

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 information relating to gateway reviews on the universal credit project. The Department for Work and Pensions (DWP) refused to provide the requested information under sections 36(2)(b)(i) and (ii) and section 36(2)(c) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the DWP has incorrectly applied section 36(2)(b)(i) and (ii) and section 36(2)(c) to withhold the requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the PAR review.
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 1 March 2012, the complainant wrote to the DWP and requested information in the following terms:

"I would be grateful if you would let me know what gateway reviews have been carried out on universal credit. Can you please send me copies?"

6. The DWP responded on 26 March 2012. It stated that it held two documents which fell within the scope of the request. It said that those documents were:
 - A starting gate review in February 2011 (in fact, issued on 8 March 2011) ("the starting gate review")
 - A Project Assessment Review which took place between 7 and 11 November 2011 ("the PAR Review")
7. The DWP refused to disclose the above documents under section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA.
8. Following an internal review the DWP wrote to the complainant on 14 May 2012. It upheld its original decision.
9. During the course of the Commissioner's investigation, the DWP explained that it had become aware that on 11 October 2011 a copy of the starting gate review was published on the Campaign4Change website and that the complainant had a copy of this. The complainant explained that a copy of the starting gate review had been placed in the House of Commons library. DWP confirmed that the document on the Campaign4Change website is a true copy of the starting gate review. It said that since the complainant has a copy of the starting gate review and it is now in the public domain, it did not wish to provide any further submissions in support of the application of section 36 in relation to this information.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. The Commissioner has considered whether the DWP correctly applied section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA to withhold the PAR review. In relation to the starting gate review, the DWP no longer wishes to rely upon section 36 FOIA to withhold this information. The Commissioner has therefore considered whether the DWP should have provided this information to the complainant at the time of the request.

Background

12. The DWP has explained that the Government has made proposals to introduce universal credit to replace substantial parts of the existing social security system. The DWP carried out a major consultation exercise in relation to universal credit between July and October 2010. The White Paper, "universal credit: welfare that works" was published in November 2010. The Welfare Reform Bill was published on 16 February 2011. The Welfare Reform Act 2012 received Royal Assent on 8 March 2012. The Act sets out the overall framework for universal credit, but much of the detail will be set out in a series of Regulations and in Departmental guidance. Universal credit is expected to begin launching in April 2013 and to be introduced in a number of phases over several years.
13. The Major Projects Authority ("MPA") is part of the Cabinet Office and was set up in early 2011. Its aim is to reduce the risk in large projects being carried out across Government. The MPA has a number of functions to help achieve its aim. These include carrying out reviews of major projects to identify and reduce risks, working with Government Departments to improve management on their major projects and raising concerns with Ministers. The intention is that the MPA's work will function in the public interest by improving the Government's major projects and reducing their costs. The requested information relate to reviews carried out by the MPA in relation to the universal credit project.

Reasons for decision

The Starting Gate Review

14. Section 21 of FOIA states that, "Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information." In this case the DWP has explained that the starting gate review is accessible on the Campaign4Change website. The Commissioner has viewed the website and considers that this document is available to access by the public. The DWP has also confirmed that the starting gate review was published on the Campaign4Change website on 11 October 2011. As the document was published prior to the date of the request, the Commissioner considers that it was reasonably accessible to the complainant at the time the request was made. The Commissioner therefore considers that section 21 FOIA would have been applicable at the time of the request and therefore the information was exempt from disclosure.

The PAR Review

15. Section 36 of 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 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.”

16. In this case the DWP has argued that section 36(2)(b)(i) and (ii) and section 36(2)(c) is applicable.

17. In determining whether section 36(2)(b)(i) and (ii) and section 36(2)(c) was correctly engaged by the DWP the Commissioner is required to consider the qualified person’s opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable

18. The Commissioner’s approach to the reasonableness test in section 36 is set out in the external guidance document on the exemption¹.

19. In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning

1

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

of that word, rather than defining it in terms derived from other areas of law.

20. 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.
21. The DWP has explained that the qualified person is the Minister for Welfare Reform (s.36(5) of FOIA). The qualified person provided a signed statement, in August 2012, in the Commissioner's standard form, to the effect that disclosure would, or would be likely, to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. The qualified person was provided with detailed submissions on the exemption dated 9 March and 10 May 2012. The qualified person was also provided with a copy of the withheld information. The Commissioner notes however that the qualified person had given his opinion initially by email on 20 March 2012 in response to the submissions dated 9 March 2012. The DWP has provided the Commissioner with a copy of the qualified person's opinion given on 20 March 2012 as well as August 2012, the DWP also provided the submissions which were put to the qualified person to enable the opinion to be reached.
22. The following submissions were put to the qualified person:
 - For the Major Projects Authority (MPA) process to be effective, it is essential the MPA panel has access to all the relevant information about the project and that an open debate can take place between ERG, HM Treasury and the DWP owning the project under review. Disclosure of the requested documentation could significantly reduce the documentation available for scrutiny and as a consequence impact on the quality of the subsequent debate. This would mean that any future MPA recommendations would not be based on 'full and frank' assessments and, could therefore significantly put at risk the quality of advice and final decisions taken.
 - Were the requested information to be disclosed, the MPA public negotiating position would be fundamentally weakened, potentially leading to a marked increase in project costs, complexity and lifespan.

- It recognised that publication of this information could provide an independent assessment of the key issues and risks, it must be balanced against the fact that the Review document and any subsequent report includes details of a sensitive nature and publication would or would be likely to prejudice effective conduct of public affairs.
23. The qualified person's response agreed that section 36(2)(b)(i), 36(2)(b)(ii) and section 36(2)(c) were engaged. The qualified person's opinion was that the prejudice in this case would be likely to occur. The threshold to prove would be likely to prejudice is lower than if the DWP had claimed that the prejudice would occur. In dealing with the issue of the likelihood of prejudice, the Commissioner notes that in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
 24. The Commissioner notes that at the time of the request the Welfare reform Act had been passed and had received Royal Assent. However the PAR refers to the project more generally. The fact that the Act was passed may not be very a significant factor in this case.
 25. The Commissioner accepts that the withheld information does contain candid advice to assist in decision making relating to the universal credit project.
 26. Having considered the circumstances of the case the Commissioner accepts that the opinion in respect of section 36(2)(b)(i) and (ii) is reasonable – it was reasonable for the qualified person to conclude that disclosure would or would be likely to inhibit the free and frank provision of advice in the future, the free and frank exchange of views for the purposes of deliberation.
 27. The Commissioner also accepts that it was reasonable for the opinion to consider the diversionary and other wider impacts of disclosing the information and he finds that it was reasonable to conclude that disclosure would be likely to otherwise prejudice the effective conduct of public affairs.
 28. He therefore finds that sections 36(2)(b)(i) and (ii) and section 36(2)(c) were correctly engaged.

29. As the Commissioner has decided that the exemptions are engaged, he has gone on to consider whether the public interest in maintaining the exemptions outweigh the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)².
30. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.

Public arguments in favour of disclosing the requested information

31. The DWP has acknowledged that there is a public interest in the transparency of Government decision-making and explained that disclosure would provide the public with an independent assessment of the key issues and risks.
32. The DWP also acknowledged that the introduction of Universal credit is a significant reform which will affect a significant number of individuals.
33. The DWP argued that a large amount of information relating to this project has already been put into the public domain which may go some way to meeting the public interest arguments in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

34. The DWP explained that the PAR review was prepared on the basis that it would be circulated to a very limited group within Government, that includes the Senior Responsible Owner and certain interested parties within Government. The DWP said that confidence in this limited

² Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC (EA/2006/0011 & EA/2006/0013)

circulation explains why the authors of the PAR Review are able to comment with such freedom and frankness on fundamental aspects of the Universal credit Programme. The DWP provided the Commissioner with some examples of very candid advice and recommendations provided in the review document. It said that this was the kind of advice which it is in the public interest for Government to receive and which would be adversely affected by disclosure. It said that the limited circulation of reviews such as the PAR review is in line with long-established principle and conforms to the expectation of participants. The DWP said that it would not be in the public interest to have a weakened, less effective MPA scrutiny.

35. The DWP argued that the assessment of risk in relation to the Universal credit programme is a core function of the DWP and disclosure of the PAR review will have a significant influence on its ability to deliver the programme in a way that minimises the risk of outcomes which may be contrary to the public interest.
36. Finally the DWP explained that at the time of the request, the PAR Review was a fresh document in an evolving area of policy implementation. Moreover, the majority of those interviewed in order to produce the PAR Review remained in post at the time of the request (and continue to be so today). It said therefore that the timing of the request adds significant weight to the public interest arguments set out above.

Balance of the public interest arguments

37. 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;
38. The Commissioner also considers that the public interest in disclosure is very strong with respect to the particular information in question. Disclosure, at the time of the request, would have enabled the public to consider an important recent assessment of project, at a key stage of the project, alongside other information already in the public domain. Whilst, the Commissioner accepts the DWP have placed significant information in the public domain about the project, there is still a strong interest in the public being able to see the assessment in the PAR report. The Commissioner also finds that expert commentators on project management and IT would be able to use this information to make their own informed assessment of the project, which could in turn inform the public.
39. The Commissioner also accepts that there is a strong public interest in the Government being able to obtain candid and open advice in relation to projects which will have wide reaching implications and where there is a strong public interest in their success. The key question is the extent of the impact on the circumstances of this case.
40. The High Court decision in *Office of Government Commerce v Information Commissioner & the Attorney General*³ and the subsequent judgments issued by the Information Tribunal when the case was remitted⁴ are of relevance to this case. They related to requests for Gateway Reviews carried out in 2003 and 2004 in relation to the government's ID cards programme. The appeals were ultimately dismissed by the Tribunal. Whilst it did not form part of the ratio of the decision, the High Court made a number of relevant findings in relation to section 35 and the public interest test which endorsed the approach taken by the Commissioner and the Tribunal. The Tribunal noted a number the passages of the High Court judgement.
41. In the High Court judgment Burnton J stated that:
- "Having referred to the fact that the Identity Cards Bill had been presented to Parliament, and was being debated publicly, the Tribunal found that it was no longer so important to maintain the safe space at*

³ Office of Government Commerce v Information Commissioner & the Attorney General [2008] EWHC 737 (Admin) (11 April 2008).

⁴ Office of Government Commerce v Information Commissioner (2nd decision, 2009) EA/2006/0068 & EA/2006/0080

the time of the Requests. I have italicised the adverb because it makes it clear that the Tribunal did not find that there was no public interest in maintaining the exemptions from disclosure once the Government had decided to introduce the Bill, but only that the importance of maintaining the exemption was diminished. I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in the finding that the importance of preserving the safe place had diminished. Accordingly, this ground of appeal has not been made out".

42. Whilst the above decision relates to the application of section 35, the Commissioner considers that it is comparable to the arguments being made in this case under section 36.

43. The remitted OGC Tribunal decision also found that:

"It is of course quite true that all the witnesses gave extensive evidence that interviewees in the course of a Gateway Review Process express themselves in an unguarded way and that that aspect of the process would be put at risk on disclosure. On balance, however, the Tribunal is not satisfied that this fear has been made out by the evidence which strongly suggests that the risk even now continues to be minimal and that were disclosure of these two particular Reports to be made, any adverse effect would follow." (para 175)

44. It also relevant to note that gateway reviews have therefore been disclosed by governments in the past – the ID cards review and also gateway reviews following decisions by the Commissioner - FS50171478 (Modernising Medical Careers programme), FS50075956 (Department of Health's Electronic Recruitment project) and FS50130293 (traffic light status (RAG), project titles and recommendations of gateway reviews carried out by a number of government departments).

45. Finally, the Commissioner has drawn upon the Tribunal's decision in *Department of Health v ICO & Healey & Cecil EA/2011/0286 & 0287*. This case related to the disclosure of the risk registers on the government's reforms of the NHS. On the issue of chilling effect and impact of disclosure the OGC case was referred to:

"Also in a previous case, OGC v IC EA/2006/2068 & 80 ("OGC"), where the Information Tribunal ordered the disclosure of Gateway Reviews apparently there has been no evidence of a chilling effect since their release. Mr Healey was the Minister responsible for the Office of Government Commerce at the time and said that there was no

evidence that a chilling effect developed as a result of the release of the reviews even after he moved to The Treasury..." (Paragraph 6).

46. The Commissioner has considered the specific circumstances related to the timing of the request in this case and whether the need to protect the safe space to work on the project (and severity of the inhibitory effect) had diminished, in relation to the specific information. The Act had received Royal Assent whilst the request was initially being considered by the DWP. A key point had therefore been passed in the process. Whilst the Commissioner is aware that much of the detail will be set out in a series of Regulations to begin its launch around April 2013, a fundamental decision had been made once the Bill was published in February 2011 and a key milestone was passed when it subsequently received Royal Assent on 8 March 2012. This was the position when the DWP initially responded to the complainant on 26 March 2012. However, the Commissioner has considered the PAR report and he finds that the fact that the Act had passed is relevant but should not be used a crucial factor. The PAR report is focused on assessing the project more broadly, rather than a focus on the considerations leading up to the introduction of the Bill. The impact of disclosure therefore needs to be considered in this context.
47. The Commissioner therefore accepts that "safe space" arguments are relevant in this case and the impact of disclosing the information, on the processes set out in section 36(2)(b), whilst the project was still live, must be carefully considered. The Commissioner accepts that it was not unreasonable for participants to have an understanding that initial circulation would be on a limited basis but this is not a sustainable understanding for a longer period of time. The Commissioner also notes that comments are not attributed to individuals in the report and disclosure would therefore not expose those who contributed to close individual scrutiny and this lessens the severity of any inhibition that may follow.
48. In considering the timing of the request more closely the Commissioner has considered whether the DWP and the Government would have had enough time to digest and consider what actions were needed by the time the request was substantively responded to. As noted above, he only places limited weight on the significance of Royal Assent to the Act as a milestone that reduced the need for safe space. The PAR report was completed in November 2011 and the DWP responded to the request at the end of March 2012. The Commissioner considers that this was a reasonable amount of time to enable the report to be considered and therefore the need for safe space had reduced significantly, but not completely, by the time of the request. The Commissioner therefore finds that the severity of the inhibitory effects from disclosure would not have been as strong as the DWP contend.

The Commissioner has also taken into account the lack of evidence of any inhibitory effects from previous disclosures of gateway reviews.

49. The Commissioner accepts that there was a significant public interest in maintaining section 36(2)(b)(i) and (ii) and avoiding these effects but he has reached a different conclusion to DWP on the severity.
50. The matters in this case are therefore finely balanced. Having considered the very strong public interest factors in favour of disclosure and the range of factors, the Commissioner finds that these are compelling compared to the significant, but not severe, inhibitory effects under section 36(2)(b)(i) and (ii).
51. For section 36(2)(b)(i) and (ii) the Commissioner therefore finds that the public interest arguments in favour of maintaining each of the exemptions do not outweigh the public interest arguments in favour of disclosure.
52. The Commissioner has also reached the same conclusion for section 36(2)(c). He has considered how disclosure would otherwise prejudice the conduct of public affairs and whilst he accepts the must give due recognition to the opinion of the qualified person he does not accept that the other wider impacts would have been severe, for similar reasons related to timing above. The Commissioner also finds that the public interest arguments in favour of maintaining the exemption do not outweigh the public interest arguments in favour of disclosure.

Right of appeal

53. 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

54. 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.
55. 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