

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2023

Public Authority: The Governing Body of the University of Southampton

Address: Highfield
Southampton SO17 1BJ

Decision (including any steps ordered)

1. The complainant has requested an unredacted version of the Broadlands Archive Agreement ('the Agreement'). The University of Southampton disclosed the Agreement with redactions made under sections 21, 40 and 41 of FOIA. These exemptions concern information that's already accessible, personal data and information provided in confidence respectively.
2. The Commissioner's decision is as follows:
 - Some information redacted from clause 53.3 of the Agreement is exempt under section 21(1) of FOIA.
 - The remainder of the redacted information is exempt under section 40(2) or section 41(1).
3. The Commissioner doesn't require the University of Southampton to take any corrective steps.

Background

4. In 2017 and 2018 the complainant had submitted a series of requests to the University of Southampton ('the University') for information about the Broadlands Archive. In his decision FS50772671¹ the Commissioner ordered the University to disclose a redacted version of the Agreement. The University appealed this decision (EA2020/0021 and EA/2020/0058). In 2021 the University and the Commissioner agreed the redactions that could be applied to the Agreement following the Tribunal hearing ('the agreed position').
5. On 20 June 2022, the complainant made a new request for an "unredacted" copy of the Agreement arguing that the clause in the Agreement that prevented disclosure when they originally requested it in 2017/18 no longer applied. The University again refused the request relying on the exemptions and redactions that had been agreed with the Commissioner following the Tribunal hearing.
6. During the Commissioner's subsequent investigation of the new request (IC-187747-N8L1²), it was clear that the University had failed to reconsider properly whether the exemptions it had relied on previously still applied when it responded to the new request. For example, some of the information that the University continued to withhold under section 40(2) was no longer personal information, as the individuals concerned had died between the previous request being made and the new request being submitted.
7. The Commissioner therefore found the University had breached section 1 of FOIA. He asked it to carry out a proper review of the redacted information and issue a fresh response; either disclosing the redacted information no longer covered by an exemption or providing an adequate refusal notice.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616838/fs50772671.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024846/ic-187747-n8l1.pdf>

Request and response

8. The complainant had made the following information request to the University on 20 June 2022:

"I request under the Freedom of Information Act a complete unredacted copy of the Broadlands Archive Agreement dated 18 July 2011, given that all the confidentiality obligations expired in August 2021 under clause 60.4"

9. As a result of the decision in IC-187747-N8L1, the University issued the complainant with a new response on 4 May 2023. It applied section 21 of FOIA to a little of the Agreement and applied section 40(2) and section 41 of FOIA to other parts of the Agreement.

Reasons for decision

10. The complainant submitted a complaint to the Commissioner on 8 May 2023. In more recent correspondence to the Commissioner the complainant told him that confidentiality clauses had lapsed and so "those [in the Agreement] dealing with the Nehru correspondence should now be open."
11. The Commissioner put that point to the University. The University advised that it hadn't redacted the only reference to the Nehru correspondence, which is on page 35 of the Agreement. As such, the confidentiality clauses relating to that information didn't apply. The Commissioner considers that the University has satisfactorily addressed that particular point and doesn't intend to consider it further in this notice.
12. In their original complaint to the Commissioner, as well as their general dissatisfaction about the University's reliance on sections 21, 40 and 41, the complainant said that the University had redacted some information from the Agreement it provided on 4 May 2023 that it had previously disclosed.
13. The Commissioner also put that point to the University and in its submission to him, the University acknowledged that it had mistakenly redacted a small amount of previously disclosed information; namely "The University of Southampton" on page 1 of the Agreement and "that so far as ...is aware neither..." at clause 51.5. The Commissioner doesn't intend to consider that information further in this decision.

14. This reasoning will cover the University's application of sections 21(1), 41(1), and 40(2) to the information in the Agreement that it continues to withhold.
15. The Commissioner notes that the University has advised him that it reviewed the request afresh following the decision in IC-187747-N8L. The University had considered the situation at June 2022 and had referred to an unmarked copy of the Agreement. It purposefully didn't refer to the agreed position from 2021. The Commissioner considers that approach to have been sensible in the circumstances.

Section 21 – information accessible to the applicant by other means

16. Under section 21(1) of FOIA, information is exempt from disclosure if it's already reasonably accessible to the applicant.
17. The University applied this exemption to part b) of clause 53.3 of the Agreement. It advised the complainant that this information is available on the Broadlands Estate ('the Estate') website or would be "in the near future" and it provided the complainant with a link to the 'Contact us' area of the Estate's website.
18. The University then clarified to the Commissioner that a small part of the first line at part b) of clause 53.3 has been redacted under section 40 and 41, and not section 21. That will be considered separately in the section 41 analysis. The remainder of the information in clause 53.3 has been redacted under section 21.
19. In their complaint to the Commissioner, the complainant noted that it's not at all certain that if they were to contact the Estate, it would disclose to them the information being withheld under section 21.
20. The University confirmed to the Commissioner that it had applied section 21 because the Estate's contact details are available on its website, and it's an address for the Estate that has been redacted from clause 53.3 under section 21.
21. The Commissioner notes that the website includes an address for the Estate. The postcodes of the published address and the address in the Agreement differ slightly but, to all intents and purposes, what is on the Estate's website is the Estate's address. As such, the Commissioner will accept that the information redacted from clause 53.3 of the Agreement under section 21 is reasonably accessible to the complainant on the Estate's website. That information therefore engages section 21 of FOIA.

Section 40 – personal information

22. Under section 40(2) of FOIA information is exempt from disclosure first, if it's the personal information of other, living, people and second, if disclosing it would contravene a data protection principle.
23. The University has redacted under section 40(2) the following information from the latest version of the Agreement it sent to the complainant on 4 May 2023.
 - Page 1 – some information in Agreement title page
 - Page 3 – some information in the top section of 'Section A'
 - Pages 7 to 10 – some signatory details [the University's accompanying 4 May 2023 correspondence to the complainant notes pages 8 to 10, but some information on page 7 has also been redacted under section 40(2)]
 - Page 12 – Lord Mountbatten's Executors
24. Section 40(2) says that information is exempt information if it's the personal data of another individual ('the data subject') and disclosure would contravene one of the data protection principles. The relevant principle is Article 5(1)(a) of the UK General Data Protection Regulation (UK GDPR). This says that personal data must be processed lawfully.
25. When considering whether disclosure would be lawful, the Commissioner considers the complainant's legitimate interests and whether disclosure is necessary to meet those legitimate interests. If appropriate he will finally go on to balance the complainant's legitimate interests against the data subjects' rights and freedoms.
26. The Commissioner is satisfied that the information being withheld under section 40(2) is the data subjects' personal data – the living individuals can be identified from this information, either directly or from the context of the surrounding information, and it relates to them.
27. The Commissioner appreciates that the complainant has had a long-standing interest in the detail of the Agreement, which is a legitimate interest for them to have. There's also a legitimate interest in public authorities demonstrating they're open and transparent.
28. The Commissioner considers that the general interest in transparency has been met through the University's disclosure of the majority of the Agreement. However, disclosure would be necessary to meet the complainant's specific interest in the detail of the Agreement.

29. It's therefore necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it's necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
30. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individuals expressed concern to the disclosure; and
 - the reasonable expectations of the individuals.
31. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information won't be disclosed. These expectations can be shaped by factors such as the individuals' general expectation of privacy, whether the information relates to employees in their professional role or to them as individuals, and the purpose for which they provided their personal data.
32. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
33. In its submission to the Commissioner, the University has confirmed that it hasn't identified a lawful basis to release the information. This is because the representatives for the third parties within the Agreement have expressed an expectation of confidentiality and therefore wouldn't consent to the information being released.
34. The University noted that a FOIA disclosure is to the world at large but considers that the request for the Agreement in this case appears to be motivated by private concerns. The University has acknowledged that the data subjects are figures known in the public domain but says that their roles as outlined within the Agreement is not known. The University says it's also satisfied that, in view of the circumstances in which their data was shared with the University, their wishes when agreeing contract (ie the confidentiality clause) and the nature of the information about private family matters, the data subjects would reasonably expect that their personal data wouldn't be disclosed to the world at large under FOIA.
35. The Commissioner accepts that is the case and considers that disclosure would therefore cause those individuals harm or distress.

36. The Commissioner considers that the information that the University has disclosed – and other information about the Agreement and the archive that is already in the public domain - satisfies the general interest in transparency to an adequate degree. He's satisfied that the potential for causing the data subjects harm and distress and their reasonable expectations outweighs the interest in disclosing the withheld information.
37. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information wouldn't be lawful.
38. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he doesn't need to go on to consider separately whether disclosure would be fair or transparent.
39. The Commissioner finds that the information the University has redacted under section 40(2) of FOIA is other people's personal information and disclosing it would be unlawful. Disclosure would therefore contravene a data protection principle; that set out under Article 5(1)(a) of the UK GDPR. As such, section 40(2) of FOIA is engaged in respect of that information.

Section 41 – information provided in confidence

40. Under section 41(1) of FOIA a public authority is entitled to withhold information if (a) the information was obtained from another person and (b) disclosure would constitute a breach of confidence.
41. The University has applied section 41(1) of FOIA to the remaining information in the Agreement that it has redacted.
42. The Commissioner has noted the University's approach to the request ie that it didn't take account of the previously agreed position. But he's compared the information he and the University agreed could be redacted under section 41 following the Tribunal hearing, with information that is now redacted under that exemption.
43. The University has now applied section 41 to some of the information which the Commissioner and University agreed in 2021 could be redacted under section 40(2) (or section 44 which concerns prohibitions on disclosure).
44. The University has confirmed that the information now withheld under section 41 comprises:

- Page 1 – some information in Agreement title page
 - Page 3 – some information in the top section of 'Section A'
 - Pages 7 to 10 – some signatory details
 - Page 12 – Lord Mountbatten's Executors
 - Information in pages 15 – 18
 - Page 21 – clause 45 – bank details. The University had advised the complainant that it had applied section 40(2) to this clause but has now withdrawn that exemption and applied section 41.
 - Page 22 – clause 49, 49.2, 49.3
 - Page 24 – clause 53.3
 - Page 29, Schedule C1 – some information in the 'Details of Copyright Works' section. In its response to the complainant, the University had applied section 40(2) to some of the information in page 29 (with section 41 applying to other information in the Schedule). The University subsequently advised the Commissioner that it's now relying on section 41 in respect of all the information it considers to be exempt in Schedule C1.
45. The Commissioner is satisfied, first, that the University obtained the information redacted under section 41 from another person, namely the trustees and other third parties involved in acquiring the archive. Section 41(1)(a) is therefore engaged.
46. Regarding section 41(1)(b), information has the necessary quality of confidence if it's not trivial or otherwise available; is imparted in circumstances importing an obligation of confidence and finally, if disclosing the information would be contrary to the confider(s) reasonable expectations and therefore cause a detriment to them.
47. In its submission to the Commissioner, the University says it has applied section 41 to areas of the Agreement that refer to context or background information about the history of the archive and how it was managed and executed.
48. When considering the identifiable information of individuals who are now deceased, the University says it referred to the Commissioner's guidance

'Information about the deceased'³, paragraphs 11 and 12 in particular. The University says it's satisfied that the duty of confidence continues to apply to that information, as it had outlined in detail in its response to the complainant. The University also considered that some of the individuals noted in the Agreement were related by virtue of their family or relationship to the Mountbatten Office. Again, their roles as parties to the Agreement were linked. Disclosing this information would therefore expose third party information (primarily the other signatories) and information about certain other individuals. The University has provided a little more detail about these individuals in its submission, but the Commissioner doesn't intend to reproduce that in this notice.

49. The Commissioner is satisfied first, that the disputed information isn't trivial and isn't in the public domain. As such, he's satisfied that the information was provided to the University with the assumption that it would be treated confidentially.
50. Finally, in terms of detriment that may occur, the Commissioner accepts that there's a considerable amount of information already in the public domain about the University's acquisition of the archive. However, as in FS50772671, in the Commissioner's view there's a clear distinction between such information and the information which he accepts meets the requirements of section 41(1)(a). The Commissioner considers that disclosing this latter category of information would result in the disclosure of details of private affairs of the family members involved. Given the content of this information, he accepts that this could be detrimental to the individuals concerned.
51. As discussed in FS50772671, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.
52. In their complaint to the Commissioner, the complainant discusses why they consider section 41 isn't engaged but they don't present any public interest arguments for the information's disclosure. As such, the Commissioner has considered the arguments the complainant presented in FS50772671. He remains satisfied that, given the detriment that would occur to the confider(s) - because disclosing the information would represent a notable infringement into the private affairs of family

³ <https://ico.org.uk/media/for-organisations/documents/1202/information-about-the-deceased-foi-eir.pdf>

members - there's no public interest defence for disclosing the information.

53. The Commissioner has therefore decided that section 41(1) of FOIA is engaged in respect of the information to which the University has applied that exemption.

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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

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