

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2017

Public Authority: Department of Health
Address: 79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant made a request to the DoH for the diary of the Secretary of State for Health. The DoH refused to comply with the request under section 14(1) FOIA.
2. The Commissioner's decision is that the DoH has correctly applied section 14(1) FOIA to the request.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 15 January 2016 the complainant requested information of the following description:

"Please can you disclose what diaries are used by the Secretary of State for Health.

Please can you disclose the contents of these diaries (from September 2012 to the furthest date in the future which contains a diary entry).

(I note the decision in EA/2013/0087."

5. On 2 February 2016 the DoH responded. It refused to disclose the requested information under section 35(1)(d) FOIA. The complainant requested an internal review on 2 February 2016. The DoH sent the outcome of its internal review on 26 February 2016. It upheld its original position. As the complainant was dissatisfied with the internal review response, he made a complaint to the ICO. During the course of the Commissioner's investigation the DoH amended its

position, it confirmed to the complainant that it would exceed the cost limit under section 12 FOIA to comply with the request. The complainant therefore went on to make a refined request which is the subject of this Decision Notice.

6. On 31 May 2016 the complainant made the following refined request to the DoH (this should however be read in the context of the request made on 15 January 2016 set out above):

"I understand that your cost estimate of £4000 involves mainly the labour costs of converting a computer file to printed paper. Therefore, I wish to update my request for the Department to send me the Outlook data file electronically.

I understand from your response that a Lotus Notes system was used prior to July 2013, and given your response, I wish to update my request to only receive data from the date that the Outlook system was implemented.

I would estimate this would take less than one hour, and that your IT department will be able to do this without difficulty.

Please note that you are not able to include redaction in your costs under s4(3) of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

By sending me the Outlook data file electronically, you will not require the labour to print and extract these data, and this will of course have the added benefit of reducing the carbon footprint from my request. "

7. On 22 June 2016 the DoH responded. It refused to disclose the requested information under section 35(1)(d) FOIA. The complainant requested an internal review on 26 June 2016. The DoH sent the outcome of its internal review on 23 August 2016. It upheld its original position but additionally applied section 35(1)(a) FOIA.

Scope of the case

8. The complainant contacted the Commissioner 24 August 2016 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the DoH additionally applied section 14(1) to the request as it said that complying with the request would impose a disproportionate or unjustified level of disruption on the DoH.

10. The Commissioner has considered whether the DoH has correctly applied section 14(1) FOIA to the request.

Reasons for decision

11. Section 14(1) states that, "Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious"
12. The Information Commissioner's guidance on vexatious requests explains that a public authority may apply section 14(1) if the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation¹. This approach is supported by judgments of the Information Tribunal in in the case *Independent Police Complaints Commissioner vs The Information Commissioner (EA/2011/0222)* and *Salford City Council vs ICO and Tiekey Accounts Ltd (EA2012/0047)*.
13. In this context it is possible for a public authority to take account of the cost of considering exemptions and redaction.
14. However it can only do this where:
- The Request is for a large volume of information;
 - It contains exempt material;
 - The exempt material cannot easily be isolated.
15. The Commissioner would note that this is a high test to meet and she would only expect a public authority to use section 14(1) on these grounds in exceptional circumstances.

Is the request is for a large volume of information?

16. In this case the request is for the contents of a specified part of a ministerial diary. The DoH has confirmed that the information in scope is voluminous, it runs to over 1,000 pages of diary entries. It said to help visualise the volume of pages in this case, this is the equivalent of over two reams (packs) of A4 paper. It went on that all of these pages would need to be reviewed by both the FOI team and a large number of

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

stakeholders prior to any potential disclosure. It estimated that an initial review of the material would take a minimum of 2 to 3 minutes per page of the diary to consider. This initial review is approximately 50 hours work.

17. Based upon the DoH's submission relating to the amount of material falling within the scope of the request the Commissioner does consider that the request is for a large volume of information.

Does it contain exempt material?

18. The DoH considers that parts of the diary are exempt from disclosure under section 35(1)(a) and (d) FOIA. The Commissioner has dealt with previous cases in which she has not upheld the application of section 35(1)(a) and (d) FOIA to redactions made to ministerial diaries. However, that being said, it is plausible that these exemptions may be applied, the Commissioner does investigate complaints on a case by case basis and therefore cannot rule out the possibility that these exemptions could apply to material in this case.
19. Furthermore the DoH has said that it is likely that personal data would need to be redacted from the requested diary entries. In her role as dual regulator of the FOIA and the Data Protection Act 1998, the Commissioner also considers that it is highly likely that some material within the diary entries would require redaction under section 40(2) FOIA, the third party personal data exemption, due to the nature of the withheld information.
20. From her previous experience of ministerial diary cases, the Commissioner also would not rule out the potential application of other exemptions relating to national security.
21. Based upon the DoH's arguments and the nature of the withheld information the Commissioner does consider that the information requested would contain exempt material.

Can the exempt material be easily isolated?

22. The DoH has explained that once it has completed the initial work to review the requested information set out at paragraph 16 above, there would then be a subsequent requirement for the Secretary of State's private office to locate and retrieve supporting papers (invites, agendas etc) for a significant number of the engagements in order to ensure it is clear about the status on an entry by entry basis. They would also need to give advice on the sensitivity (and so potential disclosure) of each diary entry. It estimated that would take approximately 5 minutes for each diary entry. There are approximately

- 10 to 15 diary entries per page and so the potential time this exercise could take could run to well over 800 hours (based on the lower estimate of 10 entries per page). There would also need to be a process of consultation with any external parties who attended the meetings listed, either in other government departments or outside of government, to establish any sensitivities within the withheld information from their perspective.
23. It went on that given the likely sensitivity of many of the diary entries, it is highly likely that these entries would require a large number of redactions before they could be potentially disclosed. The whole process would be lengthy and would impose an unjustified burden on the resources of the DoH. It said that it would have to print each page, make the necessary redactions and scan the redacted pages. It is hard to estimate how many redactions would be required per page but it estimated that 3 minutes to redact each page would require a further 50 hours of effort. Scanning in each page would take approximately 30 seconds per page or approximately a further 9 hours. This is a substantial amount of time to prepare the information in scope for potential disclosure.
 24. It summarised that it would not be possible to easily isolate the exempt information given the nature of diary entries and the high volume of different meetings that a minister holds throughout the day.
 25. The Commissioner does consider that due to the nature of the withheld information, in order to redact it for disclosure, this would require a line by line review to ensure that information is not disclosed inappropriately. This is because this could contain personal data relevant to the Minister which could potentially enable patterns to be built relating to his whereabouts at particular times (particularly as the Minister remains in post) or information that could potentially impact national security or live policy development. Due to the volume of information that would need to be reviewed line by line in order to identify exempt material, the Commissioner does not consider that it can be said that the exempt material could be easily isolated.
 26. As a final point, the DoH referred to the Information Commissioner's guidance and the reference to *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC). This judgement stated that the purpose of section 14 was to 'protect the resources... of the public authority from being squandered on the disproportionate use of FOIA'.
 27. The Commissioner considers that in this case, due to the volume of information falling within the scope of the request and the nature of the withheld information which makes redaction only possible after carrying out a line by line review, complying with this request would

impose a disproportionate or unjustified level of disruption on the DoH. Section 14(1) FOIA was therefore correctly engaged in this case.

Other Matters

28. The Commissioner would take the opportunity to note the importance of the DoH ensuring that it considers the procedural aspects of the FOIA before considering the application of exemptions. The DoH has applied section 35 FOIA to two requests made by the complainant before ultimately realising that procedural aspects of the legislation were applicable during the course of the Commissioner's investigations. The Commissioner notes that Government Departments have periodically received requests for ministerial diaries and he would have expected the DoH to have been more aware of the issues arising from handling such requests. This has caused significant delays for the complainant in addressing his requests and ultimate complaints; if the DoH had been clearer in its approach it would have been possible for the complainant to effectively revise his request, with a greater likelihood of successfully receiving information in a timely manner.
29. The Commissioner therefore recommends that the Department of Health take steps to improve its practice in its handling of such requests in the future. The Commissioner also wishes to stress that application of section 14 to requests for ministerial diaries must be made on case by case basis.

Right of appeal

30. 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

31. 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.
32. 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

Steve Wood
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