

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2020

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking correspondence between it and the University of Southampton about a particular archive. He subsequently requested a schedule of all of the correspondence falling within the scope of the request. The Cabinet Office disclosed one email and sought to withhold further information on the basis of sections 21 (information reasonable accessible to the requester) and 40(2) (personal data) of FOIA. It subsequently disclosed the information previously withheld on the basis of section 21. The complainant sought to challenge the Cabinet Office's reliance on section 40, argued that it held further information falling within the scope of his request and was dissatisfied with the Cabinet Office's failure to provide him with a schedule of the requested information.
2. The Commissioner's decision is that the Cabinet Office is entitled to withhold some, but not all, of the information to which it has applied section 40(2). She is however satisfied that on the balance of probabilities the Cabinet Office has located all of the information falling within the scope of the request. Furthermore, given its withdrawal of section 21 of FOIA, and the provision of the information previously withheld on the basis of this exemption, the Commissioner is satisfied that the Cabinet Office has fulfilled the request for a schedule of the requested information. The only exception to this is the information which the Commissioner accepts would fall within the scope of the schedule but is also exempt from disclosure on the basis of section 40(2).

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a further copy of the withheld information falling within the scope of his request with the names and contact details of the officials at the University of Southampton unredacted.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In 2011 the University of Southampton (the University) purchased the Broadlands Archive from the Trustees of the 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. The Direction required the University to make the archive accessible to the public with the exception of information the Cabinet Office notified to it as closed and which shall remain closed until such times as the notified to the University by the Cabinet Office.

Request and response

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

'I would now like to request under FOI information within category 3 in the Cabinet Offices letter of 24 October 2018 – 2012-13: correspondence between the Cabinet Office and the University on additional closed archive records.'

8. The Cabinet Office responded on 27 March 2019 and confirmed that it held information falling within the scope of the request. The Cabinet Office explained that some of this information was exempt from disclosure on the basis of section 21 of FOIA (as the information had been previously disclosed to the complainant by the University). Albeit, the Cabinet Office noted that parts of these documents had been redacted when previously provided to the complainant on the basis of 40(2) of FOIA. (The refusal notice implied, albeit did not explicitly state, that the Cabinet Office also considered section 40(2) to apply this same information). The Cabinet Office also provided the complainant with one document, albeit this was redacted on the basis of section 40(2).
9. The complainant contacted the Cabinet Office on 12 April 2019 in order to ask it to conduct an internal review of this response. He raised the following points:
 - he asked the Cabinet Office to clarify how section 21(1) of FOIA was being applied;
 - he disputed the application of section 40(2) to withhold information; and,
 - he alleged that the Cabinet Office was likely to hold more than 5 pieces of correspondence falling with the scope of the request.
10. The complainant also asked the Cabinet Office to:

'provide a schedule identifying any withheld documents or information (including the nature, date, identity of sender/recipient, and broad subject/content) and the corresponding exemption(s) relied on'
11. The Cabinet Office responded on 9 July 2019. It provided some clarification on how section 21 of FOIA had been applied and disclosed an attachment to one of the emails which it had withheld on the basis of section 21.

Scope of the case

12. The complainant contacted the Commissioner on 21 August 2019 in order to complain about the Cabinet Office's handling of this request. More specifically, he raised the following grounds of complaint:
 - (a) He disputed the Cabinet Office's reliance on section 21 of FOIA because in his view it was not clear which emails are the ones referred to in the refusal notice and internal review or which documents the Cabinet Office claims were attached to which emails. In light of this the complainant argued that it cannot be the case that such information is

reasonably accessible if he does not know which information has actually been withheld on the basis of section 21(1) of FOIA.

(b) He disputed the Cabinet Office's reliance on section 40(2) of FOIA to redact information.

(c) He believed that the Cabinet Office is likely hold further information falling within the scope of this request other than that previously disclosed or withheld.

(d) He was dissatisfied with the Cabinet Office's failure to provide a schedule of the information falling within the scope of the request.

(e) He was unhappy with the Cabinet Office's delays in completing the internal review.

13. During the course of the Commissioner's investigation, the Cabinet Office clarified its position regarding section 21 of FOIA. It explained that in this request it knew that the complainant already had the information to which it was applying this exemption to. It noted that section 21 is there to ensure that public authorities are not burdened with unnecessary administrative costs. However, it explained that for pragmatic reasons it had decided in this case to withdraw its reliance on section 21. Therefore on 30 January 2020 it provided the complainant with copies of all of the information which it held falling within the scope of the request, albeit with certain information redacted on the basis of section 40(2) of FOIA.
14. Following this disclosure the complainant contacted the Cabinet Office to raise concerns about this disclosure. He noted that that the versions of some of the emails disclosed by the Cabinet Office were slightly different to versions of the same emails previously released by the University.
15. The Commissioner asked the Cabinet Office to clarify why these discrepancies had occurred. In response the Cabinet Office explained that due to the complications in the process of redacting some of these documents transcribed emails were created instead and it was these transcriptions which were disclosed to the complainant. The Cabinet Office apologised for any confusion caused and provided the Commissioner with redacted versions of the original documents. The Commissioner provided the complainant with these documents on 6 March 2020.
16. In light of these developments, the Commissioner has not considered the Cabinet Office's reliance on section 21 in this decision notice. However, she has considered the complainant's other grounds of complaint.

Reasons for decision

Complaint (b)

Section 40 – personal data

17. The information the Cabinet Office redacted on the basis of section 40(2) consisted of the names and contact details of an official within the Cabinet Office who it described as a junior civil servant at the time the information was created. (It noted that it had disclosed the name of another Cabinet Office official because she was at a Senior Civil Service grade at the time.) The Cabinet Office explained that it was also redacting the names and contact details of members of University staff and the name of another named individual who had made an FOI request to the University.
18. 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.
19. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
21. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

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

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

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

Would disclosure contravene principle (a)?

29. Article 5(1)(a) of the GDPR states that:

'Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject'.

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

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

32. 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”².

33. 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:-

- 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.

34. 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

35. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that

² 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”.

such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

36. 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.
37. 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 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.
38. The Cabinet Office acknowledged that there is a legitimate interest for its own sake. To this extent there is a legitimate interest in disclosure, albeit limited. However, it noted that there was no additional interest over and above basic transparency.
39. The Commissioner accepts that there is a legitimate interest in understanding the nature of the Cabinet Office's discussions with the University regarding the access to the material within the Broadlands archive.

Is disclosure necessary?

40. '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.
41. The Cabinet Office argued that whilst the disclosure of the information may be desirable or meet public curiosity, it was not persuaded that there is a pressing social need for the release of the information. The Cabinet Office argued that it had confirmed to the complainant that it held information in the scope of his request and it considered this to be sufficient to meet the legitimate interest informing the public about the existence of the correspondence.
42. Having considered the content of the information and given the issues around accessing parts of the archive identified by the complainant below, the Commissioner accepts that in the particular circumstances of this case disclosure of the names of the particular 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 fully and properly understood.

43. In contrast, the Commissioner is not persuaded that the disclosure of the name of the third party who submitted a FOI request to the University is necessary in order to understand the nature of the Cabinet Office's involvement with the archive.
44. Given this finding the Commissioner has concluded that disclosure of the third party's name would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of this information 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

45. 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.
46. 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.
47. 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.
48. The complainant alleged that the University was proposing to exploit its exclusive access to the withheld material contained in the archive 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 un-checked 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.

49. The Cabinet Office argued that the individuals in question would have a reasonable expectation that their personal data would not be disclosed and that to do so would result in adverse consequences. The Cabinet Office elaborated in these arguments in relation to its own staff member in confidential submissions to the Commissioner.
50. Having considered the submissions of both parties the Commissioner is not persuaded that disclosure of the names (and contact details) of the individuals at 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 name of the officials at the University does create some opacity in terms of the discussions between the two parties.
51. 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 in relation to officials at the University. 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 University would be lawful.
52. In contrast, based on the Cabinet Office's submissions to her, the Commissioner accepts that disclosure of the name of the official at the Cabinet Office would be against the individual's reasonable expectations. Disclosure of this information 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.

Fairness and transparency

53. Even though it has been demonstrated that disclosure of the information regarding the officials at the University under FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
54. 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.
55. The requirement for transparency is met because as a public authority, the Cabinet Office is subject to FOIA.
56. In conclusion the Commissioner has therefore concluded that the name and contact details of the official at the Cabinet Office and the name of the third party who submitted a request to the University are exempt from disclosure on the basis of section 40(2). However, the names and contact details of officials at the University are not.

Complaint (c)

57. In circumstances where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
58. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
59. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered as to why the information is not held.

The complainant's position

60. The complainant did not accept that the Cabinet Office only held five pieces of correspondence with University dating from 2012 to 2013 and relating to the closure of the archive records. He noted that as is clear from the documents disclosed by the University, there appears to have been a visit on 13 November 2012 by someone at the Cabinet Office which must have produced additional correspondence. The complainant also highlighted a number of the emails which had been disclosed which suggested that further correspondence would be sent, but this had not been disclosed to him. The complainant also suggested that there was likely to be internal Cabinet Office correspondence relating to these emails, in addition to other emails between the Cabinet Office with

relevant parties, for example the Royal Household, Foreign and Commonwealth Office and Ministry of Defence.

The Cabinet Office's position

61. The Cabinet Office noted that the complainant's request was clearly limited to communications between it and the University. Therefore internal Cabinet Office correspondence and correspondence between the Cabinet Office and other third parties fell outside the scope of the request.
62. The Cabinet Office explained to the Commissioner that it had conducted a review of electronic catalogues, paper files and inboxes using various terms to identify communications between it and the University. The Cabinet Office explained that the search terms used included Mountbatten, Broadlands Estate, University of Southampton and spanned the period in scope of the request. It explained that it then manually reviewed all files and documents identified as containing information in scope of this request.
63. The Cabinet Office emphasised that it had always said that communication between it and University had been sporadic. The Cabinet Office also explained that it undertook a review of the Mountbatten papers prior to the period in scope of the request. There was little communication between the Cabinet Office and the University during the period covered by the complainant's request.

The Commissioner's position

64. The Commissioner notes the Cabinet Office's comments about the scope of the request and she agrees that this is clearly limited to correspondence between it and the University. In the Commissioner's opinion the searches conducted by the Cabinet Office are sufficiently focused both in terms of the search terms used and locations searched to ensure that all of the correspondence in the scope of case will have been located. The Commissioner is therefore satisfied that on the balance of probabilities the Cabinet Office does not hold any further information beyond that previously located and now disclosed.

Complaint (d)

65. In its submissions to the Commissioner the Cabinet Office explained that having disclosed the information to the complainant on 30 January 2020, less the redactions on the basis of section 40(2), it was not seeking to withhold any information. In light of this it argued that to provide the complainant with a schedule of information would be nugatory effort as he now has most of the details which would be contained in such a schedule. The Cabinet Office argued that to provide

the 'missing' details of this information would disclose information which it considered to be exempt from disclosure.

66. As the Cabinet Office has now provided the complainant with the information which it holds falling within the scope of his request the Commissioner agrees that he has effectively been provided with a schedule of the requested information. That is to say, the complainant's request for a schedule is in effect fulfilled by him having access to the actual information which has been requested. Providing a schedule, of information already disclosed, is as the Cabinet Office suggests unnecessary. The only exception to this is the information which the Commissioner accepts is exempt from disclosure, ie the names of one Cabinet Office official and the name of a third party who made an FOI request. Such information would form part of the schedule but the Commissioner has already concluded that such information is exempt from disclosure on the basis of section 40(2) of FOIA and therefore such information cannot be provided as part of a schedule.

Other matters

67. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
68. In this case the Cabinet Office took 59 working days to complete its internal review response. The Commissioner has recorded this delay for her own purposes of monitoring the Cabinet Office's performance in terms of completing internal reviews in a timely manner.

Right of appeal

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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: 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.

Signed

**Jonathan Slee
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