

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2019

Public Authority: Department for Exiting the European Union

Address: 9 Downing Street
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested copies of the minutes of six meetings plus a list of the attendees. The public authority revealed the identities of the majority of attendees and withheld the minutes held relying on the exemptions at section 27(1)(c-d) (international relations) and section 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 are required.

Request and response

4. On 11 May 2018, the complainant submitted a request for information to the public authority in the following terms:

"I would like to request the minutes of the following meetings, plus a list of who attended each one. This information is taken from DEXEU's [Department for Exiting the European Union] list of meetings and I assume that TheCityUK, City UK, and The City UK all refer to the same organisation.

1. Robin Walker Sep-17 TheCityUK
 2. Robin Walker Sep-17 UK Finance
 3. Robin Walker Oct-16 City UK
 4. Rt Hon David Davis MP Oct-16 CityUK
 5. Rt Hon David Jones MP Feb-17 The City UK
 6. Robin Walker MP Feb-17 The City UK"
5. The public authority initially responded on 11 June 2018. It confirmed that the public authority held "information relevant" to the request which it considered exempt on the basis of section 35(1)(d) FOIA (information relating to the operation of any Ministerial private office). However, further to the provision in section 10(3) FOIA¹, it advised the complainant that it needed an additional 20 working days to consider where the balance of the public lies in relation to the information considered exempt from disclosure.
6. The public authority issued a substantive response to the request on 6 August 2018. It revealed the identities of most of the attendees at each of the six meetings listed by the complainant² and confirmed that it held minutes of the first meeting on the list namely, "Robin Walker, 6th

¹ Further to section 10(3) FOIA, a public authority may extend the time by which to issue a refusal notice (ie 20 working days following the request) specifically in order to consider where the balance of the public interest lies.

² Save for the identity of one of the attendees at the first meeting on the list. The identity of the organisation represented at the meeting was revealed. However, the identity of the organisation's representative at the meeting was withheld relying on section 40(2) FOIA.

September 2017 TheCityUk" only which it withheld relying on the exemptions at sections 27(1) (c-d) and 35(1)(a) FOIA.

7. The complainant requested an internal review on 13 September 2018. She specifically expressed her disagreement "with your refusal to release the 1 minute that relates to the 6 meetings in questions [sic]."
8. The public authority wrote to the complainant on 3 December 2018 with details of the outcome of the internal review. The review concluded that the public authority should have "considered another note to be a minute falling within the scope..." of the complainant's request. However, the review further concluded that both the minutes of the first meeting and the note were exempt from disclosure on the basis of sections 27(1) (c-d), 35(1)(a) and 40(2) FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 24 May 2019 to complain about the way her request for information had been handled.
10. The Commissioner established that the scope of her decision would be restricted to how the public authority handled the complainant's request of 11 May 2018, in particular, whether the public authority was entitled to withhold the information held within the scope of her request.
11. The complainant however did not dispute the application of the exemption at section 40(2) FOIA. Therefore, the application of section 40(2) was not considered by the Commissioner further to her investigation.

Reasons for decision

Withheld information

12. As the public authority has revealed, the withheld information comprises of the minutes of the first meeting on the complainant's list namely, "Robin Walker, 6th September 2017 TheCityUk" and a 'note' also considered to be a minute. During the course of the investigation, the public authority clarified that the note in question is a readout of the first meeting on the complainant's list.
13. Therefore, for the avoidance of any doubt, the withheld information in this case comprises of the minutes and readout of the first meeting on the complainant's list in her request of 11 May 2018 namely, "Robin Walker, 6th September 2017 TheCityUk"

Section 35(1)(a)

14. The Commissioner initially considered whether the public authority was entitled to apply the exemption at section 35(1)(a) to the withheld information.

15. 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.”³

16. 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.

17. 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.

18. 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.

Complainant’s submission

19. The complainant’s submission in support of her view that the exemption is not engaged is reproduced below.

20. “In its reply, DExEU argues that “information of discussions between a Minister and external stakeholders (such as those who attended the

³ The full text of the exemption is available here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/35>

meetings in question) do relate to the development or formulation of government policy. " But that seems a hugely broad interpretation and would essentially mean that no lobby meetings minutes could ever be released which I find to be a ludicrous interpretation of 'freedom of information'.

Public authority's submissions

21. The public authority's submissions in support of its view that the exemption is engaged are summarised below.

22. By way of background the public explained that Ministers meet with a variety of external stakeholders in the course of their work and those meetings are listed in the DExEU's transparency data:

<https://www.gov.uk/search/transparency-and-freedom-of-information-releases?organisations%5B%5D=department-for-exiting-the-european-union&parent=department-for-exiting-the-european-union#content>

23. TheCityUK was founded in 2010 following recommendations from Government Ministers and industry experts that the UK required an independent body that would promote the industry. It represents a variety of UK financial services institutions. TheCityUK's Brexit Steering Group was formed to oversee the organisation's post-EU referendum work and to ensure that a clear industry message is articulated to policymakers.

24. The withheld information contains a record of the meeting between TheCityUK's Brexit Steering Group and the then Parliamentary Under Secretary of State for DExEU, Robin Walker MP. The withheld information relates to the formulation or development of the Government's policy towards the UK's exit from the EU.

25. The policy was and still is undergoing development and this will remain so beyond the exit of the UK from the EU as the negotiations for the future economic partnership will follow that. The subject of the policy undergoing development is therefore a live one and remains very sensitive. The UK and the EU are engaged in negotiations concerning an agreement on the exit of the UK from the EU with a view to agreeing a subsequent future economic partnership with the EU.

26. In response to the complainant's contention, the public authority drew the Commissioner's attention to her published guidance on section 35 FOIA which states that 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.⁴ Therefore, even if the withheld information was thought not to directly concern the formulation or development of the Government's EU exit policy (although the public authority considers that it does), it undoubtedly relates to that policy in the terms outlined by the Commissioner.

27. Furthermore, the public authority explained that it has not suggested that no minutes relating to a meeting between a Minister and an external stakeholder can ever be released. The public interest can be in favour of the disclosure of such information if it outweighs the public interest in maintaining the exemption.

Is the exemption engaged?

28. The Commissioner has considered whether the exemption is engaged. In reaching a view on whether the exemption is engaged, the Commissioner has inspected the withheld information and considered the submissions from the complainant and the public authority with respect to that question.
29. The Commissioner considers that the withheld information relates to the formulation or development of the Government policy on the UK's exit from the EU and more specifically the future economic partnership between the UK and the EU.
30. The Commissioner therefore finds that the exemption at section 35(1)(a) was correctly engaged.

Public interest test

31. The exemption is a qualified exemption which means that the Commissioner must also 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.

⁴ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

Complainant's submissions

32. The complainant's submissions in support of the public interest in disclosing the withheld information are reproduced below.
33. "DEXEU argues that "It is vital within negotiations that there can be the exchange of views on available options/scenarios freely and openly, and that these can be discussed and potential implications understood, especially on live issues." But this opportunity to exchange views with DEXEU is only available to a relatively small number of organisations. As work by Corporate Europe Observatory and Global Justice Now has shown, access to ministers during the Brexit negotiations has been strongly dominated by corporate interests, while NGOs and trade unions, let alone citizens, have not had anything like the level of access enjoyed by business interests. In this context, it seems especially important that when corporate interests secure access to ministers, and do so often on a regular basis, that there is transparency rather than secrecy about what is discussed, so that there can be an assessment about whether or not such corporate interests are having excessive influence on the eventual positions of the government. Such transparency is necessary for the accountability of ministers and the wider government. Arguably, the publication of such minutes could also lead to greater input into DEXEU from a wider range of groups than is presently the case, which can only be a positive development."
34. "DEXEU further argues that "Those who provide advice to Ministers on policy should be able to do so in an atmosphere which encourages the free and frank exchange of views and ideas, unhindered by the possibility that those opinions will be prematurely disclosed to the public. Disclosure of such views would hinder the policy making process by discouraging those who participate in it from expressing their opinions." But this is deeply problematic, because it does not allow for transparency so that others can challenge or put forward alternative views; and it also troubling because, as argued above, DEXEU's lobby meetings have been imbalanced and they have not heard from enough voices from civil society and trade unions, for example."

Public authority's submissions

35. The public authority's submissions in support of the public interest in maintaining the exemption are summarised below.
36. The public authority acknowledged that there is a general public interest in openness in public affairs to ensure scrutiny of important decisions particularly in relation to policy development that could have a significant impact on the lives of citizens. More specifically it

acknowledged that there is a public interest in knowing what is discussed between Ministers and external stakeholders.

37. In favour of maintaining the exemption, the public authority argued that there is a public interest in policy making on the UK's exit from the EU being of a high quality and fully informed. There is a strong public interest in views being exchanged freely and openly and of advice being presented to Ministers that is free and frank in nature. Releasing the withheld information may undermine the effective formulation or development of policies and jeopardies the confidential environment necessary for policy development.
38. The public authority noted that the choices being made in respect of the UK's exit from the EU are far-reaching in their importance. It is therefore 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 which is pertinent to that process and be able to exchange views on options and the implications of potential courses of action.
39. Furthermore, maintaining a safe space in which policy can be developed in an environment that encourages the free exchange of ideas and opinions is important. The public authority drew the Commissioner's attention to her published guidance on section 35 FOIA which states that safe space arguments can still apply where external contributors have been involved as long as those discussions have not been opened up for general external comment. The public authority confirmed that the meeting between the TheCityUK's Brexit Steering Group on 6 September 2017 was not open for general external comment.
40. The public authority explained that TheCityUK's Brexit Steering Group was contributing to the policy making process surrounding the UK's Exit from the EU in the same way as officials do, expressing free and frank views on policy to a Minister who is responsible for the development of the policy. The public authority argued that such deliberations warrant the safe space which enables high quality policy development. Those who possess external expertise or insight should not be discouraged from participating in the development of policy. However, they may be discouraged from assisting the Government with the development of policies if their frankly expressed opinions are disclosed to the public. Policy making benefits greatly from the contributions of external stakeholders 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 the exiting the EU which will have wide ranging repercussions for the UK's external relations and its citizens and where external stakeholders who will be affected by the exiting the EU should be encouraged to participate.

41. Summing up its submission, the public authority noted that the subject of the UK exiting the EU is still a live, salient and sensitive matter. The ongoing negotiations are complex and significant. The development of the Government's policy towards exiting the EU is therefore of utmost importance and consequently there is a strong public interest in not compromising the policy making process by disclosing the withheld information.
42. In response to the complainant's contentions, the public authority considers that there is no inherent public interest in the Government opening up the contents of its meetings with external stakeholders to a plurality of countering views. In view of the public interest in maintaining the exemption in the circumstances of this case, opening up the contents of the Government's meetings with external stakeholders to general comment during the policy making process would completely undermine that process and would gravely inhibit effective government. That the contents of a meeting between Government and an external stakeholder are withheld from disclosure does not prevent people from making their own representations to the Government about a particular policy via a Member of Parliament or directly.
43. Furthermore, the public authority considers that it is important it meets with business interests during the policy making process of the UK's exit from the EU, particularly in light of the millions of people who are employed by businesses in the UK. The public authority considers that it has met with a variety of stakeholders and those meetings have been published. It does not consider that a contrary contention constitutes a valid public interest for disclosing the withheld information. Any implied imbalance in the types of stakeholders that Ministers have met does not justify the disclosure of the contents of a particular meeting. In addition, the disclosure of the withheld information would have no impact on the purported problem as the complainant sees it.

Balance of the public interest

44. The Commissioner has considered where the balance of the public interest lies. For the avoidance of doubt, in reaching a view on where the balance of the public interest lies, the Commissioner has considered the submissions from the complainant and the public authority along with the withheld information.
45. The Commissioner considers that in the circumstances of this case, significant weight should be attached to the public interest in maintaining a safe space - ie the concept that the government should have a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - in order for Ministers and external stakeholders to consider policy options pertinent

to the UK's exit from the EU. Given the media attention any views by the stakeholders at the meeting in question is likely to generate, there is a strong public interest in not revealing discussions on yet to be finalised policy options as it may distract Ministers and officials from focusing on the actual work of formulating and developing policies in relation to Brexit. The Commissioner shares the view expressed by the Information Tribunal in *The Department for Business, Enterprise and Regulatory Reform v the Information Commissioner and Friends*, that, "there is a strong public interest in the value of government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken."⁵

46. With regard to the likely chilling effect on free and frank discussions in relation to the formulation or development of government policies on Brexit, the Commissioner notes 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 formulation or development process is still ongoing, 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 importance and sensitivity of the matters which were under consideration along with the fact that Brexit itself is such a high profile subject, the Commissioner has also attached significant weight to the view that disclosing the withheld information is likely to have a chilling effect on deliberations further to formulating and developing the government's policies on Brexit.
47. In addition to the general public interest in openness and transparency, the Commissioner accepts that there is a public interest in revealing the nature and content of discussions that the government has with external stakeholders in relation to Brexit. She also accepts that there is a public interest in the government having such discussions with various stakeholders and not just with stakeholders from a particular sector. However, as the public authority has correctly noted, all stakeholders are able to express their views directly to government including through their MPs. Therefore, the public interest in disclosing the withheld information for that reason is not stronger in the circumstances of this case. Similarly, as the public authority has correctly pointed out, if in fact there are legitimate concerns about whether the public authority is

⁵ (EA/2007/0072) at paragraph 119

engaging with all stakeholders in relation to Brexit, that does not make the public interest in disclosing the withheld information stronger in the circumstances of this case. Whilst the public interest in disclosing the withheld information should not be underestimated, the Commissioner considers that there is a stronger 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.

48. In light of this conclusion, 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.

Procedural matters

49. The Commissioner has also considered whether the public authority is in breach of section 17(1) FOIA.
50. By virtue of section 17(1) a public authority refusing to disclose requested information is required to notify the applicant within 20 workings following the request of that fact, specify the exemption it is relying on, and state why the exemption applies.⁶
51. The public authority considers that it is not in breach of section 17(1). This is because the request was received on 11 May 2018 and the time limit for considering the public interest test was extended on 11 June 2018. The public authority explained that in that letter of 11 June 2018 it stated that (a) the information is exempt from disclosure, (b) specified the exemption it considered applied to the information and (c) stated why it thought the exemption applied. It submitted that this response was issued within the time limit of 20 working days and therefore in compliance with section 17(1).
52. The public authority noted that it had issued a further extension of the time limit to consider the public interest test on 9 July 2018. The public authority confirmed that there were no exceptional circumstances that justified the length of time (60 working days in total) to respond to the request on 6 August 2018 further to the two extensions of the time limit to consider the public interest test.

⁶ Section 17 FOIA: <http://www.legislation.gov.uk/ukpga/2000/36/section/17>

53. By virtue of section 10(3) FOIA a public authority may extend the 20 working day time limit up to a 'reasonable' time in any case where it requires more time to determine whether or not the balance of the public interest lies in maintaining the exemption.⁷
54. As section 10(3) only permits extensions for further consideration of the public interest, the additional time cannot be used to determine whether the exemptions themselves are engaged.
55. Any public authority claiming an extension further to section 10(3) will still be obliged to issue a refusal notice explaining which exemption applies and why within 20 working days. This notice must explain that it requires more time to consider the public interest test, and provide an estimate of the date on which a final decision is likely to be made.
56. Once that final decision has been reached, the public authority must either disclose the information to the requester or explain why it has found the public interest to be in favour maintaining the exemption.
57. The public authority originally relied solely on the exemption at section 35(1)(d) FOIA in its initial response to the request on 11 June 2018. It was not until 6 August 2018, 60 working days following the request received on 11 May 2018, that the public authority first advised the complainant that it considered the withheld information exempt on the basis of sections 27(1)(c-d), 35(1)(a) and 40(2) FOIA.
58. Section 10(3) does not permit a public authority to effectively issue two refusal notices further to the provision in section 17(1). Section 10(3) permits a public authority to extend the time limit for issuing a refusal notice under section 17(1) specifically in order to conduct the public interest test.
59. The Commissioner therefore finds the public authority in breach of section 17(1) FOIA.
60. The FOIA does not define what might constitute a 'reasonable' extension of time further to section 10(3). However, the Commissioner considers that a public authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional. Public authorities will need to demonstrate that the length of any time extension is justified.

⁷ Section 10 FOIA: <http://www.legislation.gov.uk/ukpga/2000/36/section/10>

61. It took the public authority 41 working days in total to consider the public interest test and no exceptional reasons were given for the delay. The Commissioner therefore finds the public authority in breach of section 10(3) FOIA.

Other Matters

62. The Commissioner invited the public authority to comment on why it took 58 working days to complete the internal review in this case. The Commissioner considers that internal reviews should generally take no longer than 20 working days and in exceptional circumstances 40 working days.
63. The public authority explained that at the time of the request, it was receiving a considerable number of requests for information and with its resources was unable to complete the internal review in this case within 20 working days. However, since that time, it has increased its resources for the handling of such reviews.
64. It is clearly regrettable that the internal review was not completed within 20 working days. Given the delay that the complainant had already experienced in receiving a substantive response to her request, the public authority should have ensured that the outcome of the internal review was not delayed for nearly an equal amount of time that it took to respond substantively to the request in the first place.
65. The Commissioner notes the fact that the public authority has since increased its resources in order to ensure that internal reviews are completed in a timely manner.

Right of appeal

66. 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@justice.gov.uk

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

67. 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.
68. 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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