

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 June 2024

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from the British Museum (the Museum) regarding the Ethiopian tabots. The Museum provided some information but withheld other information citing section 14(2) (repeated request), section 21 (information accessible to the applicant by other means), section 27 (international relations), and section 36 (prejudice to the effective conduct of public affairs) of FOIA. The Museum also refused to confirm or deny whether it had sought legal advice (section 42(2) of FOIA).
2. The Commissioner's decision is that the Museum is entitled to rely on section 27(1) of FOIA and that the public interest favours non-disclosure. He has accepted that section 21 of FOIA is also engaged. However, the Commissioner has decided that the Museum has failed to demonstrate that issuing a confirmation or a denial would, in itself, disclose information to which legal professional privilege could be maintained and is therefore not entitled to rely on section 42(2) of FOIA.
3. The Commissioner requires the Museum to take the following steps to ensure compliance with the legislation:
  - Confirm or deny whether it holds any information falling within the scope of part iv) of the request.

- To the extent that any information is held, either disclose that information or issue a refusal notice that complies with section 17 of FOIA.
4. The public authority must take these steps within 30 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.

## **Request and response**

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5. On 30 August 2023 the complainant wrote to the Museum and requested information in the following terms:

i. Please provide all the documents associated with discussions which took place at the British Museum trustee meetings of 26 March 2004, 5 December 2019, and 19 March 2020 relating to responses to Tabot restitution requests.

ii. Please provide a copy of all briefing notes prepared by Dr Jonathan Williams or any other Museum staff in relation to restitution requests for the Tabots. Please include in your response unredacted copies of the "The Ethiopian Tabots" notes prepared by Dr Jonathan Williams in preparation for his presentations relating to (i) item 6.2 of the Board of Trustees meeting of 26 March 2004, and (ii) item 9.3 of the meeting of the Board of Trustees on 5 December 2019.

iii. We note that the Board of Trustees meeting of 8 December 2022 refer at 3.1 to a "Collections Discussion" in which "The Chair summarised previous discussions and outlined principles and proposals that could guide decisions relating to the Collection." While paragraph 3.2 and sub paragraph 3.3.2 further notes: "Following a detailed discussion, including risks and how these would be managed, the Board resolved that: two particular cases would be managed in line with the proposals discussed." Please confirm if the Tabots were discussed in this meeting and if they were one of the "particular cases", provide information about the proposals discussed and any documents relating to the proposals or action taken.

iv. Please confirm whether the Board of Trustees has sought legal advice as to the ability of the Museum to return the Tabots under the British Museum Act 1963."

6. On 27 September 2023 the Museum wrote to the complainant to extend the timeframe for responding in order to consider the public interest.
7. On 6 October 2023, the Museum responded. Regarding parts one and two of the request, the Museum cited section 14(2). Regarding part three of the request, the Museum provided some information - a redacted Collections Paper and confirmed that the tabots were discussed. The Museum withheld some information from page three of the Collections Paper under sections 27 and 36 of FOIA. However, it withheld the information relating to the Board Minutes of 8 December 2022 under section 21.
8. Regarding part four of the request, the Museum neither confirmed nor denied whether it held information under section 42(2) of FOIA.
9. The Museum stated that pages two and four of the Collections Paper were out of scope of the request.
10. On 9 November 2023 the complainant asked for an internal review of the Museum's response solely to parts three and four of the request. Firstly, the complainant queried whether section 21 was being applied to any other information.
11. The complainant asked for an internal review regarding the citing of sections 21, 27 and 36 to part three. Finally, the complainant queried the neither confirm nor deny (NCND) response to part four of the request.
12. On 21 December 2023 the Museum provided its internal review. It maintained its position, though it provided page two of the Collections paper (under part three of the request) for transparency though it still deemed it to be out of scope.

## **Background**

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13. The tabots are 11 sacred altar tablets. The Tabots were looted from Maqdala, Ethiopia (now Amba Mariam) by British soldiers in 1868. It is the Commissioner's understanding that the Tabots are so sacred that they have never been placed on public display or photographed by the Museum.

## **Scope of the case**

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14. The complainant contacted the Commissioner on 31 January 2024 to complain about the way their request for information had been handled.

15. On 31 May 2024 the Commissioner contacted the Museum about the extent of the withheld information. The Museum confirmed that it was only the four pages with redactions (the Collections Paper) already provided to the Commissioner.
16. With regard to part three of the request, having seen page four which was withheld by the Museum, the Commissioner agrees that it does not concern the tabots, therefore it does not fall within the scope of the request.
17. The Commissioner will not consider parts one and two of the request as the complainant did not ask for the Museum's citing of section 14(2) to be reviewed or included it in their complaint to the Commissioner. He considers that the scope of his investigation is to look at whether the Museum is entitled to rely on sections 21, 27, and 36 of FOIA as a basis for refusing to provide the information falling within part three of the request that was redacted from the Collections Paper. He will also consider the citing of section 42(2) by the Museum to part four of the request in order to neither confirm nor deny whether it held the requested information.

## **Reasons for decision**

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### **Section 21 - information accessible to the applicant by other means**

18. Section 21 of FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
19. Section 21 is an absolute exemption which means that there is no requirement to carry out a public interest test, if the requested information is exempt.
20. Unlike most exemptions, the circumstances of the applicant/requester can be considered, as the information must be reasonably accessible to them. Unless a public authority is aware of any particular circumstances or contrary evidence, it is reasonable to assume that information is accessible to the applicant/requester as a member of the public.
21. As regards part three of the request, the Museum stated that some of this information was available on its website. There was one document

that fell within the scope of the request – Board Paper Minutes for 8 December 2022<sup>1</sup>.

22. The Museum stated that “this information is publicly available”. At internal review the Museum confirmed that only these Board Minutes (8 December 2022) fell within scope of the exemption by way of advice and assistance.
23. In the Museum’s refusal notice, a link was provided to all the Board minutes, without specifying what minutes were relevant. Looking at part three of the request in its broadest sense, the Museum had decided that these minutes fell within scope. The complainant clearly had the information already as the request had been made as a result of those minutes. The minutes refer to “two particular cases” without directly naming these cases. This would mean a limited number of individuals surmising that the tabots were being referenced. However, the Commissioner has concluded that the exemption is engaged as section 21 refers to the “applicant” where other FOIA exemptions are directed generally at any requester.

## **Section 27 – international relations**

24. Section 27(1)(a) of FOIA states that:

“(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice —

(a) relations between the United Kingdom and any other State’...

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

25. Section 27(1) is subject to the prejudice test. In order for a prejudice based exemption to be engaged the Commissioner believes that three criteria must be met:
  - Whether the harm is one which the exemptions in section 27(1) are designed to protect. The interests of the UK as a whole are relevant rather than a public authority’s own interests or those of individual companies. Nevertheless, it is important to consider the context. It may be appropriate for a public authority to apply the exemption if an

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<sup>1</sup> <https://www.britishmuseum.org/about-us/governance>

organisation's interests are inextricably linked to the wider interests of the UK.

- Whether a public authority can demonstrate a causal link between the disclosure and the harm. The prejudice must be real, actual or of substance. Prejudice under section 27(1) can be real and of substance if it makes international relations more difficult or calls for a particular diplomatic damage limitation exercise. However, a public authority does not necessarily have to demonstrate quantifiable loss or damage.
- What the likelihood of the harm actually occurring is (ie "would" it occur, or is it only "likely to" occur?).

26. Section 27(2) is class based and is not subject to the prejudice test.

### **The Museum's view**

27. The Museum withheld some of the requested information under this exemption because it considered it to be "sensitive and would prejudice international relations". The Museum's refusal notice confirmed that it held the information but that it was exempt under section 27(1) and section 27(2) of FOIA.
28. In its response to the complainant, the Museum said that "disclosure of the information would be likely to prejudice relations between the United Kingdom and the Federal Democratic Republic of Ethiopia (including the Government and any Ethiopian organisations)".
29. The Museum confirmed its position "that the tabots, as well as being culturally significant, are also objects of religious veneration which hold great spiritual significance for many Ethiopians". The Museum's view is that releasing the information "at this time...would cause great offence to the government of Ethiopia at a time when discussions with the Museum are ongoing".
30. The Museum's view is that disclosing the information would undermine the "trust and confidence Ethiopia has in the United Kingdom". Because of the sensitivity of this matter the Museum needs to "make decisions about their future in an informed and careful manner". The Museum does not "anticipate the sensitivity of the discussions" diminishing "within the near future". All external parties "expect deliberations around the tabots, to be held in confidence and there would be no reasonable assumption by the Ethiopian Government that this information would be disclosed into the public domain".
31. The Museum contends that these discussions began before FOIA came into force and that all "related international bodies" would expect discussions to be confidential and that their "reasonable expectation"

would be that any data continued not to be made public. The Museum states that "under Ethiopian access to information law, interactions with international countries and organisations are protected under a dedicated exemption which maintains that such communications are confidential". Disclosure would therefore "breach an expected level of confidence".

32. It goes on to argue that, "Disclosure of this information would likely impact on and ultimately prejudice...trust and confidence" in "the UK government's ability to effectively conduct international relations" which "relies on it being able to retain the trust and confidence of other countries".
33. The "recent involvement of the Ethiopian government" means that there is "a diplomatic dimension to the issue and any disclosure would be likely to negatively impact the interests of the UK government abroad". The Museum's view is that this could "potentially lead to the intervention of the UK government at a time when their resources are currently focused on other international priorities".
34. The Museum provided the Commissioner with further argument when he specifically asked about a published exchange in Hansard<sup>2</sup> that had been raised by the complainant. The Commissioner asked why, if related information was in the public domain from the UK government, did the Museum consider that the particular information it had withheld should not be released? On 30 May 2024 the Museum wrote back to him disputing that what it wished to withhold was in the public domain, making comparisons between the withheld information and the Hansard exchanges and providing confidential arguments that cannot be reproduced here.

### **The complainant's view**

35. The complainant argues that section 27(5) refers to "the government of any State and any organ of its government". They contend that 'The Ethiopian Orthodox church and/or what the Museum refers to as "other Ethiopian organisations" does not, on any view, constitute the government or an organ of Ethiopia's government.'
36. They also state that the Museum's 'reference to "prejudice" is highly speculative'. The complainant refers to *Hogan v Information Commissioner* [2011] 1 Info LR 588; approved by the Court of Appeal in *DWP v Information Commissioner* [2017] 1 WLR 1 at [22] and [27]. The

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<sup>2</sup> [British Museum: Ethiopian Sacred Altar Tablets - Hansard - UK Parliament](#)



complainant does not accept that the "burden of showing" that the prejudice is "real, actual or of substance" has been established and argues that there must be a "very significant and weighty chance" of the prejudice to the relevant interest occurring'. The complainant does not accept that anything in the Museum's responses to the request "comes close to meeting those requirements".

37. The complainant does not accept that either section 27(1) or (2) is engaged.

### **The Commissioner's view**

38. Firstly, the Commissioner does not agree with the view that if discussions had begun before FOIA legislation was introduced, any subsequent related information would be considered confidential. However, he does accept that the Ethiopian government might well have different expectations regarding confidentiality.
39. In order to engage section 27(2) the information has to have been obtained from a state, international organisation or court. It has to be considered confidential, whether implicit or explicit. It does not cover information generated by the public authority itself unless it contains the confidential information.
40. The Commissioner has looked at the withheld information and his view is that one small part of the requested information engages section 27(2). However, he considers that, as this part would also fall within the scope of section 27(1), he will not consider section 27(2) further.
41. The Hansard exchange in Parliament has stressed that the Museum is "independent"<sup>3</sup> so the Commissioner does not consider that its interests are "inextricably linked to the wider interests of the UK". However, the Museum is a significant institution housing rare objects from around the world and its decisions have the potential to cause offence regarding the return or otherwise of cultural artefacts. The Commissioner accepts additional argument that the Museum has provided confidentially and considers that it has established the causal link to make disclosing this information at present "a real and significant risk" ("would be likely to prejudice"). Therefore he accepts that section 27(1)(a) is engaged.
42. The Commissioner will now go on to look at whether it is in the public interest to disclose this information.

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<sup>3</sup> Ibid



### **Public interest factors in favour of disclosing the requested information**

43. The Museum acknowledges that "there is public interest in how the Museum liaises with international organisations and governments." It also notes that "there are currently public discussions around the repatriation of our collections".
44. The complainant suggests that the response from the Museum "severely overstates" the protection of the Museum's interests and the preservation of its Collection and "gravely underestimates" the public interest in disclosure.
45. They argue that "the public interest in understanding the nature of any and all requests for restitution and the Museum's response to those requests (including its decisionmaking processes) is overwhelming".
46. The complainant says that the public interest is greater because of the "multiple restitution requests and the Museum's response to FOIA requests about these restitution requests has been piecemeal, incomplete and amounts to only brief references in board meetings" that have not been disclosed without redaction.
47. They also believe that there is a particular interest in the previous Director of the Museum's role in decision-making.
48. The complainant contends "that there is a clear case that the Tabots are unfit to be retained in the Museum's collection..." because they "cannot be displayed".

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

49. The Museum argues that "there is a strong public interest in the United Kingdom maintaining good diplomatic relationships with international bodies and countries". Its view is that disclosing the requested information "would negatively impact relations between the UK Government, the government of Ethiopia and other Ethiopian organisations". Its view is that "any deterioration in the UK's relations with foreign governments or organisations as a result of a disclosure of information by an arm's length body, is likely to prejudice the interests of the Museum (which works closely with international cultural organisations)".
50. The Museum maintains that "it is firmly in the public interest for the UK to work collaboratively with other countries". It suggests that "there is a strong public interest in maintaining and preserving" its collection. This "includes, but is not limited to, objects held in our current collection,

objections (sic) which may be acquired for any future collections and objects which may be lent or disposed of in the future”.

51. The Museum also acknowledges that there are reports in the public domain about the Tabots. Nevertheless, “It is firmly in the public interest to make information available, which may involve or impact international organisations, governments, and/or countries” but “only where decisions have been made”. The Museum openly sets out its decisions publicly on its website.
52. The Museum also points to the Commissioner’s decision [IC-169571-L2K5](#) to support its position that it is not in the public interest to release the withheld information.
53. Disclosure “would breach the confidence which the Ethiopian Government have in British institutes to keep discussions and arrangements confidential”. Harming the Museum’s “ability to reach an accord on the matters under consideration” is not in the public interest.
54. The Museum states that the UK is building “diplomatic and trade relationships post leaving the European Union, diplomatic engagement is imperative to managing repatriation requests”. A “breakdown of communications...could damage the relationship between the two countries [the UK and Ethiopia].”

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

55. The Commissioner notes that pages one and two of the Collections Paper have been disclosed. Page four of the “Collections Discussion” is excluded from consideration as it does not concern the Ethiopian tabots. The actual amount of information that was withheld on page three is relatively minimal.
56. There has been public interest in the Tabots in the UK press with several newspaper articles written about this matter, including a newspaper report that Ethiopia’s culture minister requested the return of the Tabots whilst on a visit to the Museum in 2019. There was a letter from various well-known individuals sent to the Museum asking for the return of the artefacts. Additionally, there was an exchange on this subject in Hansard (referred to earlier in this notice).
57. Set against this, the Museum has placed information in the public domain, such as the following:

“Over the last five years the British Museum has received a number of visits and delegations representing Ethiopia, including a visit from the Minister of Culture and Tourism, Hirut Kassaw in March 2019. Several discussions with the Director concerning items taken at

Magdala have been held, including requests for the return of sacred objects.”<sup>4</sup>

The Museum has stressed to the Commissioner that it publishes the decisions it makes.

58. However, the Commissioner has considered whether the release of this information might help to further the public debate.
59. The Commissioner acknowledges the length of time the issue of the tabots has been under consideration. He understands the views of the complainant concerning the number of restitution requests and, as the complainant sees it, the need for transparency. However, the Commissioner has decided that the withheld information remains sensitive and that the information has been correctly withheld. There are differences in culture and religion between countries that have the potential to have significant and unforeseen consequences. On balance, the Commissioner agrees that releasing the information is not in the public interest at this time. As the Commissioner has decided that the information in scope of part three of the request has been correctly withheld under sections 27(1), he has not gone on to look at the Museum’s citing of section 36 of FOIA to the same information.

### **Section 42(2) – NCND Legal professional privilege**

60. Section 42 of FOIA states that:

“(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) [the duty to confirm or deny that relevant information is held] would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

61. The Museum applied this exemption to the information requested at part four of the request. However, the Museum noted for the Commissioner that it did “confirm to the requester that: Legal Services have been asked to consider various issues in relation to the Tabots by the Executive and Chair” in the interest of transparency.

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<sup>4</sup> [Maqdala collection | British Museum](#)

62. In the internal review request, the complainant argued that the exemption did not apply as disclosing the fact that legal advice had been sought could not weaken "the protection of the confidentiality of communications between lawyers and their clients, and nor have you identified why you assert this to be the case".
63. The Commissioner's guidance<sup>5</sup> says the following: "Therefore, the key question is whether confirming or denying that information is held would disclose any legally privileged information."
64. "You can only use section 42(2) if there is some information that is legally privileged. The exemption refers to information "whether or not already recorded", but it still only applies if there is some legally privileged information to disclose. If you have not sought or obtained legal advice on the issue that is the subject of the request, then you cannot use section 42(2), because to confirm or deny would not involve the disclosure of legally privileged information."<sup>6</sup>
65. The Commissioner's guidance on section 42 makes clear that the mere fact that a public authority has sought advice, or that advice has been provided, does not, on its own, disclose privileged information. In order to engage the exemption, a confirmation or a denial must disclose something about the substance of the actual advice that was provided. "Substance' means the content, rather than simply the general subject of the advice."
66. The requests asked if "the Board of Trustees has sought legal advice as to the ability of the Museum to return the Tabots under the British Museum Act 1963". To confirm or deny that legal advice has or has not been sought would not reveal anything about its ability or otherwise to return the Tabots under the named legislation. The complainant supported this view by referring the Commissioner to his decision in [IC-95382-F2Z3](#).
67. The Commissioner's view is that the Museum could confirm whether or not it had sought legal advice without disclosing anything to indicate the contents of that advice, if it had been sought. He does not accept that this would reveal any information covered by legal privilege.

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<sup>5</sup> [Legal professional privilege \(section 42\) | ICO](#)

<sup>6</sup> *ibid*

68. Therefore the Commissioner does not consider that the Museum is entitled to rely on section 42(2) of FOIA to refuse to confirm or deny that it holds information within scope of part four of the request.

## Right of appeal

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69. 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](mailto:grc@justice.gov.uk)

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

70. 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.
71. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Janine Gregory**  
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