



Neutral citation number: [2024] UKFTT 00268 (GRC)

Case Reference: EA/2022/0440

First-tier Tribunal
General Regulatory Chamber
Information Rights

Decided without a hearing

On: 5 September 2023, 27 March 2024
Decision given on: 4 April 2024

Before

TRIBUNAL JUDGE HAZEL OLIVER
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER EMMA YATES

Between

STEPHEN GIBBONS

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Allowed in part.

Substituted Decision Notice:

1. The National Archives was entitled to rely on sections 21(1), 38(1)(a), 40(2) of the Freedom of Information Act 2000 ("FOIA") to withhold the majority of the information in the file requested by the Appellant.
2. The National Archives was not entitled to withhold the following information, specified by reference to the page numbers in the closed bundle provided to the Tribunal:
 - A14CB
 - A15CB
 - A16CB
 - A17CB (except that the named individual can be redacted under section 40(2))
 - A18CB
 - A19CB
 - A21CB (except that the name of the author can be redacted under section 40(2))
 - A23CB
 - A24CB
 - A25CB (except that the name of the author can be redacted under section 40(2))

- A26CB
 - A27CB (except that the name of the author can be redacted under section 40(2))
 - A28CB
 - A117-118CB
 - A122-123CB
3. The National Archives is to disclose the information set out in paragraph 2 within 35 days from when this decision is sent to the parties.
 4. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules, and may be dealt with as a contempt of court.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 30 November 2022 (IC-154591-M6K3, the “Decision Notice). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information in a closed file about a specific murder requested from the National Archives (“TNA”).
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).
3. On 18 February 2021, the Appellant wrote to TNA and requested the following information (the “Request”): “*DPP 2/2549: DIQUE, Eric Samuel (aged 22): Murder of Annabel HASSAN.*” This file relates to the murder of the Appellant’s mother by his father in 1956.
4. TNA responded on 11 October 2021 and withheld the information on the basis it was exempt from disclosure under section 38(1)(a) FOIA (health and safety) and section 40(2) FOIA (personal information). They upheld this position on internal review.
5. The Appellant complained to the Commissioner on 4 February 2022. The Commissioner decided that the information could be withheld under section 40(2):
 - a. The closed file contains special category and third party data of witnesses and third parties mentioned in witness testimonies, and in the absence of evidence otherwise the data subjects are assumed to be alive.
 - b. The data subjects would have a reasonable expectation that information they provided to the police as part of a murder investigation would not be disclosed to the world at large, and disclosure may cause distress or harm.
 - c. The identified legitimate interests in disclosure do not outweigh the interests or fundamental rights and freedoms of the data subject.

- d. Looking at the withheld information, the volume of exempt material, the scarcity of releasable material and considering the effect redaction would have on a reader's ability to understand the historical narrative of the record, redaction is not possible and section 40(2) applies to the whole file.

The Appeal and Responses

- 6. The Appellant appealed on 16 November 2022. His grounds of appeal are:
 - a. It is unclear what documents the Commissioner considered, and the Commissioner missed the most salient points of his complaint.
 - b. He asks the Tribunal to consider section 38(1)(a) as part of the appeal. The position on harm under section 38(1) is simply based on previous decision notices which are not comparable, and the Commissioner and TNA have taken an unduly cautious approach.
 - c. The Appellant has now seen an open depositions file CRIM 1/2738 which contains witness statements, a report of the crime scene and photographs. He says that TNA have already made the file public.
 - i. In relation to section 38(1)(a), seeing this information did not have the effect on him that had been envisaged by TNA.
 - ii. In relation to section 40(2), all 12 statements are in the open file CRIM 1/2738, the argument that the requested statements are different is not credible, and the personal details would be the same anyway. The Commissioner's position on redaction and scarcity of releasable material does not make sense as he has already seen the material. The file was only closed 27 years after the case, meaning the witnesses would not have an expectation of non-disclosure, and there is nothing in the statements to indicate release would cause distress or harm.
 - d. The application of s.40(2) seems to indicate that witness statements cannot be disclosed to the public under any circumstances until 100 years has passed, irrespective of the crime committed.
- 7. The Commissioner's response maintains that the Decision Notice was correct. The Commissioner argues:
 - a. In relation to the information being available in CRIM 1/2738:
 - i. TNA have now withdrawn public access to the depositions file referred to by the Appellant under its reclosure policy.
 - ii. The requested file appears to hold more information than the list of documents in CRIM 1/2738 provided by the Appellant.
 - iii. Although some of the information may have been publicly accessible, it was not in the public domain at the time TNA dealt with the Request.
 - iv. If parts were in the public domain, there would be no basis for disclosure as they would be exempt under section 21(1) FOIA.
 - b. In relation to section 40(2):
 - i. The closed file contains both special category data, and third party data, of witnesses and third parties mentioned in witness testimonies, and criminal

offence data on one specific page. The witness statements are exempt from disclosure for this reason.

- ii. The Commissioner must assume that some of the data subjects are still alive 65 years later, and it would be prohibitive to trace and consult them.
 - iii. Disclosure would constitute a disproportionate and unwarranted level of interference with the rights and freedoms of the data subjects, and there is no evidence that any of the required conditions are met for the disclosure of special category or criminal conviction data.
 - iv. The Commissioner does not agree that the information is innocuous and uncontroversial as suggested by the Appellant. Although some witnesses may have given evidence at trial, they may have requested special measures, and in any event they would not expect the information to be disclosed to the world at large during their lifetime.
- c. In relation to section 38(1)(a):
- i. The exemption was being applied to all surviving relatives, not just the Appellant. A cautious approach is right as the Appellant does not know for sure if there are any surviving relatives.
 - ii. TNA's guidance recognises the potential damage to mental health resulting from disclosure of criminal case files.
 - iii. Although TNA was initially confused about the Appellant's identity, they referred to all surviving family in their initial response and internal review, and the public interest balancing was carried out correctly. The Commissioner relied on previous decision notices for the legal framework only and properly took account of the facts and circumstances of the case.

8. The Appellant submitted a reply to the Commissioner's response to the appeal and a reply to TNA's response to the Commissioner during his investigation, and relevant points from these replies are addressed in the discussion below.

9. The Tribunal initially met to consider its decision on 5 September 2023. We decided that we required further information from TNA in order to finalise our decision. We made directions on 6 September asking TNA to respond to a number of specific questions about documents in the closed bundle which did not appear to be covered by the claimed exemptions. As TNA had not initially wished to be joined as a party to the proceedings, we did not consider it necessary to do so in order to obtain this further information.

10. TNA responded on 12 October 2023, with a written response and an annex explaining their position in relation to each document. The Commissioner confirmed that he did not propose to reply further. Redacted versions of TNA's response were provided to the Appellant so that he could send a further response.

11. Unfortunately, there were some administrative delays at the Tribunal which meant that all of the information required by the Tribunal panel was not available until March 2024. We apologise to the parties for the delay in finalising this decision.

Applicable law

12. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) Any person making a request for information to a public authority is entitled -
- (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.

.....

2 Effect of the exemptions in Part II.

-
- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that -
- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

.....

21 Information accessible to applicant by other means.

- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1) -
- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

.....

38 Health and safety.

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to -
- (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual.

.....

40 Personal information.

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (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) the first, second or third condition below is satisfied.
- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act -
- (a) would contravene any of the data protection principles, or
 - (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

.....

58 Determination of appeals

- (1) If on an appeal under section 57 the Tribunal considers -
- (a) that the notice against which the appeal is brought is not in accordance with the law, or

- (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

13. Section 3(2) of the Data Protection Act 2018 (“DPA”) defines “personal data” as “any information relating to an identified or identifiable living individual”. The “processing” of such information includes “disclosure by transmission, dissemination or otherwise making available” (s.3(4)(d) DPA), and so includes disclosure under FOIA.

14. The data protection principles are those set out in Article 5(1) of the UK General Data Protection Regulation (“UK GDPR”), and section 34(1) DPA. The first data protection principle under Article 5(1)(a) UK GDPR is that personal data shall be: “*processed lawfully, fairly and in a transparent manner in relation to the data subject*”. To be lawful, the processing must meet one of the conditions for lawful processing listed in Article 6(1) UK GDPR. These include where “*the data subject has given consent to the processing of his or her personal data for one or more specific purposes*” (Article 6(1)(a)). It also includes where “*processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.*” (Article 6(1)(f)). The UK GDPR goes on to state that this condition shall not apply to processing carried out by public authorities in the performance of their tasks, but section 40(8) FOIA omits this provision, meaning that Article 6(1)(f) can be used as a lawful basis for the disclosure of personal data under FOIA.

15. Information relating to criminal convictions and offences, or the alleged commission of an offence, has additional legal protections. Article 10 UK GDPR requires the processing of such data based on Article 6(1) to only be carried out under the control of official authority or when the processing is authorised by Member State law providing for appropriate safeguards for the rights and freedoms of the data subject. Under section 10(5) DPA, processing of criminal convictions/offences data will be authorised in the UK if the processing complies with a condition in Parts 1, 2 or 3 of Schedule 1 to the DPA 2018. This includes a condition that the data subject has given consent to the processing (Part 3 paragraph 29).

16. The balancing of interests tests under Article 6(1)(f) involves consideration of three questions (as set out by Lady Hale DP in ***South Lanarkshire Council v Scottish Information Commissioner*** [2013] UKSC 55):

- (i) Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
- (ii) Is the processing involved necessary for the purposes of those interests?
- (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

The wording of question (iii) is taken from the Data Protection Act 1998, which is now replaced by the DPA and UK GDPR. This should now reflect the words used in the UK GDPR – whether such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.

17. In the context of section 38(1), the Upper Tribunal in ***Keane v IC, Home Office & MPS*** [2016] UKUT 0461 (AAC) held that “*likely to*” in the context of s.38(1) means “*a real and significant risk, albeit a risk that may well fall short of being more probable than not*”. The wording used in this section is “endanger” rather than “prejudice”. There is no appellate authority on the meaning of this test and how it is different from prejudice-based exemptions. Although not bound by other First-Tier Tribunal decisions that have considered this point, we agree that endanger is a different test from prejudice. We also agree with the principle that mere distress or upset is not sufficient to meet the threshold of danger to mental health. The test requires something that is likely to cause some form of mental health condition or make an existing condition worse. This is a qualified exemption, meaning it can be in the public interest to disclose information even if it would endanger physical or mental health.

Issues and evidence

18. The issues are as follows.

- a. Was some or all of the information already in the public domain at the time TNA responded to the Request?
- b. Was TNA entitled to rely on section 40(2) FOIA (personal data) to withhold the requested information?
 - i. Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
 - ii. Is the processing involved necessary for the purposes of those interests?
 - iii. Are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?
- b. If not, was TNA entitled to rely on section 38(1)(a) FOIA (health and safety) to withhold the requested information? If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

19. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the withheld information.
- c. The Appellant’s reply to TNA’s response to the Commissioner during his investigation.

Discussion and Conclusions

20. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner’s Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

21. ***Was some or all of the information already in the public domain at the time TNA responded to the Request?*** The Commissioner makes the point that if parts of the information were in the public domain, there would be no basis for disclosure of this information as it would be exempt under section 21(1) FOIA. The Appellant has seen the file CRIM 1/2783. He says that there is some additional information in the file that he has requested, DPP 2/2549. We do not have a definitive list of what was included in file CRIM 1/2783. It does appear that much of the information is the same but there is more in the requested file.

22. The Appellant has explained that file CRIM 1/2783 was easy to find. It was readily accessible by a simple search. Although the Appellant had to complete a form to request the file and view it in a particular room, no payment was required and there was no screening process before he was given access to it.

23. Under the Public Records Act 1967, TNA makes records accessible under FOIA unless exemptions apply. TNA's response to the Tribunal's directions confirms that file CRIM 1/2783 was transferred to them in 1995 and was made open to the public. However, the file was removed from public access and placed on review after TNA had seen the Grounds of Appeal during the course of these proceedings. This was due to the sensitivities of the content of the file. It is currently being considered for reclosure and so is no longer accessible to the public.

24. We therefore find that, at the time of the Request, the content of file CRIM 1/2783 was accessible to both the Appellant and the public through other means. The Appellant did, in fact, access and view the content of this file before submitting this appeal. The file CRIM 1/2783 forms part of file DPP 2/2549. This means that some of the information requested by the Appellant was already in the public domain at the time that TNA responded to the Request. The exemption in section 21(1) applies to the information that is a duplicate of that contained in CRIM 1/2783, as stated by the Commissioner in his response to the appeal. This information was reasonably accessible to the Appellant by other means.

25. This is not a complete answer to the appeal, as there are additional documents in the requested file DPP 2/2549 that were not made available to the public and that the Appellant has not seen. We have therefore gone on to consider the application of the other exemptions relied on by TNA.

26. **Section 40(2) FOIA (personal data).** It appears that CRIM 1/2783 covers statements used at trial. However, there are additional statements in the requested file of persons not called at court hearings, which contain personal data, and various other details of witnesses. Although some of these individuals may no longer be alive, we accept that it is appropriate to proceed on the assumption that some may have still been alive at the time of the Request. We agree with the Commissioner that it would be prohibitive to trace and consult these individuals, taking into account the passage of time and the number of individuals involved. A standard approach in such situations is to assume that data subjects are alive until they would have reached the age of 100. This does not mean that personal information can never be disclosed, but it does mean that it is treated as personal data and so subject to the tests set out below.

27. ***Is the data controller or third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?*** There are legitimate interests in disclosure of this information. There are general interests in transparency and the administration of justice. The Appellant also has his own interests in the information due to his connection with the relevant events. The Appellant has provided more detail about his reasons for wanting the information, which we have taken into account but have not included in this open decision as it is personal to the Appellant.

28. ***Is the processing involved necessary for the purposes of those interests?*** We accept that the processing is reasonably necessary for these interests, particularly the personal interests of the Appellant. There is not an alternative means by which the Appellant can obtain this type of information about this matter.

29. ***Are such interests overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data?*** Having considered this carefully, we find that these interests are overridden by the interests and rights of the data subjects. The Appellant's own interests in the information have been partially met by the availability of CRIM 1/2783 at the time of his Request. TNA's response to the Commissioner sets out the limited purposes for which individuals provide their personal data in connection with a criminal investigation. We note the point that witnesses would be less willing to provide information if their privacy was not protected. We accept that these witnesses would have a reasonable expectation that their personal data, consisting of information provided to the police in the context of a murder investigation, would not be made public during their lifetime. Although the Appellant makes the point that data rights did not come to prominence until the 1980s, similarly the possibility of publication to the world at large under FOIA did not exist at the time the witnesses provided their information. In any case, individual expectations of privacy in relation to disclosure at this point in time would be informed by current rights and protections. This expectation is enhanced for individuals whose statements were not used at trial (meaning they were never made public in any form), which applies to a number of the statements that were not available in file CRIM 1/2783.

30. We have considered whether it would be possible to redact witness names and other identifying features. Although names could be removed, the statements give details of events and surrounding circumstances from which it may still be possible to identify the individual involved. Anonymisation will not be sufficient if there are other identifiers. Any redaction would therefore need to cover anything that could identify the witness. This is likely to require redaction of the vast majority of each statement, and would leave only limited information that would not be meaningful.

31. We have also considered the position for special category data (information about criminal offences). There is one individual who this applies to (who is not the Appellant's deceased father). Disclosure of this information would not be lawful as none of the special conditions for processing are met. The Appellant says that it would be easy to redact this information. Although this specific information could potentially be redacted, the wider witness statement/information would still be exempt under section 40(2) in the same way as the other witness statements.

32. **Section 38(1)(a) FOIA (health and safety)** The Appellant has asked us to consider this exemption as well, although the Commissioner relied on section 40(2) for the entire requested file. We agree that we should do so. There are some documents and photographs in the file that do not contain personal data at all (as they relate to individuals who are known to no longer be alive). We agree with the Commissioner that redaction of personal data of witnesses would leave little releasable material in those documents and any material that was disclosed would not be meaningful. However, there are other individual documents which would not be affected by this level of redaction and so could potentially be disclosed unless another exemption applies.

33. ***Was TNA entitled to rely on section 38(1)(a) FOIA (health and safety) to withhold the requested information?*** The material that this exemption potentially applies to is details about the crime, including crime scene photographs. The Appellant says that he has already seen photographs in file CRIM 1/2783 and was not affected. However, this does not mean that others would be unaffected as well. The Appellant has described what he has seen so far, and that these descriptions and photographs do not show that there has been a crime. In his reply to the most recent information from TNA, the Appellant also makes the point that the material in file CRIM 1/2783 was in the public domain and there is no evidence that endangerment has occurred. However, there is additional material in the requested file which the Tribunal has seen, which is

more graphic and distressing than the material that was in file CRIM 1/2783 and described by the Appellant.

34. The Appellant says that TNA has taken an unduly cautious approach to this issue. TNA have clarified that they rely on this exemption in relation to surviving relatives of the individuals involved, as well as in relation to the Appellant. We have considered whether the mental health of surviving relatives would be likely to be endangered by disclosure of this material, meaning that it would cause or contribute to a mental health condition. The test is not simply whether they would be caused distress or upset, which might be caused to a relative of the victim or defendant by release of any material from the file.

35. Having considered the material in the requested file that was not already accessible to the Appellant in file CRIM 1/2783, we find that some of this material would be likely to endanger the mental health of individuals. We have focussed on the more shocking and graphic material which we accept could cause more than just distress to a surviving relative, in the context of a violent crime. The Appellant has made the point that graphic material is available on television and social media, but that is very different from viewing material about your own relative. We have assessed that this is a real and significant risk, even if it is not more probable than not. Some individuals may not be badly affected by seeing this material, but others may well be affected to the extent of damage to their mental health. The Appellant has provided some personal information to explain why he would not be affected by this material. Although the Appellant may disagree, we do find that this risk applies to him in relation to the graphic photographs that he has not already seen. In any event, we also find that this risk applies to other surviving relatives of both the victim and the defendant, in relation to the more detailed descriptions of the crime and the photographs that were not accessible in file CRIM 1/2783.

36. ***Does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?*** As section 38(1)(a) is engaged, we have gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. We find that it does. We have found that there is a real and significant risk that disclosure of this information would endanger the mental health of certain individuals. This is a serious consequence of a disclosure under FOIA. It is not in the public interest to endanger mental health. Although the exemption is a qualified one, it would require a strong public interest to justify disclosure. There is a general public interest in transparency in this case, but no other specific or compelling public interest in disclosure. We therefore find that information consisting of detailed descriptions of the crime and the photographs that were not accessible in file CRIM 1/2783 can be withheld under section 38(1)(a).

37. **Disclosure of other material.** The Tribunal asked TNA to respond to a number of specific questions about documents in the closed bundle which did not appear to be covered by either of the claimed exemptions. TNA's response confirms that no exemption was applied to some of these documents and explains how exemptions were applied to others. TNA argues that the Request was for the whole record and not for specific information, and says that redaction would leave only peripheral information which is of limited value to the requester and the wider public. We note that TNA's response to the Commissioner also explained that the volume of exempt material, scarcity of releasable material and effect of redaction on reader ability to understand historical information, precluded a redacted release. We agree with this position in relation to redaction of witness identifiers, as explained above. However, we do not agree that this is the correct approach under FOIA for individual documents in a requested file which are not covered by an exemption or require only very minimal redaction. These documents can be still be disclosed in a way that provides a set of meaningful material from a file, even if larger sections of the file are covered by exemptions.

38. We have considered the documents from the closed bundle that we had identified and TNA's response. We find that some of these documents are covered by the claimed exemptions. Page 13CB contains a number of individual names and redaction would leave very little information, and so is exempt under section 40(2). Page 20CB contains both a detailed description of the crime and personal data, and so it is exempt under both section 38(1)(a) and 40(2). However, the remainder of the documents we identified are not exempt and should be disclosed as follows:

- A14CB
- A15CB
- A16CB
- A17CB (except that the named individual can be redacted under section 40(2))
- A18CB (we do not agree that this reaches the threshold of being likely to endanger mental health under section 38(1)(a)).
- A19CB
- A21CB (except that the name of the author can be redacted under section 40(2))
- A23CB
- A24CB
- A25CB (except that the name of the author can be redacted under section 40(2))
- A26CB
- A27CB (except that the name of the author can be redacted under section 40(2))
- A28CB
- A117-118CB
- A122-123CB

39. We have found that some of the material in the requested file is not covered by the claimed exemptions and so should be disclosed under FOIA. We therefore uphold the appeal in part and issue the Substituted Decision Notice set out at the start of this decision.

Signed Judge Hazel Oliver

Date: 2 April 2024