

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 March 2018

**Public Authority:** Department for Exiting the European Union

**Address:** [foi@dexeu.gov.uk](mailto:foi@dexeu.gov.uk)

### Decision (including any steps ordered)

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1. The complainant submitted a request to the Department for Exiting the European Union (DExEU) for information about the UK's contingency plans in respect of queues at the port of Dover in the event of a 'no deal' scenario at the end of the Brexit negotiations. DExEU confirmed that it held information falling within the scope of the request but sought to withhold it on the basis of the following sections of FOIA: 27(1)(a) to (d) (international relations); 29(1)(a) and (b) (the economy); 31(1)(a to e, g) (law enforcement); and 35(1)(a) (formulation or development of government policy). The Commissioner has concluded that all of the withheld information falls within the scope of the exemption contained at section 35(1)(a) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.

### Request and response

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2. The complainant submitted the following request to DExEU on 27 March 2017:

*'Please send me information on the UK's contingency plans for the fallout created by 'no deal' at the end of negotiations with the European Union.*

*David Davis mentioned specifically tonight contingency plans for dealing with queues at Dover (and by implication other ports and airports).'*

3. DExEU responded to this request on 10 April 2017 and explained that it was refusing the request on the basis of section 12 of FOIA given the

estimated cost of complying with it. DExEU provided the complainant with advice and assistance so that he could submit a refined request which could be answered within the cost limit.

4. The complainant submitted the following revised request to DExEU on 18 April 2017:

*'Many thanks for the working link, which has assisted me in attempting to narrow my request.'*

*'As my enquiry relates to access through ports and airports - primarily Dover, if it is necessary to be specific to narrow the request - I would suggest that the 'Market Access and Budget' team as well as 'Justice, Security and Migration' (free movement and immigration) would possibly hold information relevant to my enquiry.'*

5. DExEU responded on 16 June 2017. It explained that it had interpreted the request as seeking the following information:

*'Information on the UK's contingency plans for the fallout created by 'no deal' at the end of negotiations with the EU which mentions 'queues' and 'Dover' and/or 'operation' and 'stack'.'*

*[This was then further refined to be recorded information using the aforementioned words in the 'Market Access and Budget' and 'Justice, Security and Migration' teams.]'*

6. DExEU confirmed that it held information falling within the scope of this request. However, it explained that it considered this to be exempt from disclosure on the basis of the following exemptions of FOIA:

- Sections 27(1)(a) to (d) – international relations;
- Sections 29(1)(a) and (b) – the economy;
- Sections 31(1)(a to e, g) – law enforcement; and
- Section 35(1)(a) – formulation or development of government policy.

7. The complainant contacted DExEU on 11 July 2017 in order to ask for an internal review of this response. He set out why he believed that the public interest favoured disclosing the information he had requested.

8. DExEU informed him of the outcome of the internal review on 29 August 2017. The review upheld the application of the various exemptions set out in the refusal notice.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 7 September 2017 in order to complain about DExEU's decision to withhold the information falling within the scope of his request. The complainant's submissions to support his complaint are referred to in the analysis below.

## Reasons for decision

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### Section 35 – formulation and development of government policy

10. DExEU withheld all of the information falling within the scope of the request on the basis of section 35(1)(a) of FOIA. This exemption states that:

*'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'*

11. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
12. The Commissioner takes the view 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' 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.
13. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
14. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - the final decision will be made either by the Cabinet or the relevant Minister;
  - the government intends to achieve a particular outcome or change in the real world; and

- the consequences of the decision will be wide-ranging.
15. DExEU explained that the withheld information related to the formulation and development of government policy in respect of the UK's exit from the EU. Having reviewed the withheld information the Commissioner accepts that this clearly relates to the formulation and development of government policy in respect of Brexit, and more specifically, the formulation and development of policy in respect of the UK's border arrangements at Dover post-Brexit.

### **Public interest test**

16. 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.

#### *Public interest in disclosure of the withheld information*

17. DExEU acknowledged that there is a general public interest in the disclosure of information and recognised that openness in government may increase public trust in, and engagement with, government. DExEU also recognised that policy formulation and/or development is in the public interest as policy decisions can have a significant impact on the lives of citizens and there is therefore a public interest in transparency of any deliberations.
18. The complainant explained that his request was based on a statement made on live television by the Secretary of State for Exiting the European Union. The complainant argued that if he and DExEU are so confident that the country has nothing to worry about, there is a clear public interest that such statements are backed up by thorough, workable contingency plans given the significance of the issues at stake and the profound implications. The complainant also argued that the countries with whom the UK is negotiating, in particular those with near borders who may feel the greatest impact, need to understand the UK's preparations and what they may need to do. The complainant noted that the EU has committed to publishing all negotiations.

#### *Public interest in maintaining the exemption*

19. DExEU argued that there was a strong public interest in policy making associated with the UK's exit from the EU being of the highest quality and being fully informed by a consideration of all options. DExEU argued that it is important that policy officials can exchange views on available options and openly discuss and understand potential implications,

especially on live issues, and that they are not inhibited by the prospective disclosure of these discussions/options in future. DExEU also argued that it was important that Ministers and officials have the safe space to formulate and develop live policy. DExEU quoted a decision of the Information Tribunal to support its position: '*Ministers and officials are entitled to time and space ... to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy*'.<sup>1</sup> DExEU argued that it was not in the public interest for it to spend departmental time or resources counteracting the release of this information. Furthermore, DExEU argued that it was not in the public interest to release information which may undermine the effective formulation and development of policies which compose key aspects of the UK's negotiation strategy.

#### *Balance of the public interest test*

20. With regard to the safe space arguments, in line with the comments of the Tribunal quoted by DExEU, the Commissioner accepts that significant weight should be given to the safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case the Commissioner accepts that at the time of the complainant's request the information was the subject of active policy formulation and development. Furthermore, the Commissioner recognises that disclosure of the information about the UK's contingency plans for Brexit in terms of border arrangements are likely to result in significant public and media attention. Consequently, in the circumstances of this case the Commissioner believes that significant and notable weight should be attributed to the safe space arguments.
21. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises 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 and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on

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<sup>1</sup> *Department for Education and Skills (DES) v Information Commissioner and Evening Standard* EA/2006/0006

those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions. As noted above, the Commissioner accepts that the policy making in relation to this issue remained ongoing at the time of the request. In light of the sensitive and high profile nature of the matters under discussion, the ongoing nature of the policy making, and the detailed content of the withheld information itself, the Commissioner accepts that the chilling effect arguments in this case should be given notable weight.

22. With regard to the public interest in favour of disclosure, there is, as DExEU recognises a general public interest in government departments being open and transparent in respect of how government policy is created. More specifically, in the circumstances of this case the Commissioner recognises that this aspect of policy making, indeed like many other aspects of policy making associated with Brexit, is likely to have a widespread and significant impact on the UK. Furthermore, disclosure of the withheld information would provide the public with a detailed insight into the government's policy making on this particular aspect of Brexit at the point the request was submitted. Consequently, in light of both of these factors in the Commissioner's view there is a significant public interest in the disclosure of the withheld information so that the public debate around this aspect of Brexit policy making is better informed. Furthermore, in the Commissioner's opinion there is a public interest in the disclosure of the information in order to reassure the public that the government has thorough and workable contingency plans in place, if indeed that is what the information would show. Conversely, if the withheld information showed that the government's plans were not thorough and workable there is arguably also a public interest in revealing this. The Commissioner therefore accepts that there are clear and weighty arguments for the disclosure of the withheld information.
23. However, the Commissioner has ultimately concluded that such arguments are outweighed by the 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. Whilst 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, ultimately she believes that in the circumstances of this case there is a greater public interest in ensuring that Brexit policy making is, as DExEU suggests, of the highest quality

given the significance of the policy decisions in respect of the UK's border policy at Dover once the UK is outside the EU.

24. In light of this decision the Commissioner has not considered whether the withheld information is also exempt from disclosure on the basis of the other exemptions cited by DExEU.

## Right of appeal

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25. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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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