

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 November 2016

**Public Authority:** Department of Health  
**Address:** 79 Whitehall  
London  
SW1A 2NS

### Decision (including any steps ordered)

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1. The complainant made a freedom of information request to the Department of Health for a copy of the official ministerial diary of the Secretary of State for Health Jeremy Hunt. The DoH refused the request under the exemption in section 35(1)(d) (operation of ministerial private office).
2. The Commissioner's decision is that section 35(1)(d) is engaged but the public interest in maintaining the exemption does not outweigh the public interest in disclosure. Whilst not relied upon by the DoH, the Commissioner also found that some of the information should be redacted under the section 40(2) exemption (personal information).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - The DoH shall disclose the requested information to the complainant but may redact personal data under section 40(2) as described in paragraphs 39 and 40 below.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 13 January 2016 the complainant made a freedom of information request to the Council which read as follows:

*"I would like to request the release of a copy of the official ministerial diary of the Secretary of State for Health Jeremy Hunt for the period 1 May 2015 - 13 January 2016."*

6. The DoH responded to the request on 20 January when it confirmed that it held the requested information but explained that this was exempt under section 35(1)(d) of FOIA (operation of Ministerial private office) and the public interest in maintaining the exemption outweighed the public interest in disclosure.
7. The complainant subsequently asked the DoH to carry out an internal review of its handling of the request and it presented its findings on 14 March 2016. The review upheld the application of section 35(1)(d) but also found that some of the information was additionally exempt under section 35(1)(a) (formulation and development of government policy).

## Scope of the case

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8. On 14 March 2016 the complainant contacted the Commissioner to complain about the DoH's decision to refuse to disclose the requested information.
9. During the course of the Commissioner's investigation the DoH said that it was now only relying on the section 35(1)(d) exemption and therefore the Commissioner considers the scope of this case to be to decide whether this exemption applies to the requested information.
10. In reaching her decision the Commissioner has been guided by her findings in a previous decision which involved a request for the diary of the then Secretary of State for Health Andrew Lansley (FS50406024) and a subsequent appeal to the First Tier Tribunal.<sup>1</sup>

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<sup>1</sup> Department of Health v Information Commissioner [EA/2013/0087]

## Reasons for decision

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12. The withheld information comprises the ministerial diary of the Secretary of State for Health Jeremy Hunt. The version provided to the Commissioner is 162 pages long. Each day contains a number of entries recording engagements including internal and external meetings, telephone calls, interviews with the media, journeys and other travel arrangements, personal and family engagements, Parliamentary engagements and some constituency appointments. The entries usually record a time and venue, and the subject matter is sometimes briefly mentioned. The DoH has withheld the entirety of the diary under the section 35(1)(d) exemption.

### **Section 35(1)(d) – operation of a Ministerial private office**

13. Section 35(1)(d) provides that information is exempt if it relates to the operation of any Ministerial private office. It is a class based exemption which means disclosure does not have to result in any kind of prejudice to engage the exemption, only that the request falls within the class of information which the exemption is designed to protect.
14. The DoH has said that it considers that section 35(1)(d) applies because the requested information relates to administrative matters within the Secretary of State for Health's private office. The Commissioner is satisfied that the request clearly falls within the terms of the exemption and therefore she has gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

### **Public interest test**

#### **Public interest arguments in favour of disclosure**

15. The DoH said that in considering the request it recognised that there was a public interest in understanding how ministerial private offices operate.

#### **Public interest arguments in favour of maintaining the exemption**

16. As regards the arguments for maintaining the exemption the DoH said that it considered that the public interest favoured ministers being able to rely on the arrangements that their support staff make. It said that in order to be confident in the independence of their support staff, ministers must be sure that they are not allowing any external considerations, such as the possible public perception of any

arrangements, to affect their judgement in administering the private office, now or in the future. It argued that if these arrangements were routinely to be made public there would be a danger that Ministers would not feel certain of this high quality of administrative support.

17. The DoH also argued that any disclosure of the diaries would weaken Ministers' ability to discuss controversial and sensitive topics free from premature public scrutiny. It said that it was in the public interest for Ministers to be able to manage their duties in the most effective way, either by face to face meetings or in any other way that is appropriate. It suggested that there is a "demonstrable tendency for the public and media to make a false correlation between the number of meetings on particular subjects, or with particular people, and the priority assigned by the Minister to those subjects or individuals". If the contents of their diaries were routinely made public, there is a risk, it said, that Ministers may feel inhibited from having face to face meetings on particular topics, or that there may be a "perverse incentive" to have meetings where the matter might most appropriately be dealt with in another way, because of fears about public perception.
18. Finally, the DoH highlighted the fact that the department already publishes quarterly, details of meetings with the Secretary of State and other Health ministers, and external organisations. It suggested that disclosure of this information went some way towards meeting the public interest in transparency.

### **Balance of the public interest arguments**

19. In balancing the public interest the Commissioner has taken into account her findings in her previous decision concerning the request for the then Secretary of State for Health Andrew Lansley's diary and the subsequent appeal. In that case both the Commissioner and Tribunal found that the public interest in disclosure outweighed the public interest in maintaining the section 35(1)(d) exemption. The Commissioner has been guided by these previous decisions and as a result has found that the DoH's arguments in the present case to the effect that disclosure would undermine the ability of Ministers and their private offices to make diary arrangements, do not attract any significant weight.
20. In particular, the Commissioner has seen no evidence to suggest that disclosure would impact upon Ministers' ability to organise their time effectively as the DoH has suggested. She is mindful that the diary entries are retrospective, i.e. for past meetings rather than future engagements where there might be a more obvious case for the information being withheld. Having reviewed the withheld information

the Commissioner also notes that many of the diary entries are very brief and do not necessarily reveal anything about the purpose of the meeting or what is being discussed. Similarly, many of the diary entries are matters of public record for instance, media interviews, attendance at parliamentary debates and speeches at public events. For these reasons the Commissioner finds it difficult to accept that disclosure would inhibit the operation of a Minister's private office in the way the DoH suggests.

21. The Commissioner also notes that in the previous case the DoH had released a redacted version of the diary to the complainant and so had applied various exemptions (including sections 21, 23, 24, 27, 35(1)(a) and (d), 36, 38, 40(2) 41 and 44) to specific diary entries. In this case the DoH has simply sought to withhold the entire diary under the section 35(1)(d) exemption. The fact that that the DoH has previously seen fit to disclose similar information calls into question its reliance on section 35(1)(d) and its decision to apply the exemption in such a blanket fashion.
22. The DoH has also suggested that disclosure would be misinterpreted and this would not be in the public interest because it would make it harder for Ministers to be able to consider controversial or sensitive issues. This is because, it suggests, Ministers would feel inhibited from holding meetings or alternatively would feel pressured into holding unnecessary or inappropriate meetings, presumably for fear that the public might conclude that a Minister was not working hard enough or was not giving a particular issue sufficient attention. The Commissioner should say that she finds these arguments unrealistic and so has not attributed any weight to this point. The Commissioner does not accept that Government Ministers would be inhibited in this way as the public would rightly expect them to be robust enough to withstand this degree of scrutiny. The Commissioner has already pointed to the fact that many of the diary entries are brief and do not reveal the purpose of the meeting and so it is reasonable to expect that Ministers would not feel unduly inhibited by details of previous appointments being disclosed. The Tribunal also commented on this point when it said:

*"The more general consideration that Ministers are freer to meet more individuals and groups if the fact of the meeting is not disclosed to the public seems to us to have little practical force as a reason for general non-disclosure of diary entries."*<sup>2</sup>

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<sup>2</sup> *Ibid*, para. 106.

23. The Tribunal also dismissed the idea that Ministers might seek to fill their diary with unnecessary appointments. It described this suggestion as “incredible” and that it lacked “any solid justification and is mere alarmism”.<sup>3</sup>
24. The Commissioner would agree that arguments about the potential for the information to be misleading or to confuse the public do not carry any weight. Her long standing view, set out in her guidance on the public interest test, is that these are not relevant public interest factors and that a public authority could avoid any confusion by providing further explanation to place disclosed information in context.<sup>4</sup> Certainly, in this case it would not be difficult for the DoH explain that the Ministerial diary does not give a complete picture of how a Minister spends their time or the importance of any particular meeting, policy or issue under discussion.
25. As regards the public interest in disclosure the Commissioner considers that there is significant public interest in promoting accountability by showing whether the public are getting good value from Ministers and the extent to which they are carrying out their functions properly. Equally, there is a public interest in transparency because disclosure would shed greater light on who has access to Ministers including lobbyists, external organisations and the media. Disclosure would also serve the public interest by helping to increase public understanding of how government operates and how ministers spend their time. Together these factors attract significant weight.
26. The DoH has pointed to the fact that it already publishes some information about ministerial and departmental meetings and that this reduces the case for disclosure. However, the Commissioner is aware that it only publishes brief details of meetings with external organisations – the published information does not show internal meetings, meetings with individuals, telephone calls or information about Minister’s role as a constituency MP. Furthermore, at the time of the request the DoH had yet to publish information for all of the period covered by the request. Therefore, this does not reduce the case for greater transparency and accountability and there remains a strong public interest in disclosure as this would reveal a significant amount of information above and beyond what the DoH had already disclosed.

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<sup>3</sup> *Ibid*, para. 97.

<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)

27. In conclusion, the Commissioner has found that the arguments for maintaining the exemption do not attract significant weight as they are unsupported by evidence and/or unconvincing. On the other hand, there is an obvious case for disclosure and so the Commissioner has found that the public interest in maintaining the section 35(1)(d) exemption does not outweigh the public interest in disclosure.

### **Section 40(2) – personal data**

28. The DoH has only applied the section 35(1)(d) exemption and no other exemptions are relied upon. Therefore, the Commissioner would ordinarily find that all of the requested information should be disclosed and no further analysis would be required in this Decision Notice. However, the Commissioner is mindful of her duty as regulator of the Data Protection Act 1998 and so in the circumstances, given that some of the information obviously raises privacy concerns, it is appropriate to consider whether the section 40(2) exemption might also apply to some of the information. This follows the approach of the Tribunal in *Bowbrick v Information Commissioner* where it found that the Commissioner, although not under a positive duty to do so, was entitled to consider exemptions not referred to by the public authority in appropriate cases.<sup>5</sup> In particular, it endorsed that the Commissioner could refer to section 40 in a decision notice where the public authority had not sought to rely upon that exemption although it stressed that the primary responsibility for identifying personal data in need of protection still rests with the public authority.
29. As the Commissioner notes at paragraph 12 above, some of the entries in the diary are of a personal nature including details of Mr Hunt's family engagements and travel arrangements, amongst other things. It is disappointing and worrying that the DoH did not seek to apply section 40(2) to what is obviously personal information especially given that her previous decision and that of the Tribunal had found that this information would not be protected under section 35(1)(d).
30. So far as is relevant to this case, section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene any of the data protection principles in the Data Protection Act 1998.

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<sup>5</sup> Peter Bowbrick v Information Commissioner and Nottingham City Council [EA/2005/0006]

31. In deciding whether section 40 is engaged the first thing to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

*“personal data” means data which relate to a living individual who can be identified—*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;*

32. The Commissioner has considered the position taken by the DoH in the previous case involving a request for a ministerial diary and the position she reached at that time. In that case the information redacted under section 40(2) included details of the Minister's private journeys, names and contact details of the Minister's private secretaries and other officials, duty contact details, contact details for other individuals involved in meetings with the Minister, personal meetings and appointments and notes as to when staff are on annual leave. Having reviewed the withheld information in this case the Commissioner is satisfied that this class of information relates to either Mr Hunt or other third parties and would allow for them to be identified if disclosed. The Commissioner is satisfied that this information can be said to be personal data so the next thing to consider is whether disclosure would contravene any of the data protection principles.
33. In this case the Commissioner considers that it is the first data protection principle which is most relevant. The first principle requires that personal data shall be processed fairly and lawfully and in particular that it shall not be processed unless one of the conditions in schedule 2 is satisfied. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
34. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the Commissioner takes into account the reasonable expectations of the data subject and the likely consequences of disclosure including any damage or distress that would be caused.

35. As regards the likely expectations of the data subjects the Commissioner takes the view that the Secretary of State would not have expected that details of his private meetings or appointments would be disclosed. Individuals he is meeting in a private capacity would have even less of an expectation that their information would be disclosed.
35. In the Commissioner's view, other individuals featured in the diary such as officials would not expect that information such as their contact details, when they were or were not on duty or when they were on annual leave would be disclosed.
36. The Commissioner also considers that disclosure of the personal data would be likely to be distressing to the individuals concerned and where the diary entries concern the Secretary of State's travel arrangements or his private meetings this would also be very damaging as this raises obvious safety concerns given that disclosure would allow a picture of his movements to be built up.
37. However, notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to disclose information if there is a public interest in doing so or if the legitimate interests of the applicant outweigh the rights and freedom of the data subject.
38. The Commissioner considers that there is a public interest in understanding how a Minister organises their time. However, disclosure of details of his private appointments, travel arrangements, the contact details of officials or other third parties, or staff leave arrangements would not meet this public interest beyond what the Commissioner has already ordered to be disclosed.
39. For these reasons the Commissioner finds that the section 40(2) exemption can be applied to some of the information in the ministerial diary. Guided by the decision reached in the previous case the Commissioner has tried to describe what information should be redacted on the basis of section 40(2). However this is not a straightforward task given that the entries are often very brief and it is not always easy for someone from outside the DoH to identify the exact nature of some of the meetings or the positions of the individuals involved. The DoH should also be reminded that it is their primary responsibility to identify what information is personal data in need of protection. That said, the Commissioner considers that the following information can be redacted from the diary.

- any entries relating to the Minister's personal appointments and which are not in his capacity as Secretary of State, a member of the Government or as a Constituency MP.
  - the Minister's travel arrangements
  - the names and contact details of the Minister's private secretaries and other officials, and their contact details.
  - The names and contact details for other individuals involved in meetings with the Minister
  - notes as to when staff are on annual leave.
40. The Commissioner would stress that when making any redaction (other than for a purely private engagement) only the information which identifies an individual should be withheld. The Commissioner would also expect that where the information relates to a meeting with an MP then the information should not be redacted.

## Right of appeal

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41. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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** .....

**Pam Clements  
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