Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **18 December 2019**

Public Authority: **The University Council**
Address: **University of Southampton**
University Road
Southampton
SO17 1BJ

Decision (including any steps ordered)

1. The complainant submitted a series of requests to the University of Southampton (the University) regarding an archive which concerns the papers of Lord and Lady Mountbatten. The University provided some of the information requested, but sought to withhold further information on the basis of a variety of exemptions within FOIA, namely: 37(1)(a) (communications with the Sovereign), 40(2) (personal data), 41(1) (information provided in confidence), 43(2) (commercial interests) and 44(1) (statutory prohibition). The University also argued that it did not hold some of the information that had been requested and that to provide some of the information would exceed the appropriate cost limit at section 12(1) of FOIA.

2. With regard to the complainant's various points of complaint (which are set out in more detail in the decision notice itself) the Commissioner has reached the following decisions:

    - Complaint (a) – the correspondence between Lord and Lady Mountbatten, and their respective diaries are not exempt from disclosure on the basis of section 44(1)(a) of FOIA.

    - Complaint (b) – the University does not hold the 'Nehru papers' for the purposes of FOIA by virtue of section 3(2)(a).

    - Complaint (c) – no parts of the 2011 Agreement between the University and the Trustees of the Broadlands Archive (the trustees are exempt from disclosure on the basis of section 37(1)(a) or section 43(2) of FOIA. However, the Commissioner

accepts that some parts of this document are exempt from disclosure on the basis of sections 40(2) or 41(1) of FOIA.

- Complaint (d) – the information redacted from the Ministerial Direction is exempt from disclosure on the basis of section 44(1)(a) of FOIA.

- Complaint (e) – the University has failed to provide the complainant with a number of attachments to certain emails which were disclosed at the internal review stage. The Commissioner has also concluded that the names and contact details of the officials at the Cabinet Office and the 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. The Commissioner has also concluded that the University cannot redact the dates of certain emails disclosed to the complainant. Furthermore, the Commissioner has concluded that the redactions made to the minutes of the University Executive Group meeting of 9 September 2009 and minutes of the University Council meeting of 18 May 2011 in relation to item 93 are not exempt from disclosure on the basis of section 40(2).

- Complaint (f) - the Commissioner has found that beyond the inventory of the S series provided to the complainant, the University does not hold an inventory of this part of the archive that is already completed. Whilst the Commissioner has also concluded that the University holds the information that could be used provide such an inventory, and that do to so would not equate to the creation of new information for the purposes of FOIA, to do so would exceed the appropriate cost limit and therefore the University can legitimately refuse this request on the basis of section 12(1) of FOIA.

- Complaint (g) – the Commissioner is satisfied that on the balance of probabilities the University does not hold any recorded information which explains the gaps in the sequential numbering of the S series of files.

- Complaint (h) – the Commissioner is satisfied that on the balance of probabilities the University does not hold any further information, beyond that previously located and disclosed to the complainant, about why each file is being withheld from public access, including providing a copy of any purported closure 'notification' by the Cabinet Office and any information held by the University about this and more generally about the genesis and operation of the Ministerial Direction.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

    - Provide the complainant with the correspondence between Lord and Lady Mountbatten and copies of their respective diaries.

    - Provide the complainant with a copy of the 2011 Agreement between the University and the trustees. In disclosing this document the University can only redact the parts of the 2011 Agreement on the basis of sections 40(2) and 41(1) identified in the confidential annex.[1]

    - Provide the complainant with the attachment to the email of 4 October 2012 identified below at paragraph 106 as attachment (b) with the name of the third party and their email address redacted; provide the complainant with a copy of the attachment to the email of 15 May 2013; and provide the complainant with a copy of the attachment to the email of 23 May 2013.

    - Provide the complainant with the copy of the emails previously disclosed to him with the names and contact details of the officials at the Cabinet Office and the University unredacted. In providing these emails the dates also need to be unredacted.

    - Provide the complainant with unredacted copies of the minutes of the University Executive Group, 9 September 2009 and unredacted copies of the minutes of the University Council 18 May 2011 in relation to item 93.

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.

[1] The Commissioner has only provided the University with a copy of this confidential annex.

Background

5. In 2011 the University purchased the Broadlands Archive (the archive) from the trustees. 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 of the archive 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 (the NHA) setting out the terms of the acquisition.

Request and response

7. The complainant submitted 15 separate requests between 10 April 2017 and 23 March 2018 to the University about various aspects of the archive, specifically about parts of it concerning the papers of Lord and Lady Mountbatten. Given the number of these requests, for the purposes of this decision notice the Commissioner has not included the full details of the requests and the University's responses in the main body of this notice. Rather, these are set out in an annex which is attached to the notice. However, the Commissioner considers that the requests broadly fall into two separate categories:

    i. The complainant is seeking access to the full archive of Lord and Lady Mountbatten's papers held at the University – both the papers which originally arrived on loan, and those elements (including the 'Nehru papers'[2]) which were added at the point of sale. In addition to seeking the full papers in the archive, the complainant has also requested an inventory of the files which are presently withheld from public access.

    ii. The complainant is also seeking information regarding why the University is, in his words, 'blocking' access to the full archive.

[2] The Nehru papers consist of correspondence between Lady Mountbatten and Jawaharlal Nehru, the Prime Minister of India.

8. Having received responses to his various requests, the complainant contacted the University on 14 May 2018 and asked it to conduct an internal review into its handling of these requests. More specifically, the complainant argued that the University had failed to respond to some of his requests; for some requests he challenged the University's position that no information was held; and he also sought to challenge the application of the various exemptions cited to the information falling within the scope of his requests, namely sections 40(2) and 44(1) to redact the Direction, section 41(1) to withhold the University's agreement with the trustees dating from 2011 and section 44(1) to withhold the papers in the archive first requested on 28 April 2017 (request 2 in the annex below).

9. The University informed the complainant of the outcome of the internal review on 20 June 2018. The review reached a number of findings, but for the purposes of this decision notice the key ones were:

- The Nehru papers were not held by the University for the purposes of FOIA, and even it if this information was held, then it would be exempt from disclosure on the basis of section 41(1) of FOIA.

- The University had already provided the inventory of each document that it holds for the S series and for the diaries of Lord and Lady Mountbatten. It did not hold an inventory of this information to the level requested by the complainant and to fulfil his request would require it to create information which it was not required to do under FOIA. In any event, the provision of such a schedule would be exceedingly time consuming and exceed the cost limit provided for under section 12 of FOIA.

- The redactions made to the Direction were exempt on the basis of section 44, but not section 40(2).

- The 2011 Agreement between the University and the trustees was exempt from disclosure on the basis of sections 41(1) and 43(2) of FOIA.

- Section 44(1)(a) had been correctly applied to withhold the information covered by the Direction, ie the diaries of Lord and Lady Mountbatten and their letters.

- The University provided the complainant with a copy of the 1989 agreement between it and the trustees concerning the deposit of the archive at the University, albeit with some redactions.

- The University also provided the complainant with correspondence with the Museum Libraries and Archives Council in respect of the acceptance of the Direction and correspondence between it and other government departments, primarily the Cabinet Office,

relating to requests under FOIA and the review of archival material and access.

Scope of the case

10. The complainant contacted the Commissioner on 1 August 2018 in order to complain about the University's handling of his request. The Commissioner agreed with the complainant that she would consider the following specific points of complainant in respect of the University's handling of his requests:

    (a) The University's position that the diaries of Lord and Lady Mountbatten and the correspondence between them (ie the files listed in the inventory of the S series), and any other documents they are seeking to withhold under section 44(1)(a), are exempt from disclosure on the basis of that exemption.

    (b) The University's position that it does not hold the Nehru papers for the purposes of FOIA and its alternative position that even if such papers were held for the purposes of FOIA then they would be exempt from disclosure on the basis of section 41(1).

    (c) The University's reliance on section 41(1) and/or (possibly) 43(2) of FOIA to withhold the 2011 Agreement between it and the trustees.

    (d) The University's reliance on section 44(1)(a) of FOIA to redact the Direction.

    (e) The University's decision to redact the various documents disclosed at the internal review stage on the basis of (possibly) section 40(2) and/or 43(2) of FOIA and its failure to provide the attachments to a number of disclosed emails.

    (f) The University's position that it does not hold an inventory of each document withheld under the Direction, and also the University's alternative position that to 'create' such an inventory would exceed the appropriate cost limit at section 12(1) of FOIA.

    (g) The University's position that it does not hold any information about the gaps within the inventory of the S series and diaries of Lord and Lady Mountbatten or within other parts of the catalogue for the archive, and the University's position that the only material it is withholding from public access are those files set out in the list it provided on 22 September 2017.

(h) The University's failure to provide all the information held about the reasons why each file is being withheld from public access, including providing a copy of any purported closure 'notification' by the Cabinet Office and any information held by the University about this and more generally about the genesis and operation of the Direction.

11. As this stage in Commissioner wishes to note that her ability to investigate this complaint in a timely manner has been fundamentally undermined by the University's significant delay in responding to her initial letter regarding this matter. The Commissioner wrote to the University on 22 August 2018 and sought a response within 20 working days. The University did not reply until 23 August 2019. The Commissioner has commented further on these delays in the Other Matters section at the end of this notice.

Reasons for decision

Complaint (a)

12. Section 44(1)(a) of FOIA states that:

'Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—
(a) is prohibited by or under any enactment'

13. Section 44(1)(a) of FOIA therefore exempts information if its disclosure is prohibited by other legislation. Such provisions are referred to as statutory prohibitions or statutory bars and they prevent public authorities from disclosing specific types of information.

14. The Commissioner's guidance on this exemption explains that information is exempt under this subsection if its disclosure would breach any of the following:

- primary legislation (an Act of Parliament); or
- secondary legislation (a Statutory Instrument).

The University's position

15. The University has explained to the Commissioner that the only part of the archive which it is seeking to withhold on the basis of section 44(1)(a) is the S series containing files of correspondence between Lord and Lady Mountbatten and the diaries of Lord and Lady Mountbatten.

16. The University's basis for relying on section 44(1)(a) of FOIA is as follows:

17. The Direction was issued under the NHA setting out the terms of the acquisition as far as it concerned the part of the archive relating to these goods. The 2011 Agreement defined these goods as 'AIL Chattels'.

18. The University argued that the Direction was made in exercise of the powers in section 9 of the NHA and section 9(4) of that legislation which requires the transferee of property (the University) to hold and manage it in accordance with any directions that may be given by the Secretary of State. The Direction in this case specifically prohibited disclosure of:

> *'those elements of the archive which have been notified to the University of Southampton as closed…by the Cabinet Office and ...which will remain closed to public access until such time as the Cabinet Office confirms in writing to the University of Southampton that the closed material can be opened to general public scrutiny.'*

19. The University explained that the loan agreement of 1989, had notified it of the 'closed excluded records' ie those which remained closed until such time as they had reached the specified date on which with the consent in writing of the Secretary of the Cabinet, acting on behalf of the Prime Minister of the time, confirmed that they may be opened. The University explained that it had already been notified that the material which it was seeking to withhold on the basis of section 44(1)(a) was closed. It explained that over the years some of the 'closed records' had gone through a process of review by the Cabinet Office to open them. It explained that the last such review before its acquisition was around 2008 and at that date (and still today) the letters between Lord and Lady Mountbatten from the S series and their diaries remained closed.

20. Therefore, the University argued that the Direction acts as a prohibition to disclosure for the purpose of section 44(1)(a) of FOIA. In support of this position the University noted that section 44(1)(a) refers to disclosure being prohibited '*by or under any enactment'*. It argued that even if the Direction is not considered to be an enactment itself, it is an instrument made *under* an enactment, ie in exercise of the powers in section 9 of the NHA. Furthermore, the University noted that section 9(4) of the NHA requires the transferee to hold and manage the property in accordance with any directions given by the Secretary of State. That is to say, the prohibition on disclosure is both specified in an instrument made under an enactment, and given force directly by a provision of primary legislation.

The complainant's position

21. The complainant did not accept that section 44(1)(a) of FOIA applied. Firstly, this is because he did not agree – in principle – that a Direction,

nor a notification under it, can be considered to provide a prohibition for the purposes of section 44(1)(a).

22. Secondly, even if in theory this were to be the case, the complainant argued that for a variety of reasons in the particular circumstances of this case there are a number of flaws with the Direction and/or the notification which means that it cannot provide a valid prohibition.

23. The Commissioner is conscious that the complainant has submitted detailed submissions to support his position and whilst these have not been set out in this decision notice she has considered them carefully as part of her investigation. However, for the purposes of her analysis below, she notes that the complainant made – amongst others - the following arguments:

    i. Paragraph 11 of the Commissioner's guidance on section 44(1)(a) states that information is exempt if it would breach primary or secondary legislation. The complainant argued that neither the Direction, nor the notification issued under it, can be considered to be either primary or secondary legislation.

    ii. Moreover, in the complainant's view section 44(1)(a) does not apply to subordinate or secondary legislation, only to primary legislation. In support of this view, he argued that section 44(1)(a) refers specifically to an 'enactment' – meaning an Act. The complainant argued that if Parliament had intended to include 'subordinate legislation' within section 44 it would have said so, as it did at section 4(2)(a) of FOIA. The complainant also noted that section 75(2)(a) of FOIA defines an 'enactment' in section 44(1)(a) as 'any enactment contained in an Act' and that in section 75(2)(b) there is again a deliberate distinction between an 'enactment contained in Northern Ireland legislation' and 'subordinate legislation'.

    iii. Even if section 44(1)(a) applies to secondary legislation, a Direction – still less a notification – is not a piece of secondary legislation.

    iv. The notification contained within the Direction is too remote from the NHA to constitute a statutory bar.

    v. The complainant suggested that there is no precedent for a Direction, let alone a notification issued under one, to be held as acting as a prohibition for the purposes of section 44(1)(a) of FOIA.

The Commissioner's position

24. In the Commissioner's view whilst her guidance refers only to statutory instruments as a type of secondary legislation made 'under' an enactment that would fall within the exemption, they are not the only type of delegated or secondary legislation, albeit they are the most common.

25. Moreover, in the Commissioner's view a Direction is a form of delegated or quasi legislation. Delegated legislation can effectively confer a power on a Minister to give Directions, for example ensuring that a Minister can give instructions to a public body which is not under the Minister's direct control. Directions in these cases in theory convert instructions which otherwise would just have political weight into legally binding orders.

26. Furthermore, in the Commissioner's view given the variety of such Directions, each power or duty to direct must be construed in its own context. The most common form of statutory direction arises where the statute empowers a minister or regulatory body to give directions to a specified authority about how particular functions are to be exercised. This would appear to be the case in respect of the University's reliance on section 44(1)(a).

27. In light of the above, theoretically then the Commissioner accepts that a Direction could, in some cases, fall within the scope of section 44(1)(a) 'by or under an enactment' if disclosure is prohibited by its terms and it is validly given and not ultra vires.

28. Turning to the facts of this particular case, the Commissioner notes that there is no specific mention in the Direction of the timescales for this review/release of information, the form of any formal notification, nor of any anticipated interplay with FOIA. Furthermore, the Commissioner notes that there is no reference to the consequences of prohibition or any remedy, eg, whether as with other statutory bars, it is a criminal offence to disclose the information. Given the absence of these factors the Commissioner considers that the notification and subsequent ad hoc review of some of the closed papers by the Cabinet Office is too far removed to form a specific statutory bar for the purposes of FOIA.

29. In reaching this conclusion the Commissioner notes that she cannot find any precedent of a notification under a Direction being used in this way. Moreover, the Commissioner is of the view that if this Direction was considered to act as a prohibition for the purposes of section 44(1)(a) of FOIA, then in theory it would mean that <u>any</u> restriction that a Minister chooses to include in a Direction, at least one issued under the NHA, is elevated to the status of a statutory prohibition for the purposes of section 44(1)(a) of FOIA. In the Commissioner's view the potential

widening of the scope of the exemption is not in line with her current interpretative position on section 44(1)(a).

30. The Commissioner has therefore concluded that correspondence between Lord and Lady Mountbatten and their respective diaries are not exempt from disclosure on the basis of section 44(1)(a) of FOIA. Since the University has not sought to rely on any other exemptions in respect of this information it therefore needs to be disclosed to the complainant by the University.

Complaint (b)

31. The complainant first sought access to the Nehru papers in his email to the University of 28 April 2017. The University's position is that although the Nehru papers are in its physical possession they are not held by it for the purposes of FOIA. The complainant disputes this position and has argued that the University does hold this information for the purposes of FOIA.

32. Section 3(2) of FOIA sets out the legal principles that establish whether information is held for FOIA purposes. For the purposes of this case section 3(2)(a) states that:

'For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person'

33. When information is held by a public authority solely on behalf of another person, it is not held for FOIA purposes. However, information will be held by the public authority if the information is held to any extent for its own purposes.

34. As the Commissioner's guidance on this section explains:

'The Upper Tribunal considered the meaning of section 3(2)(a) in the case of University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection [2011] UKUT 185 (AAC, 11 May 2011). It explained that the concept of 'holding' information for FOIA purposes "is not purely a physical concept, and has to be understood with the purpose of the Act in mind". This means that information may be present on a public authority's premises (or even its IT network) but not held by the authority for FOIA purposes. To be considered 'held' for FOIA purposes,

there has to be "an appropriate connection between the information and the authority".'[3]

35. In the Commissioner's view each case needs to be considered on its own merits to determine whether a public authority holds information for its own purposes or solely on behalf of another person. In the Commissioner's view the following factors would indicate that the information is held solely on behalf of another person:

- the authority has no access to, use for, or interest in the information;
- access to the information is controlled by the other person;
- the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
- the authority is merely providing storage facilities, whether physical or electronic.

36. Conversely, factors that would indicate that the information is also held by the public authority include:

- the authority provides clerical and administrative support for the other person, whether legally required to or not;
- the authority controls access to the information;
- the authority itself decides what information is retained, altered or deleted;
- the authority deals with enquiries about the information; or
- costs arising from holding the information are included in the authority's overall budget.

37. The Tribunal in the *McBride*[4] case cited in the Commissioner's guidance stated that '*the question of whether a public authority holds information on behalf of another is simply a question of fact, to be determined on the evidence….*' It also clarified that this question is not determined by who owns the information, whether there are exclusive rights to the information or whether there is a legal basis for holding the information.

[3] https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

[4] McBride v Information Commissioner and Ministry of Justice (EA/2007/0105)

The University's position

38. The University explained that the 'Nehru papers' were not purchased as part of the AIL scheme. The only legal interest the University has in them is that it holds an option to purchase them. It argued that whilst this option remained available, it has not yet exercised this and accordingly only holds the Nehru papers on behalf of a member of the Mountbatten family.

39. The Commissioner asked the University to respond to a number of specific questions in relation to the Nehru papers. She has replicated these questions, and the University's answers below:

- Who in the University has access to these papers?

  Only the Head of Archives and a particular professor at the University have access to these papers.

- Have these been papers used by University staff for the purposes of research?

  These papers have not been used by University staff for research.

- Have any third parties been given access to these papers since August 2011 and if so, what has been the University's role in administering access to these papers?

  Since 2011, the only access that has been given to these papers has been to one sensitivity reviewer from the Cabinet Office's Knowledge and Information Management Group, to provide the University with guidance relating to the collection. This access was given with the consent of the owner, sought by the University. The University's staff who have access to the papers, above, supervised that access.

- Is it correct to suggest that the University has some role in recording, filing, archiving and maintaining these papers?

  The University is currently only offering a secure storage and maintenance facility for the papers on behalf of the owner of the papers.

40. In response to a follow-up query, the University explained to the Commissioner that the Head of Archives and the professor in question do not require the prior permission of the owners to access the Nehru papers, but this is because access is only allowed for storage, preservation and safekeeping.

The complainant's position

41. The complainant argued that the University appeared to equate 'holding' under FOIA with legal ownership which he argued was contrary to the authority of previous Upper Tribunal decisions, including *BUAV* as cited above. The complainant also argued that without sight of the 2011 Agreement under which the University holds the Nehru papers he was prevented from properly understanding its position. However, the complainant argued that it was unlikely that the University was merely providing a storage facility for the Nehru papers; it has a legal interest in the information, ie the option to purchase acquired at the point of sale in August 2011, has access to them and use for them, and is likely to have at least some role in recording, filing and archiving these papers.

The Commissioner's position

42. The Commissioner recognises that the University has an interest in the Nehru papers, namely the option to purchase them. However, the Commissioner notes that the University has not used these papers for research purposes and does not have the ability to use, file or remove documents from the papers. Whilst two members of staff do have access to the papers, in the Commissioner's opinion in reality this is only to give effect to the University's role as a storage facility for these documents. On balance, the Commissioner is therefore satisfied that the University does not hold the Nehru papers by virtue of section 3(2)(a) of FOIA. In reaching this conclusion the Commissioner can confirm that she has considered the relevant provisions within the 2011 Agreement and there is nothing in that document which in her view undermines this finding.

Complaint (c)

43. In response to one of the complainant's requests, the University withheld a copy of the 2011 Agreement between it and the trustees. In its submissions to the Commissioner the University initially argued that it considered this document to be exempt from disclosure on the basis of a combination of the following exemptions: 37(1)(a), 40(2), 41(1) and 43(2) of FOIA. The Commissioner sought clarification from the University as to exactly how these exemptions applied to this document. In response the University initially provided her with an annotated version of the 2011 Agreement which showed how some parts of this document were exempt from disclosure on the basis these exemptions. The Commissioner has subsequently established with the University that it accepted that the parts of the 2011 Agreement to which no exemptions had been applied could be disclosed, albeit that to date such information has not been provided to the complainant. Therefore, as part of the steps required by this decision notice, the University needs to

provide the complainant with a copy of the 2011 Agreement, with the information it now accepts is not exempt, unredacted.

44. Furthermore, the Commissioner has focused on establishing whether the exemptions cited by the University apply to the parts of the document to which it has applied them.

Section 37(1)(a)

45. Section 37(1)(a) of FOIA provides an exemption for information if it relates to 'communications with the Sovereign'.

46. In support of its reliance on this exemption, the University explained that the information in question concerned the Royal Household. However, the Commissioner notes that in order to fall within the scope of section 37(1)(a) the information has to relate not simply to the Royal Household, but to communications with the Sovereign. In the Commissioner's view, the information to which the University has applied section 37(1)(a) to cannot be said to do so and thus cannot fall within the scope of this exemption.

47. Whilst there are other provisions with section 37(1) of FOIA that provide an exemption for information which relates to communications with the Royal Household, the University has not cited these exemptions.

Section 41(1)

48. 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.'*

49. 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.

50. 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.

51. 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.

52. With regard to section 41(1)(a), the University argued that the 2011 Agreement contacted contained information obtained from third parties, ie the trustees and other third parties involved in the acquisition of the archive.

53. The complainant argued that the 2011 Agreement was not exempt from disclosure on the basis of section 41(1) of FOIA, and in respect of section 41(1)(a) this requirement of the exemption was not met. The complainant argued that a contract between a public authority and a third party is not information obtained by the authority 'from another person', as is required by section 41(1)(a), because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another. In support of this position the complainant cited the First-Tier Tribunal case *Derry City Council v Information Commissioner*, EA/2006/0014, 11 December 2006. The complainant also argued that the Commissioner's guidance on this exemption was very clear, with the relevant paragraphs of the guidance stating that:

'17. The contents of a contract between a public authority and a third party generally won't be information obtained by an authority from another person.

18. This is because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another.'[5]

[5] https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf

54. The Commissioner notes that her guidance goes on to explain that:

> *'19. However, we recognise that in some cases a contract will contain technical information, given to the authority by the other party to the contract, in addition to the mutually agreed terms and obligations. Sometimes the technical material will form part of main body of the contract, although more often than not it will feature in separate schedules.*
>
> *20. Where technical information is included, it may, depending on the circumstances of the case, constitute information obtained by the authority from another person.*
>
> *21. If the contract contains information relating to the other party's pre-contractual negotiating position, then this could also qualify as information obtained from another person, although once again this will depend on the individual circumstances of the case.'*

55. The Commissioner has considered the contents of the 2011 Agreement carefully. In her view, some parts of it to which the University has applied section 41(1) to can correctly be described as containing information relating to the other party's pre-contractual negotiating position. The Commissioner is also satisfied that this information can be correctly categorised as being provided to the University by the trustees. Therefore, the Commissioner accepts that some of the information to which the University has applied section 41(1) does meet the requirements of section 41(1)(a). The Commissioner has identified this information in a confidential annex, a copy of which will be provided to the University only. However, the Commissioner is not persuaded that the remaining information to which section 41(1) has been applied meets the requirements of section 41(1)(a); rather, such information is more correctly described as forming mutually agreed terms by both parties. Such information does not therefore meet the requirements of section 41(1)(a) and such information is not therefore exempt from disclosure on the basis of section 41(1).

56. With regard to section 41(1)(b), the University argued that the information in question contained details of the private affairs of the family members involved and that disclosure of the information would be detrimental because it would result in an invasion of their privacy.

57. The complainant argued that the information was not confidential. He noted that a significant amount of information about the University's acquisition of the archive was now in the public domain. He also questioned why disclosure of the 2011 Agreement would be detrimental, noting that the 1989 agreement between the trustees for the loan of the

archive has been disclosed and that the 1969 agreement between the trustees and the government is freely available in The National Archives.

58. With regard to the three criteria above, the Commissioner accepts that the information which meets the requirements of section 41(1)(a) has the quality of confidence as this information is clearly more than trivial and is not in the public domain. The Commissioner is also satisfied that the information was provided to the University with the assumption that it would be treated confidentially. In terms of the detriment that may occur, the Commissioner accepts that there is a considerable amount of information already in the public domain about the University's acquisition of the archive. However, in her view there is a clear distinction between such information and the information which she accepts meets the requirements of section 41(1)(a). In the Commissioner's view disclosure of this latter category of information would result in the disclosure of details of private affairs of the family members involved and given the content of this information the Commissioner accepts that this could be detrimental to the individuals concerned.

59. However, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.

60. The complainant argued that the content of the 2011 Agreement was undoubtedly important for understanding key questions such as exactly what falls within the definition of 'relevant property' in the Schedule to the Direction, whether the Nehru papers are 'held' by the University for the purpose of FOIA, what 'notifications' were in place as at the date of the agreement, the status of the 1989 agreement (and related 1969 undertakings) following the sale in 2011, and how precisely over £2.85 million of public money was applied for the purchase of documents which now cannot be accessed by the public. He argued that these matters and more generally freedom of expression and information rights outweigh any possible confidentiality in this agreement.

61. The Commissioner accepts there is a public interest in disclosure of information which would add to the public's understanding of the nature of the University's purchase of the archive in 2011. Furthermore, in her view disclosure of the parts of the information to which she accepts section 41(1)(a) applies would in her view add to the public's understanding of this history and origins of the archive and the papers contained within it and thus in turn could potentially aid the public's understanding of the 2011 Agreement. However, the Commissioner is conscious that disclosure of the information would represent a notable infringement into the private affairs of the family members. 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.

62. In summary, in respect of the University's reliance on section 41(1), the Commissioner accepts that this only applies to some of the information to which the University has applied it.

Section 43 – commercial interests

63. The University argued that parts of the 2011 Agreement were exempt from disclosure 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).'*

64. 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.

65. In support of its reliance on section 43(2), the University argued that it considered this exemption to apply to any parts of the 2011 Agreement to which the other parties to the agreement, on reasonable grounds, object to the disclosure of. The University explained that this was because releasing those elements of the 2011 Agreement, which its partners expected to be kept confidential, is likely to damage their trust in the University. The University argued that this would also damage the

University's reputation more generally with those who hold papers of historical interest, and therefore make it less likely that they would wish to deposit papers with the University, as opposed to another research institution. The University argued that there is fierce competition between research institutions to secure the most prestigious archival material, because the breadth and importance of the records held by an institution is a major factor in determining its attractiveness to historical researchers and the overall research environment of the institution. The University argued that if the perception took hold that it was unable or unwilling to protect documents which depositors regarded as confidential, it would be less likely to secure collections in the future. The University argued that this would reduce its attractiveness as a place to do research, which would be damaging to its business model, which depends in part on the prestige and funding that comes with hosting important research work and the expertise that results from holding collections.

66. For his part, the complainant argued that he did not accept that this exemption was engaged. He argued that it was notable that the University did not assert that information within the 2011 Agreement would, or would be likely to, prejudice the commercial interests of any party. Indeed, the complainant noted that the University did not say that the information was commercially sensitive at all. Rather, the prejudice is said to stem from the alleged damage to 'trust' in the University that would occur if the information was disclosed.

67. The complainant argued that this is not how section 43 operates. He argued that any private entity contracting with a public authority will (or should) know that the content of any contract will be subject to FOIA. It is for the public authority to manage expectations by explaining the limits that FOIA may place upon its ability to withhold information which the contracting party may wish to be withheld. The complainant emphasised that this point was made both in the Commissioner's guidance on section 41 and in the section 45 Code of Practice.

68. In these circumstances, the complainant argued that any loss of *'trust'* caused by disclosure of the 2011 Agreement will actually have been caused by the University's failure to follow the Commissioner's guidance on managing the expectations of the trustees at the time the agreement was made. If the information within the 2011 Agreement is not, on a proper analysis, confidential or commercially sensitive, this failure cannot make it so.

69. With regard to the three criteria set out above, the Commissioner is prepared to accept that first one is met given that the University has argued that if the withheld information was disclosed this would have a negative impact on its business model, which in turn the Commissioner accepts could have a negative impact on its commercial interests.

70. With regard to the second criterion the Commissioner accepts that there is a causal relationship between the disclosure of information and the nature of the prejudice envisaged by the University. In reaching this conclusion the Commissioner agrees with the complainant that public authorities need to be transparent with third parties about their obligations under FOIA and that disclosure of information provided to them, even in confidence, may be disclosed. Nevertheless, the Commissioner accepts that in theory, a third party who entered into a contract with a public authority may be reluctant to do so in the future if information which they provided in confidence was disclosed under FOIA regardless as to how the public authority may have attempted to manage their expectations.

71. However, the Commissioner is not persuaded that the third criterion is met. In her view the line of argument advanced by the University whilst in theory is a plausible one, is ultimately one that is speculative and in the Commissioner's view is one that appears to only be a hypothetical possibility.

72. Therefore, the Commissioner has concluded that section 43(2) is not engaged.

Section 40

73. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).[6]

74. Personal data is defined in section (1)(a) of the DPA as:

> *'……data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions*
>
> *of the data controller or any person in respect of the individual.'*

[6] On 25 May 2018 the General Data Protection Regulation and Data Protection Act 2018 came into force. However, in line with the provisions contained within the Data Protection Act 2018 under FOIA for any request where a public authority has responded before 25 May 2018 the DPA 1998 applies. The redactions were made to documents disclosed by the University at the internal review stage on 14 May 2018.

75. The University explained that the information in the 2011 Agreement to which it applied section 40(2) to concerns the affairs of private family members associated with the archive.

76. The Commissioner accepts that some of the information contained in the 2011 Agreement constitutes personal data as it both relates to and identifies the individuals concerned.

77. The relevant data protection principle in this case is the first one which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

78. The relevant condition in this case is the sixth condition in Schedule 2 to the DPA which states:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

79. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
  - what the public authority may have told them about what would happen to their personal data;
  - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
  - the nature or content of the information itself;
  - the circumstances in which the personal data was obtained;
  - any particular circumstances of the case, eg established custom or practice within the public authority; and

- whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.

- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:

  - whether information of the nature requested is already in the public domain;

  - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

80. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.

81. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.

82. The University argued that the individuals concerned would not expect information of this nature to be disclosed. Furthermore, it argued that despite the high profile nature of the sale, there is no particular legitimate interest in the disclosure of the information which was not already in the public domain.

83. As discussed above in relation to section 41(1), the Commissioner accepts there is a legitimate interest in the disclosure of information which would add to the public's understanding of the nature of the University's purchase of the archive in 2011. In terms of the information which she accepts is personal data, in her view disclosure of it would add to the public's understanding of the nature of some aspects of the sale which could potentially aid the public's understanding of the 2011 Agreement. However, the Commissioner is conscious that disclosure of the information would represent a notable infringement into the private affairs of the family members who despite the high profile nature of the sale. She therefore accepts they would have a reasonable expectation that such information would not be disclosed under FOIA and that do so would be unfair and thus breach the DPA. Such information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

84. The Commissioner has set out in the confidential annex the information which she accepts is exempt from disclosure on the basis of section 40(2).

85. In light of her findings in relation to these exemptions, the Commissioner requires the University to provide the complainant with a copy of the 2011 Agreement with certain parts of it unredacted. The Commissioner has identified the redactions which she accepts the University can make to the 2011 Agreement in the confidential annex.

Complaint (d)

86. The University argued that the parts of the Direction that it had redacted from the copy disclosed to the complainant were exempt from disclosure on the basis of section 44(1)(a) of FOIA.

87. As discussed above, this provides a statutory bar to disclosure.

88. In support of its position, the University explained that it considered section 182(1) of the Finance Act 1989 (the FA) to provide a statutory bar.

89. Section 182(1) of the FA states that:

> *'A person who discloses any information which he holds or has held in the exercise of tax functions is to tax or duty in the case of any identifiable person.'*

90. 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.'*

91. The University explained that the Direction was made under the NHA and that details of the AIL scheme 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 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 or historic interest.

92. The University explained that 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 and that the Mountbatten papers forming part of the purchased archive were subject to the AIL scheme.

93. The University explained it was involved in the assessment and evaluation of the archive and provided advice and services to Arts Council England, who were in turn acting on behalf of HMRC, and this was done in the assessment of a tax function in the application of the AIL scheme. This was particularly the case because in this instance what proceeded is known as a hybrid offer, where the tax liability to be settled was less than the value of the chattels, and the University as the allocatee of the collection under the Direction had to fund the difference between the two amounts. The University was only in possession of the relevant tax information as a result of the AIL scheme and it is sufficient that a tax function was duly being exercised and does not need to be carried out directly by the University. In addition, it argued that section 182(5) of the FA does not apply since the redacted information has not lawfully been made available to the public.

94. The complainant disputed the University's position that it is entitled to rely on section 44(1)(a) by virtue of section 182 of the FA to redact the Direction. In support of this position the complainant noted that section 182(1) applies to information which 'he holds or has held in the exercise of tax functions'. However, the complainant emphasised that the University, as distinct from HMRC, does not exercise tax functions in this area, and nor does it purport to be acting on its behalf. Rather, the complainant argued that the University is simply a repository of property, some of which happens to be have been funded through the AIL scheme.

95. The complainant noted that the Commissioner had, in response to a separate complaint he had made regarding the Heritage Lottery Fund, concluded it could rely on section 44(1)(a), by virtue of section 182 of the FA to redact the same information.[7]

96. The complainant noted that at paragraph 52 of that 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'*. The complainant

[7] FS50712754 - https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259822/fs50712754.pdf

argued that in his view that was, as suggested above, 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).

97. 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'*.

98. 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.

99. Furthermore, the complainant argued that disclosure could be permitted under section 182(5).

100. The complainant also emphasised that the redactions were being made to a document which, in the University's view 'has the force of an enactment'. The complainant suggest that if that were correct it is a public document which purports to give effect to the power of the Executive and the public interest in reading it could not be higher. He noted that the idea of redacting a purported legal instrument was absurd.

101. The Commissioner has considered the complainant's submissions. However, her position remains the same as set out in the decision notice which she issued in relation to the Heritage Lottery Fund 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.

102. In the circumstances of this case, the Commissioner is satisfied that Arts Council England were acting on behalf of HMRC in relation to processing the AIL scheme in respect of Mountbatten papers which formed part of the Broadlands Archive. Furthermore, the Commissioner is satisfied that the information which the University is seeking to withhold on the basis of section 44(1) was used by Arts Council England as part of its tax functions in respect of administering the AIL scheme.

103. 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.'

104. However, the Commissioner does not consider that any of the criteria set out at section 182(5) apply in the circumstances of this request. Therefore, in the Commissioner's view the information redacted from the Direction on the basis of section 44(1)(a) is covered by the prohibition on disclosure provided by section 182(1) of the FA.

Complaint (e)

105. Complaint (e) concerns the University's decision to redact the various documents disclosed at the internal review stage and its failure to provide the attachments to a number of disclosed emails.

Missing attachments

106. With regard to the missing attachments, the complaint explained that of the emails disclosed to him at the internal review stage the following appeared to be missing attachments:

(i) email of 29 July 2011 at 09:43.

(ii) email of 4 October 2012 at 13:28. The complainant noted that this email referred to three attachments (a) 'scanned copies attached' of an exchange of email between the University and Cabinet Office in September 2011, (b) 'an enquiry below, that is a direct request about them' and (c) a 'reply' drafted by Legal Services 'also attached'.

(iii) The attachment to the final email on the bottom of page 6 of the documents disclosed at the internal review stage (the date of the email

had been redacted[8], but this email included the text 'Dear [redacted] You may remember that you met…')

(iv) The attachment to the third email on the bottom of page 6 of the disclosed documents. The date of this email was also redacted but it begins[9] 'Dear [redacted] I have looked at…' and also explains that 'Between us we have suggested an amended version of the draft response and this is attached for your consideration. As you will see I have shown the proposed changes in red.' The complainant argued that the attachments showing 'proposed changes in red' had not been disclosed.

107. During the course of her investigation, the University explained that the attachment to the email of 29 July 2011, item (i), was a copy of the draft Direction. The University explained that this draft was not altered and was the same as the final version. It explained that if it had located this draft version earlier then it would have been disclosed with the same redactions applied to the final version of the Direction as disclosed to the complainant. In light of this explanation, the Commissioner does not require the University to take any action in relation to this attachment.

108. With regard to item (ii), the University explained to the Commissioner that it now only held a copy of this email (and its attachments) in hard copy. Although it was not explicit what attachment a) was, it believed that they were two emails exchanged between the University and Cabinet Office on 6 September 2011, the purpose of the attachment simply being to recall to the Cabinet Office's attention the earlier email exchange. The University noted that redacted versions of these two emails had been disclosed to the complainant at the internal review stage (on pages 10 to 11 of the bundle of documents disclosed at that point). In light of this clarification the Commissioner does not require the University to take any further actions in relation to this attachment.

109. In relation to attachment (b), the University provided the Commissioner with a copy of this but argued that as this was an enquiry from a private researcher, disclosure of this would breach the DPA. The Commissioner accepts that disclosure of the name of the researcher and his email address would breach the DPA given that the individual in question would no expectation that such information would be disclosed to the world at large and that to do would breach his privacy by revealing his

[8] The date of the email is 15 May 2013

[9] The date of the email is 23 May 2013

interest in this particular issue. However, if such information was disclosed were redacted in the Commissioner's opinion the rest of the email could be disclosed without any personal data being disclosed. . Therefore, the Commissioner requires the University to provide the complainant with a copy of this attachment with the name and email address of the sender redacted.

110. In relation to attachment (c), the Commissioner is satisfied that this is the document found at page 8 of the disclosed bundle at the internal review stage; this is a draft reply to an enquiry with 'specific request' annotated in the top right hand corner.

111. In relation to item (iii), the Commissioner has established that the University has not previously provided the complainant with a copy of this. However, the complainant has suggested that he appears to have received a copy of this attachment from the Cabinet Office in response to FOI requests he had made to it. The Commissioner is satisfied that the attachment to item (iii) is a document containing a draft reply to an enquiry with 'Gen request for MB diaries' annotated in the top right hand corner. As the University has not previously provided the complainant with a copy of this attachment she requires it to now do so.

112. In relation to item (iv), the University has not previously provided the complainant with a copy of this attachment albeit that it has now located a copy of it and provided the Commissioner with a copy. The University now needs to provide the complainant with a copy of this attachment.

Redacted documents

113. At the internal review stage the University provided the complainant with a range of documentation, namely internal email exchanges, email correspondence between the University and third parties, a copy of the 1989 agreement between the University and the trustees, and a number of minutes from various University boards or committees.[10]

114. The Commissioner understands that the redactions were made to these various documents on the basis of section 40(2) of FOIA.

115. The University explained that the redacted withheld information broadly falls into the following categories: names and contact details for staff at

[10] In relation to this latter category of information at the point that this decision notice is being issued the complainant only wishes to dispute the redactions made to the following two documents: University Executive Group, 9 September 2009 and University Council 18 May 2011 in relation to item 93

the University, and names and contact details for third parties involved in discussions with the University.

116. The Commissioner has considered the redactions and agrees with this description of the redacted information. Furthermore, she also accepts that the information which the University has redacted constitutes personal data as it both relates to and identifies the individuals concerned. An exception to this is the dates of certain emails that have been redacted.

117. The only other exception to this consists of the redactions made to the University Council minutes of 18 May 2011 in relation to item 93 and the redactions made to the bullet points at University Executive Group, 9 September 2009. In the Commissioner's view these redactions do not relate to a living individual and thus do not constitute personal data. The redactions to these two documents cannot therefore be exempt from disclosure on the basis of section 40(2) of FOIA.

118. The University argued that section 40(2) applies because the disclosure of the redacted information would breach the first data protection principle. As noted above, this states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

119. The relevant condition in this case is the sixth condition in Schedule 2 to the DPA is met which states:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

120. The University argued that in its view each of the individuals concerned have a legitimate expectation that their names and contact details would not be disclosed under the FOIA. It argued that these are just individuals going about their daily affairs in University business and there would be no need for the complainant (or any other person) to have the names and contact details of people involved in the archives and their acquisition even if acting in their professional capacity. The University suggested that the position of the people involved was still

clear from the redactions and does not add anything of value to the complainant or the public at large but the intrusion into their personal lives is unnecessary.

121. The complainant has argued that there was a strong public interest in transparency and understanding the arrangement between the University, Cabinet Office, Foreign and Commonwealth Office and Royal Household in respect of the archive. In support of this position the complainant highlighted the enormously important and significant collection of papers which was purchased using substantial sums of public money.

122. Furthermore, 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.

123. 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 given 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 that it is entitled to know why and how 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.

124. 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 archive.

125. 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.

126. In contrast, the Commissioner is not persuaded that the disclosure of the names of the individuals at organisations other than the Cabinet Office and the 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.

127. The Commissioner is not persuaded that disclosure of the names (and contact details) of the individuals at the Cabinet Office and the 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 iniquity on behalf of the Cabinet Office in respect of how access to the archive is manged, 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.

128. The Commissioner has therefore concluded that disclosure of the names of the individuals at the University and the Cabinet Office would not be unfair. Furthermore, she has concluded that schedule 2 condition 6 of the DPA is met.

129. In conclusion the Commissioner has therefore found 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.

Complaint (f)

130. In his request of 27 June 2017 (request 8) the complainant sought a full itemisation/inventory of each file in each series (such as the S series) not publicly available in the archive. The University responded on 22 September 2017 and provided what it described as an inventory of the S series.

131. In its internal review response the University explained that it did not hold an itemisation of each document in the series, nor an itemisation at file level or to the level of detail that it understood the complainant envisaged it held. It also argued that it was not required to create information, ie a more detailed inventory, for the purposes of FOIA, and in any event to do so would be very time consuming exercise which would exceed the cost limit at section 12(1) of FOIA.

132. The complainant disputed the University's position that it did not hold an inventory of each document withheld under the Direction, and also the University's alternative position that to 'create' such an inventory would exceed the appropriate cost limit at section 12(1) of FOIA.

133. With regard to the complainant's first point of argument, in scenarios such as this 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.

134. 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.

135. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, or as in the circumstances of this complaint, other explanations offered as to why the information is not held.

136. In its submissions to the Commissioner the University explained that the inventory of the S series provided to the complainant was the extent of the inventory that it held at that point. It explained that it was a simple file list created for the transfer of the archive to the University. The University explained that no detailed cataloguing of the S series has been undertaken.

137. With regard to providing the complainant with a more detailed inventory of the S series the University explained that in terms of itemising the letters there 59 files of these, with an average of 40 letters in each, ie 2360 items. The University explained that to create a brief summary of each, for an itemised list, with a note of correspondents, date and brief note of content, at 15 minutes per letter, would take 590 hours. It confirmed that this estimate was based on a sample exercise.

138. With regard to the diaries, the University explained that a list that identifies each diary by reference number and year was a short piece of work. Beyond this the University suggested that the most effective step with the diaries that would widen the subject content of the description is a transcription given that they are readily accessible on a date basis already. However, it explained that a work of transcription is a major undertaking. In a sample exercise, it took 6 hours to transcribe two weeks of Lord Mountbatten's diary for 1947. On this basis the University argued that it would take 104 hours to transcribe Lord Mountbatten's 1947 diary. There are 47 volumes of Lord Mountbatten's diaries in the archive, and 36 volumes of Lady Mountbatten's (although 9 of these are simply appointment diaries – so there are 27 full diaries). Even allowing for variation in length – the 1947 diary is among the longest, so that if it abated the total hours by about 20% and do so in this calculation – this produces 3910 hours for transcribing Lord Mountbatten's diaries and a further 3370 hours for Lady Mountbatten's diaries.

139. Based on the University's submissions, the Commissioner is satisfied that the inventory of the S series provided to the complainant was the only one which it held at the point that his request was submitted given that no detailed cataloguing of that part of the archive had yet to take place. She is therefore satisfied that on the balance of probabilities it does not hold any further inventory of the S series beyond that previously located and disclosed.

140. With regard to the University's view that the provision of a more detailed inventory would involve the creation of new information, or alternatively, would meet the cost limit, the Commissioner considers it necessary to consider what such an inventory would be expected to contain.

141. In her view it is reasonable to assume that for the letters such an inventory would consist of an itemised list including as a minimum the date and note of correspondents. Such an inventory, could potentially also extend to a brief summary. In terms of the diaries, such an inventory would seem most obviously to include a list that identifies each diary by year and reference number. However, the Commissioner does not consider that an inventory of the diaries would extend to including a transcription of them.

142. Taking this approach to the definition of an inventory the Commissioner does not agree that the provision of such an inventory would involve the creation of new information. This is because in the Commissioner's view a public authority is not creating new information where it presents information it holds in the form of a list or schedule. In essence providing the complainant with an inventory of the S series is simply a question of just producing such a list or schedule.

143. However, the Commissioner accepts that there may be cost issues to be considered under section 12 of FOIA in retrieving and extracting the information required to answer the request and provide such a list, schedule or as in this case an inventory.

144. Section 12(1) of FOIA states that:

> *'(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'*

145. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for public authorities such as the University. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours.

146. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

147. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.[11]

148. Section 12(1) is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether, despite this being the case, there is a public interest in the disclosure of the information.

149. The Commissioner is satisfied that based upon the University's submissions compiling an inventory of the S series would exceed the cost limit. The Commissioner acknowledges that it is only a short piece of work to provide a list which identifies each diary by reference number and year. However, the burden of complying with the request comes from providing an inventory of the letters. The Commissioner notes that the University's figures in respect of the time taken to do so are based on a sample exercise which in her view gives them greater credence. If an inventory were produced which included a brief summary of each letter and note of the content then this would exceed the cost limit by a considerable margin. Even if a much more simplified version of an inventory was produced, for example simply the dates for each and note of the correspondents, then assuming it would take as minimum one minute per letter, 2360 minutes in total or over 39 hours, then such a process would still exceed the appropriate cost limit.

150. In summary, the Commissioner has found that beyond the inventory of the S series provided to the complainant the University does not hold an inventory of this part of the archive that is already completed. Whilst the Commissioner has also concluded that the University holds the

[11] http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf - see paragraph 12

information that could be used to provide such an inventory, and that to do so would not equate to the creation of new information for the purposes of FOIA, to do so would exceed the appropriate limit and therefore the University can legitimately refuse this request on the basis of section 12(1) of FOIA.

Complaint (g)

151. The complainant has sought to challenge the University's position that it does not hold any information about the gaps in the sequential file numbers within the inventory of the S series and diaries of Lord and Lady Mountbatten or within other parts of the catalogue for the archive.

152. The complainant argued that he did not accept that the University did not hold any information at all about the gaps, not even correspondence with the trustees or others about what items were, and were not, included in the deposits or sale. The complainant noted that the University had explained to him that some of the gaps arose 'almost certainly from inadvertence' and it must therefore hold some information about the gaps in order to be able to make this statement.

153. In order to investigate this particular point of complaint, the Commissioner asked the University to respond to a series of questions. She has set out these questions and summarised the University's responses to them below. However, as part of its submission the University also provided some background about its handling of the S series, as follows:

154. The University explained that it did not hold all of the S series material, beyond the correspondence between diaries and letters, none of the material has ever been held by the University and members of University staff have never had access to it.

155. The University further explained that the archive was held securely at Broadlands House, the Mountbatten family estate near Romsey. The archive was transferred from there to the University between the late 1980s and 2009/10. In order to do this, a small group of University staff went to Broadlands, under the supervision of Broadlands estate staff, to pack up the files for transfer. The University explained that the main sections allocated for transfer were already numbered, and the University prepared transfer lists with the reference numbers that had already been allocated to the files in the Broadlands system. These were then checked and counter-signed by Broadlands staff – these lists contained no details beyond the file numbers of material that was to be transferred. The files were then brought back to the University, where they were listed at file level – and these listings provide the basis for much of the access to the archive.

156. The University explained that at no time did the University staff have access to the S series files, other than the correspondence between Lord and Lady Mountbatten transferred in 2009/10. Indeed it explained that it could not conceive of any circumstances in which it would have been appropriate professional conduct while University staff were at Broadlands for it to make a listing of the entire S series or of elements of it that were not to come to the University.

157. The University explained that Philip Ziegler did much of the research for his authorised biography of Lord Mountbatten at Broadlands in the early 1980s with wide access to the archive, including the S series files, before the University was involved with the collection. The University noted that Ziegler had naturally used the referencing system that went with them in his book but as such information was not transferred to it, it could only refer to the complainant to that book.

158. Turning to the Commissioner's questions, and the University's responses, these were as follows:

- *What searches have been carried out to locate any information about the gaps in sequential file numbers, and why would these searches have been sufficient to locate all information about this issue?*

  We have searched all the listings of the Broadlands archives that we hold – but these listings are limited to material that is at Southampton. The lists are firstly: the published summary catalogue of Lord Mountbatten's papers – *A summary catalogue of the papers of Earl Mountbatten of Burma*, ed. L.M. Mitchell, K.J. Sampson and C.M. Woolgar (Southampton: University of Southampton Library, Occasional paper 9; 1991) – and this is supplemented by the loose-leaf lists of the archive in the Archives Reading Room, most of which are also available as pdf files online on the Archives website (https://www.southampton.ac.uk/archives/cataloguedatabases/webguidemss62.page).

  There is in addition an online database of detailed descriptions of parts of the archive for the period 1943-8, which we have also searched for embedded lists of other material – but there are none (https://www.southampton.ac.uk/archives/cataloguedatabases/mb/index.page). These catalogues and lists are authoritative descriptions of our holdings and the complete means of reference to them. Beyond this, a few of the transfer lists survive from the late 1980s to 2009/10: these have been checked. We have no further listings at Southampton.

- *Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations*

The University referred the Commissioner to the searches described above. It also explained that The Archives and Special Collections Division has a small group of professional staff who know the archive, its contents, lists and catalogues as well. None of them knows of any recorded information held by the University about the S series files beyond those documents held at the University.

- *If searches included electronic data, which search terms were used and please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.*

The electronic data that have been searched duplicate the manual listings, with the exception of the Mountbatten Papers database – which has been searched for 'list*', 'S series', 'catalogue', 'archive'. We have also searched by reference number.

159. The Commissioner is conscious that the focus of this aspect of the complaint is the lack of any recorded information being held by the University regarding the gaps in the S series. The University's response above arguably focuses more on its efforts to locate information which would plug such gaps rather than searches for recorded material which explains the gaps. However, in the Commissioner's view the University's response, in particular the background concerning the S series, is sufficient to assist her in considering this point of complaint. In the Commissioner's view given that the University only ever received parts of the S series, and indeed has not had access to, even at Broadlands, the other parts of the S series this explains firstly not only why the University's inventory of the S series is a partial one but also secondly why the University is unlikely to hold any recorded information about any gaps in the inventory. That is to say, the University always understood that it did not hold all of the files from the S series and thus it would have no need or would be very unlikely to create information which considered why such gaps existed.

160. In light of this, the Commissioner is satisfied that on the balance of probabilities the University does not hold any recorded information which explains the gaps in the sequential numbering of the S series files which it holds.

Complaint (h)

161. The complainant explained to the Commissioner that he had asked the University to provide him with information about the reasons why each file is being withheld from public access, including providing a copy of each purported notification from the Cabinet Office, and information held by the University about the genesis and operation of the Direction. The complainant explained that he did not accept that all of the information

that is held by the University about this issue had been located and provided.

162. In order to investigate this complaint the Commissioner asked the University to provide her with details of the searches undertaken to locate i) information about the reasons why each file is being withheld from public access ii) a copy of purported closure notification by the Cabinet Office, iii) any information held by the University about the genesis and operation of the Direction. The Commissioner also asked the University to explain why it considered such searches to have been sufficient to locate any relevant information listed at i) to iii).

163. In response the University argued that its internal review response addressed the genesis and operation of the Direction, the closure notifications from the Cabinet Office and how the clearance process works and that it provided supporting documentation that it held as part of this review.

164. Furthermore, with regard to the Direction, the University explained that it did not draft this; rather it was the work of the Arts Council England. The University explained that the Head of Special Collections had been the single point of contact for the entire period of the loan and acquisition of the archive. It explained that any correspondence to the University regarding a decision in respect of the archive would have involved him. As part of the internal review process he searched his emails accounts for the word 'direction' in connection with 'Arts Council England' and he located the correspondence that was released to the complainant at the internal review. The University explained that no paper file records were in the University Library were searched because the Head of Special Collections specifically recalled destroying the working paper file in which he held his file notes and correspondence with Arts Council England in connection with this acquisition in early 2012.

165. The University explained that its Legal Services department was involved in providing legal and governance and advice in connection with the archive and it conducted a search for 'ministerial direction' in its relevant archive case file and did not find any further relevant information other than that already provided to the complainant.

166. Having considered these submissions, the Commissioner contacted the University and explained that whilst she accepted that any relevant information is likely to be held by the Head of Special Collections, the search terms used appear to be relatively narrow ones. For example, the Commissioner suggested that she would envisage that emails may have been exchanged with the Cabinet Office about the subject matters listed at i) to iii) that did not include the word 'direction', and thus such emails would not have been located by the searches conducted to date. The

Commissioner suggested that in her view additional search terms it would be logical for the University to use would be 'Mountbatten', 'Broadlands, and 'Cabinet Office' and she asked the University to conduct such further searches.

167. In response the University explained that the Head of Special Collections had conducted a further search of the requested additional terms of his current and archive outlook email folders for these terms and found no further information to add. He also advised that he searched his outlook accounts for 'Acceptance in Lieu'; 'AIL'; 'Resources'; 'Museums Libraries Archives'. He also searched by name for the officials with whom he was corresponding at the time, at the Cabinet Office and at Arts Council England. However, no further information was located.

168. In the Commissioner's opinion the searches undertaken by the University are sufficiently through, and sufficiently focused, to have located all relevant information falling within the scope of these aspects of the complainant's requests. In light of this the Commissioner has concluded that on the balance of probabilities the University does not hold any further information falling within the scope of these requests beyond that previously located and disclosed to the complainant.

Other matters

The University's delay in responding to the Commissioner

169. As explained in the Notice above, the Commissioner first wrote to the University on 22 August 2018 asking it to provide her with detailed submissions to allow her to investigate the complainant. In line with her usual practice the Commissioner asked for a response within 20 working days.

170. Having received no response from the University, despite a number of chasers, the Commissioner served an Information Notice on the University under section 51(1) of FOIA on 23 October 2018 requiring it to provide the Commissioner with a response to her letter of 22 August 2018. The Notice required the University to respond within 30 calendar days. The University acknowledged receipt of the Notice, but did not respond to it, and did not provide any reasons for that failure to respond. The Commissioner chased the University several times for a response.

171. On 23 January 2019, the Commissioner served an Information Notice in substantively identical terms on the University Council. She did so because the Information Notice served on 23 October 2018 had been addressed to the University, rather than the Council. Though neither the Council nor the University had sought to dispute the validity of the Information Notice dated 23 October 2018, the Commissioner considered it prudent to cancel that notice and to issue a new Information Notice to the Council instead, out of an abundance of caution.

172. The Council acknowledged receipt of the Information Notice, but did not respond to it, and did not provide any reasons for that failure to respond.

173. As a result, under section 54(1) of FOIA, the Commissioner made a certification to the High Court in April 2019 and asked it to deal with the Council as if it had committed a contempt of Court in failing to comply with the Information Notice of 23 January 2019.

174. The High Court subsequently listed the case for a committal hearing on 17 October 2019.

175. Prior to this hearing taking place, the University provided the Commissioner with a response to the Information Notice on 23 August 2019 and a further response on 6 September 2019. At that stage the Commissioner was content that the Information Notice had been complied with.[12]

176. In light of this, the Commissioner sought the Court's approval of a consent order to dispose of the proceedings.

177. With regard to the delay in responding to the Commissioner's letter of 22 August 2018, and indeed her subsequent Information Notices, the University explained that in August 2018, and for some time afterwards, its legal department had been suffering from staff shortages. The University explained that there was no intention to ignore the Commissioner's requests for information. However, the University suggested that these shortages, coupled with the complexity of the requests and complaint to the ICO made it difficult for it to respond in a timely manner. The University explained that its intentions to respond to the Commissioner were missed and subsequently overlooked.

178. As noted above, following the University's compliance with the Information Notice, the Commissioner did not pursue the court proceedings regarding the University's initial failure to comply with it.

179. However, the Commissioner wishes to draw attention to the fact she has never before had to take make a certification to the High Court in respect of a public authority's non-compliance with an Information Notice. The steps that the Commissioner has had to take in this case are therefore unprecedented.

180. For the avoidance of any doubt, the Commissioner considers the University's failure to respond to her letter of 22 August 2018 for twelve months to be completely unacceptable. Such a delay clearly undermined the complainant's ability to seek a timely section 50 decision from the Commissioner and moreover undermines the purpose and value of the legislation itself.

[12] Albeit that the Commissioner had a number of follow up enquiries before she was in a position to issue her decision notice in respect of this complaint

Right of appeal

181. 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

182. 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.

183. 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

Request number	Date of request	Request or summary of request	Date of response	Response or summary of response
1	10/04/2017	'I'm doing some research on Mountbattens and wondered what had happened to the R series which it appears other researchers have used but is not now in Southampton. I would also be grateful if you could confirm the current trustees of the Broadlands Trust.'		
2	28/04/2017	'As requested, I am writing to seek access to the retained papers of Lord and Lady Mountbatten which include the material in the S series of files, the diaries of Lord Mountbatten (47 volumes 1920-68), the diaries of Lady Mountbatten (36 volumes: 1921-60), and the correspondence between them (59	26/05/2017	The University explained that under a Ministerial Direction made on behalf of the Secretary of State on 5 August 2011, pursuant to the National Heritage Act 1980 it held the following information: the diaries of Lord Mountbatten (47 volumes 1920-68), the diaries of Lady Mountbatten (36 volumes: 1921-60), and the correspondence between them (59 files). (The University noted that the latter was from the 'S' series and are the only material in sequence that the University holds) However, the University explained it was a condition of the Direction that it kept the information closed to public access until the Cabinet Office had reviewed it and cleared it for release to the public. The University

		files), the letters from Lady Mountbatten to Jawaharlal Nehru, the first Prime Minister of the newly independent India (33 files, 1948-60), along with copies of his letters to her (15 files, 1947-60).		asked the complainant to advise of any specific parts he was particularly interested in and it would liaise with the Cabinet Office in order to determine whether the information could be released or were subject to exemptions in FOIA. The University also explained that the correspondence between Lady Mountbatten and Jawaharlal Nehru remained in private ownership and is confidential but the University has a future interest in it.
3	26/05/2017	'May I have details of the conditions the Broadlands Trustees stipulated on access given two official biographers have looked at the material already and it has been offered to other historians, such as Susan Williams, without these conditions. Apart from Philip Ziegler and Janet Morgan, has anyone else had access to the material? Under what provision of the 1980 Act was the 'ministerial direction'	31/05/2017	The University explained that it had to refer to the Cabinet Office with regard to accessing the closed material and asked the complainant to clarify what information he specifically wanted to access. The University explained that it had no knowledge of the S series beyond the material that it holds, namely the correspondence between Lord and Lady Mountbatten. With regard to the remaining questions the University explained that it would respond in due course.

		made and may I have a copy? Under which exemption of FOIA are Southampton relying on? Does Southampton have legal title to the material? What financial assistance was provided for the acquisition and was the material accepted in lieu of tax? Why are Southampton accepting material subject to political interference? What is the justification for the Cabinet Office vetting personal diaries and letters written 40-80 years ago and why has it taken six years without the material being made available? It looks like public money has been used to on condition that the State/Crown could censor the donated material at its leisure'.		
4	30/05/2017	'I would be grateful if the diaries – or as many		

		volumes as possible – for Lady Mountbatten (who was not a government employee) could be released. May I also see the diaries and correspondence which have already been cleared and the inventory for the S series. Could you confirm what has been cleared and when the clearance is likely to be completed.'		
5	31/05/2017	'I imagine that some material was already been cleared and I'd like to see that but the bottom line is I'd like to see whatever I can! I understood there was an inventory for the S series – Philip Ziegler references various files in his biography – and I'd be grateful to see the list of what the university holds in the S series.		

		What is available to researchers and on what basis? I can't understand how the collection can be 'closed'. Presumably Southampton bought the collection on the basis it would be available to scholars and it must be frustrating that the Cabinet Office control access? What baffles me is why would the Heritage Lottery Fund help purchase a collection when then cannot be viewed? Is the material physically at Southampton? Have you seen it?'		
6	07/06/2017	The complainant asked the University to reply to the outstanding questions contained in his last three emails, namely:	23/06/2017	The University provided the following responses to the complainant's questions (for ease of reference both the request and answer have been included): Question:

		• May I have details of the conditions the Broadlands Trustees stipulated on access given two official biographers have looked at the material already and it has been offered to other historians, such as Susan Williams, without these conditions. Apart from Philip Ziegler and Janet Morgan, has anyone else had access to the material? • Under what provision of the 1980 Act was the 'ministerial direction' made and may I have a copy? Under which exemption of FOIA are		• May I have details of the conditions the Broadlands Trustees stipulated on access given two official biographers have looked at the material already and it has been offered to other historians, such as Susan Williams, without these conditions. Apart from Philip Ziegler and Janet Morgan, has anyone else had access to the material? Answer: The University has no knowledge of this. Question: 'Under what provision of the 1980 Act was the 'ministerial direction' made and may I have a copy?' Answer: The Direction was made by the Arts Council England under delegated authority from the Secretary of State under section 9 of the National Heritage Act. The copy of the Direction was provided, redacted on the basis of taxpayer confidentiality. Question: Under which exemption of FOIA are Southampton relying?

		Southampton relying on? Does Southampton have legal title to the material? What financial assistance was provided for the acquisition and was the material accepted in lieu of tax? Why are Southampton accepting material subject to political interference? What is the justification for the Cabinet Office vetting personal diaries and letters written 40-80 years ago and why has it taken six years without the material being made available? • What is available to researchers and on what basis? I can't		Answer: The University had written to the Cabinet Office to clarify whether the information referred to in the University's email of 26 May 2017 could be released or whether FOI exemptions would apply. Question: Does Southampton have legal title to the material? Answer: Please see the Direction. Question: What financial assistance was provided for the acquisition and was the material accepted in lieu of tax? Answer; The property in the schedule of the Direction came to the University as part of a broader acquisition of the archives. The property in the schedule was accepted in lieu of tax but as the tax to satisfied was less than the value of the material offered funds had to be raised by the University to support the acquisition. The

		understand how the collection can be 'closed'. Presumably Southampton bought the collection on the basis it would be available to scholars and it must be frustrating that the Cabinet Office control access? What baffles me is why would the Heritage Lottery Fund help purchase a collection when then cannot be viewed? Is the material physically at Southampton? Have you seen it?'		response provided details of this fundraising. Question: Why are Southampton accepting material subject to political interference? What is the justification for the Cabinet Office vetting personal diaries and letters written 40-80 years ago and why has it taken six years without the material being made available? Answer: Under the acceptance in lieu process, the property enters the ownership of the state, and it is for the Secretary of State to decide how to dispose of it.
7	26/06/2017	'I am making an FOIA request for ALL	22/09/2019	With regard to his request for all documents, the University asked the complainant to clarify

		documents relating to the acquisition of ownership of the Mountbatten Archives not least an un-redacted copy of the ministerial direction… …[Your previous correspondence] states "The correspondence between Lady Mountbatten and Jawaharlal Nehru remains in private ownership and is confidential but the University has a future interest in it". Would you please disclose the nature of this "future interest" when it comes into play, where physically the correspondence is held and on what grounds the correspondence is "confidential"'.		exactly what documentation he was interested in. The response explained that the redactions made to the Ministerial Direction had been made on the basis of section 40 (personal data) and 44 (statutory bar) of FOIA. The response also explained that the closed material was exempt from disclosure on the basis of section 44 of FOIA. The response explained that the future interest that the University holds is an option to purchase the correspondence between Lady Mountbatten and Jawaharlal Nehru.
8	27/06/2017	'Please supply a full itemisation/inventory of each file in each series	22/09/2017	The University provided an inventory of the S series.

		(such as the S series) not publicly available in the Mountbatten collection and the reasons why it has been withheld.'		
9	30/08/2017	'I attach a letter from the Cabinet Office which states: "We are aware that you are seeking access to the closed material in the Mountbatten Archive. We suggest that the most appropriate starting point would be to make a request the University for a specific set of papers (for example, focussing on a single year in order to try to bring he request within the s.12 cost limit). The Cabinet Office would then be consulted and would be able to assess whether any of the requested material is now suitable for		

		release." May I see the two diaries of Edwina and Dickie and their correspondence for 1947'.		
10	06/09/2017	'May I have a detailed description of the parts of the archive closed by the Cabinet Office under clause 2b of the Ministerial Directive and which FOIA exemptions apply to the closed archive. Could you confirm what has been cleared over the last six years and when the clearance is likely to be completed. How many people are working on the clearances.'		
11	23/09/2019	The complainant argued that the list provided in response to request 8 was not complete. The complainant asked the		

		University to explain a number of gaps and omissions that he had identified.		
12	29/09/2017	In response to the University's response of 22/09/19 to the letter of in response to request 8, the complainant asked for the following information: '(1) Soton's agreement with the trustees for the acquisition. (2) any **agreement** between Soton and CO. (3) All documents in Soton's possession evidencing the genesis and promulgation of the ministerial direction, including (without limitation) Soton's internal memoranda on its acceptance thereof as an element of the archive's acquisition.		

		(4) The option to purchase the Nehru papers'. The complainant also asked the University to clarify a number of further points regarding the Ministerial Direction.		
13	30/10/2017	'I am making a new FOI request re the disclosure from Hampshire County Council that Soton told it in 2009 that the Cabinet Office was trawling through the Mountbatten Archives: "The Cabinet Office has recently completed a review of the collection which has resulted in the release of significant quantities of papers from the 1940s onwards. It has also confirmed that at the end of these transactions, the University of Southampton will own	08/12/17	The University issued an overarching response covering what it understood to be the outstanding responses. Of note for the purposes of this complaint, it explained that the University's agreement with the trustees of the archive was exempt from disclosure on the basis of section 41 (information provided in confidence of FOIA). The University also explained that it was aggregating the requests that had been received for the purpose of section 12 (cost limit) of FOIA and the limit would be reached imminently. The University also advised that the repeated and persistent attempts to obtain information about the closed records by making further requests was bordering on the vexatious and it reserved the right to refuse future requests on the basis of section 14 of FOIA.

		all the papers." On what basis was Southampton [clarified to be the Cabinet Office] viewing a private collection on deposit at Soton? Which papers were "released" – "released" from what?'		
14	15/03/18	The complainant listed a number of files which he explained were missing from the Mountbatten collection and asked for a full inventory of them and on what grounds they were not available to researchers.		
15	23/03/18	The complainant submitted a further request identifying numerous additional files and again asked for a full inventory of them and clarification as to why they were not available to researchers.	13/04/18	The University directed the complainant to the latest version of the archive which was available online. The response also stated that 'This reflects the release of the material to University in accordance with the Public Records Act prior to the Freedom of Information Legislation: it has not been possible to update the online database. Please also note that the University inherited the classification system for this archive and that there are gaps in the numerical sequence, some we believe almost certainly from inadvertence.

				We hold no information about the material (if any) that was given those numbers'.