

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 August 2018

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall

London

SW1A 2AS

### Decision (including any steps ordered)

---

1. The complainant has requested information on the reversibility of the United Kingdom's ('UK') Article 50 notification of the intention to withdraw from the European Union ('EU').
2. The Commissioner's decision is that the Cabinet Office has appropriately applied FOIA section 27(4)(a) (International relations) to refuse to confirm or deny holding information in the scope of the request. She considers that the public interest favours maintaining the exclusion.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

### Request and response

---

4. On 23 December 2017 the complainant wrote to the Cabinet Office and requested information in the following terms:

"I wish to know the following information concerning the legal advice that has been obtained by the Prime Minister regarding the reversibility of the article 50 notification to Mr. Donald Tusk, President of the European Council dated 29th March 2017.

1. Has the Prime Minister obtained legal advice from counsel regarding the reversibility of the article 50 notification to Mr. Donald Tusk, President of the European Council dated 29<sup>th</sup> March 2017?

2. If so, what is the date that the Prime Minister sought the legal advice from counsel regarding the reversibility of the article 50 notification to Mr. Donald Tusk, President of the European Council dated 29th March 2017?
  3. If so, what is the date of the advice that has been provided to the Prime Minister from counsel regarding the reversibility of the article 50 notification to Mr. Donald Tusk, President of the European Council dated 29th March 2017?
  4. If so, what is the name of the counsel who provided the advice that has been provided to the Prime Minister regarding the reversibility of the article 50 notification to Mr. Donald Tusk, President of the European Council dated 29th March 2017?
  5. If so, what is the text of the request or requests for advice, either by letters, emails or legal briefs, that has been provided to the Prime Minister regarding the reversibility of the article 50 notification to Mr. Donald Tusk, President of the European Council dated 29th March 2017?
  6. If so, what is the text of the advice that has been provided to the Prime Minister regarding the reversibility of the article 50 notification to Mr. Donald Tusk, President of the European Council dated 29th March 2017?"
5. The Cabinet Office responded on 2 February 2018 refusing to confirm or deny whether any information within scope of the request was held, citing the exclusion at section 27(4)(a) and stating that the public interest favoured maintaining the exclusion.
  6. Following an internal review the Cabinet Office wrote to the complainant on 12 March 2018 upholding its initial response.

### **Scope of the case**

---

7. The complainant contacted the Commissioner on 15 March 2018 to complain about the way his request for information had been handled. The complainant set out his grounds for complaint, the full text of which is found in the attached Annex.
8. The Commissioner considers the scope of her investigation is to determine whether the Cabinet Office is entitled to rely on the exclusion at section 27(4) to refuse to confirm or deny that the requested information is held.

### **Reasons for decision**

---

9. Section 27(4) of FOIA states:

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) –

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court".

Section 27(1) provides:

"Information is exempt information if its disclosure under this Act 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 United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad."

10. In order for a prejudice based exemption, such as section 27(4), to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the public authority confirmed or denied holding the requested information has to relate to the applicable interests within the relevant exemption;

- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the confirmation or denial and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied on by the public authority is met – ie, confirmation or denial 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the

Commissioner's view this places a stronger evidential burden on the public authority to discharge. The anticipated prejudice must be more probable than not.

11. The Cabinet Office explained to the Commissioner its view that confirmation or denial *would* prejudice, rather than 'would be likely to prejudice', the UK's international relations across all the subsections (a)-(d) of section 27(1).
12. The Commissioner's guidance sets out that for many requests which public authorities receive, their decision to use a neither confirm nor deny response will not be affected by whether they do or do not in fact hold the information. The starting point and main focus in most cases will be theoretical considerations about the consequences of confirming or denying that a particular type of information is held, as in this case. The Commissioner notes that her own guidance advises that section 27 may be broadly interpreted to include a wide range of issues including policy and strategic positioning in relation to other states or international organisations.
13. The Commissioner considers that by confirming or denying that legal advice had, or had not, been sought provides information to the world at large, including negotiation partners. Confirmation that legal advice had or had not been sought could lead to speculation that consideration had, or had not, been given to the withdrawal of the UK's notification to leave the EU. Such confirmation or denial would therefore undermine the UK's relationship with the Commission, and EU Member States, as the holding, or not holding, could be interpreted as an indication of the UK's commitment to leaving the EU. As a consequence this would prejudice the UK's relations with the other States, the Commission and the interests and protection of the UK's interests abroad, negatively impacting on the UK's negotiations.
14. The Commissioner is satisfied that the requested information, if held, would fall to be considered within the section 27 exemption. The information, if held, would be directly related to the UK's international relations in respect of the ongoing negotiations for the UK leaving the EU. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the hypothetical prejudice described by the Cabinet Office clearly relates to the interests which the exemption contained at section 27(1)(a)-(d) is designed to protect. With regard to the second criterion, the Commissioner is satisfied that there is a causal link between confirming or denying whether the requested information is held and prejudice occurring to the UK's international relations. Furthermore, she is satisfied that the resultant prejudice would be real and of substance with the likelihood of prejudice being more probable than not, such that there is a more than 50% chance of

the disclosure causing prejudice, even though it is not absolutely certain that it would do so. This therefore meets the third criteria.

15. Taking all of the above into account, the Commissioner is satisfied that to confirm or deny whether the requested information is held would prejudice the UK's position in relation to the subsections (a)-(d) identified at section 27(1) and therefore the exemption is engaged. Following from this she has gone on to consider the public interest test.

### **The public interest**

16. In accordance with section 2(1)(b) the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the requested information.
17. The Cabinet Office explained to the Commissioner that it recognises the general interest in disclosure of information held by government departments and acknowledges that openness and transparency in Government may increase public trust and engagement with the Government.
18. Notwithstanding this the Cabinet Office considers there to be a very strong public interest in effectively pursuing the UK's national interests abroad. It pointed to the strong public interest in the Government being able to seek, or not to seek, legal advice on any topic in the course of international negotiations without undermining its negotiation position. As such the Cabinet Office considers there to be a strong public interest in; "maintaining the sovereignty of the decision making process".
19. The Cabinet Office also explained its view that there is a strong public interest in protecting the confidentiality of all aspects of communications on significant relations between the UK and other States during 'Brexit' negotiations. It expanded this argument to state that the public interest is more than creating and maintaining a safe space in which Ministers can debate, discuss and refine proposals and options. The Cabinet Office maintains that there is an overall strong public interest in protecting:  
  
"the sovereignty of the deliberative process and the UK's promotion and protection of its interests abroad."
20. The Commissioner notes the complainant's comment:  
  
"...vis a vis the public interest in such disclosure, I would contend that due to the nature of the disclosure sought, it is in the overall public interest that such advice be published."

21. She observes the complainant's assumption that advice exists and should be published. The complainant has not provided any further comment to support his assumption.

### **The Commissioner's view**

22. The Commissioner acknowledges the significant interest demonstrated by the public in respect of 'Brexit'. She fully accepts the significant level of interest in the detail of the UK's negotiations with the EU and the on-going debate in the public domain on the decision to leave the EU. However, she also accepts that the Government is attempting to progress negotiations in the light of its consistently maintained policy that the Article 50 notification will not be withdrawn. Whether or not the Government holds advice on the possibility of reversing the notification would add to the transparency of the Government's actions. However, negotiations are still ongoing and the Commissioner accepts the Cabinet Office's weighty arguments regarding the avoidance of any harm to the UK's ability to achieve the best possible outcome for the UK.
23. The Commissioner accepts that there is public interest in confirming or denying whether the requested information is held, to inform the public on whether the Government has obtained legal advice on revoking Article 50. She recognises that this is of genuine interest to the public.
24. However, she finds that there is a stronger public interest in not prejudicing relations between the UK and the EU Commission and Member States, which she accepts would be undermined by confirming or denying whether such information is held. In the Commissioner's view, it is strongly in the public interest that the UK maintains good international relations at all times. Her view is that it would not be in the public interest if there were to be a negative impact on the effective negotiations currently in process as a result of issuing confirmation or denial in this case. Any hindrance to the progression of these negotiations would not be in the public interest.
25. Furthermore, the Commissioner also considers that the negotiation of the best possible outcome for the UK's departure from the EU is paramount. Therefore, the relevant considerations in reaching a judgement on the balance of the public interest in this case extend beyond the actual content of any information which may or may not be held.
26. Since the Commissioner considers that the public interest in issuing a neither confirm nor deny response outweighs that in confirming or denying whether or not the requested information is held, she is satisfied that the Cabinet Office was entitled to issue such a response under section 27(4).

27. In regard to the complainant's point 9 in his grounds for complaint and his reference to the Human Rights Act 1998 the following case is relevant, *Kennedy v Charity Commission* 120141 UKSC 201 (Kennedy). One of the issues before the Supreme Court in that case was whether, if section 32(2) of the FOIA contained an absolute exemption which continues after the end of an inquiry, was compatible with Mr Kennedy's rights under Article 10 European Convention on Human Rights ('ECHR'). The Commissioner is mindful that the majority of the Supreme Court in *Kennedy* held that there was no Article 10 right of access to state-held information. She considers that that conclusion is binding on inferior courts and tribunals notwithstanding any subsequent decision from the European Court of Human Rights. Furthermore, the Commissioner notes that, even were *Kennedy* not a complete answer, the majority of the Supreme Court further held that if there was an Article 10 ECHR right of access to state-held information, that right was not enforceable through the FOIA by virtue of the relevant exemption (section 32 in that case) read with section 78 of the FOIA which states:

"Nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it."

## Right of appeal

---

28. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.

30. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**