

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2018

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested a copy of any guidance for the Prime Minister for the EU summit in October 2017 around proposed topics for small talk and general discussion with EU Leaders and Heads of Government of EU Member States. The public authority withheld the information held within the scope of the request relying on the exemptions at sections 27(1)(a) and 35(1)(d) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 27(1)(a).
3. No steps required.

Request and response

4. On 26 October 2017, the complainant wrote to the public authority and requested information in the following terms:

“Please provide a copy of the prime minister's "brush-by" booklet for the most recent EU summit (19 and 20 October 2017).

Please include guidance included in the booklet for the prime minister around proposed topics for small talk and general discussion with:

- a) The president of the European Commission
 - b) The president of the European Council
 - c) The presidents or prime ministers of all EU member states”
5. The public authority responded on 24 November 2017. It confirmed that it held some of the information requested and explained that it considered the information exempt on the basis of sections 27(1)(a) and 35(1)(d) FOIA.
6. The complainant requested an internal review of this decision on 1 December 2017.
7. On 7 February 2018 the public authority wrote to the complainant with details of the outcome of the review. The review upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 9 February 2018¹ to complain about the way his request for information had been handled, specifically the decision to withhold the information held within the scope of his request on the basis of sections 27(1)(a) and 35(1)(d) FOIA.
9. At the Commissioner's request during the course of the investigation, the public authority clarified to the complainant that it did not hold a
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¹ He had originally submitted his complaint on 6 February 2018 a day prior to the public completing its internal review. The complaint was however accepted for investigation following the outcome of the review.

discrete brush-by booklet as specified in his request. It explained that no such document is, or was at any point held by the public authority. Rather, it holds relevant information contained within a wider document, and it is with regard to that information that the request was considered. The complainant accepted this clarification.

Reasons for decision

Section 27(1)(a)

10. The Commissioner first considered whether the public authority was entitled to rely on this exemption.

11. Section 27 states²:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) relations between the United Kingdom and any other State,

(b) relations between the United Kingdom and any international organisation or international court,

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.”

12. Aside from the fact that a discrete brush-by booklet is not held, the withheld information is effectively a list of proposed topics for small talk and general discussion for the Prime Minister with EU leaders and Heads of Governments of EU Member States at the EU summit in October 2017. As the public authority suggests, the information on the list was sourced from wider material for the summit. The public authority has applied both exemptions it has relied upon to the withheld information in its entirety.

13. The public authority’s submissions in support of the application of section 27(1)(a) are summarised below.

² The full text of the information is available here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/27>

14. The public authority considers that disclosure of the withheld information would, or would be likely to, prejudice relations between the UK and other nations. The information however apparently innocuous forms part of the Prime Minister's private diplomatic engagement with other leaders. It speaks to the UK's diplomatic priorities with respect to EU Member States and could be misinterpreted as an indication of the key policy priorities the UK wishes to pursue with each Member State or the relative priorities the UK is placing on its engagement between Member States. Disclosure could therefore prejudice the UK's relations with Member States.
15. Furthermore, Head of State to Head of State communications and the personal relationships that result from such communications are essential for the Prime Minister to be able to assist in the UK promoting its interests abroad. To lift the veil on topics that were prompted by officials and topics that arose more naturally would damage those personal relationships.
16. With respect to the balance of the public interest, the public authority acknowledged that there is a general public interest in transparency and accountability in Government. There is also a general public interest in being able to evaluate the foreign policy priorities of the Government.
17. It however argued that there is a stronger public interest in the UK being able to pursue its national interests. It is more likely to do so if it conforms to the conventions of international behaviour, in particular by observing obligations of confidence assumed during diplomatic exchanges and avoids giving offence to other nations and retains the trust of its international partners. In particular it would not be in the public interest to disclose information where this could prejudice the UK's relations with EU Member States. The public interest in preventing prejudice to relations with other States vastly outweighs the limited public interest in disclosing the withheld information.

Commissioner's position.

Is the exemption engaged?

18. The Information Tribunal has been clear that the phrase 'would prejudice' or 'would be likely to prejudice' means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur. The Commissioner has been guided on the interpretation of these two limbs by a number of Information Tribunal decisions.
19. With regard to likely to prejudice, the Information Tribunal in John Connor Press Associates Limited v The Information Commissioner

(EA/2005/0005) confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk”.

20. With regard to the alternative limb of ‘would prejudice’, the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that “clearly this second limb of the test places a stronger evidential burden on the public authority to discharge”, and the occurrence of the prejudice claimed “is more probable than not”
21. The Commissioner accepts that the disclosure of the withheld information would pose a real and significant risk of prejudice to the UK’s relations with EU Member States. She accepts that cultivating personal relationships with Heads of Government and other leaders is essential in order for the Prime Minister to effectively pursue the UK’s interests. Revealing that topics which it appeared the Prime Minister had raised naturally were in fact prompted by officials could undermine relationships and consequently the Prime Minister’s ability to effectively pursue the UK’s interests.
22. The Commissioner is persuaded by the view that the information could be misinterpreted as an indication of the key policy priorities the UK wishes to pursue with each Member State or the relative priorities the UK is placing on its engagement between Member States. This would pose a real and significant risk of prejudice to the UK’s relations with Member States.
23. The Commissioner considers that the risk lies not only in what the list reveals but also what it does not reveal. Member States may consider the fact that the Prime Minister might not have referred to a particular matter in discussions with a particular Head of State as indicative. This would pose a real and significant risk of prejudice to the UK’s relations with Member States.
24. The Commissioner considers that the potential for prejudice to relations with Member States is heightened due to the ongoing negotiations between the UK and EU pursuant to the UK’s withdrawal from the EU.³
25. The public authority was therefore entitled to engage the exemption at section 27(1)(a).

³ Brexit negotiations.

Balance of the public interest

26. In line with the test set out in section 2(2)(b) FOIA, the Commissioner has considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
27. There is a general public interest in disclosure in the interests of transparency, accountability and good government. The Commissioner however considers that there is limited public interest in disclosing the withheld information in terms of the value it would add to any debate regarding the UK's foreign policy priorities particularly in the context of ongoing Brexit negotiations. Its value would be limited in that regard.
28. On the other hand, the Commissioner considers that there is a strong public interest in not disclosing information which poses a real and significant risk of prejudice to the UK's relations with Member States and consequently its ability to effectively pursue its national interests.
29. The Commissioner therefore finds that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. In light of this decision the Commissioner has not considered the applicability of section 35(1)(d).

Right of appeal

30. 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

31. 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.
32. 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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