



Department  
for Exiting the  
European Union

Freedom of Information Team  
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Our ref: DEX000742

31 October 2017

Dear Sir or Madam,

We have received a copy of your letter of 12 October 2017 asking, on behalf of Molly Scott Cato MEP and The Good Law Project Limited, for information in exercise of the Secretary of State's common law powers. We have been asked to respond on behalf of the Secretary of State for Exiting the EU.

#### **Your client's request for information**

Your client made a request for the following information:

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- (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.
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You have asked us not to consider this request under the Freedom of Information Act 2000 (FOIA). However, as a government department subject to that Act, we must consider any request for information that fulfils the s.8 FOIA criteria under FOIA. We have therefore responded on this basis. We consider that this reply satisfies any entitlement that may arise at common law and/or any rights that may arise under Article 10 of the European Convention on Human Rights and the Human Rights Act 1998, as referred to by your request.

We note that you state that your clients are minded to challenge any refusal before the Courts by way of judicial review. However, any judicial review would be a clear attempt to circumvent the statutory appeal route – with the safeguards, balances and time limits it provides – established by Parliament. The Courts have recognised at the highest level that route as not merely constituting an adequate alternative remedy, but in fact as having numerous advantages over judicial review: see, for example, *BBC v Sugar* [2009] UKHL

9, [2009] 1 WLR 430. Alleged urgency cannot warrant its circumvention. In these circumstances, and in accordance with well-established case-law, any attempt at judicial review would be wholly misconceived.

We can confirm the Department for Exiting the European Union (DExEU) holds information relevant to part (i) of your clients' request. This information is exempt in accordance with Sections 27, 29 and 35 of FOIA. These exemptions consider whether the disclosure of information would or would be likely to prejudice, respectively, UK interests abroad, the economic interests of the UK, and the formulation of policy. The reasons for withholding this information are explained in further detail below.

### **Section 27 and Section 29**

The information you have requested is exempt under Sections 27(1)(a) to (d) of FOIA, which exempt information from release if to do so 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
- (c) the interests of the UK abroad, or;
- (d) the promotion or protection by the UK of its interests abroad.

The information requested is also exempt from disclosure in accordance with Sections 29(1)(a) and (b) of FOIA, which exempts information if it would, or would be likely to, prejudice:

- (a) the economic interests of the UK or any part of the UK, or
- (b) the financial interests of any administration in the UK.

The above exemptions are engaged for the reasons set out below in the public interest test. These are both qualified exemptions and we have considered whether the balance of the public interest favours disclosing this information or withholding.

DExEU recognises the importance of transparency in public affairs, enabling the public to more effectively scrutinise the manner in which public authorities reach important decisions. In the wake of the UK's decision to leave the EU, we accept that there is a public interest in the release of information which would reassure the public that the Government's analysis of our exit on various sectors and industries and their economic outcomes is sound and well-formed.

Against this, there is a very strong public interest in the correct handling of the UK's national interests abroad, and its ability to protect and promote those interests effectively. In the context of the ongoing negotiations with the EU, we find that the release of this information at such a sensitive time would be detrimental to the Government's negotiating position, the protection of which has been agreed by Parliament. [The mere fact that information on any given topic may have already been published - or may be held - by third parties does not alleviate these concerns. Any such information would be based on its own analysis and reflects the priorities of the parties that commissioned it.]

Releasing the information held would also be likely to prejudice the UK's relations with the EU, member states and other states, where the release of information in scope would impact on the UK's ability to effectively carry out future negotiations.

Causing harm to the Government's negotiating position would also, by the very nature of the current negotiations, intrinsically cause harm to the economic interests of the UK and financial interests of the UK administrations. We have therefore concluded that the public interest test under Sections 27 and 29 favours withholding the information in scope.

## **Section 35**

The information held by the Department within the scope of this request is also being withheld as exempt in accordance with Section 35(1)(a) of FOIA, which exempts information held by a public authority if it relates to the formulation or development of government policy.

Section 35 is a qualified exemption and we have considered whether it is in the public interest to disclose or withhold the requested information. Alongside the arguments for disclosure stated above, specific to this exemption we recognise that a better understanding of how Government formulates policy is in the public interest as that policy may have a significant impact on the lives of citizens, and that there is therefore a public interest in the transparency of any policy deliberations concerning the UK's exit from the EU.

Opposing this, there is a strong public interest in policy making associated with our exit from the EU being of the highest quality and being fully informed by a consideration of all options. As stated in the Information Commissioner's guidance on Section 35(1)(a), it is vital 'to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies.' The Information Commissioner, Tribunals and Courts have recognised that effective policy development requires a degree of freedom for Ministers and officials to consider and discuss options in an open and frank manner, and that there is a very strong public interest in maintaining that safe space necessary for those discussions. We have therefore determined that in all circumstances of the case, public interest favours withholding the information we hold within the scope of your request over releasing.

With regard to part (ii) of your request, in accordance with Sections 27(4), 29(2) and 35(3) of FOIA, we can neither confirm nor deny whether DExEU holds information related to this part of your request.

Section 27(4)(a) of FOIA provides that the duty to confirm or deny does not arise if to do so would, or would be likely to, prejudice any of the matters mentioned in Section 27(1)(a-d), which includes: relations between the UK and any other State; relations between the United Kingdom and any international organisation or international court; the interests of the UK abroad, or; the promotion or protection by the UK of its interests abroad.

Section 29(2) of FOIA states that the duty to confirm or deny does not arise if to do so would, or would be likely to, prejudice any of the matters mentioned in section 29(1),

including prejudicing the economic interests of the UK or any part of the UK, or the financial interests of any administration in the UK.

Section 27 and Section 29 are qualified exemptions and we have considered whether the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in confirming whether or not DExEU holds any information relating to your request. Specific to your request, we appreciate that there is a public interest in reassuring the public that analysis of the various potential outcomes and their effect on the UK's national interests has been carried out effectively.

Opposing this, there is a very strong public interest in the correct handling of the UK's economic interests and international relations. It is necessary to consider whether the act of confirming or denying whether we hold information in this case could in turn be used to infer information that could be detrimental to the Government's negotiating position. In this case, the disclosure of whether information 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. Damage to the UK's negotiating position could harm the UK's relations with the EU, its member states and third party states, and its ability to protect and promote its interests abroad. Furthermore, damage to the UK's negotiating position would inevitably cause damage to the UK's economic interests and likewise harm the financial interests of the UK Government and devolved administrations.

Section 35(3) of FOIA states that the duty to confirm or deny under Section 1(1) does not arise if to do so would, or would be likely to, prejudice any of the matters mentioned in Section 35(1), including the formulation or development of policy.

As outlined above it is necessary, for the effective development and formulation of policy, to be able to maintain a safe space for the open and frank discussion of policy options. Confirming or denying the existence of information, where doing so would be likely to prejudice that safe space or limit the options available for discussion, would result in less effective policy which would not be in the public interest.

Considering all the circumstances of this case, we have determined that there is an overwhelming public interest in maintaining the exclusion of the duty to confirm or deny whether we hold information in relation to this part of your request.

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If you are unhappy with the service you have received in relation to your request or wish to request an internal review, you should write to [foi@dexeu.gov.uk](mailto:foi@dexeu.gov.uk) or:

Freedom of Information Team (internal review)  
Department for Exiting the European Union  
9 Downing Street  
SW1A 2AG

You should note that DExEU will not normally accept an application for internal review if it is received more than two months after the date that the reply was issued.

If you are not content with the outcome of your internal review, you may apply directly to the Information Commissioner for a decision. Generally, the Commissioner cannot make

a decision unless you have exhausted the complaints procedure provided by DExEU. The Information Commissioner can be contacted at:

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

Yours sincerely,

**Freedom of Information Team, DExEU.**