

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2022

Public Authority: Attorney General's Office
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant submitted a request to the Attorney General's Office (AGO) seeking a copy of the Attorney General's ministerial diary for the period February 2020 to March 2021. The AGO refused the request on the basis of section 14(1) (vexatious) of FOIA given the burden in complying with it.
2. The Commissioner's decision is that the AGO is entitled to rely on section 14(1) of FOIA to refuse to comply with the request.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the AGO on 31 March 2021:

'FoI request: From 13th February 2020 to the day this request is processed, please provide a copy of Attorney General Suella Braverman's ministerial diaries.'
5. The AGO responded on 29 April 2021. It refused the request on the basis of section 14(1) of FOIA because of the time and resources that

would have to be expended to review each diary entry for exempt information.

6. The complainant contacted the AGO on 14 May 2021 and asked it to conduct an internal review of its response. She set out why in her view section 14(1) did not apply to her request, focusing on what she considered to be the public interest in the disclosure of the requested information.
7. The AGO informed her of the outcome of the internal review on 14 June 2021. The review upheld the application of section 14(1). The AGO suggested that in accordance with section 16(1) (advice and assistance) of FOIA that the complainant revised her request in a way that allowed it to be processed. The AGO suggested that she could submit a request targeted at events of a particular type, over a significantly reduced period that would reduce the burden on the AGO.

Scope of the case

8. The complainant contacted the Commissioner on 12 September 2021 to complain about the AGO's reliance on section 14(1) to refuse her request. The complainant's submissions to support her complaint are set out below.

Reasons for decision

Section 14(1) – vexatious

9. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
10. In the Commissioner's view, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
11. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by the AGO in this case.

12. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
- The requester has asked for a substantial volume of information **and**
 - the authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner **and**
 - any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.¹

The AGO's position

13. In order to understand the AGO's basis for relying on section 14(1) of FOIA in the circumstances of this request the Commissioner asked it to respond to a number of questions. The Commissioner has set out these questions below and summarised the AGO's response to each question.
14. **Question:** Please confirm how much information falls within the scope of the request.

Answer: In terms of the number of individual diary entries within the requested 59-week period, the AGO estimated that there are 1416 diary entries. It explained that this estimate was based on an average of 24 diary entries per week.

15. **Question:** When previous requests for ministerial diaries have been processed by government departments, the departments in question have exported the information contained in Microsoft Outlook to an Excel spreadsheet to assist with the processing of the request. Please confirm that this method – as opposed to simply reviewing the information within Outlook – has been considered by the AGO.

Response: The AGO explained that the data was exported from Outlook into a table on a Microsoft Word document to speed review.

16. **Question:** Please state the exemptions you consider will apply to parts of the requested information and provide a short justification as to which

¹ This approach is set out in the Commissioner's guidance on section 14(1) of FOIA <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/how-do-we-deal-with-a-single-burdensome-request/#section-12>

sort of material within the diary is likely to engage the relevant exemption and why.

Response: The AGO explained that it considered the following exemptions would be applicable to information falling within the scope of the request:

- Section 24 National Security
- Section 35(1)(a) The formulation or development of government policy
- Section 35(1)(b) Ministerial communications
- Section 35(1)(c) The provision of advice by any of the Law Officers or any request for the provision of such advice
- Section 35(1)(d) The operation of any Ministerial private office
- Section 40 Personal Information
- Section 42 Legal Professional Privilege

The AGO explained that a significant review of the diary entries would be required to determine what parts of the information are exempt and should not be disclosed. It suggested that:

Cabinet and Cabinet Committee meetings would be exempt from disclosure or will in essence provide the subject of ministerial communications. There are also diary entries which relate to matters of national security, which should "also be exempt from disclosure.

A significant proportion of entries contain personal information or refer to the operation of the ministerial private office.

A cross government exercise would need to be undertaken to determine which policy issues remain under development (given the AGO does not lead on any policy).

The AGO explained that by nature of the Attorney's role as a law officer, legal privilege will apply to a significant proportion of entries which reference issues on which Law Officer advice has been sought, of which neither the fact nor the matter can be disclosed. It noted that clause 2.13 sets of the Ministerial Code sets out that 'the fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority'. Disclosure of certain diary entries would disclose issues on which Law Officer Advice has been sought.

17. **Question:** What methods have you considered to remove (or at least substantially reduce) exempt material (for example using a 'Find & Replace' function to remove phone numbers)? How effective have these methods been and why?

Response: The AGO explained that it did attempt to use the 'Find and Replace' function, however the diary is built using manual inputs and

therefore there is a lack of consistency in terms of labelling. The AGO explained that this was especially the case for sensitive information such as national security meetings, which may not be clearly defined. Therefore the AGO explained that processing the request would still require a line by line search to determine the application of any exemptions given the complexity of what should and should not be disclosed. This AGO explained that this search would also require informed input from the Attorney's private office, policy officials and lawyers (advising on legal privilege) in order to understand the relevance of each diary entry.

18. **Question:** What sampling exercises have you carried out to determine the time needed to redact individual entries? Please provide details.

Response: The AGO explained that it had considered a sample of two weeks from the ministerial diary and that each week represented a typical week of diary commitments. In addition, the AGO explained that it had also reviewed a two month period of diary entries as part of its consideration of the request.

The AGO also emphasised that diaries, by their nature, are scattered and the work on this request would require an entry-by-entry analysis. The AGO noted that there will be diary entries which one private office official may review and decide can be disclosed, which are then reviewed with another official who may explain the context behind the entry and thus why it cannot be disclosed. It also explained that extensive legal advice will be needed, per meeting addressing whether exemptions applied due to issues of national security, and/or legal professional privilege. In addition, the AGO explained that extensive engagement would be required with other government departments to ascertain whether there were any exemptions for the disclosure of meetings with other ministers which should be applied, based on the exemption for Cabinet Committees and policy development.

19. **Question:** What is your overall estimate for the total time needed to prepare the diary for disclosure? Please explain how this time estimate has been calculated.

Response: As noted above, the AGO estimated there to be around 1416 entries falling within the scope of this request over the 59 week period it covered. The AGO explained that it could potentially remove 75-100 entries due to holidays over the course of the year, but this would still leave a substantial number of entries.

The AGO estimated that it would take an average of 5 to 10 minutes per entry to consider whether an exemption applies to each entry, although it acknowledged that some entries would take considerably less time where it is immediately obvious that exemption applies. The AGO

explained that this estimate of 5-10 minutes was based on a previous request which sought diary entries for a four month period. The AGO noted that dealing with that previous FOI request took significantly longer than initial estimates with input being needed from a range of officials.

The AGO explained the exercise to answer the previous request was led by a private office official with diary oversight, however, considerable support was needed from lawyers and policy officials to review each entry. As noted above, this included advising extensively, per meeting whether exemptions applied due to issues of national security, and/or legal professional privilege. Additionally, the AGO explained that extensive engagement was required with other government departments to ascertain whether there were any exemptions for the disclosure of meetings with other ministers which should be applied.

In terms of the estimate for this case, the AGO explained that it took an average of 5 minutes per entry, and 1340 entries, which it calculated would amount to 6700 minutes or 111 hours work.

20. **Question:** Are there any other arguments the AGO wishes to put forward to explain why, in all the circumstances, it believed that complying with the request would incur a grossly oppressive burden – bearing in mind the resources available to the AGO and the public value of the information within scope?

Response: The AGO emphasised that it was its view, based on prior experience, that responding to this request would involve an entry-by-entry assessment, applying the relevant exemptions to each entry. It explained that this would have to be undertaken by an official with detailed and sound understanding of the ministerial diary – this therefore narrows the scope of many people who would be qualified to carry out an effective review. The AGO suggested that this would most certainly have fallen to a member of the Private Office team, which is a small team within the AGO, which itself is a small department with just over 50 employees.

The AGO argued that such an exercise would lead to serious disruption for a key AGO function, namely the Private Office and the support offered to ministers to fulfil key and statutory functions. The disruption that would be caused by a FOI request which would exceed the time allowance provided by section 14(1) must be balanced against the wider public interest and objective value of the information to the complainant.

The AGO noted that when it initially responded to the request it suggested to the requester that she submitted a refined request for a shorter timeframe and/or specific type of entry which could potentially

be answered without being burdensome. The AGO explained that following the submission of this complaint to the Commissioner it received such a request from the complainant which it processed and disclosed some diary entries.

The complainant's position

21. The complainant provided the Commissioner with submissions to support her view that section 14(1) of FOIA did not apply. The Commissioner has summarised these submissions below.
22. The complainant explained that she was concerned about the generic response of the AGO. She suggested that if there are data protection concerns then presumably it would be quite straightforward to redact, for example the names of junior officials. She also argued that it was unlikely that lots of other exemptions would be relevant. She highlighted a decision notice issued by the Commissioner which concerned ministerial diaries which found:

‘The Commissioner’s decision is that the diary extracts for the period specified above do not engage section 35(1)(a) and 35(1)(b) of the FOIA, and whilst the extracts do engage section 35(1)(d), the public interest favours the disclosure of much of the withheld information’²
23. The complainant also cited case of the Andrew Lansley diaries, which covered around a year and were about 200 pages long, and were eventually released without the public authority in question (the then Department of Health) citing section 14(1) of FOIA.
24. Furthermore, the complainant argued that even if the processing of this her request did involve the application of numerous exemptions, then in her view there was a significant public interest in the disclosure of the information. She acknowledged that she had asked for information covering an unprecedented time period, but in her view this provided even more reason for the information to be disclosed.
25. She noted that although section 14(1) was not subject to a traditional public interest test, consideration of this provision did require consideration of whether the request had a value or serious purpose in terms of the objective public interest in the information sought. She argued that this request did and provided detailed submissions to support this position which the Commissioner has summarised below.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014731/fs50629605.pdf>

26. Firstly, she argued that disclosure of the information would provide a greater insight into lobbying by external parties. She argued that this was particularly important given both the deficit of transparency information regarding lobbying and in light of recent lobbying scandals.
27. The complainant cited a number of example to support this latter point including David Cameron having a "private drink" with health secretary Matt Hancock and Lex Greensill in 2019.³ The complainant noted that according to the Times, "There are no minutes of Hancock's meeting with Cameron and Greensill. It is not logged in transparency releases and civil servants did not attend."⁴ The complainant argued that it is possible that a ministerial diary would have included a reference to a private drink or meeting. She argued that if ministerial diaries were released, the public can compare them to what is actually logged in transparency releases, and identify ones that are missing.
28. Secondly, the complainant argued that there was a deficit of transparency information in regard to lobbying. She argued that disclosure of ministerial diaries would help rectify the situation, and would go some way in enabling the public and journalists to assess which minister has been lobbied by whom. Not only do ministerial diaries include meetings, but also information on telephone calls arranged.
29. Thirdly, the complainant argued that the government's publication of transparency data has often been criticised for its incompleteness and lack of quality. She suggested that over the years there have been many examples where transparency data had purposefully or accidentally excluded ministerial meetings.
30. By way of examples, she cited amongst others, newspaper reports that health minister Lord Bethell failed to declare 27 of his meetings, which were left off official transparency disclosures for more than a year. Health secretary Matt Hancock also failed to publicly declare meetings with testing firms that later secured millions of pounds worth of Covid contracts.⁵ She also highlighted that in September 2020, Reuters

³ <https://www.channel4.com/news/factcheck/factcheck-qa-the-gaps-in-britains-lobbying-laws> and <https://www.thetimes.co.uk/article/matt-hancock-dragged-into-david-cameron-lobbying-scandal-zq7j60dxk>

⁴ <https://www.thetimes.co.uk/article/matt-hancock-dragged-into-david-cameron-lobbying-scandal-zq7j60dxk>

⁵ <https://www.mirror.co.uk/news/politics/matt-hancock-attended-more-missing-24439919>

reported how the Secretary of State for Trade, Liz Truss had reversed a decision to remove meetings she had with the think tank, the Institute of Economic Affairs (IEA).⁶ The complainant explained that Ms Truss had two meetings and a dinner with the IEA, which was originally declared in government transparency data, but was then deleted by the department in August, arguing that the meetings were held in a 'personal' capacity. The complainant noted that Labour has accused the Minister of circumventing rules designed to stop "secret lobbying" of ministers.

31. The complainant argued that disclosure of the ministerial diaries would greatly help journalists to compare to what extent government transparency data is missing ministerial meetings, particularly in regards to the handling of the coronavirus.
32. Fourthly, the complainant argued that disclosure of the information would help provide a greater insight into how ministers had handled the coronavirus pandemic. This is because a disclosure of the ministerial diaries will enable the public to know who exactly ministers have been communicating with, especially in regards to the awarding of Covid contracts and decisions taken by ministers when handling the crisis. The complainant noted that there have been lots of accusations over cronyism⁷ and that a release of ministerial diaries will inform the public of interactions between ministers and firms who received contracts.
33. In terms of the Attorney General's diary the complainant noted that in May 2020 Suella Braverman faced calls to resign after she defended Dominic Cummings' trip to Durham during the lockdown.⁸ The complainant noted that it was alleged that her intervention undermined the independence of her office as the government's chief legal adviser and put her in an impossible position in relation to any subsequent police inquiry. She argued that the release of the ministerial diaries would allow the public to scrutinise the timeline of events - including any meetings and phone calls - in relation to the Cummings' Durham trip.
34. The complainant also argued that such a disclosure of information would provide very useful information for a Covid inquiry. The complainant noted that in May 2021 there was an announcement of an inquiry into

⁶ <https://www.reuters.com/article/britain-politics-truss/exclusive-uk-trade-minister-reverses-decision-to-remove-think-tank-meetings-from-public-register-idINKBN25U2S2>

⁷ <https://www.bbc.co.uk/news/uk-56319927>

⁸ <https://www.theguardian.com/politics/2020/may/25/attorney-general-faces-calls-to-resign-defends-dominic-cummings-suella-braverman>

the government's handling of the pandemic.⁹ She argued that by having ministerial diaries to hand, it will enable the public to scrutinise in full detail who ministers were meeting at the time - whether internally or externally - and what calls were taking place. The complainant argued that this will help build up a very detailed timeline of events and will also help inform those that are organising the inquiry and those who plan to give evidence to the inquiry.

35. Fifthly, the complainant argued that release of the requested information would enable the public to examine how Suella Braverman had used her time to deal with other important matters. The complainant noted that in September 2020 Suella Braverman clashed with MPs over the government's aim to give itself the power to break international law on Brexit.¹⁰ A release of the diaries may allow journalists and the public to understand the meetings and calls undertaken by Braverman across the months in relation to the internal market bill, and who she consulted with over the legality of the internal market bill.
36. Finally, the complainant argued that the Commissioner had previously concluded that there was significant public interest in the disclosure of ministerial diaries. She cited the case seeking the diaries of a Department for Communities and Local Government minister and noted that the decision notice, in considering the application of qualified exemptions, had concluded:

'70. In the Commissioner's opinion there is a legitimate and strong public interest in the public having knowledge of how Ministers use their time, particularly in the context of carrying out their official duties. Such knowledge has a positive effect by assisting the public in understanding of how public money is spent and whether that spending is both justified and effective.

71. Likewise, the Commissioner considers that the level of transparency gained by disclosing the Minister's diary merits a significantly high weighting in terms of the public interest.

72. What it [the diary of information] does offer, is significant in terms of the public's understanding of how government works and most certainly in how a minister spends his time: It is informative in terms of how the Minister operated and it may assist the public in identifying

⁹ <https://www.bbc.co.uk/news/explainers-57085964>

¹⁰ <https://www.politicshome.com/news/article/braverman-select-committee>

the focus and weight the Minister or his Department has given particular issues over the time period covered by the particular entries'¹¹

37. The complainant argued that such arguments were also relevant to her request.

The Commissioner's position

38. With regard to the three criteria set out above at paragraph 12, the Commissioner accepts that the first one is met. While individual diary entries may well be short or brief, there are still nearly 1340 such entries falling within the scope of this request. In the Commissioner's view this clearly represents a significant volume of information.
39. With regard to the second criterion, the Commissioner notes the exemptions that the AGO has suggested would need to be considered in relation to information falling within the scope of the request. The Commissioner is conscious of the findings in the decision notice referred to by the complainant at paragraph 22 above. However, in the Commissioner's view it is important to remember that each case needs to be considered on its own merits and therefore although the Commissioner concluded that sections 35(1)(a) and (b) did not apply to the information in the scope of that request, this does not automatically mean that they do not apply to the information in this case. In any event, the Commissioner notes that this previous decision notice did accept that section 35(1)(d) was engaged but required an assessment of the balance of the public interest test. Furthermore, the AGO identified a range of further exemptions that could also potentially apply to the requested information from its sampling exercise. Taking into account the volume and range of information falling within the scope of the request the Commissioner is satisfied that the AGO's concerns that the requested information may contain potentially exempt information are clearly legitimate ones. In reaching this finding the Commissioner is particularly persuaded by the AGO's concerns that disclosure of diary entries could reveal what issues the Attorney General has offered legal advice on.
40. With regard to the third criterion, based on the AGO's submissions the Commissioner is satisfied that the potentially exempt information cannot be easily isolated. In reaching this conclusion the Commissioner accepts that using a 'find and replace' function would not significantly aid the

¹¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014731/fs50629605.pdf>

process of locating and redacting exempt information given the variance between entries that need to be redacted and the process of checking any redactions. The Commissioner notes that the AGO exporting the diary into Microsoft Word rather than Excel. However, the Commissioner is aware from submissions from other government departments covering similarly broad requests that were also refused on the basis of section 14(1) of FOIA that the use of Excel would not reduce the burden of processing the request. Moreover, given the nature of a diary, with numerous entries covering a variety of topics over a considerable period of time, the Commissioner accepts that the exempt information is very likely to be scattered throughout the information.

41. In respect of the estimate of work involved in processing the request, the Commissioner notes that the AGO's estimate of 5 to 10 minutes per diary entry is higher than the estimate provided by some other government departments in respect of similar requests. (For example the DWP's estimate was a minimum of 2 minutes for each diary entry.) However, the Commissioner appreciates that the AGO's estimate is based on its direct experience of processing a previous, albeit narrower, request for ministerial diaries. The Commissioner is therefore prepared to accept that this request is a credible one for this particular department. The Commissioner therefore accepts that the AGO's estimate of 110 hours to process the request is a cogent one, and one which is supported by evidence.
42. Furthermore, in the Commissioner's opinion this represents a significant volume of work and one which would place a grossly excessive burden on the AGO to undertake. The Commissioner considers this burden is arguably amplified by the fact that only a limited number of individuals would have the experience/knowledge of the information, and sufficient clearances, to process the request.
43. Whilst the Commissioner is satisfied that the AGO have demonstrated that the three criteria are met and consequently that as a result complying with the request would place a grossly excessive burden on it, the Commissioner has considered whether the purpose and value of the request are enough to justify the impact on the public authority.
44. The Commissioner appreciates that the complainant has made a detailed case for why, in her view, there is a compelling interest in the disclosure of the requested information. Furthermore, the Commissioner acknowledges, as he has done in previous cases, that there is a public interest in the disclosure of ministerial diaries. Disclosure of the information would provide a direct insight into the day to day activities of the Attorney General. However it could also potentially shed light on some of the issues highlighted by the complainant, including most obviously how decisions were taken during the period covered by the request but also potentially wider issues such as matters of lobbying. In

respect of the existing transparency disclosures made by the government the Commissioner accepts that disclosure of ministerial diaries would represent a greater level of transparency and openness than such existing arrangements already provide for. The Commissioner is also sympathetic to the complainant's argument that given that this request covers an unprecedented time, ie the Covid 19 pandemic, there is arguably a particular public interest in understanding how government ministers organised their time and the meetings, contacts and appointments they had during this period. Disclosure of 16 months worth of such data, and such a volume of information, could prove to be particularly illuminating in this regard. For these reasons, the Commissioner accepts that the complainant's request does have a clear purpose and value and that this should not be underestimated.

45. However, it is precisely because of the volume of information in the scope of the request which has led the Commissioner to accept that the burden placed on the AGO in complying with it is a grossly oppressive one. In the Commissioner's opinion despite the clear value in the disclosure of this requested information, he does not accept that this is sufficient to justify placing such a burden on the AGO and expect it to undertake at least 15 days work to process this request. As result the Commissioner has concluded that the AGO were entitled to refuse to comply with the request on the basis of section 14(1) of FOIA.

Right of appeal

46. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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

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