

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2023

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

Decision (including any steps ordered)

1. The complainant submitted an information request to the Department for Business and Trade (DBT) for a copy of the then Secretary of State Liz Truss MP's Ministerial diary. DBT disclosed part of the diary but redacted other parts of the diary, citing sections 24(1) (national security), 27(1)(a), (c) and (d) (international relations), 35(1)(b) and (d) (formulation of government policy) and 40(2) (personal data) of FOIA as its bases for doing so.
2. The Commissioner's decision is that DBT was entitled to withhold the information redacted under each of sections 24(1), 27(1)(a), 27(1)(c), 27(1)(d), 35(1)(b), 35(1)(d) and 40(2) of FOIA on these bases.
3. The Commissioner does not require further steps, as a result of this decision notice.

Background

4. 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. The then Department for International Trade relied upon section 14(1) of FOIA (vexatious requests) to refuse the request. In decision notice IC-137309-R9F1¹, the Commissioner agreed that the request would impose a grossly oppressive burden.
5. On 9 December 2021, the complainant submitted a refined request for the then Secretary of State for International Trade's Ministerial diary for a period spanning six months. Again, the Department for International Trade relied upon section 14(1) to refuse the request.
6. As a result of machinery of government changes, in February 2023, the Department for International Trade's functions were transferred to DBT.
7. In decision notice IC-195245-L1M3², the Commissioner considered whether DBT was entitled to rely on section 14(1) of FOIA to refuse the request. His decision was that DBT was not entitled to refuse the request as vexatious and he required DBT to issue a fresh response to the complainant that does not rely upon the above exemption.

Request and response

8. On 9 December 2021, the complainant wrote to DBT 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."

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

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025442/ic-195245-l1m3.pdf>

9. After the issuing of the decision notice IC-195245-L1M3 on 2 June 2023, DBT reconsidered the request and issued a fresh response, on 7 July 2023, in which the diary was disclosed with redactions made under sections 23 (security bodies), 24 (national security), 27 (international relations), 35 (formulation of government), 38 (health and safety) and 40(2) (personal data) of FOIA.
10. The case was accepted by the Commissioner, without internal review on 4 August 2023.

Scope of the case

11. The complainant contacted the Commissioner on 31 July 2023 to complain about the way their request for information had been handled. The complainant confirmed that they did not want to contest DBT's application of section 38 of FOIA.
12. DBT had withheld some information within the diaries citing both section 23(1) and 24(1) of FOIA in the alternative. During the course of the Commissioner's investigation DBT revised its position to withhold this information under section 24(1). No information has been withheld under section 23(1).
13. This decision notice therefore considers whether DBT was entitled to withhold the information redacted under each of sections 24, 27, 35 and 40(2) of FOIA on these bases.

Reasons for decision

Section 24(1) - national security

14. Section 24(1) of FOIA states:

"Information which does not fall within section 23(1) [information supplied by, or relating to, bodies dealing with security matters] is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security."

15. In broad terms, the exemption allows a public authority not to disclose information if its release would make the UK or its citizens vulnerable to a national security threat.

16. In this context, the Commissioner interprets 'required for the purposes of' to mean 'reasonably necessary'. Although there has to be a real possibility that disclosure of the requested information would undermine national security, the impact does not need to be direct or immediate.
17. In submissions to the Commissioner, DBT highlighted why disclosure of the withheld information would make the UK or its citizens vulnerable to a national security threat. However, the Commissioner cannot reproduce those arguments here without undermining the exemption, but he considers that, having viewed the withheld information, DBT have amply demonstrated that section 24(1) is engaged. He has therefore gone on to consider the public interest.

Public interest test

18. Section 24(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
19. DBT recognises that there is a general public interest in the disclosure of this type of information and that disclosure "may increase public trust in and engagement with the government". However, DBT argues, that the disclosure of information is overridden by the public interest in protecting sensitive information, which "would damage national security".
20. The Commissioner notes the complainant's view that the information requested covers the first wave of the pandemic and it is "vital to assess how Liz Truss managed her time".
21. In balancing the public interest test, the Commissioner accepts that there is a public interest in the disclosure of Ministerial diaries and that the interest in this case, is heightened by the reasons cited above by the complainant, however he also considers there is a very significant public interest in ensuring that the UK's national security is not undermined. In light of this, and despite the notable public interest in disclosure, the Commissioner has concluded that the public interest favours maintaining the exemption at section 24(1) of FOIA.

Section 27(1)(a), (c) and (d) - international relations

22. Sections 27(1)(a), (c) and (d) of FOIA provides that information is withheld if its disclosure would or would likely prejudice relations between the United Kingdom and any other State, the interests of the United Kingdom abroad, or the promotion or protection by the United Kingdom of its interests abroad.

23. Section 27(5) explains that "State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom includes references to any territory outside the United Kingdom.
24. The complainant considers that DBT has incorrectly applied section 27 to their request as the information concerned "just lists meetings and calls between ministers and others". Furthermore, the complainant argued that the information is from over three years ago, and that "according to the ICO guidelines, the sensitivity of information (although I do not believe the information is sensitive) diminishes over time".
25. DBT explained that as the information, withheld under the exemption, details meetings with "foreign states in relation to trade negotiations", therefore disclosure would be likely to have a detrimental impact on the UK's negotiating position in current and future negotiations.
26. DBT further argued that it would be likely to compromise the goal of international engagement by providing details of which foreign representatives were met and which were not met; how much time was spent on one country, as opposed to the other.
27. In order for a prejudice-based exemption, such as section 27, to be engaged, the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met. In this case DBT has argued that disclosure would be likely to result in prejudice. In order for the exemption to be engaged there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.

28. With regard to the first criterion of the three-limb test described above, the Commissioner accepts that the potential prejudice described by DBT relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect, for it is information that relates to meetings with foreign states.
29. With regards to the second and third criteria, having viewed the withheld information, the Commissioner accepts that disclosure of the withheld information would be likely to encroach upon the UK's relations with other states, which value the UK's trust and discretion. Furthermore, he accepts that any indication of priority would be likely to prejudice the Government's ability to achieve outcomes which are in the national interest. He considers the likelihood of this prejudice occurring to be a real and significant risk.
30. The Commissioner has therefore concluded that the exemptions contained at sections 27(1)(a), (c) and (d) are engaged. He has therefore gone on to consider the public interest.

Public interest test

31. Section 27(1) is a qualified exemption and therefore subject to the public interest test. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
32. DBT accepts that there is a public interest in openness and transparency in all aspects of government. However, it also states that it does not routinely provide details of Ministers and senior civil servants engagements with their diplomatic counterparts, as it is not "in the national interest" to disclose this information. Furthermore, it states that there is "public interest in respecting international confidences to ensure that foreign states are not deterred from engaging with the UK Government".
33. The Commissioner notes the complainant's view that a disclosure of the information will enable the public to know "who exactly ministers have been communicating with, especially in regard to the awarding of Covid contracts and decisions taken by ministers when handling the crisis".
34. In balancing the public interest, the Commissioner accepts that there is a legitimate and clear public interest in the public having knowledge of how Ministers use their time, especially during a pandemic. However, he also accepts that there is a clear public interest in the UK Government being able to maintain effective relations with foreign states, and that disclosure of the information, withheld under sections 27(1)(a)(c)(d) would be likely to risk affecting these relations.

35. In light of this, and despite the notable public interest in disclosure, the Commissioner has concluded that the public interest favours maintaining the exemptions of sections 27(1)(a)(c)(d) of FOIA.

Section 35 - formulation of government policy

36. DBT withheld information under both sections 35(1)(b) and 35(1)(d) of FOIA.
37. Section 35(1)(b) of FOIA states that information held by a government department is exempt from disclosure if it relates to Ministerial communications.
38. Section 35(5) of FOIA explains that 'Ministerial communications' includes any communications between Ministers of the Crown and, in particular, proceedings of the Cabinet or any committee of the Cabinet.
39. As explained in the Commissioner's guidance³, the purpose of section 35(1)(b) is to protect the operation of government at Ministerial level. It prevents disclosures that would significantly undermine Ministerial unity and effectiveness or result in less robust, well-considered or effective Ministerial debates and decisions.
40. In this case, DBT explained that the communications the then Secretary of State were involved in, were "multiple and varied" and that the exemption has been applied to "Minister to Minister bilateral meetings, Cabinet, and Cabinet Committees".
41. Having viewed the withheld information, the Commissioner is satisfied that section 35(1)(b) is engaged, for the definition of 'communications' between Ministers is broad and can include entries in a diary that record the fact that a meeting was scheduled to take place between Ministers.
42. He will now go on to consider section 35(1)(d).
43. Section 35(1)(d) of FOIA states that information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the operation of a Ministerial private office.

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

44. Section 35(5) defines Ministerial private office as any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland Junior Minister, or any part of the Welsh Government providing personal administrative support to the Welsh Government.
45. The Commissioner's guidance explains that the exemption covers information which 'relates to' the operation of the private office. This is generally interpreted broadly. However, this does not mean that all information with any link to a Ministerial private office is covered. Section 35(1)(d) refers specifically to the operation of a Ministerial private office, which itself is defined as providing administrative support. In other words, it covers information about administrative support to a minister.
46. Therefore, the exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about Ministerial priorities and similar issues.
47. In the circumstances of this case, DBT explained that the information withheld under this exemption, details the administrative and operational support provided to Liz Truss by her Ministerial Private Office.
48. It further explains that the information withheld, under this exemption, is "focused entirely on that administrative function of the office" and that where possible information related to the meeting or event has been disclosed. It further adds that the administrative detail does not aid any public understanding of the activity and that there is a genuine risk that disclosure of this information "encroaches on the safe space needed to effectively run any Ministerial office".
49. The Commissioner notes the complainant's comments that they do not believe that a disclosure will "undermine the effective running of a Ministerial office". However, having looked at the withheld information, the Commissioner is satisfied that the exemption is engaged as it relates directly to the administration of the then Secretary of State's diary, and in turn, therefore relates to the operation of her office.
50. The Commissioner has therefore concluded that the exemptions contained at sections 35(1)(b) and (d) are engaged. He has therefore gone on to consider the public interest. The public interest test consideration below will address the arguments presented for both subsections.

Public interest test

51. Section 35 is a qualified exemption and therefore subject to the public interest test. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
52. Looking at the information withheld under section 35(1)(b), DBT recognises the public interest in "knowing that the Government is prepared for emergencies and can respond to disruptive challenges in a timely, proportionate manner". However, it also argues that disclosing the number of meetings would undermine the "Minister's discretion in how they organise themselves to discuss relevant topics and, in this case, engage with each other during usual and unusual times".
53. Regarding the information withheld under section 35(1)(d), DBT recognises that there is a public interest in information regarding the activity of government and Ministers, particularly during the period of the Covid pandemic. However, it also maintains that the key public interest argument against disclosure relates to "the private office's ability to focus on the effective management of the private office", and that disclosure of the withheld information of an administrative nature, would undermine the way it was managed, recorded and the effectiveness of that established administrative support requirement.
54. The Commissioner notes the complainant's comments that a full disclosure of Ministerial diaries will "enable the public to know who exactly Ministers have been communicating with, especially in regard to the awarding of Covid contracts and decisions taken by Ministers when handling the crisis". Furthermore, they argue that there have been "many examples of where transparency data has purposefully or accidentally excluded Ministerial meetings".
55. In balancing the public interest test, the Commissioner has carefully considered the information which has been withheld on the basis of sections 35(1)(b) and 35(1)(d).
56. The Commissioner accepts that there will always be a public interest in disclosure of this type of information to promote government transparency and accountability and to increase public awareness, and furthermore that there is a heightened interest, given the context of the pandemic at the time.
57. However, looking at section 35(1)(b) first, the Commissioner considers that the focus on protecting Ministerial discussions and collective decision making, reflects the underlying purpose of the exemption.

58. Turning now to section 35(1)(d), the Commissioner considers that the public interest lies in preserving a safe space for the private office to focus on managing the Minister's work effectively, and considers that disclosure of the information, withheld under this exemption, would not add significantly to the public's understanding of how a Ministerial office is run. Furthermore, having viewed the withheld material, it does not appear to concern the matters that the complainant has raised above, so would not meet the public interests identified by the complainant.
59. The Commissioner also recognises that the ongoing UK Covid-19 Inquiry, which had already been announced at the time of the request, covers similar issues to those that the complainant has raised, such as preparedness and decision making. His guidance on the public interest test, explains⁴ where other means of scrutiny are available, they may go some way to satisfying the public interest that would be served by disclosure.
60. Therefore, on balance, the Commissioner is of the view that the public interest lies in favour of maintaining the exemptions at sections 35(1)(b) and 35(1)(d).

Section 40(2) – personal data

61. Section 40(2) of FOIA provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
62. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:
- “any information relating to an identified or identifiable living individual.”
63. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit11>

64. The Commissioner has seen the withheld information and is satisfied that the information redacted relating to Liz Truss constitutes her personal data. She is clearly identifiable from it and it has biographical significance for her. Similarly, the Commissioner accepts that the names of junior staff in relation to the management and support of the Minister and her office, clearly also constitute personal data.
65. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focused here on principle (a) which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
66. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
67. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider if there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
68. The Commissioner considers that the complainant is pursuing a legitimate interest in requesting a copy of the diary, and in seeking assurance that the "names of senior officials, politicians and senior civil servants have not been redacted". Having seen the withheld information, the Commissioner can confirm that no such information has been redacted, nevertheless, he still considers wishing to verify this to be a legitimate interest.
69. In considering the balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause.
 - whether the information is already in the public domain.
 - whether the information is already known to some individuals.
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
70. DBT argued that, in relation to Liz Truss' personal data, her reasonable expectations were that diary entries relating to personal appointments, party political activities and constituency work would not be disclosed.

71. The Commissioner accepts that such expectations are reasonable ones and that whilst Ministers should expect that information relating to their Ministerial engagements will be disclosed, they would not expect disclosure of personal appointments. Furthermore, the Commissioner accepts that to do so could risk infringing the privacy rights of Liz Truss.
72. Looking at the party political and constituency work that has been withheld, the Commissioner accepts that such information has generally not been disclosed in response to a FOI request, and as such he expects that Liz Truss would have a legitimate expectation that such information would not be disclosed. Whilst the disclosure of such information is unlikely to have as significant impact on Liz Truss' privacy as the information about her personal appointments, the Commissioner accepts that by a narrow margin the balance favours withholding this information.
73. In relation to the personal data of junior employees, it is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA. Furthermore, the Commissioner has not seen any evidence to suggest that individuals involved would have a reasonable expectation that their data be disclosed in response to an information request.
74. Furthermore, the Commissioner is aware that DBT has disclosed the names of various individuals, distinguishing between junior and senior department officials, and that it has actively disclosed the identities of individuals with an existing public presence.
75. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. He therefore has not gone on to separately consider whether disclosure would be fair or transparent.
76. The Commissioner's decision is that DBT is entitled to rely on section 40(2) of FOIA to withhold the information redacted on this basis.

Right of appeal

77. 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

78. 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.

79. 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

Victoria James
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