

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 February 2015

Public Authority: The National Archives

Address: Ruskin Avenue
Kew
Richmond
Surrey
TW9 4DU

Decision (including any steps ordered)

1. The complainant requested access to information which had been withheld from a murder file under section 40(2) – personal data. He provided evidence that some of the people he believed this information related to were now no longer living.
2. The Commissioner's decision is that The National Archives (TNA) correctly disclosed information in light of the evidence provided by the complainant. However the Commissioner finds that there is additional information that should be released.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information identified in the confidential annex to this notice which has been provided exclusively to TNA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant is seeking access to the file on a murder investigation. Much of the file is open to the public, but other information is held by TNA in a closed file on the basis that it is the personal data of a number of individuals. On 13 March 2013 the complainant provided TNA with a disc containing evidence that a number of individuals, who he speculated were witnesses involved, were now either dead or were born over 100 years ago, in which case it could be assumed they were dead. He went on to state that:

"I hope this will allow some information in DPP 2/2145 withheld under the FOIA Section 40 exemption to be released."

6. On 22 March 2013 the complainant provided evidence of the death of two other individuals he believed were involved in the case.
7. TNA responded to the request on 12 April 2013. It released some information from the closed file about individuals which it now accepted were dead but continued to withhold other information within the file under section 40(2), the exemption relating to third party personal data.
8. The complainant asked TNA to clarify whether information was still being withheld because it had rejected some of the evidence he had provided or because the withheld information related to other individuals in respect of whom he had not provided any proof of death. TNA did not address this issue directly. It was reluctant to provide any information which it believed might allow the complainant to identify those individuals whose personal data was still being withheld.
9. On 6 June 2013 the complainant queried whether TNA had accepted the evidence he had submitted in respect of one particular individual. This resulted in additional information being released on 5 July 2013.
10. The complainant and TNA continued to exchange emails on the subject of the evidence which had or had not been accepted. On 29 July 2013 the complainant provided further evidence of the death of individuals he believed were involved in the case. This again led to the disclosure of further information on 26 September 2013.
11. There continued to be an exchange of emails regarding TNA's reluctance to clarify whether it was still withholding information in respect of any individual in respect of whom the complainant had provided evidence of death. As TNA considered that it had already explained its position on this issue, it advised the complainant that it would treat any further queries as repeat requests. When, on 18 December 2013, the complainant made a further attempt to explain what clarification he was

seeking, TNA refused to deal with the matter, citing section 14 (repeat requests) as its basis for doing so. In its email of 20 January 2014 TNA offered to carry out an internal review of that decision. In response, on 10 March 2014, the complainant asked TNA to conduct an internal review of its decision to continue to withhold information from the murder file under section 40(2) in light of the evidence of death he had provided. On 21 March 2014 TNA refused to carry out a review of that decision due to the length of time that had elapsed since he made that request.

Background

12. The requested information is contained in a file relating to the murder of a Cardiff shopkeeper in 1952. Mahmood Hussein Mattan was arrested, charged and found guilty of the murder. He was hanged in September 1952. In 1969 new evidence came to light and Mr Mattan eventually received a posthumous pardon in 1998.
13. The file remained closed in its entirety when originally transferred to TNA. The complainant then asked for the file to be opened in June 2011. This resulted in a large amount of information being disclosed. However certain information continued to be withheld under section 40. Ultimately this resulted in the complainant appealing to the First Tier Tribunal – Information Rights¹. At the appeal stage the complainant narrowed the scope of his appeal in relation to the information withheld under section 40 to a list of the relevant individuals. The Tribunal decided that the complainant was not entitled to receive such a list. This was because such a list would enable, what it described as, the 'jigsaw' identification of personal data, the disclosure of which would be unfair processing under the terms of the Data Protection Act 1998 (DPA). At the time the complainant made his fresh request on 13 March 2013 approximately 75% of the file was open to the public.

Scope of the case

14. The complainant contacted the Commissioner on 9 April 2014 to complain about the way his request of 13 March 2013 had been handled. His prime concern was for the Commissioner to review the acceptability of the evidence of death that he had provided. He argued that TNA were applying too high a burden of proof in respect of this evidence. Ideally he wanted the Commissioner to reach a decision as to

¹ EA/2012/0141

whether TNA had properly accepted all the evidence he had provided of certain individuals' deaths.

15. The Commissioner's duty is to consider whether a public authority has complied with its obligations under FOIA. In this case the complainant had provided TNA with evidence of the death of individuals whose personal information he believed was being withheld under section 40(2) and he was asking whether this would enable further information to be released. For the purposes of his investigation, the Commissioner considers this complaint to be about a request for the disclosure of personal information. It is not about a request for information as to the evidence of death which is sufficient to demonstrate that an identifiable individual is in fact dead.
16. At the outset of his investigation the Commissioner wrote to the complainant and advised him that the investigation would consider whether TNA is entitled to rely on section 40(2) as its basis for continuing to withhold information from the file about any of the individuals in respect of whom he had provided evidence of death. The Commissioner emphasised that he did not intend to produce a list of the individuals accepted by TNA or himself to be dead. The complainant accepted this approach.
17. However the complainant did challenge one aspect of the investigation. Initially the Commissioner proposed to consider only TNA's handling of the request in light of the evidence of death it had been provided with by the time it originally responded to the request on the 12 April 2013. The complainant objected to the evidence of death he provided on the 29 July 2013 being disregarded. The Commissioner considered the issue further. Although the evidence provided to TNA in July 2013 was not available to it at the time TNA made its original decision on this request, the evidence does relate to the circumstances that existed at that time. That is, the evidence relates to whether certain individuals were dead, or could be assumed to be dead, at the time when the request was made and when TNA originally responded to that request. It would therefore be wrong for the Commissioner to conclude that information was personal data, and so could be withheld under section 40, if there was evidence that, at the relevant time, the individual in question had in fact been dead. Therefore in reaching his decision the Commissioner has taken account of all the evidence of death provided by the complainant, including that of the 29 July 2013.

Reasons for decision

18. Section 40(2) of FOIA states that information is exempt if it is personal data about someone other than the applicant and its disclosure to a member of the public would breach any of the data protection principles as set out in the DPA.
19. TNA has argued that disclosing the information which is still being withheld under section 40(2) would breach the first data protection principle. The first principle states that the processing of personal data shall be fair and lawful and that there must be a relevant condition under the DPA for processing that data.
20. Personal data is defined as being information which both relates to and identifies a living individual. It is important to note that 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). Therefore the Commissioner has first considered whether the information in question does relate to an individual who is still living, or whether there is persuasive evidence that they are dead, or it can be assumed that they are dead.
21. For it to be safe to assume an individual is dead it is standard practice for TNA to apply a life expectancy of 100 years. If the date of the individual's birth is known then the matter is simple. Where their date of birth is not known their current age is calculated on the assumption that if they were a child at the time the information was created they were less than one year old at that time. If they were an adult, it is assumed they were 16 years old at the time the information was created. If, based on those assumptions, they would now be over 100 years old they are assumed to be dead. Although this is a cautious approach the Commissioner accepts it is a reasonable and responsible one.
22. The TNA has explained that for it to accept that someone assumed to be younger than 100 years old is dead they would require evidence from a reliable source. Reliable evidence includes scanned images of a death certificate, a published obituary or a relevant entry in an official history. It is also necessary to prove such documents correlate to the individual identified in the record. This can be difficult where people change their name, most commonly through marriage. For example in some cases it would also be necessary to provide evidence that the Miss X named in a particular record was the Mrs Y referred to in the death certificate. This could be done by providing copies of the relevant marriage certificate.
23. The Commissioner has clarified with TNA which items of evidence of death were accepted and which, if any, were rejected. He is satisfied

that where the evidence relates to an individual whose personal information was being withheld, and where that evidence meets the required standard, TNA has accepted the individual concerned is dead and has gone onto consider whether this allows additional information to be disclosed. The Commissioner has found nothing to suggest that TNA is imposing a higher burden of proof than is appropriate.

24. The Commissioner has gone on to consider whether, in respect of the individuals who it is now accepts are dead, TNA has disclosed all the information that it should. The withheld information is mainly contained in witness statements of members of the public and officials, including police officers, and in police reports. Part of the process of investigating the murder was to build up a picture of the events surrounding the crime. As such, one witness statement may be used to corroborate other statements and therefore may include references to a number of people. This means it does not necessarily follow that because it is accepted the person providing the statement is now dead, the whole of their statement can be released. There may be elements of the statement or the police report that relates to individuals who are still known to be, or are assumed to be, alive.
25. Having carried out this exercise the Commissioner has identified some information which was originally withheld under section 40(2) but which can now be released. The amount of information is not great and may not add greatly to the narrative of the police investigation. However where the Commissioner is satisfied that the information can no longer be deemed to be personal data there are no grounds for continuing to withhold it under section 40(2). The Commissioner has identified the information in a confidential annex which has been provided exclusively to TNA.
26. The Commissioner considers that section 40(2) has been correctly applied in respect of all other information that TNA is continuing to withhold from the statements of, or in reports partially concerning, any of the individuals that the complainant has suggested are or may be dead. The information relates to people who are either known to be alive or who can be assumed to be alive due their age at the time of the murder. Some were juveniles at that time. Collectively, this personal data covers a wide range of issues including aspects of the relationships and activities individuals were involved in at the time. Some of the information would constitute sensitive personal data as defined in section 2 of the DPA. It is not possible to go into any greater detail here about the nature of the information without risking revealing the information itself or identifying the individuals concerned.
27. The Commissioner is satisfied that these individuals would not expect information they had provided 60 years previously to be disclosed in

response to this request. This is so even if at the time those individuals originally provided their statements they would have known there was a possibility they could be asked to give evidence in court. To disclose that information now would be unfair and so breach the first principle of the DPA.

28. The Commissioner's decision is that although TNA correctly assessed the validity of the evidence of death in respect of those individuals whose personal information is contained in the closed file, it then failed to disclose all the information which could no longer be withheld under section 40(2). TNA are now required to communicate that information to the complainant by making it available for inspection as part of the open file.

Right of appeal

29. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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
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SK9 5AF