

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 2022

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 the decision not to proceed with commissioned research into the use of food banks.
2. The Department for Work and Pensions (DWP) initially withheld all of the information under section 35(1)(a) (formulation or development of government policy) but disclosed some of the information during the course of the Commissioner's investigation. DWP also withheld some of the personal data contained within the document under section 40(2). The complainant did not dispute DWP's reliance on section 40(2).
3. The Commissioner's decision is that section 35(1)(a) is engaged with regards to the redacted information and that the balance of the public interest lies in disclosure for some of the withheld information with the public interest favouring maintaining the exemption for the remaining withheld information.
4. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - Disclose the first paragraph of the redacted section.
5. The public authority must take this step 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

6. On 6 January 2021, the complainant wrote to DWP and requested information in the following terms:

"Background: In FOI2020/80397 22nd December 2020 you revealed the research for the report you commissioned in 2018 titled "Update on commissioning food banks research" that was due to be published in October 2019 "was not taken past the planning stage".

FoI request: Please kindly provide a copy of the document that shows staff were instructed not to take the above past the planning stage so we may perhaps find the reason(s) for not taking it forward.

Search parameters: Letters, memos, meeting minutes."

7. DWP provided its response on 19 January 2021 and confirmed that it held information falling within the scope of the request. DWP confirmed that it was withholding the requested information on the basis of section 35(1)(a) because it relates to the formulation or development of government policy. DWP explained that this exemption protects the private space within which Ministers and their policy advisers can develop policies without the risk of premature disclosure.
8. DWP provided generic public interest considerations. It acknowledged the public interest in transparency of decision making, including assessing the quality of advice given to ministers which allows the electorate to hold the government accountable. In favour of maintaining the exemption, DWP stated that good government depends on decision making and this relies on accessing the best available advice and full consideration of all the options without fear of premature disclosure. DWP considered that failing to protect this risks decision making becoming worse and recorded inadequately.
9. DWP confirmed that it was satisfied that the balance of the public interest lies in maintaining the exemption.
10. The complainant requested an internal review of the handing of their request for information on 19 January 2021 and disputed that the public interest favoured maintaining the exemption. They considered that the public interest favoured disclosure due to the reported cases of child hunger and campaigns to end child hunger, including the campaign to extend free school meals by Marcus Rashford. The complainant provided

links to an article regarding child hunger numbers and Marcus Rashford's Wikipedia page as supporting evidence¹.

11. The complainant considered that these campaigns demonstrate that the general public will not tolerate children going hungry and the public would wish to know about anything which could be making the problem worse. The complainant considered that access to this information will enable the public to make better choices in future to stamp out child hunger.
12. DWP provided the outcome of its internal review on 26 January 2021 and upheld its original response. DWP repeated the arguments set out in its original response and did not provide any further insight.

Scope of the case

13. The complainant contacted the Commissioner on 26 January 2021 to complain about the handling of their request for information.
14. During the course of the Commissioner's investigation, DWP reviewed its position and disclosed part of the email containing the requested information. DWP disclosed one of five paragraphs and withheld the remaining four paragraphs under section 35(1)(a). DWP also redacted the personal data within the email on the basis of section 40(2).
15. The complainant confirmed to the Commissioner that they disputed DWP's reliance on section 35(1)(a) and they considered that the public interest lies in disclosure of the requested information. The complainant confirmed that they did not dispute DWP's redaction of personal data.
16. The Commissioner therefore considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 35(1)(a) to withhold the remaining four paragraphs.

Reasons for decision

Section 35: Formulation or development of government policy

¹ <https://www.walesonline.co.uk/news/uk-news/almost-two-million-children-went-19424026>
https://en.wikipedia.org/wiki/Marcus_Rashford

17. Section 35 states:

“(1) 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”

18. The Commissioner’s view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.

19. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered and effective policies. In particular, it ensures a safe space to consider policy options in private. His guidance² advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

20. The exemption is a class based exemption which means that, unlike a prejudice based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.

DWP’s position

21. In its revised response to the complainant, DWP explained that the requested information comprised:

“An email readout of 30th July 2018³ from a meeting with the then Minister for Family Support, Housing and Child Maintenance (MfFSHCM) detailing the reasons for the decision to not take the food bank research

² <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

³ The Commissioner notes that the email is dated 30 July 2018. The disclosed information within this email confirms that a “brainstorm/workshop session” took place on 24 July 2018 and the decision was made at this session.

past the planning stage. The email also includes steers for next steps in relation to understanding food bank usage”.

22. DWP explained to the Commissioner that the request relates to the decision of 24 July 2018 to not continue with the piece of research into the drivers of food bank usage. DWP explained that the email containing this decision includes a readout of Ministerial views on a connected yet separate piece of work in relation to understanding food bank usage. DWP explained that this work has been in development for a number of years and has yet to be launched due to delays caused by the Covid-19 pandemic.
23. DWP considers that this future work is not relevant to the specific request under consideration and has redacted this section of the email for both this reason and because disclosure would be likely to significantly damage the relationship the government has with partner organisations, risking the collapse of a carefully designed project, intended to help people in need.
24. DWP explained that with the effects of the pandemic still ongoing and the rise in the cost of living, ministers and officials still need to develop policy to continue supporting individuals, including how to support those on Universal Credit and legacy benefits, in a safe space. DWP explained that this remains an active policy debate in government around the rising cost of living. DWP therefore believes that section 35(1)(a) is engaged in relation to the redacted parts of the email as the government is still considering how best to support food bank users.

The Commissioner's position

25. The Commissioner has considered both the withheld information and DWP's submission and he is satisfied that the information relates to the development of government policy, namely its approach to supporting those using food banks.
26. The Commissioner disagrees with DWP that the redacted section is not relevant to the request. The request specifies that the complainant is seeking the document in which the decision not to take forward the research is communicated. As the request specifies that they are seeking the document containing the decision, the entirety of the email falls within the scope of the request.
27. The Commissioner also notes that DWP has provided arguments regarding the prejudice disclosure may cause. As section 35(1)(a) is a class based exemption, these arguments are not relevant to the Commissioner's consideration of whether the exemption is engaged.

However, he will consider these arguments as part of his consideration of the public interest test.

28. DWP has also provided arguments regarding why, at the time of providing its submissions to the Commissioner, section 35(1)(a) was still engaged, including the rising cost of living. The Commissioner's decision is based on the circumstances of the policy at the time of the request. On the basis of DWP's submissions, and on review of the withheld information, the Commissioner is satisfied that the government policy was at the development stage at the time of the request.
29. Having accepted that the exemption is engaged, the Commissioner has gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments

30. The complainant considers that the public interest lies clearly in disclosure as this provides insight into the increased use of food banks and the issue of child hunger. The complainant considers that:

"...it is critical the public see records of decisions leading to the stopping of investigations into foodbank use. Those who want to stamp out child hunger need to see this information because it will help them to make better choices in future. Specifically, if the decision to stop feeding hungry children was a political one then voters have a right to see it..."
31. The complainant accepted that in many cases the private space to formulate and develop policy should be kept private. However, they do not consider this applies where information is linked to child hunger.
32. DWP acknowledged the inherent public interest in transparency and accountability of public authorities. It also recognised the broad public interest in further public understanding of the issues which public authorities deal with such as policy considerations in supporting users of food banks. DWP considered that there is a clear public interest in the work of government departments being transparent and open to scrutiny in order to increase understanding of the issues it deals with.
33. DWP explained that it has openly discussed the topic of the request on a number of occasions and publicly stated its justifications for not proceeding with the research. DWP set out that it had released information related to further plans regarding food bank use. DWP considers that the complainant is able to access all of these statements as they are already in the public sphere. DWP provided two examples:

- A Parliamentary Question surmising some of DWP's plans regarding food bank use dated 30 June 2021
<https://questions-statements.parliament.uk/written-questions/detail/2021-06-30/25107>
 - A response to a different freedom of information request detailing the reasons for not taking the research further dated 21 April 2021
<https://www.whatdotheyknow.com/request/744449/response/1774413/attach/html/3/FOI2021%2027258%20Reply.pdf.html>
34. DWP considered that balanced against the arguments in favour of disclosure is the public interest in protecting the Government's ability to discuss and develop policies and to reach well-informed conclusions. DWP explained that policy development needs some degree of freedom to work effectively and it considered that there is a strong public interest in protecting information where release would be likely to have a detrimental impact on the ongoing development of the processes and policies relating to providing support to users of food banks.
35. DWP explained that due to the sensitive nature of food bank use and the necessity to agree buy-in with external stakeholders, extra care was needed regarding the handling of internal documents.
36. DWP considered that release of the information could damage the relationships between these stakeholders and DWP. DWP considers that this, in turn, could lead to criticism of DWP and may create barriers to it working effectively with its stakeholders to support users.
37. DWP considered that the policy development around supporting food bank users needs to take place in a safe space and it would not be in the public interest for all the information contained in the relevant document to be released.
38. DWP stated that if officials could not be sure that their input into the policy formulation process is protected from disclosure, there would be a strong incentive to omit, or to diminish the significance of negative information provided, to minimise the prejudice likely to be caused by disclosure. DWP considers that this would weaken the quality of the information being provided to ministers which in turn would damage their ability to make effective and well-informed decisions.
39. DWP concluded that although there is merit in greater transparency within government, the need to protect the space in which DWP and its stakeholders can develop ongoing live policy outweighs the public interest in disclosure.

The balance of the public interest

40. With regard to the arguments advanced by DWP for maintaining the exemption, the Commissioner notes that these specifically cite the need for safe space but also that parts of its submissions reflect arguments generally referred to as a 'chilling effect'.
41. The Commissioner accepts that a safe space is needed for discussion and decision making by officials and ministers, particularly in handling complicated and sensitive issues such as those relating to food bank usage. He considers that the need for a safe space will be strongest when the issue is still live. He acknowledges that the policy was still at the development stage at the time of the request and had still not been announced by the time that DWP provided the Commissioner with its submissions.
42. 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 process is live and the requested information relates to that policy making.
43. The Commissioner considers that the arguments advanced by DWP in paragraph 38 above comprise chilling effect arguments. DWP argues in general terms that there would be a loss of frankness and candour which would damage the quality of advice and lead to poorer decision making. However, DWP has not provided specific arguments regarding why disclosure of the withheld information would lead to this chilling effect.
44. The Commissioner has set out many times previously that he considers that civil servants should not be easily deterred from giving impartial and robust advice by the possibility of future disclosure. Having viewed the withheld information and DWP's generic chilling effect arguments, the Commissioner is not persuaded that a generalised chilling effect on all future discussions would result from disclosure in this case.
45. The Commissioner considers that DWP has failed to consider the specific public interest in understanding the decision to not taking forward the research into food bank usage. The Commissioner notes that DWP considers that it has made information available regarding why the research was not taken forward and DWP's plans regarding supporting those using food banks. However, both of the examples provided by DWP were published after DWP had provided the outcome of the internal review. This information was not therefore available to the complainant at the time of the request.

46. The increasing use of food banks is a controversial issue which affects a significant number of the population. The Commissioner considers that there is a strong public interest in understanding DWP's, and the government's, approach to supporting those using food banks who include some of society's most vulnerable people.
47. The withheld information comprises four paragraphs which follow the disclosed information. Having reviewed the withheld information, the Commissioner considers that the public interest lies in disclosure of the first withheld paragraph and in maintaining the exemption in relation to the last three paragraphs.
48. The information in the first paragraph relates specifically to the decision not to proceed with the research into food bank usage. The Commissioner acknowledges that at the time of the request, the policy to which the information relates was still being developed. There is, therefore, a public interest in protecting the space in which this can occur. However, having reviewed the contents of this first paragraph, the Commissioner is not persuaded that the detriment envisaged by DWP would occur following disclosure of this information.
49. The Commissioner notes that the request was made following DWP's response to a previous request in which it confirmed that the research was not being taken forward. The Commissioner considers that this has obviously led the requester to query why it was not taken forward. Disclosure of this paragraph would answer that question. The Commissioner is not persuaded that disclosure would lead to the safe space in which the policy is developed being eroded. In fact, he considers that withholding the information within this specific paragraph is more likely to lead to queries and speculation regarding why the research was not taken forward as, at the time of the request, this information was not available to the public.
50. The Commissioner therefore considers that in relation to the first withheld paragraph, the balance of the public interest lies in disclosure.
51. The remaining three withheld paragraphs include the very early considerations of the subsequent project which superseded the research.
52. In light of DWP's confirmation that the project is still in development and the clearly early stage considerations contained within the final three paragraphs, the Commissioner is satisfied that the public interest in maintaining the exemption is strong enough to outweigh the public interest in disclosure in the specific circumstances of this request. The public interest lies in allowing DWP, and the government, the space to develop the project and its ability to support those using food banks without detrimental external interference. Having reviewed the contents

of this information, the Commissioner is satisfied that the detriment described by DWP regarding its external stakeholders is a real possibility. As the policy development is still ongoing, the public interest in protecting this safe space is significant. However, this will reduce with time once the policy has been finalised and implemented.

53. The Commissioner requires DWP to disclose the first of the four redacted paragraphs within the body of the email.

Right of appeal

54. 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

55. 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.
56. 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
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