

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 November 2013

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 a copy of the risk register for the Universal Credit scheme. The Department for Work and Pensions ("DWP") refused to provide the requested information and cited exemptions at section 36 (prejudice to the effective conduct of public affairs) as its basis for doing so. It upheld this position after an internal review.
2. The Commissioner's decision is that the DWP is entitled to rely on the exemptions it has cited and is not obliged to disclose the requested information under the FOIA.
3. No steps are required.

Request and response

4. On 3 April 2013 the complainant requested information of the following description:

"I would like to request a copy of the risk register for the Universal Credit under the Freedom of Information act. If you can only release some of the report, please send me what you are able.

If you need any further clarification of my request, please contact me at this address or on the mobile number below. I would like the information in digital form to this email address."

5. On 23 April 2013, the DWP responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - Section 36(2)(b)
 - Section 36(2)(c)
6. It argued that the public interest in maintaining these exemptions outweighed the public interest in disclosure.
7. The complainant requested an internal review on 24 April 2013. The DWP sent him the outcome of its internal review on 14 May 2013. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 15 May 2013 to complain about the way his request for information had been handled. He argued that the public authority had not reached the correct conclusion on the balance of public interest.
9. The Commissioner has therefore considered whether the public authority is entitled to rely on the exemptions that it has cited as a basis for withholding the requested information.

Background

10. Universal Credit is a new single payment scheme to replace substantial parts of the existing social security system. The DWP carried out a consultation exercise in relation to Universal Credit between July and October 2010 and the White Paper 'Universal Credit: welfare that works' was published in November 2010. Following this the Welfare Reform Bill was published on 16 February 2011 and the Welfare Reform Act received Royal Assent on 8 March 2012. This Act set out the framework for Universal Credit and draft secondary legislation was sent to the Social Security Advisory Committee in October 2012. The main secondary legislation for Universal Credit is the Universal Credit Regulations 2013, which were made on 25 February 2013.
11. In its submissions to the Commissioner, DWP explained:

"The launch [of Universal Credit] has taken place as a 'Pathfinder'. This is why Universal Credit is currently only available in a small area of the country for limited types of claimant. Pathfinders help test the new

benefit, including the policies behind it, the systems for administering it and the effect it has for claimants. It enables the policies and systems to be changed and improved where necessary. Several amending statutory instruments have already been made as a result and more are likely. The Pathfinder was expanded to four areas in July and a national launch will take place from October where a further 6 Jobcentres will begin to take new claims; this means Universal Credit will be rolling out in areas of England, Wales and Scotland”.

12. It also drew attention to other official information available online about Universal Credit.¹

Reasons for decision

13. The Commissioner has previously considered the question of access to the risk register in his decision notice ref: FS5050460988.² Although the DWP has maintained the same position in relation to this request as it did in that case, it considered the matter afresh. It explained that the content of the register had changed since then. This was inevitable because:

“Risk Registers are ‘living documents’. They are regularly updated and new versions are regularly drafted (there can be new versions every fortnight or even more frequently; sometimes there are gaps of months for various reasons). This enables the Department to keep track of the progress on addressing risks and to record any new risks. So although this case is about the same Risk Register, the information contained in the Risk Register in this case is different from the information it contained in the previous case. This case is about a different version of the Risk Register.”

14. Section 36(2) of the 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 –

(b) would, or would be likely to, inhibit –

¹ <https://www.gov.uk/government/policies/simplifying-the-welfare-system-and-making-sure-work-pays/supporting-pages/introducing-universal-credit>

² http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50460988.pdf

(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."

15. The exemptions listed in section 36(2) are qualified exemptions so are subject to the public interest test in section 2. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
16. For any of the exemptions listed at section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for the DWP is the Minister for Welfare Reform, Lord Freud. The DWP has provided the Commissioner with evidence to demonstrate that the opinion has been sought and provided. The Commissioner has next gone on to consider whether the opinion of the Minister was a reasonable one.
17. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following: "*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.*"³
18. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:
 - whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.

³ Information Commissioner's section 36 FOIA guidance, 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, November 2011, page 6.

19. In its submissions to the qualified person the DWP focused on the prejudicial effects set out in section 36(2). Firstly, it emphasised the importance of maintaining a "safe space" for discussion with specific reference to examples of candour. Secondly, and connected to the first point, it explained that it adopted an approach of "imaginative pessimism" which, inherently, meant that the register was not a balanced assessment of positive and negative points. This was to ensure that risks were contemplated and addressed at the earliest stage possible. Thirdly it explained that:

"[The withheld information is] drafted with a view to the fact that [it] will be superseded within a very short period of time. [It is] up-dated at least fortnightly... As a result, entries are made ...on the basis that they represent a shifting picture of the perception of risk as mitigation measures are devised and implemented. The risk that a particular version of these documents would be disclosed would discourage contributors from expressing themselves in a succinct manner best designed to capture the attention of those responsible for policy development and the formulation of mitigating measures at that time".

20. As regards section 36(2)(c) the DWP explained how the qualified person had reached the view that disclosure would also otherwise prejudice the effective conduct of public affairs. With reference to a specific example, it explained that a number of the entries on the register were "time-specific". If it were disclose the register as it stood at a particular point in time, it would need to disclose other information to explain actions taken to mitigate against risk. This would, in effect, put the whole exercise into the public domain which would undermine efficient progress. It also explained that the effect of disclosing examples of "imaginative pessimism" would lead to a distorted emphasis in the media on those examples and not on actions taken or proposed to be taken to mitigate against them. Connected with this, it further argued that:

"it [is] likely that substantial resources in the Department would have to be shifted from identifying and mitigating risks (in order to ensure the successful development and implementation of the programme in the public interest) to redressing the distortion to the debate about Universal Credit which their disclosure brought about". Finally, it speculated that identified risks would become more likely where they were put into the public domain. It gave two specific examples from the withheld information in support of this.

21. The Commissioner is satisfied that the DWP's arguments set out above provide sufficient evidence to illustrate what the Minister was asked to consider in relation to the application of section 36(2)(b) and (c) of the FOIA. He is also satisfied that the Minister was asked to consider the

matter with specific reference to the information withheld by the DWP in this case. It is clear having reviewed this information the Minister formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank provision of advice and exchange of views and the effective conduct of public affairs.

22. Having considered the points outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. In places the Commissioner finds that there is some overlap in the arguments underpinning the opinion between sections 36(2)(b) and (c), when it is clear that the focus in (c) must be on *otherwise prejudice*, however the Commissioner accepts that the opinion does provide enough evidence to support the reasonableness under (b) and (c). Therefore, he considers that sections 36(2)(b)(i), (b)(ii) and (c) are engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

23. The DWP acknowledged the strong public interest in the disclosure of information which ensures transparency in the way in which government operates. There is also a strong public interest in increased transparency and accountability regarding the work of Ministers and public officials which would lead to increased trust in governmental processes.

24. The complainant submitted the following arguments:

"[In] this case, the public interest is a more important factor than the desire not to undermine policy making.

The Universal Credit is a £2bn overhaul of the existing welfare system, which will bring into one system all existing working-age benefits. It will affect millions of people, including those on out-of-work benefits, low-earners on tax credits and the businesses that have to sign up to the Real Time Information system.

This policy will have a significant impact on the public. There is also a public interest in transparency and accountability with regards to a significant item of government spending.

There is also precedent for releasing this sort of information. In May last year, the Department of Health published portions of the risk register for a similarly sweeping reform of the NHS, after losing an appeal with the Information Commissioner to do so. I would argue this case correlates closely with that decision".

25. The Commissioner notes that according to published guidance for businesses regarding Universal Credit:

“Universal Credit payments are linked to how much money an employed Universal Credit claimant has earned. This is captured through the new way of reporting PAYE [Pay As You Earn] information to HM Revenue and Customs (HMRC) in real time. You may have seen this referred to as Real Time Information or RTI.”⁴

Public interest arguments in favour of maintaining the exemption

26. The DWP recognised that Universal Credit is a substantial programme intended directly to affect the lives of millions of people. It argued that there is very clear public interest in the effectiveness of its delivery and the quality of its programme management.
27. It also argued argues that the constantly evolving nature of register and the media scrutiny around the programme are such that disclosure of the information would be likely to inhibit the free and frank provision of advice and the effective conduct of public affairs.
28. The DWP explained that the register was intended for limited circulation within the DWP and not for public disclosure. It also argued that maintaining the confidence in the limited use of these documents is crucial to ensuring officials feel they can talk about and advise on worst case scenarios.
29. As noted above, the DWP set out specific examples of the candour displayed in the risk register. The Commissioner is unable to set these out on the face of the notice without disclosing the withheld information. However, he notes that they illustrate the candid assessment of risk that is, in the DWP’s view crucial for the management of the programme. DWP argues that if they were to be disclosed, any future entries would be written with a view to publication. This, in turn, may mean that risks are not properly identified or mitigated against and the programme is not managed effectively. It is particularly important to guard against this effect given that the register is regularly updated and time specific. Decisions about mitigating actions are taken regularly and must be considered within a safe space in order to be most effective.

4

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/239992/universal-credit-toolkit-quick-guide-employers.pdf (page 2)

Balance of the public interest arguments

30. When making a judgement about the weight of the public authority's arguments under section 36(2), the Commissioner will consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.
31. The Commissioner acknowledges that the high profile nature of Universal Credit, the wide reaching implications and the challenge of delivery have prompted significant media attention. This would suggest there is a public interest in disclosure of any information surrounding the delivery of the programme.
32. The Commissioner is also mindful of previous decisions such as the Department of Health case noted above by the complainant, where the Tribunal ordered disclosure of the transition register but agreed the strategic register could be withheld. He is also aware that risk registers have been disclosed by other public authorities in the past such as the one related to the expansion of Heathrow airport and others in the NHS. However, the Commissioner must consider the individual circumstances of this case when making a decision on where the balance of the public interest lies.
33. The DWP has mentioned the need to maintain a 'safe space' in its responses to the complainant and its submissions to the Commissioner. The Commissioner generally considers 'safe space' arguments to be applicable to arguments regarding the formulation and development of policy and the need to make decisions arising from the assessment of risk away from public scrutiny. However, he accepts that, in this case, they equally apply to the operation of a programme for implementing a policy – that being the policy of introducing Universal Credit and the programme of assessing risk while that policy is introduced.
34. The Commissioner accepts that there is some likelihood that disclosure would therefore impact on the DWP's ability to deliver its aims on time and within budget as the increased scrutiny would divert resources from the Programme to dealing with enquiries. However, the Commissioner notes that there is no specific evidence to suggest that in previous cases where risk registers and other information have been disclosed there has been any impact on the ability to deliver projects within their stated aims. That said, the Commissioner does recognise there is significant weight to the 'safe space' arguments put forward by the DWP.
35. With regards to the 'chilling effect' argued by the DWP, the Commissioner would generally give some weight to the argument that disclosing information that is being used to influence decisions, whether on the formulation and development of policy, or in this case, on the

management of a project, could affect the frankness and candour with which relevant parties would continue to contribute to discussions on how to mitigate risks and keep the project moving on time. The weight that can be given is stronger when it can demonstrate that the information clearly relates to a matter which is still effectively "live".

36. The Commissioner notes that the withheld information includes considerable detail setting out a wide variety of potential risks, ways to mitigate these risks, actions taken, future actions and ownership of the risks. This register therefore relies on the candour of contributors and the need to deal in worst case scenarios. The Commissioner is mindful of decisions of the Information Tribunal⁵ where broad arguments that disclosure would affect the frankness and candour with which officials would contribute to gateway reviews and risk registers were rejected. However the Commissioner also accepts the need to consider the specific impacts of disclosure in each case. As such the Commissioner does consider that there is some validity to the 'chilling effect' arguments in this case in relation to the risk register.
37. It is also important that Commissioner considers the position at the time of request, which was, to some extent, different to the position in case FS5050460988. By the time of the request being considered in this notice the secondary legislation had passed and the project was now moving towards the start of the pilots in April 2013. The Commissioner therefore finds that a need for safe space still existed at the time of request as matters were still being decided, but more of the key decisions had been made compared to FS5050460988. It is also relevant to note that the government 'reset' Universal Credit in early 2013, because of the Major Projects Authority's (MPA's) serious concerns about programme implementation. In response to the concerns, the head of the MPA was asked to conduct a 13-week 'reset' between February and May 2013. This process was ongoing at the time of the request. The safe safe space and chilling effect arguments may carry slightly less weight but strong weight should still be given to them.
38. The risk register, unlike the registers considered in previous cases, does contain a large amount of very detailed information intended for candid and frank discussions and planning. He notes that the information in the risk register is based on worst case scenarios and what the DWP term 'imaginative pessimism'. He recognises that this is important to the ongoing risk assessment programme. Due to the level of detail

⁵ Office of Government Commerce v Information Commissioner [EA/2006/0068 & EA/2006/80]

contained in it, there is a possibility that disclosure would be likely to directly impact on how risks relating to Universal Credit are recorded and detailed in future iterations of the register.

39. Balanced against all of this, the Commissioner does find there is a very strong public interest in disclosure of the information given the significant changes to the benefits system Universal Credit is intended to bring. These changes may materially affect a significant percentage of the population. Transparency regarding Universal Credit is therefore a matter of significant public interest 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
40. It was also clear that the project was facing significant challenges by early 2013, as noted above, related to the MPA report. It is therefore clear that the public interest in the problems the project was facing were higher by the time of the request, compared to FS5050460988.
41. There has been widespread debate amongst the public and campaign groups and industry bodies, as well as media commentary, about whether the project is within budget and on schedule. Disclosure of any information, particularly that which shows how the project is being managed, would significantly aid public understanding of risks related to the programme and how it is being managed to keep to schedule. The Commissioner has also carefully considered what he should take into account in terms of evidence about perceived problems with the project. The National Audit Office report from September 2013⁶ reached some

⁶ National Audit Office: Universal credit – early progress.
<http://www.nao.org.uk/report/universal-credit-early-progress/>

important conclusions from an early assessment of the programme. The NAO report found weaknesses in the management of the Universal Credit programme. The report also specifically called for improvements in risk management. If relevant, the report, as an independent assessment, would add to the public interest arguments in favour of disclosing the risk register. The Commissioner has found that he should not take the report into account, as it post-dates the request.

Section 36 - Conclusion

42. The Commissioner recognises that the decision regarding the risk register is finely balanced. He has accepted the validity of both the safe space arguments and the chilling effect arguments in relation to this. These strong arguments combined with the sensitivity and depth of some of the information in the register do slightly outweigh the also strong public interest in disclosure. The Commissioner therefore finds that the public interest in maintaining the section 36(2)(b)(i) and (ii) outweighs the public interest in disclosure. In conclusion the Commissioner has decided that the risk register which has been correctly withheld.

Right of appeal

43. 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

44. 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.
45. 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