

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 3 December 2018

**Public Authority:** Department for Exiting the European Union  
**Address:** [foi@dexeu.gov.uk](mailto:foi@dexeu.gov.uk)

### **Decision (including any steps ordered)**

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1. The complainant has requested from the Department for Exiting the European Union ("DExEU") sector studies referenced by Rt Hon David Davis MP in a submission to a Select Committee of the House of Commons. DExEU refused to provide this citing sections 35 (formulation/development of government policy), 27 (prejudice to international relations) and 29 (prejudice to the economy) as its basis for doing so. It failed to conduct an internal review despite the complainant requesting one.
2. The Commissioner's decision is that DExEU is entitled to rely on section 35 as its basis for withholding most of the requested information. It cannot rely on section 35 in respect of a list of the document titles in the requested information in accordance with the Confidential Annex to this notice. This information is also not exempt under section 27 or section 29.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose a list of the titles of the documents which contain the withheld information in accordance with the Confidential Annex to this notice.
4. 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**

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5. On 12 August 2017, the complainant requested information of the following description:

"Please could you supply electronic copies of the reports of each of the 57 studies referenced by David Davis MP in Q410 in this Inquiry:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-uks-negotiating-objectives-for-its-withdrawal-from-the-eu/oral/44457.html>"

6. On 11 September 2017, DExEU responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
- section 27 (Prejudice to international relations)
  - section 29 (Prejudice to the economy)
  - section 35 (Formulation/Development of government policy)
7. The complainant requested an internal review on 19 September 2017 and DExEU acknowledged receipt of this on 25 September 2017.
8. DExEU did not send him the outcome of any internal review. Arguably, it should have done so by 14 November 2017 (40 working days later). Further comment is made about this in the Other Matters section of this of this notice.

## Scope of the case

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### Background

9. Following a meeting of the Committee of 6 December 2017 (subsequent to the one described in the request), the complainant contacted the Commissioner the following day to raise concerns about an apparent change of position by DExEU based on these comments and the implications of such a change. He had not received any response to his request for internal review by this date.
10. The Speaker of the House of Commons has considered the apparent contradiction following complaints about it and commented accordingly.<sup>1</sup>
11. The Commissioner has no remit to comment on matters of parliamentary procedure. She is satisfied that information within the

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<sup>1</sup> <http://www.bbc.co.uk/news/uk-politics-42350892>

scope of the request is held and that DExEU has confirmed as such to her and supplied her with a copy.

12. DExEU has drawn to the Commissioner's attention a written statement by Mr Davis MP regarding the withheld information.<sup>2</sup> It also drew the Commissioner's attention to the Better Regulation Executive's definition of a risk assessment. It did not provide a link to this but the Commissioner has concluded it is referring to the definition of an Impact Assessment in the "Better Regulation Framework Manual" as follows:

**"Impact Assessment (IA):** Both a continuous process to help the policy-maker fully think through and understand the consequences of possible and actual Government interventions in the public, private and third sectors; and a tool to enable the Government to weigh and present the relevant evidence on the positive and negative effects of such interventions, including by reviewing the impact of policies after they have been implemented."<sup>3</sup>

13. Regardless of how the information in question is perceived or described, the Commissioner is satisfied that DExEU holds information within the scope of the complainant's request. DExEU has acknowledged that the information within the scope of the request is in fact more considerable than the information considered at refusal notice stage and it has provided the Commissioner with a copy of that information.
14. The Commissioner clarified the scope of the complaint with the complainant on 20 December 2017. The Commissioner has considered whether and to what extent DExEU can rely on the exemptions it has cited as its basis for withholding the requested information. As noted above, she has addressed DExEU's failure to conduct an internal review in the Other Matters section of this Notice. As an exercise of her discretion, the Commissioner has accepted this complaint without DExEU having carried out an internal review.

## Reasons for decision

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15. In submissions to the Commissioner, DExEU explained that all the information was exempt under section 35 of the Act.
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<sup>2</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-11-07/HCWS231/>

<sup>3</sup> <http://regulatoryreform.com/wp-content/uploads/2015/02/UK-better-regulation-framework-manual-guidance-for-officials-July-2013.pdf>

## **Section 35(1)(a) – formulation and development of government policy**

16. Section 35(1)(a) of FOIA provides that information is exempt if it relates to the formulation and development of government policy.
17. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
18. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead, the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relate to" the formulation and development of government policy.
19. Having read the information, the Commissioner is satisfied that it relates clearly to the formulation and development of government policy such that section 35 is engaged. DExEU explained:

"These documents not only inform our ongoing negotiations with the EU, but will in many cases be used to inform future policy for trade deals (both with the EU and third countries) yet to be negotiated."
20. DExEU also provided more detail about the information and about its methodology to assist the Commissioner in understanding the detail and its context. The Commissioner is unable to set out on the face of this notice any analysis which discloses what the information says. However, she is satisfied that the information relates to the formulation and development of government policy on how each of the sectors considered will be impacted by the UK's departure from the European Union.
21. While all the information may be caught by the exemption at section 35(1)(a), DExEU cannot withhold it unless the public interest in maintaining that exemption outweighs the public interest in disclosure. This is widely referred to as the public interest test.

## **Public interest test**

### **Public interest arguments in favour of disclosure**

22. There is a clear and compelling public interest in disclosure. The UK's exit from the EU is widely regarded as the most significant public policy issue the UK has engaged with in modern times. The UK's exit from the EU will have major political, social and economic implications. There was at the time of the request, and continues to be, a widely reported public debate over the approach to be taken to Brexit and what the impact will be.
23. Disclosure would give a much clearer picture of the Government's approach and its policy making around the subject of Brexit across a wide range of sector subject areas. Brexit preparations affect virtually every area of the UK economy and therefore a huge cross section of the UK population. As a consequence, there are a broad range of interested parties with specific knowledge on various subjects who could contribute to public debate where the requested information is disclosed. Similarly, those with well-publicised concerns could see where the Government is currently (or was at the time of the request) focussing its attention and consider the wider implications contained in the analysis in the documents.
24. At the time of the request, there was a public interest in understanding and resolving the apparent confusion around the definition of the documents referred to above. This confusion heightened the debate about transparency around the Brexit process.

### **Public interest arguments in favour of maintaining the exemption**

25. The public authority explained that there was a strong public interest in protecting the details of its policy making in this area. It stressed not only the sensitivity of Brexit policy making in general but also the fact that its policy development was a live issue. It explained the importance of protecting the space in which such matters were discussed and argued that there was a more compelling public interest in doing so by maintaining the exemption. The Commissioner asked DExEU to consider disclosing a small portion of the withheld information that, on the face of it, appeared to be more mundane. There appeared to be a strong factual element to the information in question. DExEU explained with specific reference to the information that it formed part of a particular area of work. DExEU also explained why there could well be a negative consequence as a result of disclosing this information at this stage. It emphasised, in particular, that as this was a matter of ongoing policy development, this was best conducted in a safe space at this stage.
26. The Commissioner then asked DExEU to look at the possibility of disclosing the titles of the documents containing in the information as opposed to full disclosure – in effect, a list of the documents within the

scope of the request. With specific reference to the withheld information, DExEU explained how disclosure of a list would reveal a great deal about ongoing policy development contrary to the public interest. The Commissioner will not set out the detail of this argument in order to avoid inadvertent disclosure of the withheld information.

### **Balance of public interest**

27. The Commissioner has had regard for her published guidance when considering the balance of public interest<sup>4</sup>.
28. The public interest in the disclosure of this information is very strong. There are very few aspects of life in the UK which are not directly or indirectly affected by Brexit. The decision to leave and the manner in which that is undertaken is a subject of considerable public debate. The importance of informing that debate with fact rather than conjecture cannot be understated. Disclosure of the requested information would show the facts that the government has considered and allow the public to contribute meaningfully to the debate as to whether all relevant facts are being considered. There is a strong public interest in informing that public debate.
29. However, the Commissioner thinks that there is a more compelling countervailing argument in favour of maintaining the exemption in respect of most of the information. The formulation and development of government policy on this subject must be of the highest quality. In the Commissioner's view, protecting the safe space within which facts are analysed and policy is developed and formulated is strongly in the public interest. The timing of the requests and the live nature of the ongoing policy process at the time of the request is a particularly compelling factor.
30. As would be expected of documents of this nature the information contains a mix of analysis and factual, background information. As noted above, the Commissioner sought further arguments from DExEU as to why disclosure of background information would also harm the policy making process and the UK's position. Having considered the response, the Commissioner has considered the additional arguments provided that the context in which this background is presented is relevant and that significant harm would also follow from its disclosure. The Commissioner therefore accepts that it would not be possible to make a meaningful disclosure of any of the background. However, the

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf> (see in particular paragraphs 197 – 199)

Commissioner does not agree with DExEU's additional arguments in respect of a list of the documents within the scope of the request.

31. As noted above, there is a strong public interest in the disclosure of an important set of information on a live subject of such national importance. However, in specific circumstances of the requests and the information, there is, a greater public interest in protecting the safe space in which the Government formulates and develops its policies on a live matter for each of the sectors covered in the withheld information with respect to the main text of each document.
32. Given the very strong public interest in disclosure, the Commissioner has considered carefully the harm that may arise where a list of the documents is disclosed. The Commissioner has given considerable weight to the concerns raised by DExEU that disclosure would show the development of the government's thinking but does not agree that disclosure of this information at the time of the request (or subsequently) would, on balance, have been contrary to the public interest. There is, in the Commissioner's view, considerable public interest in showing, at a high level, the breadth and nature of the Government's work which would be satisfied by disclosing the list of the documents. The Commissioner recognises that while there is a compelling public interest in protecting the detail of the government's policy formulation and development on this live issue, there is a stronger public interest in informing the general public in broad terms of the areas that the government is looking at.
33. While the Commissioner accepts that the government requires a safe space in which to formulate and develop policy, she does not agree that this safe space would be undermined by disclosure of a document list in this case. The disclosure of such a list would serve the considerable public interest in transparency on this subject.

### **Section 35(1)(a) - Conclusion**

34. In light of the above, the Commissioner has concluded that the public interest in maintaining the exemption at section 35(1)(a) in respect of most of the requested information outweighs the public interest in disclosure. The Commissioner has reached this view by a narrow margin because she recognises the importance of informing the public debate as to the impact of Brexit on each of the sectors.
35. However, she has concluded that the public interest in disclosing a list of the documents caught by the scope of the request is not outweighed by the public interest in maintaining the exemption at section 35 in respect of that information. In reaching this view, she has considered DExEU's arguments but disagrees with its view in this regard. Further description



of what information cannot be withheld under section 35(1)(a) is in a Confidential Annex to this Notice.

36. Having concluded that a list of the documents caught by the scope of the request cannot be withheld under section 35, the Commissioner has gone on to consider whether such a list would be exempt under section 27 (prejudice to international relations) and section 29 (the economy), the other exemptions cited by DExEU. When looking at the application of these exemptions the Commissioner has considered them in relation to the information set out in the Confidential Annex to this Notice.

### **Section 27 – Prejudice to international relations**

37. Section 27(1) of FOIA states that

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) relations between the United Kingdom and any other State
- (b) relations between the United Kingdom and any international organisation or international court
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

38. DExEU has relied on all four subsections of section 27 for most of the withheld information in this case.

39. In order for a prejudice based exemption, such as section 27(1) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk.

40. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.



41. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance '*if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary*'.
42. DExEU has argued that the UK's exit from the EU is an incredibly complex and evolving situation which means it is difficult to assume how the European Commission, individual member states or third countries might react. DExEU refers to interlinkage between the information and different areas of the negotiation. It made specific reference to parts of the main body of the withheld information in support of this position.
43. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by DExEU clearly relates to the interests which the exemptions contained at sections 27(1)(a), (b), (c) and (d) are designed to protect. With regard to the second criterion, having considered the withheld information, and taking into account DExEU's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of the main body of the withheld information and prejudice occurring to the UK's international relations. However, she is less convinced with regard to the information referred to in the Confidential Annex to this notice. She has concluded that the resultant prejudice would not be of significance or substance in respect of this specific information. While the Commissioner agrees that disclosure of much of the main body of the requested information would prejudice international relations to varying but significant degrees, she does not consider that there is a likely risk of prejudice to international relations where the information identified in the Confidential Annex is disclosed.
44. In light of the above, the Commissioner has concluded that sections 27(1)(a), (b), (c) and (d) are not engaged in respect of the information identified in the Confidential Annex to this Notice. The Commissioner has therefore not gone on to consider the balance of public interest in respect of section 27 because the exemptions in section 27 are not engaged. In reaching this view, the Commissioner has concluded that there is not strong enough argument to suggest disclosure of this information would provide any detailed insight or impact that would have an substantive effect in the ongoing negotiations at the time of the request

## **Section 29 – The Economy**

45. The relevant part of section 29 states:

"(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2)."

46. Again, the Commissioner has only considered the application of this exemption in relation to the information identified in the Confidential Annex to this Notice. DExEU explained that many of its arguments on section 29 are similar to the ones it submitted regarding section 27. It also stressed that it was relying on both section 29(1)(a) and, to an extent explained in its submissions, section 29(1)(b). DExEU also submitted arguments on section 29 with specific reference to the requested information.
47. The Commissioner accepts DExEU's submissions but notes that her focus is on the information which is cannot be withheld under section 35 or section 27 for the reasons outlined above.
48. The Commissioner has set out above the three points she considers when considering whether a prejudice based exemption such as section 29 is engaged.
49. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by DExEU clearly relates to the interests which the exemptions contained at sections 29(1)(a) and (b) are designed to protect. With regard to the second criterion having considered the withheld information, and taken into account DExEU's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of the main body of the withheld information and prejudice occurring to the economy as described in section 29. However, she is less convinced with regard to the information referred to in the Confidential Annex to this notice. She has concluded that the resultant prejudice would not be of significance or substance. While the Commissioner agrees that disclosure of much of the main body of the requested information would prejudice the economy to varying but significant degrees, she does not consider that there is a likely risk of prejudice to the economy where the information identified in the Confidential Annex is disclosed.
50. In light of the above, DExEU is not entitled to rely on the exemptions at section 29(1)(a) and (b) in respect of the information identified in the Confidential Annex to this Notice. In reaching this view, the Commissioner has concluded that there is not strong enough argument to suggest disclosure of this information would provide any detailed

insight or impact that would have a substantive effect on the economic interests of the UK or any part of the UK or on the financial interests of any administration in the UK, as defined by section 28(2) at the time of the request

## **Conclusion**

51. In light of the above, the Commissioner has concluded that the information in the Confidential Annex to this notice is not exempt under section 35, section 27 or section 29. As a consequence, it should be disclosed.

## **Other matters**

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52. The Commissioner notes that there was a significant delay in responding to the complainant's request for an internal review in respect of his request. While highly regrettable and contrary to the FOIA section 45 Code of Practice, it is not a breach of FOIA to fail to do so.
53. The Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
54. In this case, the request for an internal review was made on 19 September 2017 and no response was issued.
55. The Commissioner finds that this delay is concerning and asks DExEU to ensure that future requests for internal reviews are handled appropriately and in accordance with her guidance.

## **Right of appeal**

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56. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

57. 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.
58. 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 .....**

**Steve Wood**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**