

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2015

Public Authority: The National Archives
Address: Kew
Richmond
Surrey, TW9 4DU

Decision (including any steps ordered)

1. The complainant has requested information relating to the file listed as closed record MEPO 2/9138 held by The National Archives.
2. The Commissioner's decision is that The National Archives (TNA) has correctly applied sections 40 and 41(1) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 20 June 2014, the complainant wrote to TNA and requested information in the following terms:

"I would like to request access to the information contained in a file listed as closed on the catalogue of the National Archives.

The file has the catalogue reference MEPO 2/9138 and the original references are 22/50/427, 221/54/108, 74/591/910."
5. TNA responded on 11 July 2014. It refused to provide the requested information citing sections 40(2) and 41 of the FOIA as its basis for doing so.
6. Following an internal review TNA wrote to the complainant on 9 September 2014 and maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 15 September 2014 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if TNA has correctly applied sections 40 and 41 to the withheld information.

Reasons for decision

Section 40(2)

9. TNA sought to rely on section 40(2) in relation to the majority of the withheld information.
10. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and one of two conditions is satisfied.

Is the information personal data?

11. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

*"data which relate to a living individual who can be identified –
(i) from those data, or
(ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

12. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
13. TNA explained that the main subject of the file is now deceased. However, it considered section 40(2) was applicable to the personal data

of third parties mentioned in the file who it is reasonable to assume may still be alive adopting the 100 year rule¹ which has previously been explained to the complainant.

14. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles.
15. The Commissioner has reviewed the withheld information and considers that the majority of information can be described as personal data and that some parts can be described as sensitive personal data under section 2 of the DPA 1998.
16. The file in question is a Metropolitan Police registered file relating to investigations into the suspected criminal activity of the subject and third parties. As the title of the file suggests, its' purpose was to document the exploits of Hans Joachim Mueller, who was an escaped prisoner of war. Hans had committed various offences, but was also suspected of committing further crimes and there are reports within this file that detail his suspected offences. As the focus of the reports and correspondence is about collecting evidence of the illegal activity of specific individuals this file can be considered a case file about these individuals and consequently the majority of information is their personal data.
17. The next question for the Commissioner is whether disclosure of that personal data would contravene any of the data protection principles.

Would disclosure contravene any of the data protection principles?

18. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.
19. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

¹ www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf

20. The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
- what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - the particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
21. Notwithstanding the reasonable expectations or any damage or distress caused to the individuals in question by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
22. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, ie it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing.

Reasonable expectations

23. Focussing just on the expectation of these individuals, it is important to consider the circumstances in which the personal data was obtained. This includes the how, when and why the information was collected.
24. As stated previously to avoid inadvertent disclosure of the information itself, the Commissioner does not propose to go into further details in this decision notice. However, he is satisfied that the individuals to whom the personal data relates would expect the information to be withheld and that this expectation is reasonable.
25. The relative age of the information does not diminish that expectation in the circumstances of this case. As to the damage or distress that may be caused by disclosure, again the Commissioner accepts that despite the passage of time, there is a general and reasonable expectation that such information would not be made publically available and disclosure could cause distress.
26. Therefore with respect to the first principle the Commissioner finds that disclosure of the information would be unfair and constitute a breach of this principle.

Balancing the individuals' rights and freedoms against the legitimate interest in disclosure

27. Despite the factors above, the requested information may still be disclosed if there is a compelling public interest in doing so.
28. When balancing the public interest in the case of section 40(2) it is different owing to the interaction with the Data Protection Act. This means the assumption is reversed; a justification is needed for disclosure. Considering the information in question and the specific public interest that it seeks to address, TNA considers that the public interest would not favour disclosure. The judiciary have differentiated between information that would benefit the public good and information that would meet public curiosity. It does not consider the latter to be a "public interest" in favour of disclosure.
29. TNA referenced a Tribunal case EA/2012/0030 which highlighted that "A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principle, including the determination of what is "necessary" for the purpose of identifying a legitimate interest. In order to qualify as being "necessary" there must be a pressing social need for it..." And if a public or legitimate interest does exist this must be balanced against the rights, freedoms and legitimate interests of the individuals whose information is sought".

30. TNA has to observe its obligations to these living individuals and their rights under the DPA. The rights and interests of these individuals may be impacted by this release, to the extent that release would be unfair and would cause damage or distress. It is a legitimate interest in favour of non-disclosure to protect personal data about someone who is still living, where that release would breach the first principle of the DPA and their and the family's right to a private and family life under the Human Rights Act 1998.
31. The Commissioner has reviewed the withheld information and is satisfied that it relates to living individuals on the basis that it has no evidence that they are deceased. Although there is some information which clearly does not relate to living individuals, it is still possible that family members of the deceased may still be living and therefore identifiable if the information was disclosed.
32. TNA did consider whether it was possible to redact the names of the individuals however it said that this is a difficult case because the file predominately relates to the collection of evidence against a named individual and those closely connected to him. In this specific case it is therefore not a question of anonymisation, as this would be extremely problematic to achieve. From information already known (name of subject in the file is on TNA's Catalogue), it could be relatively easy to work out and or guess whose personal details were being collected and who was being investigated.
33. TNA provided a specific example that the Commissioner does not feel is appropriate to share.
34. However, TNA further stated, that in terms of the details which would lead to identification it is difficult to precisely establish what information and/or combination would lead to identification.
35. In ICO Decision Notice – FS50429375, paragraph 18 the Commissioner states: *"the Commissioner considers that the London Fire Brigade could not know which biographical details would allow individual interviewees to be identified by friends, family or colleagues. It is on this basis that they have chosen to withhold the information in its entirety."*
36. Furthermore TNA considered the jigsaw effect which could occur with the partial release of information within this file. Any release which alludes to identities could contribute to the jigsaw effect, as described by the Tribunal in paragraphs 69-70 of their decision – EA/2012/0141.
37. *"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."

38. If only names were removed and the individuals were identified TNA would have released sensitive personal data into the public domain, which given the private nature of the information, is likely to cause some damage and distress.
39. The Commissioner also considers that if certain information were redacted such as the names of individuals it is highly likely they would still be identifiable through other information contained within the requested file.
40. Whilst the Commissioner also acknowledges that there is a legitimate public interest in disclosing information which would add to the historical account and further public knowledge, he does not consider that this outweighs the interests of the data subjects in this context.
41. The Commissioner therefore considers that section 40(2) FOIA was correctly applied in this case to the withheld information.

Section 41 – information provided in confidence

42. Section 41 of the FOIA states that:

(1) Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority,) and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

43. This exemption is absolute and therefore it is not subject to a public interest test.
44. The TNA has applied section 41 to a small part of the information relating to information supplied to the police from third parties and details allegations against others that had been provided with an explicit expectation of confidence.
45. The Commissioner notes that the requested information was originally provided to the Metropolitan Police. The requested information was not created by TNA. The Commissioner is satisfied that this information was obtained by the Metropolitan Police from another person or persons. Therefore the requirement of section 41(1)(a) is satisfied.

46. TNA consulted with the Metropolitan Police by virtue of section 66 of the FOIA.

Section 66 states:

(1) this section applies to any information which is (or, if it existed, would be) contained in a transferred public record, other than information which the responsible authority has designated as open information for the purposes of this section.

47. Having established that the requested information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.
48. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether the disclosure would be an unauthorised use of the information and of detriment to the confider.
49. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
50. During the investigation of the case the Commissioner conducted his own searches (by use of an internet search engine), but was unable to find any information in the public domain aside from the TNA file listing in its catalogue. The Commissioner is satisfied that the information requested is not otherwise accessible.
51. The information constitutes correspondence between the relevant parties when dealing with an investigation into alleged criminal activities of Hans Joachim Mueller and other third parties.
52. Given the nature of the information, the Commissioner is satisfied that the information is not trivial.
53. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. A breach of confidence will not be actionable if the information was not

communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.

54. In its response to the Commissioner TNA explained that it had discussed the request with Metropolitan Police. The Metropolitan Police has clarified that information supplied to assist the police whether it's in the form of witness statements or unsolicited communication, would be assumed to have the quality of confidentiality, whether explicitly stated or not. It is reasonable to assume in most cases that any person supplying information to the police would expect it to be treated as confidential during his/her lifetime.
55. Furthermore, the Commissioner notes that the information significantly pre-dates the FOIA. Bearing this in mind, the Commissioner is satisfied that there would have been no reasonable expectation on behalf of the confiders, or those commenting on this information, that this may be put into the public domain in the future.
56. The Commissioner considers that it is apparent from the nature of the information that it would have been provided to the Metropolitan Police under an expectation of confidence. The Commissioner also considers that an implicit obligation arose in the circumstances of this case.
57. In many cases, because of the age of this information, the confider of the information as well as the individuals to whom the information relates will be deceased. The Commissioner has considered whether an obligation of confidence will survive the death of the confider and such individuals.
58. While there is no case law on this point, the Commissioner is of the view that an obligation of confidence survives in such circumstances for the following reasons:
 - The Commissioner is mindful of the basis of the common law claim for breach of confidence, which is that the defendant's conscience is affected by the disclosure. An action for breach of confidence is based in the equitable principle of good faith. The courts have in the past prevented the disclosure of confidential information where such disclosure is 'unconscionable' and there was no likely damage to the confider.
 - The Commissioner considers therefore that disclosure of confidential information after the death of the confider may still be unlawful, because it is unconscionable of the defendant to disclose it.
 - In circumstances where there is a contractual obligation of confidence, the courts have found that there is no reason in principle why a

contract cannot be enforced by personal representatives after the death of one of the parties².

59. The Commissioner has then considered whether disclosure of the information would be to the detriment of the confider.
60. The loss of privacy can be a detriment in its own right.³ The Commissioner considers that allegations of criminal activity constitute information of a personal nature and there is no need for there to be any detriment to the confider, in terms of tangible loss, in order for it to be protected by the law of confidence.
61. It follows then that where the disclosure would be contrary to the deceased's reasonable expectation of maintaining confidentiality in respect of his private information, the absence of detriment would not defeat a cause of action.
62. The Commissioner considers that while disclosure would cause no positive harm to the confider, knowledge of the disclosure of the information pertaining to the deceased's alleged activities could distress surviving relatives of the deceased.
63. Therefore, in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether, as a matter of fact, the deceased person has a personal representative who would take action.
64. The Commissioner has next considered whether there is a public interest defence for a breach of confidence. In the Commissioner's view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.
65. The Commissioner accepts that there is likely to be a public interest in information relating to a German prisoner of war, especially in the current times of commemoration and the approach of the 70th anniversary of the end of WWII.
66. In weighing this against the public interest in keeping information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.

² Beswick v Beswick [1968] A.C. 58

³ Bluck v ICO & Epsom and St Helier University Hospital NHS Trust [EA/2006/0090] para 15.

67. It is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence.
68. The Commissioner is mindful of the need to protect the relationship of trust between confider and confidant and not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
69. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant. In light of all the information at hand, the Commissioner considers that TNA would not have a public interest defence for breaching its duty of confidence. The Commissioner cannot conclude that there is a strong enough public interest argument to disclose the requested information.
70. Therefore, the Commissioner finds that the information is exempt under section 41 and section 40 and TNA was correct to withhold this information.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

72. 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.
73. 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

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