

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2019

Public Authority: Department for Exiting the European Union
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information in relation to the European Union (Withdrawal) Bill, the Explanatory Notes accompanying the Bill and the European Union Delegated Powers Memorandum accompanying the Bill.
2. The Commissioner's decision is that the Department for Exiting the European Union ('DExEU') is not obliged to comply with the request in reliance of section 12(1). No steps are required as a result of this decision.

Request and response

3. On 1 February 2018, the complainant wrote to DExEU and requested information in the following terms:

"This request for information relates to the European Union (Withdrawal) Bill as brought from the House of Commons on 18 January 2018 (HL Bill 79); to the Explanatory Notes accompanying the Bill, dated 18 January 2018; and to the European Union Delegated Powers Memorandum accompanying the Bill, dated 18 January 2018.

1. Please provide a copy of existing Departmental guidance on the criteria to be applied by the Department or any other Government Department in identifying a "failure" of retained EU law, and a "deficiency" of retained EU law, as provided for in clause 7(1) of the Bill. If no such guidance exists, please state which criteria are being applied and provide a copy of such criteria.

2. Please provide a copy of existing Departmental guidance on the criteria to be applied by the Department or any other Government Department in identifying "reciprocal arrangements" which "are no longer appropriate" in clause 7(2)(c) of the Bill. If no such guidance exists, please state which criteria are being applied and provide a copy of such criteria.
 3. Please provide a copy of existing Departmental guidance on the criteria to be applied by the Department or any other Government Department in identifying "other arrangements" which "are no longer appropriate" in clause 7(2)(d) of the Bill. If no such guidance exists, please state which criteria are being applied and provide a copy of such criteria.
 4. Please provide a copy of existing Departmental guidance on the criteria to be applied by the Department or any other Government Department in identifying anything in retained EU law which is of "a similar kind" to any deficiency which falls within clause 7(2), as provided for in clause 7(3). If no such guidance exists, please state which criteria are being applied and provide a copy of such criteria.
 5. Please provide a list of the retained EU law you have already identified as being necessary to amend under clause 7(1) of the Bill.
 6. Please provide a list of the retained EU law you have already identified as being necessary to amend under clause 7(1) of the Bill, but using powers under clause 7(5) of the Bill.
 7. Please provide any minutes, reports or other documents which relate to your Department's consideration of whether to consult with external stakeholders on amendments to retained EU law under clauses 7(1) and 7(5) of the Bill. In each case if there are any earlier versions of any of the above Guidance or criteria that have been in use by Government for the purposes identified in each of the requests above please provide copies of those earlier versions."
4. DExEU responded on 28 March 2018. It provided a refusal notice in reliance of the exemptions at FOIA sections 35(1) and 42(1).
 5. The complainant requested an internal review on 4 May 2018. Following an internal review DExEU wrote to the complainant on 23 October 2018. It stated that it overturned its initial response as it discovered that all the information at the time of the request had not been gathered and DExEU now relied on section 12 to refuse the request.

Scope of the case

6. The complainant contacted the Commissioner on 18 July 2018 to complain about the way his request for information had been handled. At that time DExEU had failed to respond to his request for internal review. Following the Commissioner's intervention the internal review was provided after a delay of over five months.
7. The Commissioner considers the scope of her investigation to be the application of section 12 to refuse the request for information.

Reasons for decision

Section 12 – Cost of compliance

8. Section 12(1) states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

When considering whether section 12(1) applies, the authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). The Regulations also provide that a cost estimate must be calculated at the rate of £25 per hour, giving an effective time limit of 24 hours, and specify the tasks that can be taken into account when forming a cost. These are:

- (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it."
9. Section 12 of the FOIA is clear in stating that a public authority only has to estimate whether the cost of complying would exceed the appropriate limit. It is not required to provide a precise calculation. The task for the Commissioner is to reach a conclusion as to whether the cost estimate made by the public authority is reasonable; whether it estimated reasonably that the cost of compliance with the request would exceed the limit of £600, thereby engaging section 12(1).
 10. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the

requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.

11. With respect to points 1-4 of the request DExEU explained to the Commissioner that it has produced a large number of pieces of guidance for other departments as to the meaning of the clauses of the Bill (while still in production and passage) and the Act (subsequent to its passage). However, DExEU advised that it:

"..is not aware of any particular pieces of guidance that meet the descriptions given in these requests."

12. DExEU noted that the complainant had assumed that consolidated guidance has been produced setting out criteria for assessing the meaning of various specific terms in the Act. As stated, it is not aware of such particular guidance. Notwithstanding this DExEU considers that it holds guidance within the scope of the request.

13. In respect of point 5 of the request DExEU advised the Commissioner that:

"..read strictly, it proceeds on a misunderstanding as 'necessary' is not a test found in section 8 of the Act and so the department would have no reason to have undertaken the exercise of identifying what retained EU law it is 'necessary' to amend."

14. DExEU went on to explain that it, nevertheless, chose to interpret point 5 as a request for a list of retained EU law which the Government considers appropriate to amend (or repeal or revoke). However, when using this interpretation, DExEU advised the Commissioner that no such single list has ever been created nor would any such list be definitive at any given moment. The reason given for this is that as the process of identifying the appropriate changes to be made to retained EU law has been ongoing since the referendum and continues to be undertaken across government following developments in negotiations.

15. With regard to point 7 of the request DExEU explained that it has not generally been the role of DExEU to consult with external stakeholders on appropriate amendments to the retained EU law. However, DExEU is directly responsible for a very small proportion of retained EU law.

Would the cost of compliance exceed the appropriate limit?

16. DExEU went on to explain that reviewing all of the guidance (points 1-4) would be:

"a very considerable undertaking as the department does not necessarily store all such guidance in a single place, but it is thought to extend to thousands rather than hundreds of pages. The process of

locating all the guidance issued, identifying which elements of that guidance fell within the scope of the request would undoubtedly require the deployment of a number of senior staff... for some days, both legal and professionals, as well as some administrative support for searching through the files held across the department."

17. Following the Commissioner's request for further detail DExEU added that its 'desk leads' would need to search all electronic correspondence and documents held by the departments for which they are responsible. There would be no easily definable search term by which officials could quickly reduce the number of documents as no singular identifier exists. Therefore, DExEU explained:

".. officials would need to trawl through the entirety of their correspondence using an unknown number of search phrases to look for the information. The initial findings would then need to be sifted to ascertain which were actually relevant to the request. It is estimated that this sift would be a considerable exercise as there are so many possible search terms, and many are used with great frequency in discussions about EU Exit secondary legislation."

18. DExEU advised the Commissioner that even after the searches detailed above, there would be no certainty that the list produced would be exhaustive. The search could not be 100% reliable due to its complexity in that new deficiencies were discovered following the initial conclusion of negotiations and that new EU laws are still being introduced whilst the UK remains a member of the EU.

19. DExEU explained that in respect of point 5 and point 6, which it describes as a 'subset' of point 5, it 'may hold' a great amount of information within the scope of the points. DExEU used the example that it may hold lists provided by departments, or teams within departments, of the pieces of retained EU law they consider appropriate to amend, repeal or revoke. It went on to explain:

"... no attempt has been made to ascertain what lists along such lines are held across the Department as there are a very great number of places where such lists might have been received. Again, the process of even identifying such information would be enormously time consuming as there are multiple areas of DExEU which have regular dealings with other departments on their exit plans."

20. In respect of point 7 DExEU again advised the Commissioner that there is no "obvious straightforward way of determining what would be within the scope of the request". Consequently DExEU stated that a very large manual search of the documents it holds would be required.

21. In summary, DExEU considers that to comply with the request would involve a vast amount of legal and official time and effort to locate

information that it knows is held and to identify whether other information that may fall within the scope of the request is held. It confirmed that its estimate is based on the quickest method of locating the requested information:

"... in so far as that can be ascertained from the vast scope of the request and the information that could potentially be identified as in scope."

22. The Commissioner asked DExEU if a sampling exercise had been undertaken. DExEU referred to collating some information in preparation for its initial response to the complainant. It determined at the time of the internal review that section 12 should have been applied.
23. In regard to the first four elements of the request DExEU advised the Commissioner that it considered a sampling exercise to demonstrate a calculation of cost impacts on the department would not be 'sensible and realistic' as the type and volume of documents in which information may be found would vary according to the departmental lead involved and similarly a small sample would not be representative of the whole. The significant variation between the results from one departmental lead compared to another would result in a sample search not providing a reliable estimate of the extent of a full search across DExEU.
24. DExEU went on to explain that a Grade 7 policy official would be required to coordinate this work, along with a legal official at the same grade, and a minimum of 20 desk officer officials in teams that engaged with departments during the period covered in the request. This would equate to 72 hours work for two Grade 7 officials over five days and 420 hours work for twenty Higher Executive Officers for three days. A total of 492 hours at a cost of £12300, far exceeding the £600 cost of compliance limit.
25. DExEU advised the Commissioner that the further requests at points 5, 6 and 7 would necessitate a repeat of the above process resulting in additional equivalent costs.
26. The Commissioner accepts that DExEU has faced difficulties in conducting a representative sampling exercise in the circumstances of this request. She also notes that the formulation of an exact calculation is not required in the application of section 12. She considers that DExEU has provided an explanation which is sufficient to demonstrate the scope of the work required and the time which would be necessary to undertake that work.
27. The Commissioner understands the complainant's assumption in points 1 – 4, that consolidated guidance has been produced by DExEU setting out criteria to be used in identifying a failure or deficiency of retained EU law. The Commissioner considers it to be a reasonable assumption that

general guidance would have been created and stored accessibly by DExEU. Notwithstanding this, it is clear from DExEU's submission that this is not correct. It appears that DExEU has provided a considerable amount of guidance falling within the scope of the request including both general guidance, and in answer to specific queries, which is spread throughout DExEU and therefore not easily located.

28. With regard to points 5 and 6 of the request the Commissioner again accepts as reasonable the complainant's assumption that a list, as specified in the request, would have been collated by DExEU. As DExEU has confirmed to the Commissioner that no such list has been created she accepts that the process detailed above would apply in a similar fashion. Similarly, in respect of point 7 of the request, the information sought would require the same laborious manual searches to determine the location of any information captured in the scope of the request.
29. Following from the above the Commissioner is satisfied that DExEU is not obliged to respond to the request in reliance of section 12(1).

Section 16 – advice and assistance

30. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. In general, where section 12 is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit. However, as in this case, the Commissioner recognises that where a request is far in excess of the limit, it may not be possible to provide any useful advice to enable refinement of the request. In this case, the information that could be relevant to the request in points 1 – 6 is not indexed or filed precisely as described by the complainant which results in the extensive scope of the searches necessary to identify and locate the information in the scope of the request.

Other matters

31. The complainant explained to the Commissioner that he was deeply dissatisfied by the significant delay by DExEU in responding to the Commissioner's request that it should conduct an internal review, and the content of the response, which relied on new grounds for withholding disclosure.
32. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to

be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.

33. In this case the complainant submitted his request for an internal review on 4 May 2018. DExEU informed him of the outcome of the internal review on 23 October 2018, almost six calendar months later. The Commissioner clearly considers this to be an unsatisfactory period of time.

Right of appeal

34. 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

35. 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.
36. 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
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