

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2023

Public Authority: Department for Environment Food and Rural Affairs (Defra)

Address: Seacole Building
4th Floor
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested a copy of Secretary of State for Environment, Food and Rural Affairs George Eustice's ministerial diaries within a particular time period.
2. Defra refused to comply with the request, citing section 14(1) (vexatious requests), based on the grossly oppressive burden that complying with the request would impose.
3. The Commissioner's decision is that the Defra is entitled to rely upon section 14(1) to refuse to comply with the request.
4. The Commissioner does not require Defra to take any further steps.

Request and response

5. On 21 April 2022 the complainant requested the following information:
"From 1st March 2020 to 16th April 2020, please provide a copy of Secretary of State for Environment, Food and Rural Affairs George Eustice'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.

I would like to highlight that I recently received the ministerial diaries of Dominic Raab (request sent to the FCDO, FOI reference: FOI2021/27787). This did not engage section 12 or 14, and I had asked for more than six week's worth of diaries. There is a clear precedent of government departments releasing ministerial diaries."

6. On 20 May 2022 Defra responded and refused to comply with the request citing section 14(1) (vexatious requests), based on the grossly oppressive burden that complying with the request would impose.
7. The complainant requested an internal review on 31 May. On 26 July 2022 Defra upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 26 October 2022 to complain about the way that their request for information had been handled.
9. The Commissioner considered the scope of his investigation to be to determine if the Defra is entitled to rely upon section 14(1) FOIA as a basis for refusing to comply with the request.

Reasons for decision

Section 14 (1) – vexatious requests

10. Section 12 of FOIA provides an exemption from the duty to comply with a request where doing so would exceed the appropriate limit.¹ This is £600 for a central government department and such as the DHSC. This equates to 24 hours of work at approximately £25 per hour. This limit is laid down by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.²
11. The following activities may be taken into account to determine whether compliance with a request would exceed the appropriate limit:
 - determining whether the information is held;

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

² <https://www.legislation.gov.uk/uksi/2004/3244/regulation/3/made>

- locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
12. The Commissioner's guidance states 'An authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information.'
 13. For such circumstances a public authority may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.
 14. The Commissioner considers the threshold for such a refusal to be high and he considers it appropriate 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 ICO **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
 15. In circumstances where a public authority wishes to apply section 14(1) based on the grossly oppressive burden that compliance with a request would cause, it must balance the impact of the request against its purpose and value to determine whether the effect on the authority would be disproportionate.
 16. In this case Defra explained that the request is asking for the entries in George Eustice's ministerial diaries during a 47-day period. This information will show who he had meetings or telephone calls with and at what date and time. The diary is managed via Outlook and some entries for each day do have additional documents attached to them. Defra confirmed it conducted a sampling exercise and obtained entries from a 5-day period of George Eustice's ministerial diary, which contained 66 diary entries. Taking that figure as an average for a 5-day period and multiplying it up to 47 days would mean approximately 620 entries over the entire period of the request.
 17. To fulfil this request, it would then need to open up each individual entry, with any potential attachments, assess them, and transfer them to a format which could be presented in response to a request. Considering the wide range of policy work Defra is involved in, it would also need to consider if any of the information fell within section 39 of

the FOIA, therefore exempt under the Act and requiring to be handled under the Environmental Information Regulations 2004 (EIRs). Further consideration would then be required of any further exemptions, such as sections 35(1)(a), 35(1)(b), 35(1)(d), 36, 40, 41 and 42, or possible exceptions under the EIRs, would need to be determined, making redactions where needed. Finally, third party consultation may need to be carried out with certain individuals within Defra, such as lawyers, or externally if necessary.

18. Defra said that even if it were to take a modest average of 10 minutes per diary entry to carry out the actions described above this would amount to 104 hours of staff time.
19. Defra acknowledged that it could not rely upon section 12 FOIA as the activities within its time estimate are not relevant considerations under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. Instead, due to the estimated time it would take to comply with the request it looked at it in relation to the burden that would be put on Defra, should it have to fulfil this request, and considered section 14(1). Although ICO decision notices are not binding, when reviewing the burden Defra did consider a recent ICO decision on this exact issue, IC-129067-F2L3 in its handling of this request. In this decision, the Information Commissioner commented on the estimate of work involved in processing the request and the quoted time of 5 to 10 minutes per diary entry that the Attorney General Office (AGO) had argued were necessary to process entries in a similar way to Defra's practice.
20. Defra reiterated that, unlike most other government departments, the majority of its work will involve information that is likely to fall within the definition of environmental information in regulation 2(1) of the EIRs. Careful analysis of the information in question is therefore important in ensuring that it applies the correct regime and managing requests in accordance with the law.
21. So, to solidify the 10-minute time estimation even further, Defra carried out a timed sampling exercise on some of the actions that would be needed for each diary entry:
 1. Open up the Outlook dairy entry and save it to desktop, then convert to PDF and redact any personal details using the Adobe Pro redaction tool. This took 1 minute 27 seconds.
 2. Decide which information rights regime the information falls within, either FOIA or EIR. This would be very much on an entry-by-entry basis but a fair time estimation, including any discussion with our EIR policy lead, would be 2 minutes.

3. Consult Private Office, and any other third party on whether any exemption or exception applies, and any public interest arguments over each entries release. It estimates this would take 5 minutes. This is set as 5 minutes because the Information Rights Team in Defra would need to advise the Private Office on the merits of applying an exemption/exception on each entry or groups of similar entries.
4. Do the necessary redactions of the information in relation to those exemptions/exceptions. This action was carried out on a sample PDF document with elements redacted and took 1 minute 31 seconds.
22. 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 Defra and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, through considering whether a reasonable person would think that the purpose and value are enough to justify the impact on Defra.
23. Defra noted the arguments made in the referenced ICO decision notice about the public interest arguments in favour of disclosure. However, the request is considered to be vexatious because the estimated 104 hours required to review and prepare the information for disclosure would place a grossly oppressive burden on Defra, and therefore it maintained its position that section 14(1) of the FOIA applies.
24. In accordance with its duty to provide advice and assistance under section 16 Defra did invite the requester to consider selecting a particular week that they are interested in, and that advice still applies.

The Commissioner's view

25. In this instance, the Commissioner is satisfied that the Defra is entitled to refuse to comply with the request, citing section 14(1) as its basis for doing so.
26. The Commissioner is certainly satisfied that the complainant has requested a large volume of information and that Defra would need to consider several exemptions in the event that it complied with the request in full. The Commissioner is also satisfied that the exempt information would be scattered throughout the information and could not be easily isolated.
27. When considering the application of section 14(1), where compliance with the request would impose a grossly oppressive burden, the Commissioner expects the public authority to provide clear evidence to substantiate its claim. Given the further sampling exercise carried out

(set out at paragraph 21 above) it would appear that Defra has taken all reasonable steps to ensure its estimate is accurate and reasonable.

28. The 104 hour estimate is grossly above the 24 hour limit. Whilst the limit laid down by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 is not directly relevant to the application of section 14 FOIA, these give a clear indication of what Parliament considered to be a reasonable charge for staff time. Even though the threshold is high for refusal of a request under section 14 FOIA due to the grossly oppressive burden compliance would impose, given the estimate in this case, the Commissioner considers this can be met.
29. Even where it is established that compliance with a request would impose a grossly oppressive burden, the public authority must still balance the impact of the request against its purpose and value to determine if the request is vexatious or not.
30. The complainant has argued (in relation to a previous wider request on this subject matter) that:

“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. 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.”
31. Whilst the Commissioner acknowledges the public interest in the disclosure of ministerial diaries, particularly during the pandemic, he must always consider the disruption, irritation or distress compliance would impose at the time that the request was made against any value that the request represents.
32. The Commissioner also notes that quarterly transparency reports are available on Defra’s website for this time period which include information regarding Ministerial travel and meetings. Whilst the complainant has previously argued that the quarterly transparency reports, “are often minimal, and there have been numerous times where ministers have failed to properly disclose meetings with external organisations” the Commissioner is of the view that this information does go some way to meeting the public interest in information regarding ministerial day to day working during this time. With this in mind, as well as the number of diary entries that would be caught by the time period of this request, the Commissioner does not consider that the

value or purpose in the requested information outweighs the burden compliance with the request would impose upon the public authority.

33. As Defra has already advised, it is open to the complainant to submit a further refined request, and in particular Defra has suggested that the complainant may wish to select a particular week of interest.

Right of appeal

34. 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

35. 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.
36. 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.....

Gemma Garvey
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