

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2023

Public Authority: HM Treasury
Address: 1 Horse Guards Road
Westminster
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant requested information from HM Treasury ("HMT") relating to Rishi Sunak's ministerial diary for a six week period during his role as Chancellor of the Exchequer. HMT refused the request under section 14(1) of FOIA (vexatious requests).
1. The Commissioner's decision is that the request was not vexatious.
2. The Commissioner requires HMT to take the following step to ensure compliance with the legislation.
 - Issue a fresh response to the request under FOIA without relying on section 14(1).
3. HMT must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background to the request

4. In 2021 the complainant submitted a request to HMT for copies of Chancellor Rishi Sunak's ministerial diaries spanning a period of almost 13 months. HMT refused the request citing section 14(1), and the Commissioner upheld this position in his decision under reference IC-127986-J3T3¹.

Request and response

5. On 21 April 2022, the complainant made the following request for information to HMT:

"This is a request for information under the Freedom of Information Act. I would like to request the following information:

From 1st March 2020 to 16th April 2020, please provide a copy of Chancellor of the Exchequer Rishi Sunak's ministerial diaries.

Please note, I am making this request out of the public interest. It is absolutely essential for the public to know – in full detail – the calls, events and meetings that took place across the year when the pandemic gripped the UK and beyond.

I would like to highlight that I recently received the ministerial diaries of Dominic Raab (request sent to the FCDO, FOI reference FOI2021/27787). This did not engage section 12 or 14, and I had asked for more than six week's worth of diaries. There is a clear precedent of government departments releasing ministerial diaries."

6. On 20 May 2022, HMT responded and said the request was being refused because it was vexatious under section 14(1) of FOIA.
7. On 31 May 2022, the complainant requested an internal review.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4023710/ic-127986-j3t3.pdf>

8. On 2 August 2022, HMT responded in the following terms:

“Please accept our apologies for the late response to your request for an internal review.

As a result of the review we are complying with your original request.

We are currently assessing the information in scope.

We will send you a substantive response as soon as possible.”

9. On 8 August 2022 the complainant contacted the Commissioner to complain that HMT had not provided an internal review. The Commissioner assigned case reference IC-185332-J6L2 to the complaint.
10. On 17 August 2022 the Commissioner wrote to HMT to query the delay and asked it to provide an internal review within 10 working days. HMT responded, stating that as a result of the review it had concluded that it could comply with the original request, however due to the volume of information within scope of the request it was unlikely to meet the 10 working day deadline.
11. On 16 November 2022, the Commissioner spoke with HMT to discuss the outstanding internal review. HMT explained that it considered section 14(1) to apply to the request, on the grounds that compliance presented a significant burden, however it would make a discretionary release of information to the complainant. The Commissioner advised that HMT’s response of 2 August 2022 had not made clear that the intended release was being made on a discretionary basis, and directed HMT to issue the complainant with a detailed internal review response to cover this matter. The complainant was notified of this on 16 November 2022.
12. Following an internal review, HMT wrote to the complainant on 30 November 2022, upholding its position. HMT explained that it had identified over 400 entries within scope of the request, and that to review, assess and redact that information would present an unnecessary burden on its resources. Despite its previous indications that it was considering doing so, HMT did not provide the complainant with a discretionary release of information at this stage.

Scope of the case

13. The complainant contacted the Commissioner on 3 February 2023 to complain about the way their request for information had been handled.

The Commissioner assigned case reference IC-214594-Q7Y0 to the complaint and notified HMT that the complaint had been accepted for investigation.

14. HMT subsequently wrote to the Commissioner to advise that final redactions were being made to the diary and that the disclosure was being sent to Number 10 for clearance by the Prime Minister's Office.
15. After a number of delays, HMT wrote to the Commissioner to state that it was no longer intending to release the information as, after checking entries with officials and the PM's Private Office, it became clear that the diary disclosure would need to be further examined by those in the department best placed to understand the sensitivities of the entries. HMT stated that this would be very time consuming.
16. HMT again stated that it was relying on section 14(1) to refuse the request.
17. This notice covers whether HMT correctly determined that the request was vexatious.

Reasons for decision

Section 14(1) – vexatious requests

18. In cases where a public authority is relying on section 14(1), it is for the public authority to demonstrate why it considers that a request is a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA. This exemption can be used by public authorities where the cost and time to redact exempt information would create an oppressive burden on its resources. The threshold for the application of this exemption on this basis is very high. There must be a significant amount of information falling in the scope of the request, the public authority must demonstrate that it contains exempt information scattered throughout and the task of redaction would be burdensome.

HMT's position

19. In a letter to the Commissioner, HMT set out its interpretation of the request as seeking "in full detail – the calls, events and meetings that took place across the year when the pandemic gripped the UK and beyond.". HMT took the position that the diary - which had been

exported into an excel spreadsheet² and presents the requested information in a list of short-hand entries - would need to be "enhanced" in order to satisfy the complainant's request, per HMT's interpretation. This is in order to provide context to the information so that it is not misleading. HMT stated that to extract either a simple list or an enhanced list would engage section 14(1).

20. To create a simple list of shorthand diary entries, HMT explained that it would need to review each line of diary entry in the excel spreadsheet before potentially cross-referencing against the original Outlook diary to check whether further details were available to aid an understanding of the subject. This would produce an index of entries where potential sensitivities could be highlighted. HMT stated that this exercise would take 3 minutes per entry and almost 24 hours to complete for each line of information in the spreadsheet, and further cross-referencing would then be required for some entries in order to bring the information to a satisfactory standard.
21. To produce a detailed "enhanced" response, as per HMT's interpretation of the request, the indexed entries that had been identified as potentially sensitive would need to be checked against Outlook calendar invites to identify relevant attachments and "locate policy officials who could give meaning to what at times are shorthand meeting titles". HMT stated that a Diary Manager would be able to make simple redactions in some of the diary entries, such as removing the names of junior staff, but many entries would require referral to staff in the wider department. HMT maintained that engaging the relevant policy areas in order to make an assessment of each entry (ie consider whether exemptions apply and conduct a public interest test) would impose a disproportionate burden on the department.
22. HMT estimated that it would take between 5 and 10 minutes per entry to produce a detailed response that met the specifications of the request, as it had interpreted it, and to conduct this exercise for just half of the entries within scope of the request would exceed 30 hours. By way of a sampling exercise, HMT sought to rely on the exercise it had

² In previous decisions regarding requests for ministerial diaries the Commissioner advised central government departments to export the diaries to Excel to reduce the time required to review the material. See, for example, the following decisions:

<https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022384/ic-129067-f213.pdf> , <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022827/ic-148740-m6d1.pdf> , and <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022383/ic-129066-d1g1.pdf>

undertaken in respect of the complainant's prior request (IC-127986-J3T3) for 13 months worth of diary entries, in which the Commissioner had upheld section 14(1).

23. HMT also stated that the following exemptions may theoretically apply; section 24(national security); section 27(1)(c)(prejudice to the interest of the United Kingdom abroad); section 29(the economy); section 35(formulation or development of government policy etc); section 36(prejudice to effective conduct of public affairs); section 38(health and safety); section 40(2)(personal data); section 41(information provided in confidence); section 43(2)(prejudice to commercial interests). As HMT has not sought to actively apply these exemptions to the requested information the Commissioner will not be considering them in this notice.
24. In its submissions HMT stressed that what it would be able to produce in response to the request would fall short in comparison to already published transparency data³. It argued that the already published data was more meaningful, as it had been enhanced by the addition of descriptions of the purposes of the meetings listed.
25. HMT accepted that there was a clear public interest and value in being able to scrutinise how ministers handled the pandemic but stated that provision of ministerial diaries would not adequately satisfy that interest:

"A request with more focus on certain aspects of the pandemic and the role HM Treasury played in the economic response would satisfy the public interest to a far better degree. Therefore, we would suggest the lack of detail has the potential to mislead and it would not be in the public interest for HM Treasury to release a very anodyne and ambiguous list. One only has to look at the FCDO release that Ms Corderoy has cited in her request to see how little information it contains. To use such a list to gain understanding of a rapidly changing landscape during the pandemic would at best offer the requested a "stab in the dark" chance on being able to focus on a particular aspect of the pandemic and understand what was happening at the time,"

26. HMT concluded its submissions by stating that the request lacked focus and purpose and drawing the Commissioner's attention to his recent decision notice IC-199129-V7V7 concerning the Department for

³ <https://www.gov.uk/government/publications/transparency-data-hmt-ministers-meetings-hospitality-gifts-and-overseas-travel-1-april-to-30-june-2021>

Environment, Food and Rural Affairs (DEFRA), in which section 14(1) was upheld.

The complainant's position

27. In a letter to the Commissioner, the complainant argued that the published transparency data already available on the government's website had often been criticised for incompleteness and lack of quality. They stated that disclosure of ministerial diaries would greatly aid the public in comparing to what extent government transparency data is missing ministerial meetings, particularly in regards to the handling of the coronavirus.
28. The complainant stated that disclosure of ministerial diaries over the six weeks at the beginning of the pandemic response in the UK would give an indication as to "what they [ministers] were doing (or not doing) – and reacting to (or not reacting to) – at that time."
29. The complainant also argued that disclosure would allow greater insight into lobbying. In light of recent lobbying scandals surrounding government Covid contracts, the complainant states that release of the diaries would "go some way in enabling the public and journalists to assess which minister has been lobbied by whom. Not only do ministerial diaries include meetings, but also information on telephone calls arranged."

The Commissioner's decision

30. The Commissioner feels it is pertinent to point out that HMT had, effectively, processed the present request with a view to disclosure of the information sought with necessary redactions, and that it was only after the information was sent for clearance from the Prime Minister's Private Office that extra work was identified.
31. As in his recent decision concerning a request to the Department for Business and Trade ("DfT") for Secretary of State Liz Truss's ministerial diaries⁴, the Commissioner recognises that it is courteous to offer the Private Office the opportunity to review material that is proposed for disclosure and that this can add value. However, this process also added a considerable delay. Given the time elapsed since HMT decided (in principle) to disclose some of the diary, it is not clear to the

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025442/ic-195245-11m3.pdf>

Commissioner why this intervention could not have been made at an earlier stage.

32. As he has already found that HMT were entitled to refuse the complainant's prior request for over 13 months of material, the decision facing the Commissioner is whether HMT's estimation of the time it would take to prepare the information, over a reduced timeframe, continues to support the application of section 14(1). The Commissioner notes that the timeframe of the present request is around an eighth of the previous request - therefore, based on HMT's own estimates, the Commissioner's basic assessment is that the amount of work required should be around an eighth of the previous estimate (475 diary entries compared with 3835 diary entries previously). However, he recognises that this estimate does not factor in the Private Office's consideration of the material as requiring more rigorous analysis.
33. In terms of the interpretation of the request, the Commissioner notes that HMT's approach differs from that taken by other central government departments' handling of similar requests in that it appears to proffer that the request cannot be fulfilled by simply providing the "anodyne" list of diary entries. Rather, it would have to provide a list of "enhanced" list of diary entries. By the Commissioner's understanding, HMT is inferring that this would involve producing two different versions of the same information: one that is complete ("enhanced") and one that isn't ("anodyne"). In his previous decisions concerning similarly worded requests by the same complainant, the Commissioner has accepted that the information within scope of requests for ministerial diaries is simply the recorded information in each diary entry. HMT states that it currently holds the information as "an extracted list that simply contains shorthand entries" and that "the diaries in their current state would need additional enhancement to meet the criteria [name redacted] is seeking". The Commissioner is not inclined to consider that a request for "full details" equates to a request necessitating enhancement, rather, it is simply for all of the recorded information that HMT holds in the form of diary entries. The Commissioner would also add that the right of access under FOIA is limited to recorded information held by a public authority; the legislation does not place any obligations on a public authority to enhance information in response to a request. To be clear, in the Commissioner's view HMT could fulfil this request by simply providing the recorded information in the Outlook diary for each entry; no enhancement is required by the legislation, even if the entries are written in shorthand.
34. In considering HMT's assessment that it would take three minutes per entry to organise the list into an indexed format to check for potential sensitivities, which would produce an "anodyne" list, the Commissioner has compared this approach with that of other public authorities who

have consolidated this task into the total time estimate for processing each entry. For example, in his decision concerning a request for copies of Secretary of State Thérèse Coffey's ministerial diaries⁵, the Commissioner noted the Department for Work and Pensions' estimation of two minutes to "review, mark up and prepare" each entry, and in his decision concerning the request for Attorney General Suella Braverman's ministerial diaries⁶ he accepted an estimate of five minutes per entry. The Commissioner also noted that the Attorney General's Office had acknowledged that "some entries would take considerably less time where it is immediately obvious that an exemption applies".

35. The Commissioner has considered HMT's assertion that it would take between five to ten minutes per entry to produce an "enhanced" disclosure to fulfil the request, and to do so would take in excess of 30 hours. This includes the time required to check the original Outlook diary for attachments and make necessary enquiries with relevant policy officials within the department. Having seen the material, the Commissioner takes the position that it is unlikely that every entry in the diary would require forensic assessment and that five minutes is sufficient for the entries necessitating further work. However, he also recognises that HMT is unable to provide an exact time estimate for each individual entry and accepts that 5 minutes is a realistic average.
36. By the Commissioner's calculations, the amount of time required to prepare the diary for release would be around 39 hours based on a five minute average per entry (475 entries in scope x 5 minutes = 2,375 minutes).
37. Whilst the limit laid down by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 is not directly relevant to the application of section 14 FOIA, these give a clear indication of what Parliament considered to be a reasonable charge for staff time. The limit prescribed for central government authorities applying section 12 of FOIA is 24 hours, and this provides a useful starting point for assessing the burden of complying with a request, however it is important to note that the threshold is high for refusal of a request under section 14 based on the time needed for processing.

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022383/ic-129066-d1g1.pdf>

⁶ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022384/ic-129067-f2l3.pdf>

38. In most of the previous ministerial diaries decisions⁷ that the Commissioner has considered where the threshold for section 14(1) has been met, the amount of time required to prepare diaries for disclosure has exceeded 100 hours of work. In the present case, the amount of time required is less than half of that.

39. In assessing the burden of complying with the request the Commissioner has referred to his decision in respect of a similar request to the Department for Health and Social Care for copies of Secretary of State Matt Hancock's ministerial diaries⁸, in which he estimated the time required to comply with the request to be 31 hours. In the decision he continues to state:

"Even if the Commissioner were to accept that it does take three hours for every 2 weeks' worth of entries throughout the entire process (which is not what DHSC has actually stated (instead it stated that pace could not be maintained, suggesting some – but not all – of the two week batches would need three hours), he does not consider 42 hours of work meets the high threshold that is set for a section 14(1) application. It is close to the threshold but given the serious purpose and value to this request the Commissioner considers purpose and value in this case outweigh the burden of compliance."

40. Ultimately, the Commissioner found that section 14(1) was not engaged. He has used his findings in the decision referenced at paragraph 39 as a reference point in coming to his decision in this case.

41. The Commissioner has also given consideration to HMT's statement that its position in this case is no different to that of DEFRA in its handling of a request for Secretary of State George Eustice's ministerial diaries⁹. He recognises that the time period of the request is identical to that in the present request. However, for the reasons set out in that decision notice the Commissioner was satisfied that DEFRA had provided sufficient evidence, based on the detailed sampling exercises, to justify that it would take 10 minutes per diary entry. Furthermore the Commissioner

⁷ See <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025034/ic-195648-s6z4.pdf> , <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024172/ic-199129-v7v7.pdf> for example.

⁸ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025024/ic-182779-t5q4.pdf>

⁹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024172/ic-199129-v7v7.pdf>

notes DEFRA's processing of the request would involve an assessment for each entry to determine the correct access regime given DEFRA's particular policy area (FOIA or the Environmental Information Regulations), a factor not relevant to HMT's processing of this request. The Commissioner also notes that DEFRA adopted a different methodology of exporting each diary entry from Outlook into PDF rather than Excel. For this reason the Commissioner does not accept the comparison drawn.

42. The Commissioner recognises that the period covered by the request is historically significant and there is reasonably strong public interest in understanding how ministers allocated their time during this period. The Commissioner considers public interest will be further heightened by the UK Covid 19 Inquiry¹⁰, which began to hear evidence on 13 June 2023. In his previous decisions¹¹ the Commissioner has acknowledged that the government's transparency returns have fallen short in meeting the public appetite in understanding how ministers allocated their time during the pandemic, and he considers that disclosure of the information requested in this case would provide significant insight. The Commissioner therefore disagrees with HMT's claim that the published transparency data is more meaningful, as it contains gaps that could potentially be filled by providing copies of the diaries requested.
43. He also disagrees with HMT's claim that the request lacks purpose and focus. The Commissioner, in previous decisions concerning the release of ministerial diaries, has been clear that he acknowledges the serious purpose of the request and the potential value that disclosure would bring to public discourse, and also that it could potentially shed light on some of the issues highlighted by the complainant including matters of lobbying. He also considers that the focus of the request is unambiguous.
44. Taking the above into account, the Commissioner does not find that section 14(1) is engaged in this case. He does not agree that 39 hours of work for information of such significance is unduly burdensome, especially considering the size of the public authority, the resource

¹⁰ https://covid19.public-inquiry.uk/every-story-matters/?utm_source=Bing&utm_medium=Search&utm_campaign=EveryStoryMatters2324&utm_idParticipateE&utm_content=Contextual&msclkid=bdec67a189b41ec32af6033dcd8169b3&utm_term=UK%20Covid-19%20Inquiry

¹¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4023648/ic-163088-s0f8.pdf>

available to it and the fact that the request had already been largely processed with a view to disclosure of the information held (subject to exemptions).

45. The Commissioner therefore requires HMT to provide the complainant with a fresh response to the request that does not rely on section 14(1) of FOIA.

Right of appeal

46. 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

47. 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.
48. 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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