

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2023

Public Authority: Department for Work and Pensions
Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has made a meta-request for the Qualified Person's opinion in relation to a previous request.
2. The Department for Work and Pensions (DWP) withheld the requested information under sections 36(2)(b) and 36(2)(c).
3. The Commissioner's decision is that DWP is entitled to rely on section 36(2)(b)(i), prejudice to the free and frank provision of advice, and the public interest favours maintaining the exemption.
4. The Commissioner does not require DWP to take any steps.

Request and response

5. On 28 January 2022, the complainant wrote to DWP and requested information in the following terms:

"I refer to the recent article in the Guardian - <https://www.theguardian.com/society/2022/jan/27/report-on-effectiveness-of-benefit-sanctions-blocked-by-dwp> . The article refers to an FOI request which was (partly or fully) rejected on the basis that "the withheld documentation includes details of a sensitive nature whose

publication would be likely to inhibit candour and be likely to prejudice the effective conduct of public affairs”.

My questions are as follows:

1. Please tell me whether a qualified person’s opinion was obtained under section 36 of FOIA in relation to this FOI request mentioned in the article.
2. If a QPO was obtained, please send me a copy of it.
3. If a QP considered making a QPO on this request, please send me a copy of all information and briefing material submitted to the QP in relation to obtaining the QPO”.
6. DWP provided its response on 25 February 2022. DWP confirmed that it held the requested information but was withholding it under sections 36(2)(b) and 36(2)(c). DWP did not explain why the exemption was engaged and simply quoted the exemption. In particular, DWP failed to specify the nature of the prejudice at section 36(2)(c) “would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs”.
7. DWP provided its consideration of the public interest. In favour of disclosure, DWP acknowledged that disclosure could provide a greater understanding of the decision to withhold the Sanctions Evaluation from release under the exemption at sections 36(2)(b) and 36(2)(c).
8. DWP explained that it has to balance this against the fact that the withheld documentation includes details of a sensitive nature whose publication would be likely to inhibit candour and be likely to prejudice the effective conduct of public affairs.
9. DWP considered that there is a strong public interest in the effectiveness of benefit sanctions. DWP stated that, however, the ‘deterrent effect’ is an important element in representing the full picture of sanctions. DWP considered that without this, the research is incomplete and does not reflect the complete picture of the effectiveness of benefit sanctions.
10. DWP explained that the correspondence requested includes discussion between departmental officials and Ministers relating to the Sanctions Evaluation. DWP considered that there is also a strong public interest in protecting this space in order to not impair the quality of the advice and the Minister’s ability to make crucial decisions on that basis. It also considered that there is a strong public interest in DWP being able to carry out and use frank assessments, including unrestrained and candid contributions from business areas.

11. DWP confirmed that, on balance, it was satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.
12. The complainant requested an internal review on 27 February 2022 and requested an internal review of the handling of their request. They raised the following concerns:
 - Whilst DWP's response suggests that the answer to question 1 is 'yes', this is not confirmed explicitly.
 - The public interest favours disclosure.
 - DWP's response provides no specific evidence to confirm the alleged harm that would result from disclosure. DWP's assertion of prejudice is not supported by evidence and the complainant believed it is greatly exaggerated.
 - DWP's response takes insufficient account of the public interest in greater scrutiny, transparency and accountability for the way DWP handles FOI requests.
 - Material being 'incomplete' is not a factor against disclosure. If material is incomplete then DWP can simply add what further context is necessary when releasing it.
 - The exemption should not have applied to the entirety of the information. If information should be withheld, it can be redacted.
 - While the response confirms that DWP is relying on section 36(2), it does not state whether a Qualified Person's opinion was actually obtained and on what date.
13. DWP provided the outcome of its internal review on 14 March 2022 and upheld its original response. DWP confirmed that the Qualified Person's opinion was obtained on 22 February 2022 and acknowledged that it would have been helpful to confirm this in its original response.

Scope of the case

14. The complainant contacted the Commissioner on 14 March 2022 to complain about the handling of their request for information. Specifically, they disputed that DWP was entitled to withhold the requested information as the public interest favoured disclosure.

15. The Commissioner therefore considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 36 to withhold the requested information.

Reasons for decision

Section 36: Prejudice to the effective conduct of public affairs

16. Section 36(2)¹ 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.

¹ 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—

(a) would, or would be likely to, prejudice—

- (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
- (iii) the work of the Cabinet of the Welsh Assembly Government.

(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.

19. The submissions and request for opinion was sent on 22 February 2022 and the Minister for Work and Pensions (Lords), Baroness Stedman-Scott, provided her opinion on the same day which essentially confirmed that she agreed with the points set out in the submissions. 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 the Minister for Work and Pensions (Lords) was authorised to act as the qualified person in this case.
22. Section 36 specifies that information can be withheld where the Qualified Person is of the opinion that disclosure would or would be likely to prejudice the effective conduct of public affairs.
23. In determining whether the exemption is engaged, the Commissioner must consider whether the Qualified Person's opinion was a reasonable one.
24. The Commissioner takes the approach that 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. 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.
25. DWP confirmed to the Commissioner that it was relying on sections 36(2)(b) and 36(2)(c) to withhold the information. DWP did not confirm which of the two limbs of section 36(2)(b) it was relying on.
26. The Commissioner has reviewed the submissions, including the background information, and the Qualified Person's confirmation that they approve the use of section 36.
27. Having reviewed the submissions, the Commissioner is satisfied that section 36(2)(b)(i), the free and frank provision of advice, is engaged as the Qualified Person considers that disclosure would or would be likely to inhibit free and frank advice and views by inhibiting the candid assessment of risks. The Qualified Person did not confirm whether it

considered the appropriate prejudice threshold was 'would' or 'would be likely', however, the Commissioner is satisfied that the lower threshold of 'would be likely' is met.

28. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
29. The Commissioner has considered whether section 36(2)(c) is engaged. In order for the Qualified Person's opinion to be reasonable, it must be clear as to precisely how the prejudice may arise. In his published guidance on section 36, the Commissioner notes that it is in the public authority's interests to provide him with all the evidence and arguments that led to the opinion in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find the opinion is not reasonable.
30. The Commissioner has reviewed the submissions and the Qualified Person's confirmation that they approve the use of section 36. He is unable to locate an explanation of the nature of the prejudice that would 'otherwise' occur should the withheld information be disclosed.
31. It is not sufficient for a Qualified Person to simply assert that disclosure would, or would be likely, otherwise to prejudice the effective conduct of public affairs, the opinion must set out what prejudice the Qualified Person considers would or would be likely to occur. With regards to section 36(2)(c), the Commissioner considers that this limb of the exemption is not engaged.
32. As the Commissioner has found that section 36(2)(b)(i) is engaged, he will therefore go on to consider the balance of the public interest.

Public interest test

33. Section 36 is a qualified exemption and therefore the Commissioner must consider 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 in favour of disclosing the information

34. The complainant confirmed to the Commissioner that they considered the public interest favours disclosure. They repeated the arguments put to DWP in their request for internal review. They also considered that if DWP has been using, considering or discussing inadequate information, that in itself should be made public in full detail, for the sake of transparency and accountability.

35. DWP acknowledged the 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, so as to increase public trust in the Government's processes. In particular, the effectiveness with which the Government works in ensuring the successful delivery of projects and programmes to time, scope and budget as part of DWP's key objectives.

Public interest arguments in favour of maintaining the exemption

36. DWP set out that the substance and purpose of a submission from officials to Ministers is different from other documents and includes advice to Ministers, containing detailed discussion of arguments for and against. It is a private space for officials to offer free, frank and balanced advice.
37. DWP explained that the submissions requested is part of its dialog regarding the non-publication of the Sanctions Evaluation. DWP stated that it contains a description of the public interest test which the Qualified Person must apply². DWP explained that this test is a frank discussion of arguments for and against disclosure of the relevant information, in light of the public interest. If this were made public, it would negatively impact on the candour of such submissions.

The balance of the public interest

38. In considering complaints regarding section 36, where the Commissioner finds that the Qualified Person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or 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 dictates disclosure.
39. With regards to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not be easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information

² The Commissioner has previously confirmed to DWP that the public interest test does not form part of the Qualified Person's opinion as the opinion must be obtained **before** considering the balance of the public interest.

is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make more convincing arguments about a generalised chilling effect on all future discussions.

40. At the time of the request, DWP was still undertaking an internal review of the previous request to which the disputed information relates. Therefore, the Commissioner accepts that this information concerned a live and ongoing decision making process.
41. Taking this into account, the Commissioner considers that the chilling effect arguments carry notable weight.
42. In terms of the public interest arguments in favour of disclosing the withheld information, the Commissioner considers that there is an inherent public interest in public authorities being transparent about their decision-making processes. This extends to public authorities being transparent about how they consider and reach decisions in respect of FOI requests. Disclosure of the withheld information would provide the complainant with a more detailed understanding of DWP's basis for relying on section 36.
43. However, the Commissioner does consider that this public interest in transparency and scrutiny of DWP's handling of the specified request, and section 36 in general, is at least partly fulfilled by the role of the Commissioner. Requesters are entitled to a decision notice on whether, in any specified respect, their request for information was handled in accordance with FOIA. The Commissioner has investigated several complaints regarding DWP's use of section 36 to withhold the benefit sanctions report and issued decisions on these³.
44. The Commissioner found that section 36 was not engaged in these cases due to the Qualified Person failing to specify the nature of the prejudice envisaged under section 36(2)(c). The Commissioner accepts that this decision lends additional weight to the public interest in disclosure, however, he considers that due to the timing of the request, this public interest does not outweigh the significant public interest in maintaining the exemption.

³ IC-159734-S6B5, IC-162699-X6D9 & IC-194759-T1T3

45. On balance, the Commissioner has concluded that the public interest favours maintaining the exemption. He has reached this decision as, in light of the timing of the request, he accepts that disclosure of the withheld information would be likely to have a significantly detrimental effect on DWP's process for seeking the opinion of the Qualified Person when it wishes to cite section 36 in future by impacting the candour of officials. In the Commissioner's opinion, this would be disruptive to the effective conduct of public affairs and clearly against the public interest.
46. The Commissioner therefore considers that DWP is entitled to withhold the requested information under section 36(2)(b)(i).

Other matters

47. The Commissioner has issued a template for recording the Qualified Person's opinion which DWP may find helpful in ensuring that the opinion includes all the evidence required for the Commissioner to accept that a reasonable opinion has been expressed⁴.
48. The Commissioner reminds DWP again that the balance of the public interest does not form part of the Qualified Person's opinion. Once DWP is satisfied that section 36 is engaged, it is at this point that the balance of the public interest should be considered.
49. The Commissioner also reminds DWP of the requirement under section 17 and the section 45 Code of Practice to explain why the information requested engages the specific exemption cited. The Commissioner does not consider that using template responses or simply citing the exemption is sufficient to fulfil this requirement.

⁴ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-record-of-the-qualified-person-s-opinion/>

Right of appeal

50. 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

51. 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.
52. 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
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