

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2024

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

Decision (including any steps ordered)

1. The complainant has requested copies of historic murder investigation files. The above public authority ("the public authority") relied on sections 31 (law enforcement), 38 (health and safety) and 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that all three exemptions will be engaged and that, where applicable, the public interest favours maintaining the exemption. The public authority breached section 17(3) of FOIA by failing to complete its considerations on the balance of the public interest within a reasonable time period.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 27 June 2023, the complainant wrote to the public authority and requested information access to the following files:

"MEPO 2/10438 - Unsolved murder of Dr Richard CASTILLO at Albert Studios, Bridge Road, Battersea SW11 on 7 May 1961

"MEPO 2/10439 - Unsolved murder of Dr Richard CASTILLO at Albert Studios, Bridge Road, Battersea SW11 on 7 May 1961: further reports and laboratory papers

"MEPO 2/10440 - Unsolved murder of Dr Richard CASTILLO at Albert Studios, Bridge Road, Battersea SW11 on 7 May 1961: original statements

"MEPO 2/10441 - Unsolved murder of Dr Richard CASTILLO at Albert Studios, Bridge Road, Battersea SW11 on 7 May 1961: index to statements, typed statements and completed questionnaires of Malta League members."

5. The public authority responded on 4 December 2023. It relied on sections 31, 38 and 40(2) of FOIA to withhold the requested information. A position it upheld following an internal review.

Scope of the case

6. At the outset of the investigation, the Commissioner contacted the complainant to explain his provisional view of the complaint. Based on his experience of similar cases, he took the view that all three exemptions were likely to apply. The complainant asked for a decision notice.

Reasons for decision

7. The Commissioner has decided not to seek the withheld information in this case. He has extensive experience of dealing with records of this type and is satisfied that it is proportionate to reach a decision based on that experience, rather than the actual information itself.

Section 40(2) – third party personal information

8. Section 40(2) of FOIA allows a public authority to withhold information that is the personal information of someone other than the requester, if there would be no lawful basis under data protection legislation for publishing that information.
9. When dealing with requests of this type, in order to protect personal information, the public authority must assume that, unless it can be proved that they are dead, every individual who can be identified from a record must be assumed to still be alive – unless they would be more than 100 years old.

10. Given the age of the material, many of the individuals who can be identified are likely to be dead but, unless there is a specific record of their age, they are assumed to have been 16 at the point the records were created (unless it can be demonstrated that they were a child at that time – in which case they are assumed to have been under the age of 1).
11. A person who was 16 in 1961 would now be 79 and therefore likely to still be alive.
12. Within files of this type, the Commissioner would expect to find numerous witness statements. Not only will these identify the person who gave the statement, but they will also usually identify other individuals – describing their behaviour before, during and after the crime was committed.
13. In the Commissioner's experience, witness statements are difficult to anonymise. It is not just a matter of removing names. Witness statements represent the witness' specific view of events, both in the sense that it represents their opinion and more literally in terms of the events they witnessed and the angle they witnessed those events from. Unless all such references are removed, the information has not been anonymised and remains personal information.
14. Where the information is personal information, the public authority would not be entitled to rely on legitimate interest as a lawful basis for processing.
15. The Commissioner recognises that the victim in this case was a local hero and that a key suspect died whilst under suspicion. Publishing the information may shed some light on the crime, potentially exonerate a suspect or allow fresh eyes to be brought to bear on the evidence – potentially leading to new lines of enquiry.
16. He also recognises that disclosure is necessary in these circumstances as there is no less-intrusive way of improving public understanding of this crime.
17. However, the Commissioner is not persuaded that the legitimate interest in disclosure is sufficient to outweigh the rights of the data subjects. Those who gave statements at the time will have done so with the expectation that they would be treated in confidence.
18. From previous experience, the Commissioner notes that such statements often contain details of private family matters, information that would now be considered to be special category data (such as information about someone's race or medical history) and information

about this and other criminal offences that individuals may have committed.

19. In the Commissioner's view the individuals who provided statements would suffer a loss of privacy were this information, which they provided in confidence, to be published for all to see. This loss of privacy would cause them damage and distress. Those people still alive whose names are mentioned within the statements may also suffer damage and distress as a result of private information about their lives being made public.
20. The Commissioner is therefore satisfied that, to the extent the withheld information is personal information, the public authority would have no lawful basis for processing. As the processing would be unlawful, section 40(2) of FOIA would apply.

Section 38 – health and safety

21. Section 38 of FOIA allows a public authority to withhold information whose disclosure would be likely to endanger the mental health of any individual.
22. The Commissioner is also aware that files of this kind often contain detailed photographs of the victim and their injuries. Some of the witness statements are likely to contain very graphic descriptions of those injuries. These usually go beyond any information about the crime likely to have been reported at the time. The Commissioner is not aware that this level of detail has been public more recently.
23. The Commissioner considers that making such information available for everyone to see is likely to be extremely distressing to the victim's families to the point of endangering their mental health. This endangerment arises not just from the content itself, but also from the fact that this content is now freely available.
24. The complainant argued that this information would not be published and that he would have no intention of publishing it. That may be the case, but it is also irrelevant.
25. Once information is disclosed under FOIA, it is made available to the world at large. The information has been irrevocably placed into the public domain and the public authority loses any ability to control how widely the information is then spread. Anyone else who wants to have a copy of the same information is entitled to receive it. Whilst the information may not literally be published, the effect will be the same.
26. The complainant also argued that, as far as he was aware, Dr Castillo's close family were dead. As he did not define what "close" family meant,

nor provide copies of death certificates, the Commissioner was unable to place any weight on this argument.

27. Once again, the Commissioner recognises that there is some public interest in finding out what happened to an apparently popular local man – especially if that may exonerate an innocent party.
28. However, he is not persuaded that this public interest is sufficiently compelling as to justify publication of graphic photos and accounts that would be likely to endanger the mental health of others.
29. The Commissioner is therefore satisfied that section 38 will also apply to some of this information and that, where it does, the public interest will favour maintaining this exemption.

Section 31 – law enforcement

30. For the information not covered by the previous exemptions, the Commissioner considers that section 31 applies. This information will include the contents of those witness statements and police interviews which can be anonymised or where the individuals identified can be proved or assumed to be dead.
31. Section 31 will apply to information whose disclosure would make it more difficult to prosecute someone for a crime or which would make it more difficult for someone to receive a fair trial.
32. Whilst this crime took place over sixty years ago, whilst there has been no known recent police activity and whilst a previous suspect has died, there remains a possibility (albeit, perhaps, a small one) that someone could still be charged with the crime.
33. A person in their early twenties in 1961 would now be in their mid-eighties and so, potentially, still alive. There remains the possibility (albeit a slim one) that new information could still be brought to light that would allow the killer to be identified.
34. The Commissioner also notes that the public authority consulted with the Metropolitan Police (the force that originally investigated the case and would do so again in the event of new evidence) prior to applying this exemption and has explained that it has previously provided information from decades-old cases to the police to assist current investigations.
35. Even if the evidence currently appears weak and circumstantial, that does not prevent it from being crucial in future. For example a new witness may come forward or a previous witness might now provide information that they withheld at the time.

36. Revealing, in exact detail, the full breadth of evidence the police have, would allow a suspect the opportunity to prepare for an interview and concoct a plausible explanation for any evidence that might be capable of incriminating them. Given the time that has elapsed, it may be difficult for the police to disprove a false but well-crafted account of events. Making it difficult for the suspect's guilt to be proved beyond reasonable doubt.
37. It's also important to remember that, if anyone is charged, they have the right to a fair trial. Placing the entirety of the evidence relating to the case into the public domain is likely to prejudice the accused's right to a fair trial because potential jurors will be able to assess evidence not tested in court – including evidence (such as hearsay evidence) that is likely to be contained within witness statements, but will usually be inadmissible in court.
38. The Commissioner is therefore satisfied that section 31 of FOIA will be engaged.
39. In respect of the public interest, the Commissioner considers that the moderate public interest in disclosure is easily outweighed by the public interest in not undermining the possibility of successfully, but fairly, convicting someone of the crime.
40. The Commissioner recognises that, as the information ages, the public interest in maintaining the exemption will diminish – as it will become increasingly unlikely that anyone can be prosecuted. However, he is not persuaded that this point has yet been reached.
41. Whilst the probability of the harm occurring might be low, if it did occur, it would be severe.
42. The Commissioner has also taken account of the fact that, because a large part of the information will already be exempt under the other exemptions referred to above, the information to which only section 31 applies will provide, at best a partial and possibly a misleading, picture of the crime. This further reduces the public interest in disclosure.
43. Having considered the matter, the Commissioner is satisfied that the balance of the public interest favours maintaining the exemption.

Procedural matters

44. The public authority breached section 17(3) of FOIA as it failed to complete its considerations on the balance of the public interest within a reasonable time period.

Right of appeal

45. 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

46. 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.
47. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF