

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2019

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 between the European Research Group ('the ERG') and Mr Stewart Jackson (Special Adviser at the time of the request) and the ERG and Mr Steve Baker, at the time of the request Parliamentary Under-Secretary of State for exiting the European Union.
2. The Commissioner's decision is that the Department for Exiting the European Union ('DExEU') is not correct in its application of the exemptions at section 35 and 40 FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the sentence withheld in reliance of section 35(1)(d).
 - Disclose the names and official email addresses of Members of the House of Commons and the House of Lords and Members of the European Parliament included in the emails determined to be in the scope of the request.
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

5. On 18 January 2018 the complainant requested the following information:

"1) From July 2017 to the day this request is processed, I would like to request all correspondence and communications between Stewart Jackson and the European Research Group.

2) From June 2017 to the day this request is processed, I would like to request all correspondence and communications between Steve Baker and the European Research Group.

I define correspondence and communications as including (but not limited to) the following:

- Emails (and their attachments)
- Newsletters from the European Research Group
- Reports/briefings produced/written by the European Research Group
- Letters
- Memos
- Research documents
- Invitations
- Presentation slides
- Notes taken during telephone conversations
- Notes taken during meetings
- Text/WhatsApp messages"

6. On 5 March 2018 DExEU responded with a refusal notice in reliance of section 35(1)(a) and (d) FOIA – Formulation of government policy etc. in respect of the second element of the request. It stated that no information was held on the first element of the request.
7. Following the internal review of 6 July 2018 DExEU changed its position. It considered that the majority of information with respect to the second element which was initially withheld was, in fact, out of the scope of the request. It determined that the remaining information engaged section 35(1)(d) and found that the public interest favoured disclosure save one line which was redacted. Section 40(2) – Personal information was relied on in addition with respect to email recipient names and email addresses.

Scope of the case

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8. The complainant contacted the Commissioner on 6 September 2018 to complain about the way her request had been handled. The complainant provided the Commissioner with a detailed submission of her view. She explained her concern that there had been more communication between Mr Baker and the ERG, other than the redacted emails which

had been disclosed. She explained her interest in any communications regarding Mr Baker's attendance at ERG meetings during his time as Brexit Minister. The complainant also explained her view that the application of section 40(2) was not appropriate or unfair in the circumstances of this case.

9. The Commissioner considers the scope of her investigation to be the application of the exemptions at sections 35(1)(d) and 40(2) FOIA to redact the limited amount of information DExEU considered to be in the scope of the second element of the request. The Commissioner also considered the information deemed to be out of the scope of the request at the time of the internal review; focussing particularly on communications with Mr Baker as a Minister or in his party political role.

Reasons for decision

Section 35

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-

(d) the operation of any Ministerial private office."

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 operation of any Ministerial office.
12. As is her usual practice, the Commissioner requested a submission from DExEU to provide her with the public authority's detailed reasoning for the application of the exemptions relied on to withhold the redacted information. DExEU responded as follows:

"Please find attached the information in scope of this request, I also attach our internal review response, in this case there is not much that I can add to the explanation given at internal review, there is only a very small amount of information that was withheld under section 35(1)(d)."
13. The Commissioner has therefore considered the content of the internal review to comprise DExEU's submission to the Commissioner.
14. DExEU advised that the purpose of the section 35(1)(d) exemption is "to ensure that ministerial business is managed effectively and efficiently". It explained that the exemption had been applied to protect the safe

space to allow the Minister's office to focus on the day to day management of the diary.

15. Having seen the withheld information the Commissioner accepts that the withheld information comprises information relating to the operation of the Ministerial private office with respect to diary management. She is therefore satisfied that the exemption is engaged.

The public interest

16. 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)(d) outweighs the public interest in disclosing the information.
17. DExEU provided its public interest considerations as follows. Considering that in favour of maintaining the exemption is:

“the impact on the effective operation of private offices, and the limited value of such disclosures of information that is essentially routine information relating to the management of the Minister's diary.”
18. DExEU did not provide any reasoning in favour of disclosure. However, it advised;

“taking into account all the circumstances of this specific request, including the volume of material held, I have concluded that for the majority of the information the public interest outweighs the public interest in maintaining the exemption in this case. There is a very small amount of information relating to diary arrangements, which has been redacted.”
19. Having viewed the limited redaction in reliance of section 35(1)(d) the Commissioner does not agree that disclosure of the limited redaction would have any significant impact on the effective operation of the Minister's private office. DExEU itself considers the information to be 'routine'.
20. The Commissioner is cognisant of the very significant public interest in Brexit and considers that transparency and accountability surrounding correspondence and communications between the Minister and the ERG carries a compelling weight. She therefore considers that the public interest favours disclosure of the information redacted in reliance of section 35(1)(d).

Section 40 – personal information

21. The public's right of access to the personal data of third parties is, in effect, governed by the Data Protection Act. At the time of the request

the relevant Data Protection Act was the 1998 Act. Since that time the Data Protection Act 2018 has come into force, however, the Commissioner's role is to determine whether DExEU correctly applied the legislation that was in force at the time of its response.

22. Section 40(2) of the FOIA provides that a public authority is entitled to refuse a request for information which constitutes the personal data of someone other than the person making the request, if disclosing that information would breach any of the data protection principles set out in Schedule 1 of the Data Protection Act 1998.
23. The information which has been withheld in reliance of section 40(2) consists of the names of senior public servants and their email contact details for work. The Commissioner is satisfied that this constitutes the personal data of the individuals concerned.
24. DExEU advised:

"In this case, disclosure would contravene the first data protection principle, which provides that personal data must be processed fairly and lawfully. Section 40(2) is an absolute exemption."
25. DExEU has argued that disclosing this information would breach the first data protection principle. So far as is relevant, the first principle of the Data Protection Act 1998 provides that personal data shall be processed fairly and lawfully and not be processed unless one of the conditions set out in Schedule 2 of the Act can be met.
26. 'Fairness' is a difficult concept to define. It involves the consideration of the following interrelated elements:
 - The possible consequences of disclosure to the individual.
 - The reasonable expectations of the individual regarding how their personal data will be used.
 - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.
27. The Commissioner considers that, in general, there should be recognition amongst high ranking officials in the public sector that some information about their working life may be disclosed in response to an FOIA request.
28. In this case, the Commissioner considers that those officials listed in the distribution list of the emails concerned are senior public officials with public facing, high profile roles. She notes that a significant number of Members of Parliament ('MPs') are included. The Commissioner considers that, in the normal course of events, their names are

constantly placed in the public domain; they frequently use publicly accessible Twitter accounts to provide their views. She also notes that MPs' professional email addresses are already in the public domain¹. Consequently, these points should shape their expectations with respect to disclosure of their personal data in the circumstances of this case.

29. DExEU has not made the Commissioner aware of any particular consequences of disclosure for the individuals concerned and she cannot deduce any obvious reasons to believe that disclosing their names would have any detrimental consequences for them.
30. In conclusion, in the circumstances of this case, the Commissioner considers that the legitimate interests in the public having access to the redacted information carries greater weight than the rights and freedoms of the individuals concerned.
31. She therefore finds that the names and parliament email addresses of the MPs, MEPs and Lords redacted from the emails disclosed should be provided. The email addresses of those MPs who received emails to a private email address may continue to be withheld.

Information out of scope of the request

32. As described above DExEU changed its determination of the information in the scope of the request. The Commissioner gave particular scrutiny to the emails latterly considered to be out of the scope of the request.
33. DExEU advised the Commissioner that at the time of the internal review and following discussion with the private office, some emails relating to Mr Baker's political role had been included in the consideration of the request. The Commissioner therefore considered whether the content of this material comprised information relating to Mr Baker's party political role rather than his Ministerial role.
34. The Commissioner would like to assure the complainant that she gave detailed consideration to this material as she was somewhat concerned that some of the information appeared to her, in the first instance, to fall within the ambit of 'Ministerial business' and therefore within the scope of the request. However, following her consideration the Commissioner decided that the information concerned was in fact 'party political' and related to Mr Baker's political role rather than his role as a Minister.

¹ <https://www.parliament.uk/mps-lords-and-offices/mps/>

Right of appeal

35. 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

36. 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.
37. 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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