



Department
for Exiting the
European Union

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Jonathan Rush
Via: request-453168-20c90b0@whatdotheyknow.com

Our ref: DEX000949

30 April 2018

Dear Jonathan Rush

FREEDOM OF INFORMATION REQUEST REF: DEX000949 - INTERNAL REVIEW

Thank you for your email of 15 February 2018 requesting an internal review of your request made under the Freedom of Information Act 2000 ('the Act'). I have now completed the review. I sincerely apologise for the time taken to complete the review and provide you with a substantive response. The Department aims to complete all requests for an internal review within a maximum of 40 working days, however, this is not always possible. I note that the Department did not acknowledge receipt of your request for an internal review, I apologise for this oversight and the inconvenience this has caused.

The Request

On 18 December 2017 you asked for the following information:

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/belgium>

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

The Response

Our response of 14 February 2018 confirmed that information relevant to your request is held

by the Department for Exiting the European Union (DEXEU), and explained that the information was withheld under section 27(1)(a) and (b), and section 35(1)(a) of the Act. Sections 27 and 35 are qualified exemptions; requiring us to consider the balance of public interest. An explanation of the public interest was provided to you.

Consideration of Exemptions

I have considered the response again, and I have also considered the points you raised in your request for an internal review. DEXEU recognises that there is a public interest in disclosing information relating to such exercises, this would enable a more informed public debate on the process of exiting the European Union (EU), however, against this we must consider the prejudice that would be caused by disclosure.

Section 27

Section 27 International relations provides that:

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
 - (a) relations between the United Kingdom and any other State,
 - (b) relations between the United Kingdom and any international organisation or international court.

The response explained that we considered disclosure of the requested information would be likely to prejudice the working relationships with the EU as we seek to build a strong and close relationship with the EU, and that there is a very strong public interest in maintaining an effective working relationship during the exit process.

In your request for a review you stated that you consider that as the Parties involved are aware of the contents of the mapping exercise it is difficult to see how disclosure would prejudice the United Kingdom (UK) position. There is a process of engagement in such discussions and exercises, and that process involves sharing necessary information to inform the debate, we consider that disclosure of the information in scope of your request would harm our relations with the EU by undermining this process. Even if it were the case that both sides in a negotiation are aware of each others position at any given stage in the negotiation; it does not necessarily follow that information can be safely disclosed to the world at large without any prejudice occurring. Both sides must feel able to put forward any views or considerations free from any restriction that may be imposed if the information was to be prematurely disclosed.

I confirm that the information engages the exemption at section 27, disclosure would be likely to prejudice negotiations, and on balance the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

Section 35

Section 35 Formulation of government policy provides that:

- (1) Information held by a government department is exempt information if it relates to—

(a) the formulation or development of government policy,

The response explained that there is a strong public interest in ensuring policy formulation and decision-making is well-informed, this is particularly important while the UK negotiates the withdrawal from the EU. We consider that disclosure would undermine the effective formulation of policy by undermining the process involved in such discussions.

I note that you suggest the mapping exercise would seem to be a description of current arrangements rather than information which outlines different policy options, and therefore may not be properly characterised as falling within scope of the exemption.

Section 35(1)(a) provides an exemption for information that relates to the formulation or development of government policy, it is a classed based exemption, and the exemption is engaged as the information in question falls within the class described in this section. The information in scope relates to the policy process of withdrawal from the EU and engages section 35(1)(a) as it is held for the purposes of the formulation or development of government policy. It may assist to consider paragraphs 13 and 14 from the Information Commissioner's guidance on section 35, copied below for ease of reference:

The term 'relates to' can be interpreted broadly: see DfES v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007). This means the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough. Information may 'relate to' the activity due to its original purpose when created, or its later use, or its subject matter. Information created before the activity started may still be covered if it was used in or affected the activity at a later date. And information created after the activity was complete may still be covered if it refers back to the activity.

The Information Commissioner's guidance also explains that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosure of information which would undermine this process. The scope of section 35(1)(a) is broad and captures a wide range of information. The Commissioner also recognises that public interest arguments to withhold will be strongest when there is a live policy process to consider. The information in scope falls into this category.

When considering the balance of the public interest in relation to section 35(1)(a) it is important to consider the public interest in preserving a space for confidential sharing of information in the policy making process. This is due to the possibility of harm to the quality of that process if those involved were not confident that their contributions would remain confidential.

We consider that there is a very strong public interest in being able to carry out this process effectively and negotiations will be undermined if the safe space away from the possibility of disclosure is not maintained.

I confirm that the information falls within scope of section 35(1)(a) and that on balance the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

Conclusion

In conclusion, I find the original response was correct; the exemptions at section 27(1)(a)(b) and 35(1)(a) are engaged and the public interest in maintaining the exemptions strongly outweighs the public interest in disclosure in this instance.

This response ends the complaints process provided by the Department. If you are not content with the outcome of your internal review, you may apply directly to the Information Commissioner. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Yours sincerely

J Millar
Information Rights Appeals
Freedom of Information Team