

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2022

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 "MEPO 2/9533/1" held by The National Archives (TNA). The withheld information consists of two sentences. TNA withheld the requested information under section 40(2) of FOIA on the basis that the requested information is third party personal data and its disclosure would breach data protection law.
2. The Commissioner's decision is that TNA is entitled to withhold this information in accordance with section 40(2) of FOIA.
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 29 April 2021, the complainant made a request for access to the following file:

"MEPO 2/9533/1 Closed Extract: 1 page

From the parent piece: MEPO 2/9533 Unsolved murder of Sir Harry Oakes at Nassau, Bahamas on 8 July 1943: pressure to reopen the case."

5. On 28 May 2021, 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 responded on 9 June 2021 and refused to provide the requested information citing section 40(2) of FOIA as its basis for doing so.
7. The complainant requested an internal review of TNA's decision. The complainant specifically argued that "the murder was in 1943 and the file is dated 1959, it is unlikely that any person named would still be alive."
8. On 7 July 2021, TNA wrote to the complainant advising that his appeal was still being considered and it had not yet finished its review. It went on to explain that it anticipated being able to provide a response with its final decision within 40 working days.
9. TNA provided the complainant with the outcome of its internal review on 12 July 2021, in which it stated that "following consultation with the Metropolitan Police Service it has been decided to release some information from the record in which the personal information of those individuals who are presumed to still be living has been withheld. The first sentence of the redacted paragraph is to be released as it is considered no longer sensitive."
10. The complainant wrote to TNA on 16 July 2021 asking it to confirm when the record would be viewable at TNA. TNA responded on the same day advising that the file is currently undergoing redaction. It went on to explain that due to current social distancing measures and a backlog accrued as a result of the pandemic, it was unable to immediately complete the redaction work.
11. On 19 July 2021, the complainant wrote to TNA with "a list of key players in the murder with dates of deaths." The complainant asked TNA to confirm that "...the information claimed to be exempt from disclosure under s. 40 does not concern any of them".
12. TNA responded on 19 July 2021 advising the complainant that:

"Although the murder of Harry Oakes was in 1943, further information was provided in 1959. This is why the file is dated 1959.

Some information within the file is to remain redacted and closed as it contains the personal information of an individual who can be assumed living. The age of the individual is unknown. Therefore, as per the lifespan assumption practices, they are

assumed to be at least aged 16 at the time of the record and therefore still living.

Unfortunately, as the information within this extract is closed under section 40(2) of the Freedom of Information Act 2000, we cannot confirm to whom this information does or does not relate.”

Scope of the case

13. The complainant contacted the Commissioner on 19 July 2021 to complain about the way his request for information had been handled.
14. Since the Commissioner accepted this complaint for investigation, TNA has confirmed that it notified the complainant on the 28 September 2021 that the physical redaction process was now complete, whereby the updated version of the open parent piece would be available from the 6 October 2021.
15. The Commissioner considers that the scope of his investigation is to consider whether TNA is entitled to rely on section 40(2) of FOIA as a basis for refusing to provide the two sentences it withheld.

Reasons for decision

16. The Commissioner has viewed the withheld information. Due to its nature, he will not provide any further details about the withheld information in this decision notice, as doing so could inadvertently reveal the information itself.

Section 40 personal information

17. Section 40(2) of 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 (4A) is satisfied.
18. 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

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

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 UK General Data Protection Regulation ("UK GDPR").

19. 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 FOIA cannot apply.
20. Secondly, if the Commissioner is satisfied that the requested information is personal data, he must then establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

22. The two main elements of personal data are that the data must relate to a living person and that the person must be identifiable.
23. An individual is "identifiable" if they 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.
24. 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.
25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to a named individual. He is satisfied that this information both relates to and identifies the named individual concerned. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
26. In line with its usual practice, where it is not clear whether an individual named in a document is living or dead, and where their age is unknown, TNA has advised that it is standard government practice to assume that the individual was at least 16 years old at the time of the record, and is still living if they would not have reached the age of 100.
27. The Commissioner has agreed that, where it cannot be determined that an individual is alive or dead, this is a cautious but pragmatic approach.

Would disclosure of the information contravene any of the DP principles?

28. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
29. The most relevant DP principle in this case is the one contained within Article 5(1)(a) of the GDPR, which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
30. 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.
31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
32. In addition, 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 UK GDPR.

Is the information criminal offence data?

33. Information relating to criminal convictions and offences is given special status in the UK GDPR.
34. Article 10 of the UK GDPR defines “criminal offence data” as personal data relating to criminal convictions and offences. Under section 11(2) of the DPA, this 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.
35. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that the withheld personal data falls within the category of unsubstantiated allegations of criminal activity against a named individual.
36. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed (including 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.

37. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Sch. 1, Part 3, paragraph 29 (consent from the data subject) or Sch. 1, Part 3, paragraph 32 (data manifestly made public by the data subject).
38. 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 an FOIA request, nor that they have deliberately made this data public.
39. 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) of Article 5 of the UK GDPR, and so this information is exempt under section 40(2) of FOIA.
40. As the disclosure of the information would be unlawful (and therefore already in breach of principle (a) of Article 5 of the UK GDPR), the Commissioner has not gone on to consider whether the disclosure would be fair and transparent.

The Commissioner's view

41. The Commissioner has therefore decided that TNA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

42. 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

43. 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.
44. 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
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