

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2012

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

Decision (including any steps ordered)

1. The complainant has requested the case file of MahmoodMattan. The National Archives (TNA) considered that part of the file (the closed extract) could not be released on the basis of section 38(1)(a) and section 40(2). However, TNA did release the rest of the file with some redactions to certain documents where it considered section 38(1)(a) or 40(2) applied.
2. The Commissioner's decision is that section 38(1)(a) is engaged in respect of some of the information and section 40(2) respect of the remainder of the withheld information. After considering the public interest test in relation to section 38 the Commissioner accepts that the exemptions have been correctly applied to withhold the closed extract and in order to redact information in the open file.

Request and response

3. On 25 June 2011, the complainant wrote to TNA in relation to the case of MahmoodMattan (File DPP 2/2145) and asked for the whole file or the parts of it that could be made available.
4. TNA responded on 25 July 2011. It stated that the information was being withheld as disclosure could endanger the physical or mental health of any individual (section 38) and some of the information constituted the personal data of third parties (section 40(2)). As section 38 is subject to a public interest test, TNA advised the complainant it would write to him again once this had been considered.
5. On 12 September TNA provided its further response. It explained that after considering the public interest test in relation to section 38 it had concluded

that the public interest favoured maintaining the exemption in this case and the requested information would be withheld.

6. The complainant wrote to TNA for further clarification of the application of the section 40(2) exemption. TNA provided a response on 15 September 2011 confirming that any information within the file relating to named individuals and references to their private lives and medical details was personal information (in some cases sensitive personal data) of those individuals and therefore section 40(2) applied.
7. The complainant wrote to TNA on 23 September 2011 to ask for an internal review of its decision. In particular the complainant argued that not all of the information in the files would be likely to endanger the mental health of any individual and that some of the information was already in the public domain. Additionally the complainant set out his understanding that as the file was nearly 60 years old any information in it relating to individuals may not be personal data as some of the people may now be deceased.
8. Following an internal review TNA wrote to the complainant on 18 November 2011. It stated that following its review a redacted version of the file containing general correspondence, newspaper cuttings, maps and some statements would be made available. However, TNA maintained that some information was correctly withheld under section 38(1)(a) and 40(2).

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The complainant has argued that section 38 is not engaged in relation to the withheld information. He considers that the possibility of family members of the victim being unwillingly exposed to the material is remote as the release of the information would be unlikely to generate press attention. The complainant further argues that TNA has not demonstrated how exposure to the withheld material would, or would be likely to, endanger the mental health of individuals.
11. The complainant also considers that the section 40(2) exemption has been inconsistently applied. For example, some of the information which has been disclosed could be considered to be personal data (depending on whether the individuals are still alive) and has been disclosed without question. The complainant asked TNA to identify the people to whom the personal information relates to so that it could be established if they were still alive and that the information was in fact personal data. TNA refused this on the basis that to reveal the names would be to potentially reveal personal data.

12. On this basis the Commissioner considers the scope of his investigation to be to determine if the section 38(1)(a) exemption is engaged in relation to the withheld information and, if so, to consider the public interest arguments. The Commissioner will also consider whether TNA has correctly applied section 40(2) to withhold personal data and sensitive personal data.

Background

13. The file details the case of the 1952 murder of shopkeeper Lily Volpurt, aged 42. Mr MahmoodMattan was charged with the murder and was found guilty and hanged later in 1952.
14. In 1969 further evidence came to light that a Mr Harold Cover, a witness in the Mattan murder case, had since been charged with the attempted murder of his own daughter and this, along with the earlier conviction for murder of another suspect in Lily Volpurt's murder, prompted a review of the Mattan case in 1969. In 1998 MahmoodMattan received a posthumous pardon 46 years after his execution.

Reasons for decision

15. The closed extract covers the period of 1952 to 1969 and contains various different types of information:
 - i. Witness statements;
 - ii. Crime scene and area photos and maps;
 - iii. Post-mortem report;
 - iv. Medical report about MahmoodMattan;
 - v. Police reports
 - vi. Court administration papers;
 - vii. Other miscellaneous documents

The Commissioner has included a confidential annex to this decision notice which provides further descriptions of the types of documents covered by these categories.

16. With regards to the exemptions applied by TNA these were identified in consultation with the department who transferred the records to TNA, the Crown Prosecution Service ("CPS"), in accordance with section 66 of the FOIA. The CPS was then responsible for carrying out any relevant public interest tests with consideration also given to this by the Lord Chancellor's

Advisory Council on National Records and Archives under section 66(5) of the FOIA.

17. TNA has therefore, following this consultation, applied section 40(2) and section 38(1)(a) as a basis for withholding the information listed above. The Commissioner in making his decision has looked at the categories of data above and considered the relevant exemptions for each one.

i. Witness statements

18. TNA has applied section 40(2) as a basis for withholding the witness statements in the closed extract and redacting some information from documents in the open file.

19. Section 40(2) states that personal data of anyone other than the applicant is exempt if the disclosure of that information would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 ("DPA").

20. In relation to section 40(2)(a), the Commissioner is satisfied that the requested information is personal data as defined in the DPA. In the DPA it is defined as "*data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of the data controller*".

21. Given that the file covers information from the period 1952 to 1969 it is possible that some of the people involved in the case are now deceased. Although some of the people referred to in the file may be deceased the Commissioner's position in this case is to be cautious and assume that the information is personal data because he does not have the capability or resource to investigate this and nor, for the same reason, does he expect TNA to have done so.

22. In this case the Commissioner has had to consider whether section 40(2) applies by virtue of 40(3)(a)(i). It is clear from TNA's submissions that it considers this provision to be satisfied by virtue of the first data protection principle which requires that personal data is processed fairly and lawfully and is not processed unless a condition in Schedule 2 of the DPA (and Schedule 3 for sensitive personal data) is met.

23. The Commissioner has first considered whether the disclosure of the withheld information would be fair. In considering this he has taken into account the following factors:

- Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
- The individual's reasonable expectations of what would happen to their information; and

- Whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the data subjects.
24. TNA has provided some explanations as to how the disclosure of this information would cause unnecessary damage or distress to these individuals. Given that Mr Mattan has received a posthumous pardon for the murder of Lily Volpert to release statements made by other individuals which may have had some bearing on his original conviction would lead to the individual's concerned potentially suffering criticism or damage.
 25. In relation to the reasonable expectation of the witnesses, the Commissioner considers that they would have had no reasonable expectation that this information would be placed in the public domain. Witnesses, when providing information as part of an investigation, do so with the expectation that their information will not then be published. Given the nature of the material and the sensitivity of the subject matter disclosure could lead to an intrusion into the private lives of the individuals concerned.
 26. Whilst there is a public interest in openness and transparency, especially in relation to the ways in which crimes are investigated, the Commissioner considers these interests are met by the release of the rest of the file. These documents provide a broad and detailed understanding of the 1952 case and trial and the 1969 review.
 27. The Commissioner does recognise that the names of some of the witnesses are already in the public domain and can be seen in the information in the open part of the file. However, having viewed the information in the closed extract, the Commissioner can see the distinction between the witness statements which are available and the witness statements which are being withheld and this is explained in more detail in the confidential annex.
 28. Therefore he considers that the disclosure of this information would be unfair. As such, he considers that this information is exempt from disclosure under this exemption.
 - ii. *Crime scene and area photos and maps*
 29. TNA has applied section 38(1)(a) – information which would be likely to endanger the physical or mental health of any individual – and section 40(2) to the crime scene and area photos and the Commissioner considers section 38(1)(a) to be most relevant to this information.
 30. In order for section 38 to be engaged it must be the case that release of the specified information would, or would be likely to, endanger the mental or physical health of any individual. In this respect, the Commissioner has taken into account the decision of the Information Tribunal¹ in which it

¹*John Connor Press Associates Limited v The Information Commissioner* [EA2005/0005]

confirmed that *"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk"*.

31. Therefore the risk of prejudice must be substantially more than remote. In this case, the Commissioner understands from TNA's submissions that its position is that disclosure of the information withheld 'would be likely' to endanger the physical or mental health of an individual. The Commissioner has therefore gone on to make his decision regarding the withheld information on the basis of this limb of the exemption.
32. The Commissioner has previously accepted an individual's mental wellbeing to fall within the scope of section 38. In this he includes emotional and psychological wellbeing, including the likelihood of causing significant upset or distress. In this case, having looked at the photographs to which section 38 has been applied, the Commissioner considers that the consequences of the disclosure of this information into the public domain, especially if there is a likelihood of it being reported in the media, is such that it would cause significant distress to the families of the victim. As such the Commissioner is satisfied the exemption is engaged in relation to the photographs.
33. In reaching his view the Commissioner relied heavily on the fact that much of the material he viewed was graphic in nature and of the harm this information would cause to the surviving relatives of the victim. However, as section 38 is subject to the public interest test, the Commissioner has gone on to consider this before reaching a decision.

Public interest factors in favour of disclosure

34. The Commissioner recognises the general public interest argument in ensuring transparency in the activities of public authorities. The Commissioner notes that transparency is the fundamental objective of the FOIA and accepts that this is a factor in favour of disclosure in most cases.
35. TNA has acknowledged that the nature of this murder, resulting in one of the last hangings in the UK, and the later quashing of Mr Mattan's conviction, is of some interest to the public. Details of the crime if released would increase public understanding of the case and contribute towards a historic public record of crime at that time.

Public interest factors in favour of maintaining the exemption

36. The photographs are, mostly, graphic in nature and as a whole show a picture of the crime and the investigation of the crime scene. Releasing these photos would be likely to cause distress to the extent of mental endangerment for the victim's family.
37. Even with the passage of time there is still a duty of care to the family and to some of the people involved in the investigation. TNA argue disclosure after this length of time would have the same effect as putting the information into the public domain for the first time.

Balance of the public interest test

38. The Commissioner has only afforded slight weight to each of the arguments identified as favouring disclosure of this information. This is because he believes that the withheld information, albeit of some interest to the public, would only actually serve the public interest in disclosure to a limited extent. Releasing the crime scene photographs is not likely to add anything meaningful or assist the public in understanding the investigation to any great extent.
39. Therefore when balanced against the single factor he considers supports the maintenance of the exemption to which the Commissioner has afforded significant weight i.e. avoiding the significant distress which release would be likely to cause, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

iii. Post-mortem report

40. TNA has applied section 38(1)(a) and section 40(2) to the post-mortem report and the Commissioner considers section 38(1)(a) to be most relevant to this information.
41. As with the crime scene photographs, the Commissioner has first considered whether the release of this information would be likely to endanger the mental or physical health of any individual.
42. In this case, the post-mortem report of the victim contains detailed descriptions of the victim and the nature of the crime. The Commissioner believes that the consequence of the disclosure of this information into the public domain is such that it would cause significant distress to the families of the victim.
43. The Commissioner considered the public interest arguments in relation to the specific disclosure of the post-mortem report and for the same reasons as outlined in paragraphs 35-40 above, concluded that the public interest favoured withholding the post-mortem report.

iv. Medical report about Mahmood Mattan

44. TNA has applied section 38 and 40(2) as a basis for withholding this report. However, as Mr Mattan is deceased TNA cannot rely on section 40(2) as this relates to the personal information of living individuals. The Commissioner has therefore considered section 38 in relation to this information.
45. The Commissioner has first considered whether the disclosure of this information would be likely to endanger the mental or physical health of any individual. In this case, the report was provided by a medical examiner to the CPS (see confidential annex for details of content of report). As this

report discusses Mr Mattan's condition the Commissioner considers that the consequence of the disclosure of this information into the public domain is such that it would cause significant distress to the family of Mr Mattan.

46. The Commissioner considered the public interest arguments in relation to the specific disclosure of this report and for the same reasons as outlined in paragraphs 35-40 above, concluded that the public interest favoured withholding the medical report.
47. Although the Commissioner has determined that section 38 provides a valid basis for withholding the medical report in this case, he also notes that section 41 (information provided in confidence) would have been likely to have been engaged. The Commissioner has previously considered the issue of access to medical records of deceased people and has established his view that the information contained within these records will be exempt as it was information provided in confidence. The Commissioner's view has also been supported by the Tribunal (Bluck EA/2006/0090).

v. Police reports

48. TNA has applied both section 40(2) and section 38 to the police reports and the Commissioner has considered both in relation to the reports in the closed extract and open file.
49. The police reports contain varying degrees of information; some contain graphic descriptions of the crime and these are the reports that the Commissioner has considered section 38 in relation to. The reports the Commissioner has considered section 40(2) in relation to contain descriptions of witnesses and suspects.
50. With regards to section 38, the Commissioner is satisfied that the disclosure of information detailing the graphic nature of the crime would be likely to endanger the mental health of the family of the victim and he has determined that the public interest arguments set out in paragraphs 35-40 are also relevant to this information and favour withholding any reports detailing the nature of the crime.
51. In terms of the reports which contain information on witnesses and suspects; the Commissioner has considered section 40(2) in relation to witnesses in detail in paragraphs 19-29 and concluded it would not be fair to disclose this information. The Commissioner considers information related to witnesses in the police reports would also be exempt from disclosure for these reasons and would also extend this to information about suspects or other individuals such as family members who are discussed within the police reports.
52. The Commissioner also accepts that some of the police reports in the open file have been redacted on the basis of section 40(2) and 38(1)(a) and, for

the same reasons, as set out above he is satisfied the exemptions have been correctly applied to this information.

vi. Court administration papers

53. Court administration papers are held as part of the criminal case file. TNA has explained that these files are created before trial and no information is added to them after proceedings. It is impossible to determine which information in the file was aired or viewed in court and it is likely some of the information would not have been used (for examples see the confidential annex). Due to the graphic nature of some of the information TNA determined that it should be withheld on the basis of section 38.
54. The Commissioner has considered the information in this case file and acknowledges that the approach taken by TNA in this particular instance is very cautious as there is likely to be information that was used in court. However, the Commissioner recognises that a cautious approach is appropriate given the nature of the information and the graphic descriptions and amount of personal data that is contained within the papers.
55. TNA has applied section 38 to the court administration papers on the basis that the disclosure of this information would be likely to endanger the mental health and wellbeing of the families. The Commissioner accepts that the exemption is engaged and that the public interest arguments previously put forward are also applicable to this information and favour withholding this information.

vii. Miscellaneous documents

56. TNA has also identified other documents which do not fall under the broad categories of information already considered by the Commissioner but would form part of the closed extract. This information is described in the confidential annex and TNA has applied section 38 as a basis for withholding this information.
57. For the reasons outlined in earlier parts of this decision notice the Commissioner accepts that the exemption is engaged in relation to this information and that the public interest favours withholding this information.

Right of appeal

58. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

59. 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.
60. 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

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