

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

### **Decision notice**

**Date:** 30 March 2021

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

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

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1. The complainant submitted a request to the Cabinet Office seeking information about the Broadlands Archive dating from 1987 to 1989. The Cabinet Office located one document falling within the scope of the request but sought to withhold this on the basis of section 21(1) (information reasonably accessible to the requester), albeit that it subsequently voluntarily provided the complainant with a copy of this. The complainant argued that the Cabinet Office was likely to hold more information falling within the scope of his request and disputed the Cabinet Office's reliance on section 21(1) of FOIA. The Commissioner has concluded that on the balance of probabilities the Cabinet Office does not hold any further information falling within the scope of the request. She has also concluded that the Cabinet Office cannot rely on section 21(1) of FOIA. However, she has not ordered it to provide the complainant with a copy of the information withheld on the basis of this exemption as it has already voluntarily provided him with a copy of this.
2. No steps are required.

## Background

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3. On 31 May 2017 the complainant submitted the following request to the Cabinet Office:

*'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 5<sup>th</sup> 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'.*

4. The Cabinet Office refused this request on the basis of section 12(1) of FOIA and provided some advice and assistance in line with its obligations under section 16 to allow the complainant to submit a refined request.

5. The complainant submitted such a request on 27 June 2017 in the following terms:

*'May I then limit my request to documents relating to the performance by the Cabinet Office of the matters specified in paragraph 2b of the Schedule to the Ministerial Direction dated 5 August 2011'.*

6. The Cabinet Office responded and explained that it did not hold any information falling within the scope of the request. In doing so it noted that:

*'The reason for the 'not held' response is that material relating to closed parts of the Archive relates to the Broadlands Trust prior to the Ministerial Direction and acquisition by Southampton University of the Archive. Of course, you have the right to request this information from us, but our assessment is that this would result in a section 12 refusal because of the age of the material and the way in which it is stored.'*

7. The complainant subsequently contacted the Commissioner about the Cabinet Office's handling of his request. He disagreed with the Cabinet Office's position that it did not hold any information falling within the scope of his request of 27 June 2017. When she began her investigation of that complaint, the Commissioner contacted the complainant in order to seek clarification of the period of time which he intended his request to cover. The complainant explained that he intended his request to cover information both pre-dating the signing of the Ministerial Direction (the Direction) on 5 August 2011 **and** information post-dating the signing of the Direction. The Commissioner explained to the complainant that she accepted that such an interpretation of his request was an

objective one, albeit that she noted that the Cabinet Office appeared to have interpreted this request as only seeking information which post-dated the Direction. The Commissioner suggested to the complainant that in her view it was likely, given the Cabinet Office's response to his original request, that if his refined request of 27 June 2017 was interpreted broadly then the Cabinet Office's position would probably seek to argue that complying with it would also exceed the appropriate cost limit. During the course of the Commissioner's investigation of this case the Cabinet Office confirmed that this in fact was its position.

8. The Commissioner subsequently issued a decision notice on 17 August 2018 in relation to this complainant.<sup>1</sup> The notice concluded that the correct interpretation of the complainant's request of 27 June 2017 was it covered the period both before **and** after 5 August 2011 (ie the date the Direction was signed), but based on that interpretation of the request, the Cabinet Office was entitled to refuse to comply with it on the basis of section 12(1). The decision notice also found that the Cabinet Office had breached section 16(1) of FOIA by failing to offer the complainant any advice and assistance so that he could refine his request of 27 June 2017. The decision notice ordered the Cabinet Office to provide the complainant with this advice and assistance.
9. The Cabinet Office did so on 24 October 2018 by explaining to the complainant it had attempted to identify areas where searches might yield records relevant to the request. The Cabinet Office explained that it had identified the following four areas:
  - 1987-89: early agreements on custody of the papers and the initial loan of the archive.
  - 2006-11: purchase of part of the Broadlands archive by the University [of Southampton].
  - 2012-13: correspondence between the Cabinet Office and the University on additional closed archive records.
  - 2016-present day: correspondence on current arrangements for addressing requests for access to closed archive records.
10. The Cabinet Office suggested to the complainant that if he submitted a refined request restricted to one of the four periods this would allow it to ascertain whether it held relevant material within the cost limit. The

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<sup>1</sup> FS50693473 <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259634/fs50693473.pdf>

Cabinet Office noted that extending beyond this was likely to engage section 12 and also that if the complainant were to submit more than one request within sixty working days, the Cabinet Office would be entitled to aggregate those requests when calculating the costs of compliance.

## Request and response

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11. The complainant submitted the following request to the Cabinet Office on 5 November 2019:

*'As per the attached suggestion [the Cabinet Office's letter of 24 October 2018], I would now like to request under FOI information within category 1 in the Cabinet Office's letter of 24 October - 1987-198[9], correspondence between the Cabinet Office and the University on additional closed archive records.'*

12. The Cabinet Office responded on 4 December 2019 and explained that it had interpreted the request as seeking *'early agreements on custody of the papers and the initial loan of the archive'* for the period 1987 to 1989 rather than for correspondence between the Cabinet Office and University on additional closed archive records. This was because this was the category of information listed in the advice and assistance letter of 24 October 2018. The Cabinet Office also noted that this was the complainant's fourth request since 24 October 2018 based on the advice and assistance it had provided and the previous requests for categories 2, 3 and 4 had followed completely the advice provided. The Cabinet Office explained that based on its interpretation of the request it only held one document that fell within the scope of the request, namely:

- A redacted copy of the Agreement No.1 for Deposit of Archives between the Trustees and the University of Southampton dated 16 March 1989.

13. The Cabinet Office explained that it considered this information to be exempt from disclosure on the basis of section 21(1) (information reasonably accessible to the applicant) of FOIA. The Cabinet Office asked the complainant to let it know if its interpretation of the request was not correct. It suggested that he may need to make a separate request for *'1987-1989, correspondence between the Cabinet Office and University on additional closed archive records'*.

14. The complainant contacted the Cabinet Office on 12 December 2019 and asked it to conduct an internal review of this decision. He raised two grounds of complaint: Firstly, he argued that the request clearly covered all details and correspondence/documents relating to the 1989 Agreement and any other early agreements concerning closed material

relating to the archive. In light of this he asked the Cabinet Office to establish whether it held any further information falling within the scope of the request. Secondly, he argued that section 21(1) of FOIA did not apply to the 1989 Agreement.

15. The Cabinet Office responded to the request for an internal review on 31 January 2020. It noted that the request had sought '***all information on early agreements on the custody of the papers and initial loan of the archive between 1987-89***'. (Commissioner's emphasis). The Cabinet Office explained it had undertaken all necessary searches to identify and locate relevant information. It specifically stated that:

*'I can re-confirm that the our archives were searched for all correspondence between the Cabinet Office and University of Southampton during the time period specified. We identified one item in scope' [emphasis in original].*

16. The Cabinet Office maintained its position that section 21(1) applied to this document, ie the 1989 Agreement, but for ease it provided the complainant with a redacted copy of it. The Cabinet Office explained that the redactions to the 1989 Agreement had been made on the basis of sections 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA.

## Scope of the case

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17. The complainant contacted the Commissioner on 6 May 2020 in order to complain about the Cabinet Office's handling of this request. Firstly, he argued that the scope of his request was wrongly restricted and that the Cabinet Office was likely to hold more information falling within the scope of his request than the single document it had located. Secondly, he also disputed the Cabinet Office's application of sections 21, 40(2) and 41(1) to the 1989 Agreement.
18. During the course of the Commissioner's investigation the Cabinet Office explained that it did not in fact hold an unredacted version of the 1989 Agreement. It suggested that the confusion appeared to have arisen from the internal review response which says that '*However, for ease of reference, we are providing a copy of the redacted Agreement and explaining the exemptions applied to the portion of the Agreement withheld by the Cabinet Office.*'
19. The Cabinet Office acknowledged that its drafting could have been clearer and that it did not intend to suggest that it had independently made the redactions. Rather it had provided the complainant with a copy of the redacted 1989 Agreement that the University had provided to it. The Cabinet Office acknowledged that it should have explained that

the redactions had already been made by the University under section 40(2) and that section 41 was referenced in error. (The Commissioner understands that when the version of the 1989 Agreement was previously disclosed by the University under FOIA it redacted certain parts of it on the basis of section 40(2), hence the Cabinet Office's reference to this exemption in its internal review response.) The Cabinet Office confirmed that it was not therefore seeking to rely on either of these exemptions. As result of this development the Commissioner does not need to consider either of these redactions.

20. With regard to the application of section 21(1), the Commissioner understands that although the Cabinet Office provided the complainant with a redacted copy of the agreement at the internal review stage, this was a voluntary disclosure, and it did not overturn its reliance on section 21 of FOIA. Therefore, the Commissioner has still considered the Cabinet Office's reliance on section 21 of FOIA in this decision notice.
21. The decision notice also considers the complainant's first ground of complaint, ie that the scope of his request was wrongly restricted and that the Cabinet Office was likely to hold more information falling within the scope of his request than the single document it had located.

## Reasons for decision

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22. In order to consider the first ground of complaint the Commissioner has initially considered how the request should be interpreted and then whether the nature of the searches undertaken by the Cabinet Office are sufficient to locate all information falling within the scope.
23. The views of both parties on these issues are set out below and the Commissioner's findings follow.

### The complainant's position

24. The complainant provided the Commissioner with detailed submissions to support his position. The Commissioner has summarised these below:
25. The complainant argued that it was clear from the background to this request that the natural interpretation was not intended to simply capture one contractual agreement from 1989. He suggested this would render the reference to the years 1987 and 1988 in the Cabinet Office's advice and assistance letter of 24 October 2018 misleading.
26. Rather, the complainant emphasised that the request was for **information about** the '*1987 - 89: early agreements on custody of the papers and initial loan of the [Broadlands/Mountbatten] archive*'. He argued that this included, but is not limited to, '*the early agreements*'



(which he took to include the Undertakings by the Trustees of the Broadlands Archives Settlement dated 30 March 1969) and the '*initial loan*' agreements (which he took to include the agreement dated 16 March 1989) themselves.

27. The complainant argued that the Cabinet Office had appeared to accept this as the first paragraph of the internal review referred to the request as being '*for all information on the early agreements on custody of the papers and initial loan of the [Broadlands/Mountbatten] archive between 1987-89*' (emphasis added by complainant).
28. However, the complainant argued that a search for information falling within the scope of the request simply of '*correspondence between the Cabinet Office and the University of Southampton*' was not sufficient to locate relevant information. His reasons were:
  - Both the 1969 and 1989 '*agreements*' were made with the Broadlands Trustees, and it is clear from material available to him that bodies including the Ministry of Defence (MOD), the Foreign and Commonwealth Office, the Lord Chancellor's Office, Buckingham Palace, 10 Downing Street and the Public Records Office had input into the arrangements. Yet the Cabinet Office did not appear to have searched for correspondence/documentation between it and the Trustees, nor internal Cabinet Office correspondence/documentation, nor correspondence/documentation between it and other departments or other third-party stakeholders.
  - Given the scope of the request '*agreements*' must be construed to include sequences of correspondence which amount to an agreement (not just formal, signed contracts/undertakings/agreements), and information about the agreements (not just the agreements themselves). By way of example, the complainant explained that it was clear from publicly available archives that there was correspondence between the Cabinet Office and the Trustees of the Broadlands Archive in 1985 and at that stage a review by the MOD of the papers at Broadland was not yet complete.<sup>2</sup> The complainant noted that the last document in the PREM file is dated 24 September 1985, but no doubt there would have been further correspondence and internal discussion about the papers during and following this review, and this would have extended into 1987-1989, together with internal Cabinet Office minutes and memoranda and communications with the Prime Minister and possibly the Royal Family in the same vein as the 1985

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<sup>2</sup> It cited the PREM 19/1618 file available here <https://www.margaretthatcher.org/source/prem19/prem19-1618>

communications in PREM 19/1618. The complainant suggested there was not simply silence at the Cabinet Office and between the Cabinet Office/University/Trustees/others in the period between Robert Armstrong's receipt of the message from the Prime Minister on 24 September 1985 (the last document in the PREM file) and the finalised, signed agreement with the other parties on 16 March 1989, as the Cabinet Office's FOI response appears to suggest.

- The complainant noted that in the Cabinet Office's letter of 24 October 2018 it claimed that '*records created prior to 1987 have either been transferred to The National Archives or destroyed in accordance with the requirements of the Public Records Act 1958*'. However, the complainant argued that any information about the early agreements on custody of the papers and the initial loan of the archive which is contained in documents/correspondence created between 1987 and 1989 fall within the scope of the request. It argued that the Cabinet Office must previously have taken the view that this information could be retrieved within the section 12 costs limit or it would not have proposed this category as part of its '*advice and assistance*' but has clearly not conducted an adequate search for it.

### The Cabinet Office's position

29. The Cabinet Office explained that it did not accept the complainant's interpretation of category 1. It argued that it was clear from its advice and assistance letter of 24 October 2018 and its response letter of 4 December 2019 what the scope of the category was.
30. The Cabinet Office explained that the wording in the internal review response that referred to the request as asking for '*all information on...*' was an unfortunate drafting error that it did not pick up on at the time. It explained that if it had agreed with the complainant's interpretation of the request the internal review response would have stated this explicitly as it is not an insignificant point. In the absence of any such statement the Cabinet Office maintained that its interpretation of the request is the only reasonable one and that it therefore remains valid.
31. Therefore, the Cabinet Office explained that it did not accept that internal documentation about the agreements and correspondence between the Cabinet Office and the other suggested third parties would fall within the scope of the request based on what it considered to be the only reasonable interpretation of it.
32. With regard to the nature of the searches undertaken the Cabinet Office explained that it had searched its archives for any correspondence between the Cabinet Office and University of Southampton during the time period specified (1987-1989). It explained that it was not surprised at the low number of items identified by the search. It knew that



communication between the Cabinet Office, the University and other government departments has been sporadic. The Cabinet Office also noted that 1987-89 coincides with a period of time when the University and Broadlands Estate were agreeing to the terms of the archive sale, to which the Cabinet Office would not be privy to in great detail.

33. The Cabinet Office explained that papers from the 1980s are located in PREM files, in the CAB 103 files series (administrative files of the Histories, Openness and Records Unit (HORU) and other predecessor units of the Knowledge & Information Management Unit) or in the Cabinet Secretary's Administration files. The Cabinet Office explained that PREM 19 1618 which is in the public domain covers Prime Ministerial approval for the loan of Lord Mountbatten's archive to the University of Southampton subject to a number of stipulations i.e. the Cabinet Secretary's approval being required for Lord Mountbatten's papers to be made public. The Cabinet Office explained that there are no other PREM files dating from the 1980s that cover this issue.
34. In relation to the CAB 103 files series and the Cabinet Secretary's administrative files, the Cabinet Office explained that it is highly unlikely that files from these collections would have been selected for permanent preservation at The National Archives (and previously the Public Records Office) and in all probability have been destroyed. The Cabinet Office explained that it would vastly exceed the section 12 limit to search for evidence in metadata records such as docket books to identify if there were any registered files over the decades that might have contained information relevant to the Mountbatten papers. The Cabinet Office explained that the only reason it held anything from 1987 to 1989 relating to the Broadlands Archive is because it is file material identified during later correspondence which has been copied and retained on a different later file as background for that later correspondence. It explained that later files that were identified as part of searches relating to this or other requests from the complainant were found in much younger paper records where previous papers had been copied from older files. As such, the basic facts it had located were found in later files which are largely administrative ephemera because they would not be selected for permanent preservation at the point at which they become historic under the Public Records Act.
35. The Cabinet Office explained that any additional searches beyond those that it had undertaken would exceed the appropriate cost limit and therefore section 12(1) applied to the broad interpretation of the request (albeit that its position remained that it was not reasonable to interpret the request broadly). The Cabinet Office explained that this is because of the way in which the records about the archive have been stored. In support of this position the Cabinet Office explained that given its long history of its involvement with the archive and given the way its records about the archive are stored, in order to locate any

additional information it would have to conduct the searches described at paragraph 30 of the Decision Notice FS50693473.<sup>3</sup> The Cabinet Office noted that the Commissioner had already accepted that the estimates of the time it would take for it to conduct these searches are reasonable and realistic ones. The Cabinet Office highlighted that in reaching this conclusion the Commissioner noted that *'the Cabinet Office has based some of its estimated figures on previous searches that it has done of the systems in question which in her view give the estimates added credibility.'* The Cabinet Office noted that the Commissioner was satisfied that it was correct to refuse that request, ie the 31 May 2017 request, as exceeding the appropriate cost limit.

### The Commissioner's position

36. The Commissioner understands that it is now accepted by both parties that the complainant's request of 5 November 2019 was intended to be for the information described in category 1 of the Cabinet Office's letter 24 October 2018. This read as follows:

*'1987-89: early agreements on custody of the papers and the initial loan of the archive.'*

37. The issue in dispute is how this request should be interpreted.

38. The Commissioner is not persuaded that it is reasonable to interpret this request as seeking *'information about'* the early agreements as the complainant has suggested. Rather, on a plain reading of the request she is satisfied that the request is simply intended to capture any agreements themselves. The Commissioner considers it unfortunate that the wording of the internal review suggested that the Cabinet Office considered the request to be seeking *'all information on'* such agreements. Nevertheless, the Cabinet Office has clarified its position and she accepts that it is entitled to do so at this stage.

39. However, the Commissioner is persuaded by the complainant's argument with regard to how the phrase *'agreements'* should be interpreted. The Commissioner accepts that given the context of the request this extends beyond simply formal agreements, otherwise the only document in scope would be the 1989 Agreement, which prior to providing the advice and assistance that it did, the Cabinet Office presumably took into account. (For the avoidance of doubt, the

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<sup>3</sup> This decision notice set out the Commissioner's findings in relation the request of 31 May 2017.

Commissioner accepts that the 1989 Agreement falls within the scope of this request.)

40. The Commissioner acknowledges that there is some evidence of the Cabinet Office having had discussions with parties other than the University about the archive. However, in the Commissioner's view it is reasonable to assume that any 'agreement' of note about the archive would have been documented in correspondence between the Cabinet Office and the University. This is on the basis of the central role the Cabinet Office, and more specifically the Prime Minister, had in terms of the ongoing arrangements in respect of the parts of the archive containing Lord Mountbatten's papers, and the fact that the University was the party that, during the time period covered by request, was intending to loan these papers from the Trustees of the archive. Moreover, the Commissioner notes that although a letter was sent from the Cabinet Office to the Trustees of the Broadlands Archive in 1985, this was also copied to the University. In light of this the Commissioner considers that it is reasonable to conclude that similar letters, if sent between 1987 and 1989, would also have been copied to the University.
41. The Commissioner is therefore persuaded that a search simply of correspondence between the Cabinet Office and the University would have been adequate to locate information about the nature of any agreement about the archive. Furthermore, Commissioner notes that the Cabinet Office's point that the only reason it held anything from 1987 to 1989 relating to the Broadlands Archive is because it is file material identified during later correspondence which has been copied and retained on a different later file as background for that later correspondence. As a result the Commissioner accepts the Cabinet Office's point that its record holdings in relation to this topic are sporadic in terms of the records for this period. The Commissioner notes that the complainant's point that if the only document falling within the scope of the request was the 1989 Agreement then this would render the reference to the years 1987 and 1988 in the Cabinet Office's advice and assistance letter of 24 October 2018 misleading. However, the Cabinet Office's letter of 24 October 2018 explained that revised requests within the four categories would allow it *'to ascertain whether we hold relevant information within the cost limit'*; in other words although the Cabinet Office suggested these categories as potential requests it was not confirming whether it definitely held information within their scope.
42. Taking the above into account, the Commissioner is satisfied that the searches undertaken by the Cabinet Office were sufficient to locate, on the balance of probabilities, all of the information falling within the scope of the request.

**Section 21 – information reasonably accessible by other means**

43. The complainant noted that section 21(1) applies to information which is 'reasonably accessible to the applicant otherwise than under Section 1', (emphasis added by complainant). He accepted that he had a redacted version of the Agreement but only because this had been provided to him as result of a FOI request to the University. As result the complainant argued that the redacted version of this Agreement was not available to him otherwise than under section 1 of FOIA and it was on this basis that the Cabinet Office was incorrect to rely on section 21 of FOIA to withhold this information.
44. With regard to the application of section 21, the Commissioner accepts the complainant's position that this exemption can only be used by a public authority if the requested information is accessible to a requester by a means *other* than FOIA. In the Commissioner's view this invalidates the Cabinet Office's use of section 21(1) of FOIA. Despite this finding the Commissioner not included a step in the decision notice for the Cabinet Office to provide the complainant with a copy of the information which it sought to withhold on the basis of section 21(1) as it has already provided him with a copy of this, albeit outside of FOIA, and the further provision of the same document would serve no practical purpose.

## Right of appeal

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

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

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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**