

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 2 July 2020

Public Authority: The Department for Work and Pensions

Address: Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information related to a specific piece of correspondence between MPs.
2. The Department for Work and Pensions (DWP) is relying on section 35(1)(d) to withhold the requested information.
3. The Commissioner's decision is that DWP is not entitled to rely on section 35(1)(d) to withhold the requested information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
5. 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

6. On 29 April 2019, the complainant wrote to DWP and requested information in the following terms:

"I understand that Catherine West MP on 12 August 2018 sent a letter to the then Secretary of State for Work and Pensions, which was

responded to by Alok Sharma MP, Minister of State for Employment, on 24 April 2019.

Please can you provide all records relating to these pieces of ministerial correspondence, i.e. any drafts, internal notes, and internal discussions / correspondence relating to it.

I am afraid I do not have any reference numbers for the above correspondence though I trust with the information given you will be easily able to retrieve them from your MinCorr database. I trust you will then be able to use that file reference to conduct the searches for the above information, so that any s12 FOIA issues do not arise."

7. On 29 May 2019, DWP provided its response. It stated that it held no information regarding the response sent to Catherine West MP within the scope of the request.
8. The complainant wrote to DWP on 29 May 2019 and requested an internal review of the handling of his request for information. He disputed DWP's response stating that ministerial correspondence generates a document trail. He stated that all central government departments have systems in place to record the arrival of ministerial correspondence, allocate it to the relevant business units to draft a reply and submit it for clearance together with a cover note/proforma, so that once a reply has been duly cleared, it can be given to the Minister concerned for review and signature. The complainant disputed that DWP did not hold the information as this would mean that the Minister had the letter for eight months before responding to it himself without any input from officials. He also considered that in light of the Ministerial letter being sent five days before his request for information, it was unlikely that this had been deleted in this short time frame.
9. DWP provided the outcome of its internal review on 20 July 2019. It confirmed that the original decision was incorrect and that the requested information is exempt under section 35(1)(d) as it refers specifically to the operation of a ministerial private office which is defined as providing administrative support. DWP explained that the drafting of correspondence on behalf of Ministers, including redrafts, is a purely administrative matter between Ministers and their immediate support staff.
10. DWP confirmed that section 35(1)(d) is a qualified exemption and set out its consideration of the public interest. DWP accepted that there is an overarching public interest in the work of government and its Ministers. However, it considered that there is an even greater public interest in avoiding harm to the effectiveness of their private offices in providing administrative support to Ministers. Civil servants who support

Ministers are entitled to a “safe space” in which they can focus on managing the Minister’s work efficiently without external interference and distraction. DWP stated that public accountability remained with Ministers and not the civil servants who provide them with administrative support.

Scope of the case

11. The complainant contacted the Commissioner on 20 July 2019 to complain about the way his request for information had been handled.
12. The Commissioner considers that the scope of this investigation is to determine whether DWP is entitled to rely on section 35(1)(d) to withhold the requested information.

Reasons for decision

Section 35(1)(d)

13. Section 35 of the Act states:

“(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(d) the operation of any Ministerial private office.”

14. The exemption is a class-based one 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 class described, in this case, the operation of any ministerial office.
15. The Commissioner’s published guidance points out that section 35(1)(d) refers specifically to the operation of a ministerial private office, which itself is defined as providing administrative support. In other words, it covers information about administrative support to a minister.
16. In the Commissioner’s opinion, this means that the exemption is fairly narrow in scope. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about ministerial priorities and similar issues.
17. Section 35(5) defines ‘ministerial private office’:

“Ministerial private office” means any part of a government department which provides personal administrative support to a Minister of the Crown, to the a Northern Ireland Minister or a Northern Ireland junior Minister, or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government.”

18. All government ministers have their own private offices comprising a small team of civil servants. They form the bridge between the minister and their department. The private office’s role is to regulate and streamline the ministerial workload and allow the minister to concentrate on attending meetings, reading documents, weighing facts and advice, and making policy decisions.
19. The Commissioner considers that the purpose of section 35(1)(d) is to ensure that ministerial business is managed effectively and efficiently.
20. The exemption covers information which ‘relates to’ the operation of the private office. This is generally interpreted broadly, however, this does not mean that all information with any link to a ministerial private office is covered. Section 35(1)(d) refers specifically to the operation of a ministerial private office, which itself is defined as providing administrative support. In other words, it covers information about administrative support to a minister.
21. The upshot of this is that this exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about ministerial priorities and similar issues.
22. The exemption is likely to cover information such as routine emails, circulation lists, procedures for handling ministerial papers or prioritising issues, travel expenses, information about staffing, the minister’s diary, any purely internal documents or discussions which have not been circulated outside the private office.
23. However, the exemption will not automatically cover the content of a document just because it originated in or passed through the ministerial private office. In particular, it will not automatically cover the content of all ministerial papers, or details of ministerial meetings with third parties. Where the information contains a substantive discussion of the underlying issues, rather than relating to administrative matters, the exemption is unlikely to be engaged.
24. The Commissioner wrote to DWP, setting out the above, and invited it to review its decision and handling of the request. DWP confirmed that it did not intend to amend or reverse its decision.

25. DWP confirmed that the Private Office to which the information related is the Private Office of the Minister for Employment. At the time the correspondence was handled, this post was held by Alok Sharma MP.
26. DWP explained that the information related to the operation of the office as it shows the process through which letters received from another MP are considered, drafted, and approved by the Minister and his office. This includes frank discussion within the Private Office of timescales, allocation of resources, communications with the Minister, circulation of drafts, and discussion on the scope of the letter and how the response should be drafted. This is the office in its administrative capacity.
27. DWP explained that the withheld information relates exclusively to the operation of the Private Office. DWP explained that the letter from Catherine West MP was not one that required a deep dive into the formulation of policy. DWP considers that due to the limits of 35(1)(d), the information that falls within its scope is not likely to contain discussions which are particularly radical, but are administrative.
28. DWP explained that the requested information could not be released in a redacted formatted as to do so would inhibit the free and frank discussion required in the safe space of Private Office to allow it to function effectively, as well as undermining the purposes of applying the exemption.
29. The Commissioner has reviewed the withheld information and considers that the majority of the information does engage the exemption at section 35(1)(d) as it comprises the Private Office's administrative support to the Minister in responding to a letter from an MP.
30. The Commissioner considers that the original letter from Caroline West MP and the resultant final letter from Alok Sharma MP do not engage the exemption as they are the initiation and result of the administrative process and therefore do not provide any information on the process itself.
31. The Commissioner also considers that the information on the substantive issues raised in the letter from Ms West do not comprise routine administrative support, therefore this information does not engage section 35(1)(d). The Commissioner requires DWP to disclose this information.
32. With regards to the information that does engage section 35, the Commissioner will now consider the public interest test with respect to that information only.

Public Interest Test

33. Section 35 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 contained at section 35(1)(d) outweighs the public interest in disclosing the information.

Public interest in disclosure

34. DWP explained that it had considered the importance of transparency in how the Minister's Private Office handle and response to correspondence between MPs, which is a route for individuals to express their concerns to the Department via their elected representative.

Public interest in maintaining the exemption

35. DWP stated that similar to the reasoning used by the Commissioner in the decision notice FS50165511¹ with regards to formulating a response to a Parliamentary Question, in regarding to disclosing the relevant information would reveal some of the methods and processes used by a Minister's Office to answer correspondence from MPs, and would distract from the operation of the office. DWP explained that the steps in responding to both types of question are not dissimilar.
36. DWP explained that Ministerial correspondence provided an essential avenue for MPs to communicate with each other, outside the formal scope of Parliamentary Questions. The reduced formality does not detract from their seriousness, as often a more detailed answer may be given in this manner. Parliamentary Questions have tighter deadlines for response to be provided and are drafted in a way to communicate information in a very succinct way.
37. DWP explained that Ministerial correspondence allows Civil Servants the opportunity to develop a response with more time and in a safe space; being able to discuss how they intend to respond as well as the ability to consult and obtain information to be able to provide as full a response as possible. If this is taken away, the public interest is further harmed in that the relevant Civil Servants will be reluctant to engage on a substantive and detailed level for concern that their internal correspondence and administration will be published. DWP considers that this would result in responses to correspondence being stock replies that do not attempt to address the substantive issues in the letter, removing the vital avenue for constituents to address issues of interest

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2008/444556/FS_50165511.pdf

to them via their MP, thereby undermining the efficiency of the office, and process of responding to letters.

Balance of the public interest

38. The Commissioner acknowledges that there is a significant public interest in allowing Civil Servants the safe space to conduct free and frank discussions and provide the Minister with candid advice and opinion.
39. However, the Commissioner is not persuaded that this argument carries much weight in the specific circumstances of this case. DWP has stated in its submissions to the Commissioner that the discussions within the withheld information were not radical and the Commissioner notes that the final letter from the Minister does not contain new information, rather it refers to previously published surveys and information on the Universal Credit rollout.
40. The Commissioner does not accept that all discussions and advice provided by Civil Servants should be subject to safe space considerations. It is the role of Civil Servants, particular Senior Civil Servants, to provide frank and candid advice to the relevant Minister and the potential for the disclosure of relatively anodyne information such as in this case should not prevent Civil Servants from carrying out their duties.
41. DWP has stated that disclosure of the withheld information would distract from the efficient running of the Private Office, however, DWP has not explained how this would occur.
42. The Commissioner also notes that the response from the Minister took approximately nine months to be provided, by which time the events Ms West had raised concerns about had come to fruition approximately five months previously.
43. Having viewed the withheld information, the Commissioner is not persuaded that disclosure would have any significant impact on the effective operation of the Minister's private office.
44. The Commissioner is cognisant of the very significant public interest in Universal Credit and considers that transparency and accountability surrounding correspondence and communications between the Minister and the MPs, particularly in light of the significant delay in providing a response, carries a compelling weight. She therefore considers that the public interest favours disclosure of the information redacted in reliance of section 35(1)(d).

Other matters

45. The Commissioner notes that DWP originally stated that it did not hold any information within the scope of the request, however, at internal review it located a significant amount of information.
46. The Commissioner raised this with DWP and DWP explained that this was an administrative error by a member of the Private Office staff. Following the request for internal review, where this issue came to light, all staff within the private office have been reminded of their roles and responsibilities under the Act when responding to FOI requests.
47. In addition to the Commissioner's concern that DWP did not identify the significant amount of information held, she is concerned that it was not apparent to DWP that information would clearly be held. As the complainant sets out in his request for internal review, correspondence to a Minister automatically generates an information trail.
48. The Commissioner expects DWP to ensure that it performs adequate searches at the time of the request in future.

Right of appeal

49. 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: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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
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