



Department
for Exiting the
European Union

Freedom of Information Team
Correspondence Unit
9 Downing Street
SW1A 2AG

foi@dexeu.gov.uk
www.gov.uk

James Hirsch
Via: request-480665-ec61f099@whatdotheyknow.com

Our ref: DEX001201

23 November 2018

Dear Mr Hirsch

FREEDOM OF INFORMATION REQUEST REF: DEX001201 - INTERNAL REVIEW

Thank you for your email of 23 May 2018 in which you requested an Internal Review. Your request for an Internal Review was prompted by the Department for Exiting the European Union's (DExEU) response of 18 May 2018 to your request for information under the Freedom of Information Act 2000 ('the Act').

This letter constitutes the outcome of the Internal Review. My findings are below.

Please accept our apologies for the lengthy delay in providing this response to you.

The Request

On 26 April 2018, you said:

A brief review of the transparency data notes that the Department for Exiting the EU made a series of large payments to McKinsey, presumably for management consultancy services. I identify five payments during 2017: £1.9m (24 April), £0.5m (5 Sep), £0.75m (5 Sep), £0.3m (13 Sep) £0.4m (1 Dec)

For each of the payments, I wish to understand - as precisely as possible - what benefit, the taxpayer received. I am aware of the limits imposed by the FOI act around commercial confidentiality (s43.2) and policy advice (s36), as well as others, and, within these constraints, want to understand as much as I can.

I therefore ask to see, for each of these five payments, a list of the deliverables produced in exchange for each payment, and a brief note as to what type of information/advice the deliverable contains. I imagine that such a list should exist in the annex to a contract with McKinsey.

DExEU's response

DExEU responded to your request for information on 18 May 2018. It referred to the published contract on Contract Finder and informed you as to what the contract concerned.

It advised you that the release of information on deliverables and the information and advice relating to each deliverable was information which is exempt under section 43(2) of the Act. It was explained that this section exempts from disclosure information which would, or would be likely to prejudice the commercial interest of any person, including the public authority holding it.

DExEU explained the public interest factors it had considered under the exemption and informed you that it had concluded that the balance of the public interest favoured exempting the information from disclosure.

Request for an Internal Review

On 23 May 2018, you said:

I understand the logic you have set out for withholding this information - but I am going to have to request a review of your public interest test under a s43 exception.

Briefly, my reasons for requesting the review:

1. You identify a potential increase in 'public trust and engagement with the government' as a reason for releasing the information. However, you do not appear to have considered the other, more pressing reasons to release the data: namely, to allow informed scrutiny of a very significant piece of government spending. Whilst there is a general benefit from informed public scrutiny of such contracts, there is a particular need in this case, where the nature of the contract covers such skills as the government might already reasonably be supposed to possess inhouse ('advanced technical project management capabilities' and '[generating] options for consideration' on various design questions). I would also suggest that there is a heightened public interest in releasing the information because of the well-publicised difficulties in creating the DExEU - releasing this information would increase public confidence that the tendering process for this big piece of spending was carried out with a sufficient degree of rigour.

2. It is not obvious to me why releasing this information should harm McKinsey's commercial

interests. (It is relevant to note here that I do not ask for details on the methodology or approach that McKinsey adopted, which would have a much stronger claim to being commercially sensitive information.) I am not sure why releasing information about the deliverables that McKinsey committed to would give McKinsey's competitors a 'competitive advantage'.

3. If you do not accept my argument 2 - that releasing the information would give a competitive advantage to McKinsey's competitors - then I would advance a further argument. Namely - any loss to McKinsey by releasing this information would be more than made up by the positive public benefit that would come from a more transparent market in consultancy services. If you release this information, you will, in effect, tell the marketplace that the government is willing to pay £xm, in exchange for these Y specific services. Releasing this would create a known price point in the market - and would encourage consultancies in the future to offer more services/less money for the same service, in order to win the contract. In short, the public could have a substantial commercial benefit from releasing the information.

4. Finally, I would suggest that the hypothetical you pose - that releasing this information would harm the ability of the Government to secure such services in the future - is far fetched at best. There are many obvious reasons why this is so - but most importantly is that the government is an extremely large contractor of consultancy services and has the power to set market norms: if it becomes a market normal for UK public sector consultancy that you must declare all of your deliverables, then it is much more likely than not that most consultancy firms would comply with this.

Outcome of the review

I have reached the following conclusions:

- that some of the information within scope of the request which was exempt from disclosure under section 43(2) of the Act should be disclosed to you;
- that in respect of the remaining information within scope of the request, section 43(2) of the Act was correctly applied in the response of 18 May 2018, but only insofar as there is a likelihood of prejudice of DExEU's commercial interests. I did not find that McKinsey's commercial interests would be likely to be prejudiced by a disclosure of this information;
- that in any event, the remaining information within scope of the request is exempt from disclosure under sections 24(1) (national security) and 31(1)(a) (law enforcement) of the Act; and
- that DExEU could have more clearly explained what prejudice to commercial interests there would have been under section 43(2) of the Act as a result of a disclosure of the information you requested.

Section 43 of the Act

Having reviewed the information within the scope of your request, I consider that some of it is not exempt from disclosure under section 43(2) of the Act. I did not conclude that the disclosure of this information would be likely to prejudice the commercial interests of any person, including DExEU and McKinsey. Therefore, I found that this information should be disclosed to you and it is attached to the email accompanying this letter.

However, I consider that DExEU was correct in its assessment that some of the information should be exempt from disclosure under section 43(2) of the Act. I consider that it would be likely that the disclosure of this information would prejudice the commercial interests of DExEU.

I note your comments in your email of 23 May 2018 that the disclosure of this information would encourage consultancies to offer more at a lower price in a bid to win the contract and that the public would have a substantial commercial benefit as a result. However, I consider that a greater likelihood is that the disclosure of this information would reveal the price which DExEU was willing to pay for services of this kind and that the prices offered by potential providers of the service would converge around that point. The consequence of this would be to inhibit the ability of DExEU to secure good value in future contracts of this kind, prejudicing its commercial interests.

To this I add additional factors which I consider militate against the public interest being in favour of disclosure. First, the importance of DExEU responsibly safeguarding the use of public resources in procuring services which enable it to perform its functions and secondly, the benefits which accrue to the public with the promotion of competition in the procurement of public services.

I did not find that the commercial interests of McKinsey would be likely to be prejudiced by the disclosure of any information within scope.

I consider that, in its response to you of 18 May 2018, DExEU could have more clearly explained what prejudice to commercial interests there would have been under section 43(2) of the Act as a result of the disclosure of the information you requested. Notwithstanding that I have found that some of the information requested which was exempt under that section should now be disclosed to you, I consider that DExEU should have stated more clearly its finding that the disclosure of the information you requested would be likely to prejudice the commercial interests of any person. It should also have explained more clearly how the public interest factors supported that conclusion.

I have also concluded that information within the scope of your request (which is not otherwise to be disclosed to you as a result of this Review) should be exempt from disclosure under sections 24 (national security) and 31 (law enforcement) of the Act. I explain further how these exemptions apply below.

Section 24 of the Act

Some of the information within the scope of your request is exempt from disclosure under

section 24(1) of the Act, as the exemption of the information is required for the purpose of safeguarding national security.

Section 24(1) of the Act is a qualified exemption and I considered whether the balance of the public interest favoured releasing or withholding the information you requested.

Recognising that openness in government may increase public trust in and engagement with the government, I considered that there was a general public interest in the disclosure of the information you requested. However, there is a definite and very strong public interest in safeguarding the security of the UK, particularly the security of information in the context of the UK's exit from the European Union. This interest can only be overridden in exceptional circumstances, and having taken into account all the circumstances of the case, I determined that the balance of the public interest is in favour of withholding the information from disclosure.

Section 31 of the Act

Some of the information within the scope of the request is exempt from disclosure under section 31(1)(a) of the Act, as the disclosure of the information would be likely to prejudice to prevention or detection of crime. The information requested contains details which, if released, are likely to assist criminals to plan and execute criminal acts and avoid detection. The disclosure of such information would therefore make the prevention of certain crimes more difficult and reduce the effectiveness of the police service in detecting perpetrators.

Section 31(1)(a) of the Act is a qualified exemption and I considered whether the balance of the public interest favours releasing or withholding the information. As stated above, there is a general public interest in the disclosure of information. However, I also gave consideration to the public interest in assuring the public that effective arrangements are in place for preventing and detecting crime. By disclosing the information requested, we may undermine the security of DExEU's systems and thereby prejudice the prevention or detection of crime. I concluded that it is contrary to the public interest to disclose information which would facilitate the commission of crime or hinder its detection and that, taking into account all the circumstances of the case, the balance of the public interest is in favour of withholding the information.

The Information Commissioner

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 for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire

SK9 5AF

Yours sincerely

J. Millar
Head of FOI
DExEU