

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 between Steve Baker and specific organisations and individuals.
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 the public interest favours maintaining the exemption.
3. The Commissioner does not require DExEU to take any steps to ensure compliance with the legislation.

Request and response

4. On 27 February 2019 the complainant wrote to DExEU and requested information in the following terms:

"1) From June 2017 to the day he left the Department, I would like to request all correspondence and communications between Steve Baker and representatives of the Initiative for Free Trade, previously known as the Institute for Free Trade.

2) From June 2017 to the day he left the Department, I would like to request all correspondence and communications between Steve Baker and representatives of the Bruno Leoni Institute.

3) From June 2017 to the day he left the Department, I would like to

request all correspondence and communications between Steve Baker and representatives of the Economists for Free Trade, including Professor Patrick Minford.

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

- Emails
- Reports
- Briefings
- Letters
- Memos
- Research documents
- Invitations
- Presentation slides
- Notes taken during telephone conversations
- Minutes taken during meetings
- Text/WhatsApp messages"

5. DExEU responded on 21 March 2019. It provided a refusal notice relying on FOIA sections 35(1)(a), 35(1)(d) and 40(2) to withhold the requested information.
6. Following an internal review, requested on 5 May 2019, DExEU wrote to the complainant on 4 June 2019. In its response DExEU amended the initial response to rely on section 35(1)(a), 40(2) and 21(2) whilst providing one email in the scope of the request.

Scope of the case

7. The complainant contacted the Commissioner on 2 September 2019 to complain about the way her request for information had been handled. She asked the Commissioner to consider DExEU's application of section 35(1)(a). She provided a detailed explanation of her consideration of DExEU's application of section 35(1)(a). She explained her view that DExEU had not fully considered the strong public interest in disclosure, advising the Commissioner:

"I am seeking the requested information as the individuals connected with the request have consistently argued for a very hard Brexit. It is absolutely in the public interest to receive these communications to assess to what extent those named organisations had influence over policy in regards to exiting the EU – a policy which will disrupt many lives and businesses in the UK and across Europe."

The complainant also explained her concerns regarding Government consulting and listening to groups who may go on to influence

government policy when their research has been “consistently debunked”.

8. The Commissioner considers the scope of her investigation, as requested by the complainant, to be to determine whether DExEU appropriately applied the section 35(1)(a) exemption to the withheld information.

Reasons for decision

9. Section 35(1)(a) 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,”

10. 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.
11. 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.
12. 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.
13. 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.
14. 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."

15. 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.'"

16. 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."

17. Having viewed the withheld information the Commissioner is satisfied that it relates to the formulation and development of government policy with respect to trade and the future economic partnership between the UK and the EU therefore the exemption at section 35(1)(a) is engaged.

The public interest

18. 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.

19. 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

20. DExEU advised the Commissioner that it recognises the general public interest in disclosure and the increase in public trust in Government which may result from openness. It also referenced the public interest in

transparency of deliberations with external stakeholders as policy is developed in relation to the exit of the UK from the EU.

Public interest in favour of maintaining the exemption

21. DExEU explained its view that there is a public interest in the Government being able to deliberate with stakeholders so as to fully inform the policy making process. It considers that there is a strong public interest in a robust policy making process that is well informed by external stakeholders.

22. DExEU added that:

"The government engages with economists' work in a wide variety of ways from direct correspondence to assessing published reports."

23. It further explained its view:

"Releasing the information in scope, taken out of context, would give a misleading impression that DExEU had been (or still is) open only to a particular economic viewpoint and that it is closed to competing opinions."

24. DExEU considers that if economists became less willing to engage with DExEU as a result of this impression of a limited viewpoint, the consequence would be a policy making process that was less open to varied external contributions.

25. DExEU explained that establishing a trade agreement with the EU is an important strategic objective of the UK.

"...it is critical that the Government is able to use the best tools, evidence and insight to assess the potential costs and benefits associated with different EU exit scenarios to help with policy making. It will therefore benefit the development of policy towards such an agreement if it is able to draw upon a wide range of economists for their insight and evidence."

The Commissioner's view

26. The Commissioner acknowledges the complainant's concerns regarding transparency in government. She understands how she has concluded that the balance of the public interest should favour disclosure following the complainant's explanation set out above in paragraph 7. The Commissioner notes the complainant's comments regarding the Economists for Free Trade, the Initiative for Free Trade and the Bruno Leoni Institute and the negative narratives finding prominence in the media. The Commissioner has reflected on the complainant's comment:

"The public has been kept in the dark about these individuals' and organisations' influence on how Brexit has been formulating – a policy which will have a huge impact on people's lives. It is therefore essential for the information to be released."

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 who have the opportunity to exert influence on policy making. However, in this case, the complainant has focussed on information relating to specific organisations. The Commissioner is mindful of DExEU's confirmation that it is open to competing opinions from economists holding different views.
28. The Commissioner accepts the importance of maintaining good relations with external economists, however, she does not agree with DExEU that disclosure of the withheld information would deter other economists from engaging with DExEU.
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. Notwithstanding this, the Commissioner considers the balance of the public interest to be finely balanced. Nevertheless she 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.
31. 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 allowing for considered decisions. 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 and the importance of establishing well-considered economic partnerships. 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.
32. The Commissioner's decision is, therefore, to uphold the application of section 35(1)(a) to the withheld information.

Right of appeal

33. 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

34. 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.
35. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF