

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 February 2016

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

Decision (including any steps ordered)

1. The complainant has requested access to a closed War Office/Ministry of Defence file held by The National Archives relating to Northern Ireland in 1971. The National Archives (TNA) refused the request under the exemptions provided at sections 31(1)(a)-(c), law enforcement, 38(1)(a) and (b), health and safety, 40(2), personal information.
2. The Commissioner's decision is that TNA was entitled to refuse the request under the exemptions cited.
3. The Commissioner does not require the public authority to take any further action.

Request and response

4. On 11 February 2015, the complainant wrote to TNA and requested information in the following terms:

"Document reference: WO 305 305/4617 Dear Sir/Madam, May I request the above file, a Headquarters Northern Ireland Log for December 1971."
5. TNA responded on 8 April 2015. It refused to provide the information citing the exemptions provided by sections 31, 38 and 40 as its basis for doing so.

6. Following an internal review TNA wrote to the complainant on 5 June 2015. It upheld its original position to withhold the information under the exemptions cited.

Scope of the case

7. The complainant contacted the Commissioner on 10 June 2015 to complain about the way his request for information had been handled. He argued that the information was nearly 44 years old and the sensitivity of much of the information may well have waned over that period. He also argued that given the nature of the events that occurred in December 1971, which included the bombing of McGurk's Bar in which 15 civilians were killed and a number of others were injured, there was an overwhelming public interest in its disclosure. McGurk's Bar was situated in a Catholic neighbourhood. Some years later a member of a loyalist terrorist group was convicted for these and other murders.
8. In broad terms, section 40(2) has been applied to living individuals who can be identified from the file. TNA argue that disclosing this information would be unfair to the individuals concerned. Section 38 has been applied on the basis that disclosing information about individuals linked to the events recorded in the file would put them at risk of reprisals. Section 31 has been applied to information on how terrorist activities were conducted and in particular to details of bomb making equipment, which TNA argue would still assist those planning acts of terrorism today. TNA argues that collectively these provisions exempt such a significant proportion of the file that any residual information is rendered meaningless.
9. The Commissioner considers that the issue to be decided is whether the exemptions cited by TNA are engaged, and, in respect of sections 31 and 38, whether those exemptions can be maintained in the public interest. He will start by looking at section 40(2).

Background

10. The requested information relates to one month during a period of intense terrorist activity in Northern Ireland's Troubles. The file contains a log of events as they occurred and how they were reported as more details became available, together with other more administrative details relating, for example, to members of the security forces. It also contains summaries of each day's events, and messages including intelligence summaries which were compiled on a weekly basis. The

intelligence summaries identify which of the different factions involved in the violence were suspected of being responsible for particular events, and includes lists of individuals who had come to the attention of the authorities over that period, together with information on weapons and explosives being used.

Reasons for decision

11. The complainant raised one argument which he considered relevant to all three exemptions claimed. He has previously had access to other files within the series of MoD files on Northern Ireland. Based on the information contained in those two files he is sceptical that the withheld information is truly sensitive. TNA accept that some files from the series were originally open to the public. This was in recognition of the fact there are differences in the characteristics of individual files. However the contents of one file does not necessarily indicate the sensitivity of the information contained in another file from that series. The sensitivity of the contents will depend, in part, on the events that occurred over the month to which the file relates. In any event TNA have explained that it has since decided to review the files that were originally open to the public and that while that review is ongoing those files have been closed. In light of this the Commissioner does not consider the fact that the complainant has previously had access to some files from the series can be taken as being indicative of the sensitivity of the withheld information. The Commissioner does appreciate that as he has not seen the withheld information the complainant is forced to speculate as to the file's contents.

Section 40(2) – personal information

12. Section 40(2) of FOIA states that personal data about someone other than the applicant is exempt, if its disclosure to a member of the public would breach the principles of the Data Protection Act 1998 (DPA).
13. The exemption can only be applied to personal data. In the context of information released in response to a freedom of information request, information will be personal data if it relates to a living individual who can be identified from that information or that information and other information which is or is likely to come into the possession of a member of the public.
14. In this case section 40(2) has been applied to living individuals who are named in the file or can be identified from the recorded details, for example the priest at a named church. The exemption can only be applied to individuals who are still alive. It is standard practice for TNA to apply a life expectancy of 100 years. If the date of the individual's

birth is known then the matter is simple. Where their date of birth is not known their current age is calculated on the assumption that if they were a child at the time the information was created they were less than one year old at that time. If they were an adult, it is assumed they were 16 years old at the time the information was created. If, based on those assumptions, they would now be over 100 years old they are assumed to be dead. Although this is a cautious approach the Commissioner accepts it is a reasonable and responsible one.

15. TNA considers that to disclose the information withheld under section 40(2) would breach the first data protection principle. This states that the processing of personal data shall be fair and lawful. The term 'processing' includes the disclosure of information. The first principle further states that personal data shall not be processed unless one of the conditions set out Schedule 2 can be satisfied, and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 also has to be satisfied. Sensitive personal data is defined in section 2 of the DPA and includes information on an individual's political opinions, their religion, their physical health or condition and the commission or alleged commission by them of an offence.
16. The Commissioner's approach to the first principle is to start by looking at whether disclosing the information would be fair. This involves considering:
 - whether the information is sensitive personal data;
 - the possible consequences of disclosure on the individual;
 - the reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and
 - any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.
17. Having viewed the withheld information the Commissioner is satisfied that some of it constitutes sensitive personal data. This includes records of the grounds for granting compassionate leave to soldiers which reveal details of illnesses suffered by named family members, details of injuries suffered by soldiers and police officers, and civilian casualties of bombings and shootings as well as injuries sustained by suspected

terrorists. Other sensitive personal data includes information on the commission of offences by suspected terrorists and information from which an individual's political or religious beliefs could easily be inferred. The very nature of this sort of information means that it deserves a higher level of protection than other personal information.

18. The consequences of revealing the sensitive personal data described above may vary. Disclosing the medical details of a member of a soldier's family may be very intrusive, but where suspected terrorists are named and linked to particular crimes there is a risk of reprisal even long after the events in question. In all cases though the Commissioner finds that disclosing such sensitive information would be unfair.
19. Even where the information does not constitute sensitive personal data the consequences of its disclosure could be detrimental to the individuals in question. TNA has argued that its disclosure would be an unwarranted interference with the individual's privacy. The Commissioner accepts that disclosing information which associated members of the armed forces with the Troubles in Northern Ireland or, for example, about a soldier's family circumstances which gave rise the granting of compassionate leave, could be intrusive. Some of the personal data relates to those involved in traumatic terrorist attacks as victims and witnesses or those who had to respond to the aftermath of such events. The disclosure of such information would be distressful to those involved.
20. The Commissioner is satisfied that the disclosure of this information would have a negative effect on those concerned ranging from being merely intrusive to exposing them to potential reprisals. As a consequence those identified in the file and those who could be identified from its contents, would not expect this information to be released. However before determining whether the disclosure would be unfair it is necessary to consider the legitimate interests of the public in gaining access to this information and balance this against the consequences for the individuals concerned.
21. The Commissioner recognises that the file relates to a very troubled period in the recent history of Northern Ireland which continues to affect its political landscape and that a great many people were affected by the events which occurred around that period. For example, the bombing of McGurk's Bar was a significant event in the Troubles and was reported as the deadliest terrorist attack in Belfast causing the greatest loss of civilian lives since World War Two. It should also be noted that the event which became known as Bloody Sunday occurred the following month. Therefore there is a real value in disclosing information which shed light on the events that took place in December 1971 and the military's

perspective of those events, including information which constitutes the personal data of those associated with those events.

22. Furthermore the subsequent investigation into who was responsible for the bomb attack on McGurk's Bar proved controversial and lead to criticism of the Royal Ulster Constabulary from some quarters, with some alleging the security forces intentionally tried to point the finger of suspicion on republican terrorists. The Commissioner recognises that there are to this day, active campaigns seeking greater transparency of information on the bombing and the subsequent investigation in order to better understand those events. He also recognises the value such transparency can have in building confidence in public institutions.
23. Obviously the Commissioner is not able to reveal the content of the information which the file contains. However in reaching his decision, he has taken account of the extent to which information contained in the file would meet those interests.
24. Balanced against the legitimate interests of the public in gaining access to this file are the interests and rights of the individuals whose personal data is contained within it. The Commissioner is satisfied that the need to maintain the confidentiality of the sensitive personal data, particularly where its disclosure could expose individuals to the risk of reprisals, outweighs the need for transparency in this case. In respect of the other personal data the Commissioner finds that disclosing this information is still capable of causing significant distress and/or would represent a significant intrusion into their private lives. The Commissioner is satisfied that these concerns outweigh the interests of the public in having access to this information.
25. The disclosure of this information would be unfair and would therefore breach the first data protection principle. In light of this the Commissioner has not gone onto to consider whether the disclosure would be lawful or whether any of the conditions in the relevant Schedules could be met.

Section 38 – health and safety

26. Section 38(1)(a) states that information is exempt if its disclosure would or would be likely to endanger the physical and mental health of any individual.
27. The exemption can be engaged on the basis that harm to the health and safety of individuals either 'would' occur or would be 'likely' to occur. The term 'would' is taken to mean that it is more probable than not that the harm envisaged would occur. The term 'would be likely' refers to a lower level of probability. There must be a more than hypothetical or

remote possibility of the harm occurring; there must be a real and significant risk of harm, even if that probability is less than 50%. TNA has argued that disclosing certain information from the file 'would be likely' to endanger physical and mental health.

28. TNA has applied this exemption to information which may place individuals identified in the file at risk of physical harm through revenge attacks. TNA also argues that those at risk of harm would suffer distress as a result, so endangering their mental health. There is therefore some overlap between the information to which section 38 has been applied to and that already considered under section 40(2). However TNA have extended the application of section 38 to include individuals not directly identified in the file, that is to the family members and their next of kin of those identified in the file. The Commissioner understands therefore that the exemption has been applied to the people identified in the file who may be known to be dead or could be assumed to be dead under the 100 year rule discussed in paragraph 14 above, on the basis that their surviving relatives may be at risk.
29. The exemption has also been applied to details of bomb making equipment on the basis that its disclosure could aid those planning acts of terrorism in the future.
30. Before going on to look in more detail at the arguments presented by TNA, the Commissioner notes that although in its submission to him TNA only cited section 38(1)(a), the exemption provided by 38(1)(b) could also be relevant to the concerns it has raised. Section 38(1)(b) provides an exemption in respect of information which would or would be likely to endanger the safety of any individual. The Commissioner also notes that in its internal review letter to the complainant TNA also cited 38(1)(b) in addition to citing the wording of this subsection in its refusal notice.
31. TNA argues that information capable of identifying individuals would be likely to put those individuals and their families at risk. It has stressed that concerns over terrorism are still very real in Northern Ireland today. The Commissioner accepts information linking individuals to loyalist or republican terrorist organisations, or which identifies, by name and rank, military officers serving in Northern Ireland at that time would, or would be likely to, endanger the physical safety of those individuals, and that of their families, because there remains a real risk of some form of reprisal. It is also possible that the disclosure of what may at first appear innocuous information, for example a record of when and what information was received from an anonymous informant could lead to speculation by those involved, or having knowledge of the particular terrorist act in question, as to who that informant was. Even if the wrong conclusions were arrived at, there could still be a risk to the physical health of any individual suspected of being an informant.

32. TNA has also argued that being exposed to physical harm would be likely to cause mental distress to those concerned and that this would be likely to endanger the mental health of those individuals. The Commissioner considers that to engage section 38(1)(a) on the basis of a risk to someone's mental health the impact of disclosing the information must go beyond stress or worry. However, in line with Tribunal decisions, there is no requirement for a public authority to provide clinical evidence of the risk to mental health.
33. The Commissioner has carefully considered whether the potential impact on someone's mental health would be sufficient to engage the exception. Having found that disclosing information capable of identifying individuals would expose them to a real risk from a revenge attack, the Commissioner must consider what impact this would have on their mental health. Having viewed the information it is apparent that some individuals would be far more obvious targets than others. Also the Commissioner considers that different individuals would respond in different ways to their identities being revealed depending, not only on their perception of the risk to which they had been exposed, but also on their mental robustness or fragility. Therefore the Commissioner does not consider disclosing the information would endanger the mental health of all those to whom the information relates. However, as it is impossible to rule out the risk to the mental health of some of those concerned, he finds the exemption can also be engaged on the basis that disclosure would, or would be likely to endanger the mental health of at least some of the individuals.
34. As well as applying section 38 to protect those who may become the target of reprisals, TNA has applied the exemption to information which relates to bomb making equipment including what they refer to as the components of improvised explosive devices. TNA also refer to information on the concealment of explosive devices. Having viewed the withheld information the Commissioner acknowledges that the file does contain inventories of bomb making materials and where such materials had been hidden. It also catalogues the explosions that occurred, estimating the amount of explosives used, the resulting damage and in some cases comments on such things as where the bomb was placed.
35. The complainant has argued that it is likely that any information contained in the file would be readily available on the internet. Although he has not searched for such information the Commissioner accepts there is some merit in this argument. However any information in addition to the body of information that may assist terrorists in the preparation and placement of bombs, or the planning of acts of terrorism is likely to be prejudicial to public safety and so be likely to endanger the public's physical health.

36. The Commissioner is satisfied that disclosing information which identified individuals directly or indirectly would be likely to place those individuals and their families at risk. He also considers information that may lead to speculation regarding the identity of others who may have had some involvement in the events of December 1971 is capable of exposing individuals to the risk of reprisals. It is likely that the mental health of at least some of those exposed to such risks would be endangered. Finally the disclosure of any information which may assist the commission of terrorist acts is likely to endanger the physical health of the public. The exemption at section 38(1)(a) and (b) is engaged.

Public interest

37. Section 38 is subject to the public interest test as set out in section 2 of the Act. This means that even where information is covered by an exemption it can only be withheld if,

“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

38. Where a request is made for information transferred to the TNA, it is the transferring department which is responsible for applying the public interest test. In this case the transferring department is the Ministry of Defence (MoD)
39. Many of the arguments in favour of disclosure have already been aired in paragraph 21 when considering the public's legitimate interest in accessing the personal data of those identified in the file. These relate to the value of shedding light on the events of December 1971, a period of intense violence and the run up to Bloody Sunday. This was also the month in which McGurk's Bar was bombed, the subsequent investigation of which remains highly controversial. As such the MoD recognises that disclosure may assist the peace and reconciliation process by providing knowledge surrounding incidents during the Troubles.
40. As part of that process the Commissioner also considers that disclosure would help build confidence in the public institutions that govern and serve Northern Ireland today.
41. The complainant argues that in addition to these public interest factors, the information would assist ongoing litigation in respect of alleged failures in the investigation of McGurk's Bar bombing. The weight given to such an argument would depend on the extent to which the withheld information addressed this matter. Again the Commissioner is unable to comment on the content of the withheld information. However the Commissioner has considered the relevance of this argument. In any

event if the information contained in the file was of relevance to ongoing litigation then there would be a process under the civil disclosure rules through which access to this information could be gained.

42. The arguments in favour of disclosure are weighty but must be balanced against the public interest in maintaining the exemption. The Commissioner has found that it is likely that disclosing this information would put particular individuals at risk of reprisals and endanger the safety of the general public by assisting acts of terrorism. The MoD and TNA have made the point that terrorism is still relevant to Northern Ireland and that the tactics used in the 1970's and 80's are still instructive to terrorists today.
43. Clearly, there is a very real public interest in withholding information that could put lives at risk and therefore despite some weighty arguments in favour of disclosure, the Commissioner finds that the public interest favours maintaining the exemption.

Section 31(1) Law enforcement

44. TNA have cited sections 31(1)(a)-(c) as its basis for withholding information that it considers could assist those intent on committing terrorist acts. These provisions state that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice,
 - (a) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice.
45. The exemptions have been applied primarily to information about bomb making equipment and so there is some overlap between the information to which these exemptions have been applied and that to which section 38 has been applied.
46. From TNA's submissions the Commissioner understands that TNA is arguing that the disclosure of the information withheld under this exemption 'would be likely' to prejudice the interests described in (a) to (c) above. That is there must be a real and significant risk of the prejudice, even though the probability of prejudice occurring is less than 50%.
47. TNA has argued that the exemptions are engaged in respect of information which contains detailed inventories of bomb making equipment and reports on the seizure of such equipment. As discussed when considering the application of section 38, the complainant has argued that information on the construction of such devices could now

be found on the internet and therefore the disclosure of such information would not be prejudicial to the prevention of crime. Again, the Commissioner would not be prepared to order the disclosure of any information which would add to the material available on that subject. Furthermore TNA has stated that it remains the expert opinion of the MoD that the details of the component part of bombs and improvised explosive devices would be likely to assist a terrorist in the preparation of such weapons. TNA have also explained that reports of the recovery of such equipment would be likely to assist terrorists in the concealment of bomb making equipment. Although the information concerns events that took place 44 years ago it is the opinion of TNA and the MoD that the tactics and techniques used then are still used today. In the Commissioner's opinion the reference to "tactics" extends the application of section 31(1) to a range of information including, for example, information on the means by which bombs were planted.

48. The Commissioner has given significant weight to the expert opinion of the MoD as reported by TNA. The arguments presented by TNA/MoD appear most relevant to (a), the prevention or detection of crime, in that the thrust of the arguments relate to withholding information which would be likely to assist those planning future terrorist or criminal acts. The Commissioner is satisfied that section 31(1)(a) is engaged in respect of this information.
49. In relation to section 31(1)(b) TNA has argued that release of this information could assist criminals in the adoption of techniques for avoiding detection in the future. The withheld information is also a record of the criminal acts committed by terrorists during December 1971 and reveals something of the evidence and intelligence available to the authorities at that time. The Commissioner therefore considers that the disclosure of such information would be likely to be of use to the perpetrators of those crimes in avoiding apprehension and prosecution, so engaging (b), prejudice to the apprehension or prosecution of offenders. It could be argued that this in turn would engage (c), the administration of justice. However as TNA has not provided any compelling arguments in support of the application of section 31(1)(c). In any event it is understood that section 31(1)(c) has been applied to the exact same information to which (a) and (b) have. Therefore the Commissioner has not found it necessary to make a decision on the application of section 31(1)(c).

Public interest test

50. Having found that the exemptions provided by section 31(1)(a) and (b) are engaged it is necessary to consider whether those exemptions can be maintained in the public interest. The exemptions can only be

maintained if, in all the circumstances of the case, the public interest in favour of doing so outweighs the public interest in disclosure.

51. The public interest arguments in favour of disclosing the information are the same as those discussed under the analysis of section 38 and when considering whether it would fair to disclose personal data from the file.
52. Having accepted that the withheld information would likely be of use to those planning acts of terrorism it follows that its disclosure is capable of jeopardising the safety of civilians, the police and members of the armed forces. The Commissioner accepts TNA's argument that the public interest in preventing the commission of further terrorist crimes and the detection of such crimes outweighs the public interest in disclosure. In respect of section 31(1)(b) the Commissioner is satisfied that the public interest in not releasing information which would be likely to assist those who have committed, or might in the future commit, such crimes avoid apprehension, outweighs the public interest in disclosure.
53. Having found that the three exemptions cited by TNA are all engaged, and that, in the case of sections 38 and 31, the public interest favours maintaining those exemptions, the Commissioner has gone onto to consider whether it is practical to delete the most obviously sensitive material to allow the disclosure of any remaining information.
54. During the course of the investigation the complainant identified the type of information and the events that he was most interested in. The Commissioner welcomes this approach as in many cases it may help resolve the complaint informally or at least narrow down the issues which need to be considered.
55. However having viewed the withheld information and considered the extent to which information from the file would need redacting the Commissioner is satisfied that the vast majority of the file's contents would need redacting in order to ensure that all the sensitive information had been removed. This would result in the remaining information being so disjointed that it would be rendered meaningless. Although TNA did not make specific representations to the Commissioner regarding redaction, this view largely accords with TNA's conclusion on redaction as set out in its internal review response. The Commissioner is satisfied that TNA was correct to withhold the file in its entirety and it is not required to take any further action.

Right of appeal

56. 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

57. 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.
58. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF