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12 October 2017

By courier

The Rt. Hon. David Davis MP
Secretary of State for Exiting the European Union
Department for Exiting the European Union
9 Downing Street
London, SW1A 2AG

The Rt. Hon Philip Hammond MP
Chancellor of the Exchequer
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Dear Secretary of State and Chancellor,

Request for disclosure in exercise of common law powers

We are solicitors for Molly Scott Cato MEP and The Good Law Project Limited, and write on their behalf to request that you disclose the documents described below. Our clients make this request to both of you, in case some of the documents they seek are held or controlled by only one of you. You may wish to provide us with a single response on behalf of both of you.

Please note that this request is not made under the Freedom of Information Act 2000 (FOIA). Instead, our clients ask that you exercise your common law power to disclose these documents.

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The documents our clients seek concern the likely effects on the UK's economy of the country's exit from the European Union. Self-evidently, Brexit is an issue of the highest national importance. Public and Parliamentary debate about the terms of our withdrawal from the EU must be as well-informed as possible, including about the likely economic consequences of that withdrawal. Without the information our clients seek, those debates will be inadequate, and the UK risks leaving the EU on terms that do not serve the British people in the best possible way.

That is the purpose of this request: our clients seek to ensure a fully informed democratic debate about the terms of Brexit.

There can be no doubt that you each have a common law power to disclose the documents we seek. Thus, you would have the power to disclose the documents even absent a specific request for them, and even if there were no freedom of information legislation in the UK: you would not act *ultra vires* in making such disclosure. As a matter of principle, this analysis is correct; and the position is put beyond doubt by the Supreme Court decision in *Kennedy v Charity Commission* [2014] UKSC 20.

That common law power of disclosure must be exercised in accordance with public law principles, and consistently with Article 10 of the European Convention on Human Rights (ECHR), as given further domestic effect by the Human Rights Act 1998.

The triggering of Article 50 on 29 March 2017 – coupled with the running two-year negotiation period prescribed in Article 50 – means that very little time remains for informed debate about the terms of Brexit. The public needs sight of the requested documents without delay. We therefore ask that you respond to this request as a matter of urgency, either by disclosing the requested documents or by explaining the grounds for your refusal.

Please note that our clients are minded to challenge any refusal before the Courts by way of judicial review. We would seek the expedition of their application on the ground of urgency.

The documents we ask you to disclose

This request is concerned with two categories of document.

The first is a set of sectoral studies setting out predictions prepared by the Department for Exiting the EU as to the likely impact of Brexit. On 14 December 2016, you (the Secretary of State for Exiting the EU) gave evidence to the House of Commons' Committee on Exiting the EU, in which you said that *"our 57 studies cover 85% of the economy—everything except sectors that are not affected by international trade"*. There have subsequently been repeated public references to there being more than 50 sector-specific studies on the likely impacts of Brexit. Your Department has repeatedly promised to publish the list of studies "shortly", but to our knowledge has not done so.

Secondly, we understand that HM Treasury has produced a report that compares the predicted economic detriment of Brexit with the predicted economic benefits of alternative free trade agreements. We understand that both the Department for Exiting the EU and HM Treasury hold copies of this HM Treasury report.

Please disclose to us:

- (i) the most up-to-date versions of all of the (approximately) 57 sectoral studies;
- (ii) the most up-to-date version of the HM Treasury report.

Our clients seek the disclosure of all of the information contained in these documents. Alternatively, however, our clients ask you to disclose as much of this information as possible. A blanket refusal of their request would be irrational and disproportionate.

The legal basis for this request

Our clients acknowledge that their request could be made under FOIA. Indeed, we are aware that the same information has been requested (unsuccessfully) by others under that regime.

FOIA is not, however, the only basis on which such a disclosure could be requested and made: see above.

In the present case, FOIA is not a suitable alternative route to obtaining the documents we seek. This is principally because of the urgency of this matter. FOIA requests involve multiple rounds of correspondence between requester and public authority (request; response; request for internal review; response to internal review), a complaint to the Information Commissioner (which takes several months at best to resolve), a decision from the Information Commissioner, and then a potential appeal to the First-Tier Tribunal. These timescales render FOIA wholly unsuitable in this instance: there is simply not enough time to complete this process so as to resolve the issue of disclosure well before March 2019.

That is why our clients ask you to exercise your common law powers in relation to their request. You are of course required to exercise those powers in accordance with public law principles. If our clients are compelled to seek judicial review of your refusal or partial refusals of their request, they will urge the Court to scrutinise the rationality of your decisions stringently. The issues underlying this request are of the greatest importance in constitutional, democratic and economic terms. The debate our clients seek to facilitate will affect the lives of everyone in this country, now and in future. In these circumstances, your responses to their request will merit judicial scrutiny at the most exacting standard.

That point is reinforced by the human rights context of our clients' request. Any refusal of their request will interfere with their right under Article 10(1) ECHR to receive and impart information and ideas without hindrance by any public authority. We draw your attention to the judgment of the Grand Chamber of the Court of Justice of the European Union in *Magyar Helsinki Bizottság v Hungary* (Application no. 18030/11; judgment of 8 November 2016). In that case, the Court agreed that the public authority's refusal to disclose requested information was an interference with the requester's rights under Article 10(1) ECHR.

By application of *Bizottság* (see in particular paragraphs 158-170), the same would be true here. The purpose of our clients' request is to enable them to exercise their rights to receive and impart information and ideas to others: as we have explained, they make this request in order to facilitate a vital public debate. The information they seek is of legitimate and indeed

overwhelming public interest. In working to facilitate that debate, our clients are functioning in effect as forms of “watchdog” (a term that can extend even to bloggers and social media commentators: see *Bizottság* at paragraph 168). The information our clients seek is readily available to you.

Therefore, if your refusal of our clients’ request compels them to seek relief by way of judicial review, they will urge the Court to scrutinise your decisions using not only domestic public law standards, but also the anxious scrutiny standard of ECHR jurisprudence. Your refusals could only stand to the extent that they are necessary for one of the purposes listed in Article 10(2), and only to the extent that they are proportionate.

For the reasons outlined below, we do not consider that the refusal of our clients’ request would be rational or proportionate.

Why the requested documents should be disclosed

From your refusals of FOIA requests made by others, we are aware of the concerns you are likely to advance in refusing our clients’ request to any extent. You will no doubt explain your concerns in answer to this letter, and evidence them in due course if needed. We will consider and address those explanations in detail in due course. For present purposes, however, our views are as follows.

In responses to comparable FOIA requests, the Department for Exiting the EU has cited concerns as to the UK’s interests abroad, the UK’s economy and the formulation and development of government policy. More specifically, we anticipate that you may express a concern about these disclosures potentially prejudicing the interests of the UK in securing the best terms from the Brexit negotiations.

At present, we do not understand how the disclosure of these specific documents would cause any material prejudice to those interests. In particular, we do not accept that these disclosures would disadvantage the UK in its negotiations or grant the EU’s negotiators an advantage. The EU’s negotiators, for example, are highly likely to formulate their own views on the

strengths and weaknesses of the UK's position. They are unlikely to change those views or their negotiating position because of the information we seek.

In any event, our client's firm view is that the public interest in the disclosure of the documents they seek is overriding. Brexit is the most important public issue in the UK. It will have far-reaching implications for every aspect of life in the UK, in constitutional, economic and social terms. It will affect every individual, business and public authority in profound and long-term ways. It is and will continue to be the subject of urgent and intensive debate, including in the media and in Parliament, as to the terms on which the UK should leave the EU. That debate will involve many competing perspectives and sources of information.

Without the information our clients seek from you, that debate will be compromised. Participants will have wholly inadequate information with which to understand, and express views on, the likely consequences of the proposed terms of exit. They will be unable properly to contribute to democratic decision-making and to hold the government to account. There will be real risks of Parliament and the public being asked to accept Brexit terms without fully understanding their implications.

In short, the information our clients seek is crucial to a democratic Brexit. We therefore urge you to disclose to us all or as much of it as possible.

Conclusion

Please provide us with your substantive response within 14 days. We ask that, within that time, you either disclose the documents we have requested, or explain your reasons for refusing our clients' request to any extent. We do not believe that this timeframe is unwarranted or unrealistic in these circumstances. We reiterate our points about the urgent need for a fully informed public debate about the terms of Brexit. We are also aware that, in refusing FOIA requests for the same or materially similar information, you have already formulated and expressed your views. Even allowing for the fact that our clients' request is made under the common law and Article 10 ECHR, you will already be well placed to provide a reasoned response swiftly.

We look forward to hearing from you as a matter of urgency.

Yours sincerely

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