

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2016

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 file (reference FCO 57/955) on the Discovery catalogue. The National Archives (TNA) refused to provide the requested information citing the exemptions under section 38(1) and section 40(2) of the FOIA (health and safety and third party personal data) as its basis for doing so.
2. The Commissioner's decision is that TNA has correctly applied sections 38(1) and 40(2) of FOIA 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 9 November 2015 the complainant made the following request for information:

'I would like to get access to the full contents of a file listed as closed on the Discovery catalogue.'

The file has the reference FCO 57/955 and is titled "Cases of Cruelty to Children" by members diplomatic missions in the UK. Its former reference is TXP 380/1'

5. On 20 January 2016 the complainant requested an internal review into the timeliness of the case and the outcome was provided on 11 February 2016.

6. On 16 March 2016 TNA cited the exemptions sections 38 and 40 to refuse the request.
7. The complainant queried this response and the outcome of the internal review was provided on 30 March 2016. The internal review upheld the original decision to withhold the information under sections 38(1) and 40(2).
8. The complainant contacted the Commissioner on 23 February 2016 (and after exhausting the internal review process at the TNA the case was accepted) to complain about the way his request for information had been handled. On 11 April, the Commissioner invited the complainant to withdraw his case. However, the complainant declined to withdraw his case.

Scope of the case

9. The Commissioner considers the scope of this case is to determine if TNA has correctly applied sections 38(1) and 40(2) FOIA to the withheld information.

Reasons for decision

Section 38 – Health and safety

10. Section 38(1) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to:
 - (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual
11. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
12. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of disclosure of the information in question is *"real, actual and of substance"*, rather than trivial or insignificant. As part of this he must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.

13. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that is envisaged would, or would be likely to occur relates to the applicable interests described in the exemption. Secondly, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.
14. In this case TNA, in consultation with the Foreign and Commonwealth Office (FCO), maintain that although there exists a public interest in disclosure of the information which comprises this file, this is outweighed by the public interest in maintaining the exemption.
15. TNA explained that the file is made up of correspondence relating to several cases of accusations of physical abuse of children in the care of members of diplomatic missions. It identifies the victims and gives detailed accounts of their backgrounds and family lives. It also identifies those accused of perpetrating the abuse and contains some discussion of possible action to be taken by authorities. It includes descriptions of the abuse suffered by the children and medical reports on individual children detailing the injuries they had sustained. The file includes correspondence with the NSPCC, police and hospitals.
16. TNA also stated that the file does not contain any indication as to what extent these allegations were investigated or proven in a court of law.
17. Having viewed the file, the Commissioner agrees with this summary of the file.
18. In considering the level of mental endangerment, TNA referred to a previous decision notice (FS50121803 - Ministry of Justice v. ICO, 14 April 2009), where the Commissioner concluded that this risk while needing to be a significant possibility, also "need not be more likely than not, but must be substantially more than remote". The Commissioner also added in that decision that the assessment of what renders mental endangerment included the "likelihood of causing significant upset or distress."
19. A key consideration for TNA when considering whether to release information contained within this file was the fact that such material can continue to be extremely upsetting to surviving victims of abuse, even years after the event. It is not possible to say with certainty that the

impact of the public release of information of this nature would decrease over time.

20. TNA's assessment of this file was that the information about juvenile victims, if released, would be likely to cause significant emotional distress to those identified. The release of this material and its availability to all is likely to cause shock, harm and distress to the extent that mental endangerment may be rendered.
21. In summary, TNA, in consultation with the FCO, is relying in this instance, on the lower threshold that disclosure 'would be likely' to have a prejudicial effect (mental endangerment) on the individuals identified within the file as having been victims of abuse.
22. The Commissioner is satisfied that the nature of the harm referred to by TNA is relevant to the exemption and following his guidance on the prejudice test¹, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice would or would be likely to result. This is because the test relates to something that may happen in the future. However, the Commissioner is satisfied that TNA have explained that there is a logical connection between the disclosure and the prejudice.
23. His analysis of the arguments provided has led the Commissioner to conclude that the three conditions have been satisfied and that sections 38(1)(a) and (b) are engaged on the basis that the risk of endangerment is substantially more than remote. As section 38 is a qualified exemption, however, consideration must be given to the balance of the public interest in disclosure.

Public interest arguments in favour of disclosure

24. The complainant has argued that disclosure is necessary because his concern is 'how the allegations of abuse were dealt with and whether they were taken seriously' and not the identity of the juveniles which could be redacted.
25. The FCO provided arguments to TNA in favour of disclosing the information, which included acknowledgement of the disclosure obligations placed upon it by Freedom of Information and Public Records legislation. The FCO explained

¹http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf

- that it adhered strongly to the principle that there is a public interest in showing a true and open account of the historical record. It acknowledged that releasing information contained within file FCO 57/955 could increase public confidence in government decision-making, by explaining how it was investigated and dealt with, or conversely, would make for greater accountability in future. The FCO agreed that there is a general public interest in being able to evaluate the manner in which incidents of this nature were investigated and, over the last couple of years, a considerable public interest in information relating to child abuse or cases of cruelty to children, by those in positions of authority.

26. The Commissioner recognises that there is considerable public interest in information relating to the investigation of such allegations of cruelty to children. He accepts that disclosure of the requested information may help to ensure transparency and future accountability in such cases.

Public interest arguments in favour of maintaining the exemption

27. TNA have stated that the file contains descriptions of the abuse suffered by children, the public release of which would be highly distressing for the surviving victims and cause them significant mental anguish. There is a public interest in protecting victims of abuse from suffering any further trauma. Furthermore, it was considered that putting this information back into the public domain could well be considered to have the same effect as releasing it for the very first time; the individuals concerned may, in the best-case scenario have successfully dealt with these memories and any ill effects they may have caused, and in the worst-case scenario, suppressed them. In either case, it would not be in the public interest to risk causing considerable emotional harm to these individuals by forcing them to confront these issues all over again.
28. On balance, the FCO concluded in this instance that the public interest in maintaining the exemption outweighed that in disclosing of the withheld information.

Balance of the public interest

29. The Commissioner will invariably place significant weight on protecting individuals from the risk to their mental safety and wellbeing. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.
30. The Commissioner has considered the complainant's concern to see 'how the allegations of abuse were dealt with and whether they were taken seriously' and although there is a presumption in FOIA that openness is

in the public interest, in this case, the Commissioner considers that it is in the public interest to protect the details of the abuse of the child victims.

31. Therefore, in all the circumstances, the Commissioner has decided that the risk of endangerment outweighs the reasoning for disclosure in this specific case and that the exemption at section 38(1) has been correctly applied.
32. The Commissioner has also considered whether section 40(2) was cited correctly by the public authority to the withheld information.

Section 40(2) – Third party personal data

33. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data

34. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
35. 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 and has them as its main focus or impacts on them in any way.
36. TNA has explained that the closed file contains allegations of physical cruelty to identified children and includes the names of those accused, the victims, and details of the physical abuse and medical reports.
37. The individuals are believed to be still living, adopting the 100 year rule². This has previously been explained to the complainant.
38. The Commissioner considers that the information withheld under section 40(2) is information from which living data subjects would be identifiable.

² www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf

Sensitive personal data

39. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
- (a) racial or ethnic origin
 - (b) political opinions
 - (c) religious beliefs
 - (d) trade union membership
 - (e) physical or mental health
 - (f) sexual life
 - (g) criminal offences, sentences, proceedings or allegations.
40. TNA have stated that the file contains the sensitive personal information relating to the private home and family lives of several vulnerable individuals who are identifiable. None of this information exists already in the public domain. The individuals to whom the information relates would have no expectation that this sensitive personal information would enter the public domain within their lifetimes. Furthermore, to do so would be to pose a risk of causing real distress to the individuals identified.
41. Upon viewing the withheld information the Commissioner considers it would be sensitive personal data.

Would disclosure breach the Data Protection Principles?

42. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
43. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

44. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.

45. The information in this case concerns the sensitive personal information of named individuals and there is no expectation from these living individuals that their personal information would be made publicly available during their lifetimes. The Commissioner understands that TNA would not routinely make public such information.
46. 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.

Consequences of disclosure

Damage and distress

47. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the named individuals.
48. TNA have argued above (see paragraphs 15, 20 and 27 above) that disclosure of the contents of the file into the public domain would be distressing for the named juvenile victims and the identified individuals where unsubstantiated allegations have been made.
49. TNA has explained to the complainant that redaction was carefully considered. However, because each piece of correspondence relates to a specific case, the individuals for whom exemptions have been engaged to protect would be likely to be identifiable even if redaction was undertaken. Anonymization of the file would not be an adequate way of protecting the vulnerable individuals in this case.
50. The complainant has stated that he wishes this file to be opened in redacted format, as he wants to review how the allegations of abuse were dealt with and whether they were taken seriously.
51. However, upon viewing the contents of the withheld information, the Commissioner has seen that there is sensitive personal information on nearly every page; in social services reports, police notes, and hospital notes and reports. The Commissioner accepts that it would be extremely problematic to achieve complete anonymization and to remove all sensitive information, in a way that any material of value from a research perspective would remain.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

52. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been

cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.

53. In this case, the Commissioner accepts that there is a public interest in reviewing how historical allegations of abuse were dealt with but is not convinced that the specific information requested warrants overriding the protection of the third party sensitive personal data of those concerned.
54. The Commissioner also notes from the file that it does not contain any indication as to what extent these allegations were investigated or proven in a court of law.
55. Having considered TNA's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that TNA has put forward for protecting the individuals' personal data, namely:
 - the individuals' likely expectation about how their sensitive personal data will be managed
 - the individuals' lack of consent to its release; and
 - the possible consequences of damage and distress to the individuals of releasing the information.
56. The Commissioner accepts the importance of protecting the sensitive personal data of juveniles and that disclosure would be distressing for the named individuals.
57. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the individuals named within the file and that it would not be fair to disclose the requested information in this case.

Conclusions

58. The Commissioner is satisfied that the withheld information is sensitive personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned.
59. The Commissioner upholds TNA's application of the exemptions provided at both sections 38(1) and 40(2) of the FOIA.

Right of appeal

60. 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

61. 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.

62. 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

Pam Clements
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