

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 March 2019

**Public Authority:** Department for Exiting the European Union  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### Decision (including any steps ordered)

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1. The complainant has requested information on a meeting between Lord Bridges of Headley and the Legatum Institute in April 2017.
2. The Commissioner's decision is that the Department for Exiting the European Union ('DExEU') has appropriately relied on section 35(1)(a) to withhold some of the requested information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

#### Request and response

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4. On 23 October 2017 the complainant wrote to DExEU and requested information in the following terms:

"According to the gov.uk website (ministerial meetings, April to June 2017), there was a meeting between Lord Bridges Of Headley and the Legatum Institute in April 2017, where there was a discussion on the Department for Exiting the European Union policy. See:

**<https://www.gov.uk/government/uploads/sy...>**

Regarding this meeting, I would like the following information:

- A full list of attendees, including the full names and titles of each attendee, as well as who each attendee represents
- The exact time and date of when the meeting took place

- The location of the meeting
  - A copy of the agenda for the meeting
  - Materials that were handed out and received during the meeting, such as presentation slides, brochures, reports, and leaflets
  - Minutes taken during the meeting, as well as any accompanying briefing notes and papers.”
5. DExEU responded on 20 November 2017. It stated that information is held within the scope of the request and provided information on the first three elements of the request, advising that the second two parts are not held and relying on sections 35(1)(a) and 40(2) to withhold the final element of the request.
6. Following an internal review, requested on 9 January 2018, DExEU wrote to the complainant on 29 June 2018. The request for review focussed on the application of the section 35(1)(a) exemption. In its response DExEU also focussed on this application. It upheld the application in respect of the Minutes etc. and in addition introduced reliance on the exemption at section 27(1)(a)-(d).

## Scope of the case

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7. The complainant contacted the Commissioner on 28 September 2018 to complain about the way her request for information had been handled. She provided the Commissioner with a detailed explanation of her consideration of the background to her request and DExEU’s application of the section 35 and 27 exemptions. The complainant explained her concerned interest in the role of a named individual and his access to government. She also explained her view that Legatum, which is a registered charity, has emerged as one of the most influential think tanks in Westminster and referenced an investigation by the Charity Commission which found that Legatum’s work on Brexit ‘crossed a clear line’ and ‘failed to meet the required standards of balance and neutrality’. The complainant stated that she did not dispute [the application of section 40(2), however, she challenges the application of both section 35 and 27 in respect of the public interest.
8. During the course of her investigation the Commissioner discovered that some of the information withheld by DExEU, namely “Legatum Institute Special Trade Commission: Cost of EEA membership for UK”<sup>1</sup> and “Legatum Institute Special Trade Commission Mission Statement”, were

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<sup>1</sup> <https://reaction.life/cost-eea-membership-not-worth-uk/>

in fact already in the public domain. The first document is available using a link from the Legatum Institute's website, the second appears on the website itself.

9. The Commissioner identified this publicly available information to DExEU which it subsequently provided to the complainant on 30 January 2019.
10. The Commissioner therefore considers the scope of her investigation to be to determine whether DExEU appropriately applied the section 35 and 27 exemptions to the remaining withheld information.

## **Reasons for decision**

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11. 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,”

12. 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.
13. 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.
14. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information itself does not have to be created as part of the activity. Any significant link between the information and the activity is sufficient.
15. DExEU explained that the information in the scope of the request constitutes part of its wide range of on-going stakeholder engagement and analysis. Specifically the information constitutes economic and trade policy matters and negotiations with the European Union ('EU') in general. The formulation and development process remained at the time of the request, and continues to remain live.

16. DExEU confirmed its view that:

“it is necessary to withhold the information requested to protect this particular process, as well as the development of policy in general.”

17. DExEU added that it considers that the policy formulation for the UK’s withdrawal from the EU is unique, and the issues relating to the development of trade policies following the exit of the EU is a key part of the negotiations in our withdrawal agreement. DExEU explained:

“..the further development of the UK’s independent trade policy beyond its economic partnership with the EU, which will be formulated throughout the transition phase up to 2020 (and possibly beyond). This topic remains live and it is necessary to provide a ‘safe space’ for this policy development to happen. It is accepted that the Government needs a safe space to develop policy and to reach decisions protected from external interference and distraction,”

18. DExEU further advised the Commissioner that to release the requested information, or information similar to it, would weaken and undermine the UK’s negotiating positions and policy formulation:

“It is the Department’s firm position that the information in scope relates closely to the on-going policy process, and thus engages section 35(1)(a).”

19. Having viewed the withheld information the Commissioner is satisfied that it relates to the formulation and development of government policy and the exemption at section 35(1)(a) is therefore engaged.

### **The public interest**

20. Section 35(1)(a) 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.

21. The complainant explained to the Commissioner that she had drawn DEXEU’s attention to the media attention attracted by the Legatum Institute. She was surprised by its dismissal that such media attention would not sway the balance of public interest in favour of disclosure. The complainant considers there to be:

“.. a huge public interest in knowing how much influence (named individual) and his organisations have had on Brexit.”

22. As part of its public interest considerations the Commissioner asked DExEU to comment directly on the opportunity for the named individual and Legatum to influence public policy, which has not been available to others.

23. DExEU explained:

"Transparency data published on gov.uk detailing Ministerial and Senior Staff meetings, including on policy matters, sets out various meeting and engagements including those referenced in regards to [the complainant's] FOI request. Of the several hundreds of entries published (in excess of 800 entries for the period up to [the complainant's] request), four meetings with Ministers and three with the department's Permanent Secretary are listed as taking place with Legatum between July 2016 and the end of October 2017."

24. DExEU reiterated its view that it must be able to consult with a wide range of stakeholders in a free and frank manner to fully inform any policy formulation, and to consider research and analysis from a variety of sources. It advised the Commissioner:

"DExEU would also highlight that the policy formulation process is complex and engagements with Ministers and Senior Officials should not be seen as the only way to engage with, and inform government as it prepares for the UK departure from the EU."

*Public interest in disclosure*

25. DExEU recognises that there is a strong public interest in the process of withdrawal from the EU. It also recognises that increasing the understanding of how Government formulates policy is in the public interest, particularly when that policy may have a significant impact on the lives of citizens.

26. DExEU acknowledged that there is a strong public interest in the transparency of any policy deliberations concerning the UK's exit from the EU and, specifically the public interest in further understanding the effect the UK's exit from the EU could have on trading policies.

*Public interest in favour of maintaining the exemption*

27. DExEU considers that there is "a very weighty public interest" in ensuring that the policy formulation and development associated with the UK exit from the EU is conducted in a safe space.

28. It further explained its view:

".. it is vital that the process is able to proceed in a safe space, and that the necessary information relating to stakeholder engagement and

future trading is protected to inform discussions, raise potential options and risks, and fully inform the best possible policy decisions in the interests of the UK and its citizens.”

29. DExEU considers that “premature” disclosure of information would harm the quality of the policy making process. It also considers that the factors which will have an impact on the UK’s future trading policies are sensitive and therefore it is not in the public interest to release information which may jeopardise the negotiations, or cause unnecessary speculation about what the eventual outcome may be. The potential negative outcomes of jeopardising negotiations and policy development for future trade would not be in the public interest.

### **The Commissioner’s view**

30. The Commissioner accepts the complainant’s reasoning and concerns regarding the role of the Legatum Institute. She understands how she has concluded that the balance of the public interest should favour disclosure. However, having the benefit of seeing the withheld information, the Commissioner is satisfied that DExEU is conducting its policy making work objectively and appropriately.
31. The Commissioner considers that there is a significant public interest in the disclosure of the withheld information so that the public debate around Brexit policy making is better informed. However, in this case, the complainant has focussed on information relating to the content of discussions between DExEU and external organisations, specifically the Legatum Institute. She has shared her concerns regarding the access to government, and thereby the influence exerted, by the Legatum Institute in comparison to other interest groups.
32. DExEU has advised the Commissioner that Legatum’s ‘access’ comprises 7 meetings out of 800 cited in published transparency data. The Commissioner is unable to comment on whether this data accurately reflects all formal and informal meetings/access taking place, nor is it her role to do so.
33. The Commissioner has ultimately concluded that, notwithstanding the huge importance of trading policies for the well-being of UK citizens post Brexit, the arguments in favour of disclosure of the information in this case are outweighed by the public interest in maintaining the exemption.
34. She has reached this conclusion having seen the content of the withheld information and given the weight she believes should be attributed to the safe space arguments. 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. However, ultimately she believes that, in the particular circumstances of

this case, there is a greater public interest in ensuring that Brexit policy making has the best opportunity to be of the highest quality, given the significance of the policy decisions to be taken.

35. In light of this decision the Commissioner has not considered whether the withheld information is also exempt from disclosure on the basis of the section 27 exemptions cited by DExEU as the exemption has been applied to the same information.

## **Other matters**

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36. 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.
37. The complainant asked for an internal review of the outcome of her request on 9 January 2018. DExEU did not provide the results of its review until 29 June 2018, almost six calendar months later.
38. DExEU did not offer an explanation for this delay, save an apology and acknowledgement of the 40 working day expectation. The Commissioner considers that the period of six 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.
39. The Commissioner is developing a specific department – Insight and Compliance – to engage with public authorities to improve their compliance. If further such cases are brought to the attention of the Commissioner she will consider taking any action open to her in order to ensure that DExEU complies with not only its statutory responsibilities under the legislation but also to ensure that internal reviews are undertaken in line with the timeframes set out in her guidance.

## Right of appeal

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40. 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)

41. 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.
42. 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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