

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 March 2018

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

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to correspondence between Ian Brady and Myra Hindley.
2. The Commissioner's decision is that The National Archives (TNA) has correctly applied section 38(1)(a) of the 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

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4. On 16 May 2017, the complainant wrote to TNA and requested information in the following terms:  
*"I would like to request access to three closed files all of which include correspondence between the late Ian Brady and the late Myra Hindley.  
The appropriate references are HO 336/173, HO 336/176; HO 336/177."*
5. TNA responded on 22 June 2017 and released a redacted version of file HO 336/176. However, it refused to provide the other two files citing sections 31 and 38 of the FOIA
6. Following an internal review TNA wrote to the complainant on 30 June 2017. It maintained that sections 31(a) and (c) applied, along with section 38(1)(a). It further cited section 40(2).

## Scope of the case

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7. The complainant contacted the Commissioner on 5 September 2017 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 the FOIA exemptions it has cited to the withheld information.

## Reasons for decision

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### Section 38 – health and safety

9. Section 38 of the FOIA states:

*(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.*

10. 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.
11. 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 she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
12. 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'.

13. The Commissioner considers an individual's mental wellbeing to fall within the scope of section 38. In this she includes emotional and psychological wellbeing, including the likelihood of causing significant upset or distress. In this case, having reviewed the withheld information, the Commissioner believes it to be evident that the consequences of the disclosure of this information into the public domain, especially the likelihood of it being reported in the media, is such that it would cause significant distress to surviving family members of the victims and the perpetrators.
14. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by TNA. In her guidance on the prejudice test<sup>1</sup>, 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 considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.
15. In this case TNA have relied on the second limb of the exemption: that mental endangerment (the likelihood of causing significant upset or distress) is 'likely to occur'. Whilst unable to provide definitive or an evidential link between disclosure of the information and any endangerment, TNA argue that the 'nature, context and substance of the material under consideration, if released, could potentially cause extreme personal anguish, and significant distress to surviving family members'.
16. Having considered all the circumstances of the case the Commissioner is satisfied that the exemption is engaged. Having viewed the file, the Commissioner is satisfied that the nature of the harm referred to by TNA is relevant to the exemption. As section 38 is a qualified exemption, however, consideration must be given to the balance of the public interest in disclosure.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/the\\_prejudice\\_test.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf)

*TNA arguments in favour of maintaining the exemption*

17. Whilst it is appreciated that a great deal of information about the "Moors Murders" is already in the public domain, the level of detail in these files goes beyond what has already been made public.
18. It is considered that the release of this information would impart the risk of subjecting the surviving members of the families of victims whose bodies have been found and, just as importantly, those whose body has not yet been found to a totally unacceptable level of mental distress. It is not considered appropriate to provide such a level of detail to any members of the public.

*Public interest arguments in favour of disclosure*

19. TNA considered the following arguments in favour of disclosure:
  - One of the most notorious crimes of 20th century Britain, the story of Brady and Hindley and their victims remains a source of intense interest and speculation. With the body of one of the victims yet to be recovered, there is still public concern about the case. Information that might help to explain the circumstances would not only be of interest but would help the community come to terms with a case that still causes considerable anxiety to this day. Opening this file would contribute towards an historic public record of crime.
  - There is a presumption running through the Freedom of Information Act that openness is, in itself, is to be regarded as something which is in the public interest. Public authorities should meet people's requests unless there is a good reason within the Act not to and organisations must be aware that they do not have to withhold information even if an exemption applies. Organisations should not fear setting precedents. All decisions should be made on their own merits and on a case by case basis at the time of the request.
  - Openness furthers the understanding of and participation in the public debate of issues of the day and allows a more informed debate of issues under consideration by the Government. It promotes accountability and transparency by public authorities for decisions taken by them and places an obligation on authorities and officials to provide reasoned explanations for decisions made, thereby improving the quality of decisions and administration; therefore greater transparency is good for the public and democracy.
  - Openness promotes accountability and transparency in the spending of public money [e.g. Legal Aid] allowing individuals and companies to understand decisions made by public authorities affecting their lives

and, in some cases, assisting individuals in challenging those decisions.

20. The complainant argued that the following factors favour disclosure of the requested information:

- Disclosure would help the public come to a judgement on whether the police and other authorities have done all they can to locate the victim's body in the light of available evidence.
- Release of the documents might lead to the emergence of new information that might lead to the recovery of the victim's body. It could for instance attract the attention of independent experts who otherwise might not have had access to the files.

#### *Passage of Time*

21. TNA further argued that:

- Additionally whilst the historical dates of the documents are noted, the passage of time in this instance is not seen as a factor in favour of release. A release now could be as damaging or distressing to living relatives as if made at the time; potentially more so when taking into account the notoriety of this case, the likely media interest in any new information disclosed and the resulting press intrusion into their lives. As stated it is living relatives whom the applied exemption is designed to protect.
- Therefore, whilst it may appear overly cautious, the balance must (and always will) lie with protecting members of the public's mental well-being.
- Therefore it has been determined that the risk of prejudice outweighs the reasoning for disclosure in this specific case and the exemption at section 38(1)(a) of the FOIA applies to the information.

#### *Balance of the public interest test*

22. TNA noted that when considering the public interest test, it is important to be clear that the public interest refers to the interest of the public as a whole, and not just one person, or a few people. ICO guidance states<sup>2</sup>:

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)

*that the 'public interest' covers the principles and values which relate to the public good – or what is in the best interests of society. In this instance, the factors for disclosure were weighed against the factors against disclosure, and it has been judged that to release significant information, which could potentially jeopardise the conclusion of a criminal investigation that has been ongoing, on and off, for several decades, would not be in the public interest.*

23. Furthermore, TNA considered that the arguments for and against release of this information constitutes balancing the need for governmental accountability and an open record surrounding the justice system against safeguarding and considering the mental health needs of the individuals who would be likely to be affected by release of information. In this case, these are the victims' surviving family members and other individuals who were connected to the events at the time. It is TNA's position that to potentially endanger even just one person would be irresponsible, dangerous and pose an unacceptable risk.

#### *Commissioner's decision*

24. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.
25. The Commissioner recognises the complainant's view that people not generally privy to such files may glean new information from them. However, she does not consider that an unfettered disclosure to the world at large via the FOIA would be an appropriate action to take.
26. It is obvious that when a person dies the family will be distressed for a considerable period of time. When that death is the result of a crime the distress can be even more severe, and in some cases family members may never be able to come to terms with it.
27. Regardless of the content of the correspondence the Commissioner is well aware of the notoriety of this particular crime and is mindful that surviving family members of all parties would be likely to be distressed by the circumstances these letters were written in.
28. On this occasion the Commissioner considers that the strength of the arguments for disclosure is clearly outweighed by the public interest in maintaining the exemption in order to safeguard the mental health of surviving relatives. Therefore, in all the circumstances, the Commissioner has decided that the balance of the public interest favours maintaining the exemption at section 38(1)(a).

29. As this exemption applies to all of the withheld information it has not been necessary for the Commissioner to consider the other exemptions

## Right of appeal

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1. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

2. 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.
3. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**