

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 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 the Department for Work and Pensions' (DWP) response to the Independent Review on Administrative Law.
2. The Commissioner's decision is that DWP is entitled to rely on section 35(1)(a) to withhold the requested information and the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require DWP to take any steps.

Request and response

4. On 19 March 2021, the complainant wrote to DWP and requested information in the following terms:

"I write to request a copy of the Department's submissions to the Independent Review on Administrative Law".
 5. The request confirmed that DWP had previously refused to disclose the information on the basis that section 35 (formulation or development of government policy) was engaged¹.
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¹ The Commissioner was not contacted regarding this complaint and therefore has not made a decision regarding its handling.

6. DWP provided its response on 20 April 2021 and confirmed that it held the requested information but was withholding it as section 36(2)(a)(i) was engaged (prejudice to the maintenance of the convention of collective responsibility). DWP confirmed that it considered the balance of the public interest lay in maintaining the exemption.
7. The complainant requested an internal review on 2 June 2021 and disputed that section 36(2)(a)(i) was engaged.
8. DWP provided the outcome of its internal review on 19 August 2021. It upheld its reliance on section 36(2)(a)(i) to withhold the information and introduced section 36(2)(c) (prejudice to the effective conduct of public affairs).

Scope of the case

9. The complainant contacted the Commissioner on 2 September 2021 to complain about the handling of their request for information, specifically that they disputed DWP's reliance on section 36 to withhold the information.
10. The Commissioner asked DWP to reconsider its position in light of its previous reliance on section 35 in relation to the requested information and the mutually exclusive nature of sections 35 and 36.
11. DWP confirmed that, having reconsidered the request, it was relying on section 35(1)(a) to withhold the requested information following the First Tier Tribunal's confirmation that this exemption was engaged.
12. 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 requested information.

Reasons for decision

13. 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”
14. 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.

15. The exemption is class based 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.
16. The requested information forms DWP's response to the Judicial Review Reform Consultation². Following this consultation, the Judicial Review and Courts Bill was introduced to implement the measures recommended and on 28 April 2022 the Judicial Review and Courts Act 2022 was enacted.
17. The Commissioner therefore accepts that the requested information relates to the formulation of government policy and therefore engages section 35(1)(a).
18. The Commissioner will therefore go on to consider the balance of the public interest.

Public interest in disclosure

19. DWP acknowledged that there were strong and legitimate public interest considerations in favour of disclosing the information. DWP explained that judicial review is an important means of address for individuals against the state and public authorities generally. The Lord Chancellor refers to a wider public interest in the foreword to the consultation ensuring "that the courts have available to them a flexible range of remedies, allowing cases to be resolved in a manner which is sensitive both to the rights of the individual and to the wider public interest" (paragraph 5).
20. DWP explained that the proposals for reform are now set out in the Judicial Review and Courts Bill, which has been introduced into the House of Commons. DWP recognised that publication of the particular information concerned would encourage public debate regarding these important proposals.

Public interest in withholding the information

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf

21. DWP considered that there are strong and constitutionally important public interest factors in favour of withholding the information concerned, which outweigh the important public interest factors in favour of disclosure.
22. DWP provided the following arguments in favour of maintaining the exemption:
 - There is a strong public interest in maintaining collective Ministerial responsibility for the proposals for reform, as to do otherwise might undermine these important proposals.
 - In general, the Commissioner accords a high level of importance to the convention of collective responsibility of Ministers given its high constitutional importance.
 - The Ministry of Justice has released a summary of departmental responses which is a proportionate response in relation to the need for transparency. DWP confirmed that this does not breach collective responsibility because it was a summary of the views of all the Departments who had responded and was presented as a collective government view. DWP considers that this summary will facilitate debate and scrutiny of the Judicial Review and Courts Bill. DWP considered that publishing individual departmental views may undermine the passage of this important piece of legislation and debate may be moved away from the Government's proposals to the individual department view.
 - There is a strong public interest in providing a safe space for future discussions at a Ministerial level regarding important government policies which disclosure of the department's proposals might inhibit.
 - There is a strong public interest in favour of maintaining public confidence in effective consultation which might be undermined if Ministerial views are published whilst consultations are being undertaken.
 - DWP confirmed that it considered the balance of the public interest lies in maintaining the exemption.

The balance of the public interest

23. In making his determination, the Commissioner has considered the arguments put to him, the timing of the request and the withheld information itself.

24. The Commissioner accepts that there is a strong public interest in maintaining collective responsibility within government and in allowing a safe space to consider important government policies such as Judicial Reform.
25. At the time of the request, the Judicial Review Reform consultation document had been published the previous day which confirmed that the Judicial Review and Courts Bill would implement the measures within the consultation document.
26. The Judicial Review and Courts Bill was published on 21 July 2021 and the Judicial Review and Courts Act enacted on 28 April 2022³.
27. The Commissioner therefore accepts that the public interest in protecting the safe space was particularly strong as the issue was still live. The Commissioner must consider the circumstances at the time of the request and at this time, the policy position on judicial reviews was still being developed and was at consultation stage before the Government's position was finalised.
28. In the specific circumstances of this case, the Commissioner accepts that at the time of the request, the balance of the public interest favoured maintaining the exemption.

Other matters

29. While there is no statutory timeframe in which a public authority is expected to complete an internal review, the Commissioner observes that paragraph 5.4 of the Code of Practice⁴ recommends that internal reviews should normally be completed within 20 working days.
30. In this case, DWP took 53 working days to conduct its internal review.
31. The Commissioner reminds DWP of his guidance on completing an internal review which sets out the Commissioner's view that internal reviews should take a maximum of 40 working days, even in the most exceptional of circumstances.

³ <https://www.legislation.gov.uk/ukpga/2022/35/contents/enacted>

⁴ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

32. 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

33. 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.
34. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF