

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 April 2023

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

Decision (including any steps ordered)

1. The complainant has requested DHSC to disclose a copy of Matt Hancock's ministerial diaries for the period 1 February to 1 July 2020. DHSC refused to comply with the request, citing section 14(1) of FOIA.
2. The Commissioner's decision is that DHSC is not entitled to rely on section 14(1) of FOIA in this case.
3. The Commissioner requires DHSC to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant, with appropriate redactions in accordance with section 38 and 40 of FOIA.
4. The public authority 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.

Request and response

5. On, 15 October 2022, the complainant requested DHSC to provide the following information:

"From 1st February 2020 to 1st July 2020 this request is processed, please provide a copy of Secretary of State for Health and Social Care Matt Hancock's ministerial diaries."
6. DHSC responded on 19 January 2022, refusing to comply with the request under section 14(1) of FOIA.
7. The complainant requested an internal review on 19 January 2022.
8. DHSC carried out an internal review and notified the complainant of its findings on 25 April 2022. It revised its position and applied section 12 of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 27 July 2022 to complain about the way their request for information had been handled.
10. During the Commissioner's investigation DHSC confirmed that it wished to rely on section 14(1) of FOIA and, following an Information Notice dated 21 March 2023, it provided submissions detailing why it considered this exemption applied and provided a sample of the requested information to highlight its position.
11. The Commissioner considers the scope of his investigation to be to establish whether or not DHSC is entitled to refuse to comply with this request in accordance with section 14(1) of FOIA.

Reasons for decision

12. Section 14 of FOIA states that a public authority may refuse to comply with a request that is vexatious. This exemption can be used by public authorities where the cost and time to redact exempt information would create an oppressive burden on its resources. The threshold for the application of this exemption on this basis is very high. There must be a significant amount of information falling in the scope of the request, the public authority must demonstrate that it contains exempt information scattered throughout and the task of redaction would be burdensome.

13. DHSC confirmed that the scope of the request covers 22 weeks' worth of diaries entries. It reviewed a two week sample (for the period 1 to 14 March 2020) and established that this comprised of 169 entries. It stated that it took two members of staff one hour each to review all 169 entries.
14. It argued however that that speed could not be sustained over a longer period of time. It considers a more expansive review would undoubtedly encounter greater volumes of new information that would need to be understood and examined. DHSC explained further that it would need to be examined by those who are reviewing the information contemporaneously, but also those who were in the private office at the time, to ensure that it is correctly upholding the application of section 40 (personal data), in addition to other exemptions applied to the diary's content.
15. DHSC said that the pandemic was a fast moving and exceptional event that translated as extraordinarily busy and varied for each of its ministers, including the Secretary of State. It therefore felt overall that three hours for every two weeks' worth of entries was more appropriate, when estimating how much time it would take to comply and prepare the requested information for disclosure.
16. All in all, DHSC estimated that it would take 42 hours to comply with the request and it felt this would place an unreasonable and significant burden on its time and resources, which could not be justified. It confirmed that it would take 33 hours to review all 22 weeks' worth of entries (allowing three hours for every two weeks' worth of entries). It would also take private office approximately five hours to examine the entries where needed (taking the total to 38 hours). Additionally, it felt that it would take around 15 minutes for every two weeks' worth of entries to redact exempt information and specify the exemption used (despite this equating to just under three hours in total, it has allowed four hours for this task).
17. In terms of withheld information, from the sample it provided to the Commissioner, it highlighted where section 21, 38 and 40 would apply.
18. For section 21 (information accessible by other means), it stated that while it accepted that it is not obliged to redact such information it wished to highlight that external meetings are published in the Transparency Returns for ministerial diaries. Additionally, it said that there are many other meetings from this period that are in the public domain. It identified 36 entries that fall into this category.
19. DHSC confirmed that undertaking the work to comply and respond to this request would require a significant amount of time. It stated that

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 Officer and therefore work would be duplicated. It felt this adds to its argument that the request is unduly burdensome.

20. Turning to the application of section 38 (Health and Safety), it said that the entries include times, locations of pickups, number plates of official cars and waiting locations. Disclosing this information would endanger the current Secretary of State, as patterns are more than likely familiar. DHSC and security services have taken measures to reduce the amount of information available online about minister/advisor movements and locations. DHSC argued that disclosing this information would reverse that work.
21. With regards to section 40, it confirmed that this applies to a number of entries in the diary. DHSC accepted that redaction would not take a significant amount of time, but each entry needs to be reviewed to take forward that decision to redact.
22. The Commissioner has already considered the application of section 14(1) of FOIA to the same request; just over a longer time period. The decision notice was issued on 10 October 2022, and can be accessed here:

[ic-127984-w0m1.pdf \(ico.org.uk\)](#)
23. It is noted that DHSC has taken on board some of the criticisms outlined in the earlier decision notice, but equally highlighted how some, once tested, did not provide the reduction of time and resource as the decision notice seem to suggest.
24. There is no argument that the requested information does contain sensitive information. The previous decision notice documented in detail why it accepted that redaction would be necessary. This is however with the exception of section 21. If the requested information does contain information that is already in the public domain or is reasonably accessible by other means, it seems pointless going to the time and cost of redacting such information. The Commissioner would expect a pragmatic approach to be taken with a request of such value and public interest. Whether the time spent on redacting information which is subject to section 21 does or does not save time on compiling the Transparency Returns is not a relevant consideration when considering compliance with this request. It would only be duplicated work if DHSC chose to identify and redact the information under section 21 from the diaries.

25. The Commissioner would remind DHSC that section 78 of FOIA makes clear that a public authority is not obliged to withhold information simply because an exemption would apply.
26. The question here is whether DHSC's estimate of the time it would take to redact and prepare the requested information, over this reduced timeframe, continues to support the application of section 14(1).
27. The Commissioner is sceptical to accept that it would take three hours for every two weeks' worth of entries. This is because the sample reviewed revealed that it would take two hours (not three) for two weeks' worth of entries and it seems more likely that as the officers progress through the entries the task of identifying information that requires redaction will become easier. The Commissioner would expect that if a thorough approach is taken, as the officers make their way through the requested information, the time it would take to review 2 weeks' worth of entries would either reduce slightly or at least remain the same.
28. He accepts that it would need to consult with private office over the contents and that it would take additional time to physically redact the withheld information and mark up the relevant exemption. But again, the Commissioner would expect these tasks to become easier to manage as the process goes on.
29. Despite the added complexities DHSC has described (multiple owners of the diary, inconsistencies in how meetings are recorded, the diary entries being at the height of the pandemic and staff turnover since) the Commissioner considers two hours for every two weeks' worth of entries is more reasonable, especially as this is what the sample exercise revealed. Taking two hours (as opposed to three), this means it would likely take DHSC 31 hours (22 hours to review every two weeks' worth of entries, five hours to consult office and three hours to redact and mark up) to comply with the request.
30. The Commissioner disagrees with DHSC that the request lacks focus and purpose and in his earlier decision notice he highlighted the value and significance of the requested information to the public. The request is focussed on the run up to the first lockdown and management of Matt Hancock's time and resource throughout it.
31. Given the value and purpose already identified, the Commissioner does not agree that 31 hours of work for information of such significance is unduly burdensome, especially considering the size of the public authority, the resource available to it and the purpose of the request.

32. Even if the Commissioner were to accept that it does take three hours for every 2 weeks' worth of entries throughout the entire process (which is not what DHSC has actually stated (instead it stated that pace could not be maintained, suggesting some – but not all – of the two week batches would need three hours), he does not consider 42 hours of work meets the high threshold that is set for a section 14(1) application. It is close to the threshold but given the serious purpose and value to this request the Commissioner considers purpose and value in this case outweigh the burden of compliance.
33. For the above reasons, the Commissioner is satisfied that section 14(1) of FOIA is not engaged.

Other matters

34. DHSC is reminded of the importance of the section 45 Code of Practice and the need to respond to internal review requests within the recommended timeframe. The code recommends that internal reviews are completed in 20 working days, and certainly no later than 40 working days from receipt. The additional 20 working days should also only be required for the most complex and voluminous of cases.

Right of appeal

35. 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

36. 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.
37. 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 Coward
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