

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2018

Public Authority: Department for Food & Rural Affairs
Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information about the impact of the UK leaving the European Union (EU) on food prices. The requested information was withheld under the exemptions provided by sections 35 – formulation and development of government policy, section 27 – international relations and section 29 – prejudice to the economy.
2. The Commissioner's decision is that Defra is entitled to rely on section 35 to withhold all the requested information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 21 July 2017 the complainant made an information request to the Department for Environment Food & Rural Affairs (Defra). At point 5 he requested information of the following description:

"What assessment or estimate has been made of the increase in food prices in the run up to the UK leaving the European Union and the first five years after the departure?"
5. On 21 August 2017 Defra responded. It refused to provide the information requested at point 5, citing section 35 – formulation and development of government policy, as the basis for doing so.

6. The complainant requested an internal review on 22 August 2017. Defra provided the outcome of its internal review on 20 October 2017 at which time it revised its position and now cited additional exemptions. Defra now relied on section 35(1)(a) – formulation and development of government policy, section 27(1)(c) – prejudice to the interests of the UK abroad, section 27(1)(d) – prejudice to the promotion or protection by the United Kingdom of its interests abroad, and section 29(1)(a) – prejudice to the economic interests of the United Kingdom.

Scope of the case

7. The complainant contacted the Commissioner on 31 October 2017 to complain about the way his request for information had been handled.
8. The Commissioner considers that the matter to be decided is whether Defra is entitled to rely on any of the exemptions cited to withhold the requested information. The exemption provided by section 35(1)(a) has been applied to all the information, whereas the other exemptions have only been applied to some of the information. The Commissioner will start by looking at section 35(1)(a).

Reasons for decision

Section 35(1)(a) - formulation and development of government policy

9. Section 35(1)(a) of FOIA states that information held by a government department is exempt if it relates to the formulation or development of government policy.
10. Clearly the disputed information is held by a government department.
11. It is only necessary for that information to 'relate to' the formulation or development of government policy for the exemption to be engaged. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
12. Ultimately, responsibility for government policy lies with the Cabinet. That is not to say that all government policy has to be jointly agreed by Cabinet ministers or a Cabinet Committee, where a particular policy has a more narrow focus it may be generated within one department and agreed by the minister responsible for that area.

13. In this case Defra has argued that the requested information informs the government's approach to EU exit negotiations. In particular it says the information relates to border, trade and EU exit policy. These are clearly matters of government policy to be decided by the Cabinet. It is self-evident that any information captured by the scope of the request would relate to some degree to these matters and having viewed the withheld information the Commissioner is satisfied that it does relate to these areas of policy. It is also very clear that at the time of the request the government's policy in these areas was still being developed and that this remains the case.

14. The Commissioner therefore finds the exemption is engaged.

Public interest test

15. Section 35(1)(a) is subject to the public interest test as set out in section 2 of the FOIA. This means that although the exemption is engaged the information can only be withheld if, in all the circumstances of the of the case the public interest in maintaining the exemption is greater than the public interest in disclosure.

16. As well as acknowledging the general public interest in the government being transparent with the information it holds, Defra has recognised that there is a public interest in people being better informed on the impact of leaving the EU on food prices, both in the run up to the UK's departure and in the first five years following its exit. It recognises that disclosing the information would provide greater clarity for both consumers and businesses on the implications of the different scenarios under which the UK could leave the EU.

17. In arguing his case the complainant has suggested that Defra would only wish to withhold the information if it was contentious, perhaps indicating that food could become unaffordable or in short supply. If this was the case, he argues, the public has a right to know before the UK leaves the EU.

18. The Commissioner recognises the significance of the UK's departure from the EU and the importance of the government's policy on this issue. There is therefore a value in the public having access to information which would allow them to influence such policies and/or decide whether they can support government policies in this area which will undoubtedly impact on the UK for many years to come.

19. In terms of the public interest factors in favour of maintaining the exemption, Defra has stated that the requested information forms part of the evidence base being used by the government in formulating its negotiating position with the EU. It argues that disclosing the information would undermine the government's position in those negotiations and that this would be detrimental to the UK's interests.

Having viewed the requested information the Commissioner considers that there are grounds for accepting this argument.

20. The second argument put forward by Defra in favour of maintaining the exemption is that assessments of the impact on food prices is only one element of a wide range of consequences and opportunities that leaving the EU may present. It therefore argues that to provide information on just this one element would be misleading. The Commissioner does not accept this argument. The implications of the UK leaving the EU has been widely debated in the media and the public will appreciate that leaving the EU will affect many areas of the economy as well as other aspects of life. Disclosing this information may initially focus some of that debate on food prices but it is doubtful that anyone would be misled into thinking this is the sole issue raised by our departure. Disclosing this information would simply inform the public on one aspect of that wider ranging debate.
21. Defra has also argued that it is in the public interest for government policy to be based on the most robust and reliable evidence available. This can involve examining all possible options and scenarios. The Commissioner recognises that policy makers need to be free to gather information on all the potential outcomes, even if some of those outcomes are not realistic prospects. This is necessary so that the ministers involved in the UK's withdrawal from the EU fully understand the parameters in which they can negotiate. The Commissioner recognises the importance of protecting the safe space government ministers need in which to develop the government's negotiating position. To undermine this safe space would lead to weaker policy decisions and a less robust negotiating position. This would be counter to the UK's interests and therefore those of the public. This argument carries particular weight when account is taken of the significance of negotiations on the UK's exit from the EU and long term impact the outcome of such negotiations will have.
22. The Commissioner has also considered what is often referred to as the 'chilling effect'. Ministers may become more reluctant about requesting such information in the future, and, similarly, civil servants may become more cautious in how such research was presented, if they were concerned it could be released at a future date. The chilling effect is usually considered to be more pronounced when information is disclosed during an ongoing policy process, as is the case here, or soon after its completion. The effect will also be stronger on policy making in respect of the same or similar policy issues. Also the more frequently such issues are likely to be the subject of policy making, the greater the effect will be. Applying these principles to the current case it is noted that the information relates to policy issues that will continue to be of major concern to the government whilst the UK is negotiating its exit from the EU. Therefore it could be argued that the chilling effect

argument would carry great weight. However due to the importance of those negotiations being based on as strong a position as possible the Commissioner is not convinced the government or its civil servants would, realistically, shy away from producing the information it needed to inform its negotiating position. That is not to say that the chilling effect would not still be present in the development of policy in respect of other aspects of the UK's relations with the EU following its withdrawal.

23. In weighing the competing arguments for and against disclosing the requested information the Commissioner has had regard for the significance of the UK's withdrawal from the EU. There is undoubtedly a public interest in the public understanding the implications of the different terms under which that departure may take place so that they can support or lobby for changes in the government's exit policy whilst there is an opportunity to do so. Although the requested information relates to only one aspect of the UK's departure, its disclosure would help serve that public interest.
24. However, having viewed the withheld information the Commissioner considers its disclosure would be capable of undermining the UK's negotiating position in the ongoing negotiations. This could potentially have a very serious negative impact on the UK's interests. In addition the disclosure of the information would erode the safe space required by ministers in order to consider all possible scenarios and potential consequences. If ministers did not feel free to access information such as that requested in this case, there is a risk that their decisions would not be based on a full understanding of the issues and this would lead to poorer policy making in what is a vital area of the government's work. Therefore despite the fact that the Commissioner gives little weight to the chilling effect disclosing this information may cause, and no weight to Defra's arguments that disclosing the information would be misleading, the Commissioner finds that the public interest in maintaining the exemption is greater than the public interest in favour of disclosure.
25. As the Commissioner had found that Defra is entitled to withhold all the requested information under the exemption provided by section 35(1)(a) it is not necessary to consider the application of any of the other exemptions.

Right of appeal

26. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rob Mechan
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Information Commissioner's Office
Wycliffe House
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