



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2020/0021  
EA/2020/0026  
EA/2020/0058  
EA/2020/0059  
EA/2021/0125**

**Heard by CVP  
On 15, 16, 17 and 19 November 2021  
Tribunal deliberations  
On 26 November, 9 December 2021 and 27 January 2022**

**Representation:  
Cabinet Office: Adam Heppinstall QC  
University of Southampton: Rory Dunlop QC  
Information Commissioner: Robin Hopkins (Counsel)  
Dr Lownie: Clara Hamer (Counsel)**

**Before**

**SOPHIE BUCKLEY  
STEPHEN SHAW  
AIMÉE GASSTON**

**Between**

**CABINET OFFICE (2020/0059) (2021/0125)  
UNIVERSITY OF SOUTHAMPTON (2020/0058)  
DR ANDREW LOWNIE (2020/0021) (2020/0026)**

Appellants

**and**

**THE INFORMATION COMMISSIONER (ALL APPEALS)**

First Respondent

**and**

**DR ANDREW LOWNIE (2020/0059) (2020/0058)  
CABINET OFFICE (ALL APPEALS EXCEPT 2020/0059 & 2021/0125)**

**UNIVERSITY OF SOUTHAMPTON (ALL APPEALS EXCEPT 2020/0058 AND  
2021/0125)**

Second Respondents

*UO.x refers to pages in the OPEN bundle for EA/2020/0021 and 0058 ('the University Appeals')*  
*UC.x refers to pages in the CLOSED bundle for the University Appeals*

*CO1.x refers to pages in the OPEN bundle for EA/2020/0026 and 0059 ('the first Cabinet Office Appeals')*

*CC1.x refers to pages in the CLOSED bundle for the first Cabinet Office Appeals*

*CO2.x refers to pages in the OPEN bundle for EA/2021/0125 ('the second Cabinet Office Appeal')*

*CC2.x refers to pages in the CLOSED bundle for the second Cabinet Office Appeal*

*USSO.x refers to document numbers in the final version of the OPEN Scott Schedule for the University Appeals (filed on 12 January 2022) containing a list of 182 documents*

*USSC.x refers to document numbers in the CLOSED Scott Schedule for the University Appeals containing a list of 182 documents*

*CSSO.x refers to item numbers in the OPEN Scott Schedule for both Cabinet Office Appeals containing a list of item numbers 1-22 in the First Cabinet Office Appeals and item numbers B1 and B2 in the Second Cabinet Office Appeal*

*CSSC.x refers to item numbers in the CLOSED Scott Schedule containing a list of item numbers 1-22 in the First Cabinet Office Appeals and item numbers B1 and B2 in the Second Cabinet Office Appeal*

**DECISION**  
**CORRECTED UNDER RULE 40**

**EA/2020/0021 EA/2020/0058 (DN FS0772761)**

1. For the reasons set out below and in the closed annex, the University of Southampton's appeal (EA/2020/0021) and Dr Lownie's cross-appeal (EA/2020/0058) are both allowed in part. The substitute decision notice is set out below.
2. The University of Southampton did not hold the information referred to as 'the Nehru papers'.
3. The University of Southampton was entitled to withhold some of the requested information, identified in the reasons below, under s 23, section 27(1)(a), section 40(2), section 37(1)(a), (aa) and (ac).

4. The University of Southampton was entitled to withhold the information redacted from the latest redacted version of the 'Broadlands Agreement' (defined in the reasons below) under s 40(2), s 41(1) and s 44.

**EA/2020/0026 and EA/2020/0059 (DN FS50827458)**

5. For the reasons set out below and in the closed annex, the Cabinet Office's appeal (EA/2020/0026) is allowed in part. Dr Lownie's cross-appeal (EA/2020/0059) is dismissed. The substitute decision notice is set out below.
6. The public authority was entitled to withhold the information under s 40(2), s 41, s 42 and s 44 Freedom of Information Act 2000 (FOIA).

**EA/2021/0125 (DN IC-47499-X8X1)**

7. The Cabinet Office withdrew their appeal EA/2021/0125 by email dated 17 November 2021 and this appeal is accordingly dismissed.

**SUBSTITUTE DECISION NOTICE FS0772761**

**Organisation: The University of Southampton**

**Complainant: Dr Andrew Lownie**

**The Substitute Decision FS0772761**

The University of Southampton did not hold the information referred to as 'the Nehru papers'.

The University of Southampton was entitled to withhold some of the requested information, identified in the reasons below, under s 23, s 27(1)(a), s 40(2), and s 37(1)(a), (aa) and (ac).

The University of Southampton was entitled to withhold the information highlighted in the latest CLOSED version of the 'Broadlands Agreement' (defined in the reasons below) at UC.F1478 - UC.F1512 under s 40(2), 41(1) and 44 save that:

- The University is no longer withholding Lord Brabourne's name under s 40(2)
- The University is no longer withholding clauses 25-27
- The University is no longer withholding the text redacted from the introductory part of clause 31.
- The University was entitled to withhold some additional wording (not highlighted in error) identified in para (i) of the email from the University to the Tribunal dated 22 February 2022.

The University of Southampton is required to disclose the following information within 42 days of the date this decision is sent to the parties:

USSO.79

USSO.112

The parts of USSO.171 and USSO.172 which are not highlighted by the Commissioner in the versions emailed to the Tribunal on 19 November 2021.

### **SUBSTITUTE DECISION NOTICE FS50827458**

**Organisation: The Cabinet Office**

**Complainant: Dr Andrew Lownie**

**The Substitute Decision FS50827458**

The Cabinet Office was entitled to withhold some of the requested information under s 40(2), s 41, s 42 and s 44.

Any information which the Cabinet Office was not entitled to withhold has already been disclosed. The Cabinet Office is not required to take any steps.

### **REASONS**

#### **Closed annex**

1. It was necessary to include some of the Tribunal's reasoning in a short-CLOSED annex.

#### **Application to postpone**

2. For the reasons given orally in the hearing the Judge refused an application by Dr Lownie to postpone the hearing.

#### **Introduction and background to the appeals**

3. The Tribunal is considering a series of related appeals and cross-appeals against three decision notices by the Commissioner: FS50827458 and FS0772761 (both dated 18 December 2019 and IC-47499-X8X1 (dated 15 April 2021).
4. We have attempted to take a proportionate approach to the proceedings in accordance with the overriding objective. The amount of material and evidence before us is vast. We have attempted to address the issues and to draft this decision in a focussed and proportionate way.

5. The Tribunal has gained enormous assistance from the detailed background information set out in the Decision Notices, the pleadings and the parties' skeleton arguments. This is a complex series of appeals with a long history. We have attempted not to include in this decision any more than is necessary for us to reach our decision and to explain to the parties why they have won or lost. The parties are all intimately aware of the background and history of these appeals. We do not intend to repeat or paraphrase the expert summaries of the relevant background and history which have been set out by all parties in the documents before us.
6. The detail of the requests and the decisions reached by the Commissioner are familiar to all parties, are set out in the respective Decision Notices and will not be repeated here.
7. The appeal and cross-appeal against FS50772671 (EA/2021/0021 and EA/2020/0058) are referred to as the 'University Appeals'. They concern requests for the disclosure of information from the 'Mountbatten Papers' (diaries and correspondence of Lord and Lady Mountbatten) which forms part of the 'Broadlands Archive' which was purchased by Southampton University in 2011, along with an option to purchase the 'Nehru papers'. The University Appeals also include a request for the 2011 purchase agreement, known as the 'Broadlands Agreement'.
8. The Broadlands Archive was obtained by the University pursuant to a Ministerial Direction issued under the National Heritage Act 1980 ('the Ministerial Direction'), which included a condition that the contents of the Broadlands Archive were to be made available to the public with the exception of elements notified to the University as closed by the Cabinet Office. The relevance and effect of the Ministerial Direction is in dispute.
9. The appeal and cross-appeal against FS50827458 (EA/2020/0026 & EA/2020/0059) are referred to as the 'first Cabinet Office Appeals'. In essence they concern requests for more correspondence concerning the circumstances in which the Broadlands Archive was transferred to the University.
10. The appeal by the Cabinet Office against IC-47499-X8X1 (EA/2021/0125) has been withdrawn and dismissed. It is referred to as the 'second Cabinet Office Appeal'.
11. Matters have moved on considerably since the decision notices, particularly in the University Appeals, and the vast majority of the Mountbatten Papers have now been made public.
12. The three main issues remaining in the University appeals are:
  - 12.1. The relevance and effect of the Ministerial Direction.

- 12.2. Whether the University can withhold certain extracts from the letters and diaries in the Mountbatten papers under s 23, s 27(1)(a), (c) and (d), s 40(2), s 37(1)(a), (aa), (ac) and (b). The withheld extracts and the section relied on are identified in CLOSED and OPEN Scott Schedules referred to as USSO and USSC. The most up to date versions of USSO and USSC were filed on 12 January 2022.
- 12.3. Whether the University held the 'Nehru papers' otherwise than on behalf of another person.
- 12.4. Whether the University can withhold the information redacted from the Broadlands Agreement under s 40(2) or s 41.
13. In the first Cabinet Office Appeals the withheld information consists mainly of personal information redacted from correspondence. There are also some redactions of information said to be obtained in confidence and of information subject to legal professional privilege. The Commissioner and the Cabinet Office agree on which information can be withheld. Dr Lownie does not. The issue for the Tribunal is, in essence, whether the information redacted from the correspondence can be withheld under s 40(2), s 41 or s 42.

## Issues

14. The issues for the Tribunal to determine were agreed by the parties at the start of the hearing as follows. We have removed a section in square brackets, and a reference to that section, because the University withdrew reliance on s 44 before the hearing. Although we have dealt with all these issues or explained why we have not dealt with them in our discussion and conclusions below, we have divided the issues slightly differently to the parties:

### The University of Southampton's appeal and Dr Lownie's Cross-Appeal

1. Are the exemptions set out in the Scott Schedules (OPEN and CLOSED) engaged by the items of information to which they are said to apply in the Scott Schedules?

*The claimed exemptions in the Scott Schedules are section 23, section 27(1)(a), (c) and (d), section 40(2) (first condition - breach of data protection principles), section 37(1)(a), (aa), (ac) and (b).*

2. In relation to the items to which sections 27 and 37 applies, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

3. It is Dr Lownie's view, and that of the ICO, issues 1 and 2 include the issue of whether the University is required by paragraph 2(b) of the Schedule to the Ministerial Direction dated 5 August 2011 to make all the withheld information contained in the correspondence between Lord and Lady Mountbatten and their respective diaries (including the appointment diaries and tour diaries) accessible to the public. On that basis, Dr Lownie has attached sub-issues relating to the Ministerial Direction at Annex A. The University and the Cabinet Office accepts that Dr. Lownie may make whatever submissions he likes on issues 1 and 2, e.g. he may submit that a particular fact-specific exemption does not apply or that the public interest favours disclosure because of the terms of the Ministerial Direction. However, the University and the Cabinet Office do not accept that it is proportionate for the Tribunal to decide whether any particular piece of information is OPEN or CLOSED for the purposes of the Ministerial

Direction. The University and the Cabinet Office are accordingly of the view that it will not be necessary for the Tribunal to determine the Issues at Annex A.

3a) The issues arising in relation to the Ministerial Direction (relevant to issues 1 and 2) may need to be determined at the hearing.

3b) If relevant, is the University required by paragraph 2(b) of the Schedule to the Ministerial Direction dated 5 August 2011 to make any or all the withheld information contained in the correspondence between Lord and Lady Mountbatten and their respective diaries (*including the appointment diaries and tour diaries*) accessible to the public and if so, what account of this should be taken by the Tribunal when considering the applicability of the claimed FOIA exemptions referred to in issue 1 above and the public interest balancing exercise referred to in issue 2 above?

4. Is the information in the 2011 Agreement which the University and the Information Commissioner have agreed should be redacted exempt from disclosure under sections 40(2), 41(1), and 44? (*the University and Information Commissioner have agreed the redactions and the exemptions, but it arises on Dr Lownie's cross-appeal.*)

5a) At the time of Dr Lownie's requests for information from the University during the course of 2017 - 18, did the University hold:

(i) any further information about the gaps within the inventory of the 2017 S-series list provided to Dr Lownie on 22 September 2017;

(ii) any further papers in the archive of Lord and Lady Mountbatten which the University was withholding from public access, in addition to the papers in the list of 22 September 2017 and the Nehru papers at issue 6 below); and/or

iii) any further information about the genesis and operation of the Ministerial Direction, including any agreement between the University and the Cabinet Office in relation to the same;

and if so, is this information still being withheld from public access?

5b) Were the transfer lists, as mentioned in the 1989 Agreements, within the scope of Dr Lownie's requests for information from the University during 2017-18 and if so, did the University's supply of the relevant transfer list for 10th August 2009 and schedule C5 to the 2011 Broadlands agreement (as supplied to Dr Lownie on 9 March 2020) satisfy the requirement for the provision of this information?

6. Does the University hold the Nehru papers? This raises the issue of whether those papers are held otherwise than on behalf of another under section 3(2)(a) and in the alternative, if the University does hold the Nehru papers for the purposes of FOIA is the information contained in the Nehru papers exempt from disclosure on the grounds of section 41(1) (*this arises only on Dr Lownie's cross-appeal*)?

7. Are the redacted names and other biographical details of certain individuals within the Cabinet Office exempt from disclosure by reason of section 40(2), first condition - \_breach of data protection principles (*this arises on both the University's and the Cabinet Office's appeals*)?

8. Are the redacted names and other biographical details of certain individuals at other bodies (i.e. other than the Cabinet Office and the University) exempt from disclosure by reason of section 40(2), first condition - \_breach of data protection principles (*this arises on Dr. Lownie's appeal*)?

9. Is the information redacted from the correspondence referred to in paragraph 39 of ICO's response to both appeals dated 13 October 2020, which the University and the ICO have agreed should be redacted, exempt from disclosure under sections 40(2) and 41(1) of FOIA?

The Cabinet Office's First Appeal and Dr Lownie's Cross-Appeal

10. This relates to 27 items of correspondence, and one review schedule which are withheld in part or in full. In addition to issues 4 and 6 above, the exemptions claimed in relation to the correspondence are sections 37(1)(a), 37(1)(ad), 41 and 42.

11. As to the Review Schedule, sections 35, 36, 23, 26, 27, 37(1)(a), (aa), (ac) and (ad) as well as 37(1)(b), 40(2) and 41 are claimed. The PIT will arise on the qualified exemptions (all the above save for 37(1)(a), 40(2) and 41).

The Cabinet Office's Second Appeal (withdrawn)

12. This relates to two emails which the Cabinet Office contends should be withheld under sections 35 and 41 or provided with redactions under section 40(2) (issue 7 above).

15. The list of issues in Annex A are as follows. As noted in the list of issues above, the University and the Cabinet Office were of the view that it would not be necessary for the Tribunal to determine the issues at Annex A.

Annex A List of issues under s 44(1)(a) in respect of the Withheld Papers

	Issue	Relevance of the content of the Papers
1.	<b>Is the Direction, or any Notification made under it, capable of being within the reach of the exemption in s. 44(1)(a) of FOIA?</b>	Questions of law. No need to consider the content of the Withheld Papers
	a. Is s. 44(1)(a) capable of encompassing a prohibition in a Ministerial Direction made under s. 9 of the National Heritage Act 1980?	
	b. Even if yes, is s. 44(1)(a) capable of encompassing information whose disclosure is prohibited by virtue of a non-statutory Notification which is referred to in a Ministerial Direction?	
	c. Even if yes, does para. 2(b) of the Schedule to the Direction purport to prohibit disclosure pursuant to a FOIA request?	
	d. Even if yes, was it open to the Minister to include the prohibiting words in the Direction. I.e. was it open to him to use the power conferred by s. 9(2) of the National Heritage Act 1980 to empower the Cabinet Office to prohibit the University from disclosing information pursuant to a FOIA request which it would otherwise have been obliged to disclose including under FOIA – either in the temporal interpretation contended for by Dr Lownie or by the University?	



	e. Even if yes, are the prohibiting words in the Direction effectual even though they were not part of the particulars laid before Parliament under s. 9(6) of the National Heritage Act 1980?	
2.	<b>Even if yes, do the Withheld Papers fall within the scope of the Direction in that they are elements of “the Archive of Louis, First Earl of Mountbatten and of his wife Edwina, Countess Mountbatten already on deposit at the University of Southampton at the date of this direction” [5 August 2011]?</b>	
	a. Were the Withheld Papers <i>physically</i> at the University as at 5 August 2011?	
	b. Even if yes, were they there “on deposit” within the meaning of clauses 3(ii) and 4 of the 1989 Loan Agreement? I.e. as at 5 August 2011, did the University, the Cabinet Office, and the other parties to the agreement <i>know</i> that the Withheld Papers were at the University on loan and had they <i>consented</i> to their loan?	
3.	<b>As at 5 August 2011, had the Cabinet Office issued a Notification to the University that the Withheld Papers were closed within the meaning of the Direction?</b>  Specifically, was the University so notified by virtue of the Undertakings it had given in 1989 not to disclose “ <i>those papers formerly held by Earl Mountbatten of Burma which relate to his official activities as a naval officer as Supreme Allied Commander, South East Asia Command, as Viceroy of India, and as Chief of Defence Staff, and any similar papers</i> ” without the consent of the Cabinet Office?	Questions of mixed law and fact. Need to consider the content of the Withheld Papers for steps 3(c) and (d) and need to consider the applicability of non-s.44 exemptions for step (d).
	a. Are the Undertakings capable of constituting a Notification within the meaning of the Direction? [If no, skip to 4 below.]	
	b. Even if yes, did the University and the Cabinet Office consider that the Withheld Papers were closed because of the operation of the Undertakings?	
4.	<b>If the Withheld Papers had not been notified as closed as at 5 August 2011, as a matter of construction of the Direction can the University rely on a Notification post-dating 5 August 2011? I.e. did the Direction lawfully</b>	Question of law. No need to consider the content of the Withheld Papers.

	give the Cabinet Office power to close papers after that date which were previously open?	
5.	<p><b>If yes, at any time between 5 August 2011 and 26 May 2017 (being the date the University responded to Dr Lownie’s request for the Withheld Papers), or since 26 May 2017, has the Cabinet Office issued a Notification to the University that the Withheld Papers are closed within the meaning of the Direction?</b></p> <p>Specifically, was the University so notified by (i) the Undertakings, (ii) the 2011 Email, (iii) the 2012 Meeting, and/or (iv) the Cabinet Office’s 2020 Observations?</p>	Questions of mixed law and fact. Need to consider the content of the Withheld Papers and the applicability of non-s.44 exemptions for steps 5(b) and (f).
	a. Are the Undertakings capable of applying to the Withheld Papers after 8 August 2011 (being the Effective Date for the purpose of clause 1.5 of the 2011 Sale Agreement)? [If no, skip to 5(c) below.]	
	b. Even if yes, repeat 3(a)-(d) above.	
	c. Without relying on the Undertakings, are the 2011 Email, the 2012 Meeting, and/or the 2020 Observations capable of constituting a Notification within the meaning of the Direction?	
	d. Even if yes, did the University and the Cabinet Office consider that by virtue of these communications the Cabinet Office was issuing a Notification pursuant to the Direction that the Withheld Papers were closed?	
	e. Even if yes, were the University and the Cabinet Office correct to consider that the Withheld Papers had been notified as closed pursuant to the Direction by virtue of these communications? I.e. as a matter of fact, are the Withheld Papers within the scope of these purported Notifications?	
	f. Even if yes, repeat 3(d) above.	

## Legal framework

### *The holding requirement*

16. S 3(2) FOIA provides:

- For the purposes of this act, information is held by a public authority if –
- (a) it is held by the authority, otherwise than on behalf of another person, or
  - (b) it is held by another person on behalf of the authority.

*S 40 – personal information*

17. The relevant requests were dealt with before 25 May 2018. In accordance with para 52 Schedule 20 DPA 2018, s 40 FOIA applies as it applied under DPA 1998 and therefore as unamended to bring GDPR into force.

18. The relevant parts of s 40 FOIA provided:

(2) Any information to which a request for information relates is also exempt information if-

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

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a)-(d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

- (i) any of the data protection principles...

19. The legislation in force at the relevant time was the Data Protection Act 1998 ('DPA') Personal data is defined in s1(1) DPA as:

data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller...

20. The first data protection principle is the one of relevance in this appeal. This provides that:

1. 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... (See para.1 Sch 1 DPA).

21. The potentially relevant conditions in Schedule 2 DPA are sections 3, 5(b) and 6(1) which provide that:

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

5. The processing is necessary –

- (a) ...

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c)...

6(1) 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.

22. The case law on section 6(1) has established that it requires the following three questions to be answered:

1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

23. S 34 DPA provides:

Personal data are exempt from –

- (a) the subject information provisions,
- (b) the fourth data protection principle and section 14(1) to (3), and
- (c) the non-disclosure provisions,

if the data consist of information which the data controller is obliged by or under any enactment to make available to the public, whether by publishing it, by making it available for inspection, or otherwise and whether gratuitously or on payment of a fee.

24. S 35 DPA provides:

35. – (1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.

(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary –

- (a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or
- (b) for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

25. The ‘subject information provisions’ and the ‘non-disclosure provisions’ are defined in s 27 DPA:

(2) In this Part “the subject information provisions” means –

- (a) the first data protection principle to the extent to which it requires compliance with paragraph 2 of Part II of Schedule 1, and
- (b) section 7.

(3) In this Part “the non-disclosure provisions” means the provisions specified in subsection (4) to the extent to which they are inconsistent with the disclosure in question.

(4) The provisions referred to in subsection (3) are –

- (a) the first data protection principle, except to the extent to which it requires compliance with the conditions in Schedules 2 and 3,
- (b) the second, third, fourth and fifth data protection principles, and
- (c) sections 10 and 14(1) to (3).

*S 41 – information provided in confidence*

26. S 41 provides, so far as relevant:

*S 41 – Information provided in confidence*

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.

27. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

27.1. Does the information have the necessary quality of confidence?

27.2. Was it imparted in circumstances importing an obligation of confidence?

27.3. Is there an unauthorised use to the detriment of the party communicating it?

28. The common law of confidence has developed in the light of Articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of ‘private’ information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.

29. S 41 is an absolute exemption, but a public interest defence is available to a breach of confidence claim. Accordingly there is an inbuilt balancing of the public interest in determining whether or not there is an actionable breach of confidence.

*Section 23*

30. Under s 23(1) information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority or relates to any of the bodies specified in s 23(3).

31. Section 23(2) lists a number of bodies dealing with security matters.

32. S 23(1) is class-based, which means that there is no requirement to demonstrate prejudice.

33. The Tribunal decides the question of whether or not information was supplied by or relates to a relevant body on the balance of probabilities.

*Section 27(1) International relations*

34. S 27(1) provides:

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice–

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

35. The exemption is prejudice based. ‘Would or would be likely to’ means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

36. Section 27 is not an absolute exemption and therefore under s 27(1) the Tribunal must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Section 37(1) Communications with Her Majesty, etc and honours*

37. The relevant sections of s 37(1) provide:

37(1) Information is exempt information if it relates to –

- (a) communications with the Sovereign,
- (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,

...

(ac) communications with other members of the royal family (other than communications which fall within any of the paragraphs (a) to (ab) because they are made or received on behalf of a person falling within any of those paragraphs), and

...

- (b) the conferring by the Crown of any honour or dignity.

38. S 37(1)(a) and (aa) are absolute exemptions. The other subsections are qualified. and therefore the Tribunal must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*The role of the Tribunal*

39. The Tribunal’s remit is governed by s 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising

discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

### **Evidence and submissions**

40. We had before us the following bundles:

UO: The University Appeals OPEN bundle in EA/2020/0021 and 0058 (4614 pages)

UC: The University Appeals CLOSED bundle in EA/2020/0021 and 0058 (1634 pages)

CO1: The First Cabinet Office Appeals OPEN bundle in EA/2020/0026 and 0059 (2629 pages)

CC1: The First Cabinet Office Appeals CLOSED bundle in EA/2020/0026 and 0059 (508 pages)

CO2: The Second Cabinet Office Appeal OPEN bundle in EA/2021/0125 (342 pages)

CC2: The Second Cabinet Office Appeal CLOSED bundle in EA/2021/0125 (189 pages)

41. A small number of additional documents were produced during the hearing and the Judge made an order that these documents should be CLOSED in accordance with rule 14.

42. We had before us the following Scott Schedules:

USSO: OPEN Scott Schedule in the University Appeals EA/2020/0021 and 0058 (final version filed on 12 January 2022)

USSC: CLOSED Scott Schedule in the University Appeals EA/2020/0021 and 0058

CSSO: OPEN Scott Schedule in the Cabinet Office Appeals EA/2020/0026 and 0059 and EA/2021/0125

CSSC: CLOSED Scott Schedule in the Cabinet Office Appeals EA/2020/0026 and 0059 and EA/2021/0125

43. We had before us the following witness statements:

AL WS1: Dr Andrew Lownie 24 December 2020 UO.E1008

AL WS2: Dr Andrew Lownie 13 January 2021 UO.E1467

AL WS3: Dr Andrew Lownie 22 January 2021 UO.E2795

AL WS4: Dr Andrew Lownie 11 October 2021 UO.E3059

AL WS5: Dr Andrew Lownie 27 October 2021 UO.E3059  
AL WS6: Dr Andrew Lownie 11 November 2021  
AL WS7: Dr Andrew Lownie 10 December 2021

PH WS1: Peter Hawthorne 24 November 2020 UO.E1002  
PH WS2: Peter Hawthorne 2 March 2021 UO.E3051

RS OWS1: Roger Smethurst (open) 13 January 2021 UO.E1178  
RS OWS2: Roger Smethurst (open) 28 January 2021 UO.E2817  
RS OWS3: Roger Smethurst (open) 10 February 2021 UO.E3044  
RS OWS4: Roger Smethurst (open) 11 October 2021 UO.E3300  
RS OWS5: Roger Smethurst (open) 27 October 2021 UO.E3367

RS CWS1: Roger Smethurst (closed) 13 January 2021 UC.F1032  
RS CWS4: Roger Smethurst (closed) 11 October 2021 UC.F1345  
RS CWS5: Roger Smethurst (closed) 27 October 2021 UC.F1513

CW OWS1: Professor Christopher Woolgar (open) 13 January 2021 UO.E1192  
CW OWS2: Professor Christopher Woolgar (open) 29 January 2021 UO.E2822  
CW OWS3: Professor Christopher Woolgar (open) 11 October 2021 UO.E3176  
CW OWS4: Professor Christopher Woolgar (open) 22 October 2021 UO.E3362

CW CWS1: Professor Christopher Woolgar (closed) 13 January 2021 UC.E1067  
CW OWS2: Professor Christopher Woolgar (open) 29 January 2021 UO.E2822  
CW OWS3: Professor Christopher Woolgar (open) 11 October 2021 UO.E3176  
CW OWS4: Professor Christopher Woolgar (open) 22 October 2021 UO.E3362

LC OWS1: Lesley Craig (open) 1 October 2021 UO.E3056  
LC CWS1: Lesley Craig (closed) 1 October 2021 UC.F1342

KR WS1: Karen Robson 11 October 2021 UO.E3268  
KR WS2: Karen Robson 27 October 2021 UO.E3371

44. We heard oral evidence from the following witnesses:

Dr Lownie  
Roger Smethurst  
Nigel Casey (who adopted the witness statements of Lesley Craig), Director  
for Afghanistan, Pakistan and Iran Directorate (APID) in the Foreign,  
Commonwealth & Development Office.  
Karen Robson  
Professor Woolgar

45. We read closed and open skeleton arguments and heard oral submissions from  
all parties.



46. The Tribunal held a closed session for evidence and a closed session for submissions. The following gists were provided to Dr Lownie:

#### **CROSS EXAMINATION OF ROGER SMETHURST IN CLOSED**

Mr Smethurst (RS) was cross-examined in CLOSED by Mr Hopkins (RH) for the ICO.

RH put the following points as requested by Dr Lownie (Dr L):

1. RH indicated that, in light of what was discussed in open, he would not ask RS questions about the application of the Ministerial Direction
2. RH asked RS questions about Dr L's 4<sup>th</sup> statement (para 8.3) and 6<sup>th</sup> statement para 6.
  - RS identified some items from the University Appeal Scott Schedule for which Dr L is correct that some or all of the redacted material is in the public domain and can be disclosed. Those items are 2, 75, 78, 100, 169.
  - RS identified by reference to the closed documents some items from the University Appeal Scott Schedule where the public domain material relied upon by Dr L is not relevant to the withheld information. Those items are 6, 113, 152, 168.
  - For the remainder, RS indicated that the CO was continuing its work to check the material relied upon by Dr L against the withheld information.
3. RH then asked RS about the data subjects whose personal data Dr L surmises has been redacted but whose personal data was available in materials in the open bundle. The relevant data subjects were: Lord Brabourne, Sally Falk, Richard Jordan-Baker, Mrs Travis and Mrs Chalk. RS and AH indicated that no personal data was being withheld for some of those data subjects and for others, RS considered that the presence of certain personal data in the public domain did not justify (i.e. did not render fair) the fresh disclosures Dr L seeks, including because (a) some of the previous disclosures were inadvertent, and (b) the personal circumstances of the relevant data subjects were sensitive.
4. RH then asked RS, on behalf of the ICO, about the two emails that are the subject of the CO's second appeal. As this appeal has now been withdrawn by the CO, this evidence is no longer relevant.

#### **CROSS EXAMINATION OF NIGEL CASEY IN CLOSED**

Mr Casey (NC) was cross-examined in CLOSED by Mr Hopkins (RH) for the ICO.

1. RH put to NC the items of evidence (save for the extract from Disastrous Twilight sent to the Tribunal by Dr L's solicitors at 16.04 to which the CO will respond as directed by the Tribunal) raised by Dr L in OPEN cross-examination as being either a match for or similar to the withheld items.
2. NC gave evidence about whether or not Dr L had identified a match between the withheld material and the public domain materials adduced by Dr L.
3. NC confirmed that regardless of whether there was a match or not the materials ought to be withheld because disclosure with the perceived approval of the British Government would cause the prejudice to international relations alleged. He gave evidence that this was still the case even if similar materials to that being withheld are in the public domain.
4. He was asked by Dr Gasston whether it might make a difference if the disclosure were to be understood to have been made because it was required under UK law. NC stated that he did not think it would make a difference because such laws would not be well understood in the relevant countries.

#### **CROSS EXAMINATION OF PROFESSOR WOOLGAR IN CLOSED**

Prof Woolgar (CW) was cross-examined in CLOSED by Mr Hopkins (RH) for the ICO.

RH put the following points as requested by Dr Lownie (Dr L):

- CW was asked questions about the Option Goods, and in particular why the University had not yet exercised the Option. He explained that necessary consultations with certain interested parties remained ongoing. He also said that if at any time the Option can be exercised, the Cabinet Office will be consulted on any FOIA exemptions that may apply at that point in the future.
- CW was asked about alleged inconsistencies between information which had been withheld and information in the public domain, by reference to the list of points identified by Dr L. These issues have been deferred for CLOSED legal argument.
- CW was asked about references (if any) in the material redacted from the 2011 Agreement that referred to the Undertakings, the Excluded Records, sealed sacks, the still-withheld diaries or correspondence, or the Cabinet Office. If and to the extent that any such references had been redacted, he was asked why those redactions were being made, in light of the public interest in the disclosure. On these questions, the Tribunal was referred to the rationale for each redaction, as set out at page F1481 in the closed bundle (and in redacted form at page E3236 of the open bundle). The Tribunal indicated that any additional queries arising from this document will be addressed further in CLOSED submissions.
- CW was asked to respond to the point that there is a public interest in knowing the identity of the trustee who Mr. Smethurst says in his witness statement is a “very senior member of the Royal Family” given the Cabinet Office’s purported control over royal papers. He said that that there were all sorts of reasons for redacting that, including that the agreement was confidential in its entirety. He also referred that to the University’s legal team.
- CW was asked why the CO was not a party to the 2011 agreement. He said he was not sure, but he thought that this was probably because there was no Government ownership of the materials which then came to the University by way of the AIL scheme and Ministerial Direction. The 2011 Excluded Records were not owned by the Government at that point.
- CW was asked whether the CO had seen a draft of the 2011 agreement before it was signed. He did not know the answer, but thought it probably had not.
- CW was also asked whether the expiry of the 10-year contractual limit for the confidentiality clause affected the assessment of ongoing confidentiality duties. He answered that this was in large part a point for legal submissions, but his view was that certain confidentiality interests merited protection even beyond the life of that clause.

## **GIST OF CLOSED SUBMISSIONS**

### *University submissions*

Mr Dunlop addressed some of the closed evidence and some of the questions that Prof Woolgar had referred to his legal team.

He confirmed name of Lord Brabourne would be unredacted where it had been redacted under s.40(2).

He responded to the questions, asked of Prof Woolgar on Dr Lownie’s behalf, about the document at [UO.2995]. He made two points about this:

1. The relevant request for information was about any agreement between the University and the Cabinet Office. That request was made on the 29 September 2017 [UO.C370] and refused in December 2017 [UO. E1247]. The University released the 1989 loan agreements as part of its review response on the 20<sup>th</sup> June 2018 (UO.C408). So, this disclosure took

place after the refusal and is irrelevant for the FTT's purposes as they must consider exemptions at time of refusal.

2. who disclosure is to – He reiterated what he said in open about how disclosure in proceedings is different to disclosure to the world. Even now, [UO.2995] is not one of the documents that has been provided to the press.

He responded to the questions, asked of Prof Woolgar on Dr Lownie's behalf, about the names of Trustees being in the public domain already due to a book [UO.2664] published in 1985 [UP. E2577]. He made the point that families don't always know who the trustees of family trusts are. An official legal document confirming the names of trustees in 2011 is different to the guesses of a family member in a book from 1985.

He responded to the questions, asked of Prof Woolgar on Dr Lownie's behalf, about Emberdove Ltd.

He responded to [a] question, asked of Prof Woolgar on Dr Lownie's behalf, about the fact that Mr Smethurst had said, in a witness statement, that one of the Trustees was a senior member of the Royal Family. He made three points

1. That statement was not in the public domain at time of request so that statement cannot affect the quality of confidence at the material time.
2. Even if there were a public interest in knowing that a senior member was a trustee, that public interest has now been met by Mr Smethurst's statement. There is comparatively little public interest in knowing which senior member of the Royal Family is a Trustee.
3. The test was not whether there was a public interest in disclosure of the particular member's name but the much higher test of whether there was a public interest in breaching confidence. There was not.

He responded to questions, asked of Prof Woolgar on Dr Lownie's behalf, about whether there were references in redacted material to undertakings, excluded records, sealed sacks, diaries or parts of diaries. There were such references, but they were exempt under s.41.

He responded to a question from Dr Gasston about why recital D had a quality of confidence at the material time.

### *CO submissions*

Mr Heppinstall for the Cabinet Office made submissions in relation to items 171, 172 (in relation to why these are to be withheld under section 40(2)); 176, 177, 178 (in relation to why these are to be withheld under section 27) and 179 (as to why this is to be withheld under section 23). He drew attention to the CLOSED evidence from Mr Smethurst and Mr Casey in relation to these matters (which is already set out in a Gist).

A Rule 14 order was made in relation to additional documents adduced by the Cabinet Office in CLOSED session. These documents were adduced by the Cabinet Office as evidence in support of its argument that disclosure would or would be likely to prejudice international relations under s 27.

### *ICO submissions*

Mr Hopkins only made submissions on Items 171 and 172 and why the IC argues that some of the text that the CO seeks to withhold is not exempt under s. 40(2) because it does not fall within the definition of personal data

47. The parties were given the opportunity to provide further information/submissions after the hearing. The following were provided:

Dr Lownie's seventh witness statement with exhibit AJHL13 filed on 10 December 2021 (AL WS7)

An updated OPEN and CLOSED Scott Schedule in the University Appeals (USSO and USSC) filed by the Cabinet Office on 12 January 2022

A letter in response from Dr Lownie dated 17 January 2022

## **Discussion and conclusions**

### *The Mountbatten papers*

#### *The relevance of the Ministerial Direction (issue 3 in the parties' list of issues)*

48. The Broadlands Archive was acquired by the University pursuant to a Ministerial Direction issue under the National Heritage Act. The Ministerial Direction provides that the Broadlands Archive be transferred to the University subject to the conditions specified in Schedule 2. The relevant condition in Schedule 2 is that the University shall:

Keep the relevant property at the University of Southampton, University Road, Southampton, Hampshire and make it accessible to the public, with the exception of those elements of the archive which have been notified to the University of Southampton as closed by the Knowledge and Information Management Unit of the Cabinet Office which shall remain closed to public access until such times as the Cabinet Office confirms in writing to the University of Southampton that the closed material can be opened to general public scrutiny....

49. In our view it is not necessary, for the purposes of the issues before us, to determine whether or not any particular piece of information is OPEN or CLOSED for the purposes of the Ministerial Direction. It is not necessary because we have adopted the approach proposed by Mr Hopkins on behalf of the Commissioner.
50. We find that a 'default setting' of disclosure, i.e. if a particular piece of information was OPEN for the purposes of the Ministerial Direction, is not determinative of whether that information can be withheld pursuant to a request under FOIA. We agree with the reasoning of Mr Hopkins on this point: FOIA is a distinct regime with specific exemptions and no provision for mandatory disclosure in circumstances such as these. There is no provision for the automatic overriding of exemptions that would otherwise apply.

51. We find that the 'default setting' is relevant to the public interest in disclosure but does not have overriding weight. It carries weight, but it can be displaced. In assessing the weight we have taken account of the evidence that at the time the Ministerial Direction was made there had not been a detailed review by the Cabinet Office of all the information such as has now been undertaken. The 'default setting' in our view carries less weight than it would have done had such a detailed review taken place at the time the Ministerial Direction was made.
52. We have considered each piece of information on the basis of a presumption that it is OPEN under the Ministerial Direction (i.e. that it has not been notified as CLOSED). Where we have decided that the information can be withheld, there is no need to explore whether the presumption is correct or not. Where we have concluded that the information should be disclosed, we have considered whether, in each case, the presumption tipped the balance in favour of disclosing the information. There were no occasions when the presumption tipped the balance. Accordingly, we do not need to determine whether or not a particular piece of information was OPEN or CLOSED for the purposes of the Ministerial Direction.
53. Ms Hamer makes a further argument in relation to s 40(2). Under s 34 (or s 35) DPA where a data controller is obliged by an enactment to make information available to the public, personal data is exempt from the non-disclosure provisions under s 34 DPA. This does not remove the need to ensure that a condition from Schedule 2 DPA is met, but Ms Hamer submits that condition 3 and/or 5(b) and/or 6(1) are met. Ms Hamer submits that *full* disclosure is reasonably necessary to comply with the Ministerial Direction. The Direction is binary and does not provide for substantial compliance or partial disclosure. Anything less than full disclosure will not have achieved the legitimate aim.
54. In the alternative, Ms Hamer submits that if the Tribunal does not accept that full disclosure is reasonably necessary, the University has taken an overly restrictive approach.
55. We agree with Mr Hopkins that condition 5(b) (necessary for the exercise of any functions conferred on a person by or under an enactment) does not apply on these facts.
56. In relation to the application of conditions 3 and 6(1) we agree with Mr Hopkins and Mr Dunlop that when considering what is reasonably necessary, we must apply the principles of EU law on proportionality and ask ourselves whether it would be proportionate to disclose items of personal data - is disclosure of those items of personal data required to secure substantive compliance with the Ministerial Direction? Mr Hopkins and Mr Dunlop submit that substantive compliance is achieved notwithstanding the limited

redactions. Further it is submitted that to the extent that the redactions are contrary to the Ministerial Direction the EU principles of proportionality take precedence.

57. We agree with Mr Hopkins and Mr Dunlop. Applying the principles of proportionality, we conclude that the Ministerial Direction can be construed, in accordance with EU law and s 3 of the Human Rights Act 1998, as only requiring the University to make the diaries and letters public in so far as that would be proportionate to data subject's right to privacy. Substantive compliance can be achieved by disclosing the information, redacted to exclude personal information of living individuals, and it is therefore not necessary to disclose that personal information in order to comply with the legal obligation or to achieve the legitimate aim.

*Information which Dr Lownie has identified as being already in the public domain*

58. Certain information which Dr Lownie has correctly identified as being in the public domain has now been released, and our findings below do not apply to that information.
59. The Cabinet Office has been made aware of Dr Lownie's submissions and evidence on this point and, where there is a dispute on this point, we accept that the Cabinet Office have correctly identified and disclosed any information already in the public domain where appropriate.
60. On occasion, information identified by Dr Lownie as being in the public domain is still withheld and, where necessary, we have dealt with this in the decision at the appropriate point.

*S 23 – Information relating to bodies dealing with security matters (issue 1 in the parties' list of issues)*

61. We accept that the information identified in USSO.179 and UC.B174 relates to a body specified in s 23(3) and we find that it can be withheld under s 23.

*S 40(2) – personal data (issue 1 in the parties' list of issues)*

*Personal information of police officers, staff of the Royal Household and other 'third parties' in the diaries or letters*

62. We have reviewed each redaction. We have considered Dr Lownie's additional comments in column K OF USSO.
63. We accept that the redacted information is personal information i.e. information relating to an identifiable individual. We find that it is not reasonably necessary to disclose the personal information of police officers,

staff of the Royal Household or other third parties to comply with the Ministerial Directive. As we indicated above, in our view, substantive compliance with the Ministerial Directive is achieved by disclosure with redactions to remove the personal information of living individuals.

64. In relation to s 6(1) of Schedule 2 DPA we find that it is not reasonably necessary for the particular personal information that has been redacted to be available to the public as a whole (as opposed to, for example, more restricted access for academic research) for the purposes of the undoubted legitimate academic and historical interest in the diaries and the letters as a whole.
65. We accept that there is an additional legitimate interest in making the Mountbatten Archive public because it was purchased by public funds subject to the condition (as a result of our presumption) that it would be accessible to the public. As we indicated above, in our view, substantive compliance with this legitimate interest is achieved by disclosure with redactions to remove the personal information of such individuals.
66. Further and in any event, we find that the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. We accept that it is highly likely that none of the data subjects were aware that their personal data was being recorded. They are highly unlikely to have considered that when speaking or writing to others in these particular contexts their information would be recorded. They would not have expected this type of personal data to have entered the public domain during their lifetimes even if they had anticipated that it would be recorded in a private diary or letter.
67. For those reasons we find that the personal information of police officers, staff of the Royal Household and other third parties can be withheld under s 40(2).

*Personal information of members of the Royal Family in the diaries and letters*

68. We have reviewed each redaction. We have considered Dr Lownie's additional comments in column K OF USSO.
69. We accept that the redacted information is personal information (information relating to an identifiable individual) save for USSO.79. The University is not entitled to withhold USSO.79 under s 40(2).
70. USSO.79 does not, in our view, contain personal information relating to the Queen. It does not have the Queen as its focus. She is not the subject of the information. There is a passing reference to the Queen, but we do not accept that this is sufficient to make it her personal information.

71. In relation to the remainder of the withheld information, we find that it is not reasonably necessary to disclose the personal information of members of the Royal Family to comply with the Ministerial Directive. As we indicated above, in our view, substantive compliance with the Ministerial Directive is achieved by disclosure with redactions to remove personal information of living individuals.
72. In relation to s 6(1) of Schedule 2 DPA we accept there is a legitimate academic and historical interest specifically in the personal information of the Royal Family. Even so, we find that it is not reasonably necessary for the particular personal information that has been redacted to be available to the public as a whole (as opposed to, for example, more restricted access for academic research) for the purposes of the legitimate academic and historical interest in the diaries and the letters as a whole.
73. We accept that there is a legitimate interest specifically in the personal information of the Royal Family in the context of their relations with the Mountbatten family being made available to the public as a whole, because of the Royal Family's unique constitutional and public role, and we accept that it was reasonably necessary to disclose this personal information for those purposes. Further we accept that there is a related and overlapping legitimate interest in the Mountbatten diaries and letters being made available to the public without the redaction of personal information of the Royal Family.
74. Further we accept that there is a legitimate interest in making the Mountbatten Archive public because it was purchased by public funds subject to the condition (as a result of our presumption) that it would be accessible to the public. As we indicated above, in our view, substantive compliance with this legitimate interest is achieved by disclosure with redactions to remove personal information of living individuals.
75. We have therefore gone on to consider if the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.
76. Whilst much of the life of a member of the Royal Family is taken up with public matters, they are also private individuals with private lives. Underlying the importance of protecting the private as opposed to the public part of the Royal Family members' lives is the inherent public interest in protecting the Sovereign's dignity and that of the close members of her family, in order to preserve their position and enable them to fulfil their constitutional role. They are entitled to the same rights to a private life, and to the protection of their personal data during their lifetime, as others.
77. We accept that it is highly likely that none of the members of the Royal Family would have been aware that their personal data of this nature was being



recorded. They are highly unlikely to have considered that when speaking or writing to others in these particular contexts their information would be recorded. They would not have expected this type of personal data to have entered the public domain during their lifetimes even if they had anticipated that it would be recorded in a private diary or letter.

78. On this basis we conclude that the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.
79. For those reasons we find that the personal information of members of the Royal Family can be withheld under s 40(2).

#### Members of the Mountbatten Family

80. For the reasons that follow, we find that some information in USSO.171 (UO.G4539 and UC.B643) and USSO.172 (UO.G4539 and UC.B661) can be withheld under s 40(2). The Tribunal agrees with the Commissioner that the remainder of the withheld information does not amount to personal information of a living individual and cannot therefore be withheld under s 40(2). The CLOSED marked up version provided by the Commissioner to the Tribunal during the hearing identifies the parts that can be withheld and those that must be disclosed.
81. As the open skeleton argument of the Cabinet Office sets out, the withheld information concerns Lady Pamela Hicks' parents' relationship with her and her sister. They concern intimate and highly personal matters. They relate to a spousal (parenting) disagreement relating to both sisters, with comparisons made between them.
82. We find that some of the withheld information is not information 'relating to' Lady Pamela Hicks. The information is not about her or her relationship with her parents. It concerns her parents' relationship with her sister, who is deceased. There is no reference to Lady Pamela Hicks in the information. It does not have her as its focus. She is not the subject of the information. In our view it is not enough that it is information relating to her sister and her parents. It has to relate to Lady Pamela Hicks herself.
83. In relation to the personal information of Lady Pamela Hicks, we have concluded that it can be withheld for reasons mirroring those that we have already set out above.
84. We find that it is not reasonably necessary to disclose the personal information of Lady Pamela Hicks to comply with the Ministerial Directive. As we indicated above, in our view, substantive compliance with the Ministerial Directive is achieved by disclosure with redactions to remove personal information of living individuals.

85. In relation to s 6(1) of Schedule 2 DPA we accept there is a legitimate academic and historical interest specifically in the personal information of Lady Pamela Hicks. Even so, we find that it is not reasonably necessary for the particular personal information that has been redacted to be available to the public as a whole (as opposed to, for example, more restricted access for academic research) for the purposes of the legitimate academic and historical interest in the diaries and the letters as a whole.
86. We accept that there is a legitimate interest specifically in the personal information of Lady Pamela Hicks in the context of her relations with the rest of the Mountbatten family being made available to the public as a whole, and we accept that it was reasonably necessary to disclose this personal information for those purposes. Further we accept that there is a related and overlapping legitimate interest in the Mountbatten diaries and letters being made available to the public without the redaction of personal information of Lady Pamela Hicks.
87. Further we accept that there is a legitimate interest in making the Mountbatten Archive public because it was purchased by public funds subject to the condition (as a result of our presumption) that it would be accessible to the public. As we indicated above, in our view, substantive compliance with this legitimate interest is achieved by disclosure with redactions to remove personal information of living individuals.
88. We have therefore gone on to consider if the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.
89. We accept that it is highly unlikely that Lady Pamela Hicks would have been aware that her personal data of this nature was being recorded. As recorded in the Cabinet Office's open submissions, this information is intimate and highly personal. Lady Pamela Hicks would not have expected her personal data of this nature to have entered the public domain during her lifetime even if she had anticipated that it would be recorded in a private diary or letter.
90. On this basis we conclude that the processing is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.
91. For those reasons we find that the personal information of Lady Pamela Hicks can be withheld under s 40(2), although we agree with the Commissioner that the information, he has identified is not the personal information of Lady Pamela Hicks and must be disclosed.

*S 37 – Communications with Her Majesty, etc. and honours (issues 1 and 2 in the parties' list of issues)*

92. The particular subsections relied on and the items of information to which they relate are identified in USSO and USSC. We considered Dr Lownie's additional comments in column K OF USSO where applicable.
93. In relation to s 37(1)(a) (communications with the Sovereign) and s 37(1)(aa) (communications with the heir to the throne) we have reviewed each item.
94. Save for USSO.112 we are satisfied that the information relates to communications with the Sovereign or the heir to the throne. As these exemptions are absolute this information can be withheld.
95. USSO.112 does not, in our view, relate to communications with the Sovereign. Although this exemption is very broad, it does have limits. Whilst we consider that it is broad enough to include all matter of written and oral transmissions and exchanges of information, we do not accept that it is broad enough to include a hypothetical planned future communication which may or may not have taken place. The University is not entitled to withhold USSO.112 under s 37(1)(a).
96. In relation to s 37(1)(ac) we have reviewed each item. We are satisfied that the information relates to communications with other members of the Royal Family. This is a qualified exemption and therefore we must apply the public interest balance. When considering the public interest balance we have applied the presumption that the information was OPEN in accordance with our conclusions above.
97. We accept that there is a public interest in disclosure of this information because it forms part of the Mountbatten Archive which was purchased by public funds subject to the condition (as a result of our presumption) that it would be accessible to the public. In our view, this public interest can be served to a large extent by disclosure with redactions to remove communications with members of the Royal Family.
98. Further we accept there is a legitimate public interest specifically in information relating to communications with the Royal Family in this particular context (i.e. the context of their relations with the Mountbatten family, and as part of the Mountbatten Archive) for historical, academic and other related reasons. This could be achieved to some extent without making the information available to the public as a whole (as opposed to, for example, more restricted access for academic research).
99. The communications are those that have taken place with members of the Royal Family acting in their private capacities. We find that the public interest in disclosure would have been stronger if they had been acting in a public capacity.

100. When considering the public interest in maintaining the exemption we have considered the particular information that has been withheld. As the members of the Royal Family were acting in their private capacities, there is in our view a strong public interest in ensuring their privacy and dignity.
101. We have concluded that the public interest in disclosure of this information is outweighed by the public interest in maintaining the exemption.
102. USSO.130 is also withheld under s 37(1)(b) – information relating to the conferring by the Crown of any honour or dignity. Given that we have concluded that the university is entitled to withhold this extract on the basis of s 37(1)(a) and section 40(2) we do not need to consider s 37(1)(b).

*S 27 – international relations (issues 1 and 2 in the parties’ list of issues)*

103. This is part of the decision where we have considered it necessary to put some of our reasoning in a closed annex. We have concluded that the University is entitled to withhold this information under s 27(1)(a).
104. We heard evidence from Mr Casey, who adopted the written statements of Ms Craig. We have considered the parties’ submissions including Dr Lownie’s additional comments in column K of USSO.
105. When considering whether the University has established a causative link and whether the occurrence of prejudice is more probable than not, we have to take account of the fact that disclosure has not yet happened. It is a hypothetical, future event. There is therefore unlikely to be concrete or direct evidence of the specific effect of this particular disclosure.
106. We also take account of the fact that we have heard evidence from Mr Casey and read evidence from Ms Craig who have expertise and experience in relation to foreign policy matters and security matters that the Tribunal cannot match. We must therefore rely more on the evidence and less on our own experience when assessing the balance of public interest under s 27.
107. The claimed prejudice is the exposure to a risk of damage to UK’s relationship with Pakistan and India at a critical time for the UK. On the basis of the evidence of Mr Casey and Ms Craig we conclude that disclosure would be likely to cause the claimed prejudice, that the prejudice is real, actual and of substance and that there is a causative link, based on the experience and expertise of those witnesses.
108. Turning to the public interest balance we accept there is a public interest in disclosure of this information because it forms part of the Mountbatten Archive which was purchased by public funds subject to the condition (as a result of

our presumption) that it would be accessible to the public. In our view, this public interest can be served to a large extent by disclosure with this particular information redacted. However, given the content of the information we accept that there is a clear public interest in the disclosure of the Archive without the redaction of this particular information.

109. Further we accept there is a legitimate public interest specifically in this particular information taking account of its particular historical context and its context as part of the Mountbatten Archive.
110. In terms of the public interest in maintaining the exemption, we accept on the basis of the evidence of Ms Craig and Mr Casey that disclosure would be likely to harm international relations. We accept that Mr Casey is in a better position to the Tribunal to judge the impact of disclosure even if similar or identical materials were already in the public domain. We accept his evidence that the prejudice would still be likely to occur because the disclosure would be with the perceived approval of the British Government, and we note that, in his opinion, it would make no difference that disclosure was required under FOIA.
111. We find in those circumstances that there is an extremely strong public interest in maintaining the exemption.
112. Taking all the above into account, including the reasons set out in the closed annex, we find that the public interest in maintaining the exemption outweighs the public interest in disclosure.

*The Broadlands Agreement - s 41 and s 40(2) (issue 4 in the parties' list of issues)*

113. There is no longer any dispute between the Commissioner and the Cabinet Office as to which information can be redacted. There is no appeal in relation to the s 44 redactions (relating to tax) by Dr Lownie so the Tribunal has limited its findings to the redactions made under s 40(2) and 41(1). Lord Brabourne's name is no longer withheld under s 40(2).
114. As a preliminary point, we do not regard names or specific information that has been inadvertently left unredacted in one document in the open bundle should be treated as being in the public domain, and certainly not in the public domain for all purposes. Whilst consistency is desirable, inadvertent disclosure in the course of these proceedings does not in our view mean that any confidence under s 41 is lost or that s 40(2) can no longer apply. Further, we note that any inadvertent disclosures took place after the relevant date for assessing whether the exemptions apply.
115. Dr Lownie argues that the names of the trustees of the Broadlands Archive should not be redacted from the Broadlands Agreement because the names of the trustees are already in the public domain. Ms Hamer refers to, for example,

the acknowledgements section in Knatchbull, T, 2009, 'From a Clear Blue Sky: Surviving the Mountbatten bomb' We accept Mr Dunlop's argument that unconfirmed references to the names of some trustees in, for example, the acknowledgements section of a book in 2009 is not the same as a legal document confirming who the trustees were in 2011. This would not, in our view, remove any reasonable expectation of confidentiality under s 40(2) or affect a potential action for breach of confidence under s 41.

116. Dr Lownie also points to certain other information in the public domain. For example, he anticipates that references to Emberdove Limited have been redacted at one or more points under section 41. Dr Lownie and points to a number of documents in the public domain containing reference to Emberdove Limited as, for example, the copyright owner in respect of the text of three travel diaries edited by Philip Ziegler (UO.E2611). This is dealt with in the CLOSED annex.

*S 41(1)*

117. S 41 applies only to information obtained from another person. Ms Hamer submits that a concluded contract between a public authority and a third party does not constitute information obtained by that public authority from any other person for the purpose of the section (**Derry City Council v Information Commissioner**, IT, 11 December 2006 at para 32(a)- (e)] **Montague v IC and Tate Gallery** FTT 22 December 2014 at para 27 and see commentary in Coppel, Information Rights (5th edn.), 34-005 at pp840-841).
118. Miss Hamer submits that "technical information" contained in a contract relating to the pre-contractual negotiating position of the non-PA, and which does not form part of the mutually agreed terms may, depending on the facts and context, be information obtained by a public authority from another person for the purpose of s 41. As the redacted information is not of that nature it cannot be information obtained from another person. Ms Hamer argues in particular that anything within Section C of the Broadlands Agreement is a mutually agreed term.
119. We agree with Mr Dunlop that there is no rule in principle that information contained in a contractual term cannot be information obtained from another person. We are not bound by First-tier Tribunal decisions, and in any event the Upper Tribunal confirmed in para 16 of **IC v Driver and Thanet District Council** that the First-tier Tribunal was not seeking to lay down a general rule to the effect that s 41 was not engaged where information was contained in a contract.
120. We must decide as a matter of fact whether the information in question was obtained from another person. We have reviewed all the information withheld from the Broadlands Agreement under s 41. We are satisfied that all the information was obtained from another person, albeit now recorded in a

contract. We note that the Commissioner has scrutinised the withheld information from this particular angle and has, for example, raised queries where it was unclear that the information set out a pre-contract position. Like the Commissioner we are satisfied with the University's responses on these points.

121. The relevant point of time for assessing whether or not there was an actionable breach of confidence is the time of the response to the request (29 September 2017). It was an express term of the Broadlands Agreement that the terms of the contract should be kept confidential. In any event, taking into account the nature of the information and the context of the Agreement, we find that the information has the quality of confidence and was imparted in circumstances giving rise to a duty of confidence.
122. If there is a need to establish detriment, we accept that this element is satisfied because disclosure would reveal details of the private affairs of individuals.
123. We accept that there is a public interest in transparency and, in particular, in the public being able to scrutinise an unredacted and complete version of the Broadlands Agreement, given the circumstances and the amount of public money involved, in order to understand the details of the acquisition. However, having reviewed the particular redactions we have not identified any specific public interest in any particular information which has been withheld.
124. There is a strong public interest in protecting confidences. Although there is a public interest defence to an action for breach of confidence, the test is whether it is in the public interest for the confidence to be breached, which is a high threshold. We do not accept that there is sufficient public interest in the disclosure of these particular items of withheld information, or in the public having access to an unredacted complete version of the Agreement to outweigh the public interest in upholding duties of confidence.
125. There is a small section of additional reasoning in the CLOSED annex.
126. We find that the University is entitled to withhold the information redacted under s 41.

*S 40(2)*

127. Where the information is withheld in the alternative under s 41 we do not need to consider it under s 40(2).
128. In relation to the remaining redactions under s 40(2) these consist largely of the parties' names and signatures and the signatures of University representatives.

129. We accept that this personal information can be withheld under s 40(2). Although there is a legitimate interest in understanding the details of the transfer of the Broadlands Archive to the University, it is not reasonably necessary to disclose these particular items of personal information to achieve that aim. Further, given the confidentiality terms in the agreement, the individuals involved would have had a reasonable expectation that their personal information provided for the purposes of the Agreement would remain private. Disclosure would, in our view, be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the data subject.
130. Clause 28 contains other personal information of Lord Brabourne, the release of which is not reasonably necessary to achieve the legitimate interest. It is of a particularly personal nature and Lord Brabourne would, in the circumstances, have had a clear and reasonable expectation that it would remain private. Disclosure would, in our view, be unwarranted by reason of prejudice to the rights and freedoms and legitimate interests of the data subject.
131. The University confirmed by email dated 22 February 2022 that although clauses 25-27 are marked as redacted they are no longer withheld under s 40(2) and can be released.

*Was any further information held? (issue 5a in the parties' list of issues)*

132. This dispute is no longer of practical relevance because Dr Lownie accepts, as at the date of the hearing, that no further information is held. In these circumstances this issue is academic, and we do not consider it an appropriate use of the Tribunal's resources to reach a determination on this issue.

*The transfer lists (issue 5b in the parties' list of issues)*

133. This dispute is no longer of practical relevance because Dr Lownie accepts, as at the date of the hearing, that no further information is held. In these circumstances this issue is academic, and we do not consider it an appropriate use of the Tribunal's resources to reach a determination on this issue.

*The Nehru papers (issue 6 in the parties' list of issues)*

134. The question for the Tribunal to determine is whether the Nehru papers were held by the University at the relevant time otherwise than on behalf of another under s 3(2)(a).
135. Our conclusion, for the reasons set out below, is that the University did not hold the Nehru papers at the relevant time otherwise than on behalf of another.



136. Ownership of the Nehru papers did not transfer to the University under the Broadlands Agreement (UO.E3201). Instead the agreement included an option to purchase those papers. They are described in the agreement as the 'Option Goods'. The option is dealt with in part 3 of the agreement, the relevant part of which reads:
18. In consideration of One pound payable by the University within 30 days of the Effective Date, Lord Brabourne hereby grants to the University an exclusive and irrevocable option (the 'Option') to purchase the Option Goods for the fixed sum of One Hundred Pounds (£100.00) inclusive of any value added tax (VAT).
  19. The University will immediately at its own expense collect the Option Goods from Lord Brabourne (who will make them available for collection) and will hold them securely and separately from the rest of the Archive and will hold the information they contain on behalf of Lord Brabourne in accordance with this Contract.
  20. Pending the exercise of the Option nothing in this agreement shall operate to make or be construed as making the University hold the Option Goods or have Lord Brabourne do so on the University's behalf, pursuant to the terms of the Freedom of Information Act.
  21. Pending the exercise of the Option the University covenants with Lord Brabourne to keep the Option Goods and the information they contain confidential and in the event that the University receives a request for information contained in the Option Goods as set out in clause 59 under the Freedom of Information Act the University shall raise the exemption available in section 41 of the Act.
137. Clause 26 of the Broadlands Agreement (no longer withheld) provides:
26. Lord Brabourne shall not loan, lease, let, hire or otherwise deal with the Option Goods from the effective date until the expiry of the option, without the express written consent of an authorised representative of the University.
138. The fact that Lord Brabourne is unable to 'loan, lease, let, hire or otherwise deal with' the Option Goods without the express written consent of the University is a factor that points towards the University holding the papers. It gives the University a level of control over Lord Brabourne's use of the Nehru Papers. However, we feel this must be considered in the light of the purpose of this clause: to preserve the University's future option to purchase, which in our view gives it less weight than might ordinarily be the case.
139. We accept Professor Woolgar's evidence that although the Nehru papers were kept at the University, its role was simply to safeguard them physically. For reasons not relevant to our decision, the Nehru papers did not physically move to the University until April 2016.
140. The cost of storage and maintenance was borne by the University. The University only accessed the materials for the purposes of preservation. Professor Woolgar explained in his CLOSED evidence why the option has not been exercised but the reason given does not, in our view, assist in determining

if the information was held by the University otherwise than on behalf of another person.

141. There is one short paragraph of CLOSED reasoning on this issue in the CLOSED annex. In that paragraph we record that we do not consider a piece of evidence given by Professor Woolgar to be relevant because it related to a period after the date of the request.
142. Taking all the above into account, including both the legal position as set out in the Broadlands agreement and the factual position as described by Professor Woolgar we conclude that the University only held the information on behalf of Lord Brabourne. The information was not owned by the University, and its use was restricted both in contract and in practice to physically safeguarding the papers. This is akin to the papers being held by an expert storage company. The certain level of control afforded by the Broadlands agreement to the University over Lord Brabourne's use of the Nehru papers is a factor pointing in the other direction, but it is not sufficient, in our view, to make the University 'hold' the information other than on behalf of Lord Brabourne, because its purpose was to preserve the University's option to purchase at a later date.

*Personal data of Cabinet Office individuals in the University and the Cabinet Office appeals (issue 7 in the parties' list of issues)*

143. We note that the names of individuals holding senior positions have not been withheld. We would ask the Cabinet Office to ensure that redaction is consistent and that none of these more senior names have been mistakenly redacted.
144. The withheld information is the personal information of more junior officials or employees and it is that information to which these findings relate.
145. We accept that the personal data of those individuals working in the Cabinet Office can be withheld under s 40(2).
146. It was submitted on behalf of Dr Lownie that there is a legitimate interest in being able to track what has happened to the documents which are the main subject of the appeal, given the public interest in transparency and the sums of public money spent on the documents. We accept that this is a legitimate interest.
147. However, we do not accept that to serve this purpose it is necessary to identify the individuals who took the specific actions given the more junior level with which we are concerned. We do not accept that there is a pressing social need for disclosure, and the disclosure of the documents with the individual's name redacted enables sufficient scrutiny while interfering less with privacy.

148. We do not accept that there is any more specific legitimate interest in knowing which individual took which action given the more junior level of the individuals involved.

*Personal data of other individuals (issue 8 in the parties' list of issues)*

149. We accept that this information may be withheld under s 40(2).
150. As above, we accept that there is a legitimate interest in being able to track what has happened to the documents which are the main subject of the appeal, given the public interest in transparency and the sums of public money spent on the documents.
151. We do not accept that it is necessary to know the identity or other personal information of individuals working for private bodies outside the University and the Cabinet Office to serve that interest. The disclosure of the documents themselves, along with the names of the more senior officials at the Cabinet Office enables adequate scrutiny of the process and interferes less with privacy.
152. We do not accept that the fact that there may have been inconsistencies in redaction alters our conclusions on this point. These individuals do not have secret identities. Their names are likely to be in the public domain in some context in any event. This does not mean that they lose any expectation of privacy in relation to other actions that they take or correspondence that they write.

*Redactions to USO.E3252-E3267 and USC.F1498-F1511 (issue 9 in the parties' list of issues)*

153. For the same reasons set out above we find that redactions may be made of personal details and names of more junior Cabinet Office staff or third parties under s 40(2).
154. The other redactions are limited to details of the proposed Broadlands Agreement, which we find can be withheld for the reasons set out under our consideration of the Broadlands Agreement above.

*Redactions to 27 items of correspondence (issue 10 in the parties' list of issues)*

155. There are no longer any items of disagreement between the Cabinet Office and the Commissioner in relation to these items.
156. We conclude that any personal information can be withheld under s 40(2) for the reasons detailed above, namely that knowledge of personal information is not necessary for the purposes of the legitimate interests relied on.

157. Dr Lownie has conceded that the information withheld under s 42 (legal professional privilege) is exempt and we do not need to determine this issue.
158. We accept that CSSC.8 engages s 37(1)(a) because it is information relating to communications made on behalf of the Sovereign. This is an absolute exemption and the Cabinet Office is entitled to withhold this information.
159. There are two documents which have been redacted or withheld under s 41 and which are challenged in Dr Lownie's cross-appeal in the First Cabinet Office Appeals:
- 159.1. CSSC.9 - a letter from Broadlands to the Cabinet Office dated 17 October 2008
- 159.2. CSSC.14 - an email from the University to the Cabinet Office dated 6 May 2011.
160. We are satisfied that the withheld information has been obtained by the Cabinet from a third party and that they were imparted in circumstances importing an obligation of confidentiality. We accept that the information has the quality of confidence and is not in the public domain. If there is a need to establish detriment, we accept that this element is satisfied because disclosure would reveal details of the private affairs of individuals.
161. We accept that there is a public interest in transparency and, in particular, in the public being able to scrutinise and understand the background to the transfer of the Mountbatten Archive to the University, given the circumstances and the amount of public money involved. We accept that the information in the letters does assist in providing understanding of the background to the transfer and that there is a public interest in this particular information.
162. As set out above, there is a strong public interest in protecting confidences. Although we accept that the disclosure of these items would contribute, to some extent, to a greater understanding of the circumstances of the transfer, we do not accept that there is sufficient public interest in the disclosure of these particular items of withheld information to outweigh the public interest in upholding duties of confidence.

*The review schedule CC1.B47 CSSO/C.21 (issue 11 in the parties list of issues)*

163. This issue no longer arises for determination. The document was released to Dr Lownie in redacted form during the hearing and Dr Lownie withdrew his cross-appeal in relation to this document.

*The Cabinet Office's Second Appeal (issue 12 in the parties' list of issues)*

164. This appeal was withdrawn by email dated 17 November 2021 and this appeal is accordingly dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 15 March 2022