

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2020

Public Authority: Department for Exiting the European Union
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information on correspondence and communications dating from January 2018 between Steve Baker and specified individuals, Shanker Singham and Mark Littlewood and lists of attendees at specific functions declared in government transparency data.
2. The Commissioner's decision is that the Department for Exiting the European Union ('DExEU') has appropriately relied on section 35(1)(a) to withhold some of the requested information and other requested information is not held.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 1 January 2019 the complainant wrote to DExEU and requested information in the following terms:

"1) From January 2018 to the day he resigned, please provide all correspondence and communications between Steve Baker and Shanker Singham (previously of the Legatum Institute, who then joined the Institute of Economic Affairs in March 2018).

2) From January 2018 to the day he resigned, please provide all correspondence and communications between Steve Baker and Mark Littlewood, Director General of the Institute of Economic Affairs.

3) According to government transparency data, I understand that there was a domestic think tanks roundtable on 19th December 2017.

([https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/693978/FINAL 2018-](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/693978/FINAL_2018-02-15_DEXEU_Q3_2017_Ministers_Quarterly_Return_DEXEU.xlsx_Meetings.csv_-_FINAL_2018-02-15_DEXEU_Q3_2017_Ministers_Quarterly_Return_DEXEU.xlsx_-_Meetings.csv_1_.csv/preview)

[02-15 DEXEU Q3 2017 Ministers Quarterly Return DEXEU.xlsx - Meetings.csv - FINAL 2018- 02-15 DEXEU Q3 2017 Ministers Quarterly Return DEXEU.xlsx - Meetings.csv 1 .csv/preview](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/693978/FINAL_2018-02-15_DEXEU_Q3_2017_Ministers_Quarterly_Return_DEXEU.xlsx_Meetings.csv_-_FINAL_2018-02-15_DEXEU_Q3_2017_Ministers_Quarterly_Return_DEXEU.xlsx_-_Meetings.csv_1_.csv/preview)). For this roundtable, please provide the following information:

- A full list of attendees, including the full names and titles of each attendee, as well as who each attendee represents

4) On 7th March 2018, according to transparency data, Steve Baker had dinner with the Bruno Leoni Institute

([https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/720643/DExEU Ministers Quarterly Return Q417.xlsx - Hospitality.csv - COMPLETE 2018-12-06 DExEU Ministers Quarterly Return Q417.xlsx - Hospitality.csv.csv/preview](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/720643/DExEU_Ministers_Quarterly_Return_Q417.xlsx_-_Hospitality.csv_-_COMPLETE_2018-12-06_DExEU_Ministers_Quarterly_Return_Q417.xlsx_-_Hospitality.csv.csv/preview)). Regarding this dinner, please provide the following information:

- A full list of attendees, including the full names and titles of each attendee, as well as who each attendee represents
- The location of the dinner."

5. DExEU responded on 30 January 2019. It stated that information is held within the scope of the request and responded with a refusal notice in respect of point 1 relying on FOIA section 35(1)(a); a statement that the information in the scope of point 2 is not held; the information in the scope of point 3 was provided and a statement in respect of point 4 explaining that the dinner was a private event which Mr Baker attended in his personal capacity.
6. Following an internal review, requested on 20 March 2019, DExEU wrote to the complainant on 17 April 2019. The request for review focussed on points 1, 2 and 4 of the initial request. In its response DExEU also focussed on these points. It upheld the application of section 35(1)(a) to point 1; confirmed that no information was held in respect of point 2; acknowledged its failure to clearly state whether information was held in respect of point 4 and confirmed that no information was held on this point either.

7. During the course of the Commissioner's investigation DExEU discovered that some information in regard to point 1 which was previously withheld in reliance of section 35 was, in fact, in the public domain.¹ DExEU wrote to the complainant on 30 September to explain that it was relying on section 21 in respect of this information as it was accessible by other means.

Scope of the case

8. The complainant contacted the Commissioner on 3 June 2019 to complain about the way her request for information had been handled. She provided the Commissioner with a detailed explanation of her consideration of DExEU's application of section 35(1)(a). The complainant explained her concerned interest in the role of a named individual and his access to government. She explained her view that DExEU had not fully considered the strong public interest in disclosure:

"...especially considering what the media has uncovered about Mr Baker, Mr Singham and Mr Littlewood.

It is particularly concerning that the Department admits that Mr Singham and Mr Littlewood as having some influence on the '*formulation or development of policies*'.

A disclosure would bring about more transparency and allow the public to scrutinise the parties involved in this request, and to assess the extent of their power over how Brexit has been formulated and how it has progressed."

The complainant also explained her concerns regarding meetings Mr Baker may have had with Mr Singham which did not appear in government transparency records.

9. The Commissioner considers the scope of her investigation to be to determine whether DExEU appropriately applied the section 35 exemptions to the remaining withheld information and the nature of the searches undertaken to find information in the scope of points 2 and 4 of the request.

¹ 'Under Control - What HMRC can do to prepare and optimise customs processes for all outcomes'

Reasons for decision

10. Section 35 FOIA states:

“(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy,”

11. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the class described, in this case, the formulation of government policy.

12. The Commissioner considers that the purpose of section 35(1)(a) is to protect 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. In particular, it ensures a safe space to consider policy options in private. Her guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

13. 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 sufficient.

14. DExEU explained that the information in the scope of the request constitutes part of its wide range of on-going stakeholder engagement and analysis. Specifically the information constitutes economic, customs and trade policy matters and negotiations with the European Union (‘EU’) in general, as well as “other third countries” in the future. The formulation and development process was live at the time of the request, and is on-going.

15. DExEU confirmed that, in reviewing the information in the scope of point 1 of the request, it became aware that a final version of a draft publication provided to DExEU was publically available. This was provided to the complainant. However, DExEU further advised that:

“We consider that it is necessary to withhold the remaining information in the scope of the request to protect the process of formulating and developing the policy of our exit from the EU, and to protect the safe space for the development of policy.”

16. DExEU referenced the Commissioner's guidance on section 35(1) and explained:

"..the purpose of section 35(1)(a) is 'to protect 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. In particular, it ensures a safe space to consider policy options in private.'"

17. DExEU further advised the Commissioner:

"We regard the policy making process in respect of the UK's exit from the EU to be a unique one which continues to develop in stages. The policy was (and still is) undergoing development and this will remain the case beyond the exit of the UK from the EU."

18. Having viewed the withheld information the Commissioner is satisfied that it relates to the formulation and development of government policy and the exemption at section 35(1)(a) is therefore engaged.

The public interest

19. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

20. The complainant explained to the Commissioner:

"Taking into consideration the background of the individuals, as well as recent media coverage, there are strong public interest factors, particularly relating to transparency and scrutiny, as to why the information should be released."

Public interest in disclosure

21. DExEU advised the Commissioner that it:

"... recognises the significant impact that policy development can have on the lives of citizens, and that there is a strong public interest in knowing what is being discussed between Ministers and external stakeholders in respect of matters relating to the UK's exit from the EU."

Public interest in favour of maintaining the exemption

22. DExEU considers that there is a significant public interest in the policy making surrounding the UK's exit from the EU being *"of the highest quality and fully informed."*

23. DExEU added that:

"Views must be exchanged freely and openly, and advice and analysis prepared for Ministers needs to be free and frank to be of the most value."

24. It further explained its view:

"We emphasise in particular the public interest in maintaining a robust policy making process. The choices being made in respect of the UK's exit from the EU are far-reaching in their importance and it is crucial that such choices are made as a result of a high quality, well informed and fully considered policy making process. Those engaged in policy making must be free to exchange relevant information, including relevant information from third party stakeholders, to fully inform the process."

25. DExEU considers that disclosure of the withheld information could discourage those with external expertise or insight from participating in the development of government policy. It stated:

"Such individuals may be discouraged from assisting the Government with the development of policy if their frankly expressed opinions were disclosed to the public. We consider that policy making benefits greatly from the contributions of external stakeholders, which is reflected in the broad range of external stakeholders that DExEU Ministers engage with, (published with DExEU transparency data), and it would not be in the public interest for this to be undermined by the disclosure of the withheld information. This is particularly true of the Government's policy towards exiting the UK, which will have wide ranging repercussions for the UK's external relations and its citizens and where external stakeholders who will be affected by exiting the EU should be encouraged to participate."

The Commissioner's view

26. The Commissioner accepts the complainant's reasoning and concerns regarding the transparency of Government Ministers. She understands how she has concluded that the balance of the public interest should favour disclosure. The Commissioner has given much consideration to the balancing of the public interest in this case and considers the matter to be finely balanced.
27. The Commissioner considers that there is a significant public interest in the disclosure of information which can inform the public debate around Brexit policy making, including the contributions of those external to Government. However, in this case, the complainant has focussed on information relating only to the content of discussions between DExEU and particular individuals. She has shared her concerns regarding the access to government, and thereby the influence exerted, by Mr Singham. The Commissioner is mindful of DExEU's comments to her that

increased media attention on any organisation should not sway the balance of public interest in favour of disclosure of information that has been provided as part of DExEU's work in formulating policy.

28. The Commissioner has reviewed the, somewhat limited, information presented by DExEU as falling within the scope of point 1 of the request. Clearly this relates to exchanges between Mr Baker and Mr Singham. Mr Singham is quite a prominent figure in the public domain, the Commissioner notes his appearances on the Radio 4 "Today" news programme where he is content to express his views. Much media attention has surrounded Mr Singham and his role in influencing policy, however, the Commissioner cannot be influenced in her decision on ordering disclosure of one party's contributions to policy making based on media attention.
29. The Commissioner must accept DExEU's submissions advising her of the wide range of stakeholders with whom it consults. The Commissioner considers free and frank consultation resulting in research and analysis from a variety of sources to carry significant weight.
30. DExEU has argued that individuals may be discouraged from assisting the Government with the development of policy if their frankly expressed opinions were disclosed to the public. The Commissioner is not convinced that many individuals who hold particular views would be deterred from expressing those views. The nature of the views of those consulted is often already clear to the public.
31. Notwithstanding this, the Commissioner has ultimately concluded that, the arguments in favour of disclosure of the information in this case are outweighed by the public interest in maintaining the exemption.
32. She has reached this conclusion having seen the content of the withheld information and given the weight she believes should be attributed to the safe space arguments. 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. However, ultimately she believes that there is a greater public interest in ensuring that Brexit policy making has the best opportunity to be of the highest quality, given the significance of the policy decisions to be taken. The public must trust that its elected representatives will consider all options and the resultant policy making will be effective and in the best interests of the public.

Section 1 – information not held

33. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

34. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
35. The complainant explained her view in respect of point 2 as follows:
- "I was informed that there is no record of correspondence between Mr Baker and Mr Littlewood. I find this hard to believe considering Mr Baker has very strong links to the IEA, and I would like to know whether the Department conducted a search within Mr Baker's private email account."
36. DExEU explained to the Commissioner that it had conducted several searches for correspondence between Mr Baker and Mr Littlewood. It confirmed that no information in the scope of point 2 was identified.
37. DExEU searched the former Minister's inbox using various appropriate terms likely to produce a result. It advised the Commissioner that this inbox would have been the primary location for any correspondence between the Minister and Mr Littlewood. DExEU advised that this location provided the information withheld in respect of point 1. DExEU stated that such information would not be held anywhere else within the Department.
38. The Commissioner notes the complainant's comment regarding Mr Baker's private email account, however, she considers that a pragmatic approach is appropriate in the circumstances of this case. The Commissioner has guidance on the use of private email accounts.² She considers it neither reasonable nor proportionate to request searches of private email accounts without prima facie evidence that a private email account has been used.

² https://ico.org.uk/media/for-organisations/documents/1147/official_information_held_in_private_email_accounts.pdf

39. With respect to point 4 of the request, the complainant has again questioned DExEU's response that no information is held. She advised the Commissioner:

"...it must surely have some information for the Department to have registered the dinner on the government transparency registers. The Department should at least have information on the location of the dinner."

40. Again the complainant questioned whether DExEU had searched Mr Baker's private email account. The Commissioner's view is as detailed in paragraph 38 above.
41. DExEU explained to the Commissioner that the publication of the dinner in the government transparency register was in error. The invitation was passed to Mr Baker's Parliamentary office as it was considered to be a personal event rather than an official one. The event was noted for diary management purposes only.
42. The Commissioner is satisfied that DExEU does not hold any information within the scope of points 2 and 4 of the request.

Right of appeal

43. 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

44. 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.
45. 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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