



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2012/0141

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No:**

FS50431011

Dated:

11 JUNE 2012

Appellant:

DR CHRISTOPHER PHILLIPS

First Respondent:

INFORMATION COMMISSIONER

Second Respondent:

THE NATIONAL ARCHIVES

Heard at:

VICTORY HOUSE, LONDON

Date of oral hearing:

13 NOVEMBER 2012

Further consideration of the papers: 3 JANUARY 2013

Date of decision:

15 FEBRUARY 2013

Before

ROBIN CALLENDER SMITH

Judge

and

DAVE SIVERS and DAVID WILKINSON

Tribunal Members

Attendances:

For the Appellant: in person

For the Respondent: not represented at the oral hearing

For the Additional Party: Mr Adam Heppinstall, Counsel

Subject matter:

FOIA

s.38

s.40

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal, in part, and substitutes the following decision notice in place of the decision notice dated 11 June 2012.

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2012/0141

SUBSTITUTED DECISION NOTICE

Dated 15 FEBRUARY 2013

Public authority: The National Archives

Name of Complainant: Dr Christopher Phillips

The Substituted Decision

For the reasons set out in the Tribunal's determination and detailed in the Schedule to this decision the Tribunal allows the appeal, in part, and substitutes the following decision notice in place of the Decision Notice dated 11 June 2012.

Action Required

Within 31 days of service of this notice on the Respondents, The National Archives is to release the information detailed in the Schedule to this substituted Decision Notice to the Appellant.

Dated 15 February 2013

Robin Callender Smith

Judge

REASONS FOR DECISION

Background

1. On 6 March 1952 a 42-year-old Cardiff shopkeeper, Lily Volpert, was found dead with her throat cut. Mr Mahmood Hussein Mattan, a member of the Somali community in Cardiff, was tried for her murder – a capital offence at the time - and convicted in July 1952.
2. In August 1952 he was refused leave to appeal and to call further evidence. In September 1952 he was hanged.
3. In 1969 further evidence came to light in respect of the Mattan case. One of the prosecution witnesses in that original trial – Mr Harold Cover – was himself subsequently tried and convicted for the attempted murder of his own daughter.
4. At that stage unsuccessful attempts were made to reopen the Mattan case but it was not until 1997 that it was referred to the Court of Appeal by the Criminal Cases Review Commission. In 1998 his conviction was quashed and he received a posthumous pardon 46 years after his execution.
5. Mr Mattan's file was transferred to the Second Respondent in this appeal (The National Archives), and the Appellant (Dr Christopher Phillips) – on 25 June 2011 – asked for access to it. In respect of Document reference DPP 2/2145 he stated:

The file relates to the case of Mahmood Mattan, who was convicted of murder in 1952 and executed following the refusal of leave to appeal. His conviction was quashed by the Court of Appeal in 1998. I should like to consult the whole file if possible. If the whole file cannot be made available I should like to consult such parts as can be made available.

6. The National Archives consulted with the Crown Prosecution Service (CPS) on section 66 FOIA in respect of whether or not the file constituted exempt information and also in respect of the application of

the public interest test. On 25 July 2011 Dr Phillips was informed by The National Archives that he could not inspect the file because it contained exempt information in respect of section 40 FOIA. He was also informed that section 38 FOIA applied and that a decision on the public interest test would be made.

7. On 6 September 2011 the CPS asked for advice from a panel of the Lord Chancellor's Advisory Council of National Records and Archives about the application of section 38.
8. On 12 September 2011 that Council advised that the public interest came down in favour of not disclosing the file. Dr Phillips asked for a review and he was informed on 18 November 2011 that, following a review and further consultation with the CPS, parts of the file were going to be released. This material included general correspondence, newspaper cuttings, maps and plans. The remainder of the file was to remain closed.

The Information Commissioner's Decision

9. The Information Commissioner, in a decision notice dated 11 June 2012, upheld The National Archives' review decision. The National Archives had allowed access to a significant portion of the file in April 2012 but the general public – including the Appellant – was unable to order or view the withheld information at the heart of this appeal.
10. The withheld information was:
 - (a) Witness statements;
 - (b) Crime scene and area photos;
 - (c) Post-mortem report;
 - (d) Medical report about Mr Mattan;
 - (e) Police reports;
 - (f) Court administration papers; and
 - (g) Other miscellaneous documents.

11. The Commissioner found – in relation to the two exemptions claimed by The National Archives – that:

(a) It would be unfair to disclose the witness statements and that section 40 (2) was engaged;

(b) It would be likely to endanger the physical or mental health of the victim's family to disclose the crime scene and area photos, the post-mortem report, the court administration papers and miscellaneous documents. The public interest test favoured maintaining section 38 FOIA in relation to these documents.

(c) It would be likely to endanger the physical or mental health of Mr Mattan's family to disclose the medical report about him; the public interest test favoured maintaining section 38 and section 41 was likely to have been engaged.

(d) Sections 38 and 40 (2) applied to the police reports.

12. In terms of the *Witness Statements*, the Commissioner noted (Paragraph 24 DN) that The National Archives had provided some explanation about how the disclosure of this information would cause unnecessary damage or distress to the individuals. Given that Mr Mattan had received a posthumous pardon for the murder, to release statements made by other individuals which may have had some bearing on his original conviction would lead to the individual concerned potentially suffering criticism and reputational damage. In relation to the reasonable expectation of the witnesses, the Commissioner considered that they would have had no reasonable expectation that this information would be placed in the public domain. Witnesses, when providing information as part of an investigation, do so with the expectation that their information will not then be published. Given the nature of the material and the sensitivity of the subject matter, disclosure could lead to an intrusion into the private lives of the individuals concerned.

13. In relation to the *Crime Scene and Area Photos and Maps* the Commissioner had previously accepted that an individual's mental well-being would fall within the scope of section 38. Having looked at the photographs to which the section had been applied, the Commissioner considered that the consequences of the disclosure of the information into the public domain – especially if there was a likelihood of it being reported in the media – would cause significant distress to the families of the victim. It was graphic in nature. Even with the passage of time there was still a duty of care to the family and to some of the people involved in the investigation. Disclosure after the length of time that had passed would have the same effect as putting the information into the public domain for the first time.
14. In terms of the *Post-Mortem Report* the same reasoning was applied.
15. In relation to the *Medical Report about Mahmood Mattan* the Commissioner had previously considered the issue in relation to access to medical records of deceased people and had established that the information contained within such records would be exempt as it was information provided in confidence (a view supported by the Information Rights Tribunal: *Bluck* EA/2006/0090).
16. The *Police Reports* contained varying degrees of information. There were graphic descriptions of the crime considered under section 38 and matters in relation to descriptions of witnesses and suspects under section 40 (2). Information relating to the graphic nature of the crime would be likely to endanger the mental health of the family of the victim. It would not be fair to disclose the information relating to witnesses in the police reports.
17. The *Court Administration Papers* were held as part of the criminal case file. Because of the graphic nature of some of the information the National Archives' cautious approach in respect of FOIA sections 38 and 40 (2) was appropriate given the nature of the information and the

graphic descriptions and amount of personal data contained within the papers.

18. The reasons relating to the *Miscellaneous Documents* that had been withheld were set out in a confidential annex.

The appeal to the Tribunal

19. Some of the original issues in Dr Phillips's detailed grounds of appeal dated 4 July 2012 were refined and accommodated before the oral hearing. In particular he indicated that he was not seeking access to the crime scene photographs or the mortuary photograph, the depositions in the Magistrates' Court or to the trial transcript as he had for copies of those from other sources. [The reason is that the Criminal Cases Review Commission released this material to him on request.]
20. He disputed the withholding of the material under section 38 in the remainder of the file and specifically in relation to [* = subsequently released before the appeal hearing]:
- (a) the witness statements of DS Dalton*, Dr A H Mitchell, Dr WRL James (post-mortem), PS Walsh* (part), PC J Davies (part), DCI H Power* (part) and Mr EG Davies* (part)
 - (b) the report by DCI Power dated 26 March 1952 (about 20 lines)
 - (c) advice on evidence* (one page withheld)
 - (d) appeal Court judgement, 19 August 1952 (two lines withheld)
 - (e) handwritten notes on the evidence [by RLD Thomas] (about a page and a half withheld).
21. Dr Phillips had also indicated that he was prepared to accept more limited information in respect of issues to which section 40 had been applied. He had stated he was seeking only:

.... The non-sensitive personal data that would assist me in determining which of the people concerned are still living. I understand that in some circumstances this cannot be provided simply by redacting the sensitive data as what remained might provide clues to what had been removed. What I am therefore asking for is a list of the names of those for whom personal data have been removed, together with their addresses, ages, occupations and names of spouses, where given.

22. As a result of the key CPS witness (Mr Andrew Penhale, the Deputy Head of the Central Fraud Group who is also the CPS Freedom of Information Champion) reconsidering matters in relation to the public interest and making a written witness statement signed 31 October 2012, the Treasury Solicitor wrote to Dr Phillips on 1 November 2012.

23. Mr Penhale's key evidence, set out in that witness statement, stated (at Paragraphs 18 and 19):

There is a very significant public interest in favour of disclosure in this case. The case involved a miscarriage of justice and a man being hanged following his wrongful conviction. It appears from the papers that significant evidence was not considered during the trial and this may have substantially altered the case outcome. The conduct of the investigation and prosecution should, as a result, be subject to public scrutiny.

It is important, therefore, that the case material is considered carefully before any material is withheld. This has indeed happened and the TNA have carefully redacted and removed only those items where they consider the exemptions under section 38 or section 40 are engaged. In particular, they have removed sensitive personal information (relating for instance to the sexual history of Mr Matten and his wife) and items likely to cause distress to the family of the victim (such as photographs of the body and scene, pathology reports and any references to the presence of blood at the scene as reported by police witnesses). Whilst I agree with the principles applied to the withholding of the material which may cause distress to the family, I am not sure that I agree with all the redactions and removals. Photographs of the deceased and the bloody scene and pathology report are exactly the sort of material which may cause significant distress and upset to the family, by reminding them of the terrible murder which had taken place. On the other hand, statements of the police officers, which simply describe the bloodstains found at the scene are far less likely to do so; and, in this case, are relatively innocuous. In my view, there is a very strong public interest in revealing this latter material. The nature of

the crime makes it likely that there was a very significant distribution of blood at the scene, including on the perpetrator's clothing. This should have given rise to an important line of investigation, even within the limited forensic science available in 1952, surrounding blood recovered from the clothing at Mr Matten's home. There is therefore a legitimate interest in the description of blood at the scene which is likely to override concerns about upsetting the family.

24. Despite The National Archives' slight relaxation of its original position Dr Phillips indicated he wished to continue the appeal in relation to section 38 – and documents that had not been released under that category – and that he also wished to pursue his appeal in relation to section 40 (the provision by the National Archives' to him of a list of biographical details of the data subjects).
25. The submissions made by The National Archives in relation to qualified exemption relating to section 38 at the oral appeal was that the information – if disclosed – would or would be likely to endanger the physical or mental health of any individual. There had to be a real and significant risk of endangerment as opposed to a fanciful or remote or hypothetical risk. "Mere" stress or worry would be insufficient. The withheld items contain graphic descriptions of the injuries inflicted on the victim such as to pose a real and significant risk of significant upset or distress being caused to the surviving family members of the victim, particularly her niece.
26. The National Archives accepted that there was a public interest in the underlying capital criminal proceedings. That strong interest had to be balanced against a real and significant risk of significant upset and distress. Although The National Archives had adjusted its position in relation to the importance attached to the distribution of blood at the scene of the crime, because of the reasoning set out in Mr Penhale's witness statement, the graphic descriptions of the physical injuries suffered added little to the public understanding of the Mattan case, especially given the wealth of information in the public domain. The

public knew enough about the nature of the injuries to permit public debate about the case.

27. The potential damage that might be done to the public's ability to discuss and debate the Mattan case by withholding graphic descriptions of the injuries inflicted was outweighed by the real and significant likelihood of significant distress and upset that might be caused to surviving family members.
28. In relation to section 40 the National Archives had reasonably applied a "100 years-of-age" Rule and needed to act cautiously. Disclosure of a list of biographical information would breach the first data protection principle that required all personal data to be processed fairly and lawfully. Fairness required balancing of interests it involved balancing the legitimate public interest in the Mattan case itself with the right to privacy of those who were involved with the Mattan criminal proceedings.
29. Participants in criminal proceedings might expect to give evidence in public and might also expect that some of their private information might be aired at the public trial or hearing. Mere revelation of private information at a public hearing could not be equated with the effect of release of the same information under FOIA. In a criminal court setting the release of private information was judicially controlled, unrecorded by the public and haphazardly reported by the media. It was only usually disclosed to those who were physically present in the courtroom. The public could not obtain access to the information after the hearing was over and, as such, it was right that the information remain private and protectable under the Data Protection Act 1998 and the "gateway" provision into that statute by virtue of section 40 FOIA.
30. It would significantly undermine the criminal justice system if prosecutors such as the CPS could not protect personal data merely because the data subject was involved in a criminal case in which there was a public interest – no matter how historic – especially where

sensitive personal data was involved. The CPS' Mr Penhale had emphasised, in his witness statement, the

vital public interest consideration that victims and witnesses of serious crime should be protected from unfettered release of case information into the public domain.

Evidence

31. The Tribunal heard oral evidence from two witnesses who were able to give their core evidence in the open session. The first witness was Ms Helen Potter. She is one of the Freedom of Information Managers in The National Archives. She is responsible for overseeing FOI activity throughout The National Archives, managing internal appeals and responding to complaints made to the Information Commissioners Office. She had become involved in the Appellant's request at the point where he sought an internal review of the decision of 12 September 2011.

32. She set out the process of this involved and the guidance which she had used to assist her in making decisions. When the matter was first allocated to her, initially she had looked at whether or not the procedural aspects of the handling of the Appellant's request had been carried out correctly. She had then proceeded to read all of the documentation in the case file including The National Archives' research report to the CPS and subsequent correspondence in order to understand fully how the original decision was reached on whether the recommendations made were accurate and justifiable in relation to the information requested. She then reviewed file DPP 2/2145 to see whether the conclusions reached about withholding the file in its entirety was one that was supportable.

33. In respect of section 38 – having reviewed the file and undertaken some initial research on the Internet to understand the background to the file – she formed the view that there was a great deal of information contained in DPP 2/2145 that was already in the public domain and

which recounted the basic facts of the case. She took the view that the surviving relatives of the victim will likely to have a basic knowledge and understanding of what happened to the victim whether or not they had been present at Mr Mattan's trial. Court papers outlining the charge, maps, plans and statements which included details of the events prior to and directly after the murder (which did not describe the attack itself) did not – in her view – provide details which, if seen, would cause undue and “significant damage and distress” to those surviving family members.

34. She had referred to a decision of the Commissioner in April 2009 – *Ministry of Justice v Information Commissioner* [FS50121803] – where the Commissioner had stated that he considered

an individual's mental well-being to fall within the scope of the section. In this he includes emotional and psychological well-being including the likelihood of causing significant upset or distress.

35. She considered that documents which illustrated the extent of the violence suffered by the victim amounted to information that was likely to have a significant impact upon the surviving family members. This information included material about the state in which the victim/murder scene was found, any post-mortem reports and analysis and the collection of forensic evidence from the body. Information provided by those who are acting in an official capacity and who had responsibilities for handling the body, attending the crime scene and collecting forensic evidence – while clinical and objective – could often be interpreted as cold. Because that information could be disturbing and could cause substantial distress to the victim's surviving relatives, she considered that detail to be sensitive.

36. She had considered whether the release of that specific information was likely to harm or prejudice the mental health of any of the victim's surviving relatives. Although the content of murder file cases, particularly those in the “DPP 2” series, could often be similar in respect of the types of document they contained, the actual level of

graphic detail could differ quite widely. Understanding the circumstances of the case under review was important because it was not just graphic details regarding the death of the victim that could cause mental distress. It could also be any tragic set of events that led to the murder including details of domestic abuse, extramarital affairs or details of how a child might have been lured or snatched.

37. It was clear from the review of the file that the victim's young niece had been present in the adjoining room when the victim was murdered and, as a result, the event itself would be a deep-rooted personal experience as it had occurred during her childhood within her home environment. While she would have been clearly aware of the manner in which her aunt was murdered she would not necessarily have been present at the trial of Mr Mattan and might not be aware of the graphic details of the murder itself.

38. Mr Mattan had been hanged and it was possible that some of the information contained in the file could be distressing to his surviving family members. That could include information in relation to any mental health assessments or his state of mind prior to his execution.

39. Ms Potter arrived at the conclusion that, although the release of certain information contained in the file might cause significant distress to those surviving family members – either of the victim or Mr Mattan – not all of the documents in the file contained distressing information. She concluded that redaction could be used to ensure that such information was not disclosed to the detriment of those relatives.

40. In terms of the sensitivity of the information, she recognised the importance of Mr Mattan's case to the legal history of the United Kingdom. He had been one of the last persons to be hanged in the United Kingdom and, subsequently pardoned. Those specific circumstances meant that the case was one of very significant public interest. In her view, the public interest in the case related predominantly to the information that would provide greater knowledge

and clarity in relation to the investigation and prosecution of Mr Mattan and not to the information about the details of the murder itself. She had given more weight to the disclosure of information falling into the former category. She had recommended release of as much information that would inform the public about Mr Mattan's prosecution – such as court papers, parts of the court transcript and the police report – but had redacted information that related to the details of the murder itself.

41. She had also considered the amount of information that was already in the public domain. She had been guided by The National Archives' guidance paper entitled *Information in the public domain and access to historical records at The National Archives*. The guidance made it clear that, even in circumstances where information may be in the public domain, that did not necessarily mean that the official record should be released by The National Archives. The reason was that it was difficult to establish, in relation to historical files relating to criminal cases, what information was released into the public domain at the time of the criminal proceedings. The guidance stated that

in the criminal field there are several websites and books that specialise on the detail of crimes and the motives of those involved: this does not warrant the release of all the circumstances of the crime including those details that may damage the mental health of a victim's immediate family (scene of crime photographs) or details of victims who did not press charges.

42. She had come to the conclusion that documents which contained factual details relating to the case – rather than details of the actual murder/murder scene – could be released while documents containing details of the murder could be released in redacted form.

43. In terms of section 40 (personal data), in the absence of date of birth information for many of the data subjects mentioned in the file she applied the 100-year rule and assumed the data subjects to be alive. In the context of the totality of the file she considered that certain information had to be withheld in order to ensure that The National

Archives did not breach the first data protection principle requiring the personal data be processed in a fair and lawful manner. She was particularly concerned with whether the release of certain data would be unfair.

44. She considered that the data in question that might need to be withheld fell into two categories: personal data including that pertaining to juveniles (i.e. those who were juveniles at the time of the case) and sensitive personal data which included medical data of a witness, unsubstantiated allegations and information relating to the sexual lives of witnesses.
45. Although the identities of witnesses who provided evidence in the court proceedings could be released, the content of the witness statements and other documentation that contained evidence from witnesses (particularly police reports) required further attention because some of the information contained was personal data or sensitive personal data of the individuals or other third parties. Her actual redactions had been limited to those categories of personal data.
46. She had borne in mind that although, at the time, witnesses had provided evidence for the purposes of criminal proceedings – and they may have had an expectation that their identities would become known – it did not necessarily follow that they would have expected their personal and/or sensitive personal data would be disseminated more widely under FOIA.
47. She had also considered that the general public interest in Mr Mattan's case predominantly related to the fact that a miscarriage of justice had occurred. Releasing information now – that was personal and sensitive personal data of a witness – added very little to the public's interest in the matter. The National Archives also had to ensure that the release of such information about individuals who were still living and identifiable did not cause some substantial damage or distress.

48. The Tribunal also heard oral evidence from Mr Stuart Abraham. He had worked at The National Archives since 1993 and was the Freedom of Information Centre Manager.

49. He explained that within the series DPP 2, of the 6300 files currently in the series 2624 of them – 42% – were closed files. The CPS transferred the majority of its files on a closed basis to protect surviving relatives. Allowing files to be open to the public could have very serious adverse impact on the lives of relatives and files might also identify juvenile defendants and victims of sexual crimes.

50. Prior to the introduction of FOIA the policy on disclosure of files relating to murder and other serious violent crimes was summarised in The National Archives' Access to public records manual (Appendix 3) which stated

information relating to the victims of murder may be closed for the lifetime of their parents, siblings, spouse or children. This is most likely to be justified where the offence was committed within the family or had a personal element. Substantial distress is less likely to be caused by release of information obtained during the investigation of murder committed in the course of robbery or manslaughter or by motor car. Types of information likely to be severely distressing to the family [included] film or photographs of the deceased taken at the scene of the crime and photographs taken during post-mortem investigations; graphic descriptions of what was done to the victim included in witness statements or post-mortem report; negative comments on the victim's character, family or domestic circumstances; evidence of the legitimacy or inheritable illness of the victim and their immediate family.

51. He noted that on 6 September 2011 the CPS had produced a submission to a panel of the Lord Chancellor's Advisory Council on National Records and Archives regarding the nondisclosure of the information requested by the Appellant. The Advisory Council endorsed the CPS' recommendation for nondisclosure on the basis that "the danger to the mental health of the surviving child outweighs the public interest in disclosure. The file should therefore remain closed".

52. For the benefit of the Appellant – who was not permitted to be present during the closed examination of those two oral witnesses – the Tribunal heard further argument in respect of why certain matters should remain redacted so that it could better understand how TNA had arrived at its decisions to make the remaining redactions. This closed session lasted little more than 20 minutes.

Appellant's Legal submissions

53. Dr Phillips argued that, in relation to section 38, the exemption was not engaged. He stated that, if it was considered to be engaged on the basis that there was a likelihood of danger to someone's mental health, then he would not wish to argue for disclosure on public interest grounds. His main point was that members of the victim's family were very unlikely to be unwillingly exposed to the information in question and that the likelihood of any danger to mental health itself was remote. In previous arguments before the Tribunal the required level of likelihood had been found to be "a very significant and weighty chance" and he did not believe that particular threshold had been crossed in this case.

54. His position was that the substance of the medical evidence about the injuries to the victims was already in the public domain in the form of the testimony of Dr James and Dr Mitchell (at the trial) because the trial transcript was available from the Criminal Cases Review Commission (CCRC). He had obtained a copy of the transcript in 2012 after a simple request (not an FOIA request) and the CCRC had placed no conditions on his use of it and had apparently checked that there were no bars in respect of that in relation to disclosure.

55. Another version of the medical evidence – in the form of depositions given at the Magistrates' Court – had been freely available at The National Archives from 1996 until 2012 in the Assize file.

56. In relation to arguments that the disputed information was likely to come to the attention of the victim's family there was no substantial or objective evidence that there was a "real and significant chance" of that happening.

57. He believed that for section 38 to be engaged it was necessary further to be more than a simple risk of upset and distress in a manner that had been suggested that would result from the disclosure of the information. The National Archives had used a "substantial distress" test and the stronger language used by the CPS in its submission to the Lord Chancellors Advisory Council was based on The National Archives' report in relation to the case being "particularly upsetting" and that some of the material was likely to be "very distressing". He believed that FOIA had moved things beyond those more general categorisations with the enactment of section 38 requiring a clear likelihood of endangerment of mental health, a stronger requirement.

58. Both in his written submission and final submission he had referred to a consultation paper and a Report of the Law Commission (published in 1992 and 1993 respectively) in which the meaning of "impairment of mental health" was discussed. The Report stated that the impairment of mental health required the court to consider

probably with the benefit of medical advice whether the condition has passed beyond the line that divides anxiety or distress from damage to health.

59. In relation to the section 40 matters what he was seeking was a list of names and non-sensitive data that would be sufficient to identify people unambiguously in respect of addresses, occupations, ages and names of spouses. With that information he would be able to seek proof of death such that he could then ask TNA to release information on the basis that section 40 only applied to living individuals. In view of the age of the records he believed it was likely that many of the people concerned were no longer living. He was only asking for a factual list, not for any indication about which redaction related to which individual.

Conclusion and remedy

60. The Tribunal – at the outset – is grateful for the time and effort applied to this appeal by both The National Archives (and their witnesses) and the carefully focused submissions of the Appellant. The Tribunal reflects that when this file originally arrived at The National Archives it was completely closed.

61. As a result of the Appellant's persistence and the careful consideration given to the issues raised by him by Ms Potter as she reviewed the situation more than 75% of the file is already now open to the public.

62. Having had the opportunity of hearing Ms Potter's open and closed oral evidence, and bearing in mind that Ms Potter was cross-examined by the Appellant and asked further questions by the Tribunal, her careful thought and consideration to the job that she does day in and day out for The National Archives is a credit to both her and her employer. She is not someone who simply applies a black felt tip pen to make uncritical, rule-based redactions. Rather she is someone who thinks conscientiously and carefully about the implications of every single piece of information she has to deal with and makes decisions in a thoughtful and reasonable way.

63. That said, this is an unusual and important case. It is an example of a major miscarriage of justice that led to the execution of an innocent man. There can be no greater tragedy than that.

64. A further unusual feature of this appeal is that the CCRC have released to the Appellant a copy of the trial transcript without bar or condition on its use. In short, there has been available to the Appellant – and to any other member of the public who chooses to make a similar application – a significant quantity of the withheld information provided by another public authority.

65. In terms of the section 38 exemption the Tribunal has examined carefully whether it is engaged and, if it is, the balancing factors that

then arise in terms of public interest. The core argument that has been advanced by the Information Commissioner and The National Archives is that the remaining material “would be likely to endanger.... mental health” - that the potential of exposing certain individuals – notably family members of the victim – to more graphic descriptions of the murder and the handling of the body could be deeply upsetting and could cause them to relive this event that occurred 60 years ago.

66. The Tribunal has been provided with no objective medical evidence that this would be the case and it could be invaluable in its place, providing it is proportionate. The facts within this case mean that there was a series of repeated high profile publications - in terms of the reporting of the court proceedings, newspaper investigations and indeed a book written by a former policeman with access to contemporaneous police records – and revelations of detailed information (in the form of the trial transcript) to the Appellant by the body that ultimately recommended that the conviction against Mr Mattan should be re-examined in the Court of Appeal which overturned the conviction .

67. Arguments that, separately or cumulatively, such publications may not necessarily have alerted those whose mental health may be endangered to the detail of the case do not seem to be arguments that stand up to the test of reality and proportionality because of the repeated occasions on which the information at issue in relation to the case surfaced at the trials of Mattan, and then of Cover, and in the local and national press.

68. In short, the Tribunal is not satisfied that section 38 is engaged in this appeal. For that reason it would remove the redactions applied under that section. All of the material contained within the redactions is available within the trial transcript already disclosed to the Appellant.

69. Conversely, the attempt by the Appellant to have matters currently redacted under section 40 FOIA – in terms of the personal and

sensitive personal data of individuals – disclosed to him in the form of lists of names and dates of birth (however non-specific) is doomed to fail.

70. As was demonstrated to us through a number of examples in the closed session, this would permit “jigsaw” identification of personal and sensitive personal data that would be unfair processing under the terms of the Data Protection Act 1998. It would permit the Appellant to build up a matrix of information which he could then use to narrow down specific individuals in breach of the data protection principles.

71. Our decision is unanimous.

72. There is no order as to costs.

Robin Callender Smith

Judge

15 February 2013

Phillips v (1) The Information Commissioner (2) The National Archives (EA/2012/141)**Schedule of redactions in file DPP 2/2145 Post Information Rights Appeal Decision 15 February 2013: O = OPEN and M= MAINTAIN**

Redaction	Document	Scope of redaction	Exemption	Revised position	Page ref (closed bundle)	Page ref (additional open bundle)	TRIBUNAL DECISION
Section 38 redactions							
21	Statement 1969 (Laura Mattan)	Part	38	Maintain closure	47	101	40 Not 38
33-35	Dr Andrew Mitchell, W. R. Lester James	4 pages	38	Maintain closure	60-63	123	O
46	Ditto	Part	38	Maintain closure	73	170	O
56-57	Dr Andrew Mitchell William James	2 pages	38	Maintain closure	84-85	201	O
78	Handwritten notes on evidence	Part	38	Maintain closure	110	341	O
79	Ditto	1 page	38	Maintain closure	111	342	O
80	Ditto	Part	38	Maintain closure	112	343	O
83-85	Dr Andrew Mitchell, W. R. Lester James	3 pages	38	Maintain closure	117-119	355	O
104	Dr Andrew Mitchell William James	2 pages	38	Maintain closure	138	419	O
104- 105	Statement (W. R. Lester James)	Part	38	Maintain closure	138-139	419-420	O
129-132	Depositions (Dr Andrew Mitchell, W. R. Lester James)	4 pages	38	Maintain closure	163-166	510	O
146	Trial transcript, p. 5	1 page	38	Maintain closure	180	600	O
147	Trial transcript, p. 6	Part	38	Maintain closure	181	601	O
168	Trial transcript, p. 51	Part	38	Maintain closure	202	638	O
169-180	Trial transcript, pp. 52-62 (including 53a)	12 pages	38	Maintain closure	203-214	639	O
202	Trial transcript, p. 162	1 page	38	Maintain closure	236	732	O
205-206	Trial transcript, pp. 168-169	2 pages	38	Maintain closure	240-241	738	O

Redaction	Document	Scope of redaction	Exemption	Revised position	Page ref (closed bundle)	Page ref (additional open bundle)	TRIBUNAL DECISION
212-213	Trial transcript, pp. 180-181	2 pages	38	Maintain closure	247	748	O
Section 38 and 40 redactions							
98	Ditto	Part	38 and 40	Maintain closure	132	407	O
204	Trial transcript, p. 166	1 page	38 and 40	Maintain closure	239	736	O
216	Trial transcript, p. 188	Part	38 and 40	Maintain closure	251	755	O
Section 40 redactions							
4A	Correspondence (witnesses to attend Magistrates' Court)	Part	40	Maintain closure	30	58	M
5	Correspondence 1969 (Ted Rowlands to Jim Callaghan)	Part	40	Maintain closure	31	69	O
6-7	Interviews 1969	2 pages	40	Maintain closure	32-33	74	M
8	Affidavit 1969 (Margaret Campbell)	Part	40	Maintain closure	35	75	M
9-13	Material from 1969	5 pages	40	Maintain closure	36-40	77	M
15	Correspondence 1969 (Chief Constable to Moriarty)	Part	40	Maintain closure	41	84	M
16	Ditto	Part	40	Maintain closure	42	85	M
18	Note of interview 1969 (Mr 'Kalilneh')	Part	40	Maintain closure	44	96	M
19	Ditto	Part	40	Maintain closure	45	97	M
20	Material from 1969	1 page	40	Maintain closure	46	100	M
23-26	Material from 1969	4 pages	40	Maintain closure	49-52	104	M
30A	Correspondence 1969 (James Callaghan to Tom Driberg)	Part	40	Maintain closure	57	112	M
31	Material from 1969?	1 page	40	Maintain closure	58	117	M
39	Deposition (Ernest Harrison)	Part	40	Maintain closure	66	135	M

Redaction	Document	Scope of redaction	Exemption	Revised position	Page ref (closed bundle)	Page ref (additional open bundle)	TRIBUNAL DECISION
40	Deposition (James Monday)	Part	40	Maintain closure	67	136	M
41	Deposition (DS David Morris)	Part	40	Maintain closure	68	141	M
45	Police report (26 March 1952)	Part	40	Maintain closure	72	168	M
48	Ditto	Part	40	Maintain closure	75	172	M
49	Ditto	Part	40	Maintain closure	76	173	M
50	Ditto	Part	40	Maintain closure	77	174	M
51	Ditto	Part	40	Maintain closure	78	176	M
53	Ditto	Part	40	Maintain closure	80	179	M
54	Ditto	Part	40	Maintain closure	81	184	M
54A	Police report (17 June 1952)	1 page	40	Maintain closure	82	196	M
58	Statement (Mary Tolley)	Part	40	Maintain closure	86	211	M
59	Statement (Doris Miara)	Part	40	Maintain closure	87	220	M
61A	Statement (Ernest Harrison)	Part	40	Maintain closure	90	233	M
61B	Statement (James Monday)	Part	40	Maintain closure	91	238	M
61C	Statement (Marian Simins)	Part	40	Maintain closure	92	250	M
62	Statement (DS David Morris)	Part	40	Maintain closure	93	252	M
63	Statement (DC John Lavery)	1 page	40	Maintain closure	94	255	M
67	Index to statements of persons not called at Magistrates' Court	Part	40	Maintain closure	98	268	M
68-70	Statement	3 pages	40	Maintain closure	99-101	269	M
71	Statement (Mary George)	1 page	40	Maintain closure	102	276	M

Redaction	Document	Scope of redaction	Exemption	Revised position	Page ref (closed bundle)	Page ref (additional open bundle)	TRIBUNAL DECISION
72	Statement (Elataline Jordan)	Part	40	Maintain closure	103	279	M
74-75	Statement	2 pages	40	Maintain closure	105-106	282	M
76	Statement (Sheila Rees)	Part	40	Maintain closure	107	283	M
77	Statement (Esther Williams)	Part	40	Maintain closure	108	291	M
81	Ditto	Part	40	Maintain closure	113	344	M
81B [sic]	Ditto	Part	40	Maintain closure	115	347	M
89	Deposition (Ernest Harrison)	Part	40	Maintain closure	123	367	M
90	Deposition (James Monday)	Part	40	Maintain closure	124	368	M
91	Deposition (DS David Morris)	Part	40	Maintain closure	125	374	M
95	Covering letter for police report (17 June 1952)	Part	40	Maintain closure	129		M
96	Police report (17 June 1952)	Part	40	Maintain closure	130	404	M
97	Police report (26 March 1952)	Part	40	Maintain closure	131	406	M
99	Ditto	Part	40	Maintain closure	133	408	M
101	Ditto	Part	40	Maintain closure	135	410	M
102	Ditto	Part	40	Maintain closure	136	412	M
106	Statement (Doris Miara)	Part	40	Maintain closure	140	434	M
110	Statement (Ernest Harrison)	Part	40	Maintain closure	144	444	M
111	Statement (Ernest Harrison)	Part	40	Maintain closure	145	446	M
112	Statement (James Monday)	Part	40	Maintain closure	146	448	M
113	Statement (Marian Simins)	Part	40	Maintain closure	147	456	M
114	Statement (DS David Morris)	Part	40	Maintain closure	148	458	M

Redaction	Document	Scope of redaction	Exemption	Revised position	Page ref (closed bundle)	Page ref (additional open bundle)	TRIBUNAL DECISION
115	Statement (DC John Lavery)	Part	40	Maintain closure	149	460	M
118	Index to statements of persons not called at Magistrates' Court	Part	40	Maintain closure	152	471	M
119	Statement	1 page	40	Maintain closure	153	472	M
120	Ditto	Part	40	Maintain closure	154	473	M
121	Statement (Mary George)	Part	40	Maintain closure	151	478	M
122	Statement (Elataline Jordan)	Part	40	Maintain closure	156	479	M
124	Statement	Part	40	Maintain closure	158	481	M
125	Statements - Sheila Rees	[1 page]	40	Maintain closure	159	482	M
126	Statement (Sheila Rees)	Part	40	Maintain closure	160	483	M
127	Statement (Esther Williams)	Part	40	Maintain closure	161	487	M
137	Deposition (James Monday)	Part	40	Maintain closure	171	531	M
136	Deposition (Ernest Harrison)	Part	40	Maintain closure	170	533	M
138	Deposition (DS David Morris)	Part	40	Maintain closure	172	542	M
139	Deposition (DC John Lavery)	Part	40	Maintain closure	173	543	M
148	Trial transcript, p. 9	Part	40	Maintain closure	182	604	O
184	Trial transcript, p. 91	Part	40	Maintain closure	218	669	O
185	Trial transcript, p. 93	Part	40	Maintain closure	219	671	O
186	Trial transcript, p. 96	Part	40	Maintain closure	220	674	O
187-188	Trial transcript, pp. 98-99	2 pages	40	Maintain closure	221-222	676	O
189	Trial transcript, p. 100	Part	40	Maintain closure	223	677	O

Redaction	Document	Scope of redaction	Exemption	Revised position	Page ref (closed bundle)	Page ref (additional open bundle)	TRIBUNAL DECISION
190	Trial transcript, p. 101	1 page	40	Maintain closure	224	678	O
203A	Trial transcript, p. 165	Part	40	Maintain closure	238	735	O
207	Trial transcript, p. 172	Part	40	Maintain closure	242	741	O
208-209	Trial transcript, pp. 173-174	2 pages	40	Maintain closure	243-244	742	O
215	Trial transcript, p. 187	Part	40	Maintain closure	250	754	O