

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2019

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 closed extract listed as FCO 57/769/1 held by The National Archives (TNA). TNA withheld the information, citing section 40(2) (third party personal data) and section 41(1) (information provided in confidence) of the FOIA as its basis for doing so.
2. The Commissioner's decision is that TNA was entitled to withhold the requested information under section 40(2) of the FOIA. The Commissioner has not gone on to consider the application of section 41(1) of the FOIA. However, the Commissioner has recorded a procedural breach of section 10 of the FOIA, as TNA failed to respond to the complainant's request within the statutory time limits.
3. The Commissioner does not require any further steps to be taken as a result of this decision notice.

Request and response

4. On 21 May 2018, the complainant wrote to TNA and requested information in the following terms:

"FCO 57/769/1 Closed extract: Folio 230 (From open main piece FCO 57/769 – Assassination of Louis Mountbatten, Earl Mountbatten of Burma, 27 August 1979: condolences; attendance at his funeral"

5. On 19 June 2018, TNA wrote to the complainant acknowledging receipt of his information request. It explained to the complainant that it had to consult with other government agencies in relation to his request. It also explained that it required an extension of 10 working days to respond to the request in line with regulation 4(2) of the Freedom of Information (Time for Compliance) Regulations 2004.
6. TNA provided its response to the request on 10 July 2018. It refused to provide the requested information citing section 40(2) and section 41 of the FOIA as its basis for doing so.
7. The complainant requested an internal review on 10 July 2018, explaining that *"the funeral took place almost 40 years ago and as a public occasion there is a strong public interest argument in having the extract made available."*
8. Following an internal review TNA wrote to the complainant on 5 September 2018, maintaining its original position.

Scope of the case

9. The complainant contacted the Commissioner on 25 September 2018 to complain about the way his request for information had been handled.
10. The complainant asked the Commissioner if she *"would adjudicate on this request regarding a closed extract FCO 57/769/1 relating to condolences and attendees at the funeral of Lord Mountbatten almost forty years ago. This was a public event where attendees were known and one of some significance historically given the circumstances of his death. It is unlikely any of the people mentioned in the closed extract are alive and, if so, that can be easily verified rather than just assumed. The extract is due to be opened, in any case, in four months time."*
11. The Commissioner considers the scope of this case is to determine whether TNA is entitled to rely on sections 40(2) and 41(1) of the FOIA as a basis for refusing to provide the withheld information.

Reasons for decision

12. The Commissioner has viewed the withheld information. She will not provide any further details on the withheld information in this decision notice in case she inadvertently reveals the information itself.

Section 40 personal information

13. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
14. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

17. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
20. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. TNA considers section 40(2) is applicable to the personal data of the third parties mentioned in the file, as it considers it to be reasonable to

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

assume that they may still be alive, adopting the 100 year rule². This has previously been explained to the complainant.

22. For it to be safe to assume that an individual is deceased, 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 deceased. Although this is a cautious approach, the Commissioner accepts it is a reasonable and responsible one.
23. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to named individuals who, following the 100 year rule, must be assumed to still be living. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

27. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

29. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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"³.

30. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

31. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

accountability and transparency for their own sakes, as well as case-specific interests.

33. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. TNA has stated that it recognises that there is a general public interest in government accountability and transparency, and that the release of the withheld information would add to the historical account.
35. The complainant himself has made reference to the information relating to a public event that has some significance historically because of the circumstances of Lord Mountbatten's death.
36. In the circumstances of the case, the Commissioner accepts that there is a legitimate interest in disclosure of the requested information, especially as the event described has attracted public interest of a significant historical event. Disclosure would promote openness and transparency, and provide the public with more insight into this event.

Is disclosure necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
38. In its submission to the Commissioner, TNA has referred to paragraph 10 of the Tribunal case EA/2012/0030:

*'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 principles, 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.'*⁴

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http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i831/2012_09_06;%20Ian%20McFerran%20decision.pdf

39. TNA went on to explain that whilst the disclosure of the withheld information may be desirable or meet public curiosity, it is not convinced that there is a pressing social need to release this information, which would outweigh the public interest in protecting the information, and the rights and freedoms of the individuals, and no necessity to disclose has been established.
40. The Commissioner considers that disclosure would give the public more insight into a significant historical event, and that there is no other way that the same objective could be achieved by other less intrusive means. She therefore considers that disclosure is therefore necessary to meet the legitimate interest identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

41. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
42. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
43. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. With regards to the expectations of the individuals to whom the data relates, TNA has stated that it is important to consider the circumstances in which the personal data was obtained and has referred

to paragraph 42 of the Commissioner's Decision Notice FS50314844⁵ in support of this point.

46. TNA has explained that the information contained within the closed extract is the private and personal information of the individuals to whom the data relates and has stated that the individuals would have an expectation of confidence. Releasing the withheld information would therefore be inconsistent with how the information was obtained.
47. TNA went on to explain that whilst the individuals to whom the data relates may have been content for their information to be used for the specific purpose that it was processed for, they may not wish for their data to be used for any additional purpose. TNA stated that releasing the information for another purpose, which it says the individuals have not consented to, and would not consent to, would be considered unfair. TNA stated that the manner in which the personal data, was collected and the intended purpose for processing that data, makes it personal in nature and there would therefore be a legitimate expectation from the individuals that their private and confidential information would not be released into the public domain during their lifetime.
48. TNA stated that *"there is a general understanding that information provided in a confidential manner comes with an expectation of confidence"* and there is a duty to protect that information. It went on to explain that releasing personal data of a confidential nature could be considered *"as an unwarranted interference with an individual's privacy and there would be no expectation that such information would be released to the public during their lifetime."*
49. TNA has explained that *"it is in the legitimate interests of the public to uphold the rights of the living individual to whom this extract relates."* TNA stated that it *"has to observe [its] obligations to this living individual and their rights under Data Protection Legislation. The rights and interests of this individual may be impacted by this release, to the extent that damage or distress may be caused. It is a legitimate interest in favour of non-disclosure, to protect personal data of someone who is still living, where that release would breach the data protection principles."*
50. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/607040/fs_50314844.pdf

considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

51. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

52. The Commissioner has therefore decided that TNA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).
53. The Commissioner has not gone on to consider the application of section 41 of the FOIA.

Procedural matters

Section 10 – Time for compliance

54. Section 10(1) of the FOIA states that a public authority shall respond to information requests promptly and, in any event, no later than 20 working days from receipt.
55. Sections 10(4) and 10(5) of the FOIA give the Secretary of State the power to make regulations which extend the 20 working day time limit to a maximum of 60 working days. These regulations may prescribe different time limits in relation to different cases.
56. The Freedom of Information (Time for Compliance with Request) Regulations 2004 introduced variations to the 20 working day limit for requests for information contained in public records.
57. In this case, regulation 4(2) of the Freedom of Information (Time for Compliance) Regulations 2004 provides a public records office such as TNA with an additional 10 working days to consult with the body which transferred the record to their keeping, and for the responsible authority to carry out the public interest test. TNA should therefore have responded to the request within 30 working days of its receipt.
58. The Commissioner notes that, from receipt of the request, TNA took 35 working days to respond to the request for information. The Commissioner has therefore recorded a breach of section 10(4) of the FOIA against TNA as a result.

Right of appeal

59. 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@justice.gov.uk

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

60. 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.
61. 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