

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2017

Public Authority: Department for Communities and local Government

Address: 1st Floor NW
Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested the diary of James Wharton, formerly the Minister for the Northern Powerhouse, for the period 1 January 2016 to 15 April 2016. Additionally, the complainant asked the Department for Communities and Local Government ("the DCLG") for information concerning the numbers, dates and locations of any speeches, trips and visits, in London and outside of London, made by Mr Wharton during that same period. The DCLG refused to provide the majority of Mr Wharton's diary on the grounds that its contents are exempt from disclosure by virtue of sections 35(1)(a), 35(1)(b) and 35(1)(d) of the FOIA, and it refused to comply with the second and third parts of the complainant's request in reliance on section 14(1) of the FOIA.
2. The Commissioner's decision is that the diary extracts for the period specified above do not engage section 35(1)(a) and 35(1)(b) of the FOIA, and whilst the extracts do engage section 35(1)(d), the public interest favours the disclosure of much of the withheld information.
3. The Commissioner has also decided that the DCLG is not entitled to rely on section 14(1) of the FOIA in respect of the second and third parts of the complainant's request. Additionally she has decided that the DCLG has breached section 16 of the FOIA by failing to provide the complainant with appropriate advice and assistance.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- In respect of part 1 of the complainant's request, the DCLG is required to disclose the contents of Mr Wharton's diary for the period 1 January 2016 to 15 April 2016, with the exception of those entries which constitute personal data or information which is purely party political and which are identified at paragraph 80 of this notice.
 - The DCLG is required to provide the complainant with advice and assistance to enable him to refine parts 2 and 3 of his information request (if he so wishes), so that the Department and the complainant can agree mutually understood terms for a new request.
5. 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

6. On 15 February 2016, the complainant submitted a request for information to the Department for Communities and Local Government (the DCLG). The complainant asked to be provided with:

"1. The official diary of James Wharton, Minister for the Northern Powerhouse, from 1 January 2016 to 14 February inclusive;

2. The number of visits, speeches or trips made outside of London, including the date, and the location of any visits made by James Wharton, Minister for the Northern Powerhouse, from 1 January 2016 to 14 February inclusive;

3. The number of visits, speeches or trips made in London, including the date, and the location of any visits made by James Wharton, Minister for the Northern Powerhouse, from 1 January 2016 to 14 February inclusive."

7. The DCLG acknowledged the complainant's request on 14 March 2016 and advised him that it was considering the possible application of sections 22, 35(1)(a) and 36(2)(b) to the information he had asked for. The complainant was informed that the Department would respond to his request by 12 April 2016.
8. On 12 April 2016 the DCLG wrote again to the complainant and advised him that it was necessary for the Department to extend its response

time by a further twenty working days in order to consider the public interest in respect of the exemptions listed above and also in respect of section 36.

9. In view of the time taken for the DCLG to respond to his request, on 13 April 2016, the complainant asked whether it would be possible to extend the terms of his request to 17 April 2016.
10. The DCLG responded to the complainant's email on 13 April 2016 and confirmed that it had amended his request to reflect the extended time period.
11. On 10 May 2016 the DCLG wrote to the complainant to advise him that it was still considering his request and also that it was extending the date for issuing a response to allow it to consider the application of one or more qualified exemptions – namely, sections 35(1)(a) and 36. The DCLG informed the complainant that it “will try to respond by 8 June 2016”.
12. The complainant replied to the DCLG's email - also on 10 May, to complain about the Department's failure to respond to his request, stating that the DCLG were “flagrantly ignoring the terms of the Act”.
13. On 16 May 2016, the complainant contacted the Commissioner to complain about the DCLG's failure to provide him with a substantive response.
14. This Commissioner wrote to the DCLG on 17 August 2016, asking it to make a substantive response to the complainant under the terms of his request of 13 April. The Commissioner asked the DCLG to make its response within ten working days and to send a copy of that response to her office. The Commissioner also asked the DCLG to explain why it has been necessary to extend the time for compliance with this request on three separate occasions and to inform her of any special circumstances which necessitated these extensions. In order to expedite this complaint case, the Commissioner asked the DCLG a number of questions relating to the exemptions referred to above in the event that the DCLG determined that the complainant's request should be refused.
15. On 18 May 2016, the DCLG sent the complainant a refusal notice under section 17 of the FOIA. The DCLG cited the following exemptions: Section 22 – information intended for future publication; Section 40(2) – personal data; Section 35(1)(a) and/or (b) and/or (d) – formulation of government policy, etc.; and, Section 36(2)(c) prejudice to the effective conduct of public affairs.
16. On 16 June 2016, the DCLG sent the complainant its internal review decision.

17. The DCLG's belated refusal notice and internal review decision required the Commissioner to resubmit her enquiry to reflect the exemptions which the Department was now relying on. Accordingly, the Commissioner wrote to the DCLG on 17 August setting out the terms of her enquiry.
18. On 14 September 2016, during the course of a telephone conversation with a representative of the DCLG, the Commissioner was informed that a draft response to her enquiries is almost complete and would be sent out within the next two to three weeks.
19. During this conversation the possibility of an informal resolution to the complainant's request was discussed, whereby the Commissioner was able to confirm that the complainant would accept the DCLG providing him with:

"...the number of visits, speeches, meetings, etc which the Minister has attended under the terms specified in parts 2 and 3 of his request".
20. On 21 October 2016, The DCLG informed the Commissioner that it was "talking to the private office here [at the DCLG] and Cabinet Office about this one". The DCLG asked the Commissioner to confirm "the precise scope/nature of the information [the complainant] would accept as an informal resolution".
21. The Commissioner subsequently spoke with the complainant about the terms of a possible informal resolution and was advised that he would accept:

"2. The number of visits, speeches or trips made outside of London, including the date, and the location of any visits made by James Wharton, Minister for the Northern Powerhouse, in his official capacity as Minister only, from 1 January 2016 to 17 April 2016 or as recent as possible inclusive; and

3. The number of visits, speeches or trips made in London, including the date and the location of any visits made by James Wharton, Minister for the Northern Powerhouse, in his official capacity as Minister only, from 1 January 2016 to 17 April 2016 or as recent as possible inclusive."
22. The terms of the complainant's request (above) were provided to the DCLG by email on 26 October 2016.
23. On 23 November 2016, the DCLG advised the Commissioner that it would not be able to provide the complainant with the information identified in his refined request. The DCLG advised the Commissioner that it had given serious consideration to this approach, but on close examination of the Minister's diary, "it simply does not contain the level

of detail or identifiers necessary to determine whether each and all entries relate to either a visit, or a trip or a speech". The Commissioner was informed that the diary is "not maintained with a view to being able to do that beyond what is published as part of transparency data," and "contains just the level of information needed by the private office to manage the Minister's time and engagements. That being the case, we simply do not hold the information that [the complainant] has now asked for".

24. The DCLG stated that, "it might of course conceivably be possible to construct that based on the information together with the knowledge of individuals who were working in the Minister's private office at the time, but there will of course have been changes to some personnel since, such construction would not be perfect or complete and, in any case would of course require us to create information which we do not hold."
25. On 25 January 2017, the Commissioner wrote again to the DCLG. In her email, the Commissioner asked the DCLG to respond to the questions asked in her initial enquiry letter of 17 August 2016 and to respond to additional questions which were prompted by the DCLG's position outlined in its email of 23 November 2016.
26. In the period following the Commissioner's email of 25 January, the DCLG has provided the Commissioner with a number of updates concerning the Department's progress in putting together a final response its position regarding the complainant's initial request and the suggested 'informal resolution approach'.

Scope of the case

27. The complainant contacted the Commissioner 16 May 2016 to complain about the way his request for information had been handled. The complainant expressed his belief that, "the request is being repeatedly delayed either a) to reduce the newsworthiness of my story by making the time period parameters of the request outdated (by the latest deadline set, any such data would be two months out of date); or b) to force the broadening of the time parameters in the request so much that the department is then able to refuse to fulfil the request on the basis of cost (six months information takes longer to fulfil than what was initially one and a half months).
28. In view of the chronology of this case (listed above), the Commissioner has investigated the DCLG's final position in this matter, which is the Department's reliance on section 35 and 14(1) of the FOIA. This notice sets out the Commissioner's decision.

Reasons for decision

Part 1 of the complainant's request

Information held / not held by the DCLG

29. The DCLG provided the Commissioner with a Microsoft Excel spreadsheet containing the diary entries for James Wharton MP, Minister for the Northern Powerhouse, covering the period 1 January 2016 to 15 April 2016. The Commissioner was informed that the spreadsheet entries have been directly transposed from the Department's Microsoft Outlook diary.
30. The spreadsheet is comprised of 694 rows of information (diary entries) under four columns. The columns are given the headings 'Diary engagement', 'Location', 'From' and 'To'.
31. An additional column has been inserted into the spreadsheet for the purpose of dealing with this request. This column is headed "Release/Exemption". Its purpose is to inform the Commissioner whether the DCLG is content to release particular diary entries and to identify those entries the DCLG considers should be withheld under a particular exemption.
32. The DCLG has confirmed that there is only one diary which is maintained by the Department for each Minister in terms of his/her appointments. This diary is a 'Private Secretary' electronic calendar which utilises the Microsoft Outlook application.
33. The diary contains a number of entries which the DCLG has identified as being information which is not held on the grounds that it is party political". Notwithstanding these identifications, and following the provision of the spreadsheet to the Commissioner, the DCLG subsequently confirmed that it is content to modify its position and to regard all of the information contained in the diary is being "held" by the Department.
34. Rather than arguing that the Department does not hold those pieces of information previously identified as "not held – party political", the DCLG has advised the Commissioner that it now seeks to withhold those entries in reliance on section 40(2) and/or section 35(1)(d).

Section 35 – Formulation of government policy, etc.

35. Section 35(1) of the FOIA provides an exemption to the duty to disclose information held by a government department 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 for the provision of such advice, or
- (d) The operation of any Ministerial private office.

36. In this case, the DCLG seeks to withhold various diary entries in reliance on subsections (a), (b) and (d) of this exemption.

Section 35(1)(a)

37. There are 85 diary entries where the DCLG has applied section 35(1)(a) to that information. This exemption has been applied singly or in conjunction with sections 35(1)(b) and/or 35(1)(d).

38. The DCLG has identified the following meetings which it says the withheld entries relate to:

- the Earn or Learn Ministerial Taskforce
- the Ministerial Recovery Group on flooding following Storm Desmond and discussions with Flood Envoys
- Nationally Significant Infrastructure Projects (NSIP)
- Cutting Red Tape Challenge
- The COBR crisis response committee to discuss "for example" the Government response to industrial action by junior doctors
- The Ministerial Group on Government Digital Technology
- A Parliamentary debate on housing
- The European Affairs Cabinet Committee
- The Ministerial Group on Clean Growth
- Discussions of Superfast Broadband
- A Ministerial Group on British, Black, Asian and minority ethnic matters
- "policies at the formulation or development stage, such as for example on devolution and local growth"

39. The DCLG considers the 85 entries to engage section 35(1)(a) because the information contained in those entries "need only to relate to the formulation of government policy", and, referring to the Commissioner's

own guidance on section 35, the DCLG argues that the exemption will be engaged as "relates to" is legitimately capable of being interpreted broadly, particularly where there is sufficient enough link between the information in question and how policy is formulated or developed.

40. The Department considers that, "The "policy" to which the information relates is clear enough in some cases and either quite specific [...]" and, "Each area of policy is one of "government policy" as the final policy approach and detail is subject to clearance by Ministers and collective agreement.
41. Notwithstanding the points made above, the DCLG appears to accept that it is difficult to demonstrate from each diary entry whether there is a specific stage of policy formulation or development which relates to each piece of withheld information. In order to do this, the Department argues that it would be necessary for it to provide detailed background explanation for each policy area and the stage it was at when the complainant made his request: In the DCLG's opinion, this exercise would in itself be disproportionate.
42. The DCLG therefore argues that, "it will be sufficiently clear, on balance, that the nature of the engagements and discussions to which they relate will be aimed at deciding Government policy, and on balance the section 35(1)(a) exemption is engaged.
43. The Commissioner has considered the diary entries where the DCLG has applied section 35(1)(a). For the majority of this information, with the exception to a small number of entries concerning those meetings listed above, it is difficult for the Commissioner to adduce any particular Government policy and it is certainly not possible for the Commissioner to determine the stage or formulation or development that each policy is at even where a particular policy is referred to in a diary entry.
44. On examination of the specific diary entries, the Commissioner finds the withheld information to be somewhat anodyne. Most of these entries where a particular policy is referred to, only record the fact that a meeting has been scheduled in respect of that policy: There are no records in those diary entries which identify of what might have been discussed at those meetings in terms of any given policy.
45. Essentially, the diary entries do not relate to the formulation and development of government policies in any significant way beyond the fact that the Minister was scheduled to attend a meeting which touched upon a policy in some unspecified way.

46. Whilst acknowledging that her guidance on section 35(1) does refer to the broad interpretation of the term “relates to”, the Commissioner must also point out that her guidance also states that:

“[...] information which relates to any significant extent to the formulation or development of policy will be covered, even if it also relates to policy implementation or other issues. Policy formulation does not have to be the sole or main focus of the information, as long as it is one significant element of it.”

47. In the Commissioner’s opinion it is the ‘significance’ of the withheld information which is key to a determination of whether the section 35(1)(a) exemption is engaged.

48. On examination of the diary entries where section 35(1)(a) has been applied, the Commissioner finds that the withheld information is lacking a necessary degree of significance to provide a sufficient enough link between the information itself and how a particular policy, whether specified in the entry or not, is formulated or developed.

49. The information which the DCLG seeks to withhold under section 35(1)(a) merely records that fact that a minister may have attended a meeting. That meeting has been recorded in his private Office diary under a generalised description, without specifying the purpose of that meeting. In the Commissioner’s opinion the diary entries where section 35(1)(a) has been applied lack significance to the formation or development of any particular policy and therefore the Commissioner has decided that the section 35(1)(a) exemption is not engaged.

50. The Commissioner finds support for this position in the decision of the First Tier Tribunal in *Department of Health v The Information Commissioner EA/2013/0087*. In that case, the FTT stated that:

“The proper application of these exemptions depends upon the nature of the connection intended by the use of the statutory phrase ‘relates to’.

The phrase ‘relates to’, read literally, is capable of indicating a very remote relationship. But in s35, as in s23, the function of the phrase ‘relates to ...’ is to demarcate the boundary of a FOIA exemption. It is clear, therefore, that it should not be read with uncritical literalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context” and,

“A merely incidental connection between the information and a matter specified in a sub-paragraph of s35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter.”

51. Having decided that the exemption provided by section 35(1)(a) is not engaged, the Commissioner is not required to consider whether it is in the public interest for the information to continue to be withheld or to be disclosed.

Section 35(1)(b)

52. The DCLG has applied section 35(1)(b) to 79 diary entries, either singly or in conjunction with sections 35(1)(a) and/or 35(1)(d). To support its position, the DCLG has limited its arguments to the following statement:

"In any event, it is clear that (with the exception of meetings just with officials and/or third parties) entries in the diary relate directly to meetings, and therefore communications between Government Ministers and this exemption is engaged therefore."

53. Again, the Commissioner has examined the information contained in the diary entries where section 35(1)(b) has been applied by the DCLG and again she finds the information to be anodyne.

54. Ministerial communications are defined by section 35(5) of the FOIA as being:

"... any communications –

- (a) Between Ministers and the Crown
- (b) Between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) Between Assembly Secretaries, including the Assembly First Secretary,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales"

55. In the Commissioner's opinion none of the diary entries where section 35(1)(b) has been applied constitute ministerial communications in themselves.
56. Where the DCLG has applied this exemption, it has done so apparently in reliance on the phrase 'relates to'.
57. For the same reasons outlined above the Commissioner has decided that section 35(1)(b) is not engaged and therefore the Commissioner is not required to consider the public interest in disclosure.

Section 35(1)(d)

58. The DCLG has explained the purpose of the Private Office diary. This is to ensure that ministerial business is managed efficiently and effectively and in particular it is concerned with the organisation of the minister's appointments.
59. It has advised the Commissioner that some diary entries are not about the Minister's appointments or the substance of them. They are included in the diary to manage the time, the availability of staff in the private office or meeting rooms, or the time set aside to manage or make time available for the Minister's work. For these reasons, the DCLG suggests that there would be no reason for this information to be shared more widely.
60. The DCLG has also advised the Commissioner that the entries in the diary cannot be taken at face value as being confirmation that something actually took place. This is because any entry in the diary might have been provisional, confirmed or not late in the day, or it may or may not have actually happened which is indicated by "CANX" for cancelled or "hold" provisionally.
61. Additionally, the DCLG point out that some of the diary information is also, to some extent, the personal data of either the Minister himself or that of third parties.
62. Having considered the DCLG's representations, the Commissioner accepts that section 35(1)(d) applies to the contents of the diary in their entirety. She accepts that the diary clearly relates to operation of the Minister's private office.
63. The engagement of this exemption requires the Commissioner to consider whether, in all circumstances of the case, the public interest in maintaining this exemption outweighs the public interest in disclosing the information.

The public interest

64. The DCLG acknowledges the general public interests of transparency and accountability which disclosure of Mr Wharton's diary would allow. Specifically, the DCLG accepts that these public interests would be served by making known what activities Mr Wharton was engaged in as Minister for the Northern Powerhouse and by knowing the specific details of the activities the Minister was undertaking in his role to further the Department's policy aims in this important area of the Government's policy.

65. Notwithstanding this, the DCLG argues that “the brief but fit for purpose information contained in the diary entries will not inform public debate about James Wharton’s specific Ministerial role, or wider Cabinet committee business, and how it was or could be carried out in any meaningful way”. This is because there are some instances where the diary information is more concerned with the administrative operation of the private office or with personal activities.
66. It is the DCLG’s contention that disclosure of the diary information is not an adequate or appropriate way to inform the public of the Government’s approach of decision making in respect of the Northern Powerhouse or other policy matters. It says that, “release of the diary information without context would not provide a picture of this”, and, for the Department to provide such context would require substantial time and resources, which in itself would not be in the public interest.
67. The DCLG suggests that transparency and accountability are provided to some extent through the Department’s publication of a substantial amount of information about ministerial meetings, including those of James Wharton during his appointment as Minister for the Northern Powerhouse. It argues that the effectiveness of Cabinet Committees is better judged on results, by knowledge of decided policies and through public announcements of meetings with external parties.
68. The DCLG asserts that there is a public interest in allowing a minister’s private office an appropriate degree of safe space in which to operate and in order to manage a minister’s time and it argues that the Department’s transparency publications ensure there is an adequate level of transparency where ministerial meetings are concerned. It further argues that if it was required to prepare ministerial diaries with a view to publication this would undermine the efficient running of the Minister’s diary.
69. Whilst individual diary entries might appear innocuous when read on their own, their disclosure as part of an unredacted diary would make it possible to build up a picture of how Government operates which the DCLG believes could be misconstrued. This, in the DCLG’s opinion would result in Ministers having the need to hold additional meetings in order to present a balanced picture of their policy priorities, rather than being able to manage their diary in such a way that would assist in their functions and in the policy development process. Ultimately, the diary would have to be managed in such a way that it would be created for public consumption rather than as a tool for assisting the Minister with official duties.

Balance of the public interest arguments

70. 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.
71. 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.
72. The actual diary information, as already noted, is relatively anodyne: It offers little by way of informing public debate in terms of the details of Mr Wharton's role either as Minister for the Northern Powerhouse or as a member of Her Majesty's Government. What it 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.
73. The diary does not provide the public with any information which indicates how the Minister or his colleagues made their decisions, what the Minister's private interests were or how these interests affected or impacted on the Minister's decisions.
74. The Commissioner accepts without reservation the public interest inherent in Ministers, through their private offices, being able to organise their time effectively. This does not mean however that she agrees with the arguments advanced by the DCLG in support of withholding the Minister's diary. The Commissioner rejects the DCLG's assertions that the public may misconstrue the contents of the diary and in future it would be necessary for the Department to construct future diaries for the purpose of public consumption. In the Commissioner's opinion this would not be necessary: The diary is what it is: it can and should be read at face value as being a time and resource management tool. This is a purpose which will be fully understood by most of the persons who will read it.
75. The Commissioner considers that DCLG's position is partially undermined by it being content for a number of diary entries to be disclosed without any explanation as to why these are so different from those being withheld. The DCLG has given the Commissioner no reason(s) for why the Department is content to allow such disclosures and it appears to the Commissioner to be a somewhat selective approach.

The Commissioner's decision

76. Taking into consideration all of the points favouring both the disclosure and continued withholding of the Minister's diary, the Commissioner has decided that the balance of the public interest falls in favour of disclosure. Therefore the Commissioner's decision is that the majority of the diary entries should be disclosed.
77. Notwithstanding this decision, the Commissioner is mindful of the DCLG's position that some of the diary entries contain information which is personal data – either of the Minister himself or of third parties, and therefore section 40(2) is applicable.
78. The Commissioner agrees with the DCLG that some of the diary entries contain personal data. Given that the complainant has also acknowledged this possibility and that he had previously signalled to the DCLG that he would be content for personal data to be redacted, the Commissioner has decided to allow the DCLG to withhold, by way of redaction, information which satisfies the definition of personal data provided by section 1 of the Data Protection Act.
79. This information includes matters which are solely party political, i.e. which indicate the use of a Government whip (previously where the Department had defined the information as being "Not held – party political"), matters which concern staff absences, and entries which describe the Minister's travel arrangements. To that end, the Commissioner has listed the entries where she is content for information to be redacted. These are:
80. Lines: 3, 7, 12, 14, 17, 24, 27, 30, 31, 32, 34, 35, 41, 46, 53, 54, 61, 63, 68, 70, 75, 76, 80, 81, 82, 83, 87, 88, 96, 107, 110, 112, 118, 119, 128, 136, 137, 139, 141, 142, 146, 147, 150, 151, 156, 158, 159, 161, 169, 172, 173, 180, 182, 183, 187, 188, 192, 194, 195, 196, 198, 202, 203, 204, 206, 208, 211, 213, 215, 216, 217, 218, 220, 221, 223, 226, 229, 233, 234, 234, 241, 242, 243, 246, 247, 254, 259, 260, 621, 269, 274, 275, 275, 277, 278, 279, 283, 285, 288, 289, 290, 291, 293, 294, 301, 303, 307, 308, 311, 313, 317, 320, 325, 329, 330, 333, 336, 337, 338, 340, 343, 344, 347, 348, 353, 360, 364, 370, 373, 374, 375, 382, 385, 391, 395, 400, 402, 404, 406, 407, 409, 411, 412, 414, 415, 416, 420, 422, 427, 431, 432, 434, 435, 438, 441, 442, 446, 453, 454, 461, 467, 472, 475, 480, 482, 483, 487, 488, 490, 491, 492, 499, 500, 504, 505, 506, 509, 511, 513, 514, 516, 518, 519, 520, 521, 522, 523, 525, 526, 527, 529, 530, 532, 536, 538, 539, 545, 551, 554, 559, 560, 562, 563, 565, 566, 567, 569, 572, 573, 578, 580, 583, 585, 587, 589, 594, 599, 600, 601, 602, 605, 608, 610, 611, 626, 627, 631, 634, 640, 642, 643, 644, 645, 646, 647, 648, 650, 651, 657, 662, 663, 664, 665, 674, 675, 676, 677, 679, 681, 687, 689, 690, 691, 693, 694.

81. The Commissioner considers that this last entry type – which describes how the Minister travels and when, is also capable of attracting the Health and Safety exemption provided by section 38 of the FOIA. She is alert to the possibility that disclosure of this type of information could be used to piece together patterns of behaviour which place the Minister at particular locations at certain times. At the time the Department received the complainant's request, this information could have been used by any person wishing to harm the Minister.

Parts 2 and 3 of the complainant's request

82. Parts 2 and 3 of the complainant's request concern the numbers of speeches, trips and visits within London and outside London, made by Mr Wharton as the then Minister for the Northern Powerhouse, together with the locations and dates of those speeches, trips and visits.
83. The DCLG has confirmed that on the balance of probabilities, this information is not held. In confirming that the Department probably does not hold this information, the DCLG considers "the real issue [...] is the work that would need to be undertaken to determine that".
84. The DCLG has informed the Commissioner that it has not definitively determined whether it holds the information requested by the complainant and whether to do that would in itself take more than 24 hours. Consequently the Department has advised the Commissioner that it does not seek to rely on section 12(2) of the FOIA.
85. Initially the DCLG considered the request to be valid under the terms of section 8 of the FOIA. For the most part, the Department considered the request to be clear; however on "close examination" the Department found the request to be "not particularly clear, particularly as to what is meant by a "speech" or a "trip" compared with a "visit"..."
86. The Department did not seek clarification of the request from the complainant as it considered it was appropriate to refuse to comply with parts 2 and 3 in reliance on section 35 or alternately section 36. That being the case then, the DCLG has now confirmed to the Commissioner that it no longer seeks to rely on these exemptions; but rather, it now considers that parts 2 and 3 should be refused in reliance on section 14(1) – vexatious requests, on the grounds of disproportionate burden.
87. To support its application of section 14(1), the DCLG has referred to the Commissioner's guidance on this exemption. The DCLG asserts that –
- "a request for information need not be complied with where the burden involved in doing so would be unjustified or disproportionate – this may be the case where the request is therefore "vexatious" for that reason alone and in a situation where section 12 does not apply".

88. The DCLG argues that its application of section 14(1) is justified in respect of parts 2 and 3 of the complainant's request for the following reasons:

- The diary information is not capable of being interrogated to provide a definite determination of the number of speeches, trips and visits inside and outside London. The diary does not contain that information, even if there are some entries which indicate some relevance to the request.
- The Department has considered the term "speech" and has advised the Commissioner that it is unclear as to what constitutes a "speech" for the purpose of the request. The Department argues that it would have to discern whether the Minister was due to speak and if in fact he did so, and whether it was an actual speech or he just said a few words, etc. In the Department's opinion a speech only means the former and it is likely, on occasion, the Minister was not due to speak, but did in fact make an ad hoc speech. Such an occurrence would be caught by the terms of the complainant's request and this would require the Department to determine this from searches or readouts from events and follow-up communications with officials, etc.
- As with the term "speech", the DCLG also argue that the term "trip" is not immediately clear. For the purpose of dealing with this request, the Department takes it to mean *"a journey, in which you go somewhere, usually for a short time, and then come back again"*. Therefore any journey the Minister made would be caught by the request and the Department would have to determine this from official car use, travel bookings and searches of communications to determine whether a journey actually took place.
- It is possible for the DCLG to conduct electronic searches that would provide information about some journey bookings for the Minister. Beyond these simple searches, it would not be possible for the Department to conduct further searches using keywords. "Records held in emails, briefings or any possible helpful communications would not generally be headed-up "speech" etc – and no definite numbers of such could be deduced that way". Even if they were, any sources would have to be manually checked and cross-referenced with others to determine whether a speech actually took place.

89. The combined effect of the above leads the DCLG to consider the following activities would be needed, together with an estimate of the time involved, in order to properly comply with the complainant's request:

- Liaison between the FOI team, the private office and the Records and Information Governance Services team to determine the most appropriate way of accessing the Minister's diary information to interrogate it and potentially provide information from it. Requesting and arranging for the FOI team to have that access, conversion from Microsoft Outlook to Microsoft Excel format (3 hours)
 - A line-by-line consideration by the FOI team of the 694 diary entries (2 Hours)
 - A request to the Crown Commercial Services (CCS) for information from the travel database showing any rail or air travel bookings made for the Minister; the running of a CCS report and the verification of the accuracy of that report (3 hours)
 - A request to CCS for official car journeys made by the Minister using Government Car and Despatch Agency services; the running of that report and its verification (1 hour)
 - A search of 3 private office staff member's email accounts for any relevant information. Checking individual multiple email chains as well as any related briefing or other relevant information there might be (2 hours)
 - Having obtained the results of the above searches, checking briefing information held outside of the private office – relevant business areas (1 hour)
 - Cross-checking some or all of the sources of information derived from the above searches to arrive at a definite confirmation (2 hours)
90. It is the DCLG's position that the effort needed to undertake the activities outlined above, together with the burden resulting from that effort, is at the very least capable of being characterised as significant. It is for this reason that the DCLG has found it necessary to consider the purpose and value of complying with the request compared with that significant burden.
91. Whilst accepting there is a serious enough purpose to parts 2 and 3 of the complainant's request, the DCLG considers that there would be little value in any information which could be provided reflecting that purpose.
92. In the DCLG's opinion, any information which could be provided would only give an indication of the Minister's activities, but no more than that. the Department argues that the "very limited" value of that information would not serve the wider public interest to warrant complying with the complainant's request, as to do so would require significant resources to

be diverted and expended in order to determine whether the requested information exists in sources capable of providing confirmed numbers of speeches, visits and trips and the dates and locations.

The Commissioner's considerations and decision

93. The Commissioner acknowledges the DCLG's retrospective position in respect of its interpretation of the terms used by the complainant in parts 2 and 3 of his request and she understands, but does not agree with, the DCLG's point which questions the validity of his request under section 8 of the FOIA.
94. In the Commissioner's opinion, it is not acceptable for a public authority to adopt, what appears to have been, a strategy of wilful procrastination in order to obstruct a request for information through its selective understanding of a request and where it has failed to properly engage with the requester in a timely and purposeful manner.
95. Without question the DCLG should have ensured it was clear about the nature of the information the complainant requires from the outset. If the DCLG needed further information from the complainant as to the proper interpretation of the terms of his request, it could have relied on section 1(3) of the FOIA or where the DCLG was unsure of how to interpret the terms of the request it should have engaged with the complainant and offered him appropriate advice and assistance under section 16. In this case the DCLG did neither of these.
96. In effect the DCLG has used a number of exemptions as flack which, at the eleventh hour, are either not appropriate or applicable. It has now constructed a case which is based on ambiguities relating to the proper interpretation of the terms of a request, which it has only recently identified, and which could have been identified much earlier through the Department's purposeful engagement with the complainant.
97. The Commissioner does not agree with the DCLG that it provided appropriate advice and assistance to the complainant when it advised him that "information about Minister's meetings with external organisations is published routinely". This is clearly not the information which the complainant wants to know even through a cursory reading of parts 2 and 3 of his request.
98. What the Commissioner is left with, is a situation where she is required to decide whether the DCLG is entitled to refuse parts 2 and 3 of the complainant's request on the grounds that to comply with the request would be a significant burden to the Department. Essentially, the DCLG is asking her to do this in consideration of a scenario it has constructed around the combined effect of its poor understanding of the terms of the

complainant's request, together with a number of 'reasons' why compliance would be a significant burden.

99. The Commissioner is not wholly persuaded by the DCLG's representations in this matter. It is clear to the Commissioner that the DCLG's current understanding of the complainant's request would require the Department to spend a number of hours engaged in a variety of activities designed to locate and extract meaningful information under the terms of the request and the Department's current understanding of those terms.
100. The number of hours identified by the DCLG is significant. Nevertheless it falls short by some way of the twenty four hours which the Department may be required to spend in order to comply with a request, under the Appropriate Limit provided by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004¹.
101. The Commissioner does not agree with the DCLG's assertion that the information relevant to parts 2 and 3 of the request would be of little value when considered against the burden it has identified. In most cases, the value of information can only be properly assessed once relevant information has been identified and given proper consideration.
102. It would be improper for a public authority to make such a determination unilaterally on, what might be, flawed assumptions as to what information it might hold and on what conclusions may legitimately be adduced from any information if it is held. The DCLG's position is made weaker because it appears to have made little or no attempt to find relevant information, even on its own interpretation of the terms of the request.
103. The DCLG's 'estimate' is not sufficiently adequate for the Commissioner to agree with the Department arguments. Therefore the Commissioner has decided that that section 14(1) is not properly engaged and DCLG is not entitled to rely on this exemption in respect of parts 2 and 3 of the complainant's request.
104. Having examined the extracted diary entries, the Commissioner finds that the private office diary does not contain details sufficient enough to provide the information the complainant seeks at parts 2 and 3 of his request. It is clear to the Commissioner that other sources of

¹ <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

information would need to be searched, interrogated and cross-checked in order to provide the complainant with definitive non-misleading information.

105. In view of its lack of engagement with the complainant, particularly in terms of gaining an agreement as to the proper interpretation of parts 2 and 3 of his request, the Commissioner has decided that the DCLG has breached section 16 of the FOIA. The Commissioner therefore requires the DCLG to provide the complainant with appropriate advice and assistance to enable him to refine his request if he so wishes.

Other matters

106. As noted above, for section 35(1) to be engaged, the information associated with the application of this exemption must 'relate to' a significant extent the formulation and/or development of Government policy. That being the case, it is necessary for the public authority to identify the particular policy or policies which it considers the withheld information relates to and to the Commissioner of the stage at which each policy is at.

107. It is the Commissioner's well-established practice to ask public authorities requires public authorities to provide information concerning the particular policy or policies. The Commissioner therefore asked the DCLG to identify which government policy or policies the Department considers this information to relate in respect of those diary entries where it seeks to rely on section 35(1)(a).

108. In its response to the Commissioner's request, the DCLG declined to provide the details the Commissioner would ordinarily expect in cases where section 35(1) has been applied. The DCLG stated:

"If the Commissioner requires the detail suggested in these questions to be provided to properly determine each application of section 35(1)(a) in diary requests, answering requests for more than a very small range will become a grossly oppressive burden on the Department. Reluctantly, the Department would have to use the procedural exemption at section 14(1) in almost every case."

109. The Commissioner is perturbed by what the DCLG appears to be suggesting: The Commissioner is therefore obliged to make clear to the Department that she would be unlikely to support such an approach, as to do so would penalise requesters who submit legitimate requests, largely on the grounds that the Commissioner's investigation of possible complaints arising from those requests will be considered an "oppressive burden".

Right of appeal

110. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

111. 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.

112. 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

Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF