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Our Ref: IR2021/44498

19 August 2021

Dear Claire Hall,

Thank you for your Freedom of Information (Fol) request received on 2nd June. You wrote:

"I write further to my Freedom of Information request of 19 March 2021 requesting a copy of the Department's submission to the Independent Review of Administrative Law (the "Request") and to your letter of 20 April 2021 providing a substantive response to the Request (the "Response").

The Response relies on the exemption at section 36(2)(a)(i) of the Freedom of Information Act 2000 ("FOIA") to withhold the requested information on the basis that: "in the reasonable opinion of the DWP's qualified person, its release would be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers..."

and

"...[DWP] are satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure."

I request an internal review of the handling of the Request for the following reasons:

A. Exemption not engaged – disclosure would not be likely to prejudice the maintenance of the convention of the collection responsibility of Ministers

1. It is not reasonable for the DWP's qualified person to consider that release of the information would be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers.

2. The IRAL Call for Evidence envisaged that disclosure may be required under FOIA, stating:

"Information provided in response to this call for evidence, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA)..."¹

3. IRAL was set up to "examine trends in judicial review of executive action" and to "consider data and evidence on the development of JR and of judicial decision-making"².

The IRAL Panel consistent of six independent experts, and was disbanded in January 2021, following the submission of their report to Government.

4. The general principle of collective responsibility "requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained." (paragraph 2.1, Ministerial Code). The concept of collective responsibility applies in the context of the internal, private deliberative space amongst ministers and civil servants. A formal submission to an independent and public review, which at the time of the Request had concluded and reported, is not such a

space.

5. The recent call for evidence published by the Independent Human Rights Act Review (IHRAR) indicates that “in the interests of openness and transparency, response to the call for evidence will be published on the IHRAR website as soon as is practicable, with the respondent identified.”³ Given the clear similarities between IRAL and the IHRAR, this is further prima facie evidence that collective ministerial responsibility is not engaged in relation to submissions to independent reviews such as IRAL.

6. I note that “likely to prejudice” has been interpreted to mean that the chance of prejudice being suffered should be “more than a hypothetical or remote possibility” and must be a “real and significant risk”. It is not reasonable to conclude that this threshold is met.

B. Public interest in disclosure outweighs the public interest in maintaining the exemption

1. Whilst, for the reasons set out above it is not accepted that the exemption is engaged, in the alternative, if it is engaged, then it should not be maintained due to the public interest of disclosure outweighing the public interest in withholding the

1 Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government? – Call for Evidence.

2 Terms of Reference - Independent Review of Administrative Law.

3 Independent Human Rights Act Review (IHRAR) - Call for Evidence.

information. Please reconsider the public interest test, taking into account the matters set out below.

2. The qualified person’s opinion is stated in the Response as being that release of the requested information “would be likely” to prejudice the maintenance of the convention. In conducting the public interest test, this carries less weight for withholding the information than if the qualified person had concluded that disclosure would prejudice the maintenance of the convention.⁴

3. Public authorities are required to explain to the requester why the balance of the public interest test favours withholding the information (section 17(3)). This explanation is provided in the Response, however, the only public interest considerations in favour of withholding the information are stated as:

- “The Panel must have a safe space in which to analyse and consider the evidence collected (including the submissions), away from the public gaze and to reach its conclusions. The damage that would likely be inflicted by premature release of evidence collected would impact on the Panel’s deliberations and potentially their Report. It is not a credible use of the panel or government’s time if they spend time and effort defending and debating publicly options which are still being considered.
- Premature release of evidence collected also has the potential to interfere and/or distract the Panel’s process, by causing delay to the ultimate submission of their Report to Government.”

4. Both the Request and the Response were made after the Panel had reported to the Government and after the Panel’s report had been finalised and published (on 18 March 2021). Neither of the public interest considerations set out in the Response can possibly apply to the requested information in circumstances where the Panel had already reached its conclusions and its process had already concluded.⁵

5. Public interest considerations favouring disclosure were stated as:

“The issues that were under consideration by the IRAL Panel are of constitutional importance, and the evidence on which the Panel’s Report was based which was presented to the Lord Chancellor and informed the present proposals for reform. There is therefore legitimate public interest in that evidence being released.

Release of the evidence would increase transparency and understanding of the proposals.”

4 Para 69, Prejudice to the effective conduct of public affairs (section 36) v3, ICO guidance.

5 Section 36 cannot apply to information that is exempt under section 35 (section

36(1)(a)). It therefore follows that DWP has concluded that section 35 does not apply to the requested information.

6. The Response fails to acknowledge, and therefore fails to include in determining whether the overall public interest favours disclosure or not, a key public interest consideration favouring disclosure. Namely, that the contents of the DWP's submission sets out the DWP's responses to questions concerning various areas of the judicial review process and its own decision-making and is likely to contain information that is of interest to those who represent the millions of individuals who are affected by decisions by DWP in relation to their welfare benefits. This consideration is independent of the IRAL process. In light of all of the above, if the exemption is engaged, the public interest is in favour of disclosure.

Redaction

7. To the extent that the internal review does not result in disclosure of the submission as a whole, please consider:

- a. Whether the exemption relied on only applies to part of the DWP's IRAL submission (ie. to the extent that DWP has used the IRAL Call for Evidence as a forum in which to express private opinions of the Minister on judicial review, then please conduct a review of the submission to identify those limited sections of the submission for redaction and provide the remainder of the submission); and
- b. Whether any factual or statistical evidence contained within the submission can be provided."

DWP Response

In response to your internal review request, we can confirm that the handling of your original request and response has now been appropriately reviewed by someone unconnected with the handling of your original request.

You have set out a number of grounds for review. We will address them in turn.

Maintenance of the convention of the collective responsibility of Ministers

Firstly, that the exemption is not engaged – disclosure would not be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers. In support, you refer to the description of the convention set out in paragraph 2.1 of the Ministerial Code and state-

The concept of collective responsibility applies in the context of the internal, private deliberative space amongst ministers and civil servants. A formal submission to an independent and public review, which at the time of the Request had concluded and reported, is not such a space.

We have reviewed the processes involved, as well as the Ministerial Code. The Ministry of Justice issued a call for evidence to individual government departments. The relevant submission in response was not subject to collective agreement and contains the Minister's views. Your Freedom of Information request was received the day after the relevant consultation was issued by the Lord Chancellor.

The Ministerial Code is clear that Ministers are "required" to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. It is also clear that the convention extends to correspondence and it requires that the privacy of opinions expressed in correspondence should be maintained.

We consider that the convention was engaged. The submission was private in nature containing Ministerial views in response to a call for evidence directed to government departments from the Ministry of Justice, which informed proposals set out in the subsequent consultation issued by the Lord Chancellor.

You also compare the approach of the Independent Human Rights Act Review (IHRAR), which has indicated that it will publish responses on the IHRAR website as soon as practicable, with the approach taken to Ministerial submissions regarding IRAL. IHRAR has not made a call for evidence to individual government departments and so we do not consider it reasonable to compare the two for present purposes.

We are satisfied that the threshold for the exemption is met. Releasing the submission on the present facts would be likely to undermine the united front that is a fundamental part of the convention. Disclosure may also inhibit future discussions by Ministers in relation to policy if individual views concerning proposals for reform are subsequently published.

Public interest test

Secondly, you have asked us to re-consider the public interest test taking into account the factors that you have mentioned.

We accept your arguments regarding the public interest test because the public interest factors noted in the response focus on the prejudicial effect disclosure would be likely to have on the workings of the Panel. At the time of the request, and as you note, the Panel had issued its recommendations.

We have reconsidered the public interest balance as at the time of determining the Internal Review.

We recognise that there are strong and legitimate public interest considerations in favour of disclosing the information.

Judicial review is an important means of address for individuals against the state and public authorities generally. The Lord Chancellor refers to a wider public interest in the foreword to the consultation in ensuring, “that the courts have available to them a flexible range of remedies, allowing cases to be resolved in a manner which is sensitive both to the rights of individual and to the wider public interest”, (paragraph 5).

The proposals for reform are now set out in the Judicial Review and Reform Bill, which has been introduced into the House of Commons. Publication of the particular information concerned would encourage public debate regarding these important proposals.

We consider, however, that there are strong and constitutionally important public interest factors in favour of withholding the information concerned, which outweigh the important public interest factors in favour of disclosure.

The public interest factors in favour of withholding the information are as follows-

- There is a strong public interest in maintaining collective Ministerial responsibility for the proposals for reform, as to do otherwise might undermine these important proposals. In general, the ICO accords a high level of importance to the convention of collective responsibility of Ministers given its high constitutional importance.
- The Ministry of Justice has released a [summary of departmental responses](#), which is a proportionate response in relation to the need for transparency. This will facilitate debate and scrutiny of the Judicial Review and Courts Bill. Publishing departmental views may undermine the passage of this important piece of legislation, which is one

of the government's manifesto commitments. Debate may be moved away from the government's proposals to the individual departmental view.

- There is a strong public interest in providing a safe space for future discussions at a Ministerial level regarding important government policies which disclosure of the department's proposals might inhibit.
- There is a strong public interest in favour of maintaining public confidence in effective consultation which might be undermined if Ministerial views are published whilst consultation are being undertaken.

On balance we therefore consider the public interest in withholding the information outweighs the public interest in publishing it.

Thirdly, you have asked whether the exemption applies to all of the submission and whether any factual or statistical evidence contained in the submission may be provided.

We consider that the exemption applies to the submission as a whole. We would refer you to the [anonymised summary of responses published by the Ministry of Justice](#), which might assist.

Section 36(2)(c) of the Fol Act

In addition to section 36(2)(a)(i), we consider that the information is withheld under section 36(2)(c).

Section 36(2)(c) of the Fol Act states;

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person [in this context, a Minister of the Crown], disclosure of the information under this Act

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

We consider that the submission is exempt from disclosure under section 36(2)(c) of the FOIA, because in the reasonable opinion of the DWP's qualified person, its release would prejudice the safe space required by the Ministry of Justice required to consult effectively and finalise its policy position. Publication of Ministerial submissions would be likely to distract from the proposals in the consultation and consequently undermine its effectiveness.

Section 36(2)(c) is a qualified exemption which means that the decision to disclose the requested material is subject to the public interest test. When assessing whether or not it was in the public interest to disclose the information to you, we took into account the following factors:

The public interest factors in favour of disclosure are the same as stated in the initial response.

The public interest factors in favour of withholding the information are-

- Publishing departmental views may undermine the passage of the Judicial Review and Courts Bill through Parliament, which is one of the government's manifesto commitments. Debate may be moved away from the government's proposals to the individual departmental view.
- The Ministry of Justice has released a summary of departmental responses, which is a proportionate response in relation to the need for transparency. This also facilitates public debate and scrutiny regarding this important issue.
- There is a strong public interest in providing a safe space for future discussions at a Ministerial level regarding important government policies which disclosure of the department's proposals might inhibit.

- Strong public interest in favour of maintaining public confidence in effective consultation which might be undermined if Ministerial views are published whilst consultation are being undertaken.

On balance, we consider the public interest factors in favour of withholding the information are greater than the public interest factors in favour of disclosure.

As a result of this review, we can advise that the original response was partly correct. Your complaint is therefore partially upheld. The reason for this is as follows

- We consider that the exemption in section 36(2)(a)(i) was engaged;
- We agree, however, that the public interest factors stated in the response in favour of withholding the submission were not greater than the public interest factors in favour of disclosing it.; and
- We have reviewed the public interest factors as a result. We consider that the public interest factors referred to above in favour of withholding the information outweigh those public interest factors in favour of disclosure.

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

Yours sincerely,

DWP Central Freedom of Information Team
Department for Work and Pensions

Your right to complain under the Freedom of Information Act

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.

Web: [ICO Contact Information](#) or telephone 0303 123 1113 or 01625 545745