

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 September 2011

Public Authority: **The British Library**
Address: **96 Euston Road**
 London
 NW1 2DB

Summary

The complainant requested information relating to himself, the Tyldesley Diary and British Library's internal management report on an incident involving the Tyldesley Diary. The British Library released some information and relied on the exemptions at sections 21, 31, 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 40(1), 40(2), 41, 42, 43 to withhold other information. The Commissioner identified that some of the withheld information was the complainant's personal data and therefore requested the public authority to treat parts of the requests as subject access requests under the Data Protection Act 1998. Upon further investigation, the Commissioner found that some of the withheld information was outside the scope of the requests and therefore considered the exemptions at sections 21, 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), and 40(2). The Commissioner finds that the British Library was correct to rely on the cited exemptions for the majority of the information but that four documents withheld under section 40(2) and 7 documents withheld under section 36(2)(c) are not exempt. The Commissioner also found procedural breaches of sections 1(1)(b) and 10(1).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the FOIA'). This Notice sets out his decision.

Background

2. The Tyldesley diary is a Jacobite manuscript written between 1712 and 1714. Mr Peter Tyldesley is the owner of the diary who lodged it for safekeeping with the British Library. The diary was damaged while in the care of the British Library.
3. The incident of the damage to the diary was reported in the media along with Mr Tyldesley's criticism of the British Library for not making public its report on the internal investigation into the incident and the name of the member of British Library staff who was reported to have subsequently left his job.

The Request

4. On 7 January 2008, the complainant requested a copy of the internal management report detailing the Library's investigation of the incident involving the Tyldesley Diary ('the report') (British Library reference 0801).
5. On 2 June 2009, the complainant made the following request to Ronald Milne, the Director of Scholarship and Collections, at the British Library (British Library reference 0916):

"Please take this email as a freedom of information and data protection request for any and all material you hold relating to me and/or the Tyldesley Diary. This should include any recordings or written notes you may have of telephone conversations, including but not limited to the call in which you sought to dissuade me from pursuing an earlier freedom of information request and gave me your personal assurance that the British Library was not seeking to hide anything. Please clearly indicate where you have previously held material but it is no longer available, stating the reason for its non-availability.

Please also confirm the amount of legal fees you have incurred on this matter to date, whether or not yet paid."

6. The complainant clarified this request on 14 June 2009 as follows (British Library reference 0918):

"For the avoidance of any doubt I am requesting any and all information held by the British Library relating to me and/or the Tyldesley Diary. This will include but not be limited to material held by Ronald Milne."

7. The British Library responded to request reference 0801 on 4 March 2008 apologising for the delay in its reply. At that time there was an ongoing

police investigation into the incident, as well as an active internal inquiry. A heavily redacted version of the report was released with exemptions applied relating to sections 31, 36, 40(2), 41, 43.

8. A request for a internal review of request 0801 was made by the complainant on 26 May 2008 (British Library reference 0813). The British Library responded on 24 June 2008. By this date the police investigation and internal investigations into the matter had been closed therefore the British Library reassessed the balance of the public interest and released some of the information previously withheld. However, it maintained it's reliance on the exemptions at sections 36(2)(b) and 36(2)(c), 40(2) to some of the information.
9. A response to request reference 0916 was issued on the 1 July 2009. The British Library released 808 documents with redactions relating to sections 21, 36(2)(b)(i), 36(2)(b)(i) & (ii), 36(2)(c), 40(1), 40(2), 41 and 42 of the FOIA. The part of the request relating to legal fees was responded to in full.
10. A response to request reference 0918 was issued on the 13 July 2009. The British Library released a further 376 documents taken from sources of information other than Mr Milne's email account, hard-copy records, and electronic folders to which he has access as information from these sources had been released in response to request reference 0916. 33 of these documents were released a day after the mandatory deadline for response due to internal administrative issues for which the British Library apologised. The British Library redacted information under sections 21, 36(2)(b)(i) & (ii), 36(2)(c), 40(1), 40(2), 41 and 42 of the FOIA.
11. A request for an internal review of requests 0916 and 0918 was made by the complainant on 9 August 2009 (British Library references 0931 and 0932). The British Library responded on 7 September 2009 stating that in the review it had focused on the process of discovery of documents relevant to the requests and the application of exemptions. It identified and disclosed a relatively small number of documents previously unreleased relating to request 0918. It found that the use of exemptions was correct in all instances in relation to request 0918 and, in relation to request 0916, it found that the redactions were incorrect in a very small number of instances for which it released corrected versions. The British Library apologised again to Mr Tyldesley for the late release of 33 documents responsive to request 0918.

The Investigation

Scope of the case

12. On 15 October 2009 Mr Tyldesley contacted the Commissioner to complain that, in its response to requests 0916 and 0918 and their reviews 0931 and 0932, the British Library withheld some documents in their entirety and redacted others. He requested an independent view as to whether it was in each case entitled to do so.
13. As part of the requests included information which was personal data of the requester, the Commissioner identified that they should have been dealt with as subject access requests under the Data Protection Act 1998 ('the DPA'). Upon the Commissioner's request, the British Library reviewed the information to consider disclosure under the DPA and as a result released some further information to the complainant and withheld some information in accordance with the exemptions contained within the DPA. Any information already relayed to Mr Tyldesley as a result of the data protection consideration has not been dealt with in this Decision Notice.
14. The Commissioner's letter of 28 September 2010 provides the final assessment on the information falling within the DPA. The case reference for this is RFA0274063.
15. A separate freedom of information case was created on the 27 September 2010.
16. During the course of the investigation, the Commissioner became aware that the British Library had issued a schedule of documents to the complainant. However, it became apparent that this schedule included information outside the scope of the investigation as it is not all relevant, based on an objective reading of the request. Some of this information was identified by the British Library in its correspondence relating to the Commissioner's data protection assessment and other information has been identified by the Commissioner during the freedom of information investigation. Such information has not been considered and examples include:

C36 – The redactions in this email chain relate to stock level figures and an employees budget responsibility, not to the Tyldesley Diary or Mr Tyldesley.

C128 – This email relates to the delivery of items from the House of Lords, not to the Tyldesley Diary or Mr Tyldesley.

G7 – This is an assignment planning sheet relating to a general audit of all British Library corporate procedures and processes surrounding private

work across the organisation. The audit did not focus on or specifically relate to the Diary or Mr Tyldesley.

17. This Decision Notice covers only the remaining information withheld under the FOIA. For the avoidance of doubt, this consists of third party personal data and all other non-personal data relevant to the requests. For clarity, Annex A contains a schedule of documents considered by the Commissioner in this Decision Notice.
18. The Commissioner appreciates the volume and complexity of the case and the level of engagement shown by the British Library prior to the Commissioner's investigation. The investigation has primarily focused on the position of the British Library as set out in correspondence prior to the commencement of the freedom of information investigation, making further enquiries only where necessary in relation to specific pieces of information or lines of arguments.
19. Due to the volume of documents relevant to this case, the Commissioner is not offering an analysis of each individual document for each exemption applied. With the exception of the section 21 analysis - which relates to one document only, the documents have been categorised with an analysis provided for each category. Annex B lists these categories.
20. In its response to requests 0916 and 0918, the British Library applied section 21 of the FOIA to the internal management report detailing the Library's investigation of the incident involving the Tyldesley Diary as a redacted version of the report was released in response to request 0801. The redactions were made on the basis of the exemptions at sections 36(2)(b) and 36(2)(c), 40(2). The Commissioner has not examined the application of section 21 to the report in this Decision Notice as the redacted information has been assessed in the analysis of the British Library's application of sections 36(2)(b) and 36(2)(c), 40(2).
21. The Commissioner wrote to the British Library on 18 January 2011 setting out the nature of the investigation, requesting further information in relation to request 0801 and posing questions concerning the application of s36 FOIA. At this point the British Library was informed that as the information which constituted the complainant's own personal data had been dealt with as a subject access request under the Data Protection Act 1998 (at the Commissioner's request) and the Commissioner had provided his assessment of the handling of that matter, such information would be outside the scope of this investigation.
22. A response from the British Library was received on 31 January 2011. The British Library provided the information that the Commissioner had requested but stated that it did not believe that the response to request 0801 and its review 0813 should be included in the Commissioners

investigation. The reasons given were that Mr Tyldesley chose not to complain to the Commissioner about that request within a reasonable timeframe and that it falls outside the scope of his current complaint.

23. The Commissioner considered the British Library's submission and acknowledged that Mr Tyldesley did not complain about request 0801 within a reasonable timeframe but concluded that it did not fall outside the scope of the current complaint as the request is for '...any and all material you hold relating to me and/or the Tyldesley Diary....'. Indeed, the Commissioner noted that some of the information within the report has been included as separate documents in the Library's responses to 0916 and 0918. The Commissioner also noted that the British Library had applied section 21 to the report in response to requests 0916 and 0918 stating that the information was reasonably accessible elsewhere. However, as this requested information was not previously supplied, it cannot be said to be reasonably accessible and the Commissioner believes it is now necessary to consider the application of the exemptions applied to that report as an inextricable part of Mr Tyldesley's current complaint.

Analysis

Exemptions

Section 40(2) – personal data

24. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the DPA.
25. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is 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 other person in respect of the individual.”

26. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The Commissioner notes in this case that the British Library argued that disclosure of third party personal data would breach the first data protection principle.
27. The first data protection principle 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.”
28. Each category of information (outlined in Annex B) will now be addressed in turn to decide whether this information is exempt from disclosure under section 40(2) of the FOIA.

Staff administration documents

29. As explained above, the first consideration is whether the withheld information in these documents is personal data. The documents consist of performance management records and associated emails, emails relating to disciplinary meetings and extracts from the report relating to employment history, performance and disciplinary proceedings. As these contain expressions of opinion and indications of intentions in respect of named individuals, the Commissioner is satisfied that this information constitutes personal data.
30. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the British Library has claimed, i.e. would disclosure be unfair and/or unlawful.
31. In deciding whether disclosure of this part of the redacted information would be unfair, the Commissioner has had regard to the reasonable expectations of the data subjects and what the effect of disclosure of the information would be on the data subjects.
32. The British Library has submitted that this personal data is held and processed with a high expectation of confidentiality as part of an employment relationship. The British Library believes that “to release details of these unrelated issues into the public domain would be in breach of the first Principle of the DPA in that: a) it would be an unfair breach of the confidential relationship between employee and employer; and b) no schedule 2 condition can be satisfied in relation to our disclosure of the

personal data in the absence of consent and no legitimate interests would reasonably be served in its release into the public domain given the intrusive nature of disclosure (individual performance management), the Library's duty of confidence to its employees, and the fact that Mr Tyldesley's legitimate interests in the personal data have already been served by means of disclosure under DPA.”

33. The Commissioner recognises that information relating to performance management and internal disciplinary hearings carries a very strong general expectation of privacy due to its sensitive nature and the likelihood that disclosure could cause data subjects significant distress and could also cause permanent damage to their future career prospects and general reputation.
34. With the above in mind, the Commissioner considered whether there appeared to him to be any reason why it would be fair to disclose the withheld information in this case. The Commissioner took into account the fact that the employees concerned did not occupy senior public positions but noted that disclosure of some of the information may enable the public to understand the circumstances surrounding the damage to the diary.
35. The Commissioner also gave weight to the fact that the employee who was the subject of the disciplinary process resigned before any disciplinary proceedings could be pursued. As such, the British Library had not formally determined whether the employee was culpable of any act of misconduct. As a result, the Commissioner considers that the employee has not had the full opportunity to input into this process and therefore to defend himself against any allegations of misconduct. The Commissioner realises that public authorities have a duty to properly regulate the behaviour and actions of their employees. Yet, he feels that disclosing information on the grounds of an incomplete disciplinary investigation would be unreasonable. The Commissioner recognises that such disclosure could jeopardise the trust that an employee may have with their employer that allows a free and frank working relationship; a trust that rests on an employee's expectation that their employer will protect their personal data.
36. Taking all this into account, the Commissioner concluded that it would be unfair to the staff members to release the information as he considers that their right to private, properly conducted disciplinary and performance management processes outweighs the interests of the public in understanding the allegations that were made in respect of the damage to the diary whilst in the care of the British Library. In view of this, disclosure would breach the first principle of the DPA. The Commissioner has therefore decided that the British Library was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).

37. In addition, the Commissioner notes that some of the personal data in these documents is sensitive personal data under section 2(e) of the DPA as it relates to the health of an individual. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental and distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose such information and, as above, has therefore decided that the British Library was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
38. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question or a Schedule 3 condition where the information is sensitive personal data.

Personal email addresses and mobile phone numbers

39. As above, the first consideration is whether the withheld information is personal data. The Commissioner believes that individuals' personal email addresses and mobile phone numbers are personal data as such information relates directly to identifiable individuals.
40. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the British Library has claimed, i.e. would disclosure be unfair and/or unlawful.
41. In deciding whether disclosure of this part of the redacted information would be unfair, the Commissioner has had regard to the reasonable expectations of the data subjects and what the effect of disclosure of the information would be on the data subjects.
42. The Commissioner is of the opinion that the third parties would have had a reasonable expectation that their mobile telephone numbers and personal email addresses would not be disclosed following an information request submitted under the FOIA. Whilst the Commissioner acknowledges that the third parties provided the information whilst they were acting in a professional capacity, he does not accept that this information itself relates to their professional lives. He also believes that the very fact that personal, non-work contact information has been provided strengthens the argument that this information was provided to the British Library in the expectation that it would not be provided to anybody else, and would only be used for a specific purpose.

43. Therefore the Commissioner has formed the view that the disclosure of this information would not be within the 'reasonable expectation' of the individuals concerned.
44. With regard to the effect of disclosing this personal contact information under the FOIA the Commissioner believes that it would be unfair to disclose the personal mobile numbers and email addresses because it would, in effect, allow anybody to contact the third parties at any time of the day regardless of whether the third parties were at work or at home. Therefore, the Commissioner believes that disclosure of the personal contact information could lead to an unfair infringement into the private lives of the third parties in question.
45. In light of the above the Commissioner believes that to disclose the personal contact information to the public at large would breach the fairness element of the first data protection principle and therefore the exemption provided by section 40(2) of the FOIA, by way of section 40(3)(a)(i), is engaged, in respect of this information.
46. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Staff costs and grades

47. In this case, the redacted information is not the actual level of salary or grade range relating to individuals. It is the breakdown of the estimated staff cost to the British Library of the conversation hours spent on the Tyldesley Diary along with the grades of individuals. It should be noted that the total estimated cost has been released in the same document. The cost is broken down into three figures which represent the cost per groups of employees according to stated grades. However, no information is given which would allow a calculation as to the individuals' salaries or salary ranges within a grade to be made, such as individual time spend on conservation. The only withheld information which relates directly to the individuals is their grade.

Staff costs

48. In considering whether the withheld information is personal data, a distinction needs to be drawn between the breakdown of costs and the grades of individuals. The Commissioner does not consider that the breakdown of costs amounts to personal data. All that would be disclosed through the breakdown of costs would be a general idea that the amount of the staff salaries spent on conservation hours for the Tyldesley Diary were allocated to different groups of individuals. No information which would allow the salaries of individuals to be identified would be disclosed.

49. The Commissioner is therefore satisfied that the breakdown of costs is not personal data. As this is the case, the exemption in section 40 of the FOIA cannot be engaged and the information should be disclosed.

Staff grades

50. The Commissioner believes that individuals' salaries and grades are personal data as such information relates to the financial situation of individuals.
51. As the Commissioner is satisfied that individuals' salary grades are personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the British Library has claimed, i.e. would disclosure be unfair and/or unlawful.
52. In deciding whether disclosure of this part of the redacted information would be unfair, the Commissioner has had regard to the reasonable expectations of the data subjects and what the effect of disclosure of the information would be on the data subjects. He has then balanced this against the legitimate interest in disclosure.
53. The Commissioner accepts that employees of public authorities should be open to scrutiny and accountability because their jobs are funded by the public purse. The Commissioner's guidance 'Public sector salaries: how and when to disclose' suggests that salary scales should usually be published as a matter of routine. While this is different from disclosing the salary grade of an individual, it does add to the argument that public sector employees should expect some details relating to their pay to be transparent. Furthermore, the Commissioner has decided in a number of decision notices that senior executives of public authorities should expect that details of their gross salaries would be disclosed under the FOIA. The Commissioner reached these conclusions on the basis that for some time the salaries of senior executives have been included in the financial statements of public authorities. The Commissioner also believes that as people in such senior positions are responsible for policy decisions affecting the public and the expenditure of public funds they should expect a greater degree of scrutiny of their role and accountability over their actions.
54. However, the Commissioner recognises that not all staff should be subject to such a level of scrutiny and draws a distinction between what information should be released about junior staff compared to what information should be disclosed about more senior staff.
55. Although the Commissioner believes that, given the relatively junior role of the majority of the data subjects in this case, they would have had a reasonable expectation that details of their exact salary would not be disclosed, releasing information as to the grade of the individuals should not be outside the reasonable expectations of those individuals.

56. The Commissioner has also considered the effect that disclosing details of the salary grade would have on the data subjects. The Commissioner believes that a clear distinction can be made between effects of disclosure of the salary grade and the disclosure of the data subject's gross salary. The Commissioner believes that the disclosure of the exact salaries would reveal more about the each individual's personal financial situation than the disclosure of the salary grade would. Whilst the Commissioner considers that senior executives of public authorities have to accept the effect that revealing the exact details of their salary would have, he does not accept it would be fair for employees in more junior positions, such as the data subjects in this case, to have their privacy invaded by their disclosure of their gross salaries. Again, as above, a distinction needs to be drawn here between disclosing exact salaries and the salary grade: disclosing the salary grade is far less intrusive in terms of privacy.
57. In addition, the Commissioner asserts that information about pay bands would be provided to potential employees in recruitment exercises and potentially through advertisements highlighting vacancies at the British Library at similar grades or levels. In Decision Notice FS50161274 such information was ordered to be disclosed. This strengthens the argument that disclosure of the salary grades would not be unfair, particularly as the redacted information in this case is limited to the individual's grade rather than the actual pay related to those grades.
58. Having examined the reasonable expectations of the data subjects and what the effect of disclosure of the information would be, the Commissioner now needs to balance this against the legitimate interest in disclosure.
59. The Commissioner asserts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is the legitimate public interest in knowing what grade of staff has carried out conservation work on an item damaged whilst in the care of the British Library and how much public money was spent on repairing the damage. The Commissioner is therefore satisfied that there is a legitimate public interest in disclosure.
60. As the Commissioner believes that disclosure of the individuals' salary grade should not be outside the reasonable expectations of those individuals, and he is not persuaded that there would be any substantial harm or distress to the data subjects from disclosure of the information, and is satisfied that there is a legitimate public interest in disclosure, he has concluded that disclosure would not be unfair. The Commissioner has therefore gone on to consider Schedule 2, condition 6 of the DPA.

61. There are six conditions in Schedule 2 of the DPA, but only Condition 1 (consent) or Condition 6 (legitimate interests) would usually be relevant to disclosures under the FOIA. The Commissioner considers that the relevant condition in Schedule 2 in this particular case is the sixth condition which states that:

“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.”

62. The Commissioner’s awareness guidance on section 40 states that following the former Information Tribunal decision in *Corporate Officer of the House of Commons v Information Commissioner and Leapman, Brooke and Thomas (EA/2007/0060 etc.; 26 February 2008)* public authorities should approach Condition 6 as a three-part test:

1. there must be a legitimate interest in disclosure;
2. the disclosure must be necessary to meet that public interest; and
3. the disclosure must not cause unwarranted harm to the interests of the individual.

63. The Commissioner has already highlighted in paragraph 59 of this Notice that there is a legitimate interest in disclosure of the withheld information.

64. The Commissioner has considered whether disclosure in this case is necessary to meet the legitimate interest and is of the opinion that disclosure is necessary to explain in more detail what public expenditure has been incurred by the British Library in relation to this matter.

65. The Commissioner has already weighed the consequences of disclosure in this case against the legitimate public interest in disclosure in paragraphs 56 to 59 of this Notice. As he is also of the opinion that disclosure is necessary to meet the legitimate public interest he has concluded that condition 6 of Schedule 2 of the DPA is met in this case and has therefore concluded that section 40(2) of the FOIA is not engaged. This information should therefore be disclosed.

Transcripts of investigation interviews

66. As above, the first consideration is whether the withheld information is personal data. The information in question is transcripts of investigation interviews relating to the damage to the Tyldesley Diary; notes of the interviews; comments regarding the validity of the transcripts, and invitations to attend such interviews. The information identifies the staff members by name and details their actions and opinions, as well as the actions and opinions of their colleagues. On this basis the Commissioner is

of the view that the transcripts are the personal data of the interviewees. He also believes that the transcripts contain personal data relating to other individuals who are referred to in the transcripts.

67. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the British Library has claimed, i.e. would disclosure be unfair and/or unlawful.
68. In deciding whether disclosure of this part of the redacted information would be unfair, the Commissioner has had regard to the reasonable expectations of the data subjects and what the effect of disclosure of the information would be on the data subjects.
69. The British Library has submitted that the interviews held with individual members of staff as part of the internal investigation into the incident are primarily the personal data of the interviewee, and that such interviews were carried out with a high expectation of confidentiality within an employment relationship. The British Library also stated that as the members of staff have all left it's employment in the intervening years between the date of the incident and the present day, "to release their details into the public domain in relation to the incident would be unfair and thereby breach the first principle of the DPA, in that: a) it would be an unfair breach of the confidential relationship between employee and employer, and would also create an implied accusation that would be unfair to an employee who had no direct involvement; and b) no schedule 2 condition can be satisfied in relation to the disclosure of the personal data in the absence of consent" and "no legitimate interests would reasonably be served in its release into the public domain given the Library's duty of confidence to its employees, and the fact that Mr Tyldesley's legitimate interests in the personal data have already been served by means of disclosure under DPA." The British Library further added that the members of staff have at various points made representation to the British Library that they would be extremely distressed should they be publicly linked to the Tyldesley Diary incident, given the level of negative public interest and Mr Tyldesley's persistent behaviour in pursuing this matter through the media.
70. The Commissioner considers that it is reasonable for the interviewees to expect that their personal data in these circumstances will be kept confidential and acknowledges that disclosure could cause the data subjects significant distress and potentially damage their future career prospects and general reputation. The Commissioner has also taken into account the mere fact that an investigation interview has taken place might create an implied accusation that would be unfair to interviewees who had no direct involvement in the damage caused to the Tyldesley Diary.

71. In light of the above the Commissioner believes that to disclose the transcripts of investigation interviews to the public at large would breach the fairness element of the first data protection principle and therefore the exemption provided by section 40(2) of the FOIA, by way of section 40(3)(a)(i), is engaged, in respect of this information.
72. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Allegations of impropriety stemming from the wider investigation into the Tyldesley Diary incident

73. In this category, the withheld information is concerned with allegations unconnected to the Tyldesley Diary such as suspicions of the private sale of British Library items by its staff. Although it could appear that information concerning incidents not connected to the Tyldesley Diary is not information of the description specified in the requests, the British Library included such information in its response to Mr Tyldesley as its investigation into the diary incident included the wider consideration of other such allegations. The Commissioner considers that where such information is held within the management report detailing the Library's investigation of the incident involving the Tyldesley Diary (a copy of which was requested under British Library reference 0801), or contained within documents directly related to that report, it is relevant to that request and therefore within the scope of this Decision Notice.
74. As above, the first consideration is whether the withheld information is personal data. The information relates to alleged impropriety of the employee presumed responsible for causing the damage to the Diary. As the information relates to an individual and contains expressions of opinion and indications of intentions in respect of that individual, the Commissioner is satisfied that this constitutes personal data.
75. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the British Library has claimed, i.e. would disclosure be unfair and/or unlawful.
76. In deciding whether disclosure of this part of the redacted information would be unfair, the Commissioner has had regard to the reasonable expectations of the data subjects and what the effect of disclosure of the information would be on the data subjects.
77. The British Library has submitted that during the internal and police investigations suspicions were raised relating to a number of sales, auctions and missing items. These suspicions later proved to have no evidential

basis and the British Library believes that “to release details of these unproven allegations into the public domain would be a breach of the first principle of the Data Protection Act in that a) it would be an unfair breach of the confidential relationship between employee and employer, and would widely and unfairly propagate into the public domain allegations that were found by a police investigation to be without basis; b) no schedule 2 condition can be satisfied in relation to our disclosure of the personal data in the absence of consent from the ex-employee and no legitimate interests would reasonably be served in its release into the public domain given the intrusive nature of such a disclosure, the Library's duty of confidence to its employees, and the fact that Mr Tyldesley's legitimate interests in the personal data have already been served by means of disclosure under DPA; and c) that this personal data is sensitive personal data relating to alleged criminal offences and no schedule 3 condition can be satisfied in relation to our disclosure of the personal data in the absence of consent from this ex-employee.”

78. The Commissioner recognises that information relating to allegations of impropriety carries a very strong general expectation of privacy due to its sensitive nature and the likelihood that disclosure could cause data subjects significant distress and could also cause permanent damage to their future career prospects and general reputation.
79. The Commissioner also gave weight to the fact that the employee who was the subject of the allegations resigned before any disciplinary proceedings in respect of those allegations could be pursued and that the police investigation found the allegations to be without evidential basis. As a result, the Commissioner considers that the employee has not had the full opportunity to defend themselves against the allegations. The Commissioner considers that disclosing this information relating to unproven allegations would be unreasonable as the mere engagement of the disciplinary and police process might carry an implication of wrongdoing regardless of the outcome. In respect of the internal investigation, the Commissioner recognises that such disclosure could jeopardise the trust that an employee may have with their employer that allows a free and frank working relationship, a trust that rests on an employee's expectation that their employer will afford their personal data appropriate protection.
80. The Commissioner considers that it is reasonable for the employee to expect that their personal data in these circumstances will be kept confidential and acknowledges that disclosure could cause the individual significant distress and potentially damage their future career prospects and general reputation.
81. In light of the above the Commissioner believes that to disclose the information relating to allegations of impropriety unconnected to the

Tyldesley Diary to the public at large would breach the fairness element of the first data protection principle and therefore the exemption provided by section 40(2) of the FOIA, by way of section 40(3)(a)(i), is engaged, in respect of this information.

82. In addition, the Commissioner notes that some of the personal data in these documents is sensitive personal data under section 2(g) of the DPA as it relates to the alleged commission of an offence. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is most likely to have a detrimental and distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose such information and, as above, has therefore decided that the British Library was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
83. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 or Schedule 3 condition for processing the information in question.

Identity of the individual presumed responsible for the damage to the Tyldesley Diary and the identities of other individuals involved in the incident

84. As above, the first consideration is whether the withheld information is personal data. The information in question consists of emails, letters to British Library staff and the report detailing the Library's investigation of the incident involving the Tyldesley Diary. The information identifies the individuals by name and, in some cases, details their actions and opinions, as well as the actions and opinions of their colleagues. On this basis the Commissioner is of the view that the information is the personal data of the individual staff members.
85. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the British Library has claimed, i.e. would disclosure be unfair and/or unlawful.
86. In deciding whether disclosure of this part of the redacted information would be unfair, the Commissioner has had regard to the reasonable expectations of the data subjects and what the effect of disclosure of the information would be on the data subjects. He has then balanced this against the legitimate interest of disclosure.
87. In relation to the identity of the individual presumed responsible for the damage to the diary, the British Library has stated that this former employee admitted to police that they had carried out unauthorised conservation work on the Tyldesley Diary in an attempt to cover up damage

to the book, and is also suspected of having caused that initial damage to the Diary through negligence on their part. Although this employee was arrested in conjunction with the incident, no charges were brought, and the employee resigned from the Library before any disciplinary proceedings could be pursued. Mr Tyldesley is aware of the individual's identity due to his involvement with the employee prior to the incident and due to the involvement of the police in the matter. However, the British Library has not officially disclosed the individual's identity. The Library therefore believes that "to release this identity into the public domain in relation to this incident and without consent would be unfair and would thereby breach the first principle of the Data Protection Act, in that: a) it would be an unfair breach of the confidential relationship between employee and employer; b) no schedule 2 condition can be satisfied in relation to our disclosure of the personal data in the absence of consent from this ex-employee and no legitimate interests would reasonably be served in its release into the public domain given the intrusive nature of disclosure (individual performance management & disciplinary proceedings, witness statements, alleged criminal offences, health details), the Library's duty of confidence to its employees, and the fact that Mr Tyldesley's legitimate interests in the personal data have already been served by means of disclosure under DPA; and c) that much of the individual's personal data is sensitive personal data relating to alleged criminal offences and no schedule 3 condition can be satisfied in relation to our disclosure of the personal data in the absence of consent from this ex-employee."

88. The British Library has also submitted that all personal pronouns relating to the identity of the individual presumed responsible for the damage to the diary should be withheld. The reasoning being that the fact that the individual was a Team Manager at the Library's Bloomsbury and House of Lords premises is in the public domain and given the limited number of Team Managers at these sites the Library has judged that the gender of the person suspected of causing the damage should be withheld to prevent deductions being made that would identify the individual by default.
89. In relation to other members of staff involved in the incident, the British Library has submitted that as part of the Library's internal management investigation these members of staff were found to have made errors of judgement that allowed the individual's actions to go undetected for a period of time. Some were criticised for certain management failings that may have contributed to the incident remaining undetected. These members of staff have left the employment of the Library in the intervening years between the date of the incident and the present day. The Library believes that "to release their identities and details into the public domain in relation to the incident would be unfair and thereby breach the first principle of the Data Protection Act, in that: a) it would be an unfair breach of the confidential relationship between employee and employer, and would also create an implied accusation that would be unfair to an employee who

had no direct involvement; and b) no schedule 2 condition can be satisfied in relation to our disclosure of the personal data in the absence of consent from these employees and no legitimate interests would reasonably be served in release into the public domain given the Library's duty of confidence to its employees, the intrusive nature of such a disclosure and the fact that Mr Tyldesley's legitimate interests in the personal data have already been served by means of disclosure under DPA.”

90. The British Library also stated that the staff explicitly named in the body of the text of the documents in question have at all relevant stages been consulted by the Library as it has dealt with Mr Tyldesley's requests for information. Many staff have at various points over the past two years made representation to the Library that they would be extremely distressed should they be publicly linked to the Tyldesley Diary incident, given the level of negative press interest and Mr Tyldesley's persistent behaviour in pursuing this matter through the media. These serious concerns of Library staff members were taken into account in the Library's assessment of whether disclosure of their identities would be fair.
91. In relation to the individual presumed responsible for the damage to the diary, the Commissioner recognises that information relating to the internal and police investigation into the incident carries a very strong general expectation of privacy due to its sensitive nature and the likelihood that disclosure could cause the data subject significant distress and could also cause permanent damage to their future career prospects and general reputation.
92. As stated above under the heading 'Allegations of impropriety stemming from the wider investigation into the Tyldesley Diary incident', the Commissioner also gave weight to the fact that the employee who was the subject of the allegations resigned before any disciplinary proceedings in respect of those allegations could be pursued and that the police investigation found the allegations to be without evidential basis. As such, neither the British Library nor the police had formally determined whether the employee was culpable of any acts of impropriety. As a result, the Commissioner considers that the employee has not had the full opportunity to defend themselves against the allegations. The Commissioner feels that disclosing information relating to unproven allegations would be unreasonable. In respect of the internal investigation, the Commissioner recognises that such disclosure could jeopardise the trust that an employee may have with their employer that allows a free and frank working relationship; a trust that rests on an employee's expectation that their employer will afford their personal data appropriate protection.
93. The Commissioner considers that it is reasonable for the individual to expect that their personal data in these circumstances will be kept confidential and acknowledges that disclosure could cause the individual

significant distress and permanent damage to their future career prospects and general reputation.

94. Whilst the Commissioner considers that there may be a legitimate public interest in knowing that an incident has occurred and that the British Library has invested resources into both investigating the incident and repairing the damage, the strong arguments in relation to the reasonable expectations of the data subjects and the effect of disclosure of the information on the data subjects, coupled with the fact that the individual was not a senior public official, outweigh the need to disclose to the public at large the identity of the individual presumed to be responsible for the damage to the diary.
95. The Commissioner has also considered the fact that Mr Tyldesley is aware of the individual's identity but this identity is not known to the public at large. The Commissioner is aware that Mr Tyldesley has referred to the individual on his website. However, the individual is not identified by name; only referred to as 'P'. The Commissioner welcomes the fact that Mr Tyldesley has refrained from naming the individual.
96. The Commissioner notes that the British Library has asserted that Mr Tyldesley's legitimate interests have been served by disclosure under the DPA. However, a distinction needs to be drawn between the legitimate interests of Mr Tyldesley and the legitimate public interest. Mr Tyldesley's interest is a personal one which cannot be taken into account when considering disclosure to the public at large.
97. In relation to the other members of staff involved in the incident, the Commissioner recognises that information relating to an internal investigation into the incident carries a very strong general expectation of privacy due to its sensitive nature and that it is reasonable for the employees to expect that their personal data in these circumstances will be kept confidential. He acknowledges the likelihood that disclosure could cause the data subjects significant distress and could also potentially damage their future career prospects and general reputation. The Commissioner believes this is especially relevant where an employee has had no direct involvement because it would, as the British Library have stated, create an unfair implied accusation.
98. The Commissioner also gave weight to the fact that such disclosure could jeopardise the trust that an employee may have in their employer that allows a free and frank working relationship, a trust that rests on an employee's expectation that their employer will afford their personal data appropriate protection.
99. As above, whilst the Commissioner considers that there may be a legitimate public interest in knowing that the incident has occurred and

that the British Library has invested resources into both investigating the incident and repairing the damage, the strong arguments in relation to the reasonable expectations of the data subjects and the effect of disclosure of the information on the data subjects outweigh the need to disclose to the public at large the identity of the individuals involved.

100. In light of the above the Commissioner believes that to disclose the identity of the individual presumed responsible for the damage to the Tyldesley Diary and the identities of other individuals involved in the incident to the public at large would breach the fairness element of the first data protection principle and therefore the exemption provided by section 40(2) of the FOIA, by way of section 40(3)(a)(i), is engaged, in respect of this information.
101. In addition, the Commissioner notes that some of the personal data in these documents is sensitive personal data under section 2(g) of the DPA, as it relates to the alleged commission of an offence. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is most likely to have a detrimental and distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose such information and, as above, has therefore decided that the British Library was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
102. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question, or a schedule 3 condition where the information is sensitive personal data.

Section 36 – Prejudice to the effective conduct of public affairs

103. Section 36 states that information is exempt from disclosure where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. The relevant provisions of section 36 are reproduced in the legal annex attached to this notice. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
104. Section 36(2)(b) provides an exemption where disclosure would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation. Section

36(2)(c) provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

105. In this case the British Library has relied upon both section 36(2)(b)(i) and 36(2)(b)(ii) in respect of information concerning the relationship between the British Library and the House of Lords relating to the provision of various library and conservation activities. It has also relied upon section 36(2)(c) in relation to two categories of information: first, information relating to the basis on which the British Library may choose to offer compensation to Mr Tyldesley and how such compensation might be calculated; second, information about the functioning of the library's Preservation & Conservation Management System ('PCMS') and associated security systems (these categories are detailed in Annex B).

Is the exemption engaged?

106. In order to establish whether the exemption has been applied correctly the Commissioner has:

- Ascertained who is the qualified person or persons for public authority in question;
- Established that an opinion was given;
- Ascertained when the opinion was given; and
- Considered whether the opinion given was reasonable.

107. With regard to the first two criteria, the Commissioner has established that reasonable opinions were given by Colin Lucas who was the Chairman of the British Library Board at the time of the requests. The Commissioner is satisfied that Mr Lucas was a qualified person for the purposes of section 36(5) of the FOIA.

108. In relation to the third criterion, the British Library has provided dates of when the opinions were sought and given and the Commissioner is satisfied that the opinions were provided after the receipt of the requests and before the responses to the internal reviews for all cases.

109. With regard to the fourth criterion, in deciding whether the opinion was 'reasonable' the Commissioner has been guided by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹ in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that 'in order to satisfy the sub-section the opinion must be both reasonable in substance

¹ Appeal numbers EA/2006/0011 & EA/2006/0013

and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable in substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (paragraph 60).

110. The Commissioner has also been guided by the Tribunal's indication that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.
111. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*² confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*³ commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).
112. In order to assess whether the opinions provided by the qualified person were reasonably arrived at, the Commissioner asked the British Library for details of what information was provided to the qualified person for him to consider when giving his opinion.
113. In response to this the British Library provided the Commissioner with a copy of the submissions provided to the qualified person. Each of these contained arguments supporting a recommendation that the exemption was engaged along with public interest arguments in support of withholding the information as well as contrary public interest arguments in support of disclosure of the information. The Commissioner notes that prior to giving his opinion on the 2008 request, the qualified person was fully appraised of the wider situation given the high profile nature of the incident in question and that before providing his opinion on the 2009 requests, he was given an oral briefing by the Records Manager and Board Secretary, had access

² Appeal number EA/2005/0005

³ Appeal numbers EA/2005/0026 & 0030

to a full copy of the management report and, due to the sheer volume of documents, a representative sample of the information requiring exemption. Given the above the Commissioner has concluded that the opinions were reasonably arrived at.

114. The Commissioner then considered whether the opinions were reasonable in substance. Neither the qualified person nor the public authority has explicitly stated whether disclosure would or would be likely to result in the prejudice outlined above. In light of this the Commissioner believes it is appropriate to apply the lesser test, namely that the exemption will apply if disclosure would be likely to cause the prejudice in section 36(2) of the FOIA. This approach has found support in the Information Tribunal when it stated:

"We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level."⁴

115. In respect of information concerning the relationship between the British Library and the House of Lords regarding the provision of various library and conservation activities, the British Library has explained that some was withheld from release due to sensitivities arising from the fact that, at the time of Mr Tyldesley's requests, the mutually beneficial business relationship between the two parties was under review. At the time, the House of Lords also expressed concerns about information relating to the structure of its business relationship with the Library being disclosed. Moreover, it had been established during the investigation that the incident was an internal British Library matter, the House of Lords' involvement being only peripheral. Given these concerns the disclosure of certain details about the Library's working relationship with the House of Lords would have inhibited the free and frank provision of advice and/or exchange of views for the purpose of the ongoing deliberation, resulting in discussions and decisions that would have been less robust and candid than necessary, to the detriment of the two bodies. The Commissioner believes that these suppositions are objectively reasonable and therefore reasonable in substance.

116. The qualified person's opinion was also given in respect of information relating to the basis on which the British Library may choose to offer

⁴ McIntyre v Information Commissioner & the Ministry of Defence [EA/2007/0068], para. 45.

compensation to Mr Tyldesley and how such compensation might be calculated. The British Library has submitted that during the course of the investigation into the incident involving the Tyldesley Diary, various discussions were held internally about the basis on which it might accept liability and/or choose to offer compensation. The disclosure of this information would be likely to prejudice the British Library's negotiating position on matters of compensation generally and could give rise to an increase in (potentially spurious) claims thereby resulting in a less effective use of public money. The British Library also explained that the matter was not yet settled and Mr Tyldesley retains his right to take civil action against it. Disclosure would prejudice the Library's position in relation to future negotiations relating to compensation for this specific incident. As above, the Commissioner believes that these suppositions are objectively reasonable and therefore reasonable in substance.

117. Finally, in relation to information about the functioning of the PCMS and associated security systems, the British Library explained that during the course of the investigation into the incident involving the Tyldesley Diary, information about the functioning of these security systems was reviewed. Some of the documents relating to the incident highlight potential security gaps in the Library's systems, and also provide details about other security matters such as passwords and the locations of storage safes. The British Library believes that disclosure of these details would severely prejudice its ability to guarantee the security of its collections in the future, to the detriment of the public interest in the British Library carrying out its role as the custodian of the nation's written heritage. Again, as with the other two categories above, the Commissioner believes that these suppositions are objectively reasonable and therefore reasonable in substance.

118. On the basis of the above, the Commissioner is satisfied that the section 36 exemption is engaged.

Public interest test under section 36

119. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC*⁵ indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

"The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the

⁵ Appeal nos EA/2006/0011 & EA/2006/0013

exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice." (Paragraph 88)

120. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, in the Commissioner's opinion this means that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

121. In respect of information concerning the relationship between the British Library and the House of Lords regarding the provision of various library and conservation activities, the British Library asserted that there is a strong public interest in holding public authorities accountable for their actions and a strong argument that scrutiny of those actions drives up standards. It also said that there is a public interest in information being released which would inform the public about relations between public bodies.

122. In respect of information relating to the basis on which the British Library may choose to offer compensation to Mr Tyldesley and how such compensation might be calculated, again, the British Library asserted that there is strong public interest in holding public authorities accountable for their actions and a strong argument that scrutiny of those actions drives up standards. It also stated that there is general public interest in accountability for use of public funds. In addition, the British Library has acknowledged that as it is unlikely that a very similar case would arise again, the methodology of the decision making is likely to be of reduced value to any future potential claimant.

123. With regard to information about the functioning of the PCMS and associated security systems, the British Library has again asserted that there is strong public interest in holding public authorities accountable for their actions and a strong argument that scrutiny of those actions drives up standards.

124. The Commissioner agrees with the British Library's arguments in favour of disclosing the information and is also of the opinion that openness, in itself, is to be regarded as in the public interest.

Public interest arguments in favour of maintaining the exemption

125. In relation to information concerning the relationship between the British Library and the House of Lords in respect of the provision of various library and conservation activities, the British Library has stated that in this case disclosure of information, which would make public internal thinking processes about an ongoing working relationship, would be detrimental to the work carried out between the two bodies, as it would lead to discussions and decisions which are less robust and candid than is necessary for the proper performance of the ongoing work in question.

126. The British Library also stated that disclosure at that time would have compromised ongoing negotiations between the two parties by making public internal thinking about the review and development of a working arrangement. In the Commissioner's opinion, this argument can be extended to a detrimental effect on future engagement with third parties.

127. In respect of information relating to the basis on which the British Library may choose to offer compensation to Mr Tyldesley, and how such compensation might be calculated, the public authority has stated that there is a public interest in protecting the financial interests of the public sector and that release of this information would cause prejudice to the British Library's negotiating position. The negotiating position could be adversely affected in two ways: first, on when to offer compensation which could give rise to an increase in (spurious) claims and second, with regard to the calculation of compensation. Both could result in the less effective use of public money in future cases.

128. With regard to information about the functioning of the PCMS and associated security systems, the British Library has stated that disclosure of how security processes function with regard to collection items would be likely to prejudice its ability to guarantee the security of its collections in the future, to the detriment of the public interest in the British Library carrying out its role as the custodian of the nation's written heritage.

129. The Commissioner finds that the British Library's arguments in favour of maintaining the exemption are valid.

Balance of the public interest arguments

130. Where, as with this case, a qualified exemption is engaged the information must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

131. The British Library has, in all cases where section 36(2) has been applied, stated that the public interest in maintaining the exemption outweighs the public interest in disclosing the information but have not provided details of any balancing exercise.
132. Having seen the withheld information, the Commissioner will consider where the balance of the public interest lies.
133. In relation to information concerning the relationship between the British Library and the House of Lords in respect of the provision of various library and conservation activities, the British Library has considered whether the length of time which has elapsed since the events which gave rise to the information altered the consideration of the public interest test. It has stated that although the working relationship is no longer under review, which has reduced the balance of interest in favour of maintaining the exemption, the Library continues to believe that it is in the public interest not to release details that may compromise its ongoing business arrangement with the House of Lords.
134. The Commissioner has given weight to the argument that disclosure of the information would lead to less candid discussions, and less robust decisions, than is necessary for the proper performance of the ongoing work. The Commissioner acknowledges that disclosure of views relating to a high profile incident may dissuade staff from being frank in the future, which, as in this case, could damage existing working relationships.
135. The Commissioner has also given weight to the argument that disclosure of the information would be detrimental to the work of both the British Library and the House of Lords and that this detriment could be extensive and severe in respect of the ongoing and mutually beneficial working relationship. The Commissioner considers that the public interest in maintaining the business relationship outweighs the general arguments, concerning accountability and transparency in relations between public bodies, in favour of disclosing the requested information.
136. In respect of information relating to the basis on which the British Library may choose to offer compensation to Mr Tyldesley, and how such compensation might be calculated, the Commissioner recognises the public interest in protecting the financial interests of the public sector.
137. However, in this particular case, the Commissioner has not placed significant weight on the British Library's argument that release of the withheld information would cause prejudice to its negotiating position. Having examined the withheld information, the Commissioner is of the opinion that it does not contain any specifics which would be likely to prejudice the British Library's negotiating position in relation to this individual incident or potential future cases. Any future compensation case

would be negotiated on an individual basis and, as the British Library has itself acknowledged, the circumstances of this specific incident are unlikely to arise again. The Commissioner recognises that some of the information is generic advice from the National Audit Office relating to offering compensation and quotes a publically available document, 'Managing Public Money', published by HM Treasury. The Commissioner does not accept there is any significant public interest in maintaining the exemption in relation to such information.

138. The Commissioner has given greater weight to the argument that there is a public interest in accountability for the use of public funds. He considers that a public authority should be accountable for compensation expenditure to ensure that individuals do not receive an unreasonable amount of compensation from the public purse. In this case, the Commissioner believes that accountability for the use of public funds in compensation payments outweighs the argument that release of this information could lead to an increase in claims. The incident giving rise to the claim in this case was an isolated incident. The services provided by the British Library would not generally give rise to compensation claims. Therefore any prejudice in this respect would not be frequent or extensive.
139. The Commissioner considers that the combination of the public interest in accountability for the use of public funds and the public interest in holding public authorities accountable, thus driving up standards, outweighs the public interest in protecting the financial interests of the public sector by maintaining the exemption. He considers that the balance of the public interest in respect of this category of information lies in disclosure.
140. In respect of information about the functioning of the PCMS and associated security systems, the Commissioner acknowledges the general public interest arguments that disclosure would facilitate public authorities' accountability and drive up standards but considers that this is outweighed by the argument relating to the maintenance of the British Library's role as custodian of the nation's written heritage. Whilst the Commissioner recognises the merit in holding public authorities accountable, he accepts that the prejudice in this instance could be severe and he has placed greater weight on ensuring the security of the Library's collections for future generations.

Conclusion on the public interest test

141. The Commissioner has considered the public interest arguments taking into account the severity, frequency and extent of the likely prejudice in each instance. He has given due weight to the opinion of the qualified person. He has concluded that in the circumstances of this case the public interest in maintaining the exemptions outweighs the public interest in disclosure in respect of information concerning the relationship between the British

Library and the House of Lords regarding the provision of various library and conservation activities and in respect of information about the functioning of the PCMS and associated security systems.

142. In respect of the information relating to the basis on which the British Library may choose to offer compensation to Mr Tyldesley, and how such compensation might be calculated, the Commissioner has concluded that public interest in maintaining the exemption is not outweighed by the public interest in disclosing the information. The specific documents are referenced in Annex C.

Section 21 – Information accessible to applicant by other means

143. Section 21 of the FOIA provides that a public authority does not need to provide information under section 1 of the FOIA if that information is reasonably accessible to the applicant by other means. This is an absolute exemption so not subject to the public interest test under section 2. The full text of the section can be found in the Legal Annex at the end of this Decision Notice.

144. The British Library applied this exemption to a press statement relating to the Tyldesley Diary. It informed the complainant of this via the schedule of documents included in its response to request 0918 and provided a web link to the information.

145. The Commissioner accepts that information is reasonably accessible where a public authority is able to precisely direct the applicant to the information and it can be found without difficulty and not hidden within a mass of other information.

146. As the complainant was provided with a web link direct to the press statement, the Commissioner is satisfied that section 21(1) of the FOIA is engaged.

Procedural Requirements

147. The Commissioner considers that the British Library should have disclosed some of the withheld information because it is not exempt under sections 36(2)(c) and 40(2). This means that the public authority breached sections 1(1)(b) and 10(1) for the failure to disclose this information within 20 working days or by the date of its internal review.

The Decision

148. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the FOIA:

- The British Library correctly determined that information was exempt from disclosure under the following sections:
 - Section 21
 - Section 36(2)(b)(i)
 - Section 36(2)(b)(ii)
 - Section 36(2)(c) in respect of information concerning the relationship between the British Library and the House of Lords relating to the provision of various library and conservation activities, and information about the functioning of the library's Preservation & Conservation Management System and associated security systems.
 - Section 40(2) in respect of staff administration documents, personal email addresses and mobile phone numbers, transcripts of investigation interviews, allegations of impropriety stemming from the wider investigation into the Tyldesley Diary incident, and the identity of the individual presumed responsible for the damage to the Tyldesley Diary and the identities of other individuals involved in the incident.

149. However, the Commissioner has decided that the following elements of the request were not dealt with in accordance with the FOIA:

- The British Council incorrectly withheld the documents under the following sections:
 - Section 36(2)(c) in respect of information relating to the basis on which the British Library may choose to offer compensation to Mr Tyldesley and how such compensation might be calculated.
 - Section 40(2) in respect of staff costs and grades.
- It therefore breached section 1(1)(b) for failing to provide information that the Commissioner has concluded should have been released, and section 10(1) for failing to provide the information requested within 20 working days of the request or by the time of the internal review.

Steps Required

150. The Commissioner requires the public authority to take the following steps to ensure compliance with the FOIA:

- Disclose to the complainant the documents listed in Annex C

151. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

152. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

154. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

155. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 26th day of September 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled

–

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 2(3) provides that –

“For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) section 21

(b) section 23

(c) section 32

(d) section 34

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords

(f) in section 40 –

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(g) section 41, and

(h) section 44”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

Prejudice to effective conduct of public affairs

Section 36(1) provides that –

- “(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.”

Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

Personal information.

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (c) it constitutes personal data which do not fall within subsection (1), and
- (d) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Annex A – Documents considered by the Commissioner in this Decision Notice.

Request ref.	File ref.	Request ref.	File ref.	Request ref.	File ref.	Request ref.	File ref.
0916	A1	0918	D5	0932	AG28	0801 Report	Whole Report
	B80		D46		AG29		
	B100		D47		AG30		
	B103		D48		AG31		
	B107		D59		AG32		
	B110		D60		AG33		
	B115		D61		HS29		
	B119		D62		HS68		
	B138		E3		MC10		
	B139		F17		MC3		
	B140		G1		MC6		
	B179		G19		MC7		
	B200		G21		MC8		
	B256		G24		VH1		
	B279		G26				
	B280		H24				
	B281		H25				
	B282		H28				
	C35						
	C37						
	C38						
	C40						
	C43						
	C49						
	C56						
	C62						
	C111						
	C127						
	C141						
	C158						
	C171						
	C185						
	G11						
	G17						
	G18						
	G21						
	G37						
	G38						
	G41						
	G42						
	G46						
	G47						
	G48						
	G65						
	H13						
H35							

Annex B – Categories of Information

Section 40:

- Staff administration documents
- Personal email addresses and mobile phone numbers
- Staff costs and grades
- Transcripts of investigation interviews
- Allegations of impropriety stemming from the wider investigation into the Tyldesley Diary incident
- Identity of the individual presumed responsible for the damage to the Tyldesley Diary and the identities of other individuals involved in the incident

Section 36:

- Information concerning the relationship between the British Library and the House of Lords relating to the provision of various library and conservation activities
- Information relating to the basis on which the British Library may choose to offer compensation to Mr Tyldesley and how such compensation might be calculated
- Information about the functioning of the library's Preservation & Conservation Management System and associated security systems

Annex C – Documents to be disclosed

Section 40:

Request reference 0916

- B279
- B280
- B281
- B282

NB – the above documents are different versions of an email chain but contain the same information to be disclosed.

Section 36:

Request reference 0916

- B138
- B139
- B140
- B200
- B256 (retain redactions of mobile numbers)

Request reference 0918

- E3

Request reference 0801

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