the increased transparency and accountability of Ministers and public officials leading to increased trust in governmental processes.
26. With more specific reference to the withheld information, the DWP did recognise that disclosure of the business case would increase the public's trust in the government's effectiveness in successfully delivering

large scale projects and programmes on schedule, to scope and within budget.

27. The Commissioner also recognises that increased transparency in large scale projects is particularly important where the use of public funds and taxpayer's money is involved. The business case would enable the public to better scrutinise the Programme and ensure public money is being spent in the public interest, particularly in a scheme like Universal Credit which is likely to impact on the lives of millions of people.
28. Both the DWP and the Commissioner acknowledge that the high profile nature of the Universal Credit Programme, its wide reaching implications and its delivery have prompted significant media attention. This would suggest there is a public interest in disclosure of any information surrounding the delivery of the programme.

Public interest arguments in favour of maintaining the exemption

29. When making a judgement about the weight of the public authority's arguments, the Commissioner will consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.
30. The DWP argues that the business case and its constantly evolving nature, as well as the timing of the request and the media scrutiny around the Programme are such that disclosure of the information would be likely to inhibit the free and frank provision of advice, exchange of views and the effective conduct of public affairs.
31. As a counter to the public interest in disclosure to increase transparency, the DWP argues this is a very high level, general argument which does not take account of the need to maintain a 'safe space' for the development of policy and the ability to make robust decisions based on frank advice on government Programmes.
32. To support its argument that the maintenance of a safe space is relevant in this case, the DWP has explained that the business case was prepared on the basis that it would be circulated to a limited group within Government, covering its key stakeholders at a senior level. It is this implicit understanding that allowed contributors to the business case to provide candid advice to assist in the formulation of the business case. The Commissioner considers that it is reasonable for officials to have an expectation of limited circulation within an initial period but that this is not sustainable over a longer period. In this case the Commissioner accepts the very close proximity between the last major update to the business case and the request.
33. The business case relies on the frank and candid assessment of costs, benefits and risks. The business case is a critical document in

maintaining the integrity and effectiveness of the DWP's programme management process and the objective assessment of projects. The DWP considers disclosure may lead to future business cases being more 'positive' as they may become public documents but that it is vital that they remain objective documents based on candid advice and opinions so that robust decisions can be made on whether initiatives can proceed.

34. The DWP does accept that civil servants who are involved in producing business cases will remain bound to discharge their functions responsibly whether the business case is published or not but there is a real risk of business cases losing their objectivity if officials contributing to them in the future are more reluctant to offer honest opinions which may not always be positive. Inhibition of this process would not be in the public interest as it would mean that future business cases may not be based on the best advice in the circumstances and decisions on whether to spend public money on initiatives may not be robust.
35. In terms of the likely prejudice to the effective conduct of public affairs; the DWP considers the disclosure of the business case and the surrounding media interest and public scrutiny would detract from the DWP's primary objective of delivering the programme efficiently by diverting resources away from implementation to respond to queries and concerns.

Balance of the public interest arguments .

36. The DWP has mentioned the need to maintain a 'safe space' in its responses to the complainant and its submissions to the Commissioner. The Commissioner generally considers safe space arguments to be applicable to arguments regarding the formulation and development of policy and the need to debate issues and make decisions away from public scrutiny. In this case the arguments have been advanced in relation to the need for civil servants to be able to provide free and frank advice to contribute to the production of objective business plans which in turn are an integral part of the decision-making process with regards to proceeding with initiatives and projects.
37. Whilst key milestones had been passed in the universal credit programme, such as the passing of the Welfare Reform Act, the Commissioner does accept that the safe space arguments are valid in this case and does acknowledge that there was a real possibility of a chilling effect if the information had been disclosed at the time of the request. This may lead to the provision of less candid advice by officials involved with the programme. Whilst the Commissioner is often sceptical of general arguments on chilling effect he places significant weight on the timing of the request, as noted above, being so close the recent significant update to the business case. A strong chilling effect is more

likely if the disclosure comes at a time when the latest version was still being disseminated and discussed across government. He also accepts that there is a strong public interest in effective business case documentation being produced for the project.

38. Given the timing the Commissioner also accepts that strong weight can be given to the argument that disclosure would be likely to create an unreasonable level of disruption at a time when the universal credit programme was still in the process of being finalised and draft secondary legislation being submitted for approval. There is a strong public interest in DWP's ability to deliver its aims on time and within budget and the increased scrutiny could divert resources from the programme to dealing with enquiries. For this reason the Commissioner acknowledges the strong public interest in maintaining the effective conduct of public affairs.
39. However, the Commissioner finds that the arguments in favour of maintaining sections 36(2)(b) and (c) are very strong for the business case document and most of the annexes, but not all.
40. The Commissioner considers that there is a very strong public interest in openness and transparency in relation to the universal credit project. The project may materially affect a significant percentage of the population and it is an important public interest matter for a number of reasons:
 - The project represents a significant change to how welfare provision is apportioned, managed and delivered;
 - Changes to welfare provision can impact on the most vulnerable members of society;
 - The track record of governments not delivering on large projects with significant IT components;
 - The project will represent a significant outlay of public money. The government have made clear their intention for the project to ultimately save money for the taxpayer;
 - The project involves other parts of the public sector, such as local authorities and the project could impact on the delivery of local services as well;
41. There is also a strong public interest in the particular information, which would significantly inform public debate about the costs and benefits of the project and the merits of the detailed arguments in favour of the project.

42. As in other cases related to universal credit the Commissioner can see strong arguments on both sides but that the timing of the request is an important factor in supporting the arguments in favour of maintaining each of the exemptions. He finds that the public interest in maintaining each of the exemptions under 36(2)(b) and (c) outweighs the public interest in disclosure for the business case core document and some of the annexes. The DWP correctly applied section 36 to this information.
43. However, for the annexes I and L the Commissioner finds that the public interest in maintaining the exemptions does not outweigh the public interest in disclosure. Whilst the Commissioner notes the DWP's arguments about considering the business case and the annexes as whole it is important to consider each document under the public interest test. He considers that harm under section 36(2)(b) and (c) is much less severe and he sees little harm in disclosing them out of context from the overall document.
44. The DWP must therefore disclose annexes I and L.

Right of appeal

45. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. 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

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