

**Freedom of Information Act 2000 (FOIA)  
Decision Notice**

**Date:** 22 March 2023

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

**Decision (including any steps ordered)**

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1. The complainant has requested information about an investigation into alleged wrongdoing regarding a benefit they claimed from the Department for Work and Pensions ("DWP"). DWP relied on section 40(5) of FOIA to neither confirm nor deny that it held any information.
2. The Commissioner's decision is that DWP was entitled to rely on section 40(5A) of FOIA (personal data) to refuse to confirm or deny that it held any relevant information.
3. The Commissioner does not require further steps to be taken.

## Request and response

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4. On 23 June 2022, the complainant wrote to DWP and made a request in multiple parts as follows:

"Pursuant to legal rights in place, in respect of attached document, I am seeking following information disclosures

1. confirm the document attached is as populated as known to DWP
  2. that it was exclusively created and populated by one person as signed on 24/05/16 at 08.17.36 hr; if not then by how many other people.
  3. produce any other versions / draft and like variance known to DWP , in particular of part 1.4 and part 2, and 2.1 of document
  4. produce templates used to populate part 2 5. referent of "information provided " and "information requested " , to be specified and disclosed
  6. confirm "Sections 122C and 122D of the Social Security Administration Act 1992" is legible at DWP as appearing in part 2 of the document and if so, produce text of sec.122C and sec.122D of the named Act as known to DWP.
  7. Part 2 of document concerns " Request for Claim Information and Documents " ; disclose who the "Request " was addressed to, disclose who was the addressee , disclose who sent the "Request" , disclose to whom it was sent ; and also disclose a copy of the actual "Request" that is noted in part 2.
  8. part 2.1 is blank, not populated or incomplete , it concerns " detail information required ", disclose what detail is missing from part2.1, disclose any details needed to complete part2.1."
5. DWP responded on 22 July 2022. It confirmed that it considered the information to be the complainant's own personal data. It therefore relied on section 40(5) to withhold the information. DWP noted that any personal data it held could be dealt with by a subject access request ('SAR').
6. The complainant sought an internal review that same day arguing that DWP's response was "incoherent, untenable in law and convoluted."
7. Following an internal review, DWP wrote to the complainant on 24 August 2022. It upheld its original position.

## Scope of the case

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8. The complainant contacted the Commissioner on 2 September 2022 to complain about the way their request for information had been handled. They argued that the information requested did not constitute their personal data.
9. The Commissioner considers that the scope of his investigation is to determine whether any information DWP held (if it were held) would be the complainant's own personal data and, if so, what the appropriate response to the request would have been.

## Reasons for decision

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### Section 40(5A)

10. The following analysis explains why the Commissioner is satisfied that DWP was entitled to neither confirm nor deny holding the information that had been requested.
11. Section 40(1) of FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."
12. Section 40(5A)<sup>1</sup> of FOIA states that:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."
13. Section 40(5A), therefore, allows a public authority to refuse to confirm or deny if it holds particular information if that information would (if it existed) be the personal data of the person making the request.

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<sup>1</sup> The Data Protection Act 2018 amended section 40 of FOIA, which no longer has a subsection 5. Instead, it has a subsection 5A – which covers the situation where relates to the personal data of the requestor – and subsection 5B – which covers the personal data of third parties.

14. Section 2(2) of the Data Protection Act 2018 defines personal data as:-  
    “any information relating to an identified or identifiable living individual.”
15. The Commissioner considers that any information that DWP held within the scope of the request (if it existed) would indisputably be the complainant's own personal data.
16. If an investigation into alleged wrongdoing of the complainant did indeed take place, resulting in the creation of the document that the complainant posed their questions about, that would be an investigation about the complainant and with them as its focus. Any information DWP confirmed it held (if it were held) could only have been created if the complainant had been put under investigation.
17. The Commissioner notes that, whilst the questions in the complainant's request ranged across several different topics, each individual question was in some way predicated on the assumption that DWP had commenced an investigation into the complainant's alleged wrongdoing regarding a benefit claimed.
18. Furthermore, in merely confirming that it held any information within the scope of the request, DWP would also be confirming to the world at large (which is what FOIA requires), that the complainant was under investigation for alleged wrongdoing – along with revealing the specific nature of the investigation and particular sections of the Social Security Administration Act 1992<sup>2</sup> that were being considered by DWP. This too would be the complainant's own personal data.
19. In this case, as any information that was held (if it was) would have been the complainant's own personal data, the Commissioner's decision is that DWP was correct to neither confirm nor deny holding information and could therefore rely on section 40(5A) of the FOIA to do so.
20. The Commissioner finds that section 40(5A) applies to all parts of the request, including part 6. He has therefore not moved on to consider section 21 of FOIA.

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<sup>2</sup> For example, section 122C(3) of the Social Security Administration Act 1992 refers to the prevention, detection, investigation or prosecution of benefit offences or for use in checking the accuracy of information relating to housing benefit or to council tax benefit.

## Other Matters

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21. The Commissioner's guidance<sup>3</sup> says:

"Although you will comply with FOIA ... if you neither confirm nor deny that you hold the requester's personal data, you should also go on to deal with the request as a subject access request".

22. The section 45 Code of Practice<sup>4</sup> says:

"... a request for a person's own personal data should be dealt with under the subject access provisions of the Data Protection Act 2018. Sometimes it may be necessary to consider a request under more than one access regime."

23. It is not clear whether DWP has already dealt with this request as a SAR. The Commissioner cannot require a public authority, in a FOIA decision notice, to deal with requests as a SAR, but he would strongly recommend that DWP reconsider the request under the subject access provisions of data protection legislation and respond accordingly (if DWP has not already done so).

24. The Commissioner recognises that many requestors are unaware of the nuanced differences between the various information access regimes. When a requestor makes an information request, they simply want the information and are (usually) unconcerned about the method by which it reaches them. It is for the public authority to determine, in the first instance, which information access regime(s) is likely to be most generous to the requestor and deal with the request via that route.

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619029/s40-personal-data-of-both-the-requester-and-others-foi-eir-final-version-21.pdf>

<sup>4</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

## Right of appeal

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25. 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 9368963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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**