

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 2018

Public Authority: Heritage Lottery Fund

Address: Holbein Place

London

SW1W 8NR

Decision (including any steps ordered)

1. The complainant requested information from the Heritage Lottery Fund (HLF) about a grant it had awarded Southampton University to assist it in acquiring the Broadlands Archive. The HLF provided the complainant with some information falling within the scope of his request but sought to withhold further information on the basis of the following sections of FOIA: section 40(2) (personal data), section 41(1) (information provided in confidence), section 43(2) (commercial interests) and 44(1)(a) (statutory prohibition). The complainant sought to challenge the HLF's reliance on these exemptions and also argued that it was likely to hold further information falling within the scope of some of these requests. The Commissioner has concluded that only some of the information which the HLF has withheld is exempt from disclosure on the sections 40(2), 41(1) and 44(1)(a) of FOIA; the remainder of the information which it sought to withhold is not exempt from disclosure and this information must be disclosed. However, the Commissioner has concluded that on the balance of probabilities the HLF does not hold any further information falling within the scope of the disputed requests.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information which the Commissioner has identified in the confidential annex. (A copy of the confidential annex has been provided to the HLF).
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. In 2011 Southampton University (the University) purchased the Broadlands Archive (the Archive) from the Trustees of the Broadland Archive (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.
5. In order to fund the purchase the University relied, in part, on a grant from the National Heritage Memorial Fund (NHMF) for the sum of £1.9m. The sale was also subject to the 'acceptance in lieu' (AiL) scheme under which art works and archives are accepted by the nation in lieu of inheritance tax. As a result, a Ministerial Direction (the Direction) was issued under the National Heritage Act 1980 setting out the terms of the acquisition.

Request and response

6. The complainant submitted the following request to HLF on 30 May 2017:

'I am making a FOI request for all details and correspondence concerning the 2011 purchase by Southampton University of the Mountbatten papers including the terms of the Ministerial Direction made on 5th August 2011. I would like to know the sums paid for the papers, where those sums came from, the conditions for access, reasons for any restrictions and under which provision of the 1980 Act the 'ministerial direction' was made'.

7. The HLF responded on 14 July 2017. It provided with him with some details of the grant awarded by the trustees of the NHMF to the University and disclosed the following documents to him:

1. Broadlands Archive – Application Form
2. Broadlands Archive – Board paper
3. Broadlands Archive – Grant award letter
4. Broadlands Archive – Contract between NHMF and Southampton University
5. Broadlands Archive – Ministerial Direction

8. In disclosing these documents, the HLF explained that certain information had been redacted on the basis of sections 40(2) (personal data) and 43(2) (commercial interests) of FOIA.
9. During the period of July and November 2017 the complainant exchanged a number of emails with the HLF in which he asked it to respond to further questions regarding the awarding of the grant. As part of his complaint to the Commissioner, the complainant has explained that he was dissatisfied with the HLF's response to the last iteration of these questions which he submitted on 9 November 2017. These questions were as follows:
 1. So how were 'the NHMF Trustees made aware at the point of application' of the role to be played by Cabinet Office?
 2. Did the NHMF or HLF inform the Arts Council of this role?
 3. Was the NHMF or HLF aware prior to the awarding of the grant to the University that as early as 2009 the Cabinet Office had been 'reviewing' materials within the Mountbatten Archive already on deposit at the University (that is, materials owned by the Broadlands Trustees) that were not, in fact, open to public inspection?

[4] Did NHMF liaise with the Cabinet Office at any time? After all, the Direction was not signed by a minister or official of the Cabinet Office, Treasury, or Culture but by a NHMF/HLF/Arts Council employee.
10. In response, the HLF explained to the complainant that it did not hold any recorded information falling within the scope of these further questions beyond the information previously provided to him.
11. In addition to the complainant's exchange of correspondence with the HLF regarding his follow up questions, the HLF completed an internal review into the application of the various exemptions cited in the refusal notice. The review, dated 27 October 2017, upheld the application of section 43(2) and largely upheld the application of section 40(2) but explained that the information redacted from the Direction was not exempt under that exemption but instead was exempt under section 44(1) (prohibition on disclosure) of FOIA.
12. Furthermore, in response to one of the complainant's follow up questions, the HLF informed him on 6 October 2017 that it held a copy of the agreement between the Trustees of the Archive and the University but it was seeking to withhold this information on the basis of section 41(1) (information provided in confidence) of FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 23 November 2017 in order to complain about the HLF's handling of his request.
14. The complainant raised the following points of complaint with the Commissioner:
 - He disputed the HLF's decision to redact parts of the five documents disclosed to him on 14 July 2017 on the basis of the exemptions contained at sections 40(2), 43(2) and 44(1) of FOIA.
 - He disputed the HLF's decision to withhold a copy of the agreement between the Archives and the University on the basis of the section 41(1) of FOIA.
 - He did not accept the HLF's position that it did not hold any recorded information falling within the scope of the further four questions he submitted to it on 9 November 2017.
15. During the course of the Commissioner's investigation, the HLF explained it also considered section 41(1) to apply to certain redactions made to the version of the board paper and application form. It also argued that any valuation of the archives, other than the overall purchase price and the amount awarded by the HLF, would be exempt from disclosure under section 44(1) of FOIA.
16. In order to clarify the HLF's position the Commissioner has created a schedule of information falling within the scope of the request which identifies each redaction and the exemptions which the HLF are relying on to withhold each piece of redacted information. This schedule is attached as an annex to this notice and also confirms the Commissioner's findings in relation to each particular redaction. The Commissioner has also provided the HLF with further version of this schedule in the form of a confidential annex which sets out in detail her findings in respect of the various redactions. This version has only been provided to the HLF because it includes direct reference to the content of the withheld information itself.

Reasons for decision

Section 40(2) – personal data

17. 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).¹
18. 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.'
19. The HLF redacted a variety of information from the documents disclosed to the complainant on the basis of section 40(2) of FOIA. In its responses to the complainant the HLF categorised this information as names of the Trustees of the Archive, bank details, individual contact details and information that is personally sensitive to an individual.
20. It should be noted that the complainant suggested that merely because information identifies a particular individual, such information would not necessarily therefore fall within the definition of personal data.
21. The Commissioner has of course had the benefit of examining all of the redacted information alongside a commentary from HLF which refers to the content of the redacted material in order to clarify why it considered this to be personal data.
22. Having examined these various redactions, and the HLF's submissions, the Commissioner is satisfied that some, albeit not all, of the information redacted on the basis of section 40(2) constitutes personal data. These latter redactions cannot therefore be exempt from disclosure on the basis of section 40(2) of FOIA.

¹ 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.

23. With regard to the information redacted on the basis of section 40(2) of which the Commissioner *does* accept is personal data, the HLF argued that disclosure of the information it had redacted would breach the first data protection principle. 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.'

24. The relevant condition in this case is the sixth condition in schedule 2 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'.

25. 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?
26. 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.
27. 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.
28. The HLF's submissions to support its position that the first principle of the DPA would be breached were as follows: It explained that it was of the view that it was able to process the information internally fairly and lawfully as the processing was necessary for the purposes of the legitimate interests pursued by it. However, it explained that it did not have the consent to process this data and release of it to the general public would mean that the data had not been handled fairly and lawfully, thus breaching the DPA. The Commissioner notes that in its correspondence with the complainant, the HLF explained that the names of the Trustees of the Archive were not publicly known hence its decision to redact them from the documents that had been disclosed.
29. The complainant argued that there was an overwhelming legitimate interest in the disclosure of the information which would ensure that disclosure would not breach the DPA, eg the sixth condition in schedule 2. He argued that such an interest stemmed from the need for the public to properly understand exactly what is being withheld from the public in respect of this Archive, and on what grounds, despite the substantial expenditure of public money to allow the University to acquire the Archive.
30. In terms of the HLF's submissions, the Commissioner would emphasise that simply because a data subject has not consented to the disclosure of their personal data this does not automatically mean that provision of such information in response to a FOI request would breach the first principle of the DPA. Whilst the absence of consent is likely to provide a clear indication of the individual's expectations as to what would happen

to their data, it is not determinative in respect of whether disclosure would definitely constitute a breach of the DPA.

31. Given the range of information which has been redacted from the documents in question it is difficult for the Commissioner to easily summarise her decision in relation to the HLF's application of section 40(2). The confidential annex includes details of the Commissioner's findings in respect of each individual redaction because in order to explain her position she has to make reference to the content of the withheld information.
32. However, the redacted information broadly falls into two categories: firstly, information about third parties and secondly, information about the Trustees of the Archive. There is also a very small amount of information about the officers at the HLF.
33. In terms of the first category of information the Commissioner is satisfied that the various third party valuers who are named in the redaction would have a legitimate expectation that their names and contact details would not be disclosed under FOIA, albeit that the level of intrusion into their private lives would arguably be minimal given that their opinions were given in a professional context. The Commissioner also considers that there is a limited benefit in their names being disclosed; it is the HLF which is the body responsible for the decision to offer the grant on the terms that it did not the individual valuers named in the report. For similar reasons the Commissioner accepts that the name of the agent representing the Trustees is also exempt.
34. In terms of the Trustees, the Commissioner acknowledges HLF's point that their names are not in the public domain and also accepts that they are private family members. The Commissioner therefore accepts that the individuals in question would have a reasonable expectation that their names would not be disclosed under FOIA and that disclosure of such would result in an infringement into their private family arrangements. The Commissioner agrees with the complainant that there are clearly legitimate interests in the disclosure of the redacted information for the reasons he has identified. However, the Commissioner is not persuaded that disclosure of the trustees' names would add anything of significance to the public's understanding of the terms and conditions of the sale. Such information is therefore exempt from disclosure on the basis of section 40(2).
35. The Commissioner has also concluded that a small portion of the redacted information relates to the affairs of a private family and that disclosure of this information would result in an invasion of privacy. Again, despite, despite the high profile nature of the sale, and the value of HLF's grant, the Commissioner is not persuaded that there is a

particular legitimate interest in the disclosure of this particular portion of information.

36. However, the HLF has redacted various parts of the documents which detail certain aspects of the sale on the basis that disclosure of it would infringe the privacy of the trustees. In the Commissioner's view the majority of this information is already in the public domain. Therefore in her view, disclosure of this information would not infringe the privacy of the trustees and thus it is not sustainable to argue that disclosure of this information would be unfair. Moreover, the Commissioner is satisfied that the sixth condition of schedule 2 of the DPA is met given the need for transparency in relation to this sale.
37. Finally, in terms of the names and contact details of HLF officers, the Commissioner acknowledges that it is accepted custom and practice for public authorities to redact the names of junior staff from any disclosures under FOIA and in light of this disclosure of this category of information would breach their reasonable expectations and thus breach the first data protection principle. Such information is therefore exempt from disclosure on the basis of section 40(2) of FOIA.

Section 44 – prohibition on disclosure

38. Section 44(1) of the 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,
 - (b) is incompatible with any Community obligation, or
 - (c) would constitute or be punishable as a contempt of court.
39. This is commonly known as a statutory bar to disclosure.
40. It is an absolute exemption, which means that if information is covered by any of the subsections in section 44 it is exempt from disclosure. It is not subject to a public interest test.
41. The HLF argued that certain parts of the withheld information, namely the valuation details of the Archives (other than the overall purchase price and the amount awarded by the HLF), certain redactions made to the Direction and the redaction at C11 of the application form were exempt from disclosure on the basis of section 44(1)(a).
42. In support of this position it argued that there were two provisions within legislation which prohibited disclosure of this information, firstly section 182(1) of the Finance Act 1989 (FA) and section 18 of the Commissioners for Revenue and Customs Act (CRCA) 2005.

43. The Commissioner initially consider the HLF's reliance on section 182(1) of the FA. This states that:

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

44. Section 182(2) explains that:

*'In this section "tax functions" means functions relating to tax or duty—
(a) of the Commissioners, the Board and their officers,
(b) of any person carrying out the administrative work of any tribunal mentioned in subsection (3) below, and
(c) of any other person providing, or employed in the provision of, services to any person mentioned in paragraph (a) or (b) above.'*

45. In support of its reliance on section 182(1) of the FA, the HLF explained that the material it had redacted on the basis of section 44(1) of FOIA related to the AiL process under the National Heritage Act 1980.
46. Details of the AiL scheme itself are set out in section 230 of the Inheritance Tax Act 1984. This provides that the Commissioners of HMRC, if they think fit, and the Secretary of State agrees, on the application of any person liable to pay tax, accept in satisfaction of the whole or any part of it any picture, print, book, manuscript, work of art, scientific object or other thing which the Secretary of State is satisfied is pre-eminent for its national, scientific, historic or artistic interest.
47. The AiL scheme therefore enables taxpayers who are liable for the payment of an existing inheritance tax bill to offer and (if accepted by HMRC) transfer works of art and important heritage objects into public ownership.
48. In the circumstances of this case, the Mountbatten papers which formed part of the Archive, were subject to AiL. The HLF explained that the Arts Council, which administers the scheme, were acting on behalf of HMRC in relation to the assessment of the value of the Archive for the purpose of calculating any tax.²

² It directed the Commissioner to page 224 of this document in support of this point [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/659028/Capital Taxation National Heritage.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/659028/Capital_Taxation_National_Heritage.pdf)

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

55. However, the Commissioner does not consider that any of the above criteria apply in the circumstances of this request. Therefore, in the Commissioner's view the information redacted on the basis of section 44(1)(a) is covered by the prohibition on disclosure provided by section 182(1) of the FA.
56. In light of this the Commissioner has not considered whether section 18 of the CRCA also applies to the information which the HLF has withheld on the basis of section 44(1)(a).

Section 41 – information provided in confidence

57. Section 41 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.'

58. 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.
59. 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:
- Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
60. 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.

HLF's position

61. As noted above, in its responses to the complainant the HLF withheld the copy of the agreement between the Trustees of the Archive and the University in its entirety on the basis of section 41(1) of FOIA.
62. During the course of the Commissioner's investigation the HLF also argued that section 41(1) applied to the information which it had withheld on the basis of section 43(2) of FOIA. This information consisted of material redacted from the application form and board paper. The HLF's rationale for this position being that the material redacted from the application form and board paper on the basis of the section 43(2) referred directly to the content of the agreement between the Broadlands Archives and the University which, as noted above, it withheld on the basis of section 41(1) of FOIA.

Was the information obtained from a third party?

63. In terms of the agreement itself, the HLF explained that it was provided to it by the University following the awarding of the grant. The Commissioner is therefore satisfied that the agreement clearly meets the requirements of section 41(1)(a). For similar reasons as does the application form which the University provided to HLF.
64. In terms of the redactions made to the board paper on the basis of section 41, the Commissioner recognises that this paper was of course created within HLF. However, the Commissioner accepts that section 41(1)(a) can still be met for information that a public authority has generated itself if the information in question records the contents of the information provided in confidence to it by another party.
65. Having examined the various redactions made to the board paper on the basis of section 41 the Commissioner is satisfied that they all record the content of information provided to the HLF by the University in the form of the agreement or contained in redaction D3 from the application form. These redactions therefore meet the requirements of section 41(1)(a).
66. In reaching this conclusion, the Commissioner acknowledges that the complainant argued that the agreement was a concluded contract between the University and a third party and so following cases such as *Derry City Council v Information Commissioner*, the University could not rely on section 41(1) of FOIA. That being the case, the complainant argued that he did not accept that a copy of the very same information, when in the hands of the HLF, could attract the exemption contained at section 41(1) of FOIA.
67. The Commissioner rejects such an analysis because for the reasons set out above she is satisfied that the both the agreement and the

information redacted from the application form and board paper on the basis of section 41(1) of FOIA meets the requirements of section 41(1)(a).

Does the withheld information have the necessary quality of confidence?

68. 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.
69. HLF argued that the information contained within the agreement had the quality of confidence as it contained commercially sensitive information which was not otherwise accessible. The HLF also explained that the agreement included a specific provision by which the two parties, ie the University and the Trust, agreed to not to disclose its contents unless necessary for fulfilling their obligations under the contract, for example by providing the HLF with a copy of it. For the same reasons, the HLF argued that the information it had redacted on the basis of section 41(1) from the application form and board paper had the quality of confidence. The complainant argued that he failed to see how the withheld information would have the quality of confidence or that its disclosure could cause any determinant, given the amount of information in the public domain about the 2011 acquisition, including the University's option to purchase the correspondence between Lady Mountbatten and Jawaharal Nehru and the passage of time. Furthermore, the complainant explained that the University had provided him with a copy of its 1989 agreement with the Broadlands Trustees for the loan of the archive and the 1969 agreement between the Broadlands Trustees and the government is freely available in The National Archive. In this context, the complainant argued that he did not understand why the 2011 agreement continued to be withheld.
70. It is clear to the Commissioner that the agreement is not otherwise accessible and moreover is clearly more than trivial given that it contains comprehensive details about the University's agreement with the Archive. The Commissioner is also satisfied that the information redacted from the application form and board paper is also not otherwise accessible, and whilst such redactions do not include as much detail as the agreement itself, the redacted information is clearly not trivial. The Commissioner is therefore satisfied that the withheld information has the quality of confidence.

Was the withheld information communicated in circumstances importing an obligation of confidence?

71. 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.

72. The HLF argued that there was an implicit duty of confidence on it not to disclose the agreement or to reveal the contents of the agreement. The HLF based this on the wording of a certain clause within the agreement itself.
73. The Commissioner is satisfied that the based on this clause in question the HLF were under an implied duty of confidence not to disclose the agreement or reveal the contents of it. Furthermore, the Commissioner would add that given the circumstances in which it was passed to the HLF and the fact that the University considered the agreement to be commercially sensitive, this further supports HLF's view that it was under a duty of confidence in respect of this information.

Would disclosure be detrimental to the confider?

74. The HLF argued that disclosure of the agreement could cause specific detriment to the University and could harm their commercial interests and ability to secure future acquisitions. This is because under the terms of the agreement the University were under an obligation to keep the contents of it confidential and only share it with parties which it was necessary to do so, eg the HLF. The HLF therefore argued that if it disclosed the agreement, or revealed parts of its contents, then this could result in an actionable breach of confidence by Trust against the University by failing to keep to this agreement confident. The HLF argued that such an outcome would cause direct harm to the University as it would damage its reputation and its ability to conduct future business. More specifically, it would undermine the confidence of the Trustees of Archive and others, from potentially doing business with the University in the future.
75. In considering whether disclosure would be detrimental, the Commissioner has appreciates that earlier agreements concerning the archive are in the public domain. She also accepts that there is considerable information in the public domain about the University's acquisition of the archive in 2011. However, as with any the application of any exemption, the Commissioner has to focus on the particular circumstances of the case. Whilst the Commissioner has not seen a copy of the 1969 agreement, in her view there is clear difference between the level of detail and type of information included in the 1989 agreement compared to that of the 2011 agreement. Furthermore, although the Commissioner recognises that there is considerable information in the public domain about the sale this does not extend to the material contained in the agreement or that redacted from the application form and board paper. Moreover, given the nature and wording of the agreement between the Trust and the University, she accepts that it is

plausible to argue that its disclosure by the HLF under could result in an actionable breach of confidence being taken by the Trust. The Commissioner also accepts that this could cause reputational damage to the University and could harm its ability to acquire similar archives in the future.

Public interest defence

76. 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.
77. The HLF argued that it was not in the public interest to undermine the ability of the University to secure future acquisitions which would in turn undermine its ability to maintain and preserve important heritage.
78. The complainant questioned whether disclosure would actually result in an actual breach of confidence because in his view there would be a clear case for a public interest defence which the HLF could rely on. In support of this the complainant emphasised that the 2011 agreement was important for understanding key questions such as exactly what falls within the 'relevant property' in the Schedule to the Direction, what is 'held' by the University for the purposes 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 public money (including the approximately £2m given by the HLF) was applied for the purchase of documents which now cannot be accessed by the public. The complainant argued that these arguments, and more generally freedom of expression and information rights to outweigh any confidentiality in the Agreement.
79. As the Commissioner has recognised above, she accepts that the complainant has identified a number of clear and legitimate reasons why there is strong public interest in the disclosure of information which the HLF has withheld and redacted. Furthermore, in the context of the information withheld on the basis of section 41(1), in the Commissioner's view disclosure of such information, particularly the agreement, would provide the public with further details of the basis of the acquisition, some of which could arguably address the points raised by the complainant.
80. However, in the Commissioner's opinion there is a clear public interest in ensuring that the interests of the confider, in this case the University, are not prejudiced. That is to say she agrees with the HLF that it would be against the public interest if the University's ability to acquire future archival assets in the future were undermined. Moreover, the Commissioner considers that there is a wider public interest in the preserving the principle of confidentiality. Taking the above into

account, the Commissioner has concluded that by a relatively narrow margin there is not a sufficient basis to argue that there is a valid public interest defence to justify disclosure of this information when taking into account the public interest in ensuring the detriment that would be caused to the University if the information redacted on the basis of section 41(1) of FOIA.

81. In light of the Commissioner's findings in relation to section 41(1) of FOIA she has not considered whether section 43(2) also applies to this information.

The complainant's questions of 9 November 2017

82. As noted above the complainant submitted the following requests to the HLF on 9 November 2017:

1. *So how were 'the NHMF Trustees made aware at the point of application' of the role to be played by Cabinet Office?*
2. *Did the NHMF or HLF inform the Arts Council of this role?*
3. *Was the NHMF or HLF aware prior to the awarding of the grant to the University that as early as 2009 the Cabinet Office had been 'reviewing' materials within the Mountbatten Archive already on deposit at the University (that is, materials owned by the Broadlands Trustees) that were not, in fact, open to public inspection?*
[4] Did NHMF liaise with the Cabinet Office at any time? After all, the Direction was not signed by a minister or official of the Cabinet Office, Treasury, or Culture but by a NHMF/HLF/Arts Council employee.

83. In its responses to the complainant, the HLF argued that it did not hold any information falling within the scope of these requests.

84. In cases 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.

85. 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.

86. 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.

87. The Commissioner asked the HLF a number of questions with regard to its searches for any relevant information. The Commissioner has replicated these questions, along with the the HLF's answers, below.

- *What searches were carried out for information falling within the scope of the four requests the complainant submitted on 9 November and why would these searches have been likely to retrieve any relevant information?*

All information is held as hard copy and consists of two folders worth of correspondence, one folder containing the University's application for funding and five ring binders detailing the archive's catalogue. In 2011 it was standard practice for the NHMF team to keep hard copies of any and all documentation relating to cases. Only as of April 2017 did the team move to saving documentation electronically, and even then this is only for new cases following this date.

- *If searches included electronic data, 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 email account of the case officer was searched as well as the central shared directory for any information. This gave a nil return in unearthing any new information. However, as stated above the NHMF team's policy was still to print all documentation relating to a project that was pertinent to the case. Therefore anything that would have been found would have been printed and stored in the folder.

- *If searches included electronic data, which search terms were used?*
 - Broadlands
 - Mountbatten
 - Southampton

- *If the information were held would it be held as manual or electronic records?*

Manual records, as per the paper management policy

- *Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed?*

No

- *If recorded information was held but is no longer held, when did the HLF cease to retain this information?*

- *Does the HLF have a record of the document's destruction?*

Answers to both questions above are not applicable as any information pertinent to this project has not yet been destroyed.

- *What does the HLF's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy, can the HLF describe the way in which it has handled comparable records of a similar age?*

Until recently it was the policy of the NHMF team to keep all documentation relating to all cases indefinitely. However due to a reduction in the size of our physical archive this has been reconsidered. As of January 2018 it was decided that the rule is that any complex NHMF case will be kept indefinitely and will eventually be digitised, the rule for non-complex NHMF cases is that core documents defining the project are retained and digitised (application form, supporting documents, case paper, grant award letter and contract). Due to this case being an acquisition and involvement of the Cabinet Office and the Ministerial Direction this case is deemed as complex and therefore the documentation has no destroy date.

- *Is there a business purpose for which the requested information should be held? If so what is this purpose?*

Everything that we needed to retain for business purposes has been retained and reviewed in order to respond to this request.

88. The Commissioner also explained to the HLF that the complainant considered that information falling within the scope of these four requests would be held precisely because the information previously provided to him did not actually answer his requests. The Commissioner therefore asked the HLF for its view on the complainant's suggestion that as the information previously provided to him did not answer these requests then it must be the case that recorded information in the scope of these four requests is held by the HLF.

89. The HLF's response was as follows:

- Request 1, is answered within the application form under section C11. This is when the Trustees of the NHMF were made aware of the Cabinet Office's role.

- Request 2, there is no record of any document of this kind and as such it could not therefore provide him with this information.
 - Request 3, is answered within the application form under section C11, this is when the NHMF were made aware of the Cabinet Office's role. The Cabinet Office routinely review political papers and whether enough time has lapsed to release them to the public - the Direction states such in the Schedule part 2b.
 - Request 4, the HLF explained that it was not sure how the complainant came to the assumption that the Direction was signed by 'NHMF/HLF/ Arts Council employee' as there is no name below the signature. The HLF explained that Direction was provided to it by the University of Southampton and it did not know who signed it.
90. Following its response to her queries, the Commissioner asked the HLF to confirm that as part of its search of the hard copy folders it holds on this application it did not locate *any* information about the Cabinet Office's review of materials within the Archives (ie information in the scope of question 3) and did not locate *any* information about the HLF liaising with the Cabinet Office (ie information in the scope of question 4).
91. In response the HLF confirmed that its searches did not locate any information about the Cabinet Office's review of materials within the Archives (ie information in the scope of question 3) and did not locate any information about the HLF liaising with the Cabinet Office (ie information in the scope of question 4).
92. In light of the HLF's responses to her enquires, the Commissioner is satisfied that on the balance of probabilities it does not hold any recorded information falling within the scope of these requests. She has reached this conclusion because she considers the nature of the searches undertaken by the HLF to be logical, detailed and sufficiently focused to locate any recorded information – beyond that previously disclosed/provided to the complainant, or beyond which it is seeking to withhold - which would fall within the scope of these four requests.

Right of appeal

93. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

94. 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.
95. 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

Annex

Document	Paragraph	Exemption applied by the HLF	ICO's findings on application of section 40(2)	Steps required by the HLF to comply with decision notice?
Application Form	B2	Section 40(2)	Section 40(2) is not engaged.	Yes, redacted information needs to be disclosed.
	C4	Section 40(2)	Section 40(2) is not engaged.	Yes, redacted information needs to be disclosed.
	C6	Section 40(2)	The details of the agent are exempt for reasons set out in decision notice. The other information redacted from C6 is not exempt from	Yes, disclose the information at C6 which is identified in



			disclosure on the basis of section 40(2).	confidential annex.
	C7	Section 40(2) Section 44(1) to the figures associated with the valuation	<p>Details of the valuer are exempt from disclosure on the basis of section 40(2) for the reasons set out in the decision notice.</p> <p>However, remaining information which has been withheld on the basis of section 40(2) is not exempt from disclosure.</p> <p>Section 44(1) does however provided a basis to redact the estimated value of the items in the archive.</p>	Yes, disclose the information identified in the confidential annex.
	C11	Section 44(1)	Exempt under section 44(1).	No.
	D3	Sections 41 and 43(2)	Exempt under section 41(1).	No
	D6	Section 40(2) Section 44(1) to the figures.	<p>The Commissioner is satisfied that the figures associated with the valuation are exempt on the basis of section 44(1).</p> <p>However, she is not persuaded that the remaining information is</p>	Yes, the information identified in the confidential annex.



			exempt from disclosure on the basis of section 40(2) of FOIA.	
	E2b	Section 40(2)	Section 40(2) is not engaged.	Yes, redacted information needs to be disclosed.
	E5	Section 40(2) Section 44(1)	Exempt under section 44(1).	No.
Board Paper	Page 1, Financial Summary	Section 40(2) Section 44(1)	Exempt under section 44(1).	No.
	Page 1, Partnership funding	Section 40(2)	Not exempt for the reasons discussed above – see redaction at E2b if Application Form.	Yes, redacted information needs to be disclosed.
	Page 2, para 5	Section 40(2) Section 41 and 43(2)	Exempt under section 40(2) and section 41(1).	No.

	Page 2, para 6; Page 3 paras 1 and 2	Section 41 and 43(2)	Exempt under section 41(1).	No.
	Page 3, Expert Advice	Section 40(2)	Details of the adviser are exempt on the basis of section 40(2) for the reasons set out in the decision notice.	No.
	Page 3, Para 3	Section 44(1)	Exempt on the basis of section 44(1)	No
	Page 4, para 2	Sections 41(1) and section 43(2)	Exempt under section 41(1).	No.
	Page 5, Paras 5 and 6	Section 40(2) Section 44(1) to the figures and proposed sale price.	Figures relating to the valuation of the archive are exempt from disclosure on the basis of section 44(1). The Commissioner has concluded that the remaining information is not exempt from disclosure on the basis of section 40(2).	Yes, disclose the information identified in the confidential annex.
	Page 6, Para 3	Sections 41(1) and 43(2)	Exempt under section 41(1).	No.

	Page 6, Para 4	Section 40(2) Section 44(1)	Exempt from disclosure on the basis of section 44(1).	No.
	Page 7 Appendices	Section 40(2)	Exempt under section 40(2) for the reasons discussed above.	No.
	Page 8, Paras 4 and 7	Sections 41(1) and 43(2)	Exempt under section 41(1).	No.
	Page 9 Appendix II	Section 40(2) Section 44(1)	Exempt from disclosure on the basis of section 44(1).	No.
	Page 10, Para 1	Section 40(2) Section 44(1) for the figures of the valuation.	Figures of the valuation are exempt from disclosure on the basis of section 44(1). However, the remainder of the information is not exempt from disclosure on the basis of section 40(2).	Yes, disclose the information identified in the confidential annex.
	Page 12m para 5 and page -13, Para 1	Section 40(2) Section 44(1)	Exempt under section 44(1)	No.
	Page 12, Para 3	Sections 41(1) and 43(2)	Exempt under section 41(1).	No.

	Page 14, Para 1	Section 40(2)	Section 40(2) not engaged.	Yes, redacted information needs to be disclosed.
	Page 14, Para 2	Section 40(2) Section 43(2) and 41(1)	Exempt under section 40(2) and 41(1).	No.
	Page 14, Para 3	Section 40(2)	Section 40(2) not engaged.	Yes, redacted information needs to be disclosed.
	Page 14, Name of adviser	Section 40(2)	Exempt under section 40(2).	No.
	Para 15, Appendix IV	Section 40(2)	Exempt under section 40(2).	No.
	Page 15 and pages 19 & 15,	Section 40(2) and section 44(1). For the redactions on pages 19 & 20 also section 43(2)	Exempt under section 44(1).	No.
Grant Award	Page 1 and 2	Section 40(2)	Exempt under section 40(2).	No.

Letter			Information Commissioner's Office	
Contract between NHMF and Southampton University	Page 1, Para 1.1	Section 40(2)	Exempt under section 40(2).	No.
	Page 4	Section 40(2)	Exempt under section 40(2).	No.
Ministerial Direction	Para 1 and 3	Section 44(1)	Exempt from disclosure on the basis of section 44(1).	No.