

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 August 2018

Public Authority: Department for Exiting the European Union

Address: 9 Downing Street
London
SW1A 2AG

Decision (including any steps ordered)

1. The complainant has requested information on any legal opinion or advice relating to the reversal or withdrawal of the United Kingdom's ('UK') notice of the intention to withdraw from the European Union ('EU').
2. The Commissioner's decision is that DExEU has appropriately applied FOIA section 27(4)(a) (International relations) to refuse to confirm or deny holding information in the scope of the request. She considers that the public interest favours maintaining the exclusion.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 31 October 2017 the complainant wrote to DExEU and requested information in the following terms:

"Any legal 'opinion' or 'advice' report commissioned or instructed by the government from a practicing lawyer presented in the form of a report relating specifically to the reversal or withdrawal of the United Kingdoms invocation of Article 50 of the Treaty on European Union. Should there be many such reports I would be happy to receive only the last two.

Any legal 'opinion' or 'advice' report provided to the UK Government by

the European union presented in the form of a report relating specifically to the reversal or withdrawal of the United Kingdoms invocation of Article 50 of the Treaty on European Union. Should there be many such reports I would be happy to receive only the last two.

I would also like to see the most recent report presented by or to the Permanent secretary of the Department for Exiting the European Union relating specifically to the reversal or withdrawal of the United Kingdoms invocation of Article 50 of the Treaty on European Union. I am asking only for a documented report specifically covering this matter, not the wider range of information from general emails, letters or held in notes from meetings.”

5. DExEU responded on 28 November 2017 refusing to confirm or deny whether any information within scope of the request was held, citing the exclusion at section 27(4)(a) and stating that the public interest favoured maintaining the exclusion.
6. The complainant requested an internal review on 5 December 2017. DExEU wrote to the complainant on 30 April 2018 stating that it upheld its initial response.

Scope of the case

7. The complainant initially contacted the Commissioner on 13 February 2018 to complain that he had not received the internal review which he had requested and chased. On 27 February 2018 the Commissioner wrote to remind DExEU of her guidance regarding the time taken for the provision of internal reviews. Notwithstanding this, DExEU provided the internal review after a further 45 working days.
8. The Commissioner’s investigation considers whether DExEU is entitled to rely on section 27(4)(a) to neither confirm or deny holding information in the scope of the request.

Reasons for decision

9. Section 27(4) of FOIA states:

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) –

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court”.

Section 27(1) provides:

“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.”

10. In order for a prejudice based exemption, such as section 27(4), to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the if the public authority confirmed or denied holding the requested information has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the confirmation or denial and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied on by the public authority is met – ie, confirmation or denial ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner’s view this places a stronger evidential burden on the public authority to discharge. The anticipated prejudice must be more probable than not.

11. DExEU explained to the Commissioner its view that confirmation or denial would prejudice, rather than ‘would be likely to prejudice’, relations between the UK and other States, primarily, but not exclusively, the Member States of the EU. DExEU listed the remaining

elements, (b) to (d) as also being prejudiced by the confirmation or denial that the information is held.

12. DExEU's reasoning for this is that the letter of 29 March 2017 from the Prime Minister to President Tusk notified the European Council in accordance with Article 50(2) of the Treaty on European Union of the UK's intention to withdraw from the EU. Confirmation or denial that the requested information is held would undermine the UK's relationship with the Commission, and EU Member States, as the holding, or not holding, could be interpreted as an indication of the UK's commitment to leaving the EU. As a consequence this would prejudice the UK's relations with the other States, the Commission and the interests and protection of the UK's interests abroad, negatively impacting on the UK's negotiations.
13. The Commissioner is satisfied that the requested information, if held, would fall to be considered within the section 27 exemption. The information, if held, would be directly related to the UK's international relations in respect of the ongoing negotiations for the UK leaving the EU. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by DExEU clearly relates to the interests which the exemption contained at section 27(1)(a)-(d) is designed to protect. With regard to the second criterion, the Commissioner is satisfied that there is a causal link between confirming or denying whether the requested information is held and prejudice occurring to the UK's international relations. Furthermore, she is satisfied that the resultant prejudice would be real and of substance with the likelihood of prejudice being more probable than not, such that there is a more than 50% chance of the disclosure causing prejudice, even though it is not absolutely certain that it would do so. This therefore meets the third criteria.
14. The Commissioner notes that her own guidance advises that section 27 may be broadly interpreted to include a wide range of issues including policy and strategic positioning in relation to other states or international organisations.
15. In his request for internal review the complainant explained his view:

"My request did not relate to the government's negotiating position, it asked for information on the reversibility or withdrawal of Article 50. The Government is not negotiating this – they are pursuing Brexit, and that is the focus of the negotiations. Even if this was not the focus, I would remind you that under the Terms of Reference for the Article 50 TEU negotiations – terms agreed to by the UK Government, 'For both parties the default is transparency.' The EU has published documents considering the reversibility of Brexit, as has the British Government, exemplified by the House of Commons briefing paper by Vaughne Miller,

Arabella Lang, and Jack Simpson-Caird, 'Brexit: Article 50 TEU and the EU Court', House of Commons Library Briefing Paper no. 7763, 14 November 2016, under the section 'Arguments supporting revocability'. With these documents existing, making public the most current position on reversibility of A50 cannot compromise any negotiation position.

Given the EU is negotiating the Exit of the UK from the EU, it is difficult to see why they would be interested in the existence of the information I requested, however the group that does have a clear interest in the reversibility of Brexit are the British People. Many discussions are taking place over the way forward for the country – and the question of reversibility is often key."

16. The Commissioner understands the complainant's reasoning that his request does not focus on the Government's negotiations. However, DExEU's argument is based on the prejudice that would be caused to those on-going negotiations by confirming or denying that the requested information is held. The Government has neither confirmed or denied any consideration of reversing the Article 50 notification, consequently there is no previous or "current position on the reversibility of A50" irrespective of the documents referenced in paragraph 15.
17. Taking all of the above into account, the Commissioner is satisfied that to confirm or deny whether the requested information is held would prejudice the UK's position in relation to the subsections (a)-(d) identified at section 27(1) and therefore the exemption is engaged. Following from this she has gone on to consider the public interest test.

The public interest

18. In accordance with section 2(1)(b) the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the requested information.
19. DExEU advised the Commissioner that it recognises:

"..that there is a public interest in confirming of [sic] denying whether any such information may be held, this could arguably contribute to the public debate on the process of exiting the EU."
20. DExEU went on to explain that it accepts that there is a significant public interest in transparency in relation to the negotiations and the eventual outcome will have a major impact on the people of the UK. DExEU stated that it is committed to making information available after careful consideration and at the appropriate time to raise public awareness.

21. In favour of maintaining the exclusion DExEU considers that there is a very strong public interest in protecting the Government's ability to effectively negotiate the UK's exit from the EU and to protect the UK's national interests abroad. The Government has a clear policy that the notification under Article 50 will not be withdrawn and this has been consistently maintained. The public interest in ensuring that the UK achieves a mutually beneficial agreement with the EU weighs heavily in favour of maintaining the exclusion.
22. DExEU also explained its concern that confirmation or denial in this instance would lead to further speculation in the media which would be likely to detract "valuable resources to deal with the effects of this".
23. DExEU added its opinion that as the Government's position is to withdraw from the EU, whether DExEU does or does not hold the requested information will not add any significant value to the current public debate, whilst compliance with section 1(1)(a) would cause significant harm to the UK's negotiations.

The Commissioner's view

24. The complainant did not provide the Commissioner with any specific arguments in support of his complaint. Nevertheless, she has considered his comments to DExEU, as set out in paragraph 15 above.
25. The Commissioner acknowledges the significant interest demonstrated by the public in respect of 'Brexit'. The Commissioner is aware of opinions, including legal opinions and judicial review of whether such a revocation would be lawful, already in the public domain¹ in addition to those documents referenced by the complainant. However, she does not consider that the presence of this information in the public domain adds weight to the argument in not maintaining the exclusion in this case. The information provides different views and opinions which may inform the public but were not requested by the Government in an official capacity. The Commissioner is not persuaded that the existence of this material is significant in tipping the balance of the public interest in favour of confirming or denying the existence of the requested information.

¹ <http://scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-foropinions/2018csoh61.pdf?sfvrsn=0>
<http://eulawanalysis.blogspot.com/2018/01/can-article-50-notice-of-withdrawal.html>
<https://www.matrixlaw.co.uk/news/jessica-simor-qc-sends-letter-legal-opinion-3-qcsprime-minister-confirming-advice-pm-understood-received-article-50-notificationunilaterally-revocable/>

26. The Commissioner fully accepts the significant level of interest in the detail of the UK's negotiations with the EU and the on-going debate in the public domain on the decision to leave the EU. However, she also accepts that the Government is attempting to progress negotiations in the light of its consistently maintained policy that the Article 50 notification will not be withdrawn. Whether the Government holds advice on the possibility of reversing the notification would add to the transparency of the Government's actions. However, negotiations are still ongoing and the Commissioner accepts DExEU's weighty arguments regarding the avoidance of any harm to the UK's ability to achieve the best possible outcome for the UK.
27. The Commissioner therefore accepts that there is public interest in confirming or denying whether the requested information is held, to inform the public on whether the Government has obtained legal advice on revoking Article 50. She recognises that this is of genuine interest to the public.
28. However, she finds that there is a stronger public interest in not prejudicing relations between the UK and the EU Commission and Member States, which she accepts would be undermined by confirming or denying whether such information is held. In the Commissioner's view, it is strongly in the public interest that the UK maintains good international relations at all times. Her view is that it would not be in the public interest if there were to be a negative impact on the effective negotiations currently in process as a result of issuing confirmation or denial in this case. Any hindrance to the progression of these negotiations would not be in the public interest.
29. Furthermore, the Commissioner also considers that the negotiation of the best possible outcome for the UK's departure from the EU is paramount. Therefore, the relevant considerations in reaching a judgement on the balance of the public interest in this case extend beyond the actual content of any information which may or may not be held.
30. Since the Commissioner considers that the public interest in issuing a neither confirm nor deny response outweighs that in confirming or denying whether or not the requested information is held, she is satisfied that DExEU was entitled to issue such a response under section 27(4).

Other matters

31. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
32. The complainant asked for an internal review of the outcome of his request on 5 December 2017. DExEU did not provide the results of its review until 30 April 2018, almost five months later.
33. DExEU did not offer an explanation for this delay, and the Commissioner notes that the review did not result in any change to its position in respect of the request. The Commissioner considers that the period of almost five calendar months to conduct the internal review was excessive and not in accordance with the section 45 code. She considers this to be an unsatisfactory period of time.

Right of appeal

34. 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

35. 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.

36. 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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