

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2018

Public Authority: Department for Exiting the European Union
Address: 9 Downing Street
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested mapping exercise information relating to the Northern Ireland/Ireland border. The Department for Exiting the European Union ("DExEU") refused to provide this citing section 35 (formulation and development of government policy) and section 27 (international relations) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that DExEU is entitled to rely on section 35 as its basis for refusing to provide the requested information.
3. No steps are required.

Request and response

4. On 18 December 2017, the complainant requested information of the following description:

"In the section dealing with Ireland and Northern Ireland, the Joint Report of the UK and the EU Brexit negotiators published on 8 December 2017 states that "[t]he Parties have carried out a mapping exercise, which shows that North-South cooperation relies to a significant extent on a common European legal and policy framework." See paragraph 47 of this document:

<https://ec.europa.eu/commission/sites/be...>

I am writing to request disclosure of all documents which you hold relating to this mapping exercise.

Please note the following:

1. I am not clear to what extent the mapping exercise was a joint exercise or whether the EU and UK negotiators have effectively conducted their own assessments and then "compared notes". If the latter, then my request relates to the documents which the UK government prepared to inform its assessment of the dependency of North-South cooperation on the EU legal and policy framework. If it was a joint exercise which can only be disclosed with the consent of the EU negotiator, I would be grateful if you would request that consent without delay (referring to the reasons outlined at points 2 and 3 below as to why I believe that disclosure should not be refused).
2. You appear to have refused a number of other FOI requests for Brexit-related documentation on the grounds that disclosure could prejudice the outcome of the negotiations. In this case, however, the report referred to above indicates that the mapping exercise is something that negotiators on both sides are aware of and upon which they have reached a common understanding. Against that background, it is difficult to see how its disclosure could conceivably prejudice the negotiations. If you are minded to refuse disclosure on these grounds, please explain why you disagree with my assessment of the likely impact of disclosure on the negotiations.
3. You also appear to have refused a number of requests for Brexit-related documentation (including my own previous request for details of the timetable and scope of consultations on Brexit) on the grounds that the relevant information is intended for later publication. If you are minded to do so in this case, please state when it will be published and why you consider that the public interest favours withholding the information until that later date."
5. 20 working days after receiving this letter, DExEU wrote to the complainant explaining that it needed a further 20 working days to consider the balance of public interest in respect of section 35 and section 27 (which it was intending to rely upon).
6. On 14 February 2018 (20 working days later), DExEU responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - Section 27 (prejudice to international relations)
 - Section 35 (formulation/development of government policy)
7. On 15 February 2018, the complainant requested an internal review. DExEU sent the outcome of its internal review on 30 April 2018. It upheld its original position at internal review.

8. The complainant had chased DExEU for a response several times and had contacted the Commissioner on 9 April 2018 to ask her to intervene. She wrote to DExEU about its delay in conducting an internal review. DExEU wrote to the complainant on 19 April 2018 to explain that it would provide its internal review by 30 April 2018.

Scope of the case

9. The complainant contacted the Commissioner again on 30 April 2018 to complain about the way his request for information had been handled. The complainant also raised concerns about the delays in DExEU's handling of this request.
10. The Commissioner has looked at whether DExEU is entitled to rely on the exemptions it has cited as its basis for withholding the requested information. The Commissioner has also considered whether DExEU has complied with its timeliness obligations in respect of this request.

Reasons for decision

Section 35(1)(a) – formulation and development of government policy

11. Section 35(1)(a) of FOIA provides that information is exempt if it relates to the formulation and development of government policy.
12. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
13. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relate to" the formulation and development of government policy.
14. Having read the withheld information, the Commissioner is satisfied that it all falls within this exemption. The Commissioner is satisfied that this

information forms part of the formulation and development of the Government's policy on the UK's exit from the European Union (EU) with specific reference to the border between Northern Ireland and Ireland.

15. The complainant argued "I am not seeking disclosure of discussions between civil servants and/or Ministers relating to the mapping exercise which might reveal their views about what the post-Brexit arrangements might be; I am simply requesting information amounting to the mapping exercise itself (which would seem to relate only to the pre-Brexit position". In the Commissioner's view, it is irrelevant in this case that the requested information relates to information created prior to the UK's exit from the EU. She accepts that the requester is not seeking disclosure of discussions but would note that information used as the background for discussions also falls within the class of information described in section 35.
16. Section 35 is qualified by a public interest test which means a public authority can only rely on it if the public interest in doing so outweighs the public interest in disclosure. This is referred to as the 'public interest test'.

Public interest test

Public interest arguments in favour of disclosure

17. The complainant made the following points:

"The arrangements concerning the land border between Northern Ireland and the Republic of Ireland are the subject of intense public interest. There is particular concern that changes to border arrangements could undermine the progress that has been made in Northern Ireland in reducing sectarian violence since the Good Friday Agreement was signed. To minimise that risk, it is essential for there to be as much transparency as possible about the implications of Brexit for border arrangements between Northern Ireland and the Republic of Ireland. In particular, citizens in both Northern Ireland and border regions of the Republic of Ireland should be able to assess whether proposals put forward by the UK and/or the EU relating to post-Brexit border arrangements will be sufficient to avoid a "hard border". They can only do this if they are able to compare any proposals with the current arrangements, as set out in the mapping exercise, so that they can see where differences might arise and assess how significant they would be.

The EU and the UK are expected to reach final agreement on the post-Brexit border arrangements for Northern Ireland and the Republic of Ireland in October 2018, but may reach agreement in principle by the

time of the European Council meeting in June 2018. My complaint alleges that the mapping exercise should have been disclosed already, which could have allowed sufficient time for public debate ahead of these key dates. However, as DEXEU has refused disclosure, the public has been deprived of the benefit of the mapping exercise.”

18. The complainant also raised concerns about delays in the processing of this request and complaint which, in his view, meant that “the value of any disclosure of the mapping exercise will be substantially eroded if it is not possible to process this complaint within a meaningful timeframe.”
19. The complainant drew attention to previous disclosures by the EU and expressed scepticism that the formulation and development of government policy would be damaged by to any disclosure of the requested information via FOIA.¹

20. He added the following points in summary:

“Disclosure is in the public interest because it would facilitate debate on future border arrangements and help to build political consent to any such arrangements, thus reducing the risk of a return to sectarian violence in Northern Ireland” and

“Disclosure is in the public interest because it would help to counter a perception that the government has not prepared thoroughly for Brexit and does not want its preparations to be subjected to scrutiny”.

21. He expanded upon the above points in detailed submissions to the Commissioner in support of his complaint.

22. DEXEU made the following points in support of disclosure:

“DEXEU recognises that there is a strong public interest in the process of withdrawal from the EU. DEXEU also recognises that increasing understanding of how Government formulates policy is in the public interest, particularly as that policy may have a significant impact on the lives of citizens, and there is therefore a public interest in the transparency of any policy deliberations concerning the UK’s exit from the EU.

With regard to future publication the Secretary of State wrote to the chair of the Select Committee for Exiting the EU on 24 April 2018 to confirm that there is a commitment to publish the results of this exercise as soon as the work is concluded, this will involve working with

¹ https://ec.europa.eu/commission/sites/beta-political/files/slides_regulatory_issues.pdf

the European Commission and the Irish Government to coordinate publication, the letter can be found at the following link [see note].”²

23. There is also a strong public interest in transparency generally, which DExEU acknowledged.

Public interest in maintaining the exemption

24. DExEU argued that disclosure would undermine government policy on achieving the highest quality of departure from the EU. It explained that the contents of the withheld information had not, at the time of the request, been agreed with stakeholders and, as such, it would be contrary to the public interest to release information the detail of which had not been agreed. DExEU also drew attention to another decision of the Commissioner which upheld this position although it gave an invalid reference number to the Commissioner in support of this point. The Commissioner is therefore uncertain which one it is referring to.

The Commissioner's decision

25. DExEU is not relying on section 22 in this case (information intended for future publication) even though it has made a commitment to publish the requested information, the full extent of the disclosure has not been agreed. The Commissioner agrees that it cannot use section 22 in this circumstance.
26. The Commissioner agrees that there are very compelling public interest arguments in disclosing this information which applied at the time of the request and which have not diminished since then. There is a clear public interest in seeing the materials the Government is looking at on such a key issue in the Brexit negotiations. There is genuine and widespread concern about the progress of the Brexit negotiations as a whole and the Northern Ireland border issue in particular. The complainant is correct in so far as the extent and complexity of the interrelationship between Northern Ireland and Ireland is well known and there is a strong public interest in knowing that this is being fully considered. Disclosure of the requested information would satisfy that public interest in so far as the public would see the details of the mapping exercise referred to in the request. The public would be able to see what factors are being considered in the negotiations.

² <https://www.parliament.uk/documents/commons-committees/Exiting-the-European-Union/17-19/Correspondence/Letter-to-Chair-from-Secretary-of-State-24-April-2018.pdf>

27. At the time of the request, and subsequently, the question of how Brexit applies to the Northern Ireland/Ireland border remains a key matter for consideration in negotiations. Clearly, there is a public interest in understanding what is considered as the "baseline", namely, how the border operates currently, that is, pre-Brexit. If there is any mistake, omission or misunderstanding on this point, that could prejudice progress on this difficult question. There is a public interest, as the complainant correctly points out, in the public knowing that the finer details are being considered accurately. Retaining public trust is of vital importance and disclosure would serve this interest.
28. However, there is, in the Commissioner's view, a slightly stronger public interest in ensuring that the formulation and development of government policy on the operation of the border post-Brexit is unhindered by detailed disclosure at the crucial juncture indicated at the time of the request. The disclosure of the requested information would have a negative effect on discussions around this subject even though the complainant has not requested information about the discussions themselves – in fact, he has explicitly excluded them. Disclosure would, the Commissioner accepts, create a distraction to discussions.
29. The Commissioner recognises the complainant's argument that the public needs to see this information now before any decision is taken. She has considered this but has concluded that the timing of the request adds more weight to the public interest in maintaining the exemption.
30. The Commissioner welcomes DExEU's commitment to publishing its finalised version of the mapping exercise and makes no comment as to what her decision would be if the information under consideration here were requested for comparison following publication. The time factor that constitutes an important factor in the Commissioner's decision in this case would not be of the same significance and the importance of being fully transparent would carry even greater weight.
31. The Commissioner notes that the complainant had attempted to obtain at least part of this information by making a broadly similar request to the European Commission. This request was refused primarily on the grounds that it had been supplied to the European Commission in confidence by the UK government. The complainant suggested that it was protecting the supply of the information in confidence rather than the confidential nature of the information itself that had been the main driver for the refusal. The complainant remains sceptical about whether the information itself should be withheld.
32. The Commissioner does not propose to make any comment on the merits or otherwise of the European Commission's decision, nor is it within her remit to do so. She considers that reliance on section 35 here addresses a different question to the one being considered by the

European Commission. Her decision in this case relates to protecting the safe space in which UK government policy is formulated and developed around the Northern Ireland/Ireland border question which arises in relation to Brexit. The withheld information is material which is the baseline for that policy development and at the time of the request was still in draft form.

The Commissioner's conclusion.

33. In light of the above, the Commissioner has concluded that the requested information is exempt under section 35 of the FOIA and that the public interest favours maintaining this exemption. She has reached this view with particular regard to the timing of the request and by a clear albeit narrow margin.

Delay in responding to the original request

34. Section 10 of the FOIA requires public authorities to either provide requested information or provide an explanation of its refusal to provide requested information within 20 working days counting the first working day after the request is received as the first day. It can extend this time to consider the balance of public interest in respect of any qualified exemption provided it has told the requester which qualified exemption it is considering. The Commissioner recommends the extension lasts no longer than a further 20 working days.
35. In this case, DExEU complied with the letter of its obligations under FOIA in respect of its handling of the initial request. Its handling of the request for internal review is covered in Other Matters below.

Other matters

36. The Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer and the Commissioner would consider 40 working days to be the latest reasonable time a public authority could take in most extreme circumstances.
37. In this case, the request for an internal review was made on 15 February 2018 and the response was issued on 30 April 2018 following several prompting letters by the complainant and a letter from the Information Commissioner's Office dated 16 April 2018. The

Commissioner notes that in this case, the time taken to respond was 51 working days.

38. This was a disappointing delay which the Commissioner has noted. The Commissioner recognises that the topic covered in the request requires considerable thought and that this may lead to some delay. The complainant had already endured a delay in receiving their initial response. The Commissioner does not consider the delay was reasonable in this case.

Right of appeal

39. 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

40. 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.
41. 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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