

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 January 2023

Public Authority: Department of Levelling Up, Housing and Communities

Address: Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested a copy of the ministerial diaries for the Secretary of State for Housing, Communities and Local Government, Robert Jenrick. The Department for Levelling Up, Housing and Communities (DLUHC) refused the request on the basis of section 14(1) (vexatious request) as it would require a disproportionate burden to comply.
2. The Commissioner's decision is that the DLUHC was entitled to rely on section 14(1) FOIA to refuse to comply with the request.
3. The Commissioner does not require the DLUHC to take any steps.

Request and response

4. On 29 March 2021 the complainant wrote to DLUHC and requested the following information:

"From 1st November 2019 to the day this request is processed, please provide a copy of Secretary of State for Housing, Communities and Local Government Robert Jenrick's ministerial diaries.

Please note, I am making this request out of the public interest. It is 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.”

5. The DLUHC responded on 28 April 2021. It refused the request on the basis of section 14(1) FOIA because of the significant and disproportionate burden it considered would be placed on it by answering the request. The DLUHC suggested that they considered amending their request, for example, by reducing the time frame to a specific day, week or month.
6. The complainant contacted the DLUHC on 17 May 2021 and asked it to conduct an internal review of its response. They set out why, in their view, section 14(1) did not apply, focusing on what they considered to be the public interest in disclosure of the requested information.
7. Following an internal review the DLUHC wrote to the complainant on 21 July 2021. The review upheld the application of section 14(1).

Scope of the case

8. The complainant contacted the Commissioner on 21 October 2021 to complain about the DLUHC's reliance on section 14(1) to refuse their request. The complainant's submissions in support of their complaint are outlined in the section 14(1) analysis section later in this notice.
9. The Commissioner would also point out that during the course of the Commissioner's investigation, the DLUHC's withdrew its reliance on section 14(1) in an attempt to resolve the complaint informally, by providing a redacted copy of the diaries. However, attempts at redaction demonstrated to the DLUHC that its original decision to refuse the request on the basis of section 14(1) had been justified. It therefore informed the Commissioner that it was resorting to its original position.
10. The scope of the Commissioner's investigation is to consider whether the DLUHC has correctly cited section 14(1) in respect of this request for information.

Reasons for decision

Section 14(1) – vexatious request

11. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
12. 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.
13. 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 FCDO in this case.
14. 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 DLUHC's position

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>

15. The DLUHC's confirmed that the information relates to the ministerial diary for the then Secretary of State; Rt Hon Robert Jenrick MP. The material in scope is contained within several archived outlook files which were retrieved from Archive and combined to recreate the full diary. This was undertaken by the Department for Records team due to the upcoming public inquiry related to the COVID pandemic.
16. In order to understand the DLUHC'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 DLUHC's response to each.
17. **Question:** Please confirm how much information falls within the scope of the request.
18. **Response:** The DLUHC confirmed that the information comprises 1710 lines of entry on an excel spreadsheet.
19. **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 DLUHC.
20. **Response:** "The department can confirm that it has used this method."
21. **Question:** Please state the exemptions you consider will apply to parts of the requested information and provide a short justification as to which sort of material within the diary is likely to engage the relevant exemption and why.
22. **Response:** The DLUHC confirmed that it had identified the following three main exemptions to date:
 - Section 35(1)(d) – (Formulation of government policy – the operation of any Ministerial office. On the basis that many of the entries relate to Private Office staff and the management of the Secretary of Staff's day and also which staff are on duty on any given day.
 - Section 40(2) – (personal information) The DLUHC has identified significant amounts of personal data. It added that it takes the form of junior officials and external parties where it is unable to identify their seniority. Also, personal information related to the former Secretary of State's personal life.

- Additionally, the DLUHC has identified political and non-official information in the form of meetings and social events.
 - Section 36 – (prejudice to the effective conduct of public affairs, and in particular:
 - section 36(2)(b)(i) (the free and frank provision of advice)
 - section 36(2)(b)(ii) (the free and frank exchange of views for the purposes of deliberation)
 - section 36(2)(c) (would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.
23. The DLUHC also considers that it is highly likely that other exemptions would be applicable on further examination.
24. **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?
25. **Response:** The DLUHC confirmed that it has no issue with this method of redaction, however considers the issue is to do with identifying risk within the Diary where some risk is readily apparent (personal information), other risks are not, and require extensive enquiries, time and resourcing to determine the specifics of the meetings and to provide essential background information to assess the potential risks of disclosure.
26. It further argued that trying to establish which business area within the DLUHC hold context to each of these meetings is challenging as the diary itself does not mention or list key contacts. It further stated that it does not consider that the diaries can be assessed for sensitivities centrally as there simply isn't the detail available nor the central understanding or resources to identify and assess the issues to which the information relates. The DLUHC added that a sampling exercise identified that section 36 may be engaged for some of the entries, however, a blanket refusal under this exemption would not be appropriate meaning that each entry would need to be considered individually.
27. **Question:** What sampling exercises did the DLUHC carry out to determine the time needed to redact individual entries? Please provide details.

28. **Response:** The DLUHC informed the Commissioner that the issue it faces is not just redacting time, but time necessary to ascertain the harm in release. As part of its effort to pursue informal resolution, the DLUHC applied redactions on a very high level way to information that it considered was personal, political and private office related. It added that this was a substantial effort as individual items are not categorised as 'political vs departmental' nor is it always apparent if the names of individuals are junior civil servants . The DLUHC considers that for it to carry out a line by line assessment of the information, it is now evident that it would require a considerable amount of further analysis, requiring significant resourcing and time.
29. **Question:** Please provide a reasonable estimate of the time needed to process the request with details and evidence of this estimate was calculated.
30. **Response:** The DLUHC has stated that whilst some entries might be easier to determine than others, some may take significant lengths of time to identify where the appropriate information is held and then perform analysis of its suitability. It added that a rough estimate would suggest it would take weeks to locate and contact the correct relevant parties, and begin discussions relating to the sensitivity in disclosure.
31. **Question:** Are there any other arguments the DLUHC wishes to put forward to explain why, in all the circumstances, it believes that complying with the request would incur a grossly oppressive burden – bearing in mind the resources available to the DLUHC and the public value of the information within scope.
32. **Response:** The DLUHC informed the Commissioner that the request covers a significant period of time, (16 months) and Ministerial Diaries contain very high volumes of meetings. The diary was managed via Outlook and each entry for each day in the year requested would need to be transcribed into a format which can be presented to this request.
33. It further argued that it would then be necessary for it to go through each individual entry to identify and assess the issues which might attract exemptions. Such a process would involve potentially extensive resource and time to identify appropriate individuals, make contact, and provide appropriate analysis of the further information thereafter.
34. The DLUHC further informed the Commissioner that due to the time between the request being made and the Minister in question being in post, that it has had a significant turnover in staffing within the Private Office. It added that this means that knowledge of individual diary entries is not easily accessible and would require substantial searches

across the Department to determine any sensitivities surrounding individual entries.

35. Further, it considers that it is highly likely that significant third party engagement would be necessary for many diary entries and potentially legal advice might need to be sought.
36. The DLUHC considers that releasing the Diary serves no extra public interest and is outweighed by the level of burden processing the request would entail.
37. The DLUHC further informed the Commissioner that whilst it acknowledges the need for openness and transparency supported by its attempt at an informal resolution, it is clear that this attempt demonstrated that complying with the request would result in a significant burden on the Department and divert valuable resources away from its other work.
38. Finally, the DLUHC considers that the public interest arguments put forward by the complainant are compromised by the scope of the request, and their refusal to narrow down the scope. It continued, that many Ministerial meetings are published within the transparency returns and that this information could have been used to re-focus the original request.

The complainant's position

39. The complainant provided the Commissioner with submissions to support their view that section 14(1) of FOIA did not apply which have been summarised below.
40. The complainant argued that disclosure would provide a greater insight into lobbying. They argued that this was particularly important given both the deficit of information regarding lobbying and in the light of recent lobbying scandals.
41. The complainant cited a number of examples to support this latter point including David Cameron having a "private drink" with health secretary Matt Hancock and Lex Greensill in 2019.² The complainant noted that

² <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-zg7j60dxk>

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."³ The complainant argued that it is possible that a ministerial diary would have included a reference to a private drink or meeting. They argued that if ministerial diaries were released, the public could compare them to what is actually logged in transparency releases, and identify ones that are missing. More specifically, they argued that it is essential that they obtain the ministerial diaries of Robert Jenrick to examine to what extent other ministerial meetings are missing.

42. The complainant also cited an article by Susan Hawley (Executive Directors at Spotlight on Corruption) in the Business Insider which stated:

"There is an increasing consensus that the rules on lobbying are seriously broken, and that this is exacerbated by departments abjectly failing to disclose accurate and timely information about who is lobbying who and about what."

43. The complainant further 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.
44. The complainant further argued that the government's publication of transparency data has often been criticised for its incompleteness and lack of quality. They suggested that over the years there have been many examples where transparency data had purposefully or accidentally excluded ministerial meetings.
45. By way of examples, they 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.⁴ They also highlighted that in September 2020, Reuters

³ <https://www.thetimes.co.uk/article/matt-hancock-dragged-into-david-cameron-lobbying-scandal-zg7j60dxk>

⁴ <https://www.mirror.co.uk/news/politics/matt-hancock-attended-more-missing-24439919>

reported how 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).⁵ 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.

46. 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.
47. The complainant also considers 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 cronyism⁶ and that a release of ministerial diaries will inform the public of interactions between ministers and firms who received contracts.
48. 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 the government's handling of the pandemic.⁷ They 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.

⁵ <https://www.reuters.com/article/britain-politics-truss/exclusive-uk-trade-minister-reverses-decision-to-remove-think-tank-meetings-from-public-register-idINKBN25U2S2>

⁶ <https://www.bbc.co.uk/news/uk-56319927>

⁷ <https://www.bbc.co.uk/news/explainers-57085964>

49. Finally, the complainant argued that other ministerial diaries have previously been released and cited the 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.
50. Furthermore, the complainant argued that even if the processing of this request did involve the application of numerous exemptions, then in their view there was a significant public interest in the disclosure of the information. They acknowledged that they had asked for information covering an unprecedented time period, but in their view this provided even more reason for the information to be disclosed.
51. They 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. They argued that this request did and provided detailed submissions to support this position which the Commissioner has summarised below.
52. The complainant also stated that the Commissioner has recognised the public interest in the release of ministerial diaries, and referred to a ruling in respect of the northern powerhouse minister's diaries. The ICO recognised the public interest in the disclosure of ministerial diaries and stated:

"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.

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."
53. The ICO continued: "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 the focus and weight the Minister or his Department has given particular issues over the time period covered by the particular entries".
54. The complainant argued that such arguments were also relevant to her request.

The Commissioner's position

55. With regard to the three criteria set out above at paragraph 14, the Commissioner accepts that the first one is met. While individual diary entries may be short or brief, there are still 1710 such entries falling within the scope of this request. In the Commissioner's view this clearly represents a very significant volume of information.
56. With regard to the second criterion, the Commissioner notes the exemptions that the DLUHC has suggested would need to be considered in relation to information falling within the scope of the request are based on an attempt at an informal resolution which would have involved a direct examination of some of the diary entries. Taking into account the volume and range of information falling within the scope of the request the Commissioner is satisfied that the DLUHC's concerns that the requested information may contain potentially exempt information are clearly legitimate ones.
57. With regard to the third criterion, based on the DLUHC'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 process of locating and redacting exempt information given the variance between entries that need to be redacted and the process of checking any redactions.
58. Similarly, the Commissioner accepts for the reasons set out in submissions provided to him by the DLUHC (and which are supported by submissions received from other government departments dealing within similar complaints) that exporting the diary into Excel does 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.
59. In respect of the estimate of work involved in processing the request, the Commissioner notes that the DLUHC did not provide an actual estimate based on a sample of the information, but stated that a rough estimate would suggest it would take weeks to locate and contact the correct relevant parties, and begin discussions relating to the sensitivity in disclosure.
60. Whilst the Commissioner would have expected a more considered estimate, he accepts that the processes outlined in checking each of the diary entries for various exemptions represents a significant volume of work, and one which would place a grossly excessive burden on the DLUHC to undertake. The Commissioner further considers that this burden is arguably amplified by the significant turnover in staffing within

the Private Office from the time between the request being made and the Minister in question being in post, as only a limited number of individuals would have the experience/knowledge of the information, and sufficient clearances, to process the request. This would necessitate significant third party engagement for many diary entries.

61. Whilst the Commissioner is satisfied that complying with the request would place a grossly excessive burden on it, the Commissioner has considered whether the purpose and value of the request is sufficient to justify the impact on the public authority.
62. The Commissioner appreciates that the complainant has made a detailed case for why, in their 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.
63. In this case, disclosure of the information would provide a direct insight into the day to day activities of the Secretary of State of the DLUHC.
64. 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.
65. The Commissioner also accepts that disclosure could also potentially shed light on other issues highlighted by the complainant such as matters of lobbying.
66. 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. 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.
67. However, it is precisely because of the volume information in the scope of the request which has led the Commissioner to accept that the burden placed on the DLUHC 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 DLUHC. As a result, the Commissioner has concluded that the DLUHC was entitled to refuse to comply with the request on the basis of section 14(1) of FOIA.

Right of appeal

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

Website: 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

Catherine Dickenson
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SK9 5AF