

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2019

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 meetings from 10 May 2018 between then Brexit minister Steve Baker and Shanker Singham.
2. The Commissioner's decision is that in the circumstances of the case the Department for Exiting the European Union ("DExEU") has appropriately relied on the exemptions at sections 36 FOIA – Prejudice to effective conduct of public affairs. The Commissioner finds that DExEU failed to complete its deliberations on the balance of the public interest within a reasonable time and therefore breached section 17(3) of the FOIA.
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 July 2018, the complainant wrote to DExEU and requested information in the following terms:

"Does the department hold any documents from 10 May 2018 until now which relate to meetings between Steve Baker, the former Brexit minister, and the trade policy specialist Shanker Singham?"

If so, please provide those documents in electronic form.

I provide the following context in the hope that it helps to satisfy my request:

BuzzFeed News published an article on 22 May 2018 which reported that

Baker, after becoming a Brexit minister in 2017, had regular meetings with Shanker Singham, then of the Legatum Institute, which were not disclosed by the Brexit minister in the usual way.

That article can be found here:

https://www.buzzfeed.com/alexspence/steve-baker-brexit-meetings-shankersingham?utm_term=.rewnLjME6#.hwjqB7a3M.

BuzzFeed News approached the department for comment about Baker and Singham's meetings on 10 May.

The purpose of the request is to establish, among other things, whether there was internal discussion about the meetings revealed in the article, whether Baker gave an explanation to the department for the meetings, whether anyone else in the department raised concerns, or whether action was taken. And to establish whether the matter was discussed with other departments. I am particularly interested in comments by Mark Littlewood, the director general of the Institute of Economic Affairs (Singham's new employer) to an undercover reporter for the website Unearthed that were published online on 31 July. Littlewood told Unearthed that Baker had been "referred to the f***ing standards commission" because of BuzzFeed News's article. I would expect that any documents relating to a referral of Baker to a standards or ethics authority be included in your response."

5. On 29 August 2018 DExEU wrote to the complainant advising that it needed further time to consider the public interest. DExEU responded on 13 December 2018. It refused the request in reliance of section 36(2)(b)(i), (ii) & (c) and section 40(2).
6. Following an internal review DExEU wrote to the complainant on 30 January 2019 upholding the initial response.

Scope of the case

7. The complainant contacted the Commissioner on 30 April 2019 to complain about the way his request for information had been handled. He explained:

"It seems implausible that these meetings which took place at the Legatum Institute, where Singham headed the Special Trade Commission, were purely social and did not involve discussions of government-related matters. There is clearly a high public interest in knowing more about this, and in particular, knowing what the response was from DExEU or other departments. Was any inquiry into these meetings effective, and was any action taken?"

8. The Commissioner considers the scope of her investigation is to determine whether DExEU appropriately applied the exemptions at section 36 and 40 of the FOIA to the information held.

Reasons for decision

Section 36 - prejudice to the effective conduct of public affairs

9. Section 36(2) of the FOIA states:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

b) would, or would be likely to, inhibit-

i. the free and frank provision of advice, or

ii. the free and frank exchange of views for the purposes of deliberation, or

c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

10. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person’s opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure.
11. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
12. With regard to sections 36(2)(b)(i) and (ii), it is understood that it is the process which may be inhibited rather than what is necessarily contained within the requested information itself. The question is whether disclosure could inhibit the process of providing advice or exchanging views in the future. Section 36(2)(c), refers to the prejudice that may *otherwise* occur through the release of the requested information. If section 36(2)(c) is used in conjunction with any other

exemption in section 36(2), the prejudice envisaged must be different to that covered by the other exemption. In previous cases the Information Tribunal has found that the exemption may potentially apply to circumstances where disclosure could disrupt a public authority's ability to offer an effective public service.

13. In this case, Lord Callanan, Parliamentary Under Secretary of State for Exiting the European Union, was identified as the qualified person. On 31 October 2018 he was provided with background information, the view of DExEU and the information held in the scope of the request. On 22 November 2018 the Minister subscribed to the 'Record of the Qualified Person's Opinion' provided to him without further commentary. The Commissioner has seen no evidence of any distinction made between the separate limbs of the exemption with respect to the content of the withheld information.
14. The Commissioner is satisfied that Lord Callanan as Parliamentary Under Secretary of State for Exiting the European Union meets the definition of a qualified person set out by section 36(5) of FOIA. She has therefore next had to consider whether the qualified person's opinion with regard to sections 36(2)(b)(i), (ii) and (c) is reasonable.
15. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion. This will nevertheless require that the opinion not only corresponds with the factors described in the exemption but also corresponds with the withheld information itself.
16. DExEU explained to the Commissioner that the qualified person considered the requested information to fall within the scope of the three limbs of section 36 cited above. As such he considered that in respect of section 36(2)(b)(i) & (ii) disclosure of the information would be likely to inhibit the free and frank provision of advice and exchange of views in the process of deliberation on matters arising in such circumstances as those addressed in the request.
17. DExEU provided the Commissioner with a detailed explanation for the application of section 36(2)(c) which covers 'other' prejudice not covered by the other two limbs of section 36(2). This reasoning is provided in a Confidential Annex to this Decision Notice.
18. The complainant expressed his concerns that DExEU and the qualified person had provided a "blanket response" to his request with "no real scrutiny of the particular circumstances of the case".

19. The Commissioner understands the complainant's frustration regarding the lack of detail provided by DExEU in its application of section 36(2) in its response and internal review. The Commissioner has the advantage of having examined the withheld information and is therefore able to understand DExEU's responses to her in this regard.
20. The Commissioner is therefore, on balance, satisfied that the arguments presented to her are ones which relate to the activities described by the exemptions cited. Furthermore, the Commissioner considers the opinion that disclosure of the requested information would be likely to result in the prejudice being claimed, is one that a reasonable person could hold. She has therefore found that sections 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged.
21. Each of the limbs of section 36(2) is a qualified exemption, which means that they are subject to the public interest test. The Commissioner's analysis of the application of this test follows.

The public interest

Public interest arguments in disclosing the information

22. DExEU explained to the Commissioner:

"DExEU recognises that there is a general public interest in the Government being open and transparent. In this case, the requester specifically asked for information regarding departmental discussions following a news article reporting on meetings between Steve Baker (a DExEU Minister at the time and Shanker Singham (Director of the Legatum Institute at the time) that had not been included within DExEU transparency data. DExEU recognises there is a public interest in understanding Ministerial and departmental accountability and that proper processes are followed."

23. The complainant explained to the Commissioner that there is "hardly any consideration of the public interest" in the responses he received from DExEU. He continued to explain:

"The circumstances of these meetings and the failure to declare them raises a suspicion of wrongdoing and a potential breach of the Ministerial Code of Conduct. The public are entitled to know that such matters are investigated and dealt with in a proper manner. The letter dated December 13, 2018 [the initial response] states that 'any meetings between Mr Singham and any of our Ministers or civil servant in an official capacity are recorded and declared in the usual way' but no information has been disclosed to show that there has been any proper investigation of whether these meetings were purely social or not. Was the matter referred to the Committee on Standards, and if not, why not?"

Public interest in favour of maintaining the exemption

24. DExEU explained to the Commissioner that it considers that the public interest is best served “in not prejudicing the procedures in place to maintain accountability for matters such as this.”
25. DExEU relies on the ‘safe space’ arguments often referenced in relying on section 36. It considers that protecting a space for deliberation:
“...ensures procedures are followed, or potentially allows the taking or commissioning of remedial action if they are not. It would not be in the public interest if these formal processes were harmed.”
26. DExEU specified the following prejudice:
 - “The ability of Private Office staff to discuss their views on any complaint or accusation received directly, or via other departments such as the Cabinet Office.
 - The ability of senior staff and Ministers to discuss and provide explanations and views in response to complaints or accusations.
 - The ability of senior officials, such as the Cabinet Secretary, to freely and frankly consider complaints and explanations in response to such complaints and to potentially provide views to such matters.”
27. DExEU added that harm would be caused where those involved would have had no expectation that their involvement would be disclosed, which would result in diminishing trust in established procedures.

Balance of the public interest

28. In considering complaints regarding the application of the exemptions at sections 36(2)(b) & (c), where the Commissioner finds that the qualified person’s opinion is reasonable, she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur. However, she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test favours disclosure.
29. The Commissioner has carefully considered the information which DExEU is seeking to withhold on the basis of sections 36(2)(b)(i) & (ii) and 36(2)(c).
30. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency

through the disclosure of information held by public authorities. This assists the public in understanding how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities.

31. The Commissioner accepts that there is a strong public interest in ensuring that the public has trust in the systems in place to consider any matters or concerns raised with a government department. She notes the complainant's explanation of the purpose of his request as set out in paragraph 4 above.
32. With regard to attributing weight to the public interest in maintaining the exemptions, the Commissioner accepts that disclosure of the withheld information poses some risk of a chilling effect on any future discussions in similar circumstances.
33. As referenced above the Commissioner is unable to provide a detailed explanation with reference to the content of the withheld information. She understands the complainant's frustration in seeking confirmation of an investigation into the allegations concerning the meetings detailed in his request. She notes the complainant's reference to her guidance advising that civil servants and ministers should be robust and not easily deterred from expressing their views. Notwithstanding this, she is satisfied that DExEU has appropriately considered the balance of the public interest in this case. She accepts that it would not be in the public interest to undermine the ability or to deter individuals from contributing their views concerning any allegations or investigations which may be required.
34. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemptions outweighs the public interest in disclosure.
35. In making her decision, the Commissioner considers that all of the withheld information engages section 36(2). She has therefore not gone on to consider the application of section 40.

Section 17 – Refusal of request

36. Under section 10(3) of the FOIA, where necessary, a public authority may extend the time for compliance "*until such time as is reasonable in*

the circumstances” in order to properly consider the balance of the public interest.

37. Section 17(3) of the FOIA states that where a public authority is relying on a qualified exemption, it can have a “reasonable” extension of time to consider the public interest in maintaining the exemption or disclosing the information.
38. Without explicitly confirming whether it held information within the scope of the request, DExEU wrote to the complainant on 29 August 2018 to advise that it required additional time in order to consider the balance of the public interest in relation to the exemption at section 36. It advised that it expected to be able to provide a response within a further 20 working days from 29 August 2018.
39. Although the FOIA does not define what constitutes a reasonable time, the Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days. This means that the total time spent dealing with the request should not exceed 40 working days, unless there are exceptional circumstances. A public authority would need to fully justify any extension beyond 40 working days.
40. In this case, the total time taken by DExEU exceeded 90 working days. The Commissioner does not consider there to be any exceptional circumstances to warrant this delay and finds that, by failing to complete its deliberations on the public interest within a reasonable time frame, DExEU did not comply with section 17(3) of the FOIA.

Right of appeal

41. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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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