Dear Mr Armstrong,

Following your complaint to the Information Commissioner’s Office (ICO) about how your Freedom of Information Request (Ref: VTR1156) was handled by DWP, the ICO has asked me to write to you to explain DWP’s view that it does not hold information covered by your request and to explain why you were led to believe, when DWP responded to your internal review request that legal advice was held on the specific matters covered by your request when in fact it is not. May I also apologise for the delay in sending you this reply.

However, before I respond to each of the questions in your original request, it may be helpful if I explain why you were led to believe that legal advice addressing your internal review request may be held by DWP when in fact it is not.

We consider that, when conducting the internal review, we misinterpreted your original request as a request for any information held by DWP about the general subject matters mentioned in the different parts of your request.

DWP does hold information about some of the general subject matters covered by some of your questions and some of it is legal advice. That is why we cited section 42 (Legal Professional Privilege) when responding to your request for an Internal Review.

However, we consider that we cited section 42 incorrectly, because when we received your complaint to the ICO, we considered again what your original request was asking for. We concluded that your original request asked for the information referred to in bold italics text below and that we do not hold the information requested for the reasons given below each part of bold italics text.

We consider that we should have explained in the original response what information we do and do not hold. We have explained this below.

We apologise for the unclear response that we sent to your Internal Review request and for leading you to believe that legal advice was held on the specific matters covered by your request.
DWP’s understanding of the information you requested and why DWP concludes that the information is not held by DWP:

1a. Information held by DWP about whether it is correct that a claimant cannot be mandated to use a DWP internet access device (IAD) to comply with a jobseeker's direction requiring use of Universal Jobmatch (UJ) if the claimant has not given consent for cookies to be placed on the DWP IAD.

DWP does not hold information about whether it is correct that a claimant cannot be mandated because there has been no ruling by a court on this question as such there is no definitive information about whether the statement is correct.

However, in order to assure you that DWP had considered the issue of whether it is necessary to obtain the user’s consent in such circumstances, we provided a response to your question.

We consider that we should have added “In DWP’s view” before the following sentence: “It is only therefore necessary for DWP to consent to cookies being used on those devices”, to make clear that DWP was only stating its view on the matter.

1b. Information held by DWP about the authority DWP is using to supersede the EU e-privacy directive (in relation to requiring claimants to use UJ, on a DWP IAD if they do not want to accept cookies)

DWP does not hold information on this matter because the legislation relied on by DWP to require some claimants to create a profile and public CV does not supersede EU legislation concerning privacy. DWP’s view is that it is required to comply with that legislation. Again, there has been no court ruling on this point and as such there is no definitive information about whether the authority DWP uses does supersede the EU e-privacy directive.

1c. If consent is required, information about whether claimants will be given the information and option to consent to storage of cookies on a DWP IAD on their behalf

DWP does not hold information on this point because it is premised on consent being required, in relation to which see 1b.

Our original response explained that DWP considers that consent is not required and that DWP guidance does require advisers to give a cookies factsheet to claimants when they require JSA claimants to use UJ which explains about cookies that are placed by UJ and about the claimant’s option to use a DWP IAD.

We consider that we should have added “In DWP’s view” before the following sentence “It is only therefore necessary for DWP to consent to cookies being used on those devices”, to make clear that DWP was only stating its view on the matter. We should also have explained that claimants are not given the option to consent to storage of UJ cookies on a DWP IAD on their behalf.

1d. If the consent requirement in regulation 6 of the Privacy and Electronic Communications (EU Directive) Regulations 2003 (the PECR) does not apply to UJ or has been misinterpreted, information about why it does not apply or how it has been misinterpreted
DWP does not hold information which says that regulation 6 of the PECR, as amended, does not apply to UJ, because a court has not ruled on the point.

In addition, information was not held at the time of receiving your request about whether you had misinterpreted the legislation because you had not informed DWP of your view before.

2a. Information held by DWP which confirms the authority under which a person can be mandated to upload sensitive information to UJ, where the individual does not consent to sharing their personal data.

DWP does not hold information on this point because there has been no court ruling which confirms that DWP can mandate claimants to upload personal data (including sensitive personal data) onto the UJ service. However, in the original response (to FOI 1156), we explained our view that DWP does have such authority and set out the authority relied on by DWP to mandate some claimants to create a profile and public CV in UJ. We consider that we should have made clearer that our response was only DWP’s view of the position.

2b. Information held by DWP about how the authority DWP is using to require claimants to create a profile and public CV on UJ supersedes the individual’s right to protect their data under EU law and their right to refrain from consenting to submit their data to a non-necessary 3rd party

DWP does not hold information that answers the first part of the question (concerning how the authority DWP uses to mandate claimants to use UJ supersedes an individual’s right to protect their data under EU law) because it considers that legislation relied on by DWP to require some claimants to create a profile and public CV does not supersede EU legislation concerning privacy. DWP considers that it is required to comply with that legislation. Again, there has been no court ruling on this point and as such there is no definitive information about whether the authority DWP uses does supersede the individual’s right to protect their data under EU law.

DWP does not hold information that answers the second part of the question (concerning how the authority DWP uses to mandate claimants to use UJ supersedes an individual’s right to refrain from consenting to submit their data to a non-necessary 3rd party) because DWP considers that individuals are not required to submit their data to any “non-necessary 3rd party” for the purpose of using UJ. However DWP tried to be helpful and explain the legal basis upon which DWP considers that Monster (DWP’s service provider) is able to process individual’s data within UJ. Again, there has been no court ruling on this point and as such there is no definitive information about whether the authority DWP uses does supersede any right of an individual to refrain from consenting to submit their data to a 3rd party.

Again, in both cases, we consider that we should have made clear that we were only setting out DWP’s view.

3a. Information which confirms DWP’s authority to require claimants who have refused to give DWP access to their UJ account (when creating a UJ profile) to give DWP information (e.g. screen print outs) from their UJ account (e.g. when attending a jobsearch review)
3b. Information which confirms DWP's authority to sanction a claimant if the claimant fails to comply with a request from DWP to share information from their UJ account (when they have ticked a box to say that DWP should not have access to the account itself)

DWP does not hold information on these points because there has been no court ruling which confirms that DWP can require claimants to provide evidence to DWP from their UJ account at a jobsearch review, or can sanction a claimant for failing to provide such evidence.

DWP explained in the original response to FOI 1156 its view that claimants are required to provide evidence to show that they have complied with a jobseekers direction or other specific requirement e.g. a requirement to apply for a job and are expected to provide evidence of the steps they have taken to meet the requirement to be actively seeking employment, and if they fail to demonstrate sufficiently what they have done to meet those requirements, their benefit may be affected. Our response should have explained that it only set out DWP's view on these points.

It may have been helpful if we'd set out the authority DWP relies on to sanction a JSA claimant (current-style JSA, as opposed to new-style JSA, which has begun in some pathfinder areas) for failing to comply with a jobseekers direction without good reason is section 19A of the Jobseekers Act 1995. If a current-style JSA claimant fails to meet the actively seeking work requirement (one of the conditions of entitlement for JSA - see section 1 of the Jobseekers Act 1995) they will be disentitled from receiving JSA. If they then reclaim JSA they may incur a sanction (see section 19B of the Jobseekers Act 1995).

**Why in our response above to your questions we say, in a number of places, that we do not hold the information requested because the point has not been ruled on by a court.**

We have explained above that information is not held on particular issues (see the black italic text above) because the matters have not been ruled upon by a court. For example, question 1a asks for information about whether it is correct that DWP cannot mandate someone to use an IAD without their consent to cookies. We consider that only a court can confirm whether this proposition is correct. We therefore consider that it is correct for DWP to conclude that it does not hold information on that point.

DWP may hold information on the general points raised that has informed the view that DWP has taken on particular issues e.g. on whether DWP is able to require claimants to create a profile and public CV on UJ in circumstances where they do not want to accept cookies on a non DWP IAD, without obtaining their consent. However, you have not asked for information about DWP's view, rather you have asked for information about definitive matters e.g. what is the authority that enables DWP to do something, is it correct that the law enables DWP to do something? DWP does not hold information on the definitive position because there has been no court ruling on the specific points.

If you have any queries about this letter please contact me quoting the reference number above.

Yours sincerely,

DWP Central FoI Team
Your right to complain under the Freedom of Information Act

If you are not happy with this response you may request an internal review by e-mailing freedom-of-information-request@dwp.gsi.gov.uk or by writing to DWP, Central FoI Team, Caxton House, Tothill Street, London, SW1H 9NA. Any review request should be submitted within two months of the date of this letter.

If you are not content with the outcome of the internal review you may apply directly to the Information Commissioner’s Office for a decision. Generally the Commissioner cannot make a decision unless you have exhausted our own complaints procedure. The Information Commissioner can be contacted at: The Information Commissioner’s Office, Wycliffe House, Water Lane, Wilmslow Cheshire SK9 5AF www.ico.gov.uk