

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

### **Decision notice**

**Date:** 25 July 2023

**Public Authority:** Foreign, Commonwealth & Development Office  
**Address:** King Charles Street  
London  
SW1A 2AH

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

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1. The complainant requested from the Foreign, Commonwealth & Development Office (the 'FCDO') all information associated with its visit to the University of Southampton in 2018 regarding an archive containing the papers of 1<sup>st</sup> Earl Mountbatten and Countess Mountbatten. The FCDO disclosed some documents but sought to withhold personal data under section 40(2) of FOIA. The complainant believes that the FCDO holds further information falling within the scope of the request.
2. The Commissioner's decision is that, on the balance of probabilities, the FCDO has disclosed all the information falling within the scope of the request and has complied with section 1(1) of FOIA. In addition, the Commissioner also considers that section 40(2) of FOIA has been correctly applied.
3. However, the FCDO breached section 17(3) of FOIA given the time it took complete its public interest test considerations before issuing a substantive response to the request.
4. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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5. On 20 June 2022, the complainant wrote to the FCDO and requested information in the following terms:

"I request under the Freedom of Information Act all information held by the Foreign, Commonwealth & Development Office relating to the visit to the University of Southampton on 15 March 2018 by staff of the Knowledge Management Department, Hanslope Park, Buckinghamshire, concerning the diaries and letters of the 1<sup>st</sup> Earl and Countess Mountbatten."

6. On 18 July 2022, the FCDO responded confirming that it did hold information falling within the terms of the request. However, it explained that it needed more time to conduct the public interest test ('PIT') under the exemption in section 37 FOIA (Communications with her Majesty/Royal Household). The FCDO indicated that it would take an additional 20 working days to take a decision on where the balance of the public interest lies and so it would provide a response by 15 August 2022.
7. On 15 August 2022, the FCDO wrote to the complainant advising that it needed more time to consider the balance of the PIT to decide whether the information could be disclosed. The FCDO indicated that it would provide the response by 13 September 2022.
8. On 13 September and again on 12 October 2022, the FCDO said it still needed more time to consider the balance of the PIT to decide whether the information can be disclosed.
9. On 8 November 2022, the FCDO responded to the request via a covering email and substantive response letter. It disclosed a digest containing three emails and one attachment and cited section 40(2) to redact some of the names of individuals. Two of the emails predated the visit and one email post-dated it providing a summary of the visit. Section 37 of FOIA or the PIT balance was not mentioned.
10. The complainant requested an internal review on 15 November 2022 saying: "I do not believe all the relevant material has been supplied."
11. The complainant provided suggestions of five specific email communications between the FCDO and the University of Southampton ('the University') that he thought were missing from the disclosure based on his previous knowledge. In addition, he considered that the FCDO should have more material predating the visit, and queried whether the FCDO had received a response to the email it disclosed of 16 March 2018.

12. The complainant also queried the lengthy delay in providing the response, the reason given for the delay in the covering email of 8 November 2022, why transcripts not original emails were disclosed, and if the attachment disclosed was the correct one.
13. The FCDO provided an internal review on 30 March 2023. After conducting a further search, it revised its original position and disclosed additional information, again in digest form - namely four emails, one calendar appointment for the visit and a spreadsheet extract containing an action point to visit the University to review the papers. Section 40(2) was applied to some of the new information. Of the four emails disclosed, three had been specifically highlighted by the complainant in his internal review request and one was from 2019, post-dating the visit by over a year.
14. The FCDO explained in the internal review that it was not obliged to provide original documentation. It also replied to specific queries raised by the complainant about the delay in providing the original response reiterating that it was caused by 'considering information later found not to be in scope' and confirmed that the attachment disclosed was the correct one. The FCDO referred to the complainant's queries about material predating the visit, and whether the FCDO had received a response to the email it disclosed of 16 March 2018 and said it had not found any further information relevant to the request.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 11 April 2023 to complain about the way their request for information had been handled. The complainant argued that, based on information received via other requests for information on the same topic from other bodies, there was more correspondence that had not been disclosed, that 'not supplying originals is suspicious,' and that there had been a long delay in the FCDO providing both the substantive response and internal review response.
16. The Commissioner therefore considers the scope of the case is to consider whether:
  - a. the FCDO holds further information falling within the scope of the request;
  - b. the section 40(2) exemption was correctly applied to the disclosed information;

- c. the extension for consideration of the public interest has been appropriately applied and was a 'reasonable' extension;
- d. the FCDO was obliged to provide original documentation; and
- e. the delay in providing the internal review was acceptable.

## **Reasons for decision**

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### **Section 1 – information not held**

- 17. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
- 18. FOIA concerns recorded information only. It does not require a public authority to answer general questions, provide opinions or explanations, generate answers to questions, or create or obtain information it does not hold. The information must already be held at the point a request is made.
- 19. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, i.e. the balance of probabilities. In order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
- 20. The Commissioner asked the FCDO to provide a full explanation of its response for the requested information, and how it had concluded that all information in scope of the request and held by the FCDO had been disclosed to the complainant. The Commissioner also asked the FCDO to provide details of the searches it carried out for information falling within the scope of the request. His remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held at the date of the request.
- 21. Accordingly, the investigation will consider the scope, quality, thoroughness, and results of the searches, and other explanations offered by the FCDO as to why no further information is held. The

Commissioner will also consider any arguments put forward by the complainant as to why the information is likely to be held (as opposed to why it ought to be held).

22. The complainant's request is for all information associated with a visit by the staff of the FCDO's Knowledge Management Department to the University of Southampton on 15 March 2018 to view a sample of the Broadlands Archive - an archive containing the personal diaries and correspondence of 1<sup>st</sup> Earl Mountbatten and Countess Mountbatten.
23. The complainant's reasons, as set out in his correspondence with the FCDO and his complaint to the Commissioner, for believing that the FCDO hold further information which has not been disclosed appear to be because:
  - the FCDO should have more information predating the visit;
  - he had made other requests to the University and the Cabinet Office in which other information had been disclosed;
  - he had been provided with other documents in First tier Tribunal proceedings that he was a party to.
24. The Commissioner commenced his investigation by contacting the complainant, asking him to provide details of the particular correspondence relating to the visit on 15 March 2018 that he believed the FCDO holds but has not disclosed to him. In addition, the Commissioner asked him for details of the missing correspondence 'as confirmed by the other requests' he had made to the University and the Cabinet Office.
25. The complainant responded to the Commissioner as follows:

"It is hard to believe that such an important visit has generated so little paperwork and it is clear from statements made by the Vice Chancellor and others involved that more correspondence exists but, of course, difficult to identify what one does not know. However, releases under FOI2022/17533 and IR2022/29530 give correspondence which were not disclosed by the FCDO...

I still believe not everything has been supplied.."
26. The FCDO has explained to the Commissioner that the information within scope of this FOI request was largely created to facilitate the administrative arrangements for the visit to the University.

27. The FCDO told the Commissioner that, in response to the request, Knowledge Information Management Services (KIMS), specifically the Archives Services Team, carried out the search for information falling in scope, as they were identified to be potential holders of the information. The person who was working in the Archives at the time and who took part in the visit to the University was also asked to search their personal folders, including email folders.
28. The searches undertaken were in the relevant team's electronic/email folders, and individual personal folders using relevant key words taken from the scope of the request such as, "Southampton University," "15 March 2018" , and "Mountbatten." The FCDO explained that it was these searches that found information in scope of the request that was later disclosed on 8 November 2022. These searches were reconsidered as part of the internal review request. The FCDO argued that, as the complainant provided more specific information in his follow up internal review request, this meant there was more information to use in the searches, which turned up additional information.
29. The FCDO explained to the Commissioner that it considered that reasonable and thorough searches have been carried out in all locations where it believed that relevant information is stored. It also argued that its searches 'turned up the amount of information that we expected to hold on the issue of the visit to the University.' The FCDO said that it was possible some emails, as part of 'routine weeding of mailboxes,' were deleted before the initial FOI request came in. However, it explained that this information, largely created to facilitate administrative arrangements for the visit to Southampton University, did not need to be retained under the FCDO's retention policy for business or legal purposes beyond its practical value for facilitating the visit.
30. Therefore, the FCDO is of the view that it does not hold any further information requested than that already disclosed to the complainant.
31. The Commissioner has carefully considered the points made by the complainant and the FCDO. The Commissioner notes that the internal review response directly addressed all queries raised by the complainant and disclosed more information as a result, such as material predating the visit and three of the specific emails highlighted by the complainant.
32. As part of his investigation, the Commissioner also put a specific question to the FCDO, which had been raised by the complainant in his ICO complaint, about the 2019 email disclosed in the internal review response. The complainant asked: "It is unclear whether this is a reply to a written communication from Mr [redacted] or following up a phone call or meeting. Please could you clarify?" The FCDO responded:

"The email references in passing the visit to the University; it is not the principal subject of the email, and therefore it is hard to determine in retrospect whether this followed a phone call or other interactions between the parties to the email. The remaining information within the email is not within the scope of this request."

33. Having reviewed the submissions of both parties, the Commissioner is not persuaded that the FCDO is likely to hold further information. The Commissioner is satisfied that adequate searches of the FCDO's electronic records were carried out by the relevant part of the FCDO to determine whether recorded information within the scope of the request was held. Furthermore, the Commissioner is satisfied that appropriate consultations took place with the FCDO staff and that should information within scope of the request have been held, those staff who were consulted would have been aware of such information. He has also taken into account that the visit in question occurred four years before the request was submitted and that, if any other relevant information had been held, it may have been the subject of 'routine weeding' of mailboxes or been destroyed in line with the FCDO's retention policy as there is no statutory need to hold this information.
34. The Commissioner accepts that the FCDO's conclusion that it does not hold any further information falling within the scope of the request is a reasonable one in the circumstances.
35. The Commissioner appreciates that the complainant has raised a number of specific grounds of complaint both as part of the internal review process and in submissions to support their complaint which set out why, in their view, the FCDO should hold more information.
36. The Commissioner is aware that the complainant considers that the FCDO *should* have been able to provide them with more information. However, whilst the Commissioner recognises that the complainant does not consider that the FCDO has fulfilled the request, that appears to be conjecture or expectation by the complainant rather than known facts. Whilst the Commissioner understands why the complainant would consider that such information was held, he notes the FCDO's reasons above for why it is not held. No evidence is available to the Commissioner which would indicate that the FCDO holds more recorded information falling within the scope of the request.
37. Having considered all the circumstances, on the balance of probabilities, the Commissioner therefore accepts the FCDO's position that it does not hold any further recorded information falling within the scope of the request. As such, the Commissioner has decided that the FCDO has complied with section 1(1)(a) of FOIA.

38. In addition, the Commissioner has considered if the FCDO was obliged to provide original documentation. The Commissioner notes that the complainant did not specify in his original request that he wanted to receive the information in a particular format. Nor has the complainant advanced any arguments that the information over and above the actual wording, such as the design, layout and style of writing, was important.
39. ICO Guidance<sup>1</sup> states that there is no explicit right to copies of original documents. To comply with section 1(1)(b) FOIA, a public authority must provide the requester with a complete and accurate copy of all the recorded information in the document.
40. The FCDO argue that they did this by providing all the recorded information by way of a digest and this is satisfactory to the Commissioner. In any event, the Commissioner has reviewed a portion of the original emails and compared them to the digest. He is satisfied that the digest provided is an accurate reflection of the emails.
41. For completeness, it is also noted that the FCDO did not have a duty to comply with the complainant's preference expressed later for original documents after it had already provided the information and it addressed this issue in its internal review. Nevertheless, the Commissioner suggests to the FCDO that providing copies of original documents, rather than digests, has the advantage that the requester is more likely to have confidence in the completeness and accuracy of the information. This in turn may reduce the likelihood that the requester will complain about the response.

### **Time taken to consider public interest and respond to request**

42. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions: '(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.'

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<sup>1</sup> [https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-right-to-recorded-information-and-requests-for-documents/#\\_What\\_is\\_the](https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-right-to-recorded-information-and-requests-for-documents/#_What_is_the) and <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/means-of-communicating-information-section-11/>



43. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
44. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest.. This section only permits extensions for further consideration of the public interest, the FCDO cannot ask for any additional time to search for information or to determine whether the exemptions themselves are engaged.
45. Any public authority claiming an extension will still be obliged to issue a refusal notice explaining which exemption applies and why, within 20 working days. The notice must explain that it requires more time to consider the public interest test, and provide an estimate of the date on which a final decision is likely to be made.
46. On 18 July 2022, the FCDO issued a notice confirming that it did hold information falling within the terms of the request. However, it explained that it needed more time to conduct the PIT under the exemption in section 37 FOIA. The FCDO indicated that it would take an additional 20 working days to take a decision on where the balance of the public interest lies.
47. Once that final decision has been reached, the authority must either disclose the information to the requester or issue a second refusal notice explaining why it has found the public interest to be in favour maintaining the exemption.
48. On 8 November 2022, the FCDO responded to the request and disclosed some information. In the covering email FCDO said: "I apologise for the delay in responding. We were considering information which was later found not to be in scope of your request." The FCDO's substantive response letter said: "we have now completed the search for the information...."
49. The Commissioner asked the FCDO at what point the FCDO completed their checks and searches for the requested information in this case – i.e. was this prior to the initial response of 18 July 2022, in which it confirmed that it held information within scope of the request, or was it, as the wording of the substantive response would suggest, at a later point prior to provision of the substantive response of 8 November 2022? The FCDO confirmed to the Commissioner that:

"The searches were completed prior to the PIT extension being applied, except as noted in our previous correspondence on the internal review

when further searches were conducted at a later point. The consideration of whether the section 37 exemption applied in this case was done with the information holders and in discussion with the third parties to the request. After consideration, it was later determined that Section 37 did not apply to this information.”

50. The FCDO have therefore appropriately relied on section 17(3) of FOIA as far as it allows a public authority more time to conduct a public interest test. The FCDO also said:

“We determined [section 37] was not engaged, while doing the public interest test. The use of the exemption was valid initially. Regrettably, we did not set out that the section 37 exemption was no longer considered engaged in the communications with the requestor at the time, which we will reflect upon internally.”

51. While FOIA allows a public authority to extend the timeframe up to a ‘reasonable’ time to consider the PIT, FOIA does not define what might constitute a ‘reasonable’ extension of time. In his guidance ‘Time for compliance under the Freedom of Information Act (Section 10)<sup>2</sup>’ the Commissioner explains that he considers that a public authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. The Commissioner considers that an extension beyond this should be exceptional.
52. The FCDO contacted the complainant on 18 July, 15 August, 13 September, 12 October 2022 and explained that it needed to extend the time limit, as it was considering the public interest.
53. The Commissioner asked the FCDO to explain the reason for the delay. The FCDO said:
- “The discussions were slow between parties, largely because of sensitivity and complexity of the subject of the FOI, which triggered the additional PIT extensions. The FCDO wanted to ensure we considered all the public interest arguments for disclosure with all relevant parties.”
54. Notwithstanding this, the Commissioner considers that taking in excess of 100 days to deal with the public interest test is unreasonable. He therefore considers that the FCDO has breached section 17(3) of FOIA as the authority has taken an excessive length of time to carry out the

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

public interest test. The Commissioner has therefore recorded this delay for his own purposes of monitoring the FCDO's performance.

### **Section 40(2) - third party personal data**

55. Section 40(2) of FOIA says that information is exempt information if it is the personal data of another individual and disclosure would contravene a data protection principle.
56. This part of the decision focuses on whether the FCDO was entitled to rely on section 40(2) as a basis for refusing to provide some of the names, contact details and roles of the employees in the emails disclosed in response to the request.
57. The FCDO advises that redactions have only been made to the FCDO delegated grade staff below the Senior Civil Service (SCS) grades, as well as those of third parties (the Cabinet Office staff as well as contacts in the University of Southampton).
58. The FCDO advised that the redacted names are those of the more junior employees, those with less seniority/responsibility or those with non-public facing roles (together, the 'junior employees').
59. The Commissioner is satisfied that the names, contact details and job roles of the junior employees, constitutes their personal data. The information relates to and identifies individuals.
60. The Commissioner is also satisfied that, at the time of the request, disclosure of the names, contact details and job roles of the junior employees in this case would breach data protection principles.
61. The Commissioner's guidance<sup>3</sup> accepts that the names of junior employees are usually withheld from FOIA disclosures (see pages 12-13, 19-20) and that this is also the usual practice in the civil service and local government. Junior employees therefore had a reasonable expectation that their names and/or job roles would not be made public in response to FOIA requests, even though it might be more standard practice to disclose the names and job roles of senior employees (as, in fact, happened in this case in some of the emails).
62. In the Commissioner's opinion, and based on the specific facts of this case, the disclosure of the information at the time the request was made

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)

could also have resulted in an interference with the rights and freedoms of the junior employees. The Commissioner has seen no evidence or indication that the junior employees had specifically consented to the contents of the emails being disclosed to the world in response to an FOIA request or that they had deliberately made this information public. While the complainant is likely to be familiar with the names of many of the people involved, the Commissioner does not consider that the individuals concerned are particularly senior or that they are “well known” to the public at large.

63. The position set out above relating to the non-disclosure of junior employee names, as opposed to the disclosure of senior employees names, is well established and supported in a wide range of recent ICO decision notices.<sup>4</sup> The position is also supported in the Upper Tribunal case of *Cox v Information Commissioner and Home Office*: [2018] UKUT 119 (AAC).<sup>5</sup>
64. In light of the above, the Commissioner’s decision is that, in the specific context and facts of this case, there is insufficient legitimate interest regarding junior employees to outweigh the data subject’s fundamental rights and freedoms. The junior employees were likely to have had a reasonable expectation that their names would not be published at the time the request was made. Disclosure under FOIA is to the world at large, not to the individual requester.
65. In this instance, the Commissioner has decided that the FCDO can demonstrate that the exemption at section 40(2) applies at the time the request was made to the names, contact details, and job roles of the junior employees.

## Other Matters

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4021450/ic-115637-b8b0.pdf> see para 3 & 98; <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4023656/ic-164636-c6t0.pdf>; [https://ico.org.uk/media/action-weve-taken/decision-notice/2012/754504/fs\\_50446511.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2012/754504/fs_50446511.pdf); <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022405/ic-163983-t2m0.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4023102/ic-166434-g1h2.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022859/ic-182321-p3n3.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020407/ic-128685-k1d8.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4019692/ic-123448-d1r5.pdf>

<sup>5</sup>[https://assets.publishing.service.gov.uk/media/5aded4de5274a0d820946cd/GIA\\_2906\\_2017-00.pdf](https://assets.publishing.service.gov.uk/media/5aded4de5274a0d820946cd/GIA_2906_2017-00.pdf)

66. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case the FCDO took just under 90 working days to complete its internal review response.
67. The Commissioner notes the apology provided to the complainant for the delay. The Commissioner also notes the explanation provided to the Commissioner that "the review was delayed largely as a result of reduced capacity in the information rights teams in the FCDO due to long term sickness of team members, deployment onto crisis response work and team vacancies." Nevertheless, he still considers this length of delay to be unacceptable. The Commissioner has therefore recorded this delay for his own purposes of monitoring the FCDO's performance in terms of completing internal reviews in a timely manner. He acknowledges, however, that in April 2023, the FCDO set out for the Commissioner the additional structural measures it has put in place to help address the FCDO's capacity constraints.

## **Right of appeal**

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

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

LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

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

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

69. 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.
70. 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**