

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 3 April 2007

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

Summary

The complainant asked the public authority for information from case papers relating to an unsolved murder case dating back to 1954. The public authority withheld the information under sections 31, 40(2) and 41 of the Freedom of Information Act 2000 ('the Act'). The Commissioner decided that the exemption under section 31(1) applied to all of the requested information and that it was therefore not necessary to reach a decision in relation to the public authority's application of the other exemptions. The Commissioner also decided that in its refusal notice the public authority had failed to address the public interest test properly as required by section 17(3) of the Act, since it had failed to clarify why the exemptions applied to the specific facts of the request or to assess the public interest test in relation to section 31.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. The complainant had been in contact with the National Archives, the Metropolitan Police and the Department for Constitutional Affairs in an effort to obtain information from case papers relating to an unsolved murder case dating back to 1954. In a letter dated 7 November 2004, before the implementation of the Act on 1 January 2005, he stated that:

'I do wish to register my formal application to inspect the file/s in question at the earliest possible opportunity. I would also require to have an update of the Lord Chancellor's general regulations on this subject.'

The National Archives did not take any action until the complainant contacted it for an update. The National Archives apologised to the complainant and took the formal information request as being relayed in a communication from the complainant dated 9 February 2005.

3. The National Archives sent a refusal notice to the complainant on 17 February 2005. It stated that *'all of the information which you are looking for is covered by exemptions'*, these being section 31 (law enforcement), section 40(2) (disclosure of personal information), and section 41 (information provided in confidence).

'The section 31 exemption has been applied to all of the information you seek. This section exempts information which if it was disclosed would, or would be likely to, prejudice certain specified law enforcement matters. These include the prevention or detection of crime, the arrest or prosecution of offenders, the administration of justice, the collection or assessment of a tax or duty, operation of immigration controls, and the maintenance of security and order in prisons.'

'This section also exempts information which, if it was disclosed, would or would be likely to prejudice civil proceedings brought by or on behalf of a public authority when that public authority is exercising certain functions. These include: complying with the law, investigating improper conduct, determining the cause of an accident, protecting charities from mismanagement and health and safety.'

In relation to section 40:

'The section 40 exemption has been applied to all of the information you seek. This section exempts information which is personal information relating to the applicant for the information. The right to know whether this information is held, and if so to have access to it, is covered instead by the provisions of the Data Protection Act 1998.'

'This sanction also exempts personal information relating to a third party (that is, someone other than the applicant), if its disclosure would contravene the Data Protection Act 1998 or if the person to whom it relates would not have a right to know about it or a right of access to it under that Act (because of its exemption provisions). The 1998 Act prohibits the disclosure of personal information where, for example, it would be unfair, or incompatible with the purpose for which it was obtained, or where the individual who was the subject of the information had properly served notice that disclosure would cause unwarranted substantial damage or distress.'

Regarding section 41 the National Archives stated:

'The section 41 exemption has been applied to all of the information you seek. This section exempts information obtained from any other person if its disclosure would constitute a breach of confidence actionable by that or any other person.'

The National Archives informed the complainant that he could request an internal review of the decision.

4. On 4 May 2005 the complainant repeated his request that the National Archives provide him with the information, stating that its previous responses had been unhelpful.
5. The National Archives treated the complainant's letter of 4 May 2005 as a request for internal review. It sent its decision to the complainant on 9 June 2005. In relation to the section 31 exemption it stated that:

'The file concerns an unsolved murder. Disclosure of information contained in the file could prejudice the fair trial of any person against whom proceedings may be instituted'.

Regarding the public interest test in respect of section 31, the review stated:

'The Metropolitan Police, as the transferring department in this case was responsible for conducting the public interest test. It considered that it was not in the public interest to disclose the information and, through TNA [the National Archives], sought the advice of the panel of the Lord Chancellor's Advisory Council on Records and Archives. The panel reached the same conclusion as the Metropolitan Police'.

In the view of the National Archives, *'With regard to section 31 the public interest test was applied appropriately'.*

The Investigation

Scope of the case

6. On 13 and 17 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points, which are addressed in this Decision Notice.
 - The National Archives had failed *'to state the specific reason for applying the exemptions'*.
 - It had *'sought to abrogate responsibility to the Police and the Lord Chancellor's Dept. [now the Department for Constitutional Affairs] who, it*

claims, have cited the “public interest” factor. However, no detailed explanation has been provided as to why the public interest factor is deemed relevant save for a vague reference to “personal information (Section 40)”.

- He was not seeking all of the information within the case files and a partial disclosure of information would be satisfactory (he cited the names of suspects and third parties as being information which he did not require).
7. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular, the complainant indicated that the nature of this case was such that it was appropriate to apply qualified rather than absolute exemptions. In fact, which exemptions are relevant to any particular case depends purely on the facts of the case. The Commissioner explained to the complainant on 26 September 2006 that whether a specific exemption is qualified or absolute derives from the Act, rather than being something which is within the discretion of the public authority. The complainant was also unhappy with the way in which the Metropolitan Police and the Department for Constitutional Affairs had handled the matter. It was explained to him by the Information Commissioner's Office on 26 September 2006 that the Commissioner could only investigate complaints about the way in which these public authorities had dealt with a freedom of information request, and if the complainant had not made such a request and exhausted the public authority's complaints procedure then the Commissioner could take no action. The complainant informed the Commissioner on 25 October 2006 that he had now made a formal request to both the Metropolitan Police and the Department for Constitutional Affairs.

Chronology

8. The Commissioner wrote to the National Archives on 26 September 2006 seeking clarification of certain matters.
9. The complainant subsequently discussed with the Information Commissioner's Office whether it was necessary to make Freedom of Information requests to the Metropolitan Police and the Lord Chancellor's Department (now the Department for Constitutional Affairs). He later made such requests.
10. The National Archives replied to the Commissioner on 6 November 2006, explaining what was contained within the case files, and making further comment on the application of the exemptions. Regarding section 31, it pointed out that the Metropolitan Police had advised that it would be impossible to decide which parts of the file could be released without risk of compromising future police inquiries. In relation to section 40, the National Archives explained that:

‘this applies to all of those named in the file as suspects since the allegations against them remain as unsubstantiated. Under the terms of the Data Protection Act it would be “unfair” to release the identities of those suspected but not convicted of murder.’

Regarding section 41, the National Archives stated that:

'this applies to all of the witness statements since this information was provided in confidence.'

11. The Commissioner asked the National Archives on 17 November 2006 for further clarification.
12. The National Archives replied on 18 December 2006. It provided a schedule of documents and the exemptions which had been applied to them, as well as further comments. It made clear its view that:

'It would not be possible to distinguish between information that may be critical to a future investigation and information that could be safely released without prejudicing such an outcome. Information that may appear innocuous now may take on new significance in the light of new evidence or lines of enquiry.'

Regarding section 41, the National Archives commented:

'Upon reconsideration of the use of this exemption we now feel that this applies to only a small proportion of the entire file and to those witness statements provided in confidence for fear of reprisals... not...witnesses statements of those who may now be deceased'.

13. Regarding section 31(1)(a) and (b) of the Act it stated that this exemption applied to the entire file. It explained that the public interest test had been carried out by the Metropolitan Police Service (MPS). In favour of disclosure it had identified:

'the material in question is between 20 to 50 years old; release of this information would provide the public with an insight into the methods used to investigate this unsolved murder and thereby increase the accountability of MPS.'

There were various factors which it considered favoured withholding the information.

'[T]here is no formal statute of limitation for the offence of murder and this crime therefore remains capable of investigation from which, potentially, a prosecution could result. Premature disclosure of information relative to inquiries already conducted by police could prejudice a future investigation and prosecution. It would not be possible to distinguish between information that may be critical to a future investigation and information that could be safely released without prejudicing such an outcome. Information that may appear innocuous now may take on new significance in the light of new evidence or lines of enquiry. Advances in forensic sciences and investigative techniques mean that cases previously considered unsolvable due to the passage of time, may now have potential for renewed investigation. In recent years we have been asked by 'cold case' review teams on a number of occasions to provide 'historical' case

papers relating to murders, in one instance a case of murder dating back to the 1940s. This trend is increasing.'

It concluded that the factors in favour of non-disclosure outweighed those in favour of disclosure.

14. The Commissioner obtained some further information from the National Archives on 22 January 2007.

Analysis

Section 17

15. Having regard to the contents of the refusal notice of 17 February 2005, that gives a distinct impression of being a generic response, comprised of a general explanation of the cited exemptions with no attempt to clarify why those exemptions applied to the specific facts of this information request. Furthermore, the refusal notice made no attempt to address the public interest test which was required for section 31 as a qualified exemption. The Commissioner therefore takes the view that the explanations provided by the National Archives for its application of the exemptions in its refusal notice were indeed unsatisfactory and that the refusal notice was in breach of section 17(3) of the Act, which provides that:

'A public authority which...is to any extent relying: ...
- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information must either in the notice under section 17(1) or in a separate notice within such time as is reasonable in the circumstances, state the reasons for claiming -
(a) ...
(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.'

However, in its internal review decision on 9 June 2005 the National Archives provided a fuller explanation, pointing out that the file concerned an unsolved murder and that disclosure of information from it could therefore prejudice the fair trial of any person against whom proceedings may be instituted. It also explained that it was the Metropolitan Police as the transferring department rather than the National Archives which was responsible for conducting the public interest test, and reported that the Metropolitan Police (with the benefit of advice from the panel of the Lord Chancellor's Advisory Council on Records and Archives) had not considered disclosure to be in the public interest. Having said this, there was no attempt to clarify the application of the section 40 and 41 exemptions, although the Commissioner notes that there is a reference in the refusal notice to *'further correspondence, clarifying particular points, between you [the complainant] and the unit [the National Archives' freedom of information unit]'* following the refusal

notice on 17 February 2005. A fuller explanation of the application of the exemptions was provided to the Commissioner by the National Archives in its letter of 18 December 2006.

Decision-making responsibility

16. In the complainant's view, the National Archives had *'sought to abrogate responsibility to the Police and the Lord Chancellor's Dept. [now the Department for Constitutional Affairs] who, it claims, have cited the "public interest" factor'*. In fact, section 66(4) of the Act stipulates that:

'Where any information to which this section applies is exempt information only by virtue of any provision of Part II not specified in subsection (3) of section 2 [ie the section identifying absolute exemptions], any question as to the application of subsection (2)(b) of that section is to be determined by the responsible authority instead of the appropriate records authority'.

In other words, the Act provides that the public interest test for qualified exemptions should be determined by the public authority which generated the requested information (in this case, the Metropolitan Police) rather than by the records authority holding it (the National Archives). Since this is a requirement of the Act, the Commissioner considers that it was correct for the National Archives to have sought and complied with the Metropolitan Police's determination of the public interest test in this matter.

Partial disclosure

17. The complainant stated that he was not seeking all of the information within the case files and a partial disclosure of information would be satisfactory (he cited the names of suspects and third parties as being information which he did not require). This point is addressed in the analysis below of the section 31 exemption.

Exemption – section 31

18. The complainant made an application to inspect the National Archives' file(s) in relation to a police murder investigation. In its email of 6 November 2006 the National Archives stated that paragraphs (b) and (c) of section 31 applied to all of the requested information, although its letter to the Commissioner of 18 December 2006 identified paragraphs (a) and (b). Section 31(1) of the Act states:

'1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(c) the administration of justice...'

Having regard to the nature of the information requested, the Commissioner considers that these three paragraphs are all relevant and that the exemption under section 31 is therefore engaged in respect of all the documents in the National Archives' file.

19. Section 31 requires that there be the likelihood of some prejudice as a result of disclosure of the requested information. The National Archives explained in its letter of 6 November 2006 that the Metropolitan Police had:

'advised that as an unsolved murder there is no question of releasing any of this record. We cannot risk the possibility of prejudicing any future prosecution, no matter how unlikely this may seem, by disclosure.'

Further:

'it is impossible to distinguish information that could be critical to any future investigation and prosecution from information that might not be... There would be an expectation that such information would have been kept confidential. From the reports and statements that comprise this case it would be impossible to decide which can be released without risk of compromising future police inquiries... All the material that comprises this case file may potentially have some future significance.'

The Commissioner has decided that the National Archives was justified in concluding that it was impossible to partially disclose the requested information (eg by excluding the names of suspects and third parties, as suggested by the complainant) without risk of prejudice.

20. The National Archives' letters to the Commissioner of 6 November and 18 December 2006 commented on the prejudice that it considered would result from disclosure:

'If this case was to be re-investigated (an option that becomes more feasible with advances in forensic science) the investigation team would scrutinise every document and piece of information that was collected by police during the original inquiry. There would be an expectation that such information would have been kept confidential. From the reports and statements that comprise this case it would be impossible to decide which can be released without risk of compromising future police inquiries; especially as something which appears innocuous to [sic] now may be significant to an experienced investigator or may assume a new significance in the light of new evidence.'

'Advances in forensic sciences and investigative techniques mean that cases previously considered unsolvable due to the passage of time, may now have potential for renewed investigation. In recent years we have been asked by 'cold case' review teams on a number of occasions to provide 'historical' case papers relating to murders, in one instance a case of murder dating back to the 1940s. This trend is increasing.'

The National Archives has confirmed that this case could potentially still be reopened. It has been advised by the Metropolitan Police that, should the case be reopened, releasing any information from the police investigation file now would risk prejudicing any prosecution following from such a reopening. While it is perhaps unlikely that the case will be reopened, and more unlikely that a prosecution would follow, the potential prejudice to such a prosecution from prior disclosure of the information would be very significant. The Commissioner has weighed up the relative unlikelihood of a prosecution arising, on the one hand, against the severity of the prejudice should it do so on the other. He has decided that the National Archives has demonstrated that the release of information from the file in this case would compromise the prevention or detection of crime, the apprehension or prosecution of offenders, and the administration of justice sufficiently to engage the section 31 exemption.

21. Section 31 is a qualified exemption and is subject to a public interest test under section 2(2)(b) of the Act. This favours disclosure unless, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'*. Although the National Archives failed to address the public interest test in its refusal notice, it did provide some assessment in its internal review decision, which it elaborated in the comments provided to the Commissioner on 18 December 2006. The internal review decision letter of 9 June 2005 pointed out that it was the Metropolitan Police as the transferring department rather than the National Archives which was responsible for conducting the public interest test, and reported that the Metropolitan Police (with the benefit of additional advice from the panel of the Lord Chancellor's Advisory Council on Records and Archives) had not considered disclosure to be in the public interest. The National Archives explained that:

'In carrying out the public interest test the MPS [Metropolitan Police Service] considered the following factors in favour of disclosure of the information: the material in question is between 20 to 50 years old; release of this information would provide the public with an insight into the methods used to investigate this unsolved murder and thereby increase the accountability of MPS.

MPS considered the following factors in favour of non-disclosure: there is no formal statute of limitation for the offence of murder and this crime therefore remains capable of investigation from which, potentially, a prosecution could result. Premature disclosure of information relative to inquiries already conducted by police could prejudice a future investigation and prosecution...

In weighing up the competing public interest test factors, the MPS concluded that the factors in favour of non-disclosure outweighed those in favour of disclosure. This is because the MPS has a duty to the community it serves to investigate crime and prosecute those responsible. Disclosure of information that might prejudice the investigation crime[sic] and the apprehension and prosecution of those responsible interferes with this duty. This is clearly not in the public interest.'

22. In favour of disclosure of the requested information, therefore, the National Archives identified:

- the age of the material; and
- the effect of producing greater accountability of the Metropolitan Police.

The Commissioner considers that there are two further public interest factors in favour of disclosure:

- increasing public confidence in police investigative processes; and
- facilitating the public's contribution of further evidence of benefit to the investigation (a point which the complainant has made).

However, notwithstanding these factors, the Commissioner believes that it was reasonable for the National Archives to have accepted the Metropolitan Police's assessment that there was a more powerful public interest in maintaining the exemption on the grounds that the crime remained capable of further investigation and prosecution:

- the public interest in investigation and prosecution of crime, which might be prejudiced by disclosure of the requested information in this case.

While the Commissioner does not take the view that the public interest in the investigation and prosecution of crime will always outweigh other public interest factors in favour of disclosing information, in this case he has had regard to the very serious nature of the crime and the possibility (however remote) of a successful future prosecution. As a result, he has decided that the National Archives' weighing up of the public interest in this case was reasonable, and that its decision that the balance lay with maintaining the section 31 exemption in respect of all of the information was justified.

Exemptions – sections 40 and 41

As the Commissioner has decided that section 31 of the Act provides an exemption in respect of all of the requested information, he has not undertaken an analysis of the National Archives' application of sections 40 and 41.

The Decision

23. The Commissioner's decision is that the public authority correctly withheld the requested information under the provisions of section 31(1) of the Act.

24. However, the Commissioner has also decided that, in its refusal notice, the National Archives failed to address the public interest test as required by section 17(3) of the Act.

Steps Required

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 3rd day April of 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**