

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2021

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

Decision (including any steps ordered)

1. The complainant has requested access to two closed files relating to a historic murder. The National Archives ('TNA') withheld the information citing section 38(1)(a) (health and safety) of the FOIA.
2. The Commissioner's decision is that the exemption is engaged and that the public interest lies in maintaining the exemption. Therefore TNA is entitled to rely upon section 38(1)(a) as a basis for refusing to disclose the requested information.
3. The Commissioner requires TNA to take no further steps.

Request and response

4. On 27 October 2020, the complainant wrote to TNA and requested access to two closed files in relation to Oswald Augustus Grey. Oswald Augustus Gray was hanged for the murder of Thomas Bates in 1962. He was the last prisoner to be executed at Winson Green Prison (now HMP Birmingham) and in the city.
5. TNA responded on 19 January 2021. It refused to provide the requested information, citing section 38(1)(a) (health and safety) and section 40(2) (personal information).
6. Following an internal review TNA wrote to the complainant on 20 January 2021. It upheld its position.

Scope of the case

7. The complainant contacted the Commissioner on 10 March 2021 to complain about the way that their request for information had been handled.
8. The complainant explained that they are writing a book on social history and immigration in Birmingham in the early 1960s. They require the requested information to help inform this piece of work.
9. The complainant is concerned that speculative and salacious details of the case are already in the public domain. The complainant believes that disclosure of the requested information would allow an authoritative body of work on the subject to be produced.
10. The Commissioner considers the scope of her investigation to be to determine if section 38(1)(a) is engaged and, if so, if the public interest lies in maintaining the exemption or disclosure.
11. Depending on the Commissioner's findings, she may then go onto consider TNA's application of section 40(2).

Reasons for decision

Health and safety

12. Section 38 of the FOIA states:

(1) *"Information is exempt information if its disclosure under this Act would be likely to –*

(a) *Endanger the physical or mental health of any individual, or*

(b) *Endanger the safety of any individual"*

13. The Commissioner's guidance '*Health and Safety- section 38¹*' states '*In section 38 the word "endanger" is used rather than the word "prejudice" and "The use of the phrase "any individual" in section 38 includes any specific individuals, any member of the public, or groups within society.'*

¹ [Section 38 – Health and safety | ICO](#)

14. In the Commissioner's view, three criteria must be met in order to engage section 38:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the endangerment which the exemption is designed to protect. Furthermore, the resultant endangerment which is alleged must be real, actual or of substance; and,
- Thirdly, it is necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met – ie disclosure 'would be likely' to result in endangerment or disclosure 'would' result in endangerment.

15. Consideration of the exemption at section 38 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The applicable interests

16. TNA considers disclosure would be likely to endanger the mental health of the surviving relatives of both the victim and the defendant. The Commissioner is therefore satisfied that the first criteria within paragraph 14 has been met.

The nature of the endangerment

17. The Commissioner's guidance states '*Endangering mental health means it must have a greater impact than causing upset and distress.*'

18. The Commissioner must now consider if there is a causal link between the requested information and the endangerment that section 38(1)(a) is designed to protect. In order to do so, the Commissioner has reviewed all of the withheld information.

19. Returning to paragraph 14, the Commissioner recognises that a public authority will not necessarily be able to provide evidence in support of this causal link, this is because the endangerment relates to events that have not occurred. However, there must be more than a mere assertion or belief that disclosure would lead to endangerment; there must be a logical connection between the disclosure and the endangerment in order to engage the exemption.

20. TNA have explained that the disclosure of the requested information would be likely to cause shock, harm and distress to any surviving relatives of both the victim and the defendant *'to the extent that mental endangerment may be rendered to these individuals.'*
21. The complainant is concerned that there may be no surviving relatives in question and therefore, the application of section 38 may be inappropriate.
22. TNA have argued that *'From information taken from the records we have determined that the victim was survived by two nephews and that the defendant was survived by six siblings. All of these individuals were born under 100 years ago and therefore, in accordance with the 100 year principle², are presumed to still be living.'*
23. Although the 100 year principle is a cautious approach the Commissioner accepts it is a reasonable and responsible one. Whilst the Commissioner appreciates that the complainant, an academic, has conducted extensive research to try and locate any surviving family members, TNA requires evidence to ascertain the death of an individual such as death certificates, published obituaries or entries in official histories.
24. The complainant has explained, even if they accepted that there are surviving relatives, that endangerment is still not likely to occur *'I feel that it is difficult to argue that permitting access to this information to an experienced academic could now damage the mental health of those few survivors of the episode who may read what I wish to write.'*
25. The Commissioner is mindful that disclosure under the FOIA is disclosure to the world and not just the complainant. Whilst the complainant may handle and interpret the requested information in a sensitive and academic manner, there is no guarantee that others would do the same.
26. The Commissioner will not provide a summary of the requested information for this, in itself, may engage section 38. However, the Commissioner considers it appropriate to remind herself of the nature of the crime and conviction to which the requested information relates.
27. As stated it is living relatives whom the applied exemption is designed to protect. To lose any family member is distressing. However, when that family member is the victim or perpetrator of a crime this can cause severe anguish for a considerable amount of time. Disclosure of the

² <https://www.nationalarchives.gov.uk/documents/information-management/guide-to-archiving-personal-data.pdf>

requested information now could be as damaging or distressing to surviving relatives as if made in 1962.

28. The complainant is concerned that disclosure would inform the first complete and authoritative account of the case and notes that '*scurrilous and unsubstantiated*' versions are already in the public domain '*in the more lurid end of 'true crime' publications.*'
29. TNA has taken this into account and noted '*Whilst these mediums may provide a substantive amount of detail on a criminal case they will not provide as comprehensive an account as that which is captured within records created by the investigating authorities themselves.*'
30. The Commissioner notes that any inappropriate disclosure of sensitive information in the past does not set a precedent for TNA to disregard the endangerment that section 38 represents in the present.
31. The complainant has asked if a redacted copy of the requested information could be released. TNA have explained '*where the requested file is a case file their very nature details the specifics of a case and/or an investigation...In this instance the volume of exempt material, the scarcity of releasable material and the effect redaction would have on a reader's ability to understand the historical narrative of the records precludes the possibility of a redacted release.*'
32. Having viewed the file, the Commissioner is satisfied that the nature of the harm referred to by TNA is relevant to the exemption and that to redact the exempt information from the file would be extremely difficult to do.
33. The complainant has therefore asked if arrangements could be made to allow a study of the files in question. However, it falls out of the remit of the Commissioner to order TNA to allow a private review of a specific file for research, journalistic or academic purposes.

Likelihood of the endangerment

34. TNA is relying upon the lower threshold of endangerment '*would be likely to*'. The Commissioner's guidance states '*this means that even if there is below a 50% chance, there must be a real and significant likelihood of the endangerment occurring.*'
35. The Commissioner recognises that the endangerment outlined by TNA is not absolutely certain. However, having reviewed the withheld case files the Commissioner is satisfied that much of the information is not within the public domain. Therefore, taking into account the notoriety of the case and the likely media interest in any new information disclosed, she is satisfied that press intrusion into the lives of any surviving relatives

would be likely and the mental health of any surviving relatives may be endangered as a result.

Is the exemption engaged

36. Since the Commissioner is satisfied that the three criteria required to engage section 38(1)(a) have been met, she considers the exemption properly engaged. She has therefore gone on to consider the public interest test. Even though the section 38 exemption is engaged, the Commissioner may still require TNA to release the requested information if the public interest in doing so outweighs the public interest in maintaining the exemption.

Public interest test

Public interest in disclosing the information

37. TNA has acknowledged that disclosure would contribute towards an historic public record of crime and verify information relating to the case that is already within the public domain.
38. There are also the general principles that underpin the FOIA to consider, such as transparency and openness. The Commissioner considers that disclosure of the requested information would help to build a fuller picture of the case. The Commissioner considers this particularly significant as doubts remain as to the lawfulness of Oswald's arrest, confession, trial and execution.
39. Disclosure of the requested information would satisfy the interest surrounding criminal cases and transparency of the criminal justice system which, in turn, will increase public awareness of the criminal prosecution process.
40. Furthermore disclosure of this file would, as is the complainant's intention, inform a piece of academic work which seeks to bring clarity and authority to the commentary of the case.

Public interest in maintaining the exemption

41. TNA acknowledges the need for openness and transparency. However, it must also consider the mental health needs of the individuals who would be likely to be affected by disclosure. It is TNA's position that to potentially endanger even just one person would be irresponsible, dangerous and pose an unacceptable risk.
42. TNA consider '*There is a profound public interest in not endangering the mental health of a victim's family*' and assigns considerable weight to this argument.

Balancing the public interest

43. The Commissioner considers that the balance in this case is very fine. Disclosure of the file would inform local history and add to a public record of significant interest.
44. However, the Commissioner notes the difference between what the public may be interested in and what is in the best interests or greater good of the public.
45. The FOIA is purpose blind which means that the purpose and intent of any request, whether nefarious or noble, must largely be disregarded. Whilst the Commissioner recognises the academic purpose behind the complainant's request, she does not consider that an unfettered disclosure of the case files under the FOIA would be appropriate.
46. Whilst the Commissioner acknowledges that TNA's policy may seem cautious, she agrees that the balance must (and always will) lie with protecting an individual's mental well-being. Any surviving relative of the victim or defendant will already have suffered as a result of their involvement or affiliation with such events and, for this reason, the passage of time since the event itself is not a significant factor in this instance.
47. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision. With this in mind, the Commissioner has determined that the public interest lies in maintaining the exemption and, given the proportion of information that engages section 38(1)(a), the continued closure of both case files.

Right of appeal

48. 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

49. 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.
50. 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

Alice Gradwell
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