

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 December 2021

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

Decision (including any steps ordered)

1. The complainant has requested information from the National Archives (TNA) contained in record reference numbers J271/136/1 and 2. TNA refused to disclose the requested information, citing the exemptions at sections 24, 31 and 40 of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that TNA has correctly applied the exemptions at sections 24 and 40 to the majority of the requested information. As the information to which section 31 was applied was also covered by section 24, the Commissioner did not investigate TNA's application of section 31. The Commissioner also considers that some of the information contained within the relevant record can be disclosed as the above exemptions do not apply.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the following information to the complainant:
 - Items as identified by the Commissioner's correspondence with TNA of 28 July 2021 which are specified in the Confidential Annex to this Notice.
 - The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 17 April 2019 the complainant wrote to TNA and requested the information in the record specified in paragraph 1 of this notice, namely:

"[named individual] charged with conspiracy to cause explosions likely to endanger life or property and possession of an explosive substance. With photographs and plan..."
5. TNA responded on 24 July 2019. It refused to disclose the requested information, citing the exemptions at sections 24(1), 31(1)(a-c) and 40(2) of the FOIA as a basis for non-disclosure.
6. Following an internal review TNA wrote to the complainant on 9 October 2019. It stated that the exemptions at section 31(b-c) had been incorrectly applied, however it still upheld its application of sections 24(1), 31(1)(a) and 40(2) to the requested information.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered the National Archives' handling of the complainant's request, in particular its application of the specified exemptions.

Reasons for decision

Section 24 – safeguarding national security

9. Section 1(1) of the FOIA says that anyone who requests information from a public authority is entitled (a) to be informed whether the authority holds the information and (b) to have the information communicated to him or her if it is held.
10. Section 24(1) of the FOIA says that information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security. Section 23(1) concerns information that is supplied to the public authority by specific bodies, listed under section 23(3).

11. The Commissioner's guidance on this exemption¹ advises that national security includes more than the security of the UK, its military defence and its systems of government. It also involves co-operation with other states in combating international terrorism and guarding against actions targeted at other states which may impact on the UK and its people.
12. In broad terms section 24(1) allows a public authority not to disclose information if it considers releasing the information would make the UK or its citizens more vulnerable to a national security threat.
13. Section 24 is subject to the public interest test.

Threshold for engaging the section 24(1) exemption

14. The Commissioner's guidance on the application of this exemption indicates that for the exemption to be applicable it must be 'reasonably necessary' for the information to be withheld in order to safeguard national security. The guidance also states that whilst there has to be a real possibility that the disclosure would undermine national security, the impact does not need to be direct or immediate.
15. In this instance the information withheld under this exemption provides instruction on how to create time-delay and radio-controlled detonators for explosive devices. Publication of this information is seen by TNA to carry the risk that a hostile force could use this information to facilitate a terrorist bombing.
16. TNA points out that the current national threat level is set at 'substantial' meaning that we live in an environment where a terrorist attack is likely to occur. Press coverage following terrorist attacks and attempted attacks in the United Kingdom, such as the 2017 Parsons Green train bombing and the foiled 2008 Broadmead shopping centre bombing show that terrorists rely upon the public domain to gather information on how to create explosive devices.
17. The Home Office is aware of the danger such material being in the public domain can cause and actively monitors it with a view to its removal. TNA has consulted subject matter experts within the Ministry of Defence (MOD) and has confirmed to the Commissioner that, despite the passage of time, the information contained within this record would still be of use to terrorist organisations wishing to create time-delay and radio-controlled detonators. Given these factors TNA is of the opinion that non-disclosure is reasonably necessary in order to diminish the

¹ <https://ico.org.uk/for-organisations/section-24-safeguarding-national-security/>

presence of bomb-making material within the public domain and thereby safeguard our national security.

18. This exemption has been applied by TNA to information including police reports, witness statements, circuit diagrams and photographs which provide instruction on the creation of radio-controlled and time-delay detonators for explosive devices. TNA consulted with a subject matter expert within the MOD and arranged for a copy of the record to be sent to the MOD for review. The MOD confirmed that in its view the aforementioned material engaged the exemption.
19. Having considered TNA's submission, the Commissioner is satisfied that the requested information is exempt information under section 24(1) of the FOIA, as the exemption is reasonably necessary for the purposes of national security.

Public interest test

20. As this exemption is subject to a public interest test, TNA then consulted with the National Security Liaison Group (NSLG) and the Secretary of State for the Department for Digital, Culture, Media and Sport (DCMS) in order to complete a public interest test to determine whether or not the public interest favoured the release or non-disclosure of the withheld information..
21. The Commissioner has considered the public interest arguments both in favour of maintaining the exemption and in the disclosure of the withheld information.

Public interest arguments in favour of disclosure of the information

22. There is a presumption running through FOIA that openness is, in itself, 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 FOIA not to and organisations must be aware that they do not have to withhold information even if an exemption applies.
23. TNA accepts that 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. This therefore improves the quality of decisions and administration, so greater transparency is good for the public and democracy.

24. TNA also accepts that openness promotes accountability and transparency in the spending of public money allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.

Arguments in favour of maintaining the exemption

25. TNA argues that information about explosives could prove to be valuable intelligence to individuals determined to carry out terrorist activity. Release would hinder the prevention or detection of crime and thereby compromise law enforcement. The level of detail in certain documents held upon the court files goes beyond what has already been made public. The public's right of access to information cannot be allowed to aid those determined to carry out terrorist activity, as such TNA and the bodies it has consulted find the material not appropriate for release.

Balance of public interest arguments

26. Turning to the balance of the public interest, the Commissioner has considered whether the public interest in safeguarding national security is outweighed by the public interest in disclosing the information. Clearly, the public interest in safeguarding national security carries significant weight. In order for the public interest to favour disclosure, it will be necessary for there to be public interest factors in favour of this that are of at least equal weight.
27. The complainant has put forward a case for disclosure having significant public interest, as it has been requested as part of a media investigation. While he has put forward a somewhat compelling case in favour of the disclosure of the withheld information, in the Commissioner's view this is not sufficient to outweigh the substantial public interest arguments in favour of maintaining the exemption, as the public interest in safeguarding national security significantly outweighs that in the openness and accountability of public authorities and in the current media investigation.
28. For the above reasons, the Commissioner has concluded in this case that the public interest rests in maintaining this exemption.
29. TNA also sought to apply section 31 to some of the requested information. However, as the Commissioner considers that section 24(1) is applicable to all of the information to which TNA applied section 31, she has not gone on to consider whether section 31 applies.

Section 40 - personal information

30. 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.
31. In this case the relevant condition is contained in section 40(3A)(a). 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').
32. 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.
33. Second, 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 data protection (DP) principles.

Is the information personal data?

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

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

The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

35. 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. 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.
36. The information being withheld in this case includes names, an indication of age, gender and locations of specific individuals. Clearly such information would be the personal data of those individuals if they were still living at the time of the request. Some of the individuals whose details are included in the withheld information are known to be deceased, therefore insofar as the above type of information relates to those individuals, the information does not constitute personal data.

37. The majority of individuals named within the record were born under 100 years ago and are consequently considered still living unless it is known otherwise, as stated above. It is standard government practice to assume that an individual is still living if they would not yet have reached the age of 100. Where an individual's date of birth is not given in a file, it is estimated and the 100 year principle applies. TNA says it has long relied on this practice and that the Commissioner has previously been content that it does so, as paragraph 37 of Decision Notice FS50776907² attests.
38. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the living, or presumed living, individuals in question. The Commissioner also considers that TNA's approach with regard to the possible age of the individuals at the time the record was created is appropriate. She agrees that the individuals may still have been alive at the time of the complainant's request. The Commissioner is therefore satisfied that this information falls within the definition of 'personal data' in section 3(2) of the DPA.
39. The fact that information constitutes the personal data of an identifiable living individual 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.
40. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

41. 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”.
42. In the case of a 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.
43. 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.
44. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614505/fs50776907.pdf>

45. Further, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

Is any of the information special category data?

46. Information relating to special category data is given special status in the GDPR.
47. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
48. The requested information contains information regarding the political opinions, religious beliefs and sexual orientation of certain individuals. Therefore, having viewed that information, the Commissioner finds that some of the information withheld under section 40 of FOIA can be categorised as special category data.
49. Special category data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
50. The Commissioner considers that the only conditions in Article 9 that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject).
51. TNA has stated that some of the withheld information was made manifestly public by some of the data subjects in question, and has specified to the Commissioner which information this applies to. The Commissioner does not intend to detail that information in this decision notice, however she agrees that condition (e) of Article 9 applies to that information.
52. With regards to the special category data of the other data subjects in the withheld information, TNA has found no indication that these individuals have placed this information into the public domain or that they have consented to such a release. Therefore in the case of this specific special category data, , the Commissioner finds that none of the conditions required for processing special category data are satisfied and there is no legal basis for its disclosure. Processing this special category

data would breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

53. As there is an Article 9 condition for processing some of the special category data contained within the withheld information, the Commissioner has gone on to consider whether there alsovd an Article 6 basis for processing.

Lawful processing: Article 6(1)(f) of the GDPR

54. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
55. 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.

56. 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;

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".

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

57. 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

58. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

Is disclosure necessary?

59. '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.

60. When balancing the public interest in the case of section 40(2), different considerations are made owing to the exemption's interaction with Data Protection legislation. This means the assumption is reversed; a justification is needed for disclosure, which TNA does not believe exists for the information contained in this record. The First Tier Tribunal has 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.

61. Having considered the information in question, TNA does not believe that the public interest would favour disclosure and relies upon the First Tier Tribunal case of *Ian McFerran v Information Commissioner* (EA/2012/0030) which sets out this issue highlighting 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 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.'

62. TNA recognises that there is a general public interest in government accountability and transparency and release of this material would add to the historical account of counter-terrorism policing.
63. However, while the disclosure of the requested information may be desirable or meet public curiosity, TNA is not convinced that there is a pressing social need for the release of the additional 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. In regards to the legitimate interest in enabling historical research into counter-terrorism policing and by extension the specific interest in researching the case in question as part of a media investigation, TNA considers there to be sufficient information in the public domain to enable such research.
64. In this case, whilst the Commissioner accepts that the information already published goes a long way to meet the legitimate interests in this case, to provide a full picture of the situation along with supporting documentation that is not in the public domain, in order to assist the investigation, disclosure would be necessary.

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

65. 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 subjects would not reasonably expect that the information would be disclosed to the public under 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.
66. 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 individuals expressed concern to the disclosure; and
 - the reasonable expectations of the individuals.
67. 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.

68. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
69. While TNA acknowledges that the release of this material would add to the historical account, the withheld information remains the personal data of identified living individuals created during the course of their private lives. The potential value that this information could add to public knowledge does not outweigh the public interest in protecting this data and the fundamental rights and freedoms of the individuals involved.
70. TNA considers that, in terms of the expectations 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. The withheld information contains information from a police investigation into allegations that the individuals identified within had procured various pieces of equipment in pursuit of creating radio-controlled detonators for explosive devices. This information was gathered initially through observation and later via interrogation. When personal information is provided under these circumstances the individual(s) concerned would have an expectation of privacy and confidentiality and thus to release it would be at odds with how the information was obtained. While these individuals may have been content for the information to be used for this specific purpose (i.e. for the purposes of a police investigation), they may not wish this to be used for any additional purpose.
71. TNA further pointed out that, to release information for another purpose, one for which the individuals have not given their consent, particularly in a situation where personal data was received in the course of a police investigation, which gives rise to a confidential channel of communications, and where it is assumed that for reasons of discretion, such consent would not be granted, would be considered unfair. The manner in which the information was collected and the intended purpose, makes it highly personal in nature and as a result there would be a legitimate expectation from these individuals that their private and confidential information would not be released into the public domain during their lifetime.
72. TNA has not consulted the data subjects identified within this file to enquire as to whether or not they would consent to the release of their personal data. Due to the passage of time and the number of data subjects typically appearing in archival collections the time needed to

trace these individuals and consult them is prohibitive. There is also no requirement to do so. There is a general understanding that information provided in a confidential manner comes with an expectation of confidentiality and privacy and that the government has a duty to protect this information.

73. TNA states that to release personal information of a confidential nature could be classed as an unwarranted interference with individuals' privacy and there would be no expectation that such information would be released to the public during their lifetime. It is in the legitimate interests of the public to uphold the rights of the living individuals to whom the withheld information relates. It is also deemed likely that release would cause damage and distress. As TNA have not established a lawful basis for this processing it would consider disclosure to be unlawful. TNA also considered fairness as part of its assessment and concluded that disclosure of the withheld information would be to be unfair. Therefore as disclosure would contravene Article 5(1)(a) of GDPR, TNA considers that the withheld information constitutes exempt information under section 40(2) of FOIA..
74. 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 considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
75. 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.

Criminal Offence Data

Is any of the information criminal offence data?

76. The Commissioner identified that some of the withheld information constituted criminal offence data. He will now consider this element of the withheld information in more detail.

Information relating to criminal convictions and offences is given special status in the GDPR.

77. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:

(a) The alleged commission of offences by the data subject; or

(b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.

78. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that this element of the withheld information does include criminal offence data. She has reached this conclusion on the basis that some of the information relates to the commission or alleged commission of criminal offences.
79. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
80. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
81. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to this FOIA request or that they have deliberately made this data public.
82. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Information which can be disclosed

83. As explained above, there are elements of the withheld information that the Commissioner does not consider are exempt from disclosure under either section 24(1) or 40(2) of FOIA. That information was discussed with TNA and is outlined in a confidential annex to this notice.
84. TNA accepts that some of the withheld information could be disclosed. However, it requires the withheld information, in its entirety, to remain closed, as disclosure would not significantly add to the public's understanding of the case.
85. The Commissioner, however, does not agree. He considers that as there are elements of the withheld information which are not exempt from disclosure under the cited sections of FOIA, this information should be disclosed. Therefore the Commissioner requires TNA to disclose certain information to the complainant, which he has specified in the confidential annex to this notice.

Right of appeal

86. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

87. 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.
88. 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

Deirdre Collins
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