

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2013

Public Authority: Department of Health

Address: Richmond House
79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant made a request for ministerial diaries. The Department of Health (DoH) provided the complainant with some of the requested information, but made significant redactions under sections 21, 23, 24, 27, 35(1)(a) and (d), 36, 38, 40(2), 41 and 44.
2. The Commissioner's decision is that the DoH has correctly applied section 23 and section 40(2) where relied upon to make the relevant redactions. However the Commissioner considers that the DoH incorrectly applied the other exemptions.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose or issue a valid refusal notice in respect of the information which the DoH has marked as out of scope of the request.
 - Disclose the withheld information apart from that redacted under section 40(2) and section 23 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 8 June 2011, the complainant wrote to the DoH and requested information in the following terms:

“ I would like you to provide however many ministers diaries it is possible to provide within the time constraints of FOI. Could you begin from the top of the list below and work down. If it is not possible to even provide the whole diary of Andrew Lansley within the time, I would like as many months of his diary as can be provided, working backwards from May 2011.

Andrew Lansley

Simon Burns

Earle Howe

Paul Burstow

Anne Milton”

6. The DoH responded on 21 June 2011 in which it refused to disclose the information requested on the basis of the exemptions contained at section 21 and section 35(1)(d) FOIA.
7. The complainant requested an internal review of the DoH's decision on 21 June 2011. On 21 July 2011 the DoH wrote to the complainant with the details of the result of the internal review it had carried out. It upheld the application of section 21, section 35(1)(d) and also applied section 40(2) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 22 July 2011 to complain about the way his request for information had been handled. He explained that he did not consider that the information he had requested should be withheld in its entirety.
9. The DoH explained that it had exceeded the cost limit to locate, retrieve and extract the whole of Andrew Lansley's diary. However it said that it was willing to include all of this diary within the scope of the request despite the cost implications. The complainant has not made a

complaint about this approach and therefore the Commissioner has proceeded on this basis.

10. During the course of the Commissioner's investigation, the DoH did disclose a copy of the diary to the complainant with significant redactions made under section 21, 23, 24, 27, 35(1)(a) and (d), 36, 38 and 40(2). The Commissioner has considered whether these redactions were correctly made. In its submissions to the Commissioner, the DoH suggested that section 44 and section 41 FOIA might also apply so these exemptions have also been considered in this Notice.
11. The DoH further suggested that some parts of the diary did not fall within the scope of the request. It redacted those parts as 'not applicable'. The Commissioner considers that these parts of the diary do fall within the scope of the request as the request was for the whole diary. The DoH has not provided any reasons as to why this information is exempt and should not be disclosed. The Commissioner has considered this below.

Reasons for decision

Section 1

12. Section 1 FOIA provides that, "Any person making a request for information to a public authority is entitled –
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him."
13. In this case the DoH argued that some of the information contained within the diary was outside the scope of the request. The diary is a paper diary and as the request was for the Minister's diary, the Commissioner considers this to include all information contained within that diary.
14. As the DoH has not provided the information to the complainant nor has it applied an exemption to this information, the Commissioner considers that it must now either disclose this information or take the action of applying an exemption and issuing a valid refusal notice to the complainant in respect of this information.

Section 23

15. Section 23(1) FOIA provides that, "Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)." These bodies are generically known as the security bodies and include the Security Service, the Secret Intelligence Service, GCHQ (Government Communications Headquarters) and SOCA (Serious Organised Crime Agency).
16. The DoH has provided submissions in support of its application of section 23 in relation to one entry on the diary. However after reviewing the redacted information the DoH has applied section 23 to five other entries in the diary but has not provided submissions in support of this. The Commissioner considers that the arguments provided by the DoH to be relevant to all the information withheld by reference to section 23. He considers that it all relates to one or more of the bodies referred to in subsection (3). Due to the nature of the redacted information the Commissioner cannot provide any further detail in this Notice. The Commissioner does however consider that section 23(1) does apply to these six diary entries. Section 23 provides an absolute exemption, so the public interest test does not apply.

Section 40(2)

17. Section 40(2) FOIA provides an exemption for information which is the personal data of any individual, other than the requester, where disclosure of that personal data would be in breach of any of the data protection principles.
18. The Commissioner has therefore considered whether the information redacted under section 40(2) is the personal data of one or more third parties.
19. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:
"data which relate to a living individual who can be identified –
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

20. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
21. The information redacted under section 40(2) includes details of the Minister's private journeys, names and contact numbers of SofS private secretaries and other officials, duty contact details, contact details for other individuals involved in meetings with the Minister personal meetings and appointments and notes as to when staff are on annual leave. There are also names of local MPs redacted under section 40(2).
22. The Commissioner does consider that the information redacted under section 40(2) constitutes third party personal data as it relates to the Minister or to other third parties.
23. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". In addition, if disclosure would be fair and lawful, at least one of the conditions in Schedule 2 of the DPA should be met.

Likely expectation of the data subject

24. The Commissioner considers that the Minister would not expect his private travel arrangements to be disclosed into the public domain. He also does not consider that the Minister would expect details of private meetings or appointments to be disclosed into the public domain. In a previous decision notice (Reference FS50431334) which involved a request for the Mayor of London's diary, the Commissioner accepted that "the inclusion of the Mayor's private engagements helps show his availability for official engagements. In his view, it is outside the Mayor's reasonable expectations that information relating to his private engagements such as these be disclosed."
25. The Commissioner does not consider that other third parties would expect information such as their contact details, when they were and were not on duty or when they were on annual leave to be disclosed into the public domain. Information as to when individuals are on duty or on annual leave is strongly linked to the individual's private life. In terms of contact details, the DoH has not clarified whether the

redacted information is personal or purely work related contact details. The Commissioner considers that in either instance the data subject would not expect this information to be disclosed into the public domain, he does not consider that they would expect direct contact information to be disclosed into the public domain.

26. The Commissioner does however consider that local MPs could not reasonably expect their names to be withheld from disclosure in this context given their public facing roles as elected representatives.

Would disclosure cause damage and distress to the data subjects?

27. The Commissioner considers that disclosure of information relating to the Minister's private travel arrangements and private meetings or appointments and information relating to other third parties' annual leave or duty arrangements would be a significant intrusion into their respective private lives. He considers therefore that disclosure would cause damage and distress to the data subjects.
28. In terms of the contact details of other third parties, the Commissioner considers that disclosure of direct mobile telephone numbers or other similar contact information would also cause damage and distress to the data subjects. The Commissioner considers that if the contact details were disclosed into the public domain there is a possibility that the information could be used improperly.
29. The Commissioner does not consider that disclosure of the names of local MPs which appear in the diary would cause damage and distress to those individuals as the relevant information arises from their roles and responsibilities as elected representatives.

The legitimate public interest

30. The Commissioner considers that whilst there is a legitimate public interest in understanding how a Minister has organised his time to fulfil official engagements, disclosure of information relating to private appointments and personal travel arrangements, staff leave or how staff or other third parties can be contacted does not, to any significant extent, meet this legitimate public interest.
31. Taking into account the data subjects' likely expectations and the fact that disclosure would cause damage and distress, as disclosure of the information redacted under section 40(2) would not, to any great extent, meet the legitimate public interest in this case, the Commissioner considers that the exemption has been correctly applied in relation to most of the information withheld on the basis of section 40(2). He does not however consider that it was correctly applied to the names of local MPs as he found that they should have a reasonable

expectation that their names might be disclosed and disclosure would not cause them damage or distress. Therefore even though the legitimate public interest in disclosure is limited in this case, those names should now be disclosed as they appear in the diary.

Section 21

32. Section 21 provides that, "Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

33. In this case the DoH has said that it already publishes information about the meetings that Ministers have with external organisations on its website at the following address:

http://www.dh.gov.uk/en/Aboutus/MinistersandDepartmentLeaders/Departmentdirectors/DH_110759

In addition it said that a mechanism already exists for the transmission of some of the details of Ministers' movements to the public, through media contact with government departments' media offices.

34. The Commissioner does not however consider that the information contained in the diary to which section 21 has been applied is available in its entirety on the link above and the DoH has not provided an example of information publicly accessible through media contact with government departments' media offices.

35. The Commissioner is therefore unable to uphold the application of section 21 FOIA in this case.

Section 24

36. Section 24 provides that, "Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."

37. The DoH has argued that due to some of the repeat entries, showing details of the Minister's regular home to office and home to engagement movements, would make it easy to work out a pattern of behaviour that would potentially put the Secretary of State (SofS) at security risk if put into the public domain.

38. The DoH has not however provided the Commissioner with an example of this or explained how this would occur.

39. The Commissioner would also note that as explained earlier in this decision notice, he has considered and accepted the DoH's application of section 40(2) to withhold information in relation to private journeys

as well as detailed information, such as driver name, contact and registration plate details in relation to official journeys.

40. As the DoH has not provided any significant explanation as to why section 24 is engaged in this case, and because section 40(2) is being upheld in relation to the information the DoH seems to be referring to above, the Commissioner does not uphold the application of the section 24 exemption in this case. This is not to say that, had proper arguments been put forward, supported by evidence, the exemption would not have been applicable to information about the regular travel of a Cabinet Minister.

Section 27

41. Section 27 provides that, "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) relations between the United Kingdom and any other State,
 - (b) relations between the United Kingdom and any international organisation or international court,
 - (c) the interests of the United Kingdom abroad, or
 - (d) the promotion or protection by the United Kingdom of its interests abroad."
42. The DoH has said that section 27 is applicable to one entry in the diary, but it has not explained which subsection of section 27 is applicable nor has it provided any arguments in support of its application of section 27. No obvious prejudice to international relations would arise from disclosure of the diary entry concerned.
43. As the DoH has not provided any explanation in support of its application of section 27 and no obvious prejudice is apparent, the Commissioner does not uphold the application of the section 27 exemption in this case.

Section 35

44. Section 35 FOIA provides that, "Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-
- (a) the formulation or development of government policy,
 - (b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or

(d) the operation of any Ministerial private office.”

45. In this case the DoH has said that section 35(1)(a) and (d) are applicable. It argued that section 35(1)(d) applied to all redactions made under section 35. It argued that redactions which related to external stakeholders linked to health policy development/formulation were also covered by section 35(1)(a), as were redactions relating to internal meetings with officials and other Ministers linked to health policy development/formulation.
46. The Commissioner accepts that section 35(1)(d) is applicable in this case as the diary relates to the operation of a Ministerial private office.
47. In relation to section 35(1)(a) the Commissioner does not uphold the application of this exemption as the DoH has not explained how the information relates to the formulation or development of government policy. It cannot reasonably be argued that any meetings which the SoS has with external stakeholders involved in health issues necessarily relates to the formulation or development of government policy. In any event the DoH has not attempted to argue this.

Public Interest Test

48. Section 35(1)(d) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

49. The DoH said that it recognised that there is a public interest in disclosure of the detailed diaries and movements of Ministers to enable the public to better understand the work of a Minister.

Public interest arguments in favour of maintaining the exemption

50. The DoH argued that disclosure of the Ministerial diary risks inhibiting Ministers' ability to organise their time most effectively and respond rapidly to changing day to day demands of office. It said that it is common for meetings to be arranged, rearranged and cancelled at short notice due to changing circumstances and priorities, and in the case of Health Ministers, often on subjects of public health and safety. It said that Ministers should be allowed space in which to organise their

time in a way that suits them and the responsibilities of their role, without the constraints of how decisions about the use of their time might be perceived publicly. It argued that placing information concerning Minister's detailed day-to-day movements in the public domain could be open to misrepresentation and potentially misleading. It explained that there would be a potential risk of security issues around the Ministers patterns of behaviour. It argued that this would not be in the interests of effective Government and therefore it would not be in the public interest to disclose the information.

Balance of the public interest arguments

51. The Commissioner considers that there is a public interest in understanding how Ministers are using their time and in demonstrating that public money is being used effectively.
52. The Commissioner also considers that there is a public interest in Ministers being able to organise their time effectively. However as the DoH has been unable to provide more specific arguments to demonstrate how disclosure of the redacted information would have an impact upon Ministers' ability to organise their time effectively, the Commissioner has not attributed any significant weight to this public interest consideration.
53. The Commissioner has taken account of the fact that the request was for past diaries going back to 2010, although he acknowledges that at the time of the request the most recent requested diaries were less than one month old. The Commissioner considers it most important that all the diary information requested is retrospective, referring to past events. Had the request been for diary entries for current or future meetings, events or travel plans, there would be strong public interest arguments against disclosure. However, that is not the case here. The public interest in maintaining the exemption in respect of diary entries for past events is not so great.
54. The Commissioner has attributed no weight to the argument that disclosure could be misleading as it is always open to the DoH to provide any further explanations which it considers necessary in order to avoid any possible misunderstanding or confusion.
55. Finally the DoH has argued that disclosure of the redacted information might enable a pattern of behaviour to be built up, in terms of the Minister's movements, which it argued was not in the public interest. The DoH failed to provide an example of how a pattern of behaviour could be established. In any event, the Commissioner refers to his comments at paragraph 39 above, where he indicates that what is likely to be relevant information here has been exempted under section

40(2). Therefore the Commissioner does not attribute any significant weight to this argument in the context of the public interest test for information which is exempt only under section 35(1)(d).

56. The Commissioner considers that there is a public interest in enabling the public to better understand how Ministers' time has been spent on official duties and to appreciate the range and nature of meetings and engagements which they have attended. There is a strong public interest in Ministers being open, transparent and, to a degree, publicly accountable in this regard. Whilst the Commissioner accepts that there is a clear public interest in not undermining the ability of a Minister and a Ministerial private office to make diary arrangements and to plan the Minister's time effectively, there is no clear evidence which suggests that that would be the consequence of disclosure in this case.
57. The Commissioner does not, therefore, attribute any substantial weight to the arguments provided by the DoH in favour of maintaining the exemption. Those arguments have either not been supported by evidence or have lacked cogency. In this case the Commissioner has therefore concluded that the public interest in favour of maintaining the section 35(1)(d) exemption does not outweigh the public interest in disclosure.

Section 36

58. Section 36(2) provides that, "Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(a) would, or would be likely to, prejudice-

- i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- ii. the work of the Executive Committee of the Northern Ireland Assembly, or
- iii. the work of the executive committee of the National Assembly for Wales,

(b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

59. The DoH applied this to a number of redactions. It has not explained which subsection of section 36 is applicable in this case and it has not provided any submissions or the qualified person’s opinion in support of the application of this exemption. In these circumstances the section 36 exemption has not been effectively engaged in respect of information purported to have been withheld on that basis.

Section 38

60. Section 38 provides that, “Information is exempt information if its disclosure under this Act would, or would be likely to-

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.”

61. The DoH has explained that some of the diary entries carry a health and safety risk for a Cabinet Minister if released into the public domain. It said that it is not appropriate to put details into the public domain of movements that show a particular pattern of behaviour. It gave an example of the Minister’s movements in relation to personal rather than professional engagements. It said that some of the diary entries showed the time and mode of travel and are repeated on a regular basis.
62. In relation to information in the diary which, if disclosed, would reveal the Minister’s personal movements, including travel between home and work, the Commissioner accepts that this information is exempt under section 40(2) FOIA and so will not be considered further under section 38.
63. In relation to any further application of section 38 on the basis that disclosure would enable a pattern of behaviour to be built up which would or would be likely to endanger the health and safety of the Minister, the DoH has not provided the Commissioner with any specific examples as to how disclosure would enable such a pattern of behaviour to be established. No such pattern is obvious to the Commissioner from an examination of the withheld information. Had it been, the Commissioner would certainly have entertained the argument that the health and safety exemption might be applicable. However, on the evidence before him in his case, the Commissioner finds that the section 38 exemption is not engaged in respect of any information which is not exempt under section 40(2).

Section 41 and 44

64. The DoH also applied section 41 and section 44 to telephone numbers contained in the diary. As the Commissioner considers that this information is exempt under section 40(2) he has not gone on to consider the application of section 41 or 44 any further.

Right of appeal

65. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

66. 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.
67. 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

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
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SK9 5AF**