

FOI and diaries

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During the years that I worked at the Greater London Authority ('GLA') as its Freedom of Information and Records Manager, I encountered hundreds of FOI requests. The way that these requests were managed meant that I didn't get to see every request. Understandably then, there aren't that many requests that stick in the mind from those early days of my involvement with FOI. But one of the requests that does was for the Mayor's diary.

As many practitioners will know, requests for diaries of politicians or officials can present unique challenges. Not surprisingly, such individuals may not feel comfortable with their itineraries being published, particularly not in full. Even an appointment diary can feel quite personal to them. Yet a diary can also provide a valuable insight into their activities.

The reason that the request for the diary of the Mayor (who at the time was Ken Livingstone) has stayed with me was because of a mistake. A daily newspaper published a double-page spread detailing the Mayor's daily activities, including his official duties, but also a trip to the barber and visits to the gym. Not surprisingly, the Mayor's advisers were livid and demanded explanations. As it turned out, the file had been disclosed in error by a member of the Mayor's own team. If I had been asked, I would have advised that some of its content could have been withheld. It did however, highlight the sensitivities that these kinds of request can raise.

A quick search of the WhatDoTheyKnow website establishes that the Mayor of London's diary remains the subject of FOI requests to this day. It is not just the Mayor's diary that is of interest though. People are keen to find out what council leaders, police commissioners, chief constables, vice chancellors, chief executives and other officials in public authorities across the land do with their time. As a number of decisions have highlighted, this interest extends — perhaps inevitably — to the activities of ministers and even the Prime Minister of the day.

Case law on diaries

In examining the relationship between diaries and FOIA, we are aided primarily by a single request made to the Depart-

ment of Health in 2011. Simon Lewis, a journalist, asked the department for the ministerial diary of Andrew Lansley, who was then the Secretary of State for Health. Readers will recall that there was much controversy at that time surrounding reforms to the NHS that Mr Lansley was overseeing. Much of the content of his diary was withheld, with the Department citing a range of provisions within the Act. The subsequent appeal process which culminated in the Court of Appeal last year has cast some light on how requests for diaries should be handled. Most importantly, it has established precedent which must be followed by the regulator and tribunals when looking at these matters in future.

The decisions of the First-Tier Tribunal (EA/2013/0087), Upper Tribunal ([2015] UKUT 159 (AAC)) and Court of Appeal ([2017] AACR 30) in the Lansley diary case are not our only reference points though. Notably the Commissioner and tribunals have had to rule on a number of cases where individuals wanted to know about the number of times a particular committee has met (e.g. the remitted EA/2013/0119 decision taken in November 2015), or who the Prime Minister has met with (e.g. Commissioner decision FS50123190).

What do we mean by diary?

It is important to note that we are not referring here to personal diaries reflecting on an individual's day and describing their private thoughts. Even if such material was to be found on the premises of a public authority, it would be likely to be held 'on behalf of another person' by section 3(2) of the Freedom of Information Act 2000 ('FOIA'). In other words, access to it could be refused on the grounds that it is not held for the purposes of the authority's business.

What is being asked for in most of these cases is the individual's 'business diary', 'appointment schedule', or 'daily itinerary'. From personal experience, such documents — whether they are old-fashioned desk diaries or, as is more likely these days, the output from a Microsoft Outlook calendar — can be dry, to say the least. So why are they such popular topics for applicants? What is the value in their disclosure?

What use are diaries?

In considering the public interest in disclosing Andrew Lansley's diary, the First-Tier Tribunal ('FTT') considered the various interests that would be served by disclosure. Firstly, such records provide evidence of the activities that individual officials have taken part in. There is a strong public interest in the public being informed about the activities of public authorities (confirmed by the Upper Tribunal at paragraph 10 of its decision). The FTT highlights the importance of accountability: diaries can show whether the public is getting good value from the Minister — effectively whether they are working hard enough.

Many applicants requesting access to diaries are interested in who the official met. This is important given controversies over many years involving allegations that certain individuals or businesses may have improper influence over politicians and public bodies. Sometimes requests specifically target those the applicant is concerned about, such as a request for details of the Prime Minister's meetings with Rupert Murdoch (Commissioner decision FS50230308).

The FTT also highlighted the value of disclosing diaries in helping the public to engage in informed debate, and to better understand the government's activities in a particular area, the private interests that a Minister or official might have that are relevant, and how they spent their time.

Despite these advantages, there will be entries in diaries that ought to be withheld in part or in full. The diffi-

culty is separating these from those that ought to be disclosed, and successfully making the arguments in favour of withholding them.

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Can't we just withhold it all?

It is a long-standing principle that when considering the application of exemptions, authorities are expected to analyse the information in question line-by-line, and not apply exemptions to a particular class of information. This principle was espoused in the important case of *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19th February 2007, at paragraph 75):

“The central question in every case is the content of the information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case... No information... is exempt from the duty of disclosure simply on account of its status, of its classification as minutes or advice to a minister nor of the seniority of those whose actions are recorded.”

The FTT was specifically discussing the application of the section 35 exemption ('government policy') to minutes of a meeting, but the principle is equally relevant when considering the application of any exemption to officials' diaries.

Charles J. makes this clear in his Upper Tribunal ruling in the *Lansley* case ([2015] UKUT 159 (AAC), at paragraph 20):

“In my view, a class approach is wrong. It does not accord with the underlying purpose of FOIA, it flies in the face of the background I have described, and it does not fit with equivalent balancing exercises in respect of the public interest (e.g. when a duty of confidence is owed). Also, it creates unnecessary problems in the difficult weighing or assessment of competing interests and the 'apples and pears' arguments it involves by introducing a comparison of classes or generic issues when what is at issue is the disclosure of specific information.”

So public authorities will struggle to argue that a diary should be withheld as a matter of principle. We must examine the contents of any requested diary or itinerary, and consider which exemptions are most likely to apply.

Won't extracting information from a diary be costly and disruptive?

Depending on the requested time-scale, the contents of the diary itself, and the official concerned, a request for the contents of an official's diary could result in a lot of work. Some might be tempted to look to section 12 ('costs limit') to refuse the request. However, this is unlikely to be relevant in most cases. Remember that when estimating the cost of complying with a request, only the four following activities can be taken into account:

- establishing if the information is held;
- locating the information;
- retrieving the information;
- and extracting the information.

If an applicant is simply asking for a copy of the diary, it seems unlikely that the cost of these would be excessive, especially — as will usually be the case — if the diary is in the form of an Outlook (or similar) calendar. The diary either exists or it doesn't, and if it does, it will be held in the official's office. Aside from any

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technical constraints, it would not normally be difficult to retrieve or extract the relevant entries. This may be different if the request requires a degree of analysis, as was the case when City of York Council was asked to provide details of dates, locations and transport arrangements for any meetings that the Chief Executive attended out of the city (Commissioner decision FS50566239).

If section 12 will not be relevant, an alternative would be the provision covering vexatious requests at section 14(1). It is well understood that section 14(1) can be applied to 'burdensome' requests (as established in *Information Commissioner v Devon County Council & Dransfield* [2012] UKUT 440 (AAC)), and the Information Commissioner has published guidance indicating the appropriate test for using section 14(1) in these circumstances. It indicates that section 14(1) may apply where:

- the request is for a large volume of information;
- it contains exempt material; and
- the exempt material cannot be easily isolated.

It is not hard to see that a request for an official's diary could meet that test, and that is exactly what happened with a request for the Health Secretary's diary made in 2016 (FS50643492). Notably, the request asked for the content of the diary from 2012 to the latest date available, which the Department of Health's FOI team was able to explain ran to 1000 pages, and would take over 50 hours to read through. Section 14(1) therefore offers a potential solution for diary requests that would involve significant preparation work.

Will all the information in a diary be held for FOI purposes?

One of the more controversial arguments made by the Department of

Health in handling the request for Andrew Lansley's diary was that entries relating to his personal life, constituency commitments and political activities were held on the Minister's behalf, and therefore were not held for FOI purposes. In effect, the argument is that these entries are excluded by section 3(2) of FOIA, in the same way that the Minister's correspondence in relation to these activities might be.

As was established in *University of Newcastle upon Tyne v Information Commissioner and British Union for the Abolition of Vivisection* ([2011] UKUT 185 (AAC)), "'Hold' is an ordinary English word." Another case, *McBride v Information Commissioner and Ministry of Justice*, referred to the public authority's control over, access to and use of information as being relevant in establishing whether information was held. Referring to both these cases, the Upper Tribunal decision on the Lansley diary confirmed that all entries in the diary would be held for the purposes of FOIA, since even the information relating to the Minister's private activities was held to assist his private office staff with their duty of managing his commitments ([2015] UKUT 159 (AAC), paragraph 114).

Which exemptions are likely to apply to diaries?

It will, of course, depend on the content of a diary exactly which exemptions will apply. It will even depend on the type of public authority.

In the case of ministerial diaries, the Lansley rulings found that section 35(1)(d) will apply to all entries in the diary, since the maintenance of the diary itself relates to the operation of a ministerial office. The question then is to decide whether the public interest favours withholding or disclosing the information. Other parts of section 35, 35(1)(a) and (b), may apply in specific circumstances. However, a department has to be able to explain how a particular entry relates to the formulation and development of a policy, for example, if section 35(1)(a) is to apply.

Outside of central government, section 35(1)(d) is not an option. Other public authorities might instead turn to the various options available at section 36 (prejudice to effective conduct of public affairs) of the Act. For example, the GLA cited section 36(2)(b)(i) and (ii) and section 36(2)(c), arguing primarily that disclosure would compromise the Mayor's safe space for policy discussion (FS50431334, paragraphs 72-80). Just as with section 35(1)(a), the difficulty is going to be in demonstrating how the bare bone information in a diary entry can affect the development of policy.

There was little argument that section 40(2) would apply to part or all of some entries, since they would contain personal data. It was accepted that it would be unfair for annual leave and contact details of the Minister's staff, or his own private travel arrangements or meetings (or his barber's appointments, to take us back to Mr Livingstone's diary entries described at the start of this article) to be disclosed, and indeed that the names and contact details of private individuals would need to be withheld (FS50406024, paragraph 21). The Commissioner argued successfully however that MPs have a lower expectation of privacy than private individuals, and that therefore disclosure of the fact that they had met with the Minister would not breach the Data Protection Principles. The FTT agreed that diary entries relating to MPs were disclosable unless another exemption applied (EA/2013/0087, paragraph 18).

Many authorities publish details of officials' engagements on a regular basis. The Department of Health was unsuccessful in making this argument as the Commissioner's view was that the information that it had been applied to was not 'available in its entirety' on the Department's website (FS50406024, paragraph 34). If a public authority wants to rely on section 21 (or indeed on section 22, if it is arguing that the diary entries will be published in the future), it will need to be able to demonstrate that the published information is close enough to the content of the diary for the exemptions to be valid.

One risk commonly cited by public authorities when responding to requests for diaries is that safety — primarily that of the official whose diary is being disclosed — will be compromised. It was accepted in the Lansley case that the two national security exemptions (sections 23 and 24) applied to a small number of entries. The application of section 38 (health and safety) was not considered by the Commissioner or FTT in that case since it was felt that such information could be protected by the personal data exemption. However, the GLA successfully argued that some entries in the Mayor of London's diary could be withheld as it would be possible for someone to extrapolate the Mayor's movements, and given his high-profile (by this time the Mayor was Boris Johnson), the risk to his safety was sufficient to justify the conclusion that disclosure would be likely (rather than would) to endanger it.

Public interest in protecting diary contents

Sections 22, 35, 36 and 38 are all, of course, qualified exemptions and so subject to a public interest test. Arguments should be specific to each exemption. Some key arguments in favour of disclosure have already been outlined above (see 'What use are diaries?'), but what arguments are likely to aid the protection of diary content?

When the FTT considered the Lansley diary case, it heard from senior civil servants. The main thrust of their argument against disclosure was that the disclosure of the diary entries would be misleading or uninformative. They expressed concern that people might take gaps in the diary to indicate that the Minister was not working hard enough.

The FTT pointed out that 'the ordinary member of the public would readily understand that an engagements diary does not reliably present a complete picture of a person's working life'. One argument made by the civil servants which was echoed in *Cabinet Office v IC* (EA/2013/0119, 12th November 2015), was that by disclosing details of a Minister's activities (or in the Cabinet Office case, the number

of times a committee has met), it will encourage Ministers and their staff to fill their time with unnecessary meetings for the sake of appearances. The FTT in both cases was unimpressed. Overall, the public interest in disclosing the Lansley diary entries was found to outweigh the arguments in favour of maintaining the section 35 exemptions. Other decisions have found the same (see, for example FS50629605, relating to the diary of a Minister at the Department for Communities and Local Government).

The Commissioner gave similar short shrift to the GLA's argument in favour of protecting a safe space using section 36 (FS50431334, paragraphs 81-107). It appears difficult to successfully argue the public interest in withholding diary content using sections 35 or 36. It is going to be easier to argue the public interest in protecting the safety of officials and the public. The GLA was successful in arguing that disclosure of certain entries that would reveal the Mayor's pattern of movements 'may contribute to premeditated events by persons with ill-intent' (FS50431334). On balance, the Commissioner was persuaded by this argument. If the request covers future events, it will be easier to demonstrate the public interest in withholding diary entries on this basis, since clearly stating where a public figure will be at a particular time could be a security risk. Timing is always a key consideration when assessing public interest.

Managing diaries

It is clear from the above that authorities will struggle to resist requests for diaries in most circumstances. However, there is an alternative.

If diaries are maintained with the intention to publish their content, it will make life easier. Diary secretaries can complete entries to a pre-agreed format, and with the knowledge that the information recorded will be published unless there are specific reasons not to.

If the diary is then published on a regular basis, say quarterly, it becomes possible to rely on section 21 for parts

of the diary that have already been published, and on section 22 for parts of the diary that will be published in the future. Of course, if diary entries are regularly published, it may even prevent requests for diaries being made at all.

Conclusion

Reviewing the past decisions made in relation to requests for officials' diaries and commitments, it is clear that public authorities will normally have to grant these requests, at least in part. There is a strong public interest, after all, in the public being able to see how prominent public figures occupy their time.

If a request is broad ranging, asking for entries covering a long time period, it may be possible to argue that the disclosure of a diary will present an unreasonable burden on the authority. A good explanation of this will support the use of section 14(1) in some extreme cases.

Otherwise, it will be necessary to look at each entry in turn to identify whether exemptions apply to them. The most likely exemptions to apply will be those that protect people's rights (their privacy, most notably) and their safety. Other exemptions may apply, but it is going to be difficult to demonstrate the public interest in maintaining them.

It is inevitable that the public and the media will be interested in diaries as key evidence of officials' and politicians' day-to-day activities and contact with external parties. Public authorities can best manage the impact of this interest by publishing diaries on a regular basis, thereby both promoting greater transparency and facilitating the use of sections 21 and 22 to manage the timing of disclosure.

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