

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

### **Decision notice**

**Date:** 11 June 2024

**Public Authority:** The Governing Body of the University of Southampton

**Address:** Highfield  
Southampton SO17 1BJ

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

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1. The complainant has requested information associated with the Broadlands Archive Agreement ('the Agreement'). The University of Southampton ('the University') disclosed relevant information with redactions made under section 41(1) of FOIA, which concerns information provided in confidence.
2. The Commissioner's decision is that, on the balance of probabilities, the University doesn't hold any further information within scope of the request and has complied with section 1(1) of FOIA. The Commissioner has also decided that information the University is withholding is exempt under section 41(1) of FOIA.
3. It's not necessary for the University to take any corrective steps.

### **Request and response**

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4. The complainant had made the following information request to the University on 12 September 2023:  
  
"I understand that the University Of Southampton has an option to purchase certain correspondence between Edwina, Countess Mountbatten, and Jawaharlal Nehru. I also understand that the

University has not yet exercised the option. Under the Freedom Of Information Act, I request the full terms and conditions of the option and all information held by the University concerning its non-exercise.”

5. The University responded on 9 October 2023. It disclosed the requested information but with redactions made under section 41 of FOIA.
6. The complainant requested an internal review on 7 November 2023. The University didn't provide one within the recommended timeframe and so the Commissioner accepted the complaint without a review having been carried out.

## **Reasons for decision**

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7. In their request for an internal review, the complainant disputed the University's application of section 41 of FOIA to some information. They also noted other information referenced in the disclosed document that they considered fell in scope of their request and said that the University hadn't provided this.
8. This reasoning is therefore focussed on whether the University holds any further information relevant to the request and its application of section 41(1) of FOIA to information it's withholding.
9. The Commissioner will deal with the matter of the internal review under 'Other Matters.' The Commissioner also notes that he didn't receive the University's submission, or any communication from the University, by the deadline he gave it and so it was necessary to serve an Information Notice on the University to obtain its submission.

## **Section 1 – right of access to information held by public authorities**

10. Under section 1(1) of FOIA a public authority is obliged (a) to confirm whether it holds information that's been requested and (b) to communicate the information to the applicant if it's held and isn't exempt information.
11. In their request for an internal review the complainant said,  
  
“Your reply is wholly inadequate even in respect of the option terms because clauses 18-27 refer to other clauses of the 2011 Agreement (e.g. 28, 59, the whole of Section C, Part 4), and these have not been given to me. The clauses (18-27) also use defined terms (e.g. 'Option Period', 'Option Goods', 'Effective Date', 'The Archive', 'Lord Brabourne's Executors and Trustees', 'Copyright Works' ) and these have not been disclosed.

Indeed, clause 60 itself is relevant - as is clause 61, the termination clause.

I also requested 'all information held by the University concerning its [the option's] non-exercise'. Your response only deals with the actual terms and conditions of the option."

12. The Commissioner asked the University to address these points.
13. The University confirmed that it doesn't hold any further information. It says it has liaised with the Director of Legal Services, who has previous experience with requests concerning the same subject matter and the Agreement in question. They confirmed that the only information the University holds is that which is contained within the Agreement.
14. The University also told the Commissioner that the matter of whether or when the University will exercise the option, and indeed the matter of its 'non-exercise', haven't been raised. To ensure that this position was correct, the University checked with its Governance's team and the Head of Governance confirmed the same position.
15. The University has considered this Agreement a number of times in response to various requests for information about it, including this one. It has also further checked the situation with its Director of Legal Services and Head of Governance as a result of this current request. The University has now addressed the complainant's points, and its position is that it holds no further relevant information, only that which it disclosed, with redactions. In the circumstances, the Commissioner can see no reason to doubt that's the case and his decision is that the University has complied with section 1(1) of FOIA.

#### **Section 41 – information provided in confidence**

16. Under section 41(1) of FOIA a public authority is entitled to withhold information if (a) the information was obtained from another person and (b) disclosure would constitute a breach of confidence.
17. In their request for a review, the complainant referred to the Commissioner's decision in IC-231816-H7S9<sup>1</sup>. They said that the Commissioner hadn't given due weight to the confidentiality provision at clause 60 of the disclosed document, which provides that the obligation

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4026388/ic-231816-h7s9.pdf>

imposed by clause 60 is to lapse after 10 years from the Effective Date, which was in August 2021.

18. When he considers a public authority's reliance on section 41, the Commissioner first satisfies himself that the condition under section 41(1)(a) is met ie that the information was provided to the authority by another person. In his correspondence to the University on 4 April 2024, the Commissioner asked the University to confirm what other person had provided it with the withheld information in this case. In its submission the University directed the Commissioner to its section 41 refusal to the complainant. However, the University's refusal doesn't state who provided the information to it.
19. In its submission to the Commissioner, the University also advised that, regarding the information within "the contract" (ie the Agreement) that it obtained from another person, this doesn't include any terms within the contract that the University reached mutually with relevant parties. Rather the information it obtained is technical information relating to the background or implications of the terms upon the other party's obligations or duties in a personal capacity (ie personal tax implications). The information also concerns the third party's pre-contractual position - particularly in reference to historical or legacy information relating to the [Mountbatten] archive with which the Agreement is associated. The University confirmed that it's therefore satisfied that this information was provided to it by another person.
20. As well as the current request, the Commissioner has referred back to IC-231816-H7S9 and his decision in FS50772671<sup>2</sup> which also considered information associated with the Agreement. Although the University could have been more specific in this case, the Commissioner is again satisfied that the University obtained the information redacted under section 41 from another person, namely the third parties involved in the acquisition of the archive. Section 41(1)(a) is therefore engaged.
21. Regarding section 41(1)(b), information has the necessary quality of confidence if it's not trivial or otherwise available; is imparted in circumstances importing an obligation of confidence and finally, if disclosing the information would be contrary to the confider(s) reasonable expectations and therefore cause a detriment to them.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616838/fs50772671.pdf>

22. In its submission to the Commissioner the University said that it had further considered the information in the context of the test of confidence outlined with the Commissioner's guidance on section 41<sup>3</sup> ie **Coco v A N Clark (Engineers) Limited [1968] FSR 415** from paragraph 22.
23. The Commissioner is satisfied first, that the disputed information isn't trivial and isn't in the public domain. As such, he's satisfied that the information was provided to the University with the assumption that it would be treated confidentially.
24. The University has told the Commissioner that it's satisfied that the redacted information continues to have the obligation of confidence, as this is information not reached mutually by the parties but provided by parties other than the University. The University went on to say that the inference of confidentiality was initially explicitly noted in the form of the confidentiality clause in the Agreement. However, it says, irrespective of the specified confidentiality term specified, this information was provided for context. Technical details relating to the position of the parties, and in particular in relation to personal matters, were provided under a reasonable expectation of confidence. Disclosing the information would result in a detriment to the confiders, given the personal nature of the information in respect of their privacy, and the contextual details in respect of the archive prior to the contractual agreement.
25. The Commissioner agrees with the University that, irrespective of the confidentiality clause and associated confidentiality term, the parties who provided the University with the information in question would still have the reasonable expectation that the information would be treated confidentially.
26. In terms of detriment that may occur, the Commissioner accepts that there's a considerable amount of information already in the public domain about the University's acquisition of the archive. However, as in IC-231816-H7S9 and FS50772671, in the Commissioner's view there's a clear distinction between such information and the information which he accepts meets the requirements of section 41(1)(a). The Commissioner again considers that disclosing this latter category of information would result in the disclosure of details of private affairs of the parties involved. Given the content of this information, he accepts that this could be detrimental to the individuals concerned.

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

27. As discussed in the earlier decisions, 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.
28. In their request for an internal review, the complainant discusses why they consider section 41 isn't engaged and that they consider the University holds further information, but they don't present public interest arguments for the information's disclosure. While there's a public interest in public authorities being open and transparent, the Commissioner considers that the University has been open about the Agreement, in this and previous requests, to an adequate degree. He remains satisfied that, given the detriment that would occur to the confider(s) - because disclosing the information would represent a notable infringement into the private affairs the third parties involved - there isn't a public interest defence for disclosing the information.
29. The Commissioner has decided that section 41(1)(b) of FOIA is also engaged, and that the University is therefore entitled to apply section 41(1) of FOIA to the information it's withholding.

## **Other Matters**

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30. Providing an internal review isn't a requirement under FOIA but the Commissioner considers it to be a matter of good practice. The University invited the complainant to request an internal review in its response to the request, the complainant did so but the University didn't go on to provide one. The Commissioner has recorded this failing for monitoring purposes.

## Right of appeal

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31. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**