

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2019

Public Authority: Government Actuary's Department
Address: Finlaison House
15-17 Furnival Street
London
EC4A 1AB

Decision (including any steps ordered)

1. The complainant has requested information on any studies or advice provided to the government regarding Brexit.
2. The Commissioner's decision is that the Government's Actuary Department ('GAD') has appropriately withheld the requested information in reliance of section 35(1)(a) FOIA – Formulation of government policy.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 4 July 2018, the complainant wrote to GAD and requested information in the following terms:

"This is a request under the Freedom of Information act for the following information:

1. A copy of any studies/analysis/advice given to the government concerning Brexit I would be grateful if you could confirm by email that you have received this request."

5. GAD responded on 31 July 2018. It stated that it held information within the scope of the request, however, the information was withheld in reliance of section 35(1)(a) FOIA.
6. Following an internal review GAD wrote to the complainant on 23 August upholding its initial response.

Scope of the case

7. The complainant contacted the Commissioner on 28 August 2018 to complain about the way his request for information had been handled. He explained that he considers 'Brexit' to be a "fully adopted policy" and wrote:

"They are not deciding whether to implement it, that decision has been made. So I believe the public interest in knowing the full impact Brexit will have far outweighs the public interest to withhold, and so any studies from the government department that explicitly assesses risk should be part of that. The deadline for Brexit is just seven months away, so it is essential the public know the full implication for what that will mean. Plus there is growing calls for a vote on the final deal, from politicians and across the public sphere, so again the public knowing all the risks is very important. Finding out the advice the government's actuarial department provided after the deadline in March next year will help no one."

8. The Commissioner considers the scope of her investigation to be the application of section 35 FOIA by GAD to refuse the request for information.

Reasons for decision

Section 35(1)

9. Section 35 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. GAD explained in its refusal notice that it had been commissioned by both HM Treasury ('HMT') and the Department of Health and Social Care ('DHSC') to provide analysis for Brexit related work streams. The primary topics concerned EU pensions and the European Health Insurance Card ('EHIC'). The content of this analysis is described more fully in a confidential annex to this decision notice.
13. Central to GAD's refusal is the timing of the request. GAD explained to the Commissioner that at the point when HMT and DHSC asked for advice no decisions had been taken on the topics concerned. At the time of the request many of the papers provided to the recipients were in draft form and GAD continued to advise HMT and DHSC on these matters after the request. GAD therefore determined that at the time of the request the policy formulation/development stage was ongoing.
14. The complainant considers that the policy formulation/development stage was completed at the triggering of Article 50 and the decision to exit the European Union ('EU'). As such he does not consider policy formulation/development was on-going at the time of his request.
15. To be exempt from disclosure in reliance of this exemption, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy. She considers that the decision to leave the EU cannot be deemed to be completed policy. The development of policy to enable the enactment of the decision to leave the EU is the 'policy development' as referenced in the section 35 exemption.
16. Having reviewed the withheld information the Commissioner accepts that this clearly relates to the formulation and development of government policy in respect of Brexit.
17. She is therefore satisfied that the exemption is engaged. Section 35 is subject to the public interest and the Commissioner will now proceed to consider this.

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.

Public interest arguments in favour of maintaining the exemption

19. GAD argues that there is a need to preserve a 'safe space' to debate live policy issues, including those which support the ongoing EU withdrawal negotiations. GAD explained that disclosure of the withheld information "may cause unhelpful debate based on an incomplete picture of the policy". It considers that there is a strong public interest in allowing ministers and/or officials to develop options freely and frankly without distraction.
20. It also explained its view that the policy making process must afford ministers and officials the opportunity to develop and consider a full range of options to enable a set of balanced decisions to be reached.
21. Finally GAD argued that public disclosure of the information would undermine the integrity of the policy and negotiating processes. It considers that it is important that its work with HMT and DHSC can be developed in confidence without being subject to any conscious or unconscious bias from external influences.

Public interest arguments in favour of disclosure

22. The complainant explained his view, as set out in paragraph 7 above, that he considers the public interest in the public being informed about the full impact and implications of Brexit outweighs the public interest in maintaining the exemption.
23. GAD acknowledged the public interest in promoting government transparency and accountability. It stated that openness will generally allow for more informed debate and increase trust in the quality of decision making.
24. GAD also provided its consideration that disclosure of the information may promote wider understanding such that the public may assess the quality of advice provided to policy officials and ministers.
25. It also recognised a broad public interest in furthering public understanding of the issues handled by public authorities.

The Commissioner's view

26. The Commissioner agrees that there is a need for a safe space to develop policy and debate live issues away from external interference and distraction. The need for such a safe space will be strongest when the issue is still live. Once a decision on the policy has been made a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request is therefore an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008):

“This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.”

27. This case relates to a request for information concerning the advice provided in respect of the formulation and development of government policy which at the time of the request was clearly on-going. GAD advised the Commissioner that decisions had not been taken on the policy matters at issue. GAD continues to work closely with HMT and DHSC officials to provide actuarial advice and analysis on key policy aspects of the UK's withdrawal from the EU.
28. The Commissioner therefore 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.
29. Consideration of section 35 often includes discussion of 'the chilling effect'. The chilling effect relates to inhibiting free and frank discussion amongst the parties involved. The Commissioner accepts that arguments about a chilling effect on ongoing policy discussions are likely to carry significant weight. 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 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 chilling effect arguments in this case should be given notable weight.
30. With regard to the public interest in favour of disclosure, there is, as GAD 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 the content of policy making here, as with many other aspects of policy making associated with Brexit, is likely to have a widespread and significant impact on the UK. Disclosure of the withheld information would provide the public with insight into the

government's policy making on the particular elements of Brexit covered by GAD's advice. Consequently, in the Commissioner's view there is a significant public interest in the disclosure of the withheld information so that the public debate around these aspects of Brexit policy making may be better informed.

31. The Commissioner therefore considers that, in general, there is a considerable weight in favour of transparency of government policy with respect to the UK leaving the EU. She agrees with the complainant that Brexit is hugely significant for UK citizens.
32. However, notwithstanding this, the Commissioner has concluded that such arguments are outweighed by the public interest in maintaining the exemption. She has reached this conclusion given the weight she believes should be attributed to the chilling effect and safe space arguments covered above. 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 all aspects 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 effective and of the highest quality given the significance of the policy decisions to be determined.
33. She has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure.

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
Principal Adviser
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SK9 5AF**