

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 October 2022

**Public Authority:** Department of Health and Social Care  
**Address:** 39 Victoria Street  
London  
SW1H 0EU

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of the ministerial diary of the Rt Hon Matt Hancock MP during a 17 month period when Mr Hancock was Secretary of State for Health. The Department of Health and Social Care ("the DHSC") relied on section 14(1) of FOIA (vexatious) to refuse the request on the grounds that complying would impose a grossly oppressive burden.
2. The Commissioner's decision is that the DHSC is entitled to rely on section 14(1) of FOIA to refuse the request.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 29 March 2021 the complainant requested information of the following description:  
  
"This is a request for information under the Freedom of Information Act. I would like to request the following information: From 1st December 2019 to the day this request is processed, please provide a copy of Secretary of State for Health and Social Care Matt Hancock's ministerial diaries."
5. On 28 April 2021, the DHSC responded. It relied on section 14(1) of FOIA to refuse the request.

6. The complainant requested an internal review on 14 May 2021. The DHSC sent the outcome of its internal review on 27 July 2021. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 7 September 2021 to complain about the way her request for information had been handled.
8. During the course of the investigation, the Commissioner made efforts to encourage both parties to compromise on the scope of the request, to allow some information to be disclosed. Unfortunately, neither party was willing to compromise.
9. The Commissioner considers that the scope of his investigation is to determine whether the request was vexatious.

### **Reasons for decision**

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10. Section 14(1) of FOIA allows a public authority to refuse a request that is vexatious.
11. Section 12 of FOIA allows a public authority to refuse a request if the cost of complying would exceed the appropriate limit, however FOIA caselaw provides that a burdensome request can also be considered to be vexatious if complying with it would impose a grossly oppressive burden upon the public authority.
12. As a general rule, the Commissioner encourages public authorities to rely on section 12 to refuse burdensome requests, rather than section 14. However, he accepts that there are some requests that could theoretically be responded to without breaching the cost limit, but which would, in practice, impose a particularly heavy burden upon a public authority which attempted to comply. These are usually requests where the requested information would require significant amounts of redaction (an activity a public authority is not permitted to take into account when estimating the cost of complying with a request).
13. The Commissioner therefore accepts that a request may impose a grossly oppressive burden if three criteria are satisfied:
  - The overall volume of material falling within scope is substantial; and

- The public authority can demonstrate that it has genuine concerns about sensitive information within that material; and
  - The exempt and non-exempt information cannot be easily separated.
14. Unlike with section 12, there is no formal limit beyond which a request will become grossly oppressive – although the Commissioner would usually expect the burden to exceed the cost limit by a significant margin.
15. When deciding whether a particular burden is grossly oppressive, the Commissioner will take into account the time and cost required in order to comply, but he will also balance that against the size of the public authority in question and the value of the information that falls within scope.

### **The complainant's position**

16. The complainant did not appear to dispute any of the DHSC's estimates of the burden of complying with the request. Instead she argued that any burden was outweighed by the public value of the information. She argued that it was:

“absolutely essential for the public to know - in full detail - the calls, events and meetings that took place across the year when the pandemic gripped the UK and beyond. It is of absolute interest to disclose the ministerial diaries in order for the public to scrutinise how ministers handled the pandemic on a day to day level. The pandemic has had a huge impact on people's lives, and it is of vital interest to see what internal and external ministerial meetings took place, as well as the telephone and Zoom calls taken by ministers.”

17. In her submissions to the Commissioner, the complainant also pointed to the government's transparency returns – arguing that these were insufficient. She pointed to several high profile cases where ministers had had undisclosed conversations with lobbyists that had not appeared in their transparency returns.
18. Finally, the complainant noted that the Commissioner had previously ordered disclosure of ministerial diaries.

### **The DHSC's position**

19. The DHSC originally informed the Commissioner that responding to the request would take in excess of 335 hours. It explained that the way the diary was organised often made the process of redaction difficult and that each individual would need to be checked against various sources

to see what could and could not be disclosed. In total, the DHSC argued that a total of 13 separate exemptions could apply across the various diary entries – all of which would require individual checking.

20. Having received the DHSC's submission, the Commissioner wrote back to say that, whilst he accepted that the request covered a considerable time period, the DHSC's arguments fell short of justifying the burden it was claiming. In particular, the Commissioner noted that:
  - The DHSC did not appear to have considered converting the Outlook calendar (which was the format in which the information was held) into a spreadsheet – which would have cut the amount of time needed to search the individual entries considerably.
  - The burden had not been properly quantified as, for some reason, the DHSC had only included appointments on weekdays.
  - Some of the arguments the DHSC had relied upon to explain why exemptions were engaged appeared, in some cases, to be implausible.
  - The information the DHSC was claiming it would need to check for redactions was information that did not necessarily fall within the scope of the request (such as the complete list of attendees for each meeting and their contact details).
  - The DHSC had included, in its estimate, time spent redacting information which was already reasonably accessible – an activity which seemed unnecessary.
21. The Commissioner therefore asked the DHSC to carry out a proper sampling exercise, making use of electronic search methods (such as the "Find and Replace" functionality in Excel), to get a more accurate estimate of the burden of complying with the request. He also asked the DHSC to reassess the potential exemptions that would apply and provide examples of the information that would require redaction.
22. The DHSC provided a further submission to the Commissioner in which it now cut its estimate of the overall burden down from 335 hours to 119.
23. The DHSC explained that it had carried out a sampling exercise based on Mr Hancock's diary for the first two weeks of March 2020. It informed the Commissioner that it had taken two hours to review the 169 entries within that period, but that, because this had been a "fast and intense" review, it considered that it would be unable to sustain such a pace over a longer period, therefore, in order to review every single entry that would fall in scope, a central estimate of three hours to review every two weeks' worth of diary entries was more realistic.

24. On top of that, the DHSC estimated that it would require a further 15 minutes, physically to apply each redaction and to mark the appropriate exemption, for every two weeks' worth of entries.
25. On the basis that 73 weeks of entries fell within the scope of the request, the DHSC therefore estimated that complying with the request would take around 119 hours of staff time.
26. The DHSC further explained that the diary was very much a working document – with numerous members of the private office adding or amending entries. This, along with the particularly fast-moving nature of the pandemic, had meant that diary entries were not recorded in a standard format and that the lack of standardisation slowed down the process of identifying exempt material considerably.
27. The DHSC noted that a number of diary entries contained various items of personal data. This could include the names of junior officials in the private office, the names of constituents, private phone numbers for some of the individuals Mr Hancock was scheduled to call and his own personal and departmental email addresses. This information would, the DHSC argued, be exempt under section 40(2) of FOIA (third party personal data).
28. As well as this information, the DHSC also argued that it would be entitled to rely on section 38 of FOIA (health and safety) to withhold some information – mostly related to logistics. The DHSC pointed out that, since the death of Sir David Amess MP, there was an increased sensitivity about information concerning MPs' movements. As a member of the Cabinet and, for most of the pandemic, one of the Government's most high-profile cabinet members, the DHSC noted that Mr Hancock would have been likely to have faced additional risks – therefore information about his precise whereabouts and movements should be withheld.
29. In addition, the DHSC noted that ministerial diary recorded certain meetings (such as meetings of the private office) that occurred regularly, but which Mr Hancock would not necessarily always attend. As meetings that Mr Hancock did not attend would fall outside the scope of the request, the DHSC argued that it would need to check each such meeting individually to determine whether Mr Hancock had or had not attended.
30. Finally, the DHSC argued that it was entitled to rely on section 21 to withhold some of this information, noting that:

“we would like to highlight external meetings are published in the transparency returns for Ministerial diaries. Furthermore, there are

many other meetings from this period that are in the public domain, There are 36 entries [within the sample period] that fall into that category. As mentioned, undertaking the work to comply and respond to this request would require a significant amount of time. The time spent on this would not save any time on compiling the Transparency Returns for Ministers' diaries due to the specific requirements of the returns as set by the Cabinet Office – therefore, work would be duplicated. This adds to our argument that this request is unduly burdensome”

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

31. In the Commissioner's view, complying with this request would impose a grossly oppressive burden upon the DHSC and the request is therefore vexatious.
32. As the complainant has noted, the Commissioner has dealt with a number of cases involving requests for ministerial diaries. Most famously a 2011 request for then-Secretary of State for Health Andrew Lansley's ministerial diary – a case which ultimately ended up at the Court of Appeal. In those cases, the Commissioner has mostly ordered disclosure of the diaries, but they have generally involved shorter time periods (the Lansley case sought a year's worth of entries, a later case involving Jeremy Hunt sought only seven months' data).
33. The Commissioner is not convinced that the DHSC's estimate of 119 hours' work to comply with this request is one that is robust. Whilst he notes that, as a result of carrying out a proper sampling exercise, the DHSC has cut its original estimate almost threefold, the Commissioner still considers that the DHSC is over-inflating the burden by including activities that he does not consider are necessary.
34. When a public authority receives a request under FOIA it must disclose all the information it holds, unless an exemption applies – in which case the public authority may withhold it. The key words here are that the DHSC “must” disclose information, but that it “may” withhold some.
35. There is nothing within FOIA that prevents a public authority from disclosing information that is not within the scope of the request. Nor is a public authority required, by FOIA, to withhold every piece of information that is covered by an exemption.
36. In addition, the Commissioner is not satisfied that the DHSC has fully explored the potential for automating its review of individual entries. Whilst the Commissioner accepts that not all entries in the diary follow a standard format, the sample of the diary provided would indicate that there are still certain key words that the DHSC could search for to find

entries that would need redacting. This would not guarantee that all such entries would be identified via this process, but even if the process was only 80% effective, it would still represent a considerable reduction in the average amount of time the DHSC would need to review each individual line.

37. That being said, the Commissioner does accept that the DHSC has valid concerns about exempt information within the diary.
38. In the wake of the assassination of Sir David Amess MP, there is an increased concern about the safety of all MPs – particularly high profile MPs. Whilst the Commissioner recognises that the information within the diary shows where Mr Hancock was, as opposed to where he will be in future, he nevertheless accepts that disclosure of the entire diary would reveal patterns of behaviour (such as the time the minister was collected from his home) that might allow a malicious individual to predict, with a reasonable degree of certainty, where Mr Hancock might be at a particular time of day (bearing in mind that Mr Hancock was still a minister at the point the request was responded to). There is also information such as phone numbers for drivers and registration plates of vehicles in which Mr Hancock would be travelling – disclosure of which would present a risk to the drivers of such vehicles and their occupants.
39. The sample of the diary provided to the Commissioner indicated that the DHSC may have over-applied this exemption. For example, the DHSC indicated that it wished to withhold details of Mr Hancock's journeys to the House of Commons. The Commissioner considers that the mode of transport for such a journey would be obvious and, having reviewed several similar entries does not detect any obvious pattern that would provide any greater precision as to Mr Hancock's likely whereabouts than could be deduced from facts in the public domain (such as the Parliamentary timetable).
40. Nevertheless, the Commissioner does accept that the DHSC would need to review diary entries to determine whether their disclosure would present a risk to Mr Hancock's safety. It is not necessary for the DHSC to justify the use of section 38 on an entry by entry basis – it need only demonstrate that at least some entries would be caught.
41. Equally, the Commissioner also accepts that there is a considerable amount of personal data scattered throughout the diary. This includes the names of members of the private office and constituency contacts, as well as private email address and mobile phone numbers.
42. Whilst the Commissioner accepts that there is a considerable amount of such data, he does consider that automated methods could be used to speed up the process of identification. For example, searching for all

cells within the requisite fields for the number "07" should identify all mobile numbers – which can then be removed. In addition, whilst there will be a large number of different names to be removed from such a long period of diary entries, once it is determined that a name should be redacted, the search functionality within Excel can be used to identify all the entries including that name.

43. Email addresses are likely to be much trickier to remove as the "@" symbol often appears in relation to the location of a particular event – however the sample the DHSC has provided indicates that there are certain email addresses that appear frequently, and these could be removed using the process outlined above.
44. These processes are iterative ones and therefore the Commissioner accepts that the time savings may not have been as obvious from a relatively narrow sample. However, given the way the diary is structured, the Commissioner does consider that the process could be completed more quickly than the DHSC is currently estimating.
45. Nevertheless, whilst the Commissioner considers that the DHSC's estimate is too high, given the breadth of the information involved, even with the methods outlined above, he remains unconvinced that the burden of responding to this request could realistically be brought down to a reasonable size.
46. The sample that the DHSC carried out identified 169 appointments within a two-week period. Assuming that this is a typical sample (and the first diary extract the DHSC provided suggests this is a reasonable figure), that would suggest that there are over six thousand diary entries within the overall scope of the request.
47. The DHSC's sampling exercise would indicate that it took more than a minute per entry to redact sensitive information. In decision notice FS50828379, the Commissioner rejected the Ministry of Housing, Communities and Local Government's central estimate of 1 minute per entry as too high and for the reasons given above, he is not satisfied that one minute per line is a reasonable estimate in the present case either.<sup>1</sup>
48. However, even if the DHSC were able to review each entry in 30 seconds, complying with the request would still take in excess of 50 hours of staff time. Even with all the savings identified above, the

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615867/fs50828379.pdf>



Commissioner is sceptical that that central average could be reduced much below 30 seconds per line and, reviewing every single diary entry within the ordinary section 12 cost limit (£600 or 24 hours of staff time) would require each entry to be reviewed in 15 seconds or fewer – which the Commissioner considers to be unrealistic.

49. The Commissioner is therefore satisfied that the request is exceptionally burdensome and has gone on to consider whether there might be any mitigating factors.
50. The Commissioner accepts that the nature of the request would mean a considerable role for the Private Office in responding (and the DHSC was at pains to stress how disruptive such a request would be on the work of the Private Office), although given the size and resources available to the DHSC, he can only afford a limited amount of weight to such an argument. Were the estimated burden of the request to fall only just above the usual FOIA cost limit, the Commissioner might not have been persuaded that such a burden was wholly disproportionate – however he is satisfied that, in this case, the burden is substantially higher than that and would require a diversion of resources that no public authority could easily accommodate.
51. Lastly, the Commissioner has gone on to consider whether, burden notwithstanding, the request carries an exceptional public value.
52. The Commissioner recognises that the period covered by the request is one that is historically significant. Given Mr Hancock's central role in the government's response to the pandemic, there is a reasonably strong public interest in understanding how he allocated his time during this period. This public interest is likely to be particularly strong during the period immediately prior to the first lockdown or in the build up to the vaccine roll-out – where the government's actions have been subject to both praise and criticism.
53. In addition, the Commissioner notes that the complainant has raised some valid concerns about the limitations of the DHSC's transparency returns. Given widespread press scrutiny about the handling of contracts to provide personal protective equipment during the early days of the pandemic, there is a public interest in understanding who Mr Hancock met with.
54. As has been covered in the previous diary cases, the Commissioner accepts that there will always be some phone calls that were unscheduled and so do not appear in the diary. However, the fact that the diary is not a perfect record of events does not mean that it would not provide a more complete picture than is already in the public domain.

55. The complainant has argued that this makes taking on the burden of her request “absolutely essential” and “of vital interest.” The Commissioner considers that such comments lack a sense of perspective.
56. The period covered by the request includes a period during which the DHSC and Mr Hancock were co-ordinating a national response to a highly contagious virus that was killing hundreds of people every day. On the day the complainant submitted her request, 58 deaths from Covid-19 were recorded in England – although two months previously the seven day rolling average had been more than ten times higher.<sup>2</sup> The general “stay at home” order was lifted on the day the request was made, but non-essential businesses remained closed and people were not allowed to gather indoors.<sup>3</sup> In this context, phrases such as “absolutely essential” had particular meanings and it is difficult to see how information on lobbying would justify such a description.
57. The Commissioner is satisfied that responding to the request would impose a burden on the DHSC of around 50 hours’ work or more. Whilst the request is not without value, it is difficult to envisage a value that would justify such a burden, even in ordinary conditions. In the exceptional conditions that prevailed at the point the DHSC responded to the request, such a burden would be wholly disproportionate to any value that could be received from responding to that request.
58. The Commissioner is therefore satisfied that the request would have imposed a grossly-oppressive burden and was thus vexatious. The DHSC was therefore entitled to rely on section 14(1) of FOIA to refuse it.

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<sup>2</sup> <https://www.gov.uk/government/publications/covid-19-reported-sars-cov-2-deaths-in-england/covid-19-confirmed-deaths-in-england-to-31-march-2021-report>

<sup>3</sup> <https://www.gov.uk/government/publications/covid-19-response-spring-2021/covid-19-response-spring-2021-summary>

## Other matters

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59. Whilst it is not necessary for him to make a formal determination of the matter – given that he has already found the burden to be grossly oppressive – the Commissioner has some other observations about the DHSC's estimate of the burden of complying with the request.
60. In most cases the Commissioner accepts that it would be unreasonable to expect a public authority to disclose information that has not been requested or which is exempt. However, there will be cases where the risk of harm, arising from disclosure, is negligible and where removing this information will be thus ultimately be more burdensome than disclosing it.
61. The Commissioner accepts that it is reasonable for the DHSC to withhold information that might place Mr Hancock's safety at risk, or which might invade the privacy of junior officials and it is entitled to consider how burdensome removing this. However, the Commissioner is not convinced it is reasonable for the DHSC to say that it needs to remove information whose disclosure carries no risk. This is a task which simply adds to the burden of complying when no consequences would result if the DHSC decided not to carry it out.
62. The DHSC has argued that disclosure of the material to which section 21 applies would not assist the DHSC in meeting its transparency requirements. The Commissioner accepts that the transparency requirements are a separate process, but this rather misses the point. The DHSC will have to complete its returns whether it discloses the information or not – complying with the request will only impose an additional burden on the DHSC if it chooses to **withhold** information already duplicated in transparency returns.
63. The purpose of section 21 is protect the resources of a public authority by allowing it to decline requests for information that is already available elsewhere. However, the exemption is superfluous in this case because, once the DHSC has extracted all the requested information (exempt or not), which it would be required to do anyway in order to comply with the request, it does not need to spend any extra resources if it simply discloses the information that is already publicly available.
64. The Commissioner is therefore not persuaded that it was necessary for the DHSC to carry out this task in order to comply with the request.
65. Turning to the issue of regular meetings that Mr Hancock may not always have attended, the Commissioner considers that removing such information would also have been an unnecessary task. Whilst a portion of this information may technically fall outside the scope of the request,

the Commissioner considers that it would be reasonably obvious, to anyone looking at the diary, when the meetings that the minister didn't attend would have occurred. Therefore removing such entries serves no useful purpose.

66. The Commissioner does accept that the DHSC might want to clarify that Mr Hancock did not attend every meeting, but it could simply add an explanatory note pointing this out.
67. The Commissioner accepts that, even had the DHSC not carried out these tasks, the burden of complying with this request would still have been grossly oppressive. However, these observations may become more relevant if a similar request were made for a shorter period of diary entries.

## Right of appeal

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68. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

69. 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.
70. 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 .....**

**Roger Cawthorne**  
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**Information Commissioner's Office**  
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