

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 May 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 relating to the decision or chain of decisions that the United Kingdom will leave the European Union. Department for Exiting the European Union refused to comply with the request under section 12(2) of the Act as it considered compliance would exceed the appropriate limit.
2. The Commissioner's decision is that Department for Exiting the European Union is entitled to rely on section 12(2) of the Act to refuse to comply with the request. The Commissioner does not require Department for Exiting the European Union to take any further steps.

Request and response

3. On 19 July 2018, the complainant wrote to Department for Exiting the European Union (DExEU) and requested information in the following terms:

'Any information, whether in the form of documents, letters, emails, memos, records of statements or other form, in the possession, custody or power of DExEU, pertaining to the source or maker(s) or origin or originator of the decision or chain of decisions that the UK will leave the EU (as distinct from the decision to notify the EU of the former decision), and the date(s) on which that decision (or chain of decisions) to leave was (were) made, and any contemporaneous record of that (those) decision(s).'

4. DExEU responded on 16 August 2018. They advised that *'the exit decision was taken at multiple levels in Government, including Parliamentary processes, and as a result there is no one document, nor series of documents, which illustrates the information you seek'*.

5. Under Section 16(1) of the FOIA, the Department provided advice and assistance in the form of the following information (with links) which they considered might be of interest to the complainant:

'1. On 23 June 2016, the electorate of the UK voted by a majority to leave the EU in a national referendum, in accordance with the EU Referendum Act 2015 passed by Parliament.

Prior to the referendum, the Government's policy was that the outcome of the referendum would be respected. Parliament passed the EU Referendum Act 2015 on this understanding.

2. On 7 December 2016, MPs in the House of Commons agreed a Motion around the plan for the UK to exit the EU.

3. Article 50 of the Treaty on European Union sets out the procedure by which a Member State which has decided to withdraw from the EU may achieve that result. That decision having been taken, the next stage in the process is for the state to notify the European Council of its intention to withdraw.

4. Parliamentary approval for the Prime Minister to notify the UK's intention to withdraw from the EU was given under the European Union (Notification of Withdrawal) Act 2017.

5. On 29 March 2017, the Prime Minister, following Cabinet agreement, formally notified the EU of the UK's intention to leave and made a statement to this effect to Parliament. The UK Government's Permanent Representative to the EU delivered the Prime Minister's letter to the President of the European Council'.

6. On 16 August 2018, the complainant requested an internal review of the response. Advising that he was not satisfied with the response provided, he stated that, *'your reply suggests that the information sought is contained, embodied, dispersed, incorporated etc within several documents. If so, you must provide copies of those documents in the custody, possession or power of DExEU'*. The complainant added that, *'the only acceptable reason for your supplying no such copies is that the information, or parts or components of it, is not contained in any such documents in your possession, custody or power, and that position is not remotely credible'*.

7. DExEU acknowledged receipt of the internal review request on 17 August 2018.

8. On 22 September 2018, having not received the internal review, the complainant sent a chaser email to DExEU for the same.
9. On 25 September 2018 the complainant complained to the ICO about the Department's failure to provide him with the internal review requested.
10. On 11 October 2018, the Commissioner wrote to DExEU and recommended that the Department provide the complainant with the outstanding internal review within 10 working days.
11. DExEU belatedly provided the complainant with their internal review on 24 December 2018. The review found that the original response was incorrect as *'despite providing a reasonable level of help and assistance under Section 16 of the Act',* they should have *'more adequately explained why the department was unable to identify, and consider for disclosure, specific information in scope of the request'*. Having re-assessed the request, the Department advised the complainant that they considered that section 12(2) was engaged due to the request's *'broad scope and wording'*.
12. DExEU explained that:

'Your request for 'any information' pertaining to the; 1) source; 2) makers; 3) origin; 4) originator of the: a) decision or; b) chain of decisions, is a very broad and wide reaching request, and would require DExEU to conduct a search for any document that included a reference to the origin of the decision to leave the EU. As explained in the initial response, the decision to exit the EU was taken at multiple levels in Government, including through Parliamentary processes, and there is no one document which encapsulates all of the potential information you seek'.
13. The Department further advised that:

'The initial response from the department highlighted some of the key milestones and events that led to the decision for the UK to exit the EU. To comply with your request as it is worded, we would be required to carry out a search across the whole department to identify any potential information held that related to any of the events which we listed in our original response to you. This would very likely involve tens of thousands of documents'.
14. DExEU advised that any information located would then have to be reviewed to identify the relevance to the request, and this *'would clearly exceed the specified cost limit'*. The Department advised the complainant that to comply with his request substantively, they would be required to use its broad range to search against the main events,

such as those set out in the original response, and potentially other events that may have relevance.

15. By way of advice and assistance, the Department informed the complainant that if he refined his request, *'so that it is more likely to fall under the cost limit'*, then they would consider the same. The Department however cautioned that if the complainant simply broke his request down into a series of similar, smaller requests, then they still might decline to answer if the total cost were to exceed £600.
16. DExEU advised the complainant that *'limiting your request to more specific information would increase the chances of it being processed within cost limits. In particular, you may wish to focus on one of the events highlighted in the initial response and you may wish to avoid terms like 'any information''*.
17. Finally, the Department drew the complainant's attention to the fact that some of the key steps highlighted by them in their response and the review, pre-dated the creation of DExEU, and so, depending on the wording of any revised requests, relevant information may be held in other departments. In particular, the Department suggested that the complainant might wish to contact the Cabinet Office.
18. The complainant emailed DExEU on the date of receiving the review (24 December 2018) and stated as follows:

'Needless to say, I do not believe that your response complies with the department's obligations under the Act or that the cost of supplying a response to my perfectly simple request, which amounts to nothing more than "where is the decision?" (my expanded wording necessitated only to try to avoid your circumnavigating my request) should require the disclosure of 'tens of thousands' of documents or consume more than 24 man-hours of the department's time. I did not ask for a copy of every document that contains a reference to the decision, as you pretend, but only those that contain the decision itself or the constituent parts thereof. I remind you that A.50 of the Lisbon treaty required that a decision be made. It surely shouldn't be that difficult for you to produce it'.
19. On 24 December 2018, the complainant complained to the ICO about DExEU's Section 12(2) refusal of his request.
20. The Commissioner emailed the complainant on 9 January 2019 to explain why his information request of 19 July 2018, as worded, was wider than he believed. The Commissioner advised that, *'by requesting 'any' information 'pertaining to' the source or maker(s) or origin or originator of the decision or chain of decisions that the UK will leave the EU, the scope of your request includes any held information which relates to that decision or chain of decision(s), rather than the*

decision(s) itself. That will clearly encompass a significant amount of information held by the Department'.

21. The Commissioner acknowledged that the complainant had employed 'expanded wording' to try and avoid DExEU circumnavigating his request, but the effect of the request wording was to clearly include any information relating to the source or maker or origin or originator of the decision or chain of decisions. The Commissioner therefore advised the complainant that it was likely that DExEU would be able to provide her with evidence to support the section 12 refusal. In light of this, the Commissioner suggested to the complainant that he should consider withdrawing his complaint about the section 12 refusal and instead submit an appropriately refined and narrower request to DExEU, taking into account the advice and assistance they had provided.
22. The complainant contacted the Commissioner on 25 January 2019 and confirmed that he had decided to proceed with his complaint and not submit a refined request as suggested.

Scope of the case

23. On 1 November 2018 (having then still not received the internal review from DExEU) the complainant referred a further complaint to the ICO about the original DExEU response to his request. In stating that, *'prior to the referendum, the Government's policy was that the outcome of the referendum would be respected. Parliament passed the EU Referendum Act 2015 on this understanding'*, the Department had, contended the complainant, made an *'incontrovertibly false statement'*.
24. The complainant advised the Commissioner as follows:
'Parliament was formally advised several times during the debates on the bill in question (European Union Referendum Bill 2015-16) that the outcome of the referendum would be advisory only. It was on this understanding that the Act was passed and not, as falsely stated, on the understanding that the outcome 'would be respected' (where 'respected' has the meaning, long adopted by DExEU and the government in this precise context, of 'implemented by government/Parliament')'.
25. The complainant contended that the information supplied by DExEU *'is a false statement purporting to be fact, and it is in breach of the statutory duty, under the FOIA, of the agency in question'*.
26. By way of support for his contention, the complainant cited Part 5 of the European Union Referendum Bill 2015-16, in which it is stated that the Bill *'does not contain any requirement for the UK Government to implement the results of the referendum, nor set a time limit by which a*

vote to leave the EU should be implemented'. Rather, the Bill was stated as being 'a type of referendum known as pre-legislative or consultative, which enables the electorate to voice an opinion which then influences the Government in its policy decisions'. Part 5 of the Bill also states that 'the UK does not have constitutional provisions which would require the results of a referendum to be implemented, unlike, for example, the Republic of Ireland, where the circumstances in which a binding referendum should be held are set out in its constitution'.

27. On 12 December 2018 the Commissioner advised the complainant that she would not be considering (as part of her investigation into the response provided by DExEU to his request of 19 July 2018) the complainant's allegation concerning the *'false statement'*. The Commissioner explained that the legal status and standing of the EU Referendum is outside her role and remit, and the statement made by DExEU to which the complainant took exception, did not breach any section or provision of the FOIA. The Commissioner noted that the complainant was entirely free to disagree with or challenge the Department's statement, but that was a separate matter to his information request.
28. The Commissioner confirmed that her role and remit was to establish what information (if any) within the scope of the complainant's request, was held by DExEU, and to ensure that any such information was provided to him, unless exempt from disclosure under one or more of the exemptions or other provisions in the FOIA.
29. The scope of the Commissioner's investigation is to determine whether DExEU were entitled to rely on section 12(2) to refuse to comply with the complainant's information request of 19 July 2018.

Reasons for decision

Section 12: Cost of compliance exceeds appropriate limit

30. Section 1(1) of the Act states:

'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'.

31. Section 12 of the Act states:

'(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

'(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit'.

32. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at a flat rate of £25 per hour. This means that DExEU may refuse to comply with a request for information if they estimate that it will take longer than 24 hours to comply.
33. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - Determining whether it holds the information;
 - Locating the information, or a document containing it;
 - Retrieving the information, or a document containing it; and
 - Extracting the information, or a document containing it.
34. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. However, the Commissioner considers that the estimate must be reasonable. The Commissioner follows the approach set out by the Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/004, 30 October 2007)* which stated that a reasonable estimate is one that is *'sensible, realistic and supported by cogent evidence'*.

DExEU's position

35. In detailed submissions to the Commissioner, DExEU explained that the difficulty in complying with the complainant's request within the costs limit particularly came from the references to 'any information' and 'pertaining to' (ie relates to), but also the lack of distinct clarification on the information of interest to the complainant following two attempts by the Department to explain that the decision to exit the EU *'was taken at multiple levels in Government, including through Parliamentary processes, forming a significant process overall'*. They noted that a list

of the key steps, including dates, had been provided to the complainant in both the original response and internal review *'to explain the complexity and partially answer his request'*. At internal review, the explanation was provided to invite the complainant to refine his request more specifically, perhaps to one of the steps highlighted, to increase the chances of it being answerable within the cost limit, but the complainant had not made any such refined request.

36. The Department advised the Commissioner that because of the breadth of subject that the complainant was asking about, and because of the references to 'any information' and 'pertaining to', it would be exceedingly difficult to formulate a precise calculation of the costs of complying with the request or to formulate a complete list of the totality of searches that would need to be conducted to find and identify information in scope. DExEU advised that, *'any document that includes reference to the origins and events highlighted in the internal review response would be in scope of the request'*. This would include, for instance, not only specific documents directly concerning such matters (ie the six events themselves) but also any document that makes reference to them and a 'decision' to exit the EU. DExEU stated that this *'would undoubtedly include a very large number of documents (tens of thousands)'*.
37. The Department explained that even at a basic level, many of their documents (emails, letters, briefings, policy documents etc) are likely to include introductory paragraphs or contextual details referring to any of the six events listed, or referral to a decision by the UK to leave the EU.
38. DExEU advised the Commissioner that, *'there is no single team that would hold information in scope of this particular request and DExEU's very function and remit dictates that almost every official in the department could in some way hold information in scope, as currently worded'*. The Department advised that this was especially the case without further context from the complainant regarding his specific area of interest, following help and assistance from DExEU. Department officials would therefore need to search electronic correspondence and documents very widely for information in scope.
39. In addition, DExEU explained that there would be no easily definable set of search terms by which officials could quickly narrow down the number of documents likely to be in scope. The complexity and breadth of the request means that there is no short list of searchable terms. Additionally, some of the more identifiable search terms that might be used to search for information would also be fairly generic for the Department's work. DExEU advised that terms like 'referendum', 'Notification of Withdrawal', 'article 50' or 'article 50 letter', would certainly identify huge numbers of documents and emails that might or might not be in scope of the request.

40. The Department explained that a wide number of officials would therefore need to trawl through the entirety of their correspondence and records using an unknown number of search phrases to look for the information. The initial findings would then need to be sifted to ascertain which were actually relevant to the specific request. DExEU estimated that this sift would be a considerable exercise as there are so many possible search terms, and many are used with great frequency in discussions about the majority of the Department's general business. Even after these exercises to search out and identify information were complete, there would still be no guarantee that the list produced would be exhaustive due to the breadth of the request.
41. With regard to the possibility of carrying out a sampling exercise to demonstrate a calculation of cost impacts on the Department to search out and identify information in scope, DExEU advised the Commissioner that *'the type and volume of documents that would need to be reviewed following initial searches, would vary across the department'*. All major business areas would identify significant volumes of information to review due to the breadth of the wording of the request. As such, a sampling exercise *'would not be sensible and realistic, and a small sample would not be representative of the whole'*.
42. In support of their position that a sampling exercise would not be appropriate or useful in this case, DExEU referenced two recent decisions of the Commissioner. In both FS50768806 (18 December 2018 case involving Department for Business, Energy & Industrial Strategy) and FS50768657 (29 January 2019 DExEU case), the Commissioner accepted that a sampling exercise would not have been fruitful or appropriate and upheld the respective section 12 refusals.
43. In line with those decisions, the Department advised the Commissioner that they could only provide a speculative estimate for her to consider and assess. DExEU noted that this case *'is quite obviously broader in scope than the cases highlighted above in comparison'*.

Speculative estimate

44. The Department confirmed that, at a minimum, a senior official would need to coordinate this search work, along with a legal official. Both would assist the Department to identify if information is or is not in scope of the request. This would be expected to take up to two weeks. DExEU confirmed that they have 10 Directorates, and each area would need a representative to coordinate and pull together documentation from their parts of the department. DExEU advised that this would be more significant in some areas (such as within the Department's Legal Team, who will have been involved on numerous issues related to the

events) than it would be for others (DExEU corporate centre). However, the Department estimated that it would take each area two and a half working days on average to pull the results together. This would equate to 321.5 hours of work. This would not include the time some individuals from across the Department would need to spend individually searching emails and documents.

45. As a small additional example of the sort of volumes of emails that searches of generic terms would generate, DExEU advised the Commissioner that a brief search of the email inbox of the head of DExEU's legal team was carried out from 24 June 2016 (date of referendum result) to 19 July 2018 (date of complainant's request). Searches using the term 'Article 50' identified 9,901 emails. Searches using the name 'Miller' (in reference to R (Miller) v Secretary of State for Exiting the European Union – regarding withdrawal from the EU and Article 50), identified 2,019 emails. The Department advised that reviewing two of these emails per minute to ascertain if they were in scope would account for over 90 hours of work.
46. DExEU advised the Commissioner that they '*undoubtedly*' hold information in scope of the request, but without further refinement by the complainant, they are unable to comply with the request as worded within cost limits. The Department recognised and acknowledged that the complainant is clearly not interested in acquiring such a large amount of information as that covered by their section 12 arguments, and is interested in something more specific. However, as he had failed to further explain what information he wanted, they stated that they could only respond to him based on the wording of his original request.

The Commissioner's position

47. The Commissioner acknowledges that the complainant considers his request of 19 July 2018 to be '*perfectly simple*' and to amounting '*to nothing more than "where is the decision?"*'. However, as DExEU explained to him in their responses to his request, the decision to exit the EU was taken at multiple levels in Government, including through Parliamentary processes, as indicated by the five (expanded to six in the internal review) main events listed by the Department. It is therefore clear that no one document or piece of information will encapsulate 'the decision' sought by the complainant.
48. However, even if the information was as self-contained as the complainant contends, his information request does not ask for a copy of said decision, but rather asks for '*any information*', '*pertaining to*' the source or maker(s) or origin or originator of the decision or chain of decisions that the UK will leave the EU. As the Commissioner previously explained to the complainant (see paragraph 20 above), the wording (which the complainant himself acknowledged to be '*expanded*') of his

request captures any information held by DExEU which relates to the decision (or chain of decisions) to leave the EU. Given the function and remit of DExEU, the Commissioner accepts that this will clearly encompass a considerable amount of information held across the Department.

49. The Commissioner is satisfied that DExEU have provided reasonable explanations as to why it would not be possible for them to comply with the complainant's request, as currently worded, within the appropriate costs limit, which is 24 hours, or 1440 minutes. DExEU have advised that it would take each area of the Department two and a half working days on average to pull the results of their checks and searches together. This equates to 321.5 hours of work and exceeds the cost limit by a huge margin.
50. The Commissioner accepts that given the breadth of the request, there is no one (or a few) search term(s) that would readily and quickly identify relevant held information, and given the volumes of information held, a sampling approach would not be helpful or practical in this particular case. The Commissioner notes that the brief search of the email inbox of the head of DExEU's legal team was indicative of the amounts of potential relevant held information which such searches would generate.
51. The Commissioner is entirely satisfied that DExEU would be unable to identify and review the information requested within the appropriate limit, and they are entitled to rely on section 12(2) of the Act to refuse to comply with the complainant's widely worded request of 19 July 2018.

Other matters

52. Internal reviews under the FOIA are not subject to statutory time limits. However, the Commissioner's guidance to public authorities is well established and clear, in that she expects most internal reviews to be completed within 20 working days, with a maximum of 40 working days in exceptional circumstances. A more than four month delay in providing an internal review is manifestly excessive and not acceptable. Such unjustifiable delay is contrary to both effective transparency and the spirit and purpose of the legislation. The Department should ensure that they process and provide such reviews to requesters within the timescales set out in the Commissioner's guidance. No internal review should take longer than 40 working days and that time should only be necessary in exceptional cases.
53. In submissions to the Commissioner, DExEU noted that some of the comments made by the complainant in his correspondence with the

Department suggested that he is seeking a copy of an additional singular formal decision for the UK to leave the EU. The Department advised that this point had already been explored in the courts in *R (Webster) v Secretary of State for Exiting the EU [2018] EWHC (Admin)*¹. In that case, DExEU noted that the court rejected an argument that additional formality was required under the UK constitution, for the UK to exit the EU (a permission decision, rather than being binding). DExEU advised that if the complainant were to persist in this line of direction in any revised request, then they would consider refusing any such request under Section 14(1)(vexatious) '*as the question of formality and decisions has been considered in the courts previously*'.

¹ <https://drive.google.com/file/d/16yIKxZqL-QoBdVfz547-rEFaL6yW-8po/view>

Right of appeal

54. 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

55. 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.
56. 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

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