Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **9 October 2019**

Public Authority: **Home Office**
Address: **2 Marsham Street**
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested from the Home Office, copies of any communications sent by a former Home Secretary which mention or refer to 'Arron Banks' or '*Leave.EU'*. The Home Office would neither confirm nor deny whether it held the requested information, citing the exemption at section 35(3) (formulation of government policy) of the FOIA.

2. The Commissioner's decision is that although the exemption at section 35(3) of the FOIA is engaged, the public interest in favour of confirming or denying whether or not the Home Office holds the requested information is greater than the public interest in maintaining the exemption.

3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.

   - Confirm or deny whether information falling within the scope of the request is held, and either disclose or issue a valid refusal notice in respect of any information identified.

4. The Home Office must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. Arron Banks is a British businessman and co-founder of the *Leave.EU* campaign. He has made significant financial donations to causes supportive of the UK leaving the EU and has been publicly accused of accepting funding from overseas sources.

6. In September 2019, the National Crime Agency (NCA) published a statement[1] following the conclusion of its investigation into concerns raised over the source of Mr Banks' funding. The NCA's investigation found no evidence that Mr Banks had committed any criminal offences.

Request and response

7. On 12 October 2018, the complainant wrote to the Home Office and requested information in the following terms:

> *"This is a request for information under the Freedom of Information Act. Please note there are several parts to this request:*
>
> *1) From January 2016 to when she left the Home Office, I would like to request all internal correspondence and communications from the previous Home Secretary Theresa May, as well as her ministerial office, that mention or refer to Leave.EU and Arron Banks.*
>
> *2) From January 2016 to when she left the Home Office, I would like to request all external correspondence and communications from the previous Home Secretary Theresa May, as well as her ministerial office, that mention or refer to Leave.EU and Arron Banks.*
>
> *By 'correspondence and communications', I define this as including, but not limited to, the following:*
>
> *- Emails*
> *- Letters*
> *- Briefings*
> *- Case files*
> *- Research documents*
> *- Memos*
> *- Minutes of meetings*

[1] https://nationalcrimeagency.gov.uk/news/public-statement-on-nca-investigation-into-suspected-eu-referendum-offences

I would like to receive this information in an electronic format."

8. The Home Office responded in a letter dated 23 October 2018 (but sent on 30 October 2018). It would neither confirm nor deny (NCND) whether it held the requested information, citing the exemption at section 35(3), by way of section 35(1)(a) (formulation or development of government policy) of the FOIA.

9. The complainant requested an internal review on 18 December 2018, and the Home Office provided the outcome on 10 January 2019, upholding its application of section 35(3) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 10 April 2019 to complain about the way her request for information had been handled.

11. By way of background, the complainant explained that she was aware of media reports[2] alleging that Theresa May vetoed an investigation by the Security Services into Mr Banks, when she was Home Secretary. In making her request, the complainant said she wished to establish whether these reports had any merit.

12. The complainant argued that the Home Office had failed to demonstrate that the requested information related to the formulation or development of government policy, what the act of confirming or denying whether it held the information would reveal and why the public interest in applying section 35(3) was stronger than that in confirming or denying whether or not it held the information.

13. The analysis below considers the Home Office's application of section 35(3) to issue a NCND response. The Commissioner has not found it necessary to establish whether or not the Home Office holds the requested information in order to reach her decision.

[2] See, for example, https://www.theguardian.com/politics/2018/sep/23/tom-watson-uk-on-frontier-of-new-cold-war-that-russia-is-winning and https://www.dailymail.co.uk/news/article-6343905/How-Arron-Banks-afford-bankroll-Brexit.html

Reasons for decision

Section 35 – formulation of government policy

14. Section 1(1)(a) of the FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the duty to confirm or deny. However, there are exemptions from the duty to confirm or deny.

15. Section 35(3) of the FOIA states:

> "*The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).*"

16. Therefore, in order to engage section 35(3) of the FOIA, the Home Office must demonstrate why the requested information, if held, would engage one (or more) of the main limbs of section 35(1).

17. The Home Office cited section 35(1)(a) of the FOIA, which states:

> *"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-*
>
> *(a) the formulation or development of government policy…".*

18. The Home Office explained to the Commissioner that, if held, information within the scope of the request would relate to policy formulation and development on the UK's relationship with the EU.

> *"We would argue that any communications or other information as specified in the request that mentions or refers to either 'Leave.EU' or 'Arron Banks' would by definition relate directly to the question of whether the UK should or would leave the EU, given that that is the whole purpose of Leave.EU and that Mr Banks was its co-founder, or indirectly by referring to the referendum or the activities of pressure groups in the period leading up to it. The request specifies internal and external communications or other information involving the then Home Secretary or her Ministerial office (as opposed to the Home Secretary acting in a personal or party political capacity). Any such information would, therefore, relate to or reflect the Government's position on leaving the EU …*
>
> *The request is for information dating between January 2016 and the date Theresa May left the Home Office on 12 July 2016. This was the period leading up to and just after the referendum on membership of*

the EU, which took place on 23 June 2016. We consider that during the whole of this period the Government's policy on membership of the EU, its planning for the result and its plans on how to deal with the eventual result were subject to formulation and development.

...

The referendum, the result and the decision to leave the EU have constituted the most important policy issue facing the UK in recent years. The Government's policy has been subject to formulation and development throughout the period leading up to and after the referendum and that remains the case. It is barely conceivable that any information as specified in the request would not relate in broad terms to the issue of leaving the EU and hence to a matter of continuing formulation and development.

We note the Tribunal's view that policy formulation and development is not one which is a seamless web, but given the magnitude and complexity of the issue it is unavoidable that the Government's policy in relation to leaving the EU will be in a state of formulation or development for a sustained period."

19. The Commissioner's guidance on section 35[3] clarifies that to engage the exemption, information need only "*relate to*" the formulation or development of government policy, and that the information does not itself have to be created as a result of that activity. The guidance clarifies that section 35(1)(a) should be interpreted broadly and that it is capable of catching a wide range of information. Information may "*relate to*" the formulation or development of government policy due to its original purpose when created, or its later use, or its subject matter. Any significant link between the requested information and the formulation or development of government policy will be enough to engage the exemption.

20. On the basis of the above clarification, and on the Home Office's explanation of how the information, if held, would relate to the formulation and development of government policy on the UK's relationship with the EU, the Commissioner is satisfied that section 35(1)(a) of the FOIA would be engaged by the information, if held. Consequently, she is satisfied that section 35(3) is engaged.

[3] https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf

Public interest test

21. Section 35(3) of the FOIA is subject to a public interest test and therefore the Home Office may only issue a NCND response if the public interest in neither confirming nor denying whether information is held outweighs the public interest in knowing whether information is held.

22. The Commissioner's guidance on section 35, a class-based exemption, notes that:

> "*Generally speaking, there is no inherent or automatic public interest in withholding information just because it falls within a class-based exemption. Departments will need to consider the content and sensitivity of the particular information and the effect its release would have in all the circumstances of the case before they can justify withholding the information*".

23. In accordance with her guidance, when considering the public interest in maintaining exemptions, the Commissioner considers that it is necessary to be clear what they are designed to protect.

24. The purpose of section 35 is to protect good government, and section 35(1)(a) functions 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. In particular, it ensures a safe space to consider policy options in private.

25. When considering the public interest, the Commissioner's guidance notes that:

> "*Arguments must focus on the effect of disclosing the particular information in question at the particular time of the request, rather than the effect of routine disclosure of that type of information*."

Arguments in favour of confirming or denying

26. The Home Office told the complainant that there is a general public interest in transparency and openness in government. Such openness can increase public understanding, inform public debate and maintain public trust. In the context of this request, it recognised that there "*might be*" a legitimate public interest in the disclosure of information about such communications as were referred to in the request.

27. In its submissions to the Commissioner, the Home Office acknowledged the general public interest in openness and transparency with regard to the government's policy on leaving the EU.

Arguments in favour of maintaining the exemption

28. The Home Office told the complainant:

> *"The most prominent reason to neither confirm nor deny that we hold the information requested is that doing so would impede the future formulation of government policy. This is because disclosing whether we hold or do not hold the information would indicate a detail about the extent to which a Minister had had discussions in relation to a matter of policy formulation This would tend to inhibit Ministers from engaging in free and frank debate in the future. This would not be in the public interest."*

29. The Home Office also told the complainant that it disagreed with her contention that confirming or denying would "… *help dispel the very serious rumours and allegations that the former Home Secretary vetoed a probe into Arron Banks and his activities prior to the 2016 EU Referendum*", and furthermore that it was not incumbent on the Home Office to do so.

30. The Home Office told the Commissioner that there is a strong public interest in protecting the 'safe space' in which government policy formulation and decision making takes place. It quoted the Tribunal in *Department of Health v Information Commissioner* (EA/2013/087) as saying:

> *"A safe space is needed in which policy can be formulated and developed in robust discussions, where participants are free to "think the unthinkable" in order to test and develop ideas, without fear of external interference or distraction, whether as a result of premature and lurid media headlines or otherwise."*

31. The Home Office also argued that the age of the information specified in the request was relevant to public interest considerations:

> *"… any information would have been relatively recent at the date of the initial request. Ministers must be able to consider issues such as those described in the request without necessarily confirming or denying whether the department holds information mentioning or referring to specific matters characterised by key words and without the external distraction which premature confirmation or denial under the FOIA would create".*

Balance of the public interest

32. The Home Office argued that, taking the above into account, the public interest in maintaining the exemption was stronger than that in confirming or denying whether it holds the requested information. The complainant disagreed.

33. In reaching a conclusion on the balance of the public interest, the Commissioner has considered the public interest in the Home Office confirming whether or not it holds the requested information. The Commissioner has also considered whether confirmation or denial would be likely to harm the policymaking process (which would be counter to the public interest) and what weight to give to these competing public interest factors. In reaching a decision, the Commissioner has considered arguments put forward by the Home Office and by the complainant. She has also considered the ICO's guidance on section 35.

34. On the public interest in section 35(3), the guidance states:

> "*If* [a public authority] *wishes to NCND, it must be able to explain in the public interest test exactly what a hypothetical confirmation or a hypothetical denial would reveal in the context of the particular request, and why at least one of these responses would be harmful to good government.*
>
> *What a hypothetical confirmation or hypothetical denial would reveal will depend on the phrasing of the request. Whether information is actually held is not relevant*."

35. The Home Office has argued that a hypothetical confirmation would reveal the extent to which a Minister had had discussions in relation to a matter of policy formulation, and that this would have an inhibiting effect on free and frank debate in future.

36. The Commissioner has considered the precise wording of the request. Although the Home Office had referred to the importance of Ministers being able to consider "…*issues such as those described in the request*", she notes that the request contains no reference to any "*issues*", and it does not specify in any way what the communications should be about, merely that they must refer to, or mention, 'Arron Banks' and '*EU.Leave'*. Therefore, on the question of what would be revealed, a hypothetical confirmation would mean that Theresa May, or her ministerial office, had sent one or more communications which mentioned or referred to 'Arron Banks' or '*EU.Leave*'. It would not reveal anything about the nature of those communications, or indicate the extent to which they pertained directly to government policy formulation.

37. Given Mr Banks' high profile and public involvement in the Brexit movement, it is to be expected that he might send correspondence on the subject, the receipt of which would need to be acknowledged, or that he might be included on a list of interested parties and stakeholders to whom Brexit–related updates and other material were routinely circulated. Both of these eventualities would be included in a hypothetical confirmation that information was held, meaning that it is

simply not possible to draw any conclusion as to the context in which the names specified in the request, were mentioned.

38. As to the age of the requested information, the Home Office has commented that it was "*relatively recent*". In fact, the request concerns a period between January and July 2016, and was made more than two years later, in October 2018. In view of that, and the pace at which matters moved on around the time of the Referendum, the Commissioner has placed limited weight on this argument.

39. Taking all the above into account, and while she acknowledges the general public interest in protecting the integrity of the government policymaking process, the Commissioner is unable to accept that a hypothetical confirmation in this instance would reveal sensitive information which would have the harmful effect on government policymaking that the Home Office has outlined. Had the request been more specific as to the subject matter of the communications being sought, then it may have been the case that confirming or denying might have revealed something more sensitive, which could have had an adverse impact on government policymaking. As it is, the Home Office has sought to invoke safe space arguments, without clearly explaining how that safe space would be breached in any meaningful way, by confirmation or denial in this case.

40. In view of this, and taking account of the strong and legitimate public interest in the openness and transparency of public authorities, the Commissioner considers that the public interest in knowing whether or not the requested information is held is greater than that in maintaining the exemption from the duty to confirm or deny. It follows that the Commissioner's decision is that the Home Office was not entitled to issue a NCND response under section 35(3) of the FOIA, and it must now take the steps specified in paragraph 3.

Other matters

41. The Home Office noted what it considered to be an excessive delay between its provision of the internal review, and the complainant referring her complaint to the ICO. It also commented on the length of time it then took the Commissioner to approach the Home Office about the complaint.

42. The Commissioner recommends that those wishing to raise a concern with the ICO do so within three months of receiving their final response

to the issues raised[4]. The complainant's approach to the ICO therefore fell within that timeframe.

43. The Commissioner aims to reach an outcome in 90% of concerns cases within six months of receipt. This case has been determined within that timeframe.

[4] https://ico.org.uk/about-the-ico/our-information/service-standards/

Right of appeal

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

45. 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.

46. 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 .....

Samantha Bracegirdle
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