FS50441818

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **1 October 2012**

Public Authority: **Department for Work and Pensions**
Address: **IGS Directorate**
The Adelphi
1-11 John Adam Street
London WC2N 6HT

Decision (including any steps ordered)

1. The complainant asked the Department for Work and Pensions (DWP) for the *names of the organisations that JHP Group use when delivering Mandatory Work Activity in the Scotland Contract Package Area (CPA).*

2. The Commissioner's decision is that by withholding the information under sections 43(2) and 36(2)(c) the DWP did not deal with the request for information in accordance with the FOIA.

3. By failing to state or explain in its refusal notice that section 36(2)(c) was applicable to the requested information the department breached sections 17(1)(b) and (c) of the FOIA.

4. The Commissioner requires the department to disclose the information within 35 calendar days of the date of this decision notice.

5. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

6. On 11 January 2012 the complainant requested the following information:

   "Please could you provide me with the names and locations of organisations which are participating in the Work Programme in the Scotland Contract Package Area, by providing mandatory work placements through the DWP's prime providers Ingeus, and Working Links, through JHP Group Ltd or any relevant sub-contractors."

7. The DWP asked the complainant to clarify his request and on 25 January 2012 he revised his request to:

   "'The names of the organisations that JHP Group use when delivering Mandatory Work Activity in Scotland (CPA)".

8. On 14 February 2012 the complainant was informed that the information had been withheld under s43 of the FOIA.

9. The complainant appealed and on 23 March 2012 an internal review upheld the exemption specifying the sub section at s43(2).

Scope of the case

10. The complainant contacted the Commissioner to complain about the department's refusal to disclose the information.

11. On 23 April 2012 the Commissioner asked the DWP for a copy of the information in order to determine the appropriateness of the exemption that had been applied. The department supplied the information to the Commissioner on 11 May 2012.

12. In its response dated 11 May 2012 the DWP applied a further exemption at s36(2)(c).

13. This decision notice addresses the department's withholding of the information under s43(2) and s36(2)(c) of the FOIA.

Background information

14. Since May 2011 job centres in the UK have had the power to refer people in receipt of unemployment benefit (Job Seekers Allowance) to attend Mandatory Work Activity (MWA). These are work placements with local businesses and organisations where claimants

work 30 hours a week for four weeks. The work is unpaid and failure to attend can result in loss of benefit.

15. The MWA programme divides the UK into 11 contract package areas (CPAs). Each area is run by a contract provider. These are private firms paid by the government to arrange the work placements within their area. The contract providers source the placements with companies such as Tesco, McDonalds and Burger King as well as with some charities and other organisations. The government expects each placement to provide the claimant with the experience of work discipline and to be of benefit to the local community.

Reasons for decision

Section 43(2)

16. Section 43(2) of the FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

17. The DWP informed the complainant in its review that it was aware of various campaigns aimed at harming the commercial interests of companies involved in the work programme as well as potentially undermining government policy. The information was therefore withheld under s43(2) in order to:

(a) protect the DWP's ability to obtain goods or services on the best commercial terms. The DWP submitted that disclosure could inhibit or limit its ability to obtain the best services to help people make the transition into work. It submitted to the Commissioner that higher future welfare costs would be likely given that the government's MWA objectives would not be fulfilled.

(b) protect the commercial interests of organisations providing work placements.

18. The Commissioner asked the DWP for details of the campaigns and an explanation of the detriment to the companies that would or would be likely as a result of disclosure. He asked how the DWP had established that such prejudice to the companies would or would be likely to occur and he requested copies of any correspondence with those organisations concerning this.

19. The Commissioner also asked the DWP to clarify the threshold of likelihood upon which it was reliant. He advised that the causal

relationship between disclosure and the likelihood of prejudice required demonstration. In this regard he is mindful that the Information Tribunal has determined that any reliance on 'prejudice' should be rejected if this relationship is not demonstrated.[1]

20. The DWP suggested several prejudicial effects likely to arise if placement providers were to withdraw from the MWA scheme. In principal the Commissioner accepts that finding replacement companies could result in increased costs and potentially harm the government's commercial interests. He also accepts that if the DWP can demonstrate harm to the commercial interests of the placement providers that this would be relevant to the s43 exemption.

21. However, the Commissioner does not accept that the other prejudices specified are relevant to the section 43 exemption. DWP argued that if the placement providers were to withdraw from the MWA programme this would result in higher welfare costs. In the Commissioner's view welfare costs are a financial rather than a commercial interest and therefore are not relevant when considering s43. Therefore the Commissioner has not given further consideration to this argument in this case.

22. The DWP also specified harm to the government's ability to deliver the MWA programme. The Commissioner does not consider that arguments about harm to the effective delivery of this programme are relevant to the section 43 exemption. Therefore he has not considered this argument further in relation to this exemption. However, this argument is relevant to section 36(2)(c) and is addressed later in this notice. The DWP provided the Commissioner with links to the websites of campaign groups that oppose the idea of MWA. It also supplied a sample of media articles about the issue. The department said it was reliant on the lower threshold i.e. that disclosure of the information 'would be likely to' cause prejudice.

23. When deciding whether a public authority has complied with the FOIA, the Commissioner must consider the circumstances at the time of the request or when the response was given, provided that this was within the statutory time for compliance (usually 20 working days from receiving the request). The Commissioner has studied the information on the campaign websites referred to him by the DWP. He notes that a significant amount of the content DWP referred to reflects circumstances after the date of the request. However, he also recognises that the groups and websites appear to have been established in 2010 and therefore did exist prior to the request. He

[1] Hogan v Information Commissioner and Oxford City Council (EA/2005/0030)

has taken the content into account as far as it reflects circumstances that did exist at the time of the request.

24. The central message on the websites is that organisations involved in the mandatory work programme are profiting from unpaid labour and the threat of punitive benefit sanctions if job seekers who are referred do not attend. The message also claims that existing employees are being laid off as employers take advantage of free labour. The DWP disputes the validity of the message. Some websites have encouraged demonstrations and a boycott of organisations that they consider to be profiting from unpaid labour. The websites proclaim success in having persuaded organisations to withdraw from the scheme.

25. However, in the Commissioner's view, the extent to which the campaigns themselves have influenced withdrawal is unclear. He notes that other factors are also reported by the media as being instrumental to withdrawal. These include the reduced financial circumstances of organisations concerned; the realisation on the part of organisations that benefit sanctions were involved in the mandatory process and representations made to employers by trades unions.

26. The DWP has been unable to verify the reasons for withdrawal of organisations from the programme. It supplied the Commissioner with a list of charities that have withdrawn but it did not detail the reasons why they did so. The Commissioner asked the DWP for the list of PLCs and other companies that had reportedly withdrawn from the programme but the DWP was unable to provide the names of any.

27. The Commissioner has studied the sample of media reports supplied by the DWP in support of its submission. He notes that all but one of the articles postdate the request and refusal notice, in some cases by approximately six months. Therefore he has only considered the first article in the sample.

28. The Information Tribunal has stated that in considering the test of 'would be likely to prejudice' the 'chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk'.[2] The Commissioner considers that in order to support the relevant arguments at 17(a) of this decision notice it is necessary for the DWP to:

[2] John Connor Press Associates Ltd v Information Commissioner (EA/2005/0005)

(i) indicate the number of companies and organisations that would be likely to withdraw from the scheme as a result of disclosure and

(ii) indicate the expected increase in government payments to the contract providers that would likely be necessary for sourcing alternative work placements.

29. In order to ascertain the information that is required by (i) and (ii), clear statements from the organisations concerned as to their future intentions regarding withdrawal from the scheme are necessary. However, none of the information outlined in (i) and (ii) has been supplied by the DWP. Although the Commissioner asked for copies of correspondence the DWP had with the organisations that would confirm any likelihood of withdrawal from the scheme none was supplied.

30. The Commissioner asked the DWP to support its position that disclosure of the information would be likely to prejudice the commercial interests of the organisations involved as mentioned in paragraph 17(b) of this decision notice. He asked the DWP to ensure that it provided evidence which demonstrated a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur.

31. The DWP said that two lists of organisations which had been placed in the public domain previously were being used by one of the campaign websites. It submitted that the campaigns would be likely to cause financial cost and reputational damage to the contract providers and to the employers with whom job seekers are placed. It said this outcome could carry significant commercial risk for MWA placement providers.

32. The DWP did not explain how financial cost to the contract providers might be likely to arise or how the MWA placement providers might be subject to commercial risk. The DWP did not explain its reference to the likelihood of reputational damage or how this might be quantified.

33. Although the Commissioner asked the DWP to provide correspondence from the organisations that would confirm the nature of commercial prejudice considered likely to arise from disclosure none was supplied. The DWP's case appears instead to have relied upon the claims of the campaigners themselves and on a selection of press reportage of the matter. As explained above the Commissioner has had to disregard evidence that does not relate to the circumstances at the time of the request. Having considered the media article that he does accept is relevant he notes that there is

little conclusive evidence to support the argument that the campaign directly caused organisations to withdraw from the programme. The reasons attributed in the media regarding withdrawals that have occurred since commencement of the programme are conflicting. In any event the DWP was unable to confirm or provide the Commissioner with the names of any companies that have actually withdrawn from the work programme. Whilst names of charities that have withdrawn were supplied the reason for their withdrawal was not stated or explained by the DWP. The Commissioner considers that it is reasonable to have expected such information to be available, particularly given that details of some of the companies involved in the MWA programme have previously been disclosed in response to FOI requests.

34. In line with the Information Tribunal's decision in *Derry Council v Information Commissioner* (EA/2006/0014), the Commissioner does not consider it appropriate to take into account speculative arguments advanced by public authorities about how prejudice may occur to third parties. Without confirmation from the organisations themselves the DWP's submission about harm to the commercial interests of third parties is unverified and can only be considered as supposition.

35. In the absence of any evidence or clear argument to support the DWP's submission the Commissioner considers that it has failed to demonstrate that the exemption is engaged.

36. As the exemption at s43(2) of FOIA is not engaged in respect of the arguments submitted at either paragraph 17(a) or 17(b) of this decision notice the Commissioner has not considered the public interest test in respect of the exemption.

Section 36(2)(c)

37. Section 36 of the FOIA states that information is exempt if:

"... in the reasonable opinion of a qualified person, disclosure of the information under this Act—

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

(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."

38. The DWP relied on the exemption at s36(2)(c) to withhold the information.

39. The Commissioner established that the reasonable opinion was provided by the Minister for Employment, Chris Grayling MP and that he is a qualified person for purposes of the FOIA. His opinion was sought on 24 April and was given on 30 April 2012.

40. To assist him in reaching his opinion the DWP supplied the qualified person with details of the contract package areas and placement providers, the names of campaign websites and a list of charities that have withdrawn from the programme. The DWP also provided him with a submission supporting the application of s36(2)(c). Copies of all these documents were also supplied to the Commissioner.

41. The qualified person's opinion held that, if disclosed, the requested information would likely be used by some websites to discourage organisations from participating in the scheme and that this would be likely to thwart the delivery of the MWA programme.

42. The Commissioner is mindful that he has already considered the suggestion that placement providers are likely to withdraw from the MWA programme when assessing the s43 exemption, albeit in relation to potential prejudice to commercial interests, and has not found the argument persuasive. However, the Commissioner wishes to clarify that the qualified person's opinion is not rendered unreasonable simply because others may come to a different (and equally reasonable) conclusion. In his view the opinion would only be unreasonable if it was one that no reasonable person in the qualified person's position could hold. He therefore finds the exemption at s36(2)(c) to be engaged and has proceeded to consider the public interest test in relation to the exemption.

43. The Information Tribunal[3] has considered that whilst it is not for the Commissioner to form an independent view on the likelihood of prejudice as adjudged by the opinion in respect of s36(2)(c), when it comes to the public interest test it is necessary to form a view on that likelihood in order to make the required judgement.

Public interest test

44. The Commissioner considered the arguments put forward by the DWP in favour of maintaining the exemption and also the arguments in favour of disclosure.

45. The DWP submitted the following public interest arguments in favour of maintaining the exemption:

[3] Guardian Newspapers & Brooke v Information Commissioner & BBC (EA/2006/0011 & EA/2006/0013)

(i) Discouraging employers from participating in government employment programmes undermines delivery of its Get Britain Working policies.

(ii) Disrupting employment programmes could damage the employment prospects of young job seekers and is not in their or the wider economy's interests.

(iii) Individuals going through the MWA process can discuss their options with job centre advisers thus making them aware of which organisation will be supporting them. This meets the general public interest in transparency.

46. The Commissioner notes that the argument at point (ii) above relates to the economy rather than the effective delivery of the MWA policy. As this is not a factor inherent within section 36(2)(c) the Commissioner has not considered it further. Furthermore the Commissioner does not consider the argument in point (iii) to be relevant to as far as public transparency and accountability is concerned. He has addressed this further below.

47. Public interest arguments in favour of disclosure include the following:

(i) There is a body of opinion which questions whether mandatory work programmes improve the employment prospects of young job seekers[4]. In this context, the Commissioner considers that there is a public interest in greater transparency about the MWA programme.

(ii) Private discussions with a job centre adviser on where an individual might be mandated to work does not, as suggested by the DWP's submission (paragraph 45 (iii)), equate to significant public transparency about the government's work programme. In the Commissioner's view disclosure of the withheld information is necessary to achieve this.

(iii) Private companies receive substantial funding from the public purse to deliver the MWA programme. Disclosure allows proper accountability of the spending of this money.

[4] eg *Response to the SSAC consultation on Jobseeker's Allowance Mandatory Work Activity Regulations 2011* – Citizens Advice Bureau. Also Crisp and Fletcher *A comparative review of workfare programmes* - DWP research report 533 and *Early Impacts of Mandatory Work Activity* – DWP report June 2012. The Commissioner has only considered the content of the DWP report to the extent that it reflected circumstances that existed at the time of the request.

Of these private companies, Ingeus UK Ltd has contracts worth £727 million; A4E £438 million; Working Links £308 million; Avanta Enterprise £267 million and Seetec £221 million. It is in the public interest to be informed about how and where its money is being used by the private sector.

(iv) Disclosure promotes transparency in the placement decisions of the contract providers. It encourages integrity and quality in the arrangements of such placements which are matters of legitimate public interest.

(v) Disclosure reveals the spread and availability of placements in different parts of the country and will inform the public of any shortfall and differences in performance between contract providers.

(vi) The programme's mandatory work placements are required to be of benefit to the local community. Disclosure will illustrate the sorts of placement that have been arranged and help the public to assess the community benefits that might accrue from such placements.

(vii) The number of unemployed 16-24 year olds has surpassed a million. Disclosure of the information will increase government accountability and transparency about the measures that have been put in place to address these problems and will help the public, including those directly affected, to understand what is being done to improve the situation.

(vii) The costs to society of unemployment are high and there is a strong public interest in the disclosure of information that helps the public to understand, from a more informed position, how government policies to tackle this issue are being delivered.

Balance of the public interest

48. The Commissioner has considered the public interest arguments both for and against maintaining the exemption in this case. When attributing weight to the arguments in favour of maintaining s36(2)(c) he has considered the frequency, severity and extent of the harm identified by the DWP. The extent to which campaigns organised by a few fringe groups have discouraged employers from participating in the government's mandatory work programme is arguable. There is little evidence that the campaign websites are viewed by a significant number of people and indeed most members

of the public are likely to be unaware of the particular charges that have been levelled by these sites. On the basis of the evidence supplied he does not consider that the harm would occur frequently, that it would be extensive or severe. In view of this, whilst he acknowledges the importance of the effective delivery of the MWA policy, particularly in the context of high unemployment, he has attributed limited weight to the arguments in favour of maintaining the exemption.

49. The Commissioner notes the DWP's argument that individuals involved in the MWA programme can discuss placement options with job centre advisers which goes some way to meeting the public interest in transparency. Whilst the Commissioner acknowledges that this provides transparency for those directly impacted by the programme, it does not, in his view, meet the need for greater public accountability and transparency in this case. In this instance the Commissioner considers that disclosing the withheld information would significantly inform the public's understanding of how the MWA policy is being delivered. Given that there is concern about the effectiveness of this policy as one of the measures being used to tackle unemployment, that the policy impacts a considerable proportion of the population and involves significant sums of public money, the Commissioner has attributed substantial weight to the arguments in favour of disclosure.

50. Having weighed the competing public interest arguments the Commissioner has concluded that in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Right of appeal

51. 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

52. 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.

53. 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 ……

Jo Pedder
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