

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

23 October 2008

**Public Authority:** The British Museum  
**Address:** Great Russell Street  
London  
WC1B 3DG

### Summary

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The complaint submitted two requests to the British Museum, the first focusing on the 'Parthenon Marbles' and the second on the 'Terracotta Army'. The British Museum provided some information in relation to these requests but relied on the exemptions contained at sections 22, 31, 36 and 43 of the Act to withhold the remainder of the information. With the exception of the application of section 22, the complainant asked the Commissioner to consider whether these exemptions had been applied correctly. With regard to the information relating to the first request the Commissioner has concluded that although three letters written by the Museum's Director are exempt on the basis of section 36, the public interest favours withholding only two of these letters. With to the second request, during the course of the Commissioner's investigation the British Museum suggested that it was now relying on section 12 of the Act to refuse to answer part of this request. The Commissioner has concluded that section 12 can be correctly relied upon and that some of the information is exempt from disclosure on the basis of sections 36 and 43 and that the public interest favours withholding this information. However, the Commissioner has also concluded that in respect of the remainder of the information covered by request two the exemptions contained at sections 31 and 43 of the Act are not engaged. Furthermore, the Commissioner has concluded that British Museum breached section 17(1)(b) by failing to state in its refusal notice the specific sub-sections of the exemptions it was relying on to refuse the complainant's request as well as breaching all the requirements of section 17(5) by failing to provide a refusal notice citing section 12.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. The complainant submitted two requests to the British Museum on 22 May 2007. The first of these requests concerned the Parthenon Marbles and read:

‘1...Could the British Museum please provide all correspondence (including emails) with the Greek Government and/or any museum and or museum authority in Greece which in anyway touches upon the issue of The Parthenon Marbles. I am interested in correspondence stretching from May 2006 to the present day. I would like to receive both sides of the correspondence. The reference to the Greek Government could mean the Government as a whole and or a government department and or an individual minister or politician and or an individual Greek official.

2...All minutes of any meetings of trustees which touch upon the issue of the Parthenon marbles. I am only interested in minutes which cover the period from May 2006 to the present day. I am only interested in items which refer to the marbles.’

3. The second of these requests focused on the so called Terracotta Army figures and read:

‘Could you please provide...

1...All correspondence (including emails) between the British Museum and The Chinese Government which touches in any way upon the loan of figures from the so called Terracotta Army. I am only interested in correspondence from May 2006 to the current day. I am interested in receiving both sides of the correspondence. The reference to Chinese Government could mean the Government as a whole and or any individual politician and or an individual official and or any individual government body.

2...All correspondence (including emails between) The British Museum and any Chinese Museum and other cultural institution or body in China which relates to the loan of figures from the Terracotta Army. I am only interested in correspondence which stretches from May 2006 to the current day.

3....All minutes of trustee meetings which touch upon the aforementioned loan of the figures. I am only interested in minutes which relate to the figures and I am only interested in those minutes from May 2006 to the current day’.

4. The British Museum provided the complainant with a response to these requests on 18 June 2007. With regard to the request for information about the Parthenon Marbles, the British Museum explained that copies of the Museum Trustee's statement on the Parthenon Sculptures of 21 April 2007 were sent to the Greek Embassy in London and to museums and government officials in Greece and that

- the briefing notes sent with the statement were exempt on the basis of section 36 of the Act.
5. The Museum also explained that complete minutes of the Trustees Board were on the Museum's website and there were no additional minutes.
  6. With regard to the request for information about the Terracotta Army, the Museum explained that detailed information and descriptions of the objects would be published in the catalogue that would accompany the forthcoming First Emperor exhibition. This information would be publicly available when the exhibition opens in September 2007 and therefore was exempt from disclosure on the basis of section 22 of the Act.
  7. The Museum also explained that correspondence and emails between it and the Shaanxi Provincial Cultural Relics Bureau in China relating to the contract for the forthcoming exhibition at the Museum included information about the commercial interests of both parties and therefore was exempt from disclosure on the basis of section 43 of the Act. Similarly the Museum explained that this correspondence also included detailed descriptions and valuations of loan items and arrangements for their transportation and disclosure of this information would prejudice the physical security of the objects and therefore such correspondence was exempt from disclosure on the basis of section 31 of the Act. The Museum also noted that correspondence between the Director and the Cultural Relics Bureau in China was exempt from disclosure on the basis of section 36.
  8. Finally the Museum noted that complete minutes of the Trustee Board were available on its website. However, the Museum explained that at other meetings attended by some Museum Trustees a number of reports were made that fell within the scope of the complainant's request. The Museum provided the complainant with extracts from these meetings but noted that security or commercially sensitive information had been redacted.
  9. On 19 June 2007 the complainant requested that the Museum conduct an internal review of its handling of his request.
  10. The Museum contacted the complainant on 2 July 2007 and explained that it was satisfied that his request had been dealt with appropriately and the exemptions applied correctly.

## **The Investigation**

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### **Scope of the case**

11. On 2 July 2007 the complainant contacted the Commissioner to complain about the Museum's handling of his requests, in particular its decision to withhold information on the basis of a number of exemptions. The Commissioner subsequently clarified with the complainant that he was not disputing the British Museum's reliance on section 22.

12. In his letter of 2 July 2007 the complainant did not complain about the fact that the British Museum only provided him with information that it considered not to be exempt rather than copies of the original documents with redactions made as he indicated he wanted in some of his correspondence to the British Museum. The Commissioner has not therefore considered this issue in the scope of his investigation. However, the Commissioner has commented further on the issue of how the Act provides a right of access to both information and documents in the Other Matters section at the end of this notice.

## Chronology

13. The Commissioner wrote to the Museum on 12 March 2008 in relation to the issues raised by the complainant.
14. The Commissioner explained that he had reviewed the correspondence exchanged between the Museum and the complainant in relation to this matter and with regard to the request about the Parthenon Marbles, it was his understanding that the Museum held the following information which fell within the scope of this request:
  1. Copies of the Museum Trustees' statement on the Parthenon Sculptures of 21 April 2007 which was sent to the Greek embassy in London, and to museums and government officials in Greece.
  2. Three brief covering notes sent with this statement.
  3. Complete minutes of the Trustee board (which were available on the Museum website).
  4. An updated statement on the Parthenon Sculptures (which the Commissioner presumes was circulated to the same recipients of the 21 April 2007 statement).
15. The Commissioner explained that it was his understanding that with regard to item 2, the Museum considered this information exempt on the basis of section 36. The Commissioner also suggested that although the Museum's correspondence with the complainant did not specifically mention items 1 and 4, he assumed that this information was also exempt on the basis of section 36.
16. The Commissioner asked the Museum to provide copies of items 1, 2 and 4. The Commissioner also asked the Museum to provide information to support its reliance on section 36 to withhold these items. The Commissioner noted that a public authority could only rely on section 36 to withhold information if, in the reasonable opinion of the qualified person, disclosure of the information would have the affects that the exemption is designed to protect. The Commissioner noted that although the qualified person for the Museum was the Director, in the correspondence he had seen in this case it was unclear whether the opinion of the qualified person was sought when this request was initially refused. Consequently the Commissioner explained that if the Museum wished to continue relying on section 36 to withhold this information it would need to seek the opinion of the Director. In order to assist the Commissioner's investigation into the application of section 36, he asked the Museum to confirm when this opinion was

- given and what evidence the qualified person considered when reaching this decision. The Commissioner also asked to be provided with a summary of the opinion itself.
17. The Commissioner also asked the Museum to confirm which sub-section(s) within section 36 it was relying on to withhold this information. Furthermore, the Commissioner asked the Museum what public interest factors it had considered in this case and why it had concluded that the public interest favoured maintaining the exemption under section 36.
  18. With regard to the request for information about the Terracotta Army, the Commissioner explained it has his understanding that the Museum held the following information falling within the scope of the complainant's request:
    5. Correspondence and emails between the British Museum and the Shaanxi Provincial Cultural Relics Bureau relating to the contract for the forthcoming exhibition at the British Museum.
    6. Correspondence between the Director and the Cultural Relics Bureau in China.
    7. The minutes of Trustee meetings which are available on the British Museum's website.
    8. Minutes of additional meetings which were attended by some Trustees held on the following dates: 15/06/2006, 14/12/2006, 18/01/2006, 21/03/2007.
  19. In relation to item 5 the Commissioner explained that he understood the Museum to consider this information to be exempt on the basis of sections 31 and 43 of the Act; that it considered item 6 to be exempt on the basis of section 36 and item 8 to be exempt on the basis of either sections 31 and/or section 43 of the Act.
  20. The Commissioner asked the Museum to provide him with copies of items 5, 6 and 8. He also asked the Museum to provide a detailed explanation as to why it considered the various exemptions cited provided a basis to withhold the various items of information requested.
  21. The Commissioner received a response from the Museum on 10 March 2008. As part of this response the Museum provided the Commissioner with the three briefing notes which comprised item 2 along with a response to the Commissioner's questions regarding the application of section 36 to this information. The Museum also confirmed that items 1 and 4 were in fact the same item and this statement had been issued to the press and made available on the Museum website prior to the complainant's request.
  22. In relation to the request for information about the Terracotta Army, the Museum explained that there was a considerable amount of email correspondence covered by the scope of item 5 which covered a variety of subjects including arrangements for the transportation of the objects, insurance valuations, details of the Museum's security arrangements, costs, expenses, contracts and other financial information and administrative information relating to the exhibition in London. However, the Museum explained that:

*'It was not possible to review this material on an item-by-item basis and redact information not relevant to the request and it was therefore not collated as part of this Freedom of Information request as to do so would have taken the request beyond the cost limitations.'*

23. Nevertheless the Museum explained to the Commissioner why it considered various parts of the information comprising item 5 as exempt on the basis of the following exemptions contained within the Act: 31(1)(a) the prevention or detection or crime; 31(1)(g) the exercise by the Museum of its functions for the purpose of protecting its property of charities from loss, i.e. sub-section 31(2)(g) and securing the health, safety and welfare of Museum staff, i.e. sub-section 31(2)(i); section 43(2) and sections 22(1)(a) and 22(1)(b).
24. The Museum also provided a copy of the one item of correspondence which comprised item 6 and a detailed explanation as to why this was exempt on the basis of sections 36(2)(b)(i) and (ii).
25. With regard to item 8, the Museum provided the Commissioner with copies of relevant information extracted from additional internal meetings attended by some Trustees of the Museum as well as copies of management reports presented to those Trustees referred to those in the minutes. The Museum explained why it considered some of the information to be exempt on the basis of section 31(1)(a) and section 43(2).
26. On 7 May 2008 the Commissioner wrote to the Museum in order to seek clarification on a number of different issues. With regard to item 5, the Commissioner explained that on the basis of the Museum's recent letter he understood that given the significant amount of correspondence relevant to this request, it was not possible to collate this information within the cost limit. However, the Commissioner noted that the Museum's refusal notice and internal review in relation to this item made no mention of section 12 of the Act (cost for compliance exceeds the cost limit) but instead cited a number of exemptions contained within Part II of the Act as a basis not to disclose this information. The Commissioner explained that public authorities should consider whether information could be provided within the cost limit, before going on to consider whether any information was exempt by virtue of the exemptions contained within Part II of the Act. Consequently the Commissioner asked the Museum to clarify its position with regard to this information – i.e. was it relying on section 12 to withhold this information and if so, it needed to provide the Commissioner with a detailed breakdown of the cost of complying with this aspect of the request. The Commissioner explained that if it the Museum's position was in fact that section 12 did not apply to this information, then the Commissioner would need to be provided with copies of the this information in order to assess the applicability of the various exemptions.
27. In his letter of 7 May 2008 the Commissioner also suggested to the Museum that having reviewed the information covered by item 8, he was of the initial opinion that the majority of this information was unlikely to be exempt either on the basis of section 31(1)(a) or section 43(2) of the Act. The Commissioner outlined, with

reference to the various pieces of information, why he had reached this conclusion. The Commissioner invited the Museum to provide further evidence to support its position that this information was exempt on the basis of these two exemptions.

28. The Commissioner received a response from the Museum on 16 May 2008. In this response, the Museum explained that it:

*'did not originally apply Section 12 to this request at the outset as our Press Office was keen to supply this requester (a journalist with whom we are in regular contact) with at least some information regarding the loan of figures from the "Terracotta Army" at a time when we were promoting the forthcoming First Emperor exhibition. [The complainant] insisted on receiving documents despite us having advised him that the Act places an obligation on the Museum to supply information. We attempted therefore to deal with this request by supplying the relevant information within cost limits.'*<sup>1</sup>

29. The Museum went on to confirm that it believed that section 12 could be correctly relied upon to refuse the request for information in relation to the Terracotta Army. The Museum provided the Commissioner with a detailed breakdown of the estimated cost of responding to this request (this breakdown is reproduced in the annex attached to this notice). Consequently, the Museum explained that as it was now relying on section 12 to refuse the request relating to the Terracotta Army in its entirety it did not feel that it needed to provide any further arguments in relation to the questions raised in paragraph 25.
30. On 22 May 2008 the Commissioner wrote to the British Museum again in relation to its application of section 12. The Commissioner explained that although public authorities could rely on section 12 retrospectively to refuse a request once a complaint was being considered by the Commissioner, given the circumstances of this case this created a slightly odd position: In effect, the British Museum now appeared to be relying on section 12 to refuse to answer the request about the Terracotta Army in its entirety. This was despite the fact that at least in part it had already responded to some aspects of this request by providing extracts from additional Trustee minutes and providing a refusal notice for the remainder of the information.
31. The Commissioner suggested to the British Museum that if it had originally refused this request in its entirety in line with the section 45 Code of Practice the British Museum should have contacted the complainant and provided advice and assistance so that some information could have provided within the cost limit. The Commissioner suggested that the most obvious way in which this advice and assistance could have been provided would have been to inform the complainant that although it would have exceeded the cost limit to provide item 5, the remainder of the information falling within the scope of the request (i.e. items 6, 7 and 8) could be provided within the cost limit. On this basis the Commissioner

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<sup>1</sup> The Commissioner has commented on the British Museum's assertion that the Act does not provide a right of access to documents in the Other Matters section at the end of the notice.

therefore asked the British Museum to once again provide further arguments to support its position that the information contained at item 8 was exempt from disclosure on the basis of sections 31 and 43 of the Act.

32. On 3 June 2008 the British Museum provided the Commissioner with a response to his latest correspondence. The British Museum explained that it agreed with the Commissioner's suggestion as to how its late reliance on section 12 should be dealt with. Consequently, the British Museum confirmed that its position with regard to item 5 was that it was refusing this information on the basis of section 12 and with regard to item 6 it was refusing to disclose this information on the basis of section 36(2)(b)(ii).

33. However, in relation to item 8, the British Museum explained that:

*'We would [now] claim that much of the information contained in these reports was outside the scope [the complainant's] request as it does not relate to the loan of objects. This information was not therefore provided on those grounds, not, as I suggested previously, under Section 31 (1) (a) and Section 43 (2) of the FoI Act. It is evident that the reports mainly concern the mounting of the First Emperor exhibition at the Museum and do not refer to the actual loan itself except where indicated: I attach an annotated copy of the minutes showing sections we consider to be outside the scope of his request. A summary of the information relevant to [the complainant's] request extracted from these minutes was provided in our initial response to him of 19 June 2007.'*

34. The British Museum then went on to provide further arguments to support its position in relation to what information contained in item 8 it did consider to fall within the scope of the request, namely the cost of the loan, was exempt on the basis of section 43(2).

35. The Commissioner contacted the British Museum again on 16 September 2008 and asked it to provide further clarification in relation to its reliance on section 12 of the Act and the breakdown of costs previously provided to the Commissioner (i.e. the information in annex A). In particular the Commissioner asked the British Museum to provide further details about how the relevant information would be stored and whether there were quicker ways to locate and retrieve relevant information.

36. The British Museum provided the Commissioner with this necessary clarification on 22 September 2008. (The Commissioner has not detailed this response here, but has included extracts from British Museum's letter in the 'Analysis' section below –see paragraph 64).

### **Findings of fact/Background**

37. The Parthenon Marbles (also known as the Elgin Marbles or the Parthenon Sculptures) are a collection of classical Greek marble sculptures which originated from the Parthenon building in Athens. Between 1801 and 1805 Lord Elgin, the British ambassador to the Ottoman Empire, of which Athens was a part, removed



- about half of the sculptures with the knowledge and permission of the Ottoman authorities. In 1816 following a Parliamentary Select Committee enquiry which fully investigated and approved the legality of Lord Elgin's actions, the British Museum acquired the sculptures and they have been on display to public at the Museum ever since.
38. Since the early 1980s Greek governments have argued for the permanent removal to Athens of all of the Parthenon Sculptures in the Museum. The Greek Government has also questioned the Museum's Trustee's legal title to the sculptures.<sup>2</sup>
39. The term Terracotta Army refers to a series of terracotta figures dating from 210 BC which were discovered in 1974 near Xi'an, China. The figures, of which it is estimated number around 8000 in total, were a form of funerary art buried with the Emperor of Qin. Since their discovery the Qin Terra Cotta Army Museum has been built on the site to allow the visitors to view the figures. Between September 2007 and April 2008 the Museum had an exhibition entitled 'The First Emperor' which featured a number of warriors which were loaned to it by the authorities in China.

## Analysis

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### The Parthenon Sculptures request

#### Item 2 - Section 36

40. The only outstanding point of complaint in relation to this request relates to the items described at item 2. The three letters compromising item 2 are:
- (a) A letter from Neil MacGregor, Director of Museum to HE Mr Vassilis-Achilleas Pisppinis, the Greek Ambassador in London, dated 26 March 2007.
  - (b) A letter from Neil MacGregor to Mr Angelos Delivorras at Benaki Museum dated 23 April 2007.
  - (c) A letter from Neil MacGregor to HE Mr Vassilis-Achilleas Pisppinis dated 24 April 2007.
41. The Museum has argued that these documents are exempt by virtue of section 36(2)(b)(ii) of the Act. This section provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to inhibit, the free and frank exchange of views for the purposes of deliberation.

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<sup>2</sup> The source of this background material is the British Museum's website which also includes further details about the history of the sculptures:  
[http://www.britishmuseum.org/the\\_museum/news\\_and\\_press\\_releases/statements/parthenon\\_sculptures.asp](http://www.britishmuseum.org/the_museum/news_and_press_releases/statements/parthenon_sculptures.asp).

42. In order to establish whether the exemption has been applied correctly the Commissioner has:
- Ascertained who is the qualified person or persons for public authority in question;
  - Established that an opinion was given;
  - Ascertained when the opinion was given; and
  - Considered whether the opinion given was reasonable.
43. In its submissions to the Commissioner to support the application of section 36, the Museum provided a signed statement by the Museum's director, Mr MacGregor dated 10 April 2008. In this statement Mr MacGregor confirmed that he, as Director of the British Museum, is the qualified person for the Museum. He also explained that on 31 May 2007 he was asked to give an opinion that the information listed above as (a) to (c) was exempt from disclosure on the basis of section 36(2)(b)(ii). (The Commissioner notes that this statement does not indicate exactly when Mr MacGregor provided his opinion.) In the statement provided to the Commissioner, Mr MacGregor provided the following reasoning as to why, in his opinion, disclosure of this information would be likely to be prejudicial and thus was exempt on the basis of section 36(2)(b)(ii):
- 'These documents contain personal comment made on the reasonable understanding of a level of friendly openness and confidence between myself and others so that we are able to exchange views freely and frankly in the mutual best interest of our respective organisations'.*
44. On the basis of the facts outlined in Mr MacGregor's statement, the Commissioner is satisfied that the opinion was, in terms of procedures, reasonably arrived at; although the statement does not explicitly confirm that Mr MacGregor reviewed the requested information in forming his opinion, as he was in fact the author of these documents, the Commissioner is satisfied that he gave due regard to the content of the requested information when forming this opinion. Furthermore, the Commissioner understands that this opinion was sought on 31 May 2007, and presumably given, prior to the refusal notice of 18 June 2007 being issued to the complainant.
45. In the Information Tribunal case *Guardian & Brooke v Information Commissioner & BBC EA/2006/0011 and 0013* the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable (i.e. the fourth criterion of paragraph 41). It concluded that 'in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (para 60).
46. On the basis of Mr MacGregor's reasoning as quoted above, and sight of the documents in question, the Commissioner is satisfied that the opinion is was one that is also reasonably objective. As the Tribunal in *Guardian & Brooke* indicated the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities. On the basis of Mr MacGregor's statement, and having considered the content of the withheld

information, the Commissioner's accepts that it was logical for Mr MacGregor to conclude that disclosure of these documents would be likely to make him less free and frank in similar correspondence in the future if these documents were disclosed. In reaching this conclusion the Commissioner has placed particular weight on the type or class of information which these correspondences represent – i.e. letters to ambassadors and heads of foreign cultural institutions.

47. With regard to the issue of whether the opinion itself is objectively reasonable, the Commissioner notes that in the circumstances of this case, the qualified person was also the author of the requested correspondence. Therefore, it could be argued that it is difficult, if not impossible for, the person to be truly 'objective' in their consideration of the issues. However, the Commissioner also accepts that as the qualified person and author of the documents are one in the same, Mr MacGregor was in fact in a unique position in being able to provide a judgement as to what might happen in future with regard to issues he, and future Museum directors, may or may not choose to include in similar correspondence. Moreover, such a potential conflict of interest is by no means unique to this case, and therefore must be accepted as one of the peculiarities as to how the exemption contained at section 36 works.
48. On the basis of the above, the Commissioner is satisfied that the opinion is one that was reasonably arrived and reasonable in substance and thus the exemption contained at section 36(2)(b)(ii) is engaged.

#### *Public interest test*

49. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian & Brooke* indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

*'88. The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.'*

50. As noted above, at para 91 the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the

Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

*Public interest in maintaining the exemption*

51. Although the Commissioner asked the Museum to provide a detailed explanation as to the public interest factors it considers in the application of section 36, in particular why it concluded that the public interest favoured maintaining the exemption, the Commissioner was only referred to the following comment contained in the Director's statement:

*'I do not believe it is reasonably in the public interest that such relationships should be inhibited, in the way they would be if the Museum were obliged to disclose information about them to third parties in the form of original records'*

52. The Commissioner does accept that there is a public interest in leaders of key cultural institutions, such as the British Museum, being able to correspond privately with an understanding that such exchanges will not be disclosed. Such an assurance creates an understanding of confidence which allows the authors and recipients of such letters to talk freely and frankly. The Commissioner accepts that it is logical to assume that such individuals may be inhibited in the nature of their correspondence should such information be routinely disclosed. This inhibition could affect both the content of these correspondences as well as their tone. Moreover, the Commissioner accepts that such correspondence can often touch on potentially sensitive issues, for example the status of the Parthenon Marbles, and as a consequence such correspondence can include diplomatic and careful discussions which are only exchanged on the understanding that such exchanges remain confidential.
53. The Commissioner recognises that there is a public interest in leaders of key cultural institutions in the UK, such as the British Museum, being able to conduct the affairs of their institution free from prejudicial intrusion. Ultimately, this allows such institutions to build relations with other similar institutions around the world which can ultimately result in the loan of exhibits to the British Museum (e.g. the loan of figures from the Terracotta Army). The Commissioner clearly accepts that it is in the public interest that the UK's museums and galleries are in a position to maximise the range of exhibits on display for the cultural benefit of the public. Indeed as the British Museum's statement referred to above (i.e. items 1 and 4) argues, its display of the Parthenon Sculptures form part of the 'unique overview of world civilizations that the British Museum exists to present'.

*Public interest in disclosure*

54. The Commissioner believes that there is a strong public interest in public authorities being open and transparent so that the public's understanding of decisions taken by public authorities can be improved, and where necessary challenged from an informed view point. Disclosure of the requested information could further the public's understanding and awareness of the British Museum's position with relation to the Parthenon Sculptures, in particular how it has dealt

with the Greek's government suggestions that they should be sent back to Greece.

*Balancing the public interest arguments*

55. In considering where the balance of the public interest lies the Commissioner notes that the arguments for non-disclosure advanced by the British Museum rest on the fact that the content of the information requested is in fact free and frank and thus disclosure would inhibit similar discussions in the future. If information is not of a sufficiently candid and frank nature, the Commissioner believes that the severity of harm that may occur would be low and thus the public interest in withholding may not outweigh the public interest in disclosure.
56. Turning to the particular documents which are the focus of this request, the Commissioner has not been able to identify any obvious examples of particularly free and frank debate or discussions within document (a). Rather the correspondence covers relatively procedural and straightforward issues instead of discussions focusing on the political sensitivities surrounding the Parthenon Marbles. Consequently, the Commissioner believes that disclosure of this information would not inhibit the heads of cultural institutions, such as the British Museum, from entering into free and frank discussions with their colleagues at similar institutions or representatives of foreign governments, simply because document (a) does not contain examples of such discussions. Therefore the Commissioner's view is that the public interest in maintaining the exemption in relation to this information does not outweigh the public interest in disclosure.
57. In contrast, the Commissioner does accept that both documents (b) and (c), although brief, do contain what can accurately be described as content which is free and frank in nature. This correspondence touches upon the potentially sensitive issues related to the Parthenon Sculptures. Consequently, the Commissioner accepts that disclosure of information of this nature may well inhibit the subsequent discussions between the director of the Museum and representatives of the Greek government and Greek museums on the topic of the Parthenon Sculptures.
58. In relation to criteria outlined in paragraph 50 above, (i.e. the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs that may occur) the Commissioner would make the following comments: at the core of this request is the issue of the Greek and British Government's opposing views over the ownership of the sculptures and therefore the issues are clearly ones of politically sensitive nature. Moreover, the debate over the ownership of the sculptures is one that is long standing and, in the Commissioner's opinion would appear to be one that will continue for the foreseeable future. Therefore, the Commissioner believes that if documents (b) and (c) were disclosed then inhibition to the subject of public affairs between the British Museum and related parties would be one that could be correctly classed as severe given the serious, and international, flavour of the issues at the heart of this debate. Moreover, given the ongoing nature of the debate any inhibition is likely to affect a matter that it is likely to be debated for some time to come. Given the severity, extent and frequency of the prejudice identified in respect of this

information, and having considered that the requested information could further the public's understanding of the British Museum's position with relation to the Parthenon Sculptures and how it has dealt with the Greek's government suggestions that they should be sent back to Greece the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure.

### The Terracotta Army request

#### **Item 5 – Section 12**

59. As the 'Chronology' section of this notice sets out, the British Museum's belated reliance on section 12 of the Act has resulted in a somewhat confused situation. However, the Commissioner has established that the only part of this request that the British Museum is relying on section 12 to refuse the information comprising item 5.
60. Section 12 of the Act provides that public authorities do not have to comply with a request where the estimated cost of responding to that request exceeds the appropriate limit as specified by The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations)<sup>3</sup>.
61. Section 4(3) of the Regulations sets out the basis upon which an estimate can be made:

'(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.'

62. In support of its position that providing the information covered by item 5 would exceed the appropriate cost limit of £450, the British Museum provided the

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<sup>3</sup> <http://www.opsi.gov.uk/si/si2004/20043244.htm>

Commissioner with the detailed estimate that is contained in Annex A at the end of this notice.

63. Having considered the details contained in this Annex, the Commissioner contacted the British Museum again and asked for further clarification with regard to exactly how it held the information falling within the scope of this request. In particular, the Commissioner noted that the time taken to locate the information was estimated at £1000 and the time taken to retrieve this information was estimated at £1000; the Commissioner asked the British Museum whether it was possible to locate and extract this information in less time, and thus for less cost. For example, by the systematic searching of email folders and shared drives.
64. As the chronology details, the British Museum provided the Commissioner with this clarification on 22 September 2008. This response contained a detailed explanation of how the information falling within the scope of item 5 was held. The Commissioner has summarised the pertinent points below:
- (i) Firstly, the British Museum began by noting that the complainant's request had asked for '*all correspondence (including emails between) The British Museum and any Chinese Museum and other cultural [sic.] institution or body in China which relates to the loan [my italics] of figures from the Terocotta [sic.] Army.*' The British Museum therefore suggested that the Commissioner's summarisation of this request at item 5 as 'Correspondence and emails between the British Museum and the Shaanxi Provincial Cultural Relics Bureau relating to the contract for the forthcoming exhibition at the British Museum' was a narrower interpretation of the request than the British Museum's estimate had been based upon. The British Museum explained that its estimate was not limited simply to documentation about the 'contract' but also all aspects the exhibition generally; nor was the estimate limited to documents between the British Museum and the Cultural Relics Bureau but rather to documents between the British Museum and any Chinese authority or museum. Finally, the British Museum explained that the level of Chinese property borrowed was in unprecedented quantities and scale, sensitivity and at times, urgency in relation to ongoing negotiation, all of which meant the level of correspondence generated over a 12 month period was considerable.
  - (ii) Secondly, the British Museum noted that the number of hours per member of staff at two hours was an average figure. For those on the periphery of the project the time spent searching for relevant information would be significantly less than two hours. However, for those heavily involved in the project team, the time taken to locate the information would be significantly longer given the sheer amount of correspondence that they would have generated. The British Museum noted that there were 8 staff involved in the core project team on this case with a further 15 staff across the organisation who may well hold information relevant to this request.
  - (iii) Thirdly, the British Museum acknowledged that some staff would be able to conduct rapid searches of electronic files, e.g. by sender or subject, but this would only be the case where the files were still held in mailboxes or electronic files. However, the British Museum argued that in many cases the

searches would have to include a wide variety of electronic locations such as personal and shared network hard drives, laptops, USB sticks, PDAs, CD/DVDs, as well as paper files and folders.

Moreover, as the request asked for information covering a 12 month period it would be necessary to search all information which had been deleted from mailboxes and hard drives but retained in backup tapes. This would involve the British Museum's information services team having to identify the appropriate tape or tapes from among a very large range of daily and weekly backup tapes, locate these relevant tape or tapes in an off-site storage location, restore the data to the server and then allow staff to search appropriate documents. It was not possible, the British Museum noted, to globally search backup tapes by sender or subject.

- (iv) Fourthly, the British Museum noted that it operates on a decentralised managerial basis and therefore does not have a centralised filing system for paper or electronic documents; consequently, staff file documents in ways which suit their own personal and departmental needs. This means that the records management at the British Museum includes:

*...a large number of different filing systems, both paper and electronic, many of which will include duplicate material. The ability to create folders and subfolders on shared drives is unregulated and is difficult to navigate if one is not the creator of a particular folder. The Museum currently has not the technological means to control how users manage personal mailboxes, create folders and subfolders and save files other than by imposing size quotas on mailboxes, which force users to clear them when they reach a certain size. Staff print out and file email messages, forward them to other email accounts, store them offline, save them to other networked drives or use any one of these options depending on the needs of the situation. Paper copies of correspondence and email may also be filed in various systems by different members of staff for varied purposes in diverse departments. Inevitably therefore, any search for documents is largely reliant on the knowledge of those individual members of staff involved in the project.'*

With regard to this case, the British Museum explained that a member of staff who had been central to the project had left the organisation by the time the request was received and therefore it took considerably more time to locate and search the files he had left behind. Ultimately, the British Museum argued that the nature of its records management system was not usually a problem when dealing with a request which asked for specific information about a particular matter. However, in this case as the complainant has asked for information about all aspects of a loan over a period of 12 months, the structure of the records management system meant that it was not possible to fulfil such a wide ranging request within the cost limit.



65. Having considered in detail the submissions the British Museum has provided to support its reliance on section 12 of the Act, the Commissioner has noted that following points: the estimate was in fact provided by the British Museum in support of its intermediate position that it was refusing the **entire** Terracotta Army request (i.e. items 5-8) on the basis of section 12. Therefore the Commissioner notes that some of the activities that are included in the cost estimate cannot therefore be taken into account when estimating the cost of simply providing the information covered by item 5. Furthermore, the Commissioner notes that the Regulations do not allow public authorities to charge for translation of documents or information and therefore the figure of £400 which the British Museum included in its estimate for such activities must be discounted. Similarly, the Commissioner notes that the British Museum has included in its estimate the time taken to liaise with the complainant, again not an activity that under the Regulations it can legitimately charge for.
66. Nevertheless the Commissioner is satisfied that to provide the correspondence exchanged between the British Museum and parties in China in relation to the exhibition would exceed the cost limit. The Commissioner has reached this conclusion for two reasons: firstly it is clear that volume of information which would fall within the scope of this request is clearly significant and contained in a variety of different formats and locations; and secondly, because of the complexities of the British Museum's records management system as described above at paragraphs 64 means it is simply not possible to locate, retrieve and extract the information falling within the scope of such a broad request within the appropriate cost limit.
67. On the basis of the above the Commissioner is satisfied that the British Museum can correctly rely on section 12 to refuse to disclose the requested information covered by item 5.

#### **Item 6 – Section 36**

68. The British Museum has argued that information which comprises item 6 is exempt from disclosure on the basis of section 36(2)(b)(ii). The Commissioner has established that there is only one piece of documentation meeting this description, namely:
- (d) A letter from Neil MacGregor, Director of Museum to Mr Zhao Rong, Director Cultural Relics Bureau dated 3 July 2006.
69. In support of its position that this document is exempt from disclosure on the basis of section 36(2)(b)(ii), the British Museum has relied on the same arguments outlined above at paragraph 41. That is to say in providing his reasonable opinion in relation to documents (a) to (c) Mr MacGregor also considered document (d).
70. The Commissioner does not therefore intend to outline in detail why 36(2)(b)(ii) is engaged in relation to this document; rather he simply confirms his findings outlined in paragraph 42 to 46 above and is therefore satisfied that on this basis (d) is exempt on the basis of section 36(2)(b)(ii).

71. Similarly, the Commissioner does not intend to rehearse the public interest considerations outlined above in relation to documents (a) to (c) except to say he considers the public interest arguments in favour of maintaining the exemption in relation to documents (a) to (c) are equally applicable to document (d). With regards to the balance of the public interest in relation to (d), the Commissioner has concluded that the public interest favours maintaining the exemption. Clearly, the Commissioner cannot comment in detail on the content of document (d) as to do so would undermine the purpose of this appeal, however the Commissioner believes that he can reveal that if this document was disclosed it is reasonable to conclude that such correspondences in the future would be inhibited. The Commissioner believes that this document can be correctly described as open and honest in both content and tone and if such correspondence was disclosed, he accepts that it is likely that authors of similar correspondence in the future would be inhibited in future discussions. Consequently, as with documents (b) and (c), although the Commissioner accepts that there is a public interest in the disclosure of document (d), this is outweighed by public interest in maintaining the exemption given the genuinely prejudicial consequences to the free and frank exchange of views if such information was disclosed.

#### Item 8

72. As part of his request for information about the Terracotta Army, the complainant specifically asked for 'all minutes of trustee meetings which touch upon the aforementioned loan of the figures.'
73. In response to this part of the request the British Museum confirmed that it held some information relating to the additional meetings attended by a number of Trustees on the following dates: 15/06/2006, 14/12/2006, 18/01/2006, 21/03/2007 - i.e. item 8.
74. Initially the British Museum provided the complainant with extracts from the minutes of these meetings but refused to disclose the remainder of the information on the basis of sections 31 and 43 of the Act. This remained the British Museum's position during the initial stages of the Commissioner's investigation of this case.
75. However, in its final correspondence to the Commissioner the British Museum argued that the vast majority of these minutes do not fall within the scope of the request because they do not relate to 'the loan of the objects'. Rather the majority of the information contained within the minutes relates instead to the exhibition put on at the British Museum entitled 'The First Emperor: China's Terracotta Army' following the loan of the figures. With regard to the information that the British Museum does accept falls within the scope of the request, it has explained that it has already provided the complainant with the information that it believes is not exempt. The only information which has not been disclosed, and the British Museum considers to fall within the scope of the request, is the amount paid for the loan of the figures from the Terracotta Army which the British Museum considers to be exempt on the basis of section 43(2).

76. The Commissioner accepts that there is a degree of ambiguity as to what information the complainant was seeking when he asked for information about 'the loan of figures'. Therefore the first question the Commissioner needs to consider then is what information actually falls within the scope of the complainant's request.
77. In previous cases where the meaning of the request is in dispute, the Commissioner has been guided by the Information Tribunal's decision in the case *Berend v the Information Commissioner and London Borough of Richmond upon Thames (LBRT) (EA/2006/0049 & 50)* in which the complainant and public authority disputed the meaning of the information request that had been made. The complainant intended a different interpretation of the request than was acted upon by the public authority. The Tribunal concluded that there were two objective readings of the complainant's request and whilst it did not criticise the public authority for its reading of the request, it did find it in breach of section 1 of the Act to the extent that information relating to the alternative reading of the request was not provided.
78. In the Commissioner's opinion it is reasonable to conclude that there are, as in the Tribunal case cited above, two objective readings to this request. The first reading is a relatively narrow one and that a request for information about the loan of the figures relates solely to the terms of the loan itself – e.g. payments of x pounds for loan of y objects on the basis of z terms and conditions. The second reading is a broader reading of the request in which a request for the information about the loan of the figures includes details of the loan itself but also the subsequent exhibition of the loaned figures.
79. In reaching the conclusion that there are two objective readings of this request the Commissioner has paid particular attention to the British Museum's initial handling of this request, including its position up until its final communication with the Commissioner of 22 September 2008. Until this correspondence the British Museum would appear to have been reading the request in broader terms in line with the second meaning of the request outlined in the previous paragraph. The fact that it refused to disclose information that would fall within the scope of the broader interpretation on the basis of sections 31 and 43 of the Act would demonstrate that it interpreted this request broadly. If its position had always been that the request should be interpreted narrowly, it would have no need to issue a refusal notice citing exemptions contained in Part II of the Act for information that it did not consider to possibly fall within the scope of the request.
80. Consequently, in line with the Tribunal's previous decision (*EA/2006/0049 & 50*) the British Museum was under a duty to provide a response under section 1(1)(a) of the Act for **both** of the readings of the complainant's request. Given that British Museum initially dealt with this request on the basis of the broader interpretation (which encompasses any information covered by the narrower request) the Commissioner is satisfied that the British Museum complied with its obligations contained at section 1(1)(a) of the Act for both requests.
81. However, on the basis of the above the Commissioner does not agree with the British Museum's latest position as outlined in the quoted email in paragraph 33.

Rather, the Commissioner believes that a significantly larger proportion of this information does fall within the scope of the complainant's request (on the basis of the broader reading of this request).

82. The Commissioner has therefore gone on to consider whether this information is exempt from disclosure on the basis of the various submissions provided by British Museum during the course of this investigation.

#### The cost of the loan

83. The British Museum has provided specific arguments as to why it believes the amount of the agreed loan fee was exempt on the basis of section 43(2).

84. Section 43(2) states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

85. In support of its position the British Museum explained that:

*'We believe that there is a significant likelihood that the commercial interests of the Museum would be prejudiced should this information be disclosed. The Museum intends to mount similar large scale exhibitions in the future and will be required to negotiate terms for loans from third parties: knowledge of the fee paid to the Chinese for this loan will effect the Museum's negotiating position. The fee was negotiated with the Chinese on the understanding of confidentiality and disclosure is likely to prejudice their commercial interests.'*

86. In considering the application of prejudice based exemptions the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). This interpretation followed the judgment of Mr Justice Mundy in *R (on the application of Lord) v Secretary of State for the Home Office [2003]*. In this case the Court concluded that 'likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not'. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The information Commissioner* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

87. The Commissioner has also considered the similarities between this case and that of the *John Connor* case quoted above. In that case the public authority, the National Maritime Museum ('NMM'), argued that disclosure of financial information relating to the commission of a piece of art would prejudice the

commercial interests of the NMM. The prejudice claim arose from the fact that the NMM's bargaining position would be compromised if other artists were aware of the commission's value. The Tribunal decided that the likelihood of prejudice would depend on the nature of the information and the degree of similarity between the two transactions. Ultimately the Tribunal concluded that the nature of the two works of art were so different that they could not be treated as true comparables for the purposes of negotiation.

88. With regard to the information being withheld in this case, the Commissioner accepts that in theory it is logical to argue that if the British Museum disclosed the price it paid to loan figures from the Terracotta Army, its ability to negotiate the terms of future loans may be prejudiced. This is because the third parties who are negotiating with the British Museum will be aware of the funds that the British Museum has available for such loans, and the third parties will have an incentive to bid up the price they will be prepared to accept for the loan of their objects and thus the price the British Museum will have to pay for such loans may increase.
89. As indicated by the Tribunal the key determining factor will be the similarity of future transactions. In the circumstances of this case the nature of the objects being loaned will be substantially different. For example, the requested information relates to the loan of objects from the Terracotta Army; in July 2008 the British Museum will feature an exhibition entitled 'Hadrian: Empire and Conflict' which will feature loans from a number of museums worldwide. Clearly the nature of the objects on loan in relation to the two exhibitions is very different; the first is an example of Chinese funerary art and second features various objects from the reign of a Roman Emperor. The Commissioner would envisage that any objects that the British Museum would borrow in the future would also be substantially different to those which are the focus of this request.
90. However, the Commissioner believes that in contrast to the Tribunal's findings in the *John Connor* case, there is a sufficient similarity between the transaction which is the focus of this request and major loans of very different objects in the future. In the Tribunal case the payment made by the public authority related to the commissioning of different works of art; in this case the transaction simply relates to the loan of objects for a limited period. Therefore the Commissioner believes that it is easier to quantify and compare different loans on a financial basis. For example, if a third party knew the price the British Museum paid for the loan of the objects from the Terracotta Army it could use this information along with the information already in the public domain such as the length of the loan and the numbers attending the First Emperor exhibition, to form an opinion as to how much money the British Museum would be prepared to pay for the loan of objects in the future. Whilst the objects that were being loaned would obviously differ from the Terracotta Army, a third party could make a reasonably informed assessment of the amount of money the British Museum may be prepared to pay for the loan of such objects. Consequently the British Museum's ability to negotiate with that third party would be negatively affected on the basis outlined in paragraph 85 above.
91. With regard to the likelihood of such harm occurring, the Commissioner also understands that the British Museum is committed to mounting high profile

exhibitions like the First Emperor exhibition in the future and that these exhibitions will involve the loan of objects for other Museums and institutions from around the world. For example the Hadrian exhibition referred to above will feature loans from 28 institutions from around the world.

92. On the basis of the above the Commissioner believes that there is a real and significant likelihood that disclosure of the cost of the loan would be likely to prejudice the British Museum's commercial interests. On this basis the Commissioner accepts that the exemption contained at section 43(2) is engaged.

*Public interest test*

93. The Commissioner believes that there is a strong public interest in promoting the accountability and transparency in the spending of public money. Disclosure of the figure paid by the British Museum would allow the public to be re-assured that the amount of money spent by the British Museum in borrowing the Terracotta figures is one that provided value for money.
94. Conversely if the figure was disclosed and public opinion considered the figure to be too high, there would be a public interest in the British Museum being accountable for the spending of what may be seen as too high a figure. Knowledge of the figure could allow the public to challenge the British Museum's spending of such sums and eventually lead to the British Museum being more considered in the future when negotiating similar loans.
95. However, the Commissioner is conscious of the strong public interest arguments in maintaining the exemption in respect of this information.
96. Disclosure could result in the British Museum having to pay greater sums of money in order to secure the loans of particular objects. Given that the British Museum's funding arrangements with the Department for Culture, Media and Sport are fixed for a three year period in advance, the British Museum would not be able to simply increase its revenue stream in order to accommodate the rising cost of loans. A logical consequence of this would be that the British Museum would not be able to afford to pay for as many loans of such objects in the future leading to a less varied range of exhibitions at the British Museum in the future. The Commissioner accepts that it is not in the public interest that the British Museum's underlying aim of providing a unique collection of art and antiquities from ancient and living cultures should be negatively affected.
97. In summary whilst the Commissioner believes that there is a strong public interest in public authorities being open and transparent in the way in which they spend money, in this case the Commissioner is conscious of the negative affects of disclosing the amount paid for the loan. Although disclosure of the amount of the loan will allow the public to form an opinion as to whether the British Museum achieved value for money in paying x pounds (particularly those who visited the First Emperor exhibition) disclosure will also allow other Museums and institutions to form an inevitably more informed opinion as to the amount paid by the British Museum. In short although disclosure would be used by both the public and other

Museums, it is likely that the latter will be able to use the information in a way which may prejudice the British Museum's commercial interests.

98. On the basis of the above, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Other information contained with the additional minutes which falls within the scope of the broader request.

99. As the above narrative demonstrates, the British Museum's initially argued that the majority of the information (save for that which a summary of was provided) that fell within the scope of the complainant's request was exempt on the basis of either section 31(1)(a) or 43(2) of the Act. During the course of his investigation the Commissioner explained to the British Museum that he considered it unlikely that either exemption would be engaged with regard to the information contained in these minutes, the only exception may be the cost of loan itself. The Commissioner therefore invited the British Museum to submit further arguments to support this position. However, as the British Museum's position is that this information is in fact outside the scope of the request (a position rejected by the Commissioner above) the British Museum has not provided the Commissioner with any further arguments to support its initial position that such information was exempt on the basis of sections 31(1)(a) and 43(2). The Commissioner has therefore reviewed the information contained in the minutes in light of the arguments originally supplied by the British Museum.

Section 31(1)(a)

100. The British Museum argued that parts of the Trustee minutes contained details of the Museum's internal security arrangements and such information was exempt from disclosure on the basis of section 31(1)(a) of the Act.
101. Section 31(1)(a) states that information is exempt if its disclosure would, would be likely to prejudice the prevention or detection of crime.
102. Having reviewed the information in question the Commissioner has only identified passing or very general references to the Museum's security arrangements. In the Commissioner's opinion there is no real and significant evidence to suggest that disclosure of such information would or would be likely to lead to the prevention or detection of crime and therefore the Commissioner does not accept that section 31(1)(a) is engaged.

Section 43(2)

103. In addition to the amount of the loan figure, the British Museum also argued that as the minutes also included references to sponsors, contractors and marketing opportunities, this information was also exempt on the basis of section 43(2) of the Act.

104. Having reviewed this information the Commissioner accepts that this information does relate to retail opportunities, operational details and budgets which do relate to commercial activities. However, as with the information the British Museum argued was exempt on the basis of section 31(1)(a), this information is relatively general and top level. Moreover, although the Commissioner notes that the withheld information relates to a number of organisations who were involved in the organisation and sponsorship of the exhibition, at the time of the complainant's request the fact that these organisations were involved in the exhibition was already in the public domain. In the Commissioner's opinion there is insufficient evidence to demonstrate that there is real and significant likelihood that disclosure of the remaining information contained in the minutes would or would be likely to result in prejudice to the commercial interests of the British Museum and therefore the Commissioner does not accept that section 43(2) is engaged.

## **Procedural matters**

### Section 17

105. Section 17(1) states that:

'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact
- (b) specifies the exemption in question
- (c) states (if that would not otherwise be apparent) why the exemption applies.'

106. In the Commissioner's opinion when public authorities specify a particular exemption, that specification should include both the specific section number and sub-section of the exemption claimed.
107. In both its refusal notice and in its internal review, the British Museum simply stated that it was relying on sections 22, 31, 36 and 43 of the Act. In order to comply with the requirements of section 17(1)(b) it should have in fact specified the relevant sub-sections of each exemption it was seeking to rely on, e.g. section 36(2)(b)(ii). By failing to state the specific sub-sections its refusal notice the Commissioner believes that the public authority breached section 17(1)(b).
108. Furthermore as detailed above, in its refusal notice and at the internal review stage the British Museum refused to disclose item 5 on the basis of the exemptions contained in Part II of the Act. However it is now relying on section 12 to refuse to provide the information covered by item 5. By failing to provide the complainant with a refusal notice citing section 12 the Commissioner decision is that the British Museum breached section 17(5) of the Act.



## The Decision

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109. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The British Museum is correct to withhold the correspondence labelled as (b), (c) and (d) on the basis that they are exempt on the basis of section 36(2)(b)(ii).
  - The British Museum is correct to withhold the information comprising item 5 on the basis of section 12.
  - The British Museum is correct to withhold the price paid for the loan of the Terracotta Army on the basis of section 43(2).
110. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The British Museum was not entitled to withhold the correspondence labelled (a) on the basis of section 36(2)(b)(ii).
  - The British Museum was not entitled to withhold the remainder of the information falling within the additional meeting minutes on the basis of sections 31(1)(a) and 43(2).
  - The British Museum breached section 17(1)(b) by failing to state in its refusal notice the specific sub-sections of the exemptions it was relying on to refuse the complainant's request and all the requirements of section 17(5) by failing to provide a refusal notice citing section 12.

## Steps Required

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111. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Provide the complainant with the following information:

- A copy the letter from Neil MacGregor, Director of Museum to HE Mr Vassilis-Achilleas Pisppinis, the Greek Ambassador in London, dated 26 March 2007 – i.e. document (a).
- Copies of the additional meeting minutes dated 15/06/2006, 14/12/2006, 18/01/2006, 21/03/2007 with the cost of the loan redacted.

## Other matters

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112. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
113. As detailed in paragraph 31, if the British Museum had in fact relied on section 12 to refuse the Terracotta Army request in its entirety when it initially received this request, then it would have been obliged under section 16 of the Act to provide advice and assistance in accordance with the Section 45 Code of Practice so that the complainant could have attempted to refine his request so it could be answered within the cost limit. As suggested above, the most obvious way in which this advice and assistance could have been provided would have been to inform the complainant that although it would have exceeded the cost limit to provide item 5, the remainder of the information falling within the scope of the request (i.e. items 6, 7 and 8) could be provided within the cost limit. The British Museum's handling of the request, i.e. its belated reliance on section 12, ensured that this was essentially how the request was refined. However, if section 12 had been applied initially by the British Museum the complainant would have then been in a position to refine his request to focus on the information **he** most wanted access to. This may have been information falling within the scope of item 5 rather than items 6, 7 and 8.
114. In its correspondence with the Commissioner the British Museum asked the Commissioner to take into account the fact that the complainant had insisted on being provided with copies of original documents despite the fact that the Act only places an obligation on public authorities to provide information in response to requests. The Commissioner has explained in the Scope section in the main body of the decision notice why he has not considered this issue in the main body of the notice. However, the Commissioner wishes to make clear to the British Museum, and all public authorities, that in his opinion the Act **does** provide a right of access to documents as well as information. Such a position is supported by the Explanatory Notes which accompany the Act. Paragraph 6 of these notes clearly state that: 'The Act will permit people to apply for access to documents, or copies of documents, as well as to the information itself'.

## Failure to comply

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115. Failure to comply with the steps described above 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.

## Right of Appeal

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116. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 23 day of October 2008**

**Signed .....**

**Nicole Duncan  
Head of FOI Complaints**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

**Annex A**

<b>a) determining whether the Museum holds the information</b>		
	Information Manager: establish whether information(documentation) available:1 hour	£25
	Directorate Manager: reviewing Trustee documentation: 1 hour	£25
	Press Officer: confirm request with requester, liaise with Information Manager and relevant staff: 1 hour	£25
<b>(b) locating the information or documents which may contain the information</b>		
	staff in departments: Asia; Directorate; Legal Services; Finance; Exhibitions; Capital Projects, Operations, BCo; Marketing; Photography & Imaging; Commercial Development ; Communications; Collections Management; - all may hold relevant information in paper files, mailboxes, local and shared computer drives: 20 members of staff: minimum average 2 hours per person	£1000
<b>(c) retrieving the information or documents which may contain the information</b>		
	approx. 2000 documents and emails in total required for review which may be relevant (including duplicates) covering period May 2006 to May 2007; retrieve and forward to Information Manager minimum average 2 hours per person	£1000
	Translation of documentation (assuming up to 20% of relevant documentation may be in Chinese) minimum 16 hours	£400
	Information Manager: identification of duplicate documentation, non-relevant documentation, collating, sorting: 8 hours	£200
	Information Services: search, locate and retrieve emails and documents from backups dating back 12 months (where possible) of mailboxes and deleted items folders of 20 members of staff from onsite servers and offsite tape stores; 2 members of IS team: 14 hours per staff member	£700
	Cost of processing, printing and circulating up to 2000 items @10p per page	£200
<b>(d) extracting the information from the documents containing it</b>		
	Information Manager: extracting relevant documents from approx 2000 documents and emails in total, consulting with staff, translators, third parties 16 hours	£400
<b>TOTAL COST OF COMPLYING WITH REQUEST</b>		<b>£3975</b>

## Legal Annex

### The Freedom of Information Act 2000

#### **Section 1(1)** provides that -

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

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

#### **Section 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

#### **Section 1(3)** provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

#### **Section 2(1)** provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

#### **Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 12(1)** provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 22(1)** provides that –

“Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”

**Section 31(1)** provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

**Section 36(1)** provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”