

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 9DA

Decision (including any steps ordered)

1. The complainant has requested copies of reports regarding the implementation and delivery of the Universal Credit project. The Department for Work and Pensions (DWP) refused to provide the requested information under sections 36(b) and (c) (prejudice to the effective conduct of public affairs) of FOIA. The Commissioner considers that each of the sections cited are engaged and that, in all the circumstances, the public interest in maintaining each of the exemptions outweighs the public interest in disclosure. He does not therefore require the DWP to take any steps as a result of this notice.

Request and response

2. On 28 March 2012 the complainant wrote to the DWP regarding a previous information request, which is not considered here, and also made a separate request in the following terms:

"[...] I note that the DWP has commissioned a Universal Credit Delivery Model Assessment Phase 1 and 2 and a Universal Credit End to End Technical Review which have not been published. Could these please be considered in the internal review."

3. Following the involvement of the Commissioner, the DWP wrote to the complainant on 19 July 2012 in respect of the new request. It advised that despite a thorough search of the Universal Credit Programme document library, the relevant papers had not been located. The DWP therefore concluded that the requested information was not held.

4. The complainant wrote to the DWP again later the same day and pointed out references to the information in a parliamentary reply dated 12 March 2012. The reply listed all the consultancy and audit projects commissioned in (i) 2010 before May, and (ii) from 2011 onwards, which included the following information –

Contract title	From	To	Supplier	Value (£)
Universal Credit Delivery Model Assessment Phase 2	21 March 2011	30 April 2011	McKinsey and Partners	350,000.00
Universal Credit End to End Technical Review	11 April 2011	3 May 2011	IBM	49,240.00

5. The next day, 20 July 2012, the DWP confirmed that it would conduct further searches for the reports highlighted. The DWP followed this up on 15 August 2012 by writing to the complainant and confirming that the reports had been located. The DWP advised, however, that the information requested was being considered under an unspecified exemption to which the public interest test applied and it required more time to make a determination as to this test.
6. The DWP subsequently provided its substantive response on 7 September 2012, which in effect represented its internal review. It considered that the requested information was exempt information under section 35(1)(a) and sections 36(2)(b) and (c), finding that the public interest arguments in maintaining the exemptions outweighed those in favour of disclosure.

Scope of the case

7. The complainant contacted the Commissioner on 10 September 2012 to complain about the DWP's refusal to disclose the information he had requested about Universal Credit.
8. During the course of the Commissioner's investigation, the DWP confirmed that it was no longer seeking to rely on section 35 to withhold any part of the requested information. It has therefore remained for the Commissioner to consider whether the DWP correctly applied section 36(2)(b) and (c) of FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

9. Sections 36(2)(b) and (c) states:

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

[...]

(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.

10. To find that any part of section 36(2) is engaged, the Commissioner must be able to establish that a qualified person gave an opinion which found that the exemption applied and that the opinion was reasonable.

11. The DWP has informed the Commissioner that it consulted with the Minister for Welfare Reform about the request, who provided his opinion on 5 September 2012. The Commissioner is satisfied that the Minister satisfies the specification of a 'qualified person' set out at section 36(5) of FOIA. Furthermore, the Commissioner has been provided with a copy of an email which evidenced that the qualified person approved the sign-off the application of the exemption on the date specified above. It is therefore left for the Commissioner to determine whether the opinion given was reasonable.

12. The Commissioner has seen the submissions produced by officials at the DWP and put before the qualified person on 5 September 2012, upon which the opinion was based. These included a description of the background to the request, an explanation of the section 36 exemption, a discussion of the harm arising from disclosure and an analysis of the public interest arguments both for and against the release of the information. It was recommended that the qualified person agree to the application of sections 36(2)(b) and (c) of FOIA. The Commissioner also understands that the qualified person had sight of the requested information.

13. The test of whether an opinion is 'reasonable' is based on the plain meaning of the word. Put simply, an opinion will be considered reasonable if it is an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion and not necessarily the *most* reasonable opinion.
14. As a prejudice-based exemption, section 36(2) of FOIA requires the qualified person to decide either that there '*would*' be a prejudicial or inhibiting effect or that it '*would be likely*' that the prejudicial or inhibiting effect would occur; '*would*' imposing a stronger evidential burden than the lower threshold of '*would be likely*'.
15. In this case the qualified person has subscribed to the advice set out in the submissions. This meant, in effect, that he agreed that disclosure '*would be likely to*' inhibit or prejudice the factors described by sections 36(2)(b) and (c) of FOIA. The Commissioner has therefore considered the qualified person's opinion in the context of whether it was reasonable to conclude that the risk of prejudice would be likely to arise through disclosure. Although the lower threshold, '*would be likely*' still requires that there must be a real and significant risk of prejudice.
16. In relation to sections 36(2)(b)(i) and (ii), the Commissioner considers that they are about the process that may be inhibited, rather than what is necessarily in the information itself. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views.
17. The submissions provided to the qualified person explain that the requested reports discuss the merits or drawbacks of the Universal Credit delivery model and an assessment of whether the IT architecture is fit for purpose. It goes on to advise that, by their very nature, the reports must be candid otherwise the DWP and the taxpayer will not secure value for money. A corollary of this candidness is that the reports can be negative in outlook.
18. It was the view of the officials at the DWP, and endorsed by the qualified person, that premature disclosure could lead to future consultants' reports being less frank. In addition, there is a risk that that this may lead to an absence of a recorded audit trail of the more candid elements. Similarly, it was argued that key staff selected to be interviewed by consultants are likely to be inhibited if they thought their contributions could be shared with the wider world.
19. The Commissioner notes that the '*chilling effect*' arguments do not explicitly specify whether disclosure would inhibit the way in which consultants and officials considered the particular issue in question, other similar issues, or other unrelated issues in the future. Instead, they concentrate on the general inhibiting effects that disclosure could

have on the future reports of consultants and the contributions of officials, which would impinge on the ability of the DWP to identify, assess and manage its key risks to delivery.

20. The Commissioner will normally adopt the view that arguments will carry less weight, and therefore are less likely to be reasonable, where they point to a relatively wide ranging chilling effect rather than to particular consequences. Nevertheless, the Commissioner has also reminded himself of the test for reasonableness set out in paragraph 13 above.
21. Bearing this in mind, the Commissioner has reflected on the purpose for which the information was created and is prepared to accept as reasonable the opinion which says that disclosure would be likely to have an inhibitory effect. He considers that an assessment of risks will only have value where it is based on frank advice and is driven by a forthright contribution of views; the candidness of which may be constrained where there is an expectation that the advice and views could be seen by the public and therefore open to criticism. The timing of the request and effect of disclosing at that time, whilst the information was still be actively considered and used as part of the project, supports the reasonableness of the opinion. The Commissioner has therefore decided that the qualified person's opinion is one which a reasonable person could have and thus that sections 36(2)(b)(i) and (ii) are engaged. Nevertheless, as part of the public interest test, he will form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.
22. The Commissioner turns now to the question of whether the qualified person's opinion on section 36(2)(c) of FOIA was also reasonable. At paragraph 56 of the Commissioner's section 36 guidance¹, it states that if section 36(2)(c) is used in conjunction with any other exemption in part II of the Act, the prejudice envisaged must be different to that covered by the other exemption. In *McIntyre v Information Commissioner and the Ministry of Defence* (EA/2007/0068)², the Tribunal decided that section 36(2)(c) will apply to those cases where:

¹http://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

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

"[...] the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure."

23. It is argued that the likely risk of disclosure of the reports would be to give the public an unbalanced understanding of the Universal Credit programme. This, in turn, would lead to public concerns that required management and ultimately damage progress of a key welfare reform.
24. The Commissioner understands that the reports explore a range of options and risks associated with the delivery of Universal Credit, not all of which had been fully addressed or mitigated against. He therefore considers that the qualified person's opinion on section 36(2)(c) is also reasonable, in that there is a real risk that disclosure would need the DWP to divert resources to manage public speculation about the risks associated with the project.
25. Having found that sections 36(2)(b) and (c) of FOIA are engaged, the Commissioner must next consider the public interest test. The qualified person's opinion will bring weight to the arguments in favour of withholding the information. However, the Commissioner will make up his own mind as to the severity of the prejudice and the weight that should be afforded to the arguments in favour of disclosure.

Public interest arguments in favour of disclosure

26. The DWP has acknowledged there is a strong public interest in disclosure. This is because transparency in the way the government operates should increase public trust in governmental processes. In particular, the DWP has pointed out that the release of the information will help shine a light on the "effectiveness with which government works in ensuring the successful delivery of major projects and programmes to time, scope and budget as part of the Department's key objectives."
27. The Commissioner has also found relevant the following arguments:
 - The project represents a significant change to how welfare 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 benefit 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.

Public interest arguments in favour of maintaining the exemption

28. The DWP has supported its case for non-disclosure by firstly contextualising the reasons for the reports being produced. It has explained that the reports assess the DWP's "state of readiness" to deliver Universal Credit. Furthermore, these reports were designed for limited circulation within the department so that its suppliers and officials could "think the unthinkable" and set out the worst case scenarios.
29. Building on this explanation, the DWP has argued that there is a strong public interest in preserving the safe space in which all options can be considered and a comprehensive and reliable assessment of risk made – precisely what is at risk if there was any fear that the policy options explored could be held up to public ridicule or criticism. The DWP has also claimed that disclosure may check the input of those contributing to the development of the delivery options. This would put at risk the successful implementation of Universal Credit in the future.
30. In advancing these points, the DWP has been aware of the counter argument that is sometimes made to the effect that suppliers and civil servants who contribute towards papers of this nature will remain bound to discharge their functions whether publication occurs or not. However, the difference here according to the DWP is that it is a relatively straightforward exercise to identify those who contributed to the reports, particularly the technical review. Thus, the counter argument fails to address the risk that views and advice will be sought and provided in less formal, unwritten ways.
31. The nature of the information also means that an accurate picture of the Universal Credit programme is not presented, but instead embodies the "imaginative pessimism" which is needed to ensure that all risks are contemplated and addressed. Furthermore, these would only provide a snapshot of the shifting picture of the perception of risk. The DWP has argued that disclosure would not add to the public debate on Universal Credit but would actually distort it by providing an unbalanced view of the programme. This would lead to unnecessary uncertainty and require the DWP to focus resources on redressing the distortions and negative

speculation on the development of Universal Credit in lieu of the completion of discussions.

Balance of the public interest arguments

32. The Commissioner considers that the public interest arguments in this case are finely balanced. On the one hand, the public interest in transparency commands significant weight because of the wide range of public interest factors (noted in paragraph 27 above) – in particular the Universal Credit project's far-reaching reforms of the existing social security system and the considerable number of people affected by these reforms. On the other hand, the Commissioner understands that effective decision making is dependent on the government being able to obtain candid advice.
33. The Commissioner has placed some importance on the knowledge that the reports only represent a shifting picture of the issues associated with a project and according to the DWP were drafted with a view that other activities would mean that they would be superseded within a short space of time. In fact, the DWP has confirmed that final versions of the reports were not produced on the grounds that other reviews had superseded them. To a degree, therefore, the Commissioner is sympathetic to the DWP's claim that disclosure would not provide the public with a balanced picture of Universal Credit and its implementation.
34. However, the Commissioner has reminded himself that one of the purposes behind the FOI legislation is to allow the public to have access to the information that plays a role in the delivery of public services. This is on the basis that it will help promote accountability and the public's trust in the decision making process which flows from this. Whilst the information was a snapshot in time, the public still have an interest in knowing what the state of the project was at that time and what information was being relied upon to make decisions about delivery.
35. In many cases a report which assesses the merits and drawback of a delivery model will by its very nature only reflect a partial, and naturally pessimistic, view of potential issues relating to the project. Yet, disclosure in this case will allow the public to better understand both the kinds of factors the government had considered before finalising its position on Universal Credit and the climate in which decisions on the development of the project had been made.

36. The Commissioner has next gone on to consider the timing of the request and the status of Universal Credit at that time. He finds that this is a crucial factor. The Commissioner accepts in principle that a public authority must be afforded room in which to debate issues away from public criticism. At the time of the request, the Welfare Reform Act 2012 – which set out the overall framework for Universal Credit – had received Royal Assent. However, Universal Credit was not due to launch until April 2013 and the Commissioner understands that the delivery model will continue to develop in preparation for a general roll-out of the scheme in 2017. Whilst major decisions had been made about the project the Commissioner accepts that other decisions were still to be made.
37. As stated, the DWP has pointed out that the reports were drafted in the knowledge that their relevance would shortly be superseded. It could therefore be argued that safe space in this context, just under a year after the reports had been produced, was no longer required as discussions relating to the implementation of the project would inevitably have moved on. However, in opposition to this, the Commissioner has been informed by the DWP that at the date of the request the delivery options were still being developed and no final decision had been made. The DWP has provided more detailed arguments, provided in confidence, that further illustrate the need for safe space. This, in the Commissioner's view, is a weighty consideration because it gives authority to the DWP's position that it would be premature and damaging to disclose the information at this stage of the process. This factor increases the weight that can be given to the severity of the effects under sections 36(2)(b)(i) and (ii).
38. The Commissioner understands that there will be occasions when the need for a public authority to be able to receive, and act on, candid advice prevails over recognisably strong arguments in favour of disclosure. This is one of those occasions. He has therefore found that, in all the circumstances, the public interest in maintaining each of these exemptions under sections 36(2)(b)(i) and (ii) outweighs the public interest in disclosure.
39. He also finds that the arguments about the wider disruption to the project that would be caused by disclosure are also very strong, in light of the timing, and the public interest in maintaining the section 36(2)(c) exemption also outweighs the public interest in disclosure.

Right of appeal

40. 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

41. 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.
42. 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

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF