

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

### **Decision notice**

**Date:** 18 December 2019

**Public Authority:** The Cabinet Office

**Address:** 70 Whitehall

London

SW1A 2AS

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

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1. The complainant submitted a request to the Cabinet Office seeking correspondence between it and the University of Southampton regarding the purchase of the 'Mountbatten Archive'. The Cabinet Office disclosed some information to the complainant but sought to withhold further information falling within the scope of his request on the basis of sections 21 (reasonably accessible to the requester), 23 (security bodies), 26 (defence), 27 (international relations), 35 (formulation and development of government policy), 40 (personal data), 41 (information provided in confidence), 42 (legal professional privilege), 43 (commercial interests) and 44 (statutory prohibition) of FOIA. The complainant also submitted a further request to the Cabinet Office seeking a schedule of the correspondence falling within the scope of his request.
2. The Commissioner has concluded that only some of the information which the Cabinet Office is seeking to withhold is exempt from disclosure on the basis of the exemptions it has cited. The remaining information is not exempt from disclosure. The Commissioner also has concluded that the Cabinet Office failed to provide the complainant with a schedule of information in response to his further request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Provide the complainant with a copy of information which the Commissioner has identified in the confidential annex.<sup>1</sup>
  - Provide the complainant with a schedule of correspondence falling within the scope of his request. This should include the sender/recipient of each document or if not a piece of correspondence, a brief description of the document (eg legal advice), the date of each document and the exemptions within FOIA being applied to each document.
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

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5. In 2011 Southampton University (the University) purchased the Broadlands Archive from the Trustees of the Broadland 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

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7. Following previous correspondence with Cabinet Office in relation to an early request he had submitted<sup>2</sup>, the complainant submitted the following request to the Cabinet office on 1 November 2018:
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<sup>1</sup> A copy of this confidential annex has been provided to the Cabinet Office only.

<sup>2</sup> The details of this early request were the subject of the following decision notice <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259634/fs50693473.pdf>

*'Thank you for your direction. May I request the second period 2006-2011 "purchase of part of the Broadlands archive by the University".*

*Without prejudice to my position that s12 FOIA has not been properly applied by the Cabinet Office, I would be willing to consider paying an additional fee to cover the Cabinet Office's cost of locating and providing the other three categories of material, as provided for under s13 of FOIA. Please provide an estimate of the costs under s13 in respect of the other categories. However proceed, in the meantime, with my request for the 2006-2011 material.'*

8. The Cabinet Office contacted the complainant on 29 November 2018 and confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of section 37 of FOIA and it needed additional time to consider the balance of the public interest test.
9. The Cabinet Office provided him with a substantive response to his request on 31 December 2018. The Cabinet Office explained that a number of documents (which it identified) were exempt on the basis of section 21 as they were accessible to the complainant by other means. The Cabinet Office provided the complainant with redacted versions of some of the information falling within the scope of his request. (The refusal notice suggested that these redactions were made on the basis of section 40(2) of FOIA). However, the Cabinet Office explained that it was seeking to withhold further information on the basis of the following exemptions within FOIA:
  - Section 26 – defence
  - Section 27(1)(a), (c) and (d) and 27(2) – international relations
  - Section 35(1)(a) – policy formulation and development
  - Section 40(2) – personal data
  - Section 41 – information provided in confidence
  - Section 42(1) – legal professional privilege
  - Section 43(2) – commercial interests
10. The complainant contacted the Cabinet Office on 29 January 2019 and asked it to undertake an internal review of this refusal. In addition to challenging the Cabinet Office's reliance on the various exemptions cited, the complainant also asked:
  - For clarification as to the exemption(s) which were applied to the redacted information contained in the documents which were disclosed;
  - A schedule listing each of the documents which had been withheld, including the nature, date and identity of the sender/recipient, the broad subject/content, and the corresponding exemption(s); and

- A cost estimate under section 13 of FOIA in relation to the costs of complying with the three other time periods set out in the Cabinet Office's letter to him of 24 October 2018.

11. The Cabinet Office informed the complainant of the outcome of the internal review on 1 March 2019. The review upheld the application of the various exemptions which were cited in the refusal notice and explained that the Cabinet Office did not provide a charging service for requests and therefore was unable to provide an estimate of the cost for searching the other records. The internal review response did not refer to complainant's request for clarification as to which exemptions applied to the redacted information nor did the response refer to his request for a schedule of documents falling within the scope of the original request.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 7 March 2019 to complain about the way his request for information had been handled. He asked the Commissioner to consider the following grounds of complaint:

- He wished to challenge the Cabinet Office's reliance on all of the exemptions it has sought to rely on with the exception of section 21 of FOIA.
- However, in respect of the application section 21, he wished to know whether the Cabinet Office holds an unredacted copy of the Ministerial Direction (the Direction) and if so which exemptions are being relied on to withhold the redacted parts of it.
- He was dissatisfied with the Cabinet Office's failure to clarify which exemptions have been applied to the redacted information; and,
- He was dissatisfied with the Cabinet Office's failure to respond to the further request for a schedule of documents falling within the scope of the original request.

13. The Commissioner has considered the four grounds of complaint raised by the complainant in this decision notice.

14. At this stage, for clarity the Commissioner wishes to confirm that the requested information falls broadly into three categories:

- (a) correspondence between the Cabinet Office and third parties which has been disclosed to the complainant in redacted form;

- (b), correspondence between the Cabinet Office and third parties which has been withheld in full; and
- (c) a 'review schedule' detailing the outcome of a review of files in the Broadlands Archive which took place in 2007.
15. Information redacted from the first category has been withheld on the basis of sections 40(2), 41(2) and 43(2).
  16. Information falling within the second category has been withheld on the basis of sections 37(1)(a), 40(2), 41(1), 42(1) and 43(2).
  17. The Cabinet Office argued that the review schedule was exempt from disclosure in its entirety on the basis of section 35(1)(a), and that parts of it were exempt from disclosure on the basis of sections 23, 26, 27, 37(1)(a), 40(2), and 43(2).<sup>3</sup>
  18. In order to provide clarity to her decision, the Commissioner has set out in a confidential annex – a copy of which will be provided to the Cabinet Office only – details of her findings in greater detail.

## **Reasons for decision**

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### **The withheld information**

19. The Commissioner has initially considered the Cabinet Office's decision to withhold information falling within the scope of the request.

#### **(a) redacted correspondence**

##### **Section 40 – personal data**

20. The information the Cabinet Office redacted on the basis of section 40(2) of FOIA from the correspondence it disclosed consisted of the names and contact details of officials within the Cabinet Office and similar details for individuals in third party organisations.
  21. Section 40(2) of 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.
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<sup>3</sup> The Cabinet Office not had previously cited sections 23(1) and 37(1)(a) in its responses to the complainant but explained in its submissions to the Commissioner that it considered these exemptions to apply to some of the information in the review schedule.

22. In this case the relevant condition is contained in section 40(3A)(a)<sup>4</sup>. 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').
23. 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.
24. 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?***

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

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

26. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
27. 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.
28. 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.
29. The Commissioner accepts that the information which the Cabinet Office has redacted consists 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.
30. 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.

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<sup>4</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

31. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

32. 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'.*

33. 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.

34. 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**

35. 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"<sup>5</sup>.*

36. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

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<sup>5</sup> 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".*



- 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.

37. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

38. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

39. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

40. The complainant has argued that there is a legitimate interest in knowing which individuals at the Cabinet Office and University were involved in discussions about the archive and the sale given, as discussed below, his concerns that papers were being unlawfully withheld and he suspected 'iniquity' on the part of both the University and the Cabinet Office.

41. The Commissioner accepts that there is a legitimate interest in understanding the nature of the Cabinet Office's discussions with the University and other third parties regarding the purchase of, and access to, the material within the Broadlands archive.

#### *Is disclosure necessary?*

42. '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.

43. Having considered the content of the information that has been withheld, the Commissioner accepts that in the particular circumstances of this case disclosure of the names of the individuals at the Cabinet



Office and University is necessary in order to ensure that the discussions between the two parties about this matter can be properly understood.

44. In contrast, the Commissioner is not persuaded that the disclosure of the names of the individuals at organisations other than at the Cabinet Office and University is necessary in order to understand the nature of the Cabinet Office's involvement with the archive as set out in the redacted correspondence that has been released. Rather, in the Commissioner's view the disclosure of this redacted material is sufficient to understand the involvement of these parties and the disclosure of such material that has been redacted on the basis of section 40(2) would not add materially to the public's understanding of this.
45. Given this finding the Commissioner has concluded that disclosure of the information redacted on the basis of section 40(2) from the correspondence previously provided to the complainant – with the exception of the names and contact details of officials at the Cabinet Office and University – would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

46. In terms of the names and contact details of the officials at the Cabinet Office and University it is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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.
47. 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 individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
48. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information

relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

49. The Commissioner is not persuaded that disclosure of the names (and contact details) of the individuals at the Cabinet Office and University would result in any particular infringement to their privacy given both the context within which their names appear, their seniority and in some cases the fact that it is public knowledge that they have been actively involved with the sale of, and access to, the archive. Moreover, whilst it is not for the Commissioner to comment on the veracity or otherwise of the complainant's allegations regarding the alleged inequity on behalf of the Cabinet Office in respect of how access to the archive is managed, she accepts that the redaction of the names of the officials at both the Cabinet Office and University does create some opacity in terms of the discussions between the two parties.
50. Based on the above factors, the Commissioner has therefore determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the names and contact details of the officials at the Cabinet Office and University would be lawful.

#### Fairness and transparency

51. Even though it has been demonstrated that disclosure of such information under FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
52. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
53. The requirement for transparency is met because as a public authority, the Cabinet Office is subject to FOIA.
54. In conclusion the Commissioner has therefore concluded that the names and contact details of the officials at the Cabinet Office and University are not exempt from disclosure on the basis of section 40(2) but the names of the individuals and officials at the other bodies are.

Section 41 – information provided in confidence

55. 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.'*

56. 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.

57. 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.

58. 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.

59. The Cabinet Office explained that information withheld on the basis of section 41(1) consisted of information supplied to it in confidence that is scattered liberally throughout the open and frank correspondence between it, the Broadlands Estate and the University. The Cabinet Office explained that much of the information concerns the negotiating position of third parties, including the financial, legal and technical issues they faced over the sale and transfer of the archive. The Cabinet Office argued that both third parties would not have been as open with it had

there not been a clear expectation of confidentiality. It also argued that that it was not persuaded that there is any overriding public interest in the disclosure that would justify an actionable breach of confidence.

60. The Commissioner has carefully considered the information which has been redacted from the disclosed correspondence and withheld on the basis of section 41(1). She accepts that all of this meets the requirement of section 41(1)(a) of FOIA as it was provided to the Cabinet Office by a third party. With regard to the requirements of section 41(1)(b), the Commissioner is also satisfied that all of the redacted information meets the first two limbs. That is to say, the information has the quality of confidence because it is not otherwise available and is more than trivial. Furthermore, the Commissioner accepts that given the nature of the correspondence there was an implied obligation that such information, touching as it does on more detailed aspects of the archive and the arrangements surrounding it, would be treated confidentially.
61. However, for the majority of the redacted information which has been withheld on the basis of section 41(1), the Commissioner is not persuaded that the disclosure of this would result in a detriment to the confider. In reaching this finding the Commissioner notes that the Cabinet Office has not made any specific points in its submissions to explain why or how such detriment would occur. Furthermore, having considered the content of the redacted information although the Commissioner accepts that the information is more than trivial, she is not clear how disclosure of it would in reality result in any real or obvious detriment to the confider, especially taking into account the passage of time since the information was created.
62. The only exception to this finding is in relation to the document sent to the Cabinet Office from Broadlands dated 17 October 2008. The Commissioner is satisfied that disclosure of this information would result in a genuine infringement of the confider's privacy for a number of reasons given its contents.
63. With regard any overriding public interest in the disclosure that would justify an actionable breach of confidence, as noted above the Cabinet Office did not consider this to be the case. In contrast, the complainant argued that there was a clear public interest in the disclosure of information falling within the scope of his request. In support of this position the complainant advanced the following arguments:
64. The University published the archive using several million pounds of public money. As some of the archive was also purchased through the Acceptance in Lieu (AIL) scheme, there was an additional cost to the public purse due to lost taxation income. There has therefore been considerable public investment in these papers and the impression given

was the entirety of the archive would be accessible to all. However, important papers, some of which were specifically added at the point of sale, and which other biographers have previously consulted, are now withheld from the public.

65. The complainant alleged that these papers were being unlawfully withheld and he suspected 'iniquity' on the part of both the University and the Cabinet Office. He argued that the University, amongst other things, had failed to provide a list of all papers that were 'closed' and is seeking to rely on the Direction without providing any evidence to support its position that this instrument allows it to do so.
66. The complainant alleged that the University was proposing to exploit its exclusive access to the withheld material by publishing some of it commercially for itself in 2022. The complainant argued that this was a scandal not only because of the substantial expenditure of public money, but also because the Direction purports to give the government unchecked powers of censorship. He argued that the public is entitled to see the documents that have been purchased in its name, and if access is being blocked then it is entitled to know why, and to see the evidence relied on in support. The complainant noted that this appeared to be the first and only example of attempting to use a Direction as a mechanism to block access to publicly owned material. There was therefore a unique and powerful public interest in understanding and monitoring the operation of this Direction.
67. The Commissioner has considered the points made by the complainant. However, having considered the content of the letter of 17 October 2008, the Commissioner is not persuaded that its disclosure would provide any particular insight into the operation of the Direction. Given the detriment that would occur to the confider, the Commissioner has therefore concluded that there is no public interest defence to the disclosure of this information.
68. In summary, the Commissioner has concluded that the information redacted from the correspondence provided to the complainant on the basis of section 41(1) is not exempt from disclosure on the basis of this exemption with the exception of the material redacted from the document dated 17 October 2008.

**(b) correspondence withheld in full**

69. The Cabinet Office sought to withhold 11 documents in full.

Section 41 – information provided in confidence

70. The Cabinet Office sought to withhold seven documents in full on the basis of section 41(1) of FOIA.

71. The Commissioner is satisfied that the documents in question meet the requirements of section 41(1)(a) as they consist of information provided to the Cabinet Office by a third party, or they are documents created by the Cabinet Office but clearly contain recorded information provided to it by a third party.
72. Furthermore, for the reasons discussed above, the Commissioner accepts that the documents in question meet the second of the criteria above, namely that they were exchanged with an expectation that they would be treated confidentially. However, for five of these documents (1, 2, 3, 15 and 13) the Commissioner is not persuaded that the two other criteria set out at paragraph 57 are met. That is to say, the Commissioner does not accept that the information has the necessary quality of confidence, essentially because the details of the archive and its transfer and sale are now in the public domain, and/or the Cabinet Office has, as discussed above, failed to explain how or why disclosure of these documents would result in any detriment to the confider. The Commissioner has expanded on these findings in relation to each of these five documents in a confidential annex which will be shared with the Cabinet Office only; this because it makes direct reference to the content of the information itself.
73. However, for one of these documents (item 17 in the bundle of documentation sent to the Commissioner by the Cabinet Office), the Commissioner accepts that the information has both the quality of confidence and she is persuaded that its disclosure would be detrimental to the confider. Furthermore, the Commissioner is not persuaded that its disclosure would provide any particular insight into the operation of the Direction. In light of this, and given the detriment that would occur to the confider, the Commissioner has therefore concluded that there is no public interest defence to the disclosure of this information.
74. Finally, for the remaining document (item 21), the Commissioner also accepts that it has both the quality of confidence and she is persuaded that its disclosure at the time of the complainant's request would have been detrimental to the confider. In terms of this document, the Commissioner accepts that it would provide the complainant with a greater insight into matters regarding the purchase of the Archive. However, in light of the detriment that would occur to the confider the Commissioner has concluded that by a narrow margin the public interest in disclosure does not override the competing public interest in maintaining the duty of confidence.

#### Section 37(1)(a) - Communications with the Sovereign

75. The Cabinet Office has sought to withhold one document in full on the basis of section 37(1)(a) of FOIA. This exemption states that information is exempt if it relates to 'communications with the Sovereign'.



76. The Commissioner has examined the document in question and in her view it does not fall within the scope of the exemption contained at section 37(1)(a), even with the phrase 'relates to' being interpreted broadly. Again, the Commissioner has elaborated on this finding in the confidential annex.

Section 42(1) – legal professional privileges

77. The Cabinet Office have sought to withhold one document on the basis of section 42(1) of FOIA. This provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
78. There are two categories of legal professional privilege (LPP): advice privilege and litigation privilege.
79. In this case the Cabinet Office is relying on advice privilege. For advice privilege to apply, the information must record communications that were confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
80. The Cabinet Office explained that purpose of the document in question was the provision of legal advice, by a professional legal adviser and client, on the implications of the sale of the archive. The Commissioner has examined the information in question and is satisfied that it clearly attracts legal professional privilege and therefore is exempt from disclosure on the basis of section 42(1) of FOIA.

*Public interest test*

81. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Public interest in favour of disclosing the information*

82. The Cabinet Office acknowledged that there was a general public interest in the disclosure of information and that there is a clear public interest in understanding the legal justification for decisions taken by government.
83. The complainant's submissions regarding the public interest in disclosure of the information are set out above.



*Public interest favour of maintaining the exemption*

84. However, the Cabinet Office argued that there is a strong public interest in protecting the confidentiality of communications between lawyers and clients. It argued that this confidentiality promotes respect for the rule of law by encouraging clients to seek legal advice and allowing for full and frank exchanges between clients and lawyers. It explained that it was particularly important for the government to seek legal advice in relation to sensitive and difficult decisions and for any advice given to be fully informed and fully reasoned. The Cabinet Office argued that without confidentiality, clients may be deterred from seeking legal advice at all, or from disclosing all relevant information material to their lawyers, particularly with regard to sensitive information. Similarly, the advice given may not be as full and frank as it ought to be, if there was a risk of advice being made public at a later time.
85. In the particular circumstances of this case, the Cabinet Office explained that although the sale of the archive had now taken place, it was still a live issue, as evidenced (amongst other reasons) by the complainant's ongoing dispute with the University over access to the papers. The Cabinet Office also argued that release of the information would also potentially have prejudicial implications for similar discussions and negotiations with other institutions and/or private estates looking to make similar deals in the future.

*Balance of the public interest test*

86. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, she does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

*'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).*

87. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
  - whether it is still live.
88. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
89. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
90. In the circumstances of this case, although the information dates from 2010, and therefore is arguably not particularly recent, the Commissioner accepts that it can be considered to be live for the reasons advanced by the Cabinet Office.
91. In light of this the Commissioner believes that there is a significant and weighty public interest in upholding the exemption.
92. With regard to the public interest in favour of disclosing the information the Commissioner recognises the points that the complainant has made, in particular with regard to the lack of clarity surrounding some aspects of the sale and transfer of the archive. In the Commissioner's opinion the disclosure of the information withheld on the basis of section 42(1) could potentially provide some clarity to the background regarding the sale and transfer and in her view the public interest in providing such clarity should not be underestimated. However, given that the advice is still considered to be live the Commissioner has concluded that the public interest tips in favour of maintaining the exemption.

#### Section 43(2) – commercial interests

93. The Cabinet Office has withheld two documents on the basis of section 43(2) of FOIA. Section 43(2) states that:

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

94. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
95. In support of its application of section 43(2) the Cabinet Office argued that the information goes into details of the sale arrangements between the Broadlands Estate, HMG and the University. The Cabinet Office explained that whilst the government is a party to these arrangements, they are still primarily agreements between a private estate and another public body independent of central government over the sale of private papers. As such, the Cabinet Office explained that the primary commercial interests are not the government's, but are ultimately between two third parties. The Cabinet Office therefore argued that in this instance its duty to maintain these commercial confidences is stronger than it would otherwise be if this was merely an issue about government commercial transparency.
96. With regard to the three criteria set out above, the Commissioner accepts that the interests which the Cabinet Office has identified – namely prejudice to the commercial interests of the University and Broadlands Estate – fit within the scope of the exemption and therefore the first criterion is met.
97. However, with regard to second criterion in the Commissioner's view the Cabinet Office has failed to explain the causal relationship between the disclosure of the information which it is actually withholding on the basis of section 43(2) and how such a disclosure would harm the commercial interests of either the University or the Broadlands Estate. Rather, it has simply stated, as set out above, that both parties have commercial interests. Such submissions are not sufficient to persuade the

Commissioner that section 43(2) is engaged. Therefore, the two documents in question are not exempt from disclosure on the basis of section 43(2) of FOIA.

#### Section 44 – Prohibition on disclosure

98. With regard to the Direction, the Cabinet Office argued that this was exempt from disclosure on the basis of section 21 as the complainant already had access to a redacted version of it. With regard to the redacted parts of the Direction, of the parts which the complainant did not have access to and thus could not be covered by section 21, the Cabinet Office argued that these were covered by sections 40(2), 41(1) and 44(1)(a).
99. The Commissioner understands that the part of the Direction to which the complainant does not have access to is, in the Cabinet Office's view, covered by section 44(1)(a) of FOIA. This provides a statutory bar for disclosure.
100. In support of its position, the Cabinet Office relied on the rationale set out in the Commissioner's decision notice FS50700239.<sup>6</sup> That decision notice concerned a request submitted to the Arts Council England for information relating to Mountbatten Papers, including a copy of the Direction.
101. Furthermore, the Commissioner has considered the decision notice she issued on the Heritage Lottery Fund (HLF) FS50712754,<sup>7</sup> in particular paragraphs 43 to 55 of that notice which concerned the HLF's decision to rely on section 44(1)(a) of FOIA to withhold certain information redacted from the Direction. The information the HLF redacted from the Direction is the same information which the Cabinet Office is also seeking to withhold on the basis of section 44(1)(a).
102. For ease of reference the Commissioner has quoted paragraphs 43 to 55 of the HLF notice below:

*'43. The Commissioner initially consider[ed] the HLF's reliance on section 182(1) of the FA [Finance Act]. This states that:*

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<sup>6</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258715/fs50700239.pdf>

<sup>7</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259822/fs50712754.pdf>

*'A person who discloses any information which he holds or has held in the exercise of tax functions is guilty of an offence if it is information about any matter relevant, for the purposes of those functions, to tax or duty in the case of any identifiable person'*

44. Section 182(2) explains that:

*'In this section "tax functions" means functions relating to tax or duty—*

*(a) of the Commissioners, the Board and their officers,*

*(b) of any person carrying out the administrative work of any tribunal mentioned in subsection (3) below, and*

*(c) of any other person providing, or employed in the provision of, services to any person mentioned in paragraph (a) or (b) above.'*

45. *In support of its reliance on section 182(1) of the FA, the HLF explained that the material it had redacted on the basis of section 44(1) of FOIA related to the AiL process under the National Heritage Act 1980.*

46. *Details of the AiL scheme itself are set out in section 230 of the Inheritance Tax Act 1984. This provides that the Commissioners of HMRC, if they think fit, and the Secretary of State agrees, on the application of any person liable to pay tax, accept in satisfaction of the whole or any part of it any picture, print, book, manuscript, work of art, scientific object or other thing which the Secretary of State is satisfied is pre-eminent for its national, scientific, historic or artistic interest.*

47. *The AiL scheme therefore enables taxpayers who are liable for the payment of an existing inheritance tax bill to offer and (if accepted by HMRC) transfer works of art and important heritage objects into public ownership.*

48. *In the circumstances of this case, the Mountbatten papers which formed part of the Archive, were subject to AiL. The HLF explained that the Arts Council, which administers the scheme, were acting on behalf of HMRC in relation to the assessment of the value of the Archive for the purpose of calculating any tax.<sup>8</sup>*

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<sup>8</sup> It directed the Commissioner to page 224 of this document in support of this point [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/659028/Capital Taxation National Heritage.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/659028/Capital_Taxation_National_Heritage.pdf)

49. *The HLF emphasised that section 182(1) of the FA makes it an offence to disclose any information which is held in exercise of a tax function and therefore acted as a statutory bar to the disclosure of the information it had redacted on the basis of section 44(1)(a) because it is information the Arts Council used as part of the AiL process.*
50. *The HLF noted that section 182(5) included a number of circumstances where this prohibition would be dis-applied, eg where the taxpayer had consented to disclosure, but none of these were relevant to this case.*
51. *The complainant argued that that section 182(1) only applied to information which '**he** holds or has held in the exercise of tax functions' (emphasis added by complainant). The complainant noted that the HLF does not exercise tax functions in this area; it is not HMRC and nor does it purport to be acting its behalf. Rather, the complainant argued that the HLF simply provided funding to enable an acquisition some parts of which happened to be funded through the AiL scheme. In any event, the complainant argued that the disclosure could be permitted under section 182(5) of the FA. Moreover, the complainant noted that the HLF were redacting the Direction, a document which it had referred to as 'government legislation' on the basis of section 44(1)(a). The complainant argued that if is correct, the Direction is a public document which purports to give effect to the power of the Executive; the public interest in reading it could not be higher.*
52. *In the Commissioner's view a public authority which is seeking to rely on section 44(1)(a) of FOIA by virtue of section 182(1) of the FA does not have to be the person exercising a tax function. Rather, in her view section 182(2) of the FA clarifies that the tax function only has to be that of a body or person listed in section 182(2) of FA.*
53. *In the circumstances of this case, the Commissioner is satisfied that the Arts Council were acting on behalf of HMRC in relation to processing the AiL scheme in respect of part of the Broadlands Archive. Furthermore, the Commissioner is satisfied that the information which the HLF is seeking to withhold on the basis of section 44(1) was used by the Arts Council as part of its tax functions in respect of administering the AiL scheme.*
54. *Furthermore, the Commissioner recognises that section 182(5) of the FA states section 182(1) does not apply to any disclosure of information:*

*'(a) with lawful authority,*



*(b) with the consent of any person in whose case the information is about a matter relevant to tax or duty, or  
(c) which has been lawfully made available to the public before the disclosure is made.'*

*55. However, the Commissioner does not consider that any of the above criteria apply in the circumstances of this request. Therefore, in the Commissioner's view the information redacted on the basis of section 44(1)(a) is covered by the prohibition on disclosure provided by section 182(1) of the FA.'*

103. The Commissioner is also dealing with a related complaint from the complainant regarding the University's handling of his information requests about this subject. This includes the University's decision to redact information from the copy of the Direction it provided to the complainant on the same basis as the Cabinet Office, ie on the basis of section 44(1)(a) by virtue of section 182(1) of the FA.

104. As part of his complaint to the Commissioner regarding the University, the complainant noted that at paragraph 52 of the HLF decision, the Commissioner stated that 'a public authority which is seeking to rely on section 44(1)(a) of FOIA by virtue of section 182(1) of the FA does not have to be the person exercising a tax function. Rather, in her view section 182(2) of the FA clarifies that the tax function only has to be that of a body or person listed in section 182(2) of FA'.

105. The complainant argued that in his view that was not the correct interpretation of section 182(1) of the FA as it ignores the words "he holds or has held in the exercise of tax functions". The complainant argued that clearly, if the public authority which is the subject of the information request under FOIA does not itself 'exercise' any tax functions (as defined by section 182(2)), it cannot hold or have held the information in the exercise of those functions, and therefore cannot be guilty of the offence under section 182(1). Rather, the only person who can be guilty of an offence under section 182(1) is a person who also falls within section 182(2): a person who both exercises a tax function and who holds or has held the information in exercise of that function. The complainant argued that neither the University nor HLF fall within section 182(2); nor for the purposes of this complaint would the Cabinet Office.

106. The complainant argued that Parliament cannot have intended section 182(1) to catch information which is held by *any person* in the exercise of *their* tax functions – but is not held by *the disclosing person* in the exercise of tax functions – because it specifically provided for that scenario in section 182(4)(b). Section 182(4) makes it an offence for a person to disclose information which he holds or has held in the exercise of the functions listed in section 182(4)(a) and which '*is, or is derived*



*from, information which was held by any person in the exercise of tax functions'.*

107. The complainant argued that as the University does not itself exercise any tax functions, *it* cannot be holding the information within the Direction in the exercise of any such tax functions. Therefore section 182(1) does not apply, so there is no statutory bar under section 44 of FOIA.
108. Furthermore, the complainant argued that disclosure could be permitted under section 182(5).
109. The Commissioner has considered the complainant's submissions in respect of the University complaint for the purposes of this present case involving the Cabinet Office. However, her position remains the same as set out in the decision notice which she issued in relation to the HLF complaint. That is to say a public authority which is seeking to rely on section 44(1)(a) of FOIA by virtue of section 182(1) of the FA does not have to be the person exercising a tax function. Rather, in her view section 182(2) of the FA clarifies that the tax function only has to be that of a body or person listed in section 182(2) of FA.
110. The Cabinet Office is therefore entitled to withhold the parts of the Direction which are not already accessible to the complainant on the basis of section 44(1)(a) of FOIA.

### **(c) the review schedule**

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

111. The Cabinet Office argued that the entire review schedule was exempt from disclosure on the basis of section 35(1)(a) of FOIA. This 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'*

112. 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.
113. 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.

'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.

114. 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.

115. 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.

116. In support of its decision that section 35(1)(a) applied, the Cabinet Office explained that the government policy in question concerned the Cabinet Office's ongoing development of its position on both the archive and on wider consideration on how to treat similar legacies in the future.

117. The Commissioner appreciates that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. However, in her view it is not sustainable to argue that the Cabinet Office's development of its position on the archive equates to the formulation or development of government policy. 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). With regard to the criteria set out above, the Commissioner would also question whether the consequences of the decision making would be genuinely wide-ranging.

118. For these reasons the Commissioner has concluded that section 35(1)(a) is not engaged.

119. As explained above, the Cabinet Office has argued that a variety of other exemptions provide a basis to withhold various parts of the review schedule. The Commissioner has set out her findings in relation to these exemptions below. However, at this stage she wishes to make a more general point with regard to Cabinet Office's approach to the review

schedule. In its submissions to the Commissioner the Cabinet Office did not annotate or mark up the review schedule to show how these various exemptions applied; rather it described to the Commissioner why it considered these exemptions to apply based on the contents of parts of the review schedule. For some of these exemptions, and for some of the content, such an approach has been sufficient for the Commissioner to understand why the Cabinet Office has applied such exemptions (and indeed to agree with their application). However, for some of these exemptions and thus for some of the content, such an approach has not been sufficient for the Commissioner to understand how or why these exemptions are being applied.

120. However, before the Commissioner sets out her findings in relation to each of these exemptions, she notes that the review schedule concluded that a number of the files could be opened. Indeed part of the correspondence disclosed to the complainant explained that the review had determined that around 140 files could now be opened. In the Commissioner's opinion given that the review schedule was created in 2007, there is no obvious reason why releasing the details of files that the review determined could be opened would be caught by any of the exemptions cited by the Cabinet Office. The files themselves must now be in the public domain and therefore it is difficult to envisage on what basis the title and confirmation of the status of these open files could be sensitive at the point that this request was received.

#### Section 23(1) – security bodies

121. Turning the specific exemptions cited by the Cabinet Office, it argued that a small number of the entries on the review schedule were covered by section 23(1) of FOIA. This exemption states that:

*'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'*

122. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to, any of the bodies listed at section 23(3).<sup>9</sup> The exemption is not subject to the public interest test.

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<sup>9</sup> A list of the bodies included in section 23(3) of FOIA is available here: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

123. Having examined the review schedule, the Commissioner accepts that a small number of entries on it fall within the scope of the exemption contained at section 23(1). She has identified which entries these are in the confidential annex provided to the Cabinet Office.

Section 37(1)(a)

124. The Cabinet Office argued that some of the information contained in the review schedule attracted the exemption at section 37(1)(a). Having considered the review schedule the Commissioner accepts that some of the information listed on the review schedule falls within the scope of this exemption because it relates to correspondence with the Sovereign. The Commissioner has identified these documents in the confidential annex which will be provided to the Cabinet Office. This is an absolute exemption and therefore the Commissioner does not have to consider the balance of the public interest in relation to this exemption.

Section 40(2) – personal data

125. The Cabinet Office has also argued that the review schedule contains considerable amounts of personal data which is scattered throughout the schedule and its disclosure would breach the DPA. That said, as noted above, it has not specifically highlighted which parts of the information it considers to be exempt from disclosure on the basis of section 40(2).
126. The Commissioner has considered the review schedule carefully. Having done so she accepts that some of this information constitutes personal data. Given the volume and variety of the information contained on the schedule it is difficult for the Commissioner to categorise this information, but the majority concerns members of the Royal Family in addition to other third parties. The Commissioner is satisfied that this information 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.
127. However, as explained above the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
128. With regard to whether there is legitimate interest in the disclosure of this personal data, it should be noted that the information that is contained on the review schedule essentially consists of details of the contents files which have been reviewed (and deemed still to be closed). Taking this into account the Commissioner accepts that there is a legitimate interest in the public having both a greater understanding of

the nature of the papers deemed to be withheld in 2008 and the reasons for doing so.

129. With regard to whether this is necessary the Commissioner is prepared to accept that disclosure of the information withheld on the basis of section 40(2) is necessary to provide the public with full understanding of the decisions taken at the 2007 review.
130. With regard to the balance of the legitimate interests, in the Commissioner's opinion disclosure of the information risks having a significant infringement on the privacy of the individuals concerned and furthermore the individuals in question would have not have any expectations that the withheld information, given its content and context, would be made public. Whilst the Commissioner acknowledges that that there is a legitimate interest in the public being able to understand more about the Cabinet Office's review of the closed papers from the Archive in 2007, she does not consider this interest to be sufficiently weighty to merit disclosure of the information which she considers to be personal data. In reaching this decision the Commissioner would also add that she has concluded that significant portions of the review schedule should be disclosed.

#### Section 26(1) – defence

131. The Cabinet Office has argued that some of the information contained in the review schedule is exempt from disclosure on the basis of section 26(1). Section 26(1) actually contains two exemptions which state that information is exempt if it would, or would be likely to prejudice,:
- '(a) the defence of the British Islands or of any colony, or
  - (b) the capability, effectiveness or security of any relevant forces'
132. As a prejudiced based exemption, the three criteria set out above at paragraph 94 must be met.
133. The Cabinet Office has provided the Commissioner with some submissions to justify its reliance on section 26, albeit it has explained that it considers these submissions to be sensitive. Therefore, the Commissioner has not replicated these submissions in this decision notice.
134. However, with regard to her findings in respect of this exemption, the Commissioner can explain that whilst the first criterion is arguably met, based on the Cabinet Office's submissions to her she is not clear how or why disclosure of information withheld on the basis of section 26(1) would result in prejudice to the interests which the exemption is designed to protect. That is to say, in the Commissioner's view the Cabinet Office has not demonstrated that some causal relationship

exists between the potential disclosure of the information being withheld and the prejudice to the UK's defence interests. The Commissioner has elaborated on this finding in the confidential annex.

### Section 27 – international relations

135. The Cabinet Office has argued that some of the information contained in the review schedule is exempt from disclosure on the basis of one, or more, the following sections of sections 27(1):

*'(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,*

*(b) relations between the United Kingdom and any international organisation or international court,*

*(c) the interests of the United Kingdom abroad, or*

*(d) the promotion or protection by the United Kingdom of its interests abroad.'*

136. As with section 26, the Cabinet Office has provided the Commissioner with some submissions to justify its reliance on section 27, albeit it has explained that it considers these exemptions to be sensitive. Therefore, the Commissioner has not replicated these submissions in this decision notice.

137. Again, the Commissioner accepts that based on the arguments advanced by the Cabinet Office the first criterion is arguably met. However, again based on the Cabinet Office's submissions to her she is not clear how or why disclosure of information withheld on the basis of section 27(1) would result in prejudice to the interests which these exemptions are designed to protect. The second criterion is therefore not met. The Commissioner has elaborated on these findings in the confidential annex.

### **The Cabinet Office's refusal notice**

138. As explained above, the complainant was dissatisfied with the Cabinet Office's failure to clarify which exemptions have been applied to the redacted information.

139. Section 17(1) of FOIA explains that:

*'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim*



*that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—*

*(a) states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies'*

140. In the Commissioner's view an explanation in the refusal notice should be detailed enough to give the requester a real understanding of why the public authority has chosen not to comply with the request.

141. The Commissioner notes that the refusal notice explains that the '*There is a set of documents that the Cabinet Office is releasing, with personal information redacted under section 40(2) as explained below. These documents are attached.*' The refusal notice then went on to list these documents, e.g. 'email from University of Southampton to Cabinet Office dated 23 May 2011'. The refusal notice then went on to explain that 'some' of the requested information was exempt from disclosure on the basis of sections 26(1), 27(1)(a), (c) and (d), 41(1), 42 and 43(2) of FOIA.

142. The Commissioner accepts that there is some ambiguity in respect of the wording of this refusal notice. That is to say, whilst the notice explains that the disclosed information was being redacted simply on the basis of section 40(2), the notice then goes on to list numerous further exemptions which apply to some of the requested information. The Commissioner can understand why there was confusion on the complainant's part as to whether 'some' of this information concerned material that had also been redacted from the disclosed correspondence or whether it referred to additional information which the Cabinet Office was seeking to withhold in full. In reaching this conclusion, the Commissioner acknowledges that the majority of redactions to the disclosed material are simply on the basis of section 40 however, some redactions were made on the basis of section 41(1) which was not made clear.

143. In order to comply with the requirements of section 17(1), the Commissioner does not expect a public authority to annotate each redacted disclosure to show which exemptions have been applied. However, she does expect a public authority to accurately state which exemptions are being relied on. In the Commissioner's opinion the Cabinet Office has failed to do so given that it did not advise the complainant that some of the redacted material was also exempt from disclosure on the basis of section 41(1). This constitutes a breach of section 17(1) of FOIA. For the avoidance of doubt, the Cabinet Office sought to rely on section 41(1) of FOIA to the redacted versions of the



letters dated 18 December 2007, 18 September 2008, 17 October 2008 and 5 August 2011.

### **Request for a schedule of information**

144. As explained above, in his request for an internal review of 29 January 2019, the complainant asked for a schedule of the information falling within the scope of his request. More specifically:

*'It is unclear which other documents are being withheld or why. The Letter refers to "some of the information" being exempt, but says nothing about the number or nature of withheld documents, or which exemptions are said to apply to each. Please produce a schedule listing individually the withheld documents (including the nature, date, identity of sender/recipient, and broad subject/content), and the corresponding exemptions(s) relied on).*

145. In its submissions to the Commissioner the Cabinet Office argued that:

146. FOIA does not require public authorities to provide an in-depth breakdown and description of the nature of the information in scope that they hold - all FOIA requires is that it informs the requester whether it holds the information, whether it is withholding any of that information, and if so, what exemption(s) applies and why. The Cabinet Office argued that its response of 31 December 2018 to the complainant, in which it also released an amount of information, set out all of these requirements in detail. It suggested that whilst the complainant is entitled to challenge the Cabinet Office's response, this does not extend to requesting a significant amount of additional information from that sought in the original request, as that would amount to a new request for information - which has not been submitted. The Cabinet Office argued that it was not required to address any widening of the scope of the original request as part of reviewing its response to that original request.

147. Additionally, the Cabinet Office argued that FOIA is quite clear - under section 17(4) - that a public authority is not obliged to make a statement that would involve the disclosure of information which would itself be exempt information. The Cabinet Office argued that providing a breakdown of the file review schedule would touch upon much of the information that is being withheld and therefore any breakdown of the sort required by the complainant would, if of any usefulness, by its very nature chart and reveal the development of the Cabinet Office's evolving policy position, and thus would be exempt from disclosure.

148. In short, for the avoidance of any doubt, the Cabinet Office argued that a request for a schedule of the information is **not** in scope of the original request, nor is it at requirement of its statutory response to that request, and it would also consider any such schedule to also be caught

by the exemptions covering the original material, in particular section 35(1)(a).

149. The Commissioner agrees that the complainant's original request does not include a request for a schedule of information falling within the scope of that request. Furthermore, the Commissioner also accepts that the provision of such a schedule in response to the original request did not form part of the Cabinet Office's statutory obligations in response to that request.
150. However, it is clear to the Commissioner that the complainant did make a clear and unambiguous request on 31 January 2019 for a schedule of information falling within the scope of his original request of 1 November 2018. For the avoidance of doubt, the Commissioner does not consider this request for a schedule to be a widening of the original request; rather it is a new and separate request – albeit one obviously related to the original request. As is also clear from the above, the Cabinet Office has failed to respond to this new request.
151. The Commissioner appreciates that in the Cabinet Office's view disclosure of such a schedule would also involve the disclosure of information that is in itself exempt. The Commissioner certainly accepts that providing with the complainant with the document that comprises the file review schedule itself would result in the disclosure of information which the Cabinet Office considers to be exempt from disclosure. However, in her view the complainant's request for a schedule of the information falling within the scope of the request does not equate to providing, or also providing, the complainant with a copy of the review schedule document itself. Rather, the complainant's request for a schedule simply requires the Cabinet Office to provide a list of all of the documents falling within the scope of the request of which the 'review schedule' is simply one such document.
152. Furthermore, although the Commissioner recognises that the Cabinet Office is seeking to withhold some information falling within the scope of the request in full, she is of the view that the Cabinet Office could still provide the complainant with a schedule of the information falling within the scope of the request without the disclosing the content of the withheld information itself. That is to say, provide the complainant with a schedule noting the sender and receipt of each document (if piece of correspondence, eg Cabinet Office to University) along with the date and for documents that do not consist of correspondence simply the title of the document and/or an indication of its form/format, eg 'review schedule' or 'legal advice'. The Cabinet Office should also note the exemptions within FOIA being applied to each document.

## Right of appeal

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153. 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 1234504  
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)

154. 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.

155. 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**