

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2021

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking correspondence between it and the University of Southampton about the Broadlands Archive for the period 2016 to 2018. The Cabinet Office provided the complainant with some information but sought to withhold further information on the basis of the following sections of FOIA: 21(1) (information reasonably accessible to the applicant), 35(1)(a) (formulation and development of government policy), 40(2) (personal data) and 41(1) (information provided in confidence).
2. The Commissioner's decision is that sections 21(1) and 35(1)(a) do not provide a basis to withhold any of the information in the scope of the request. She has also concluded that sections 40(2) and 41(1) provide a basis to withhold some, but not all, of the information to which the Cabinet Office has applied those exemptions. Furthermore, the Commissioner has concluded that the Cabinet Office breached section 17(3) of FOIA by failing to issue its public interest test considerations and provide the complainant with a substantive response to his request within a reasonable timeframe.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

- Provide the complainant with the information identified in the confidential annex, a copy of which the Commissioner has provided to the Cabinet Office only.¹
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In 2011 the University of Southampton (the University) purchased the Broadlands Archive from the Trustees of the Broadlands Archive. The archive, a collection of papers from the sixteenth century to the present centre on the Temple (Palmerston), Ashley, Cassel and Mountbatten families. The archive had previously been on deposit at the University for more than 20 years.
6. In order to fund the purchase the University relied, in part, on a grant from the National Heritage Memorial Fund for the sum of £1.9m. The sale was also subject to the 'acceptance in lieu' scheme under which art works and archives are accepted by the nation in lieu of inheritance tax. As a result, a Ministerial Direction (the Direction) was issued under the National Heritage Act 1980 setting out the terms of the acquisition.

Request and response

7. The complainant submitted the following request to the Cabinet Office on 13 August 2019:

'As per the attached suggestion, I would now like to request under FOI information within category 4 in the Cabinet Office's letter of 24 October – 2018 -2016 to present day correspondence between the Cabinet Office and University on additional closed archive records'²

¹ The Commissioner has deemed it necessary to use a confidential annex because it is not possible to properly describe the steps the Cabinet Office needs to take to comply with the decision notice without referring directly to information with the Cabinet Office considers to be exempt from disclosure.

² The Cabinet Office's letter of 24 October 2018 had provided the complainant with some advice and assistance on how to submit refined requests on this subject following its

8. The Cabinet Office replied on 12 September 2019 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 35(1)(a) (formulation of government policy) of FOIA and it needed additional time to consider the balance of the public interest test. The Cabinet Office issued further similar letters on 2 October and 23 October 2019.
9. The Cabinet Office issued a substantive response to this request on 14 November 2019. It disclosed some information falling within the scope of the request but explained that further information had been redacted on the basis of sections 35(1)(a), 38(1)(b) (health and safety), 40(2) and 41(1) of FOIA. It explained that additional documents were considered to be exempt from disclosure on the basis of section 21(1) of FOIA.
10. The complainant contacted the Cabinet Office on 13 December 2019 and asked it to conduct an internal review of this response in relation to the application of all of the exemptions cited in the refusal notice.
11. The Cabinet Office did not complete an internal review. The reasons for this are discussed later in this notice.

Scope of the case

12. The complainant contacted the Commissioner on 6 May 2020 in order to complain about the Cabinet Office's handling of his request. He raised the following grounds of complaint with the Commissioner:

- (1) He disputed the Cabinet Office's reliance on all of the exemptions that had been cited in the refusal notice.

- (2) He argued that the Cabinet Office had failed to provide all of the information in the scope of the request. More specifically he identified the following omissions:

- (a) An email from the University on 6 September 2017 at 10:12 referred to an '*e-mail below*'; this was missing.

rejection of a previous request on the basis of section 12(1) (cost limit) of FOIA. The letter set out four categories of information and suggested that if the complainant submitted requests for the information in each category, ensuring any requests were submitted sixty days apart, then the cost limit would not be met.

(b) An email from the Cabinet Office to a third party, presumably the University, on 7 November 2018 at 10:12 says *'please find letter attached'*, but the letter was missing.

(c) An email from the University, presumably to the Cabinet Office, on 16 November 2018 at 11:43 says *'Please find attached my reply to your letter of 7 November'* but the letter was missing.

(3) He was dissatisfied with the Cabinet Office's delay in providing him with a substantive response to his request and its failure to complete an internal review.

13. During the course of the Commissioner's investigation, the Cabinet Office provided the complainant with a further disclosure of information on 8 March 2021.

14. This disclosure consisted of the following:

- A revised version of the documents previously provided to the complainant on 14 November 2019 with less information redacted. The redactions that remained applied to information which the Cabinet Office considered to be exempt from disclosure on the basis of sections 40(2) or 41(1) of FOIA.
- Redacted versions of the letters from Cabinet Office to the University dated 7 November 2018 and the University's letter in reply of 16 November 2018 (ie the letters identified at 2(b) and (c) above).
- An email the complainant had sent to the University on 30 August 2017 which had been appended to the University's email to the Cabinet Office of 6 September 2017. (The Cabinet Office disclosed this because the Commissioner had identified this as the missing email described at 2(a) above.)

Reasons for decision

Complaint 1

15. In relation to the first ground of complaint, during the course of her investigation the Commissioner established that the information to which the Cabinet Office had applied exemptions could be classed into the following categories:
- (i) Documents disclosed to the complainant on 14 November 2019 and the further less redacted version of these documents disclosed on 8 March 2021. As noted above, these redactions had been made on the basis of section 40(2) or section 41(1) of FOIA.
 - (ii) Documents withheld on the basis of section 21(1) at the refusal notice stage. The Cabinet Office explained to the Commissioner that any parts of these documents which were not already available to the complainant, and thus in its view covered by the section 21 exemption, were exempt on the basis of section 40(2) of FOIA.
 - (iii) Documents withheld in full at the refusal notice stage. These were withheld on the basis of sections 35(1)(a), 40(2) and 41(1) of FOIA.
 - (iv) The letters from Cabinet Office to the University dated 7 November 2018 and the University's letter in reply of 16 November 2018 which the Cabinet Office disclosed on 8 March 2021 but had redacted on the basis of section 41(1).
16. The Commissioner has considered the redactions applied to each of these categories of information in turn.³

³ The Cabinet Office confirmed to the Commissioner that it had withdrawn its reliance on section 38 of FOIA and no longer sought to rely on this exemption to withhold any information.

Category (i)

Section 40 – personal information

17. The Cabinet Office explained that it remained of the view that the names of three officials from its organisation below Senior Civil Service (SCS) level were exempt on the basis of section 40(2) of FOIA. It no longer sought to withhold the names of an official at the University and the names of two further officials at the Cabinet Office on the basis of section 40(2) of FOIA (the names of these individuals were therefore not redacted from the further disclosure of information made by the Cabinet Office on 8 March 2021).
18. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
19. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
21. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

22. Section 3(2) of the DPA defines personal data as:

'any information relating to an identified or identifiable living individual.'

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

24. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
25. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
26. The Commissioner accepts that the information which the Cabinet Office has redacted, which in addition to the names of the three individuals also includes their contact details, constitutes personal data as it both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. As noted above, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
28. The most relevant DP principle in this case is principle (a).
29. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.
30. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

32. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *'processing shall be lawful only if and to the extent that at least one of the'* lawful bases for processing listed in the Article applies.
33. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and

*freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*⁵.

34. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
35. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
36. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

⁵ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

37. The Cabinet Office acknowledged there is a legitimate interest in transparency for its own sake. It therefore accepted that to this extent there is a legitimate interest in disclosure of the information, albeit a limited one. The Cabinet Office also acknowledged that there is a legitimate interest in the public being made aware of those individuals who have advised or otherwise contributed views in the correspondence in question. However, the Cabinet Office argued that there is very little added legitimate interest in this personal data being revealed as this addition would add nothing of value to the public's understanding or knowledge of the underlying subject.
38. The Commissioner agrees that there is a legitimate interest in transparency for its own sake and moreover that there is a legitimate interest in understanding the nature of the Cabinet Office's discussions with the University regarding access to the material in the Broadlands archive.

Is disclosure necessary?

39. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
40. The Cabinet Office explained that it did not believe that the disclosure of the individuals' names would be necessary to further the general transparency of government, which is achieved in multiple other ways. However, it acknowledged that the disclosure of a name would be necessary to establish that individual's identity as a person who has advised/contributed views recorded in the correspondence - if the legitimate interest in question is knowing the identity of every such person. Nevertheless, the Cabinet Office argued that whilst the disclosure of the redacted information may be desirable or meet public curiosity, it was not persuaded that there is a pressing social need for the release of information that would outweigh the public interest both in protecting the information and the rights and freedoms of the individuals.
41. The Cabinet Office therefore argued that that the disclosure of the personal data was not necessary to meet a legitimate interest in this case.
42. With regard to whether disclosure is necessary, the Commissioner considers it important to note that the Cabinet Office has only sought to withhold the names of the three officials under SCS level from the email correspondence disclosed to the complainant. It did not redact the

names of senior officials at the Cabinet Office and University. In light of this the Commissioner is not persuaded that disclosure of the names of the junior civil servants is necessary as disclosure of the more senior officials names provides, in her view, sufficient transparency and accountability with regard to which individuals at each organisation were responsible for the discussions regarding the archive.

43. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
44. The Commissioner has therefore decided that the Cabinet Office was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).
45. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(2) has been decided by reference to the GDPR. However the Commissioner is also satisfied that the disclosure of the personal data to which that exemption was applied would contravene the UK GDPR for exactly the same reasons.

Section 41 – information provided in confidence

46. Of the documents disclosed to the complainant in redacted form, the Cabinet Office relied on section 41(1) of FOIA to withhold information contained in three of these documents. The Cabinet Office explained that the information withheld on the basis of section 41(1) of FOIA consisted of information provided to it in confidence by the University about the issues concerning the Broadlands Archive.
47. Section 41(1) of FOIA states that:

'(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'
48. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party and the disclosure of that information has to constitute an actionable breach of confidence.

49. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
- The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties); and
- Whether an unauthorised use of the information would result in detriment to the confider.

50. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Was the information obtained from a third party?

51. With regard to section 41(1)(a) of FOIA, in the Commissioner's view one of the documents that has had information redacted on the basis of section 41(1) cannot be said to have been obtained by the Cabinet Office from another person. This is because it is an email from the Cabinet Office to the University. Information cannot be said to be exempt under section 41(1) of FOIA if the public authority has generated the information itself. Whilst the Commissioner accepts section 41(1) can cover parts of a document generated by a public authority if they record information provided in confidence by another person, the Commissioner does not consider this situation to be applicable to the email in question; rather the information redacted on the basis of section 41(1) consists of the views/positions of the Cabinet Office.

52. However, of the remaining two documents which contain information which has been redacted on the basis of section 41(1), the Commissioner is satisfied that they clearly meet the requirements of section 41(1)(a) as the information is contained in emails from the University to the Cabinet Office.

Does the information have the quality of confidence?

53. The Commissioner accepts that the information withheld on the basis of section 41 in those remaining documents has the necessary quality of confidence as it is not otherwise accessible and is clearly more than trivial.

Was the information communicated in circumstances importing an obligation of confidence?

54. The Cabinet Office argued that the information was communicated in circumstances importing an obligation of confidence given the contents of the documents and the confidences between the relevant stakeholders. Having considered the content of the redacted information and the relationships between the various stakeholders with an interest in the Mountbatten papers, the Commissioner accepts that the information was communicated by the University to the Cabinet Office with an expectation that it would be treated confidentially.

Would an unauthorised disclosure of information result in detriment to the confider?

55. The Cabinet Office argued that unauthorised disclosure would cause a specific detriment to either the University, which provided the information, or to the Cabinet Office. The Cabinet Office argued that detriment in this context need only be to the extent that an individual is shown the information that the person to whom the duty is owed would not want to be seen. The Cabinet Office argued that release of this information could erode confidence in its ability to deal with academic institutions or trustees or executors in the future when the Cabinet Office's view is sought on (a) matters of tax in lieu scheme and (b) the sensitivity of papers that they hold which contain 'HMG equity'.
56. The Commissioner accepts that disclosure of the information contained in the two emails would be detrimental to University as it would reveal details, albeit top-level ones, about the nature of the papers in the archive and the University's approach to managing them.⁶
57. The Cabinet Office explained to the Commissioner that it had considered whether, should this information be disclosed, it could defend an ensuing action for breach of confidence with a reasonable prospect of

⁶ The only exception to this finding is in relation to the first two paragraphs of the email of 6 September 2017. In its submissions to the Commissioner the Cabinet Office marked the entire content of the email as exempt under section 41(1). However, it has in fact already disclosed the first two paragraphs of the email to the complainant.

success. The Cabinet Office explained that in reaching a decision on this point it had taken into account that there is a presumption in favour of maintaining confidences and that it is necessary to show that greater public interest will be served by breaking the confidence. The Cabinet Office argued that it could not mount a successful defence by relying on any of the public interests that the courts have previously recognised as defences to an action for breach of confidence, namely that the defendant can show that the breach of confidence revealed iniquity or fraud or disclosure was necessary to protect the public or individuals from harm. The Cabinet Office noted that although other public interests may justify a breach of confidence, those cited are among the conventional public interests that the Courts have accepted as a defence and it argued that the information to which section 41 relates reveals nothing of this character. The Cabinet Office emphasised that the general public interest in openness is not equivalent to these recognised public interest defences.

58. The Commissioner is aware from previous cases that the complainant has brought to her that he has serious concerns about the role of the University and the Cabinet Office in overseeing public access to the archive and more specifically in the lack of transparency in the roles played by each party. In the Commissioner's view disclosure of the information, which she considers is confidential, would provide some further insight into Broadlands Archive and the University's management of it and that there is a public interest in the disclosure of the information withheld on the basis of section 41(1) of FOIA. However, given the strength of the public interest in maintaining confidences, and taking into account the specific circumstances of this case and information itself, the Commissioner is not persuaded that there is a public interest defence to the disclosure of this information.

Category (ii)

Section 21 – information reasonably accessible to the applicant

59. In its initial response to the request the Cabinet Office provided the complainant with a list of documents which fell within the scope of his request but which it considered to be exempt from disclosure on the basis of section 21(1) of FOIA. This section states that if information '*is reasonably accessible to the applicant otherwise than under section 1 [it] is exempt information.*'
60. The complainant noted that section 21(1) applies to information which is '*reasonably accessible to the applicant otherwise than under Section 1*', (emphasis added by complainant). The complainant argued that none of the emails to which the Cabinet Office had withheld on the basis of section 21 were available to him otherwise than under section 1 of FOIA. This is because they were provided to him by the University on 20 June

2018 in response to FOIA request. Consequently, the complainant argued that in his view section 21 cannot therefore apply to these documents.

61. In addition the complainant noted that the emails disclosed by the University were heavily redacted and thus parts of the information were not in fact already accessible to him.
62. During the course of the Commissioner's investigation the Cabinet Office confirmed that it held unredacted copies of the documents to which it had cited section 21. However, the Cabinet Office explained that if it disclosed these documents – as opposed to relying on section 21 of FOIA to withhold them – then it would apply the same redactions to these documents that the University did when it disclosed these documents to the complainant. The Cabinet Office explained that these redactions would be made on the basis of section 40(2) of FOIA to withhold personal data, which it noted appeared to be the same exemption used by the University to redact information from the versions of the documents it provided to the complainant.
63. With regard to the application of section 21, the Commissioner accepts the complainant's position that this exemption can only be used by a public authority if the requested information is accessible to the requester by a means *other* than FOIA. It is the Commissioner's understanding that when it cited section 21 of FOIA the Cabinet Office not only knew that the complainant had these documents in his possession but also that he was in possession of these documents as they had been disclosed to him, under FOIA, by the University.
64. In the Commissioner's view this invalidates the Cabinet Office's use of section 21(1) of FOIA. As a practical consequence of this decision the Commissioner has included a step in this decision for the Cabinet Office to provide the complainant with a copy of the documents it had sought to withhold on the basis of section 21(1) of FOIA, subject to the application of section 40(2) which the Commissioner has discussed in the following paragraphs.

Section 40 – personal data

65. With regard to the application of section 40(2), the Commissioner is satisfied that this provides a basis to redact the names and contact details of junior staff at the Cabinet Office. The Commissioner's rationale for this conclusion is set out above. She also accepts that this same rationale provides a basis to withhold the names of two individuals at two other organisations.
66. However, the Commissioner notes that the Cabinet Office is no longer seeking to rely on section 40(2) to withhold the names of two officials at

the Cabinet Office nor the name of an official at the University where they appear in other documents. She therefore adopts the position that section 40(2) does not provide a basis to withhold these names where they appear in these documents. There is also an additional redaction to which the Cabinet Office suggested section 40(2) would apply but in the Commissioner's view such information is not third party personal data. Rather it is the complainant's names and thus cannot be exempt from disclosure on the basis of this exemption.

Categories (iii) and (iv)

67. The Cabinet Office withheld five documents in full at the refusal notice stage. It argued that section 35(1)(a) of FOIA applied to all of these documents. It argued that section 41(1) also applied to one of these documents in its entirety and that section 41(1) also applied to some parts of the other four documents. The Cabinet Office also argued that parts of the documents were also exempt on the basis of section 40(2) of FOIA.

Section 35(1)(a) – formulation and development of government policy

68. The Commissioner has initially considered the Cabinet Office's reliance on section 35(1)(a) of FOIA which states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy'

69. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

70. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

71. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

72. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.

73. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
- the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
74. In support of its decision that section 35(1)(a) applied, the Cabinet Office argued that the government policy in question is that surrounding decisions about what constitutes state papers (public records) as opposed to personal papers and how they should be handled when they are not in government possession. The Cabinet Office explained that the information withheld under this exemption is correspondence between it and the University and shows where the Cabinet Office is seeking to establish how the policy applies to the handling of (a) government documents and (b) government equity within personal documents. The Cabinet Office explained that this policy is reformulated or reshaped after the passage of time. For example, the Cabinet Office had to make similar policy decisions when dealing with Margaret Thatcher's personal papers after her death; those decisions related to what was personal material and what were state papers and therefore public records.
75. With regard to the particular circumstances of this case, the Cabinet Office explained that as a result of the Ministerial Direction following the 2011 Agreement between the Trustees and the University (in relation to the purchase of the archive), the University must seek the agreement of the Cabinet Office to make any of the Mountbatten documents they hold available to the general public (including academics). The Cabinet Office noted that the vast majority of the archive is uncontentious and is currently available to the public. It also noted that because Lord and Lady Mountbatten were public servants, they were bound by conventions and obligations of confidentiality to protect sensitive official material.
76. The Cabinet Office explained that the correspondence it is seeking to withhold contained details of how the policy of reviewing the Mountbatten papers that have yet to be released would be applied. The Cabinet Office noted that it was currently reviewing the diaries and letters in line with paragraph 2b of the 2011 Ministerial Direction to ensure that Lord Mountbatten (as a public servant) did not reveal any information which could be withheld under FOIA. The Cabinet Office argued that because the diaries and letters are still under review in line with the Ministerial Direction it considered them, and correspondence

about them, to fall under section 35(1)(a) because the review activity is developing the government policy in the Ministerial Direction.

77. The Commissioner accepts that government policy may take a number of forms and furthermore she appreciates that policy may be made in a number of different ways. However, she is not persuaded that the review of the Mountbatten papers, in line with the Ministerial Direction, relates to the formulation or development of government policy making. Rather, in the Commissioner's opinion the review of the archive, and ultimately the decision to agree to release or continue to withhold particular papers, is more akin to an operational decision making process than one that concerns government policy making. In particular, it is the Commissioner's understanding that the review process did not require or involve ministers making the final decisions. In the Commissioner's view the absence of their involvement undermines the Cabinet Office's reliance on section 35(1)(a).

Section 40 – personal data

78. The Cabinet Office argued that the names of the same civil servants which were redacted from the documents disclosed at the refusal notice stage, were also exempt from disclosure on the basis of section 40(2) where they were contained in the documents withheld in full.
79. For the reasons discussed above, the Commissioner is satisfied that such names are exempt from disclosure on the basis of section 40(2) of FOIA.

Section 41 – information provided in confidence

80. As noted above, the Cabinet Office explained that of the documents withheld in full it considered section 41(1) of FOIA to apply to these either partially, ie certain parts of the documents were exempt on the basis of this exemption, and that section 41(1) provided a basis to withhold one document in its entirety.
81. The Commissioner has set out above how the exemption contained at section 41(1) works. She has considered the five documents that have been withheld in full in this context.
82. In the Commissioner's view one of the five documents does not meet the requirements of section 41(1)(a) because it is an email sent from the Cabinet Office to the University. Furthermore, in the Commissioner's opinion this document does not include any information that could be said to have been previously provided to the Cabinet Office by a third party. This document is not therefore exempt from disclosure on the basis of section 41(1) of FOIA.

83. One of the documents that the Cabinet Office sought to withhold in full was a note of a meeting which took place between the Cabinet Office and the University. The Commissioner notes that the minute was created by the Cabinet Office. However, she has carefully considered the contents of the note in line with the approach set out above to ascertain whether any parts of it could be considered to have been provided to the Cabinet Office by the University. Having done so, the Commissioner accepts that certain parts of the meeting minute do reflect information provided by the University and therefore such information meets the requirements of section 41(1)(a) of FOIA. However, not all of the information meets this requirement as it would appear to reflect the Cabinet Office's views/position and this latter category of information is not therefore exempt from disclosure on the basis of section 41(1) of FOIA.
84. Of the remaining three documents to which the Cabinet Office has applied section 41(1) to, the Commissioner accepts that they all meet the requirements of section 41(1)(a) because they are documents or communications created by the University and were provided to the Cabinet Office.

Does the information have the quality of confidence?

85. The Commissioner accepts that the information withheld on the basis of section 41 (ie the information which meet the requirements of section 41(1)(a)) has the necessary quality of confidence as it is not otherwise accessible and is clearly more than trivial.

Was the information communicated in circumstances importing an obligation of confidence?

86. Having considered the content of the redacted information and the relationships between the various stakeholders with an interest in the Mountbatten papers, the Commissioner accepts that the information was communicated by the University to the Cabinet Office with an expectation that it would be treated confidentially.

Would an unauthorised disclosure of information result in detriment to the confider?

87. There is a variety of information contained across the documents (or parts of the documents) which the Commissioner accepts meet the requirements of section 41(1)(a). As result describing in this decision notice the extent to which she accepts the disclosure of such material would be detrimental is not particularly straightforward, especially without being able to refer directly to the content of the information itself. However, the Commissioner has summarised her position below and where necessary has expanded on this in the confidential annex to further explain her findings.

88. With regard to the meeting note, the Commissioner accepts that disclosure of some parts of this which meet the criteria of section 41(1)(a) would also be detrimental to the University as it would reveal some details about the nature of the papers in the archive and the University's approach to managing them. However, in the Commissioner's view not all of the information contained in the meeting note provided by the University could be said to be detrimental given that the information is essentially factual or uncontentious information.
89. The Commissioner is also of the view that disclosure of the University's email of 21 June 2018 would not be detrimental given the minimal and uncontentious nature of the information to which section 41(1) has been applied.
90. However, in contrast the Commissioner accepts that disclosure of the attachment to this email would be detrimental as would disclosure of the University's email of 14 May 2018, albeit to a lesser extent.
91. For the reasons discussed above, the Commissioner is not persuaded that there is a public interest defence to the disclosure of the information which she accepts meets the requirements of section 41(1)(b) of FOIA.

Complaint 2

92. As explained above, during the course of the Commissioner's investigation the Cabinet Office located two of the documents that the complainant identified as missing from its initial response to his request.
93. One of these documents consists of a letter from the Cabinet Office to the University dated 7 November 2018 (ie the document described at point 2(b) of paragraph 12) and the second is a letter from the University to the Cabinet Office dated 16 November 2018 (ie the document described at point 2(c) of paragraph 12). Furthermore, the Cabinet Office provided the complainant with redacted versions of these documents on 8 March 2021 with the redacted information being withheld on the basis of section 41(1) of FOIA.

Section 41 – information provided in confidence

94. With regard to the application of this exemption to information contained in the Cabinet Office's letter, in the Commissioner's view this information does not meet the requirement of section 41(1)(a) as it is not information that can be said to have been provided to the Cabinet Office. Such information is not therefore exempt from disclosure on the basis of section 41(1) of FOIA.
95. With regard to the application of section 41(1) to the information contained in the University's letter, the Commissioner accepts that this

information meets the requirements of section 41(1)(a). However, she is not persuaded that disclosure of this information would be detrimental given that it either repeats information already provided to it by the Cabinet Office and/or is referred to in other parts of correspondence already released under FOIA.⁷

96. With regard to the third document which the complainant argued was missing (ie the document described at point 2(a) of paragraph 12), as explained above this document has now been located and provided to the complainant.

Complaint 3

97. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions,

'(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.'

98. Section 10(1) of FOIA provides that 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.

99. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.

100. In this case the complainant submitted his request on 13 August 2019 but the Cabinet Office did not provide him with a substantive to his request until 14 November 2019, some 67 working days later. The Commissioner is not aware of any factors that would justify this request being considered as an exceptional one and therefore she has concluded the Cabinet Office breached section 17(3) in its handling of this request.

⁷ The Commissioner notes that the Cabinet Office has not cited section 40(2) in relation to this document but it does contain the names of staff at University that she accepts would be exempt from disclosure on the basis of section 40(2) of FOIA.

Other matters

101. The FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice⁸ explains that such reviews should be completed within a reasonable timeframe. As is clear from the chronology of the request above, the Cabinet Office failed to complete an internal review into this request.
102. The Commissioner asked the Cabinet Office to explain why this review was not completed. In response the Cabinet Office explained that the complainant requested an internal review on 13 December 2019 and this was logged on its system and an acknowledgment receipt was sent to the complainant on 15 December 2019. The Cabinet Office explained that the internal review was assigned to the relevant business unit, who produced a draft response at the same time as considering the related Tribunal appeals concerning previous decision notices issued by the Commissioner about requests submitted by the complainant on this issue. The Cabinet Office explained that the response had been drafted late, and progressing it was overlooked because in the first few weeks of lockdown teams were trying to work out how to operate, two key staff were seconded to Covid-19 teams, and as a result the internal review fell through those gaps. The Cabinet Office offered its apologies for this administrative oversight which it noted occurred in extremely difficult and unprecedented circumstances.
103. The Commissioner accepts that administrative errors can occur and acknowledges the Cabinet Office's point that the impact of the Covid-19 pandemic contributed to this internal review being overlooked. The Commissioner is also aware that the complainant had submitted another internal review request to the Cabinet Office on 12 December 2019 on a related case and the Cabinet Office had responded to that on 31 January 2020. The Commissioner therefore accepts that the failure to complete the internal review in relation to the request which is the focus of this decision notice was a result of an unfortunate administrative error.

⁸ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

104. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 123 4504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

105. 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.

106. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF