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20 November 2017

By courier and e-mail

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
correspondence@dexeu.gov.uk;
foi@dexeu.gov.uk

The Rt. Hon Philip Hammond MP
Chancellor of the Exchequer
HM Treasury
1 Horse Guards Road
London, SW1A 2HQ
ceu.enquiries@hmtreasury.gsi.gov.uk;
foirequests@hmtreasury.gsi.gov.uk

Dear Secretary of State and Chancellor

Proposed claim for judicial review

We write further to our letter of 12 October 2017, in which our clients requested that you disclose certain specified documents in exercise of your common law powers. In letters of 30 October (from HM Treasury) and 31 October (from DEXEU) you refused that request. You confirmed your refusal in letters of 14 November.

In those letters of 14 November, you referred us to a written statement made by the Secretary of State for Exiting the European Union on 7 November about the intended disclosure to Parliament's Committee on Exiting the EU of some of the documents we seek. Our clients will,

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of course, take into account any material developments on that front when deciding how to proceed. We note, however, that the statement leaves it wholly uncertain what information will be made public, and when.

In these circumstances, our clients intend to seek judicial review of your refusal of their request. This letter outlines their proposed claim, in accordance with the Pre-Action Protocol for judicial review. Our clients will take into account any further relevant developments – including any public disclosure of information falling within the scope of our request – before deciding whether to commence proceedings.

The parties

The Defendants to the proposed claim will be the Secretary of State for Exiting the European Union and the Chancellor of the Exchequer.

The Claimants will be our clients, Dr Molly Scott Cato MEP and The Good Law Project. We are their legal representatives. Our contact details are given above. Please direct all communications to us using those details.

Details of the matter being challenged

Our clients challenge your refusals of their request set out in our letters to you of 12 October 2017. We asked you to disclose two categories of document, namely:

- (1) The suite of sector-specific studies of the impact of Brexit on the UK economy, to which repeated public reference has been made since 14 December 2016. You have confirmed that there are 58 sectoral studies.
- (2) A report produced by HM Treasury that compares the predicted economic detriment of Brexit with the predicted economic benefits of alternative free trade agreements.

We explained why our clients sought those documents. Their reasons can be summarised briefly as follows. Brexit is an issue of the highest national importance. As you know, in parallel to the ongoing negotiating process with the EU, there exists a critically important public debate as to the position that the Government should be taking in those negotiations. That public debate about the terms of the UK's withdrawal from the EU must be as well-informed as possible, including about the likely economic consequences of that withdrawal. Without the information we seek, those debates will be inadequate, and we risk leaving the EU on terms that do not serve the British people in the best possible way.

We made clear that these requests were not being made under the Freedom of Information Act 2000 (FOIA). Instead, we asked that you exercise your common law powers to disclose these documents. We explained why FOIA was not a suitable route to obtaining the documents our clients seek. This is principally because of the urgency of this matter.

We also made clear that any refusal of these requests would interfere with our clients' rights under Article 10 of the European Convention on Human Rights (*ECHR*), as given further domestic effect by the Human Rights Act 1998, to receive and impart information and ideas without hindrance by any public authority.

In your letters of 30 October (from HM Treasury) and 31 October (from DEXEU), you refused our clients' requests, in substantially identical terms. Your position can be summarised in four points:

- (i) You are obliged to respond under FOIA, but you consider that such a response satisfies our clients' rights under the common law and Article 10 ECHR.
- (ii) Judicial review is unavailable here, because the statutory complaint and appeal provisions of FOIA provide a suitable alternative remedy.
- (iii) The content of the 58 sectoral studies is exempt from disclosure under sections 27, 29 and 35 of FOIA.
- (iv) You refused to confirm or deny whether you hold the HM Treasury report, relying on sections 27(4), 29(2) and 35(3) of FOIA.

In your letters of 14 November, you confirmed that this remained your position.

We intend to bring judicial review proceedings to challenge your refusals of our clients' requests. The legal basis of our claim is summarised below, by reference to these four points.

The issues

In outline, our position is as follows.

(i) *FOIA, the common law and Article 10 ECHR*

You have (rightly) not disputed that you have the power at common law to disclose the documents our clients seek. Likewise, you have (rightly) not disputed that our clients' rights under Article 10 ECHR are engaged.

As we pointed out in our letters of 12 October, your refusals can stand only to the extent that they are necessary for one of the purposes listed in Article 10(2) ECHR, and only to the extent that they are proportionate. Your refusals ignore those critical issues. You appear not even to have asked yourselves whether your blanket refusals are necessary for a relevant purpose, or proportionate. Your approach is fundamentally flawed. We will urge the court to put that right, and to scrutinise your decisions anxiously.

(ii) *Judicial review and alternative remedies*

You rely on *BBC v Sugar* [2009] UKHL 9, [2009] 1 WLR 430 as support for your contention that judicial review is unavailable here because FOIA provides a suitable alternative remedy. That reliance is misconceived: *BBC v Sugar* is not authority for the suitability of the FOIA machinery as an alternative to judicial review, particularly in contexts of the utmost urgency. The *Sugar* case is about the scope of the BBC's derogation from FOIA, and the proper forum in which to litigate that issue. That case has nothing whatsoever to do with issues about common law powers of disclosure or Article 10.

We acknowledge that judicial review should ordinarily be a remedy of last resort. That is the case here: as we have explained, there is simply not enough time to resolve the issue of disclosure under FOIA well before the UK leaves the EU in March 2019. Only the courts can resolve this issue in time. Moreover, the FOIA process involves decision-making by the Information Commissioner, and thereafter by the First-tier Tribunal. The jurisdiction of both is exhaustively defined by statute. Neither has any jurisdiction in relation to issues arising out of common law powers to disclose.

Hence your objection based on alternative remedies is misconceived.

(iii) *Refusal to disclose the 58 sectoral studies*

Our clients have made a request for these documents under the common law. You have answered it under FOIA, relying specifically on the exemptions that seek to protect the UK's international relations and interests (section 27), economic interests (section 29) and the formulation and development of government policy (section 35). Your insistence on approaching this solely as a FOIA request, despite the terms in which the request was expressed, is misplaced and misconceived.

To the extent that the considerations you identify could be relevant to a decision under the common law, your reliance on them to withhold the 58 sectoral studies is in any event irrational and disproportionate, for the following reasons.

First, even your own description of these documents suggests they do not discuss such matters as negotiating targets, positions or tactics. The Secretary of State for Exiting the EU's own description of these documents, as given in his written statement of 7 November, suggests that they collate and analyse a range of factual matters. That is plainly not information of any great sensitivity, which is why a number of European Governments have released their own Brexit impact assessments on their own economies without hesitation (see, for example, the German and Irish Government's disclosure of such internal studies).¹ We note further that the Secretary

¹ See, for example, https://www.bmw.de/Redaktion/DE/Publikationen/Studien/oekonomische-effekte-eines-brexite-auf-die-deutsche-wirtschaft.pdf?__blob=publicationFile&v=6, and <https://merrionstreet.ie/en/EU-UK/Reports/>.

of State for Exiting the EU is reported in the media as describing the documents in the following terms: “He tried to play down its significance, insisting it was not ‘some sort of grand plan’, but ‘data about the regulations and the markets of individual sectors’”². The disclosure of information of that description could not plausibly weaken the UK’s negotiating position.

Secondly, the UK’s EU negotiating partners will plainly be capable of – and will indeed have undertaken – their own factual analysis. They would base their negotiating positions on their own analysis, not the UK’s. For this reason also, these disclosures would do no harm to the UK’s negotiating position.

Thirdly, the public interest in disclosure would be extremely strong, given the unique and far-reaching consequences of Brexit, and given the critical importance of informed public debate on the issues to which it gives rise. We reiterate that, without the information we seek, that debate will be inadequate. That is very strongly contrary to the public interest. Your refusals fail properly to engage with the exceptionally weighty public interest in disclosure and the prejudicial consequences of your position.

In these circumstances:

- your judgment that this information should not be disclosed under your common law powers – even assuming that you have directed yourself to that issue – is irrational; and
- your decision that this information should not be disclosed interferes with our clients’ Article 10(1) rights, and that interference is neither necessary for a legitimate aim nor proportionate.

(iv) Refusal to confirm or deny whether the HM Treasury report is held

Your refusal to confirm or deny that the HM Treasury report is held is irrational, evasive, and absurd. That report has been referred to repeatedly in the media: see for example articles in The Financial Times on 27 June³ and 15 September 2017⁴. Those articles show that these reputable commentators have direct knowledge of this document. It is fanciful to suggest that it does not exist or is not held by either of your departments.

More broadly, it is wholly irrational to assert that “the disclosure of whether [the HM Treasury report] is held or not held may give insight which could in turn undermine the UK’s negotiations with the EU or adversely affect the UK’s national interests abroad” (DEXEU’s refusal letter of 31 October).

² <http://www.independent.co.uk/news/uk/politics/brexit-latest-studies-economic-damage-release-deadline-david-davis-a8034161.html>

³ <http://www.cer.eu/insights/britain-prepares-softer-brexit>

⁴ <https://www.ft.com/content/ff48e924-9a0d-11e7-a652-cde3f882dd7b>

That assertion is unsupported by any reasoning. It is fanciful to suggest that the mere confirmation or denial that such a document exists would cause our EU negotiating partners to draw any meaningful inferences at all, still less that any such inferences would undermine the UK's negotiating position. Your refusal even to confirm or deny whether you hold the HM Treasury report is a clear interference with our clients' Article 10 rights. Such interference is neither necessary for any legitimate aim, nor proportionate.

For the avoidance of doubt, we maintain that you should not only confirm that you hold this document, but also that you should disclose it, for essentially the same reasons as applicable to the 58 sectoral studies.

Action that the Defendants are expected to take

We expect either or both of you to disclose the documents our clients have requested, namely (1) the 58 sectoral studies, and (2) the HMT report. We seek the most up-to-date versions of those documents that you are able to provide. If you consider that some information needs to be redacted, please explain the basis for those redactions.

ADR

It does not appear to us that alternative dispute resolution is suitable in this case. Please let us know if you take a different view.

Information and documents sought

In accordance with your duty of candour, please provide us with any documents relevant to your decisions to refuse our clients' requests, including internal communications, any submissions to and responses from ministers and any communications between your two departments and/or any other government departments.

Address for reply and service of court documents

Please use the following address for your replies and for the service of any court documents:

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Proposed reply date

We expect your reply within 14 days of the date of this letter, failing which we intend to make our application to the Administrative Court. As indicated above, we will take into account any material developments as regards disclosures to and/or by Parliament's Committee on Exiting the EU when deciding how to proceed.

As previously indicated, we will seek the expedition of our application on the grounds of urgency.

Yours sincerely,

Three Crowns LLP