Neutral citation: [2024] UKFTT 581 (GRC)

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Numbers: EA/2022/0163 (1)
EA/2023/0235 (2)

Heard by Video
On 25 March 2024

Decision given on: 05 July 2024

Before

JUDGE OF THE FIRST-TIER TRIBUNAL SWANEY
TRIBUNAL MEMBER WOLF
TRIBUNAL MEMBER YATES

Between

GEORGE GREENWOOD

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

DEPARTMENT OF HEALTH AND SOCIAL CARE

Second Respondents

Representation:

For Mr Greenwood: Mr B Mitchell, of counsel
For the Information Commissioner: Mr W Perry, of counsel
For the Department of Health & Social Care: Mr R Cohen and Ms I Saran, of counsel

DECISION

1. The tribunal substitutes the decision notice issued on 22 April 2022 as follows:

   (i) The DHSC failed to carry out appropriate searches to comply with the request for information.

   (ii) The DHSC must carry out further searches within 35 calendar days of the date of issue of this decision. Specifically, those searches must include any private email

address used by Mr Matt Hancock and the DHSC email address used by Ms Gina Coladangelo.

(iii) The exemptions relied on pursuant to sections 27 and 40 in respect of material already disclosed were applied correctly for the reasons set out in the CLOSED annex to this decision.

2. The tribunal substitutes the decision notice issued on 28 March 2023 as follows:

(i) The DHSC holds the requested information.

(ii) Within 35 calendar days of the date of issue of this decision, the DHSC must comply with the appellant's request for 'all correspondence between Matt Hancock and Gina Coladangelo relating to government business from 1st January 2021 to 29 June 2021 using… methods of communication other than their departmental email or any private email that Mr Hancock has used for government business (so this request includes, without limitation, WhatsApp messaging, and Gina Coladangelo's email account)' save that the reference to WhatsApp messaging is to be read as being limited to messages sent and received in the Matt & his NEDs and Level 4 WhatsApp groups in accordance with the appellant's narrowed request.

OPEN REASONS

Background

3. The appellant is a journalist employed by Times Media Ltd (TML) who writes for The Times, a newspaper published by TML. He is concerned with lack of transparency and conflicts of interest in government decision-making, and with potential misconduct in public office.

4. He made two requests for information following the resignation of Matt Hancock as Secretary of State for Health and Social Care which came after details of his romantic relationship with Gina Coladangelo, whom he had appointed as a non-executive director of DHSC became public.

5. The reason for the appellant's interest is what he considers to be the inherent conflict of interest and questions it raises about the policy advice the Secretary of State received and whether it was coloured by his relationship; the extent to which the Secretary of State may have considered Ms Coladangelo's advice more carefully than that of others; and the extent to which he may have listened to advice that could advance her private interests. In addition, the appellant is of the view that there is public interest in knowing the extent to which Ms Coladangelo had input into departmental business during their relationship, including in relation to procurement or the awarding of contracts.

6. On 29 June 2021 the appellant made the first request to the Department for Health and Social Care (DHSC) for information in the following terms:

> I am sending this request under the Freedom of Information Act.
>
> Please provide all correspondence between Matt Hancock and Gina Colangelo relating to government business from 1st January 2021 to date using:
>
> - Mr Hancock or Ms Colangelo's departmental email
>
> - Any private email that Mr Hancock has used for government business.

7. The DHSC responded on 8 October 2021 and confirmed that it held two emails which were within the scope of the appellant's request. It withheld the requested information under section 35(1)(a) of FOIA.

8. The appellant requested an internal review on 18 October 2021. He also requested a redacted copy of the withheld information.

9. On 17 January 2022, before the outcome of that review was known, the appellant made a complaint to the Information Commissioner (the Commissioner). The DHSC completed its internal review on 7 February 2022 and following that, the Commissioner accepted the appellant's complaint for investigation.

10. The Commissioner made his decision on 22 April 2022. The DHSC lodged an appeal against that decision which was allocated the reference EA/2022/0127. The appellant also lodged an appeal against the Commissioner's decision, which was allocated the reference EA/2022/0163. Given that both appeals challenged the same decision, they were linked to be heard together.

11. On 20 October 2022 the DHSC advised the appellant that following a review, it had identified two additional emails (additional to the two identified on 8 October 2021) it considered were within scope of his request. The DHSC advised that it had reviewed the content of all four emails and while not conceding that exemptions did not properly apply, it had decided to disclose all four emails. In light of the disclosure, the DHSC invited the appellant to withdraw his appeal. He declined to do so.

12. On 17 January 2023 the DHSC sought to withdraw its appeal against the Commissioner's decision of 22 April 2022. The tribunal consented to the withdrawal pursuant to rule 17 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Procedure Rules) on 23 January 2023 and the appeal with reference EA/2022/0127 came to an end. The appellant's appeal continues and is one of the appeals which falls for us to determine.

13. On 12 August 2022 the appellant made a further request to the DHSC for information, he requested:

> all correspondence between Matt Hancock and Gina Coladangelo relating to government business from 1st January 2021 to 29 June 2021 using… methods of communication other than their departmental email or any

private email that Mr Hancock has used for government business (so this request includes, without limitation, WhatsApp messaging, and Gina Coladangelo's email account)

14. The DHSC asked the appellant to clarify his request and on 15 September 2022 he responded in the following terms:

> Correspondence between the pair on government business which was not conducted on:
>
> - Their departmental email accounts.
> - Any private email that Mr Hancock has used for government business.
>
> This would include, but not be limited to, WhatsApp (on personal or government devices) and [name redacted] email account.

15. On 8 October 2022 the DHSC refused to comply with the request relying on section 14 of FOIA. The DHSC suggested that it was able to process the part of the request relating to emails.

16. The appellant requested an internal review on 11 October 2022. He asked the DHSC to process the part of the request which related to emails and challenged the DHSC's reliance on section 14 of FOIA in respect of the remainder of the request.

17. On 5 December 2022 the DHSC responded in respect of part of the request relating to emails. The DHSC confirmed the existence of 1385 emails between the named account and all DHSC departmental email addresses but no emails between the named account and Matt Hancock's DHSC departmental email address or the three known personal accounts he has used. The DHSC therefore advised that the requested information is not held.

18. The DHSC carried out an internal review relating to other private messaging devices and on 13 January 2023 notified the appellant that it confirmed its reliance of section 14 of FOIA at the time. It advised however, that information had been copied to a different computer system which enabled it to carry out appropriate searches. Having done so, the DHSC advised the appellant that the searches returned no results, and that the requested information is not held.

19. The appellant lodged a complaint to the Commissioner on 14 December 2022 on the basis that he did not believe that the DHSC does not hold the requested information.

20. The Commissioner gave his decision on 28 March 2023. The appellant lodged an appeal on 25 April 2023 which was allocated the reference EA/2023/0235 and is the second of the two appeals before us for determination.

The respondent's decisions

21. The Commissioner gave the following reasons for his decision made on 22 April 2022:

(i) The requested information relates to the formulation and development of government policy.

(ii) Formulation of government policy comprises the early stages of the policy process.

(iii) There is no need to identify any prejudice for section 35(1)(a) to be engaged.

(iv) The DHSC's explanation that the withheld information relates to the early development of post-pandemic health policy is accepted, as is the explanation that there is significant research ongoing which will inform policy development and it is not possible to say when formulation and development of the policy will be complete.

(v) There is significant public interest in disclosure of the requested information which includes ensuring that taxpayers' money is spent wisely, that value for money is sought, and that the process is transparent. The impact of COVID-19 continues to attract extensive Parliamentary, media and public scrutiny.

(vi) There is also significant public interest in maintaining the exemption which includes maintaining a safe space for the formulation of government policy. If that is not done, the possibility of public exposure may deter full, candid, and proper deliberation of policy formulation, including the exploration of all options. Premature public disclosure may have a negative effect on the ability of civil servants and experts to discuss all options and to expose their merits and possible implications candidly. Premature disclosure could also prejudice good working relationships and the neutrality of the civil service.

(vii) While the request relates to early post-pandemic policy development, at the time the request was made and the withheld information was recent, the government's post-pandemic health policy remains under review and development.

(viii) The public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

(ix) Information withheld pursuant to section 35(1)(a) of FOIA was correctly withheld.

(x) Information withheld under section 35(1)(d) contains substantive discussions between two of the Secretary of State's advisors relating to Covid vaccinations and does not relate to the administration of a ministerial private office.

(xi) The information withheld under section 35(1)(d) was published under the title 'How we got here: lessons from the UK vaccine rollout'. At least some of the withheld information has been circulated outside the ministerial private office.

(xii) Section 35(1)(d) was not applied correctly, and information withheld pursuant to that provision must be disclosed.

22. The Commissioner gave the following reasons for his decision made on 23 March 2023:

(i) DHSC has conducted full searches of all accounts held for both individuals named in the request including the three known personal accounts of Matt Hancock and WhatsApp and no recorded information is held.

(ii) No faxes or letters are held.

(iii) Four WhatsApp messages were identified, but they are all personal communications and not related to government business, so are not subject to FOIA.

(iv) DHSC does not hold the 100,000 WhatsApp messages disclosed by Matt Hancock because they were not transferred to the official record following his resignation.

(v) It is accepted on the balance of probabilities that the DHSC does not hold any recorded information that is within the scope of the request.

The appeal hearing

23. The hearing was initially listed for two days, however, due to the significant narrowing of the issues in advance of the hearing, only one day was required. The hearing consisted of an open session during which both DHSC witnesses were cross-examined; a CLOSED session during which the tribunal heard submissions in respect of the application of sections 27 and 40 of FOIA; and a further open session during which we heard detailed submissions from all three parties.

24. At the conclusion of the CLOSED session, Mr Perry drafted the following gist, which was agreed by Mr Cohen and which we approved:

> Mr Cohen made some brief submissions on the Department's reliance on the s.27 exemption. These submissions mirrored the submissions contained in the Department's CLOSED Response of March 2023.
>
> Mr Perry responded to Mr Cohen's submissions regarding s.27 with reference to the content of the closed information and the lack of evidence as to the diplomatic consequences of its disclosure. Mr Perry also made submission as to whether the content of the "Matt & his Neds" group messages "related to government business".
>
> Mr Cohen made submissions with reference to the "Matt & his Neds" group regarding the difficulty of determining whether or not certain messages sent on that group fall within scope of the request, in particular the question of whether messages sent by Mr Hancock or Ms Coladangelo to third parties (i.e. not to one another) amount to "correspondence between" these two individuals.

Judge Swaney asked Mr Cohen about whether distinctions might be drawn between "Matt & his Neds" and other WhatsApp groups with larger numbers of members as to the question of whether information fell within scope of the request.

Mr Cohen responded that the difficulties faced by the Department became more pronounced for larger groups. He explained that this submission could be repeated in OPEN.

Mr Perry responded to Mr Cohen's submissions, first, by explaining that the messages could be filtered to remove messages sent by third parties to either Mr Hancock or Ms Coladangelo.

Mr Cohen explained that filtering would not address the Department's concerns because it would have to consider proximate messages to determine whether a message in question fell within scope – e.g. where a message was responding to one sent by a third party.

Mr Perry responded that "relates to" in the request was a low bar for determining whether information fell within scope. He submitted that difficulties in identifying the relevance of isolated messages might go to the public interest in disclosure, but that this was a later stage of the analysis. Finally, Mr Perry submitted that a message sent within a relevant WhatsApp group by either Mr Hancock or Ms Coladangelo that was directed towards a third party would still fall within scope in circumstances where Mr Hancock or Ms Coladangelo could have chosen to send that message to the third party on a bilateral communication channel.

The appellant's case

25. The appellant contends that there are essentially four issues in this appeal:

(i) Has the DHSC conducted adequate searches for emails within the scope of the first request? The appellant's position is that it has not and that the emails disclosed demonstrate the lack of credibility of the DHSC's claim that it has carried out adequate searches.

(ii) Should the second decision notice be set aside and replaced? All parties agree that the Commissioner's decision that the DHSC did not hold the requested information was not in scope simply because it did not hold the information as part of its official record is wrong in law. The appellant's position is that the tribunal should make a finding to that effect because while not binding, decisions of the First-tier Tribunal carry weight in the absence of authorities from the higher courts and simply recording the error is insufficient. In the absence of a clear finding by the tribunal, other public authorities may rely on the decision notice which contains an accepted error.

(iii) Are messages sent between Ms Coladangelo and Mr Hancock on WhatsApp groups outside the scope of the second request simply because they were sent within groups? The appellant's position is that this cannot be the case and is an overly narrow interpretation of the request. He contends that the messages from WhatsApp groups are clearly within scope of the second request.

(iv) Is the second request in relation to messages in WhatsApp groups vexatious? The appellant contends that it cannot be, particularly in light of his offer to reframe his request. Moreover, the DHSC has failed to provide any basis for its estimate of how long it would take to respond to the request meaning that little weight should be given to that estimate. The evidence of Mr Harris is of little assistance because he did not personally view the evidence and should therefore attract little weight.

26. We note that there is a fifth issue relating to the first. That is whether the DHSC was entitled to rely on sections 27 and 40 of FOIA to withhold some information from emails disclosed pursuant to the first request, the appellant adopted a neutral position. He was unable to see the closed evidence and so could not comment on whether the exemptions were engaged or had been correctly applied.

The first respondent's position

27. The Commissioner's response in respect of the five issues is as follows:

(i) The Commissioner agrees that the DHSC's searches in respect of the first request were inadequate and that the DHSC should be required to undertake further searches to find material with the scope of that request.

(ii) The Commissioner agrees with the appellant's submissions that the decision made on 28 March 2023 contains an error of law because he did not consider whether the requested information was held on behalf of the DHSC by Mr Hancock or Ms Coladangelo or any other person included in their communications such that section 3(2)(b) of FOIA might apply.

(iii) The Commissioner adopts the appellant's submissions in respect of whether WhatsApp messages from groups are within the scope of the second request. He accepts that communications sent by Mr Hancock and/or Ms Coladangelo on WhatsApp groups of which they are both members are within scope of the second request. The Commissioner considers that communications sent by third parties on WhatsApp groups of which Mr Hancock and Ms Coladangelo are both members are outside the scope of the second request.

(iv) The Commissioner shares the appellant's concerns about the robustness of the DHSC's evidence on the level of resources it would require in order to comply with the second request. The Commissioner considers that there is insufficient evidence before the tribunal to reach a concluded view in respect of any of the WhatsApp groups other than 'Matt and his NEDs'. The Commissioner contends that the DHSC cannot rely on section 14 of FOIA in relation to that group and

there is insufficient evidence to form a concluded view in respect of the other groups. The Commissioner suggests that a legal point arises in respect of this issue, which is the suggestion that the DHSC's failure to comply with its duty under section 16 is fully or partly determinative of the issues arising under section 14. His position is that while compliance with section 16 is a matter of good practice, there is no statutory requirement to comply with section 16 in order to rely on section 14(1).

(v) In relation to the exemptions relied on by the DHSC for withholding information in the emails disclosed to the appellant, the Commissioner made submissions in the CLOSED session.

The second respondent's position

28. The DHSC's position in relation to the four primary issues is as follows:

(i) The DHSC does not accept that the searches conducted by the DHSC in relation to the first request were inadequate and points to the work done subsequently to review the evidence in much more detail than would ordinarily have been the case, which identified further emails within scope of the request, which have been disclosed. It is not accepted that the high volume of WhatsApp communications is indicative of a likelihood that there is more undisclosed email communication. The DHSC refutes the suggestion that the emails are indicative of wider communication by that method. To the contrary, the DHSC submits that they are indicative of occasional, one-off emails. The DHSC contends that the methodology used to identify emails within scope of the first request was robust and appropriate and there is no basis on which the DHSC should be required to conduct any further searches.

(ii) The DHSC agrees that the decision notice issued on 28 March 2023 is flawed for the reasons set out by the appellant.

(iii) The DHSC asserts that communications sent on WhatsApp groups are not within scope of the second request. This is because 'correspondence' does not include situations where one person provides information to a forum where people may or may not respond. The DHSC contends that messages sent to WhatsApp groups are broadcasts and not correspondence; and for communication to amount to correspondence, there must be an intention to both receive messages and reply to them. The DHSC also contends that the way groups operate means that it is difficult to say that two people are corresponding. For example, if person A posts a message; person B responds; person C contributes something else; and person D comments on those things. If person A is Ms Coladangelo and person D is Mr Hancock, are they corresponding? The DHSC accepts that correspondence must be interpreted using a real-world analysis but submits that when the nature of WhatsApp groups is considered, it contrasts with true correspondence, i.e. the true exchange of information.

(iv) The DHSC relies on the evidence of Mr Harris and contends that it is reliable and should attract significant weight. Complying with the second request creates an undue burden on the DHSC because it is not possible to simply isolate the communications originating solely from Mr Hancock and Ms Coladangelo. Because of the way in which WhatsApp groups operate, in order to determine whether those messages are within scope of the second request, it is necessary to look at the totality of the messages, because it is only by doing so that they can be viewed in context. Even if it was possible to narrow the data set to only those communications sent by Mr Hancock and Ms Coladangelo, it would still amount to a month's work, excluding work on any other requests, which is a significant burden such that the request can properly be described as vexatious. In respect of whether the DHSC should engage with the appellant further to help him narrow his request, suggestions have been made; however, at the time of the request, the DHSC did not have the WhatsApp messages and could not have provided further advice or assistance.

The law

29. Sections 1, 3, 14, and 16 of FOIA are relevant. Section 1 provides where relevant:

> (1) 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 hold information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

30. Section 3(2) provides:

> (2) For the purposes of this Act, information is held by a public authority if—
>
> (a) it is held by the authority, otherwise than on behalf of another person, or
>
> (b) it is held by another person on behalf of the authority.

31. Section 14 provides an exemption for vexatious requests as follows:

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

32. Section 16 provides that public authorities are under a duty to provide advice and assistance to requesters:

(1) It shall be the duty of a public authority to provide advice and assistance so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

33. Section 58 of FOIA governs the determination of appeals and provides:

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Findings and reasons

Has the DHSC conducted adequate searches for emails within the scope of the first request?

34. The DHSC relies on the evidence of Mr Cramp and contends that significant weight can be placed on his evidence, particularly in the light of additional work undertaken to review the data. It is worth considering the terms of the request which sought all correspondence between Mr Hancock and Ms Coladangelo using Mr Hancock's or Ms Coladangelo's departmental email and any private email that Mr Hancock used for government business.

35. Mr Cramp confirmed that four departmental email accounts were identified for Mr Hancock. There is one closed DHSC email account for Mr Hancock, two closed DHSC email accounts for Mr Hancock's private office (private office one and private office two), and one further closed DHSC email account for Mr Hancock. Mr Cramp explains that the fourth account was used solely for teleconferencing and not as a correspondence address and so was considered outside the scope of the first request. This was not disputed, and we accept that it is out of scope.

36. In his witness statement and in his oral evidence Mr Cramp explained the process used to search for and identify emails falling within the scope of the first request for information. He confirmed that searches were made of the three DHSC email accounts relating to Mr Hancock for emails where Ms Coladangelo's DHSC email or her Oliver Bonas email was a participant in any field. Mr Cramp explained in his witness statement that any emails found within the private office one account were considered to be out of scope of the request because they were operated by Mr Hancock's private

secretaries and not by Mr Hancock himself. The DHSC therefore considered that they did not fall within the terms of the request which was for all correspondence between Mr Hancock and Ms Coladangelo. We find that this was an error.

37. The two private office accounts are just that, email accounts for the private office of Mr Hancock. The role of a private secretary is as the main link between a government minister and officials in the department or ministry. For this reason, even if a private office email account is operated by a private secretary, we consider that correspondence with a private office email account ought to be regarded as correspondence with the relevant minister, in this case Mr Hancock. For these reasons, we find that the two private office email accounts are within scope of the first request.

38. In cross-examination Mr Cramp confirmed that no searches as outlined in paragraph 35 above were made of Ms Coladangelo's DHSC email account. In other words, no searches were made of Ms Coladangelo's DHSC account for emails where any of Mr Hancock's DHSC emails or any of his private emails were participants in any field. We find that this is a material omission, which is reasonably likely to have resulted in a failure to identify all emails within scope of the first request.

What is the remedy for the accepted error in the second decision?

39. There is agreement by all three parties that the decision notice issued on 28 March 2023 is not in accordance with the law and we have been asked to formally reflect that fact in this decision. Section 58 of FOIA governs the determination of appeals. If the tribunal finds that the decision notice was not in accordance with the law, it may allow the appeal or substitute such other notice as could have been served by the Commissioner. Both the appellant and the Commissioner have asked us to substitute the decision.

40. We find that the decision notice issued on 28 March 2023 was not in accordance with the law. The basis for that finding is that the respondent's decision that it did not hold the information requested was wrong in law because it failed to consider whether the requested information was held on behalf of the DHSC by Mr Hancock or Ms Coladangelo or any other person included in their communications such that section 3(2)(b) of FOIA might apply. Prior to the decision notice being issued on 23 March 2023, the DHSC confirmed that WhatsApp messages from Mr Hancock's personal device were held on a computer system on its behalf. The fact that the DHSC did not transfer those messages into its official record following Mr Hancock's resignation is not relevant for the purposes of section 3(2)(b) of FOIA.

Are communications within WhatsApp groups within scope of the second request?

41. The DHSC accepted that the meaning of correspondence must be considered by conducting a real world analysis, but sought to persuade us that the nature of communication in WhatsApp groups meant that it was not 'true' correspondence. With respect, we find that the DHSC's analysis falls some way short of a real world analysis. In fact, it was an analysis that concluded that unless correspondence consists of one person corresponding directly with another, it is not 'true' correspondence. A

real world analysis would have recognised that correspondence in the age of multiple methods of electronic communication can take different forms. We find the fact that simply because one or other of the relevant parties did not respond or may not have responded to a particular message does not mean that communications within a WhatsApp group cannot be considered to be correspondence.

42. We do not consider that any intention to correspond is required for messages in groups to be considered correspondence. Unsolicited correspondence may still be considered to be correspondence and therefore an intention to receive is not required. Equally, a response is not always required to correspondence and it follows that an intention to respond is not required for there to nevertheless be correspondence.

43. For the same reason, we also reject the submission on behalf of the DHSC that by sending a message to a WhatsApp group a person should be considered to be broadcasting rather than corresponding. We accept that some messages may well be for the purpose of notifying members of a group of a particular matter without a specific requirement for a response. However, the same can be true of emails or other forms of communication such as letters. Furthermore, the fact that an individual does not respond to a particular message is not an indication that the incoming message was not correspondence with them. They may have nothing to say or they may respond in another way, for example in a meeting, by telephone, by email etc. This is conceivable where for example a question may be posed, but the medium of a text message is inappropriate for the answer, i.e. because it would be too long and therefore impractical.

44. We find that the members of the various groups did not simply 'happen' to be members. We find that they were members of different groups for specific purposes. For example, the group Matt and his NEDs was a group consisting of Mr Hancock and two of his non-executive directors. We find that this was a channel of communication set up for the express purpose of the three individuals communicating with each other.

45. We reject the distinction identified at paragraph 27 of the skeleton argument on behalf of the DHSC between email and WhatsApp messages. When drafting an email a sender may make a choice as to which address(es) they include in the 'to', 'cc' and 'bcc' fields, particularly if they are initiating the email correspondence. A WhatsApp group has a specific and deliberate membership which can be seen on the Group Info screen where members of the group are listed. The default is that a message is seen by all members of the group when sending a message in a group chat. Similarly, WhatsApp also provides the option of replying privately or messaging a particular member rather than the entire group. In our view therefore, by sending a message or replying to a message in a WhatsApp group without choosing to reply privately or to message a particular member, a person is making a deliberate choice to communicate with all the members of the group.

46. The appellant's second request sought all correspondence 'relating to government business'. In his witness statement Mr Harris states that the DHSC categorised the WhatsApp messages as follows:

(a) government business messages, i.e. the 11 direct messages disclosed;

(b) personal messages;

(c) picture messages;

(d) weblink messages; and

(e) messages tangential to work.

47. The DHSC concluded that the messages falling into categories (b) to (d) were not within scope of the second request because they did not relate to government business. Specifically, the DHSC asserted that the correspondence did not concern policy advice given by Ms Coladangelo to Mr Hancock, nor any other input she may have had in departmental business. We disagree. We find that the WhatsApp groups were used for the purposes of carrying out government business. While there may have been some personal messages which would not be disclosable, we find that the purpose of various groups, and in particular Matt & his NEDs, was as a forum for discussing government business. We explain our reasons for this finding in the CLOSED annex.

48. For all of these reasons, we find that by applying a broad, real world interpretation of 'correspondence between', messages sent and received by Mr Hancock and Ms Coladangelo in WhatsApp groups of which they are members is correspondence between them and accordingly they are within scope of the second request.

Is the second request vexatious?

49. The DHSC asserts that the second request is vexatious because of the resources that will be required in order to respond to that request. While it is not material for the purposes of considering this appeal, we note that the DHSC made a deliberate decision to rely on section 14 of FOIA rather than section 12, which provides for an exemption where the cost of compliance exceeds the appropriate limit.

50. The term 'vexatious' is not defined in FOIA. We must therefore consider relevant caselaw to see how the term has been interpreted for the purposes of section 14.

51. In Dransfield v IC and Devon CC [2015] EWCA Civ 454, [2015] 1 WLR 5316 the Court of Appeal held that a comprehensive or exhaustive definition of vexatious is not appropriate. It held that the emphasis should be on an objective standard and, consistent with the constitutional nature of the right in question, public authorities face a high hurdle in establishing that a request is vexatious. The decision maker is required to consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.

52. Other principles that can be identified from the caselaw include:

(i) The public interest in disclosure does not necessarily trump other factors.

(ii) A request that would impose a substantial burden on the public authority may be considered vexatious, even if it has some value to the public.

(iii) The hurdle for finding a request is vexatious solely on the burden on the public authority is high.

(iv) Previous requests may be taken into account when deciding whether a request is vexatious even if the request would not be vexatious when viewed in isolation. There must be a detailed evidential foundation addressing previous dealings between the requester and the public authority.

(v) The possible availability of the information through disclosure in other proceedings is irrelevant to the question of the seriousness of the purpose for which the information is sought.

(vi) Circumstances after the date of decision are not relevant in determining whether the request is vexatious, save that they may be taken into account when deciding what steps, if any, the public authority must take. If a request has subsequently become vexatious, the tribunal can determine that the public authority does not have to take any further steps.

(vii) When taking account of the extent of work required to produce the necessary information, the time and cost of redacting any documents can be taken into account (unlike section 12 of FOIA).

53. We do not understand it to be in dispute that there is significant public interest in the scrutiny of how taxpayers' money is spent; in ensuring that government is accountable for achieving value for money and that the process is transparent, as well as exposing any potential conflicts of interest which may have an impact on matters of government and in understanding how the business of government was being carried out. In the context of events around the time of the appellant's request, we consider that there is significant public interest in disclosure of the requested information.

54. The DHCS identifies two bases on which the appellant's second request is vexatious. The first is the burden it would impose and the second is that the exercise of reviewing and disclosing messages would have limited value or purpose. This is because the posts have already been disclosed in the course of the COVID-19 Inquiry and were leaked by a journalist to the national press. The DHSC submits therefore that any public interest in the messages is likely to have been satisfied in the course of the Inquiry and/or the public reporting.

55. We find that in the light of the number of WhatsApp messages potentially in scope of the second request, it is arguable that the request would impose a substantial burden on the DHSC; however, we do not accept that the DHSC has in fact shown that this would be the case.

56. We note that we heard submissions in the CLOSED session in respect of this process, but they were repeated in the OPEN session and therefore we consider that it is appropriate to include them in the OPEN reasons.

57. The DHSC relies on the evidence of Mr Harris to demonstrate why the second request creates a substantial burden such that it should be considered vexatious. Mr Harris explains in his statement that the DHSC identified eight WhatsApp group chats which are potentially within scope of the appellant's request. The DHSC identified one of those groups – 'MSM' which was used to provide the estimate of how long it would take to comply with the request. This was a group chat with a total of 11,008 posts in total, i.e. from all 35 members of the group. This was the group with by far the largest number of posts, the next largest had a total of 3,856 posts and the smallest had a total of 62 posts.

58. Mr Hancock was said to be responsible for 28% of the messages in MSM and Ms Coladangelo was responsible for 1% of the messages, giving a combined total of 28%, or 3,192 messages.

59. In his statement, Mr Harris identifies seven steps he says the DHSC would need to take in complying with the request:

    (a) Conduct an initial review of the posts.
    (b) Consult with third parties to review their own posts.
    (c) Consult with DHSC officials.
    (d) Redact information in line with section 40 of FOIA.
    (e) Prepare the relevant spreadsheets.
    (f) Notify the parties included in the group chat and deal with follow up queries.
    (g) Complete a final review to ensure that there are no errors.

60. In his oral evidence Mr Harris confirmed that he did not complete any of the searches himself, but discussed with the team which did. He also confirmed that he had not provided an explanation of how the DHSC's estimate of the time it would take to carry out the above steps in relation to MSM was calculated but that he had discussed it with the team. He stated that the estimate of 528 hours was calculated on the basis of all 11,008 messages and not the 3,192 originating from Mr Hancock and Ms Coladangelo.

61. Although Mr Harris accepted that the estimate of 528 hours work was based on all 11,008 messages, he stated that the estimate would still be over 300 hours. He accepted that there was no detailed analysis of how that estimate was reached and gave an explanation in his oral evidence. He accepted that he had not seen the messages but understood that some were lengthy and contained attachments whereas others were simply a single emoji. He said that he had discussed the matter with the team which gave an estimate of 2.5 minutes per message. He indicated that the team had considerable experience and had dealt with many requests, and so he considered the estimate was reliable.

62. Mr Harris gave evidence explaining why he considered all of the steps he identified in his witness statement were necessary. He said that deciding whether particular messages are in scope of the request would be difficult, particularly determining whether they related to work or not. Mr Harris rejected the idea that obtaining comment from Mr Hancock and Ms Coladaneglo would be as simple as 'hitting send' and asking them for their views. He pointed to the likelihood of subsequent exchanges between them and did not consider it would be as light touch a process as was suggested.

63. Mr Harris accepted that any discussions with DHSC about whether messages were in scope would be in relation to those where it is not obvious, in other words, a subset of the 3,192 messages. Mr Harris confirmed that redacting messages would be straightforward and that preparing relevant spreadsheets was also straightforward.

64. When asked whether steps (b) and (f) were in fact duplication, Mr Harris considered that (b) was broader and that (f) was undertaken once a decision had been made about what was disclosable and sharing that with the relevant parties to get their views. When asked why it would not be possible to filter the messages and make the decision as to what is disclosable before sending them to the parties for comment, Mr Harris was unsure, but surmised that it may be due to the code of practice which stipulates the two stage approach. He also considered that even if steps (b) and (f) did amount to duplication, and only one were required, the time it would take to comply with the request would still be in excess of what is reasonable.

65. In relation to the final step of checking for errors, Mr Harris stated that this may be complex and require a second pair of eyes and which would take time.

66. Having considered the evidence, we do not accept the second respondent's assessment of the time it will take to comply with the second request. Although the respondent chose the WhatsApp group with the largest number of messages to review to provide the estimate, there is nothing to suggest that this is representative of the other groups. All but one of the other groups contains far fewer members and far fewer messages.

67. Although we accept that the messages vary in length and content, we consider that the longer, more detailed messages and ones with attachments are likely to be more easily identified as being in or out of scope because the content and its relevance will be more obvious. Similarly, very short messages including ones which contain only emojis will be easily included or excluded. The process of deciding whether the majority of messages are in or out of scope is likely to be straightforward. We accept that there will be some messages where scope is not obvious, but we consider that this will be a minority of the relevant messages.

68. We agree with the appellant that steps (b) and (f) are duplicative. There appears to be no reason why two separate consultations with the authors of the messages are required. Mr Harris was unable to confirm whether the time taken by the relevant parties to consider the messages was included in the 2.5 minute per message estimate, but believed that it was. We find that this is an error, because although the second

respondent may be obliged to seek their comment, the time they take to review their own messages is a matter for them and cannot contribute to whether the burden on the DHSC is unreasonable.

69. For these reasons, we find that the DHSC has failed to demonstrate that the second request is in its entirety vexatious solely on the basis of the burden it creates.

70. The appellant argues that the DHSC had a duty to assist him to narrow his request. He relies on section 16 of FOIA and the Commissioner's guidance in respect of that section. Section 16(1) imposes a duty on a public authority to provide advice and assistance to a person who has made a request for information. This is not an open-ended duty, requiring the public authority to assist 'so far as it would be reasonable to expect the authority to do so'. In that sense it does not create a requirement that the public authority must have offered advice and assistance to narrow a request before concluding that the request is vexatious on the grounds of the burden it would create. We accept of course that offering advice and assistance is good practice as confirmed in the Commissioner's guidance. We accept the Commissioner's submission that there is no statutory duty on a public authority to offer advice and assistance under section 16 before they may rely on section 14.

71. This is not a case where the appellant's request not sufficiently clear to describe the information sought. Similarly, this is not a case where clarification was needed to try and bring the request within the cost limit in section 12 of FOIA. The DHSC did not rely on section 12. In this case the DHSC's position is essentially that the request would be vexatious due to the burden it creates regardless of whether the appellant was able to narrow it. Therefore, even had the DHSC offered advice and assistance to the appellant, we find that the outcome would not have been materially different.

72. Our view is reinforced by subsequent events. On 14 January 2024 the appellant indicated that he was willing to narrow his request to two WhatsApp groups, namely 'Matt & his NEDs' and 'Level 4'. The DHSC responded, indicating that even in light of the narrowed scope, it considered the burden was still such that the request remained vexatious. We do not accept the DHSC's conclusion and find that the revised request is not vexatious solely on the grounds of the burden it creates.

73. We have had regard to the fact that the WhatsApp messages have already been disclosed in the course of the COVID-19 Inquiry. The appellant did not dispute that this was the case. We bear in mind that the Court of Appeal held that the possible availability of the information through disclosure in other proceedings is irrelevant to the question of the seriousness of the purpose for which the information is sought. We are satisfied that the appellant's purpose in seeking the information was a serious one and that there is a reasonable foundation for thinking that the information sought would be of value to the appellant in his role as a journalist and to the public.

74. We have considered the fact that the information is in the public domain. The reporting of the leaked messages began in or about 1 or 2 March 2023. This is after the DHSC's responses to the second request and before the Commissioner's decision in respect of

the second request. We find that the fact the messages were leaked is not relevant to the question of whether the appellant's request is vexatious. It is however potentially relevant to what steps we might require the DHSC to take.

75. Having considered the evidence and submissions, for the reasons set out above, we find that none of the factors either singly or in combination establish on the balance of probabilities that the appellant's second request is vexatious.

76. In conclusion we find that the DHSC holds the requested information and that the DHSC must comply with the second request, save that the request for WhatsApp messages is limited to messages sent and received in the two groups in the appellant's revised request, i.e. Matt & his NEDs and Level 4.

Conclusion

77. The appeals are allowed in the terms set out above.

Signed *J K Swaney* Date 6 June 2024

Judge J K Swaney
Judge of the First-tier Tribunal