Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 September 2019

Public Authority: Ministry of Housing, Communities & Local Government

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the ministerial diary of Jake Berry MP who, during the time period specified in the request, was the minister with responsibility for the Northern Powerhouse project. The Ministry of Housing, Communities & Local Government (MHCLG) relied on section 14(1) (vexatious requests) of the FOIA to refuse the request, which, it argued, would impose a grossly oppressive burden on the Ministry.

2. The Commissioner's decision is that MHCLG was not entitled to rely on section 14(1) to refuse the request.

3. The Commissioner requires MHCLG to take the following steps to ensure compliance with the legislation.

    - Issue a fresh response to the request which does not rely on section 14(1) of the FOIA.

4. MHCLG must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 27 November 2018, the complainant wrote to MHCLG and requested information in the following terms:

"Please provide a copy of Northern Powerhouse minister Jake Berry's Ministerial diary from 1st June 2017 to 27th November 2018."

6. MHCLG responded on 27 December 2018. It stated that it was relying on section 14(1) to refuse the request because it considered that complying with the request would impose a grossly oppressive burden.

7. Following an internal review MHCLG wrote to the complainant on 5 March 2019. It revised its initial estimate of the time necessary to comply with the request down from 292 hours to 55 hours, but stated that it still considered this burden to be grossly oppressive and so upheld its reliance on section 14(1).

Scope of the case

8. The complainant contacted the Commissioner on 11 March 2019 to complain about the way his request for information had been handled.

9. The complainant disputed MHCLG's central estimate for the amount of time that would be necessary to consider and effect redactions. He also argued that some of the activities that had been included in the cost estimate were impermissible.

10. The scope of the analysis that follows is to determine whether MHCLG has made a reasonable assessment of the burden the request would impose and whether such a burden would be grossly oppressive in the circumstances.

Reasons for decision

11. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.

12. Section 14 of the FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

13. The term "vexatious" is not defined within the FOIA. Section 14 refusals more commonly focus on the individual submitting the request and the patterns of their previous behaviour. However, the First Tier Tribunal held in *Salford City Council vs ICO and Tiekey Accounts Ltd* (EA/2012/0047) that a request could engage section 14 purely because the burden of complying with that request would be grossly oppressive and that:

> *"a disproportionately high cost would be incurred for any minimal public benefit flowing from the disclosure."*

14. The Commissioner's guidance[1] advises public authorities to rely on section 12 of the FOIA when refusing burdensome requests wherever possible. However, she recognises that there will be a small number of cases where a public authority can identify and extract information within scope reasonably quickly, so section 12 cannot be cited, but where responding would nevertheless impose a grossly oppressive burden. Generally this will be due to the time that the public authority believes it will be necessary to spend on work relating to citing exemptions from part II of the FOIA and separating exempt information from disclosable information. Time spent on such work cannot be taken into account in relation to section 12.

15. The Commissioner considers that such a situation is likely to occur where:

    a. The requester has asked for a substantial volume of information and;

    b. The public authority has real concerns about potentially exempt information and;

    c. Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

16. There is no time or cost limit which determines whether section 14 is or is not engaged. The Tribunal in *Salford* considered that the £600 limit – the equivalent of 24 hours of staff time – that is applied in relation to section 12 was *"helpful in considering whether the scale of costs might*

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

be proportionate."[2] However the Commissioner considers that it should not be assumed automatically that a burden which exceeds £600 would be grossly oppressive.

MHCLG's position

17. MHCLG explained to the Commissioner that it had extracted diary entries for the relevant period and placed them into an Excel spreadsheet with each diary entry being placed into a single row. It stated that the full spreadsheet amounted to 3,301 rows of data which would, it argued, all need to be checked manually for information which might be exempt.

18. Having carried out a brief review of the sorts of information contained within the diary entries, MHCLG considered that, having examined sections of the diary and given its knowledge about the types of information the diary would contain, it would be highly likely that it would seek to apply one or more of the following FOIA exemptions to withhold information:

Section 24 – National Security

19. MHCLG explained that section 24 would be engaged *"in relation to the COBRA meetings that the Minister was involved with, which also feature within the diary."*

Section 35 – Development of Government Policy and Operation of a Ministerial Private Office

20. In relation to section 35, MHCLG noted that:

> *"The Minister attended many meetings during the period the request covers. It is likely that many of these would be directly concerned with the development of policy. Likewise the presence within the diary of personal data connected to members of the Ministers Private Office indicates that the Diary was also used for matters relating to the Ministers Private Office, and not just to matters directly pertaining to the Minister himself. It is therefore likely that Section 35(1)(d) might apply to some information in relation to the operation of the Ministerial Private Office. It is worth*

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2 http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i873/20121030%20Decision%20amended%2031-10-12%20EA20120047.pdf (Paragraph 16)

noting that the Minister continues to occupy a ministerial role in the Department and therefore many of the issues and policies he was involved with are still current."

Section 38 – Health and Safety

21. MHCLG cited numerous examples of MPs being harassed and threatened by members of the public – a pattern it attributed to the current "febrile" atmosphere around politics. It commented that:

"The presence of the Minister's home address and travel arrangements within the Diary engages both Section 38 and Section 40, as release of this information would be likely to have a significant effect on the Minister's safety. If a Ministerial address or means of travel were released it could endanger the physical or mental health of the Minister, and by extension his family…It is also worth bearing in mind that a determined person with time and patience could potentially create a route map of locations that the Minister attends, when, and which means of transport he utilises to get there, by examining the diary entries."

Section 40 – Personal Information

22. Finally, in relation to personal information, as well as the comments in relation to section 38, MHCLG stated that:

"Personal information is present throughout the Diary. Information relating to junior members of staff, ie staff below SCS level, is present, usually in relation to members of the Ministers Private Office.…There is also personal information relating to persons from external organisations meeting with the Minister, in the form of names, addresses and mobile phone numbers. Seniority of external staff is not known, and whilst it can be assumed that they are senior enough for their names to be divulged, it would not be fair or proportionate to those persons present within the diary to release their names without some form of fact checking exercise first. There is the potential to breach the Data Protection Act 2018 if this exercise is incorrectly carried out. This activity could potentially take a significant amount of time and add to the burden."

Estimating the overall burden

23. In its initial response, MHCLG stated that it would take, on average, five minutes per line to consider whether the information should be disclosed. At internal review stage, it revised this estimate down from five minutes to one minute per line – but noted that this would still require a total of 55 hours of consideration in order to comply with the

request. It later confirmed to the Commissioner that its estimate of one minute per line was based on a sampling exercise:

> *"A member of staff looked through the diary to redact and review entries. We have concluded that the estimate given in our Internal Review of 1 minute a line is a robust calculation. Whilst it is possible to redact several entries within a minute, it is not possible to accurately factor in the amount of time necessary for making a proper determination of whether the information should be redacted or not. This issue, is mainly concerned with the personal data entries contained within the diary, for example; individuals names, the seniority of those names, associated telephone numbers, addresses and whether they can be left unredacted. It has been necessary, during the sampling exercise to use open source research (google) to ascertain the identities of a number of individuals. Therefore it is the Departments belief that the majority of the time taken would be concerned with determining how harmful the information would be if it were to be released without being redacted.*

24. In addition to the line-by-line analysis, MHCLG further noted in its response and review that its estimate was:

> *"not taking into account any other necessary administrative work surrounding the release of the diary, for example:*
>
> - *Preparing advice for the relevant ministers (4-5 hours)*[3]
> - *Preparing the public interest tests for any withheld information (4-5 hours)*
> - *Notifying the Security services if necessary (less than 1 hour)*
> - *Notifying third parties of the possible release of their information or information in which they are referenced (5-20 hours estimated)."*

25. Furthermore, MHCLG noted that the task of considering the diary entries would fall to a relatively small but busy private office, as redactions would need to be done by somebody familiar with the diary.

[3] MHCLG clarified, during the course of the Commissioner's investigation, that the reference to "relevant ministers" should have read "relevant ministers' private offices". It explained that it would normally brief ministers and members of the private office when a request is submitted for information relating to their professional lives.

26. Finally, MHCLG argued that an automated method of redaction (as suggested by the complainant) would be of limited use. Whilst it accepted that certain names or contact details would occur regularly (such as the names of staff within the private office) and so could be removed using a tool such as Excel's "Find & Replace" function, this would not remove the need for a manual line-by-line check. It also noted that, because the diary would be edited by several people within the private office, identical events could be described in several different ways, reducing the effectiveness of an automated process.

The Commissioner's view

27. The Commissioner considers that MHCLG has not demonstrated that complying with the request, as it was worded, would have imposed a burden which was grossly oppressive.

28. Whilst the appropriate limit under section 12 is a point of reference, the Commissioner notes that this limit does not apply to section 14(1) and she considers that the phrase "grossly oppressive" should not necessarily be taken as equivalent to the section 12 cost limit. Particularly where there is significant public interest in complying with the request, the bar may be much higher.

29. The Commissioner has considered a small sample of diary entries which MHCLG provided. The Commissioner notes that the withheld information is scattered with personal data and, in some cases, special category personal data, which should not be released.

30. The Commissioner is not, however, convinced that applying section 40 would be as burdensome as MHCLG has estimated. As noted above at paragraph 24, a significant part of the reasoning of MHCLG related to contacting data subjects to notify them of the possible release of their personal data. Whilst MHCLG may choose to take this approach, this would not be a requirement of the FOIA – section 40 includes no provision that requires the contacting of data subjects. Given this, the Commissioner does not accept that the 5 to 20 hours that MHCLG estimated for this task should be taken into account here.

31. There is also cause to question how much time it would be necessary to spend on applying section 35(1)(d) of the FOIA in relation to ministerial diaries. In an earlier case relating to similar information[4], the

[4] https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014731/fs50629605.pdf

Commissioner found that the information engaged the exemption, but that the disclosure of the information was in the public interest. This decision was upheld on appeal to the First Tier Tribunal[5]. In the absence of any reasoning from MHCLG as to why section 35(1)(d) should be expected to be upheld in this case, despite its similarities to the earlier case, the Commissioner does not accept that time spent on applying that exemption should be taken into account here.

32. The complainant has argued that many of the lines could be redacted in well under a minute and that the process could be speeded up by using automated methods. The Commissioner agrees that some form of automated process could reduce the burden and she also considers that there would be considerable variation in the time that would be required to review individual lines. Some lines would clearly take far less than a minute to redact, but some would take longer.

33. The Commissioner does not accept MHCLG's arguments about other activities which would be required on top of the line-by-line analysis. Consultations with ministers and with the Security Services are not requirements of the FOIA and so the Commissioner does not accept that time on those activities should be taken into account here. She also considers that any time taken in preparing for and conducting a public interest test should form part of "time per line" calculation and not be a separate item.

34. MHCLG did not provide a detailed breakdown of how it had arrived at its one minute per line average – although it did confirm that this was based on a sample. In view of the unnecessary activities that MHCLG appears to have included in its calculations, the Commissioner has difficulty in accepting that this figure is robust. Her view is therefore, that, based on the breakdown of its estimate given at paragraph 24 above, the 55 hours estimated by the MHCLG should be significantly reduced.

35. Whilst the Commissioner accepts that the burden would necessarily fall upon a relatively small number of people who are familiar with the ministerial diary, given that MHCLG is a large public authority with considerable resources she is unable to give much weight to such an argument.

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5 http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2191/Dept%20for%20Communities%20&%20Local%20Government%20EA-2017-0211%20(15.04.18).pdf

36. The Commissioner accepts the complainant's argument that information of this type would be of interest to anyone wishing to understand how a minister spends their time and what their priorities are. The Commissioner notes that this particular ministerial office, being relatively recent, is less well defined, in policy terms, than others which increases the public interest in how the holder of that office is spending his time.

37. The Commissioner accepts that responding to the request would require MHCLG to spend time on considering and applying exemptions. However, her view is that the time required for this would be considerably shorter than MHCLG estimated. This reduced time estimate, combined with the valid public interest in disclosure of the information, means that the Commissioner does not consider that the request would be so burdensome as to make it vexatious. She therefore finds that the request does not engage section 14(1). At paragraph 3 above, MHCLG is now required to respond to the request afresh and without relying on section 14(1).

Right of appeal

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

39. 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.

40. 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 .....

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