

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2023

Public Authority: Department for Business and Trade
Address: Old Admiralty Building
Admiralty Place
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant has requested a copy of then-Secretary of State Liz Truss MP's ministerial diary. The above public authority ("the public authority") refused the request as vexatious.
2. The Commissioner's decision is that the public authority is not entitled to rely on section 14 of FOIA to refuse the request. It also breached section 10 of FOIA by failing to respond to the request within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response, to the request, that does not rely on section 14(1) of FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. On 29 March 2021, the complainant made a request for the then-Secretary of State for International Trade's ministerial diary for a 15-month period from December 2019 to March 2021. The then-Department for International Trade relied on section 14(1) of FOIA to refuse the request. In decision notice IC-137309-R9F1¹ the Commissioner agreed that the request would impose a grossly oppressive burden.
6. In demonstrating why the burden would be grossly oppressive, the Department for International Trade provided a sampling exercise in which it stated that it had taken four and a half hours to consider 250 diary entries. That meant that reviewing all the lines within scope would take almost 65 hours at approximately 1.09 minutes per line.
7. As a result of machinery of government changes, the Department for International Trade's functions have now been transferred to the public authority.

Request and response

8. On 9 December 2021, the complainant wrote to the public authority and requested information in the following terms:

"I would like to request the following information:
"From 1st February 2020 to 1st July 2020, please provide a copy of Secretary of State for International Trade Liz Truss' ministerial diaries."
9. The public authority responded on 1 March 2022. It relied on section 35 of FOIA (operation of ministerial office) to withhold the information.
10. Following an internal review the public authority wrote to the complainant on 4 July 2022. It now refused the request as vexatious.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023713/ic-137309-r9f1.pdf>

Scope of the case

11. The complainant contacted the Commissioner on 4 October 2022 to complain about the way her request for information had been handled.
12. On 13 February 2023, the Commissioner wrote to the public authority to outline his provisional view of the complaint. He noted that the timeframe of the present request was only around a third of the size of the previous request – therefore, based on the public authority's own estimates, the amount of work required was likely to be around a third of the previous estimate: approximately 20 hours.
13. Taking into account that 20 hours would be lower than the section 12 cost limit, that the requested information had considerable public value and that, unlike the previous request, had been submitted at a time when fewer Covid-19 restrictions were in place, the Commissioner suggested to the public authority that it was unlikely to be able to rely on section 14(1) of FOIA and should consider issuing a fresh response. Given that the work involved would still be considerable and that the public authority was still working out its machinery of government changes, the Commissioner was willing to allow it a generous amount of time to provide that response.
14. On 3 March 2023, the public authority indicated to the Commissioner that it agreed that section 14 may not apply and that it was likely to disclose some information – it asked for extra time in order to do this. A deadline of 14 April 2023 was originally agreed as reasonable, but was subsequently extended to 24 April 2023.
15. When a further deadline was proposed but not met, the Commissioner informed the public authority that he would extend the deadline to 1 June 2023, but that this was the final deadline and a decision notice would follow if it was not met.
16. On 1 June 2023, the public authority contacted the Commissioner again. It explained that, the previous evening, "No.10 [Downing Street]" had asked it share what it was planning to disclose with Ms Truss MP herself, as a courtesy, before it was disclosed. It explained that it would need an additional three working days in which to do this.
17. The Commissioner recognises that it is courteous to offer a former minister the opportunity to review material that is proposed for disclosure and that this can add value. However, given the time that has elapsed since the public authority appears to have decided (in principle) to disclose some of the diary, it is not clear to the Commissioner why this intervention could not have been made at an earlier stage –

allowing the public authority to factor this consultation time into its estimates.

18. Given that very similar requests have been made to a number of government departments in the last two years, it is also not clear why no guidance appears to have been provided to government departments on the appropriate processes they should follow if considering disclosure. Relying on ad hoc interventions is likely to lead to an inconsistent approach.
19. The public authority's position following its internal review was to refuse the request as vexatious. Whilst it has indicated (including in writing) that it no longer wishes to rely upon this exemption, it has also not disclosed any information or relied on any other exemption.
20. The Commissioner considers that he has given the public authority a reasonable opportunity to disclose information or rely on exemptions to withhold information. The public authority has been courteous and candid in explaining the situation to the Commissioner, but he considers that he must now set a firm deadline for compliance. He has therefore considered whether the public authority's last formally-stated position (that the request was vexatious) is correct.

Reasons for decision

21. Section 14(1) of FOIA allows a public authority to refuse a request that is vexatious. A request can be considered vexatious if complying with it would impose a grossly oppressive burden.
22. The Commissioner pointed out to the public authority that applying its own maths from the previous request to the present request would indicate a burden of around 20 hours, which he did not consider to be grossly oppressive – especially given the other factors referred to in paragraph 13 above.
23. The public authority has not disputed the Commissioner's view and has provided no further submissions as to why the request would impose a grossly oppressive burden.
24. The Commissioner is left to conclude that the public authority is not entitled to rely on section 14(1) of FOIA.
25. Given that the Commissioner has not seen the requested information and the public authority has not stated the alternative exemptions on which it might wish to rely, or explained why those exemptions would apply, the Commissioner considers that the appropriate remedial step is

to order a fresh response to be provided. That will give the complainant the opportunity to make a further complaint if she is dissatisfied with the way any exemptions might be applied.

Procedural matters

26. The public authority breached section 10 of FOIA in its handling of this request as it failed to respond to the request within 20 working days.

Right of appeal

27. 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

28. 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.
29. 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

Roger Cawthorne
Senior Case Officer
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Wycliffe House
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