

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 February 2015

**Public Authority:** The National Archives

**Address:** Ruskin Avenue  
Kew  
Richmond  
Surrey  
TW9 4DU

### **Decision (including any steps ordered)**

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1. The complainant requested information from the National Archives ("TNA") concerning the trial in 1963 of Stephen Ward, a central figure in the Profumo affair. TNA provided some information and withheld the remainder under section 40(2). During the course of the Commissioner's investigation, TNA agreed to disclose additional information to the complainant.
2. The Commissioner's decision is that TNA has correctly applied section 40(2) to the information that it has continued to withhold. He does not therefore require it to take any further steps, beyond those already agreed, to ensure compliance with the Act.

### **Request and response**

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3. On 8 November 2013 the complainant requested from TNA:
  - a. The file CRIM 1/4140; and
  - b. All documents arising out of the public record of the Stephen Ward trial, including transcripts of evidence and proceedings for 28 June (committal proceedings), 22-25, 29-31 July (trial proceedings) and particularly the judge's summing up.

4. File CRIM 1/4140 contains documents related to the prosecution in 1963 of Stephen Ward, a leading figure in the Profumo affair, who died shortly after the conclusion of his trial.
5. TNA responded on 21 November 2013. It withheld the requested information under section 40(2).
6. The complainant requested an internal review. The outcome of the internal review was provided to the complainant on 23 January 2014. TNA disclosed some information but continued to withhold the remaining information under section 40(2).

### **Scope of the case**

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7. The complainant contacted the Commissioner on 27 February 2014 to complain about the way his request for information had been handled. Specifically, he complained that TNA had not disclosed all of the information that he believed that he was entitled to receive under FOIA.
8. During the course of the Commissioner's investigation, TNA agreed to disclose additional information to the complainant. TNA also applied section 31(1)(c) to the withheld information. However, at a later stage, it withdrew its reliance on this exemption.
9. On the basis that some information is to be disclosed, as agreed, the Commissioner has considered whether TNA has correctly continued to withhold information under section 40(2).

### **Background**

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10. The file that the complainant requested contains documents relating to the prosecution of Dr Stephen Ward who was a central figure in the Profumo affair which occurred in the early 1960's. The charges against him included living on the earnings of prostitution, inciting others to procure named women to have unlawful sexual intercourse and procuring abortions. His trial took place in July 1963. Before the end of the trial, Stephen Ward took an overdose and subsequently died. He was convicted in his absence of some of the charges brought against him. There has continued to be significant debate about the circumstances surrounding his prosecution and conviction. His case is currently under review by the Criminal Cases Review Commission with a view to determining whether it should be referred to the Court of Appeal.

## Reasons for decision

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### Section 40(2) – Personal information

11. TNA relied on the exemption in section 40(2) as a basis for not disclosing the withheld information.
12. Section 40(2) provides an exemption for information which is the personal information of an individual other than the complainant and where one of the conditions listed in section 40(3) or 40(4) is satisfied.

13. Section 40(2) states that –

*"Any information to which a request for information relates is also exempt information if-*

- a. it constitutes personal data which do not fall within subsection (1), and*
- b. either the first or the second condition below is satisfied."*

14. Section 40(3) provides that –

*"The first condition is-*

- a. in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*
  - (i) any of the data protection principles, or*
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
- b. in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."*

15. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of information to any member of the

public would contravene any of the principles of the Data Protection Act ("DPA").

16. The Commissioner therefore considered:

- (1) whether the withheld information constitutes personal data; and if so
- (2) whether disclosure would breach one of the data protection principles.

**(1) Does the withheld information constitute personal data?**

17. In order to establish whether section 40(2) has been correctly applied, the Commissioner first considered whether the withheld information is the personal data of parties other than the complainant.

18. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller. As noted, the information must relate to a living individual. If the individual is no longer living the information is not personal data and so cannot be withheld under section 40(2). The Commissioner therefore initially considered whether the withheld information relates to an individual who is still living, or whether there is persuasive evidence that they are dead, or that it can be assumed that they are dead.

19. Given that the withheld information relates to events that occurred in the early part of the 1960's, some of the people involved in the case may now be dead. However, the Commissioner's position is that it is not for him or TNA to investigate this, given the resource implications of doing so, particularly in light of the large number of people who are identified within the withheld information. Therefore, in the absence of clear evidence to the contrary, the Commissioner has assumed that any person referred to in the withheld information is still living and that the relevant information constitutes their personal data.

20. As Stephen Ward is no longer alive, any information that solely relates to him cannot be exempt from disclosure under section 40(2). However, in line with the previous paragraph, in the absence of evidence to the contrary, the Commissioner has assumed that the numerous other people referenced in the withheld information are still alive and that therefore any information related to them constitutes their personal data. The Commissioner notes that, where evidence is available in the withheld information, it suggests that a significant number of the

witnesses were relatively young at the time of Stephen Ward's prosecution. This clearly increases the likelihood that they are still alive.

21. In addition, the Commissioner notes that one of the key witnesses in the Stephen Ward trial died shortly before this notice was issued. However, he has not been able to take this into account in reaching his decision as, under FOIA, he is required to determine whether TNA correctly applied section 40(2) in the circumstances that existed at the time that the request was made, rather than at the time that this notice was issued.
22. During the course of the Commissioner's investigation, TNA agreed to disclose further information to the complainant. This information includes copies of statements of offences and instructions for indictment from the Metropolitan Police, statements by police officers, letters from Stephen Ward to the police, information related to his accounts, a tenancy agreement and lists of exhibits. Some information is to be redacted from these documents where TNA still believes that it is exempt from disclosure under section 40(2).
23. TNA continued to withhold the following documents under section 40(2):
  - (i) Witness statements and depositions;
  - (ii) Two letters to the Court from solicitors representing witnesses;
  - (iii) Transcripts of evidence given by witnesses at the trial of Stephen Ward; and
  - (iv) Lists of names of witnesses (except for the names of some prominent witnesses).
24. TNA informed the Commissioner that it had considered whether it might be possible to anonymise the remaining withheld information. However, it explained that it was aware that it had to make a careful assessment of the material to ensure any consideration of redaction was balanced between the need to be transparent and the need to protect individuals' rights to privacy. It was TNA's view that, where it was not sure if anonymisation was achievable, it had to take the position that information remained sensitive and that it should be withheld.
25. TNA noted the comments of the Upper Tribunal in *Information Commissioner v Magherafelt District Council [2012] UKUT 263 AAC*, where it was stated that:

*"Redaction is often crucial in achieving anonymisation. Getting redaction right can be difficult: too much redaction undermines transparency, too little undermines privacy."*

26. TNA went on to point to Munby LJ's comments in that case on the approach to anonymisation through redaction (at paragraph 48) that:

*"In some cases the requisite degree of anonymisation may be achieved simply by removing names and substituting initials. In other cases, merely removing a name or even many names will be quite inadequate. Where a person is well known or the circumstances are notorious, the removal of other identifying particulars will be necessary – how many depending of course on the particular circumstances of the case."*

27. In TNA's view, this case was a difficult one because there was a significant amount of information already in the public domain. It believed that from the publicly available information it might be possible to work out or guess who made a particular witness statement if just names and addresses were removed. This could lead to the sensitive personal data of witnesses being released. It noted that, for example, the witness statements described the personal lives of the relevant individuals and third parties at a specific time (1961-63), including details of the ages of the witnesses, places of work, where the individuals were from, who they knew, how they became acquainted with Stephen Ward and many other personal details.

28. In terms of the details which would lead to identification, TNA contended that it was difficult to precisely establish what information and/or combinations of information would lead to identification. Furthermore, it was also conscious of the jigsaw effect which could occur with the partial release of information within the file. It believed that any release which alluded to identities which it was protecting could contribute to the jigsaw effect. It noted the comments of the First-Tier Tribunal in *Phillips v (1) Information Commissioner and (2) National Archives (EA/2012/0141)* in relation to a similar case. The Tribunal stated at paragraphs 69-70:

*"As was demonstrated to us through a number of examples in the closed session, this would permit "jigsaw" identification of personal and sensitive personal data that would be unfair processing under the terms of the Data Protection Act, 1998. It would permit the Appellant to build up a matrix of information which he could then use to narrow down specific individuals in breach of the Data Protection principles."*

29. TNA also referred to an ICO decision notice, under case reference number FS50429375 which involved the London Fire Brigade. This discussed the issue of motivated intruders and motivated defenders in assessing whether anonymisation was possible and, if so, to what degree. In relation to the Stephen Ward case, TNA informed the Commissioner that it believed that there were individuals who could possibly be seen to be motivated intruders, including people who were involved with the original criminal case and had publicly stated that they wished all of the information to be released and also some who had already published books on this subject. It also believed that it was possible that those who knew Stephen Ward at that time and the individuals who made statements, or who were referred to in the statements, could identify people from the details that would be released by simply removing names and addresses.
30. TNA was therefore of the view that there remained a risk that simple anonymisation could lead to individuals being identified. This was a risk that it did not believe it was appropriate for it to take when dealing with personal information. It believed that this was particularly the case in this situation as it could lead to the release of sensitive personal information into the public domain, which given the nature of the information, would be likely to cause substantial damage and distress to the individuals concerned.
31. Having reviewed the withheld information, the Commissioner notes that a significant amount of it obviously concerns Stephen Ward. As already noted, as Stephen Ward is no longer alive, information solely about him cannot be exempt under section 40(2). However, in the withheld information, information about Stephen Ward is inevitably intertwined with information concerning his relationships with a large number of other individuals. Those individuals may still be alive and, if they are, the information constitutes their personal data, to which section 40(2) can apply.
32. The Commissioner accepts the argument presented by TNA that it would not be possible to simply remove the names of individuals from the withheld information in order to anonymise it. Given the large amount of detail it contains, people could still be identified from other information contained within it. In addition, in the Commissioner's view, it would not be possible, given the quantity of information involved, to try to remove other data which might allow individuals to be identified. Even if this was possible in respect of some of the documents, he believes that the very limited amount of information that would remain, with all of the personal data removed, would make little sense and be of no real value.



33. The fact that information constitutes the personal data of an 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 data protection principles. The Commissioner therefore went on to consider whether disclosure of individuals' personal data contained in the withheld information would breach one of the data protection principles.

**(2) Would disclosure breach one of the data protection principles?**

34. TNA informed the Commissioner that it believed that the first data protection principle would be breached if the withheld information were disclosed. The first data protection principle requires that any disclosure of personal data is fair and lawful and that at least one of the conditions in Schedule 2 of the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met.

**Sensitive personal data**

35. The Commissioner was informed by TNA that it considered some of the withheld information constituted "sensitive personal data". "Sensitive personal data" is defined in section 2 of the DPA as personal data which falls into one of the categories set out in that section.
36. TNA explained to the Commissioner that it believed that sensitive personal data was spread throughout the requested file. It contended that this data fell within section 2(e)-(g) of the DPA. Section 2(e) covers information as to a data subject's physical or mental health or condition, section 2(f) covers information as to a data subject's sexual life and section 2(g) covers information as to the commission or alleged commission of any offence by a data subject.
37. TNA informed the Commissioner that the file contained numerous unsubstantiated allegations about individuals being involved in prostitution and in procuring and administering abortions (which was illegal until 1967). It contended that within the context of the file there was no evidence to suggest that the people identified were charged or convicted of any offences. Furthermore, the discussions and information pertaining to these unsubstantiated allegations and the personal (sexual) relationships of the individuals concerned and third parties, by their very nature, were details of the sexual life of identifiable living individuals and therefore classed as sensitive personal data under section 2(f) of the DPA.
38. TNA argued that the references in the file to women who wanted and had abortions, allegedly arranged by Stephen Ward, should also not be



released. This again contained details of their sexual life, which resulted in unwanted pregnancies and, to an extent, also their medical information, as it explained how abortions were procured and carried out. Furthermore, TNA stated that the majority of individuals named in the file were young adults at the time of the trial and therefore it was highly likely that they would be living a rather different lifestyle today to the ones described in the file. TNA believed that to disclose information of this nature might be detrimental to their current reputation and social standing.

39. Having reviewed the withheld information, the Commissioner accepts that a significant proportion of it is sensitive personal data under section 2(e)–(g) of the DPA. It contains a large amount of details about sexual relationships, the receiving of money linked to sexual relationships, details of the procuring and carrying out of abortions and details about allegations of possible criminal offences committed by a number of witnesses and other named individuals. The Commissioner acknowledges that it is inevitably that a large proportion of the information would be of this nature, given the charges brought against Stephen Ward and the consequent nature of the evidence that needed to be produced in relation to those charges. This information clearly relates to the data subjects' physical or mental health or condition, sexual life or the commission or alleged commission of offences. As sensitive personal data under section 2(e)-(g) of the Act, by its very nature, this information is deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subjects, the Commissioner considers that it would be unfair to disclose it and, consequently, it is exempt from disclosure under section 40(2).

### **Personal data that is not sensitive personal data**

40. Having determined that any sensitive personal data contained within the withheld information is exempt from disclosure, the Commissioner went on to give further consideration to the personal data contained in the file which is not sensitive personal data.
41. The Commissioner would however initially note that in much of the withheld information the sensitive personal data is inevitably mixed in and intertwined with the personal data that is not sensitive personal data. Consequently, he is not sure how practicable it would generally be to try to separate the two types of personal data. Even if it were feasible to do so, this would obviously be a very time consuming and difficult process to carry out and it is not clear to the Commissioner how much

information of value would be left to be disclosed, even if it were found not to be exempt under section 40(2).

42. In considering the application of section 40(2) to personal data that is not sensitive personal data, the Commissioner firstly considered whether the disclosure of individuals' personal data would be fair. In doing so, he took into account the following factors:

(i) the individuals' reasonable expectations of what would happen to their information;

(ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned; and

(iii) whether the legitimate interests of the public in disclosure were sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

#### **(i) Reasonable expectations of the individuals concerned**

43. The Commissioner considers that people's reasonable expectations of what would happen to their personal data can be shaped by factors such as their general expectations of privacy and also the purpose for which they provided their personal data. This is apart from any explicit assurances which may have been given about confidentiality.

44. When considering what information an individual should expect to have disclosed about them, the Commissioner's view is that a distinction should be drawn between the information that relates to their public and private lives. He believes that information which relates to an individual's private life (i.e. their home, family, social life or finances) will generally deserve more protection than information about them acting in an official or work capacity (i.e. their public life).

45. Focussing on the expectations of the individuals whose personal data is contained within the withheld information, TNA argued it was important to consider the circumstances in which the personal data was obtained. This included the how, when and why the information was collected.

46. TNA explained that the witnesses provided evidence for the purposes of criminal proceedings, thus the purpose or reason (the 'why') their information was collected was specific and clear to them. It argued that while individuals may have been content to provide information to be used for this purpose, they may not wish this to be used for any additional purpose. It believed that any release their information would

be for a different purpose for which the witnesses had not given their consent and of which they had no expectation.

47. TNA also noted that the evidence from the witnesses was provided at a time (the 'when') prior to the Freedom of Information Act or Data Protection Act, and also prior to the existence of the internet. People's understanding as to how the information would be treated and published would be limited to what was normal at that time.
48. TNA believed that its argument was further supported by cases referenced in the ICO's specialist guidance concerning personal data disclosed in open court. It pointed to the ICO's decision notice under case reference number FS50076855 in which it was stated that "*disclosures that are required as part of the court proceedings are in practice, only disclosures to a limited audience.*". TNA contended that it was generally accepted that disclosure was required for the judicial process, but how that data was used after the fact was expected to be more restricted and limited (and in line with DPA principles), which would not be the case if disclosed to the wider public under FOIA.
49. TNA pointed to another argument relevant to both the point on expectations and on fairness that was highlighted through the cases discussed within the ICO's specialist guidance which was the "*principle of allowing people to start life with a clean slate after they have served their time/repaid their debt to society*". In TNA's view, this principle applied to a greater extent to witnesses, who should be allowed the privacy to move on with their lives, without having to continually answer questions about one specific event/case in their past, especially when it related to one from more than 50 years ago.
50. Finally, and most importantly from TNA's perspective, was 'how' the information was collected. It explained that some of the witnesses offered evidence only on the understanding that their identities would be protected. It argued that, if expectations were shaped by what people were told about how their data would be treated, clearly for these individuals there was a stronger expectation that their information would be protected.
51. TNA believed that all of the above supported the argument that the witnesses, even those whose identities were known, would have had reasonable expectations that their personal data, and particularly their sensitive personal data, would be protected and not disseminated more widely under FOIA.
52. The complainant argued that, to the extent that individuals had, at the time that the information was created, expectations, those expectations

(and the resultant notions of what would be fair use or unfair use of that information) would have been assessed according to the statutory landscape at the time. As at 1963, access to public documents was governed by the Public Records Act 1958 as it then existed. The complainant contended that, although members of the public had to wait 50 years for their right of access, once it arose it did not provide exemption for personal information. He believed that the Act struck the balance between rights of non-disclosure and rights of access through the passage of time and that it was the statutory context within which any personal information falling within the scope of the request was supplied.

53. The complainant contended that, to the extent that "fairness" had any relevance to the disclosure of the requested information, the Public Records Act provided the true yardstick of what "fairness" required. He believed that, when measured against that yardstick, disclosure of personal information, more than 50 years after it was acquired, was "fair". In addition, the complainant was of the view that Stephen Ward was the person to whom fairness was owed. For the sake of posterity, his relatives, his friends and those who were caught up in the discreditable proceedings, the complainant argued that fairness demanded that the full story be told and the information disclosed.
54. In relation to the complainant's argument concerning the impact of the Public Records Act 1958 on the reasonable expectations of individuals whose personal data is contained within the withheld information, the Commissioner notes that the Act provided a general right of access to records held by some public bodies. However, it did not provide an automatic right of access to all information falling within its scope. Information could be excluded from disclosure after a period of 50 years from it being acquired. For example, under section 5(1) of the Act, the Lord Chancellor had the power to extend the period of time that records should remain closed beyond 50 years. Likewise, under section 5(2), the person responsible for any public records could request the Lord Chancellor to extend the period for which records should remain closed beyond 50 years where the opening of the records might constitute a breach of good faith on the part of the Government or the person that obtained the information. The criteria applied to what would constitute a breach of good faith that would warrant extended closure have changed over time but have included, in earlier years, where disclosure would cause distress or embarrassment.
55. Given the potentially sensitive nature of a considerable amount of the withheld information, the Commissioner does not believe that it would necessarily have been within the reasonable expectations of those witnesses who were aware of the provisions of the Public Records Act

that the information that related to them would automatically be disclosed after 50 years. It does not appear unreasonable to the Commissioner, given the nature of the information involved, that any such witnesses might have expected that the closure period for the relevant records might have been extended beyond 50 years.

56. More generally, in relation to the witnesses, the Commissioner considers it highly unlikely that many of them would have been aware of the relevant provisions of the Public Records Act and have borne them in mind at the time. He does not believe that they would have had a reasonable expectation that their statements made prior to the trial would be placed in the public domain. Witnesses, when providing statements as part of an investigation, do not do so with the expectation that this information will be published. Given the nature and sensitivity of much of the material, the Commissioner considers that disclosure could lead to an intrusion into the private lives of the individuals concerned.
57. However, the Commissioner would draw a distinction between the statements given by members of the public and those given by police officers. He notes that the statements of the police officers were provided as part of their professional duties. In the Commissioner's view, to the extent that such information relates to those officers carrying out their duties and does not contain personal data about other individuals involved in the case, it may not attract the same level of protection as information which relates to individuals' private lives.
58. The Commissioner believes that even though the statements were provided a considerable time ago, the officers concerned would have expected to have been open to greater scrutiny and accountability in respect of the information contained in those statements than members of the public. Consequently, the Commissioner is of the view that there should be a reasonable expectation on the part of the police officers that their names and the contents of their statements might be disclosed to the public. However, the Commissioner notes that TNA has now agreed to disclose the statements of the police officers to the complainant, with the personal data of any third parties removed, and, consequently, the issue of the police officers' statements is not a matter on which he needs to make a decision, except to the extent that any other individuals' personal data, contained in those statements, is to be withheld.
59. The withheld information also contains two letters to the Court from solicitors acting on behalf of witnesses which concern issues related to the trial, such as requests for anonymity. The Commissioner does not consider that it would have been within the reasonable expectations of

the parties concerned that this information would be put in the public domain.

**(ii) Consequences of disclosure**

60. TNA informed the Commissioner that it had concluded that the consequence of disclosing the withheld information would be significant damage and distress to the individuals involved. It explained that it had taken into account both its original (historical) context and its current context (as a high profile legal case).
61. As part of its arguments, TNA drew on the example of another high profile historical case in which it had been involved that had been considered by the Commissioner under case reference number FS50497015. This concerned a request to TNA for extracts of a file containing information relating to communications between the then Prime Minister and Jimmy Savile regarding tax deductions for charitable donations, following his fundraising for Stoke Mandeville Hospital.
62. TNA identified that in that case several key points were highlighted, including how the case and those involved were judged/perceived (paragraph 17), how and if this had changed or diminished with the passage of time, and, finally, whether current or new evidence had changed those perceptions (paragraphs 18 – 19). In particular, it noted the following comments from the Commissioner:

*"As to the consequences of disclosure, the view of the Commissioner is that disclosure in contravention of the expectation referred to above would be distressing to the data subject, as in any circumstance would be the disclosure of personal correspondence into the public domain. In particular, given what is now known about the conduct of Jimmy Savile, his reputation is now such that even disclosure of correspondence revealing an involvement in his charitable endeavours would be likely to result in distress to the data subject....."*

*the sensitivity of the information in question has not been reduced by the passage of time. On the contrary, what has recently become known about Jimmy Savile means that, in the Commissioner's view, this information is more sensitive than it was at the time it was recorded....."*

*The Commissioner does not, therefore, believe that the likelihood of distress to the data subject is reduced due to the passage of time."*



63. TNA argued that the same considerations applied to the Profumo affair and Stephen Ward trial papers, in that there were specific connotations to being associated with the case. It contended that owing to the charges that were brought against Stephen Ward and the examination of the case at the time, the trial was very much one that looked at individuals' sexual morality as well as the law. Therefore, in TNA's view, to release information which would lead to those involved being identified could, even 50 years after the event, be distressing to those individuals.
64. The Commissioner accepts that disclosure of information about those involved in such a high profile case, particularly given the nature of the charges under consideration, could potentially cause damage and distress to witnesses and those identified in their evidence. The Commissioner also accepts that disclosure could cause distress to those involved by the reopening of matters which they believed had been concluded once the trial had ended.

### **(iii) General principles of accountability and transparency**

65. The Commissioner notes that, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case, it may still be fair to disclose personal data if there is a more compelling public interest in disclosure. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

### **The complainant's arguments**

66. The complainant argued that there was a vital public interest in the disclosure of the withheld information. He believed that this would allow a more informed, complete and reliable account of the true facts, matters and circumstances surrounding the prosecution of Stephen Ward, which was a matter of continuing, substantial public interest. It would also assist in understanding how the prosecution ended in a wrongful conviction and in correcting a miscarriage of justice.
67. The complainant believed that the disclosure of witnesses' depositions would allow these to be compared with the evidence that they gave at the trial and the disclosure of witnesses' statements would allow examination of how the case was shaped and who had responsibility for bringing it.



68. The complainant argued that, given the high profile nature of the trial, it was widely reported in the media at the time but that those reports only covered parts of the evidence. There was therefore a public interest in the full record being put into the public domain. He also believed that the disclosure of the withheld information was essential in relation to the making of representations to the Criminal Cases Review Commission for the case to be referred to the Court of Appeal. In the complainant's view, disclosure would allow a proper judgement to be made as to whether a miscarriage of justice had occurred.
69. The complainant contended that information given under oath in open court, or any statement or argument during a criminal trial, had a special quality deriving from the open justice principle. He argued that justice must not only be seen to be done, it must be seen to be done for all time, so that research can expose wrongful convictions years later, such as in the case of Derek Bentley.
70. The complainant noted the Commissioner's view that the more time that had elapsed since the date of a court case or conviction, the less likely any disclosure of that information would be fair and/or lawful. However, he argued that this statement was general and by no means logical for many cases and certainly not for this case, where "the longer it remains unrequited, the fairer it becomes to reveal the truth." The complainant presented arguments as to why the following general principles contained in the Commissioner's guidance should not apply in this case:

*(a) Data disclosed in open court would be unfair to release as the public knowledge of the information in court would be, in practice, to a limited audience (cases FS50075171 and FS50076855):* The complainant argued that in the Stephen Ward case, the principle supported disclosure as the case was comprehensively covered by all major domestic newspapers and received significant international press coverage. The information disclosed in court was not, in practice, to a limited, but instead a global audience.

*(b) To take account of the reasonable expectations of the data subject about how the data will be used – that although there is an expectation that the data will be disclosed in court, this is far more restricted than disclosure under FOI:* The complainant referred to his submission that the reasonable expectations of a data subject at the time would be international coverage throughout the world of any statement and full release of the transcripts, depositions, witness statements to police, etc after 50 years.

In the complainant's view, there was no doubt that the data subjects were well aware that the contents of their information went beyond the walls of the courtroom into the general public, with most of them posing for pictures outside court. The courtroom was full of reporters covering the case and sending their stories to national and international newspapers. Indeed, many of the witnesses were more than happy to sell their story and experience in court. Their reasonable expectation would have been that any information they gave in open court would have been very public and the passage of time had not diminished this.

*(c) Analogous principles to those advocated in the Armstrong case (Armstrong v Information Commissioner and HMRC) apply, which in addition to (a) and (b) above, include "[e]ven if the information had previously entered the public domain, that is not in itself conclusive of whether the public interest weighs in favour of disclosure, it is merely one consideration to be weighed in the public interest balance" (paragraph 86). The complainant noted that LTT86 note adds the remark "the context of the case should be taken into account". He argued that if the context of the case were taken into account, this strongly favoured disclosure because:*

(i) The case was widely reported by journalists at the time of the trial – the case was one of the most publicised ever;

(ii) The case has been the subject of many books;

(iii) There are strong claims made by a number of people that a serious miscarriage of justice occurred. This could be supported by the release of the trial documentation;

(iv) The case has remained firmly in the public consciousness for the past 50 years – it has been the subject of immeasurable media reports, parliamentary debates, a movie ("Scandal") and a West End musical ("Stephen Ward") by Andrew Lloyd-Webber and a play based on Ms Keeler's memoirs.

71. The complainant contended that, in this case, the context supported the same conclusion reached by the Information Commissioner in case FS50074871 where, despite the passage of time since conviction, the information was released on the grounds that:

a. The case was widely reported in the local area; and

b. The case remained in the consciousness of the local community.

72. The complainant believed that the same factors applied in the Stephen Ward case but were amplified by a very great order of magnitude. Further, the information was released in case FS50074871 as it "was the result of a conviction that had followed due process". The complainant submitted that in a case such as that of Stephen Ward, where there were allegations of a violation of due process, there was an even greater reason for disclosure.
73. The Commissioner notes that the case referred to by the complainant, FS50074871, concerned the disclosure of a very limited amount of information about individuals convicted of criminal offences. He believes that there is a clear distinction to be drawn between that case and the issues regarding disclosure in the Stephen Ward case. The latter concerns whether the personal data of witnesses, and others mentioned in the withheld information, rather than those convicted of criminal offences, should be disclosed. In the Commissioner's view, the personal data of people giving evidence in criminal proceedings, or whose names are mentioned in the course of those proceedings, is likely to warrant greater protection than those who are subsequently convicted of criminal offences in such proceedings.

### **TNA's arguments**

74. TNA contended that the main public interest argument for the release of the withheld personal data was to address the perceived miscarriage of justice in relation to Stephen Ward's conviction. It pointed to a secondary argument related to this, which was that disclosure would allow the public to gain a better understanding of the case.
75. With regard to the secondary argument, TNA informed the Commissioner that there were numerous books about the case, from which it believed that it was quite clear that the details and sources which existed within the public domain (which any general member of the public could research) allowed an informed public debate. It argued that it was also clear from the books and the reviews of those books that there was considerable public debate regarding a possible miscarriage of justice.
76. TNA explained that in considering the information in question and the specific public interest that it sought to address, it did not believe that the public interest favoured disclosure. It pointed to the fact that the courts had differentiated between information that would benefit the public good and information that would meet public curiosity. It did not

consider the latter to be a "*public interest*" in favour of disclosure. TNA informed the Commissioner that, in this instance, it had not been convinced that there was a pressing social need for disclosure that outweighed the public interest in protecting the personal data contained in the withheld information.

77. In TNA's view, to argue that the release of the withheld information was crucial to the understanding of the case did not seem justified, given the above. It acknowledged that the release of this material would add to the historical account. However, whilst the withheld information remained the personal and sensitive personal data of living individuals, it did not believe that this addition to the public knowledge outweighed the public interest in protecting the data and the rights and freedoms of the individuals involved.
78. In relation to the main public interest argument in this case, that release would aid the appeal of Stephen Ward's conviction and address the miscarriage of justice, TNA informed the Commissioner that it did not believe that the release of this material was necessary for that purpose. It noted that the Criminal Cases Review Commission was reviewing the conviction and under the legislation by which they were governed, the Criminal Appeal Act 1995, section 17 allowed the Commission to request and access material relevant to the appeal. Consequently, it was of the view that release to the wider public under FOIA would not be required to determine if a miscarriage of justice had occurred.
79. Furthermore, whilst TNA accepted that it was not an expert on this area, it appeared to it that the information within the withheld file, taken on its own, did not address or inform about the conduct of the trial and was in many ways a very standard court file, containing lists of exhibits, police reports and copies of witnesses' statements. It therefore believed that it added little to the impression or argument that the trial was unfair. TNA noted that the file did not contain the specific documents which it had been argued would help assess the correctness of the conviction such as the judge's summing up or directions. The majority of the information was the personal statements and evidence of the witnesses containing their personal data and that of third parties.
80. TNA noted the relevant comments of the First-Tier Tribunal in *McFerran v Information Commissioner (EA/2012/0030)* in which it stated that:

*"A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principle, including the determination of what is "necessary" for the purpose of identifying a legitimate interest. In order to*

*qualify as being "necessary" there must be a pressing social need for it...And if a public or legitimate interest does exist this must be balanced against the rights, freedoms and legitimate interests of the individuals whose information is sought". (Para 10)*

81. TNA informed the Commissioner that it did not believe that the complainant had offered any substantive arguments as to why the rights of the individuals whose personal data was contained in the withheld information should be overridden. It emphasised that it had to observe its obligations to those living individuals and their rights under the Data Protection Act. It believed that the rights and interests of those individuals might be impacted by the release of the withheld information, to the extent that damage or distress might be caused.

### **The Commissioner's view**

82. The Commissioner notes that the withheld information contains some of the evidence given at the trial of Stephen Ward. Clearly where cases are prosecuted in open court, as this one was, personal data will be disclosed to those in attendance. Some of that data, as again in this case, may be reported in the media. However, in the Commissioner's view, just because personal information is disclosed during the course of a court hearing, and some of that information subsequently appears in the media, does not necessarily mean that it would be fair to disclose detailed records of the evidence given by witnesses under FOIA. He notes the complainant's argument that the media exposure in this case was extensive. However, having read the withheld information, he considers that any reports in the media about this case are unlikely to have contained the level of detail contained in the records of witnesses' evidence included in the withheld information.
83. The Commissioner is of the view that whilst a witness will realise that their personal information may be disclosed in court, this is a far more restricted disclosure than to the public under FOIA. In addition, he believes that the more time that has elapsed since the date of a court case, the less likely any disclosure of that information would be fair. This is particularly so when the information dates from a time long before FOIA was on the statute book. Given the time that has elapsed in this case since the original trial in 1963, and even in light of the extensive media coverage that occurred at the time, the Commissioner does not consider that it would have been within the reasonable expectations of the witnesses that detailed records of their evidence would be released to the public at this point in time.
84. Section 40(2) requires that potential prejudice to the rights, freedoms and legitimate interests of the individuals who gave evidence, or who

were named in evidence for the purpose of the Stephen Ward case must be weighed against the public interest in disclosure. The Commissioner acknowledges that there has been a lot of public debate over the conviction of Stephen Ward for a considerable period of time. In relation to the withheld information, the Commissioner notes that it does not contain details of legal arguments, jury questions, the judge's summing up or discussions about whether the trial should continue after Stephen Ward's attempted suicide. All of this would clearly be very important in the context of assessing whether a miscarriage of justice occurred in relation to his conviction. The fact that such details are not contained in the withheld information has an impact on the weight to be given to the public interest in disclosure when considered alongside the right to privacy of the individuals involved in this case.

85. The Commissioner considers that the fact that Stephen Ward's case is under review by the Criminal Cases Review Commission, with a view to determining whether it should be referred to the Court of Appeal, is of great significance in assessing the public interest in disclosure. In looking at this case, the Commission will have access to all the relevant information, including all of the information held by TNA. Consequently, the Commissioner believes that any potential miscarriage of justice that may have occurred will now be properly addressed by the appropriate body with relevant powers and legal expertise to fully examine the matter. In the Commissioner's view, this reconsideration by the Commission will meet the legitimate interests of the public without infringing the rights to privacy of individuals whose personal data is contained in the withheld information.
86. Taking into account all the above, the Commissioner has concluded that the strength of the legitimate interest in disclosure is not sufficient to supersede the right of the data subjects, the witnesses and others named in the withheld information, to privacy. This decision has been informed by his consideration of the reasonable expectations of those data subjects and the possible consequences of disclosure for them, particularly given the sensitive nature of a lot of the information that has been withheld. He has therefore concluded that it would be unfair to disclose the withheld information and that, consequently, TNA correctly applied the exemption in section 40(2) to the information that it has continued to withhold.

## Right of appeal

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87. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

88. 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.
89. 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 .....**

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