

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2018

Public Authority: Department for Exiting the European Union

Address: 9 Downing Street
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to the considerations of the impact of the UK's decision to leave the EU on the rights of Irish citizens living in Northern Ireland. The public authority withheld the information held within the scope of the request which it had not previously published relying on the exemptions at sections 27(1)(a-d) (international relations) and 35(1)(a) (formulation and development of government policy) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on section 35(1)(a) FOIA.
3. No steps required.

Request and response

4. On 9 February 2018, the complainant wrote to the public authority and requested information in the following terms:

“Under the Freedom Of Information Act, I am seeking the following:

All records kept by the Department relating to considerations of the impact of the UK's decision to leave the EU (Brexit) on the rights of Irish citizens living in Northern Ireland.

I would prefer to receive this information electronically, preferably in its original formatting.”

5. The public authority responded on 9 March 2018. It informed the complainant that it held information relevant to his request some of which it had published and provided links to the publications. The public authority however considered the rest of the information in scope exempt on the basis of the exemptions at sections 27(1)(a-d) and 35(1)(a) FOIA.
6. The complainant requested an internal review of this decision on 22 March 2018. He specifically disagreed that the public interest was best served by withholding the information considered exempt from disclosure.
7. Although it had stated in its response that an internal review would be available in the event that the complainant was dissatisfied with its response, the public authority did not respond to the complainant's request to conduct an internal review.

Scope of the case

8. Having not had a response from the public authority the complainant subsequently contacted the Commissioner on 10 August 2018 to complain about the way his request for information had been handled, in particular the decision to rely on the exemptions at sections 27(1)(a-d) and 35(1)(a) FOIA.
9. During the course of the investigation the public authority clarified that it had relied on the exemption at section 35(1)(a) to withhold all of the withheld information and the exemptions at section 27(1)(a-d) to withhold parts of the withheld information.

Reasons for decision

Section 35(1)(a)

10. The Commissioner initially considered whether the public authority was entitled to apply the exemption at section 35(1)(a) to the withheld information.
11. Section 35(1)(a) states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.”¹
12. The exemption is one of the class-based exemptions in the FOIA. This means that unlike a prejudice-based exemption, there is no requirement to show harm in order to engage it. The relevant information simply has to fall within the class described, and that would be enough to engage the exemption. The prejudicial effect of disclosure would inevitably be considered within the framework of the competing public interest factors.
13. The Commissioner considers that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. ‘Development’ of policy may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
14. The Commissioner considers that the term ‘relates to’ in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information itself does not have to be created as part of the activity. Any significant link between the information and the activity is enough.
15. The public authority considers that the withheld information relates to the formulation and development of policy associated with the UK’s withdrawal from the EU (Brexit) specifically the issues relating to Northern Ireland and to the citizens of Ireland.

¹ The full text of the exemption is available here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/35>

16. Having reviewed the information the Commissioner accepts that it clearly relates to the formulation and development of government policy in respect of Brexit and more specifically, the formulation and development of policy in respect of issues relating to Northern Ireland post-Brexit in particular the impact of Brexit on the rights of Irish citizens living in Northern Ireland.
17. The Commissioner therefore finds that the exemption at section 35(1)(a) was correctly engaged.

Public interest test

18. The exemption is a qualified exemption which means that the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest in disclosure of the withheld information

19. The complainant says he does not accept that the public interest is best served by withholding the requested information but did not say why he holds this view.
20. The public authority acknowledged that increasing understanding of how government formulates policy is in the public interest particularly a policy such as the one in this case which may have a significant impact on the lives of citizens. It recognised that there is a strong public interest in the transparency of any policy deliberations concerning the UK's exit from the EU and in this case the very strong public interest in understanding the effect Brexit will have on Irish citizens living in Northern Ireland.

Public interest in maintaining the exemption

21. Against disclosure the public authority argued that there is a very weighty public interest in ensuring that the policy formulation and development associated with Brexit is conducted in a safe space. Drawing on the Commissioner's guidance it stressed the importance of protecting the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. Specifically in this case it argued that it was absolutely vital that the process is able to proceed in a safe space and that the necessary information relating to the rights of Irish citizens is protected to inform discussions, raise potential options and risks, and fully inform the best possible policy decisions. The process will be harmed if the withheld information were to be released prior to an agreed position being reached, all the possible ramifications considered and solutions devised.

22. In support of this view, the public authority drew the Commissioner's attention to the following comments by the Information Tribunal (Tribunal) in *Department of Education and Skills v IC & The Evening Standard*²:

"The timing of a request is of paramount importance to the decision. We fully accept the DFES argument, supported by a wealth of evidence, that disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."

23. It argued that it was not in the public interest to spend departmental time or resources counteracting the inevitable public speculation that would result from a release of the withheld information.
24. There is also a public interest in ensuring that Brexit policy making is of the highest quality.
25. Furthermore, in this particular case there is heightened sensitivity due to the significance of the relationship between Ireland, Northern Ireland and the UK.
26. The public authority therefore concluded that on balance the public interest in maintaining the exemption strongly outweighs the public interest in disclosure.

Balance of the public interest

27. With regard to the safe space arguments, in line with the comments of the Tribunal quoted by the public authority, the Commissioner accepts that significant weight should be given to the safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case the Commissioner accepts that at the time of the complainant's request the withheld information was the subject of active policy formulation and development. Furthermore, the

² EA/2006/0006

Commissioner recognises that disclosure of information about issues relating to Northern Ireland and to the citizens of Ireland post-Brexit, particularly considerations of the impact of Brexit on the rights of Irish citizens living in Northern Ireland, are likely to result in significant public and media attention. Consequently, in the circumstances of this case the Commissioner considers that significant and notable weight should be attributed to the safe space arguments.

28. With regard to the possible chilling effect on Brexit policy making, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Therefore, in light of the sensitive and high profile nature of the matters under discussion, the ongoing nature of the policy making, and the detailed content of the withheld information itself, the Commissioner considers that the view that disclosure could have a chilling effect on Brexit policy making should be given notable weight.
29. With regard to the public interest in favour of disclosure, there is, as the public authority recognises, a general public interest in government departments being open and transparent in respect of how government policy is created. More specifically, in the circumstances of this case the Commissioner recognises that this aspect of policy making, indeed like many other aspects of policy making associated with Brexit, is likely to have a widespread and significant impact on the UK. Furthermore, disclosure of the withheld information would provide the public with a detailed insight into the government's policy making on this particular aspect of Brexit at the point the request was submitted. Consequently, in light of both of these factors, the Commissioner considers that there is a significant public interest in the disclosure of the withheld information so that the public debate around this aspect of Brexit policy making is better informed.
30. However, the Commissioner has ultimately concluded that such arguments are outweighed by the public interest in maintaining the exemption. She has reached this conclusion given the cumulative, and ultimately compelling, weight she believes should be attributed to the chilling effect and safe space arguments. Whilst the Commissioner agrees that there is a clear public interest in the disclosure of information which would inform the public about government policy making on this aspect of Brexit, ultimately she believes that in the circumstances of this case there is a greater public interest in ensuring that Brexit policy making is, as the public authority suggests, of the highest quality given the significance of the policy decisions in respect of

the impact of Brexit on the rights of Irish citizens living in Northern Ireland.

31. In light of this decision the Commissioner has not considered whether the withheld information is also exempt from disclosure on the basis of the other exemptions cited by the public authority.

Other Matters

33. In response to the Commissioner's query regarding the lack of an internal review in this case, the public authority stated that it aims to complete internal reviews within the time frame set out in guidance published by the Commissioner. Unfortunately it could not in this instance.
34. It is regrettable that the public authority did not complete an internal review in this case despite the fact that it invited the complainant to appeal its decision via an internal review in the first instance which led to a lengthy delay before the matter was referred to the Commissioner and subsequently accepted for investigation. This was entirely avoidable.
35. The Commissioner trusts that the lessons learnt from this case will ensure that internal reviews are completed within 20 working days once the public authority has invited an applicant to appeal its decision via an internal review in the first instance. The Commissioner's published guidance also states that internal reviews may take up to 40 working days in exceptional circumstances.

Right of appeal

36. 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

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

37. 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.
38. 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

**Gerrard Tracey
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