

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

### **Decision notice**

**Date:** 3 February 2015

**Public Authority:** The Cabinet Office  
**Address:** 70 Whitehall  
London SW1A 2AS

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

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1. The complainant requested a file on the subject of Anthony Blunt that, according to the website of The National Archives, was still retained by the Cabinet Office. The Cabinet Office cited section 22 (information intended for future publication) as its basis for refusing to provide most of the information in the file. It withheld the remainder on the basis of section 40 (unfair disclosure of personal data) and section 41 (information provided in confidence).
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on the exemptions it has cited as its basis for refusing to provide the file.
3. No steps are required.

#### **Request and response**

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4. On 4 March 2014, the complainant requested information of the following description:

"I would like to request access to two files which both relate to the late Sir Anthony Blunt.

The catalogue of the National Archives describes them as PREM 15/1911 and PREM 16/2230.

According to the catalogue the files are 'closed and retained' by the Cabinet Office.

I believe the files should now be opened and I do not anticipate any data protection or security implications”.

5. On 27 March 2014, the Cabinet Office responded. It explained that file PREM 16/2230 was being prepared to be released to The National Archives for disclosure (with redactions). It said that it expected the file to be opened on 31 August 2014. It gave contact details for The National Archives.
6. It explained that the information in file PREM 16/2230 which was to be published was therefore exempt under section 22 (information intended for future publication). It explained that other parts of the file PREM 16/2230 which were not going to be published were exempt under the following exemptions:
  - section 23(1) (security bodies)
  - section 40(2) (unfair disclosure of personal data)
  - section 41(1) (information provided in confidence)
7. It explained that the information in file PREM 15/1911 was being withheld because it is exempt under section 23(1).
8. The complainant requested an internal review on 1 April 2014. The Cabinet Office sent him the outcome of its internal review on 28 May 2014.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 5 June 2014 to complain about the way his request for information had been handled. In correspondence with the Commissioner, the complainant agreed to exclude from further consideration information to which section 23 had been applied.
10. The Commissioner has therefore considered the application of section 22, section 40 and section 41 to that information in file PREM 16/2230 to which section 23 has not also been applied.

### **Reasons for decision**

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11. Section 22 provides an exemption from the duty to disclose in relation to information that is intended for future publication. This exemption includes the caveats that the requested information must have been

held with a view to publication at the time that the request was made, and it must be reasonable in the circumstances to withhold the information from disclosure until the date of the intended publication.

12. Consideration of section 22 is a two-stage process. First, for the exemption to be engaged the public authority must be able to demonstrate a clear intention to publish the requested information and the caveats referred to above must be satisfied. Secondly, this exemption is qualified by the public interest, which means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
13. Covering first whether the exemption is engaged, the first issue to consider is whether there was a settled intention on the part of the Cabinet Office to publish the information.
14. The Cabinet Office asserted that there was a settled intention to publish at the time of the request. It had originally intended to do this by August 2014 but explained that it would now do so by "early 2015".
15. The Cabinet Office explained that there had been some slippage in the timetable because of the complexity of the documents and because files on Anthony Blunt had been the subject of three requests under the FOIA the consideration of which, it implied, interrupted the process by which documents are transferred to TNA. It also provided general information about the process by which information is transferred to TNA. It said that the process was quite lengthy and involved consideration by the Lord Chancellor's Advisory Council which only met quarterly to consider and, where appropriate, to recommend the retention of information contained in documents considered for transfer to TNA.<sup>1</sup> Opportunities to submit documents to the Panel are therefore somewhat limited. The Cabinet Office explained that the process in relation to the relevant documents was well advanced by the time the request came in and it did not consider it reasonable to interrupt the process for the benefit of one person when the purpose of the process was to make information available to all at TNA.
16. The Commissioner accepts this position. He accepts that there was a clear intention to publish at the time of the request. He also considers it reasonable to wait until the intended date of publication (given that it is relatively soon) rather than disrupt an ongoing process which is aimed at facilitating public access to this information. This process is an

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<sup>1</sup> <http://www.nationalarchives.gov.uk/advisorycouncil/meetings.htm>

accepted practice in line with legislation. Information must be prepared prior to transfer to TNA and then prepared for publication at TNA. The Commissioner acknowledges that there has been some slippage in the proposed transfer date but he is not aware of any evidence of deliberate delay on the Cabinet Office's part. While the case of Anthony Blunt is likely to remain of considerable historical interest, the Commissioner does not see a pressing need to over-ride or expedite the normal process in the circumstances of this case.

17. He has therefore concluded that the information intended for transfer to TNA is exempt from disclosure under section 22(1). For clarity, the Commissioner would stress that it is not engaged in relation to the information in the file which the Cabinet Office intends to keep back from TNA. The Cabinet Office did not apply section 22(1) to this information. It applied other exemptions which are considered later in this notice.

### **Balance of public interest test**

18. By virtue of section 2, section 22(1) is subject to the public interest test. This means that the Cabinet Office can only rely on section 22(1) if the public interest in doing so outweighs the public interest in disclosure ahead of schedule, that is, as at the time of the request.

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

19. The complainant's arguments focussed on disputing that there was a settled intention to publish any of the file. As noted above, the Commissioner has concluded that there was a settled intention to do so such that section 22(1) is engaged.
20. The complainant's arguments also, however, made reference to the age of the information and the fact that Anthony Blunt is now dead as reasons why the sensitivity of the information had diminished such that it should now be released.

### **The Cabinet Office's arguments**

21. The Cabinet Office acknowledged a public interest in the disclosure of information about events of historical interest including the unmasking of Anthony Blunt as a spy for the Soviet Union. It acknowledged the benefits of openness to increase "public trust in and engagement with the government".
22. However, it argued that there was a greater public interest in maintaining the confidence of journalists as a whole (the complainant is a journalist), scholars and the public by ensuring the regular transfer of records to TNA. It said that given the impending transfer of the majority

of the requested file to TNA there was no justification to make a disclosure of that information ahead of time to one person. It stressed the complexity of the process involved in preparing a file for transfer to TNA particularly where it is considering redactions (as is the case here) and there is little wider public benefit in disrupting this process for one person.

23. It said that the majority of the file would be opened in early 2015 and that the public interest factors in disclosure that it had identified would be satisfied then.

### **The Commissioner's position**

24. The Commissioner's approach when considering the public interest in relation to this exemption is that this is more likely to favour disclosure where the planned date of the publication is far in the future, or where there is no firm indication of a likely date of publication.
25. In this case, the Commissioner is satisfied that there is a settled intention to disclose a large portion of the requested file in 2015. In the circumstances, the Commissioner does not regard the timescale for intended publication as too remote from the date of the request. The remaining question is whether it was in the public interest for the disclosure of this information to have been delayed for about a year from the date of the request, or whether the public interest would have been better served by publication at that time.
26. The Commissioner agrees with the complainant that there is a public interest in disclosure of the information he has requested. The public revelation that Anthony Blunt, who had been Surveyor of the Queen's Pictures, had also been a spy for the Soviet Union, had shocked the country.<sup>2</sup> It raised many questions as to how his activities were undetected and, once detected, how he was able to obtain immunity from prosecution. This is not a matter of purely historical interest. There remains a public interest in knowing more about the circumstances in which Anthony Blunt gained a position in the Royal Household. Examination of papers relating to the Blunt case would inform the public about these matters, which still provoke debate today.

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<sup>2</sup> <http://www.telegraph.co.uk/news/uknews/5889879/Anthony-Blunt-confessions-of-spy-who-passed-secrets-to-Russia-during-the-war.html>

## **Section 22(1) - Conclusion**

27. In the Commissioner's view, there was and is no pressing public interest in disclosing the relevant information in advance of the normal timescale. There was no particular public interest requirement for it to have been published during the interim period between the making of the request and anticipated publication at TNA. Preparation for transfer was already under way at the time of the request and the public interest would not be well served by interrupting that process in the circumstances. The transfer process itself supports the principle of public access to information generally. Therefore, the conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in earlier disclosure in response to the complainant's request.

## **Section 40(2)**

28. Section 40(2) of FOIA states that personal data (which is not the personal data of the requester) is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act ("DPA"). The term "personal data" is defined specifically in the DPA.<sup>3</sup>
29. The first question for the Commissioner is therefore whether the information to which section 40 has been applied is personal data. Personal data is information relating to a living, identifiable individual and which is biographically significant about them.
30. In determining whether information is the personal data of individuals other than the requester, that is, third party personal data, the Commissioner has referred to his own guidance and considered the information in question.<sup>4</sup> He has looked at whether the information relates to living individuals who can be identified from the requested information and whether that information is biographically significant about them.

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<sup>3</sup> <http://www.legislation.gov.uk/ukpga/1998/29/contents>

<sup>4</sup>

[http://www.ico.org.uk/for\\_organisations/data\\_protection/the\\_guide/~/media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/PERSONAL\\_DATA\\_FLOWCHART\\_V1\\_WITH\\_PREFACE001.ashx](http://www.ico.org.uk/for_organisations/data_protection/the_guide/~/media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx)

31. To avoid inadvertent disclosure of the information itself, the Commissioner does not propose to go into further detail as to why the information is personal data. Suffice it to say that he is satisfied that it relates to living, identifiable individuals and is biographically significant about them.
32. The next question for the Commissioner is whether disclosure of that personal data would contravene any of the DPA data protection principles.

**Would disclosure contravene any of the DPA data protection principles?**

33. The complainant asserts that there are no data protection implications arising from disclosure given its age. The Commissioner has taken this into account when reaching his view.
34. The data protection principle that is normally considered first in relation to section 40 is the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

at least one of the conditions in Schedule 2 is met, and

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

35. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
  - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
    - what the public authority may have told them about what would happen to their personal data;
    - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
    - the nature or content of the information itself;
    - the circumstances in which the personal data was obtained;
    - the particular circumstances of the case, e.g. established custom or practice within the public authority; and
    - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
  - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed?

- In consideration of this factor, the Commissioner may take into account:
- whether information of the nature requested is already in the public domain;
  - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
36. Furthermore, notwithstanding the individual in question's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
37. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing.
38. The Commissioner is satisfied that the data subjects in question – the individuals to whom the personal data relates – would expect the information to be withheld and that this expectation is reasonable. Although the information relates in part to their professional lives rather than their personal lives, it was collected in circumstances where confidentiality was expected. The relative age of the information does not diminish that expectation in the circumstances of this case. As to the damage or distress that may be caused by disclosure, again the Commissioner accepts that despite the passage of time, there is a general and reasonable expectation that such information would not be made publically available and disclosure could cause distress.
39. Further detail of the Commissioner's reasoning can be found in a Confidential Annex to this Notice, to be served only on the public authority. The Commissioner has considered whether partial disclosure would be possible in this case and has concluded that it would not.

## **Section 40(2) - Conclusion**

40. The Commissioner agrees that disclosure of any of the personal data in the withheld information would contravene the first data protection principle of the DPA. This information is therefore exempt from disclosure under section 40(2).



## **Section 41 – information provided in confidence**

41. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.
42. The Commissioner is satisfied that the withheld information which is not personal data but which was obtained by the Cabinet Office from another person or persons was provided in confidence

### **Would disclosure constitute an actionable breach of confidence?**

43. In considering whether the disclosure of information would constitute an actionable breach of confidence the Commissioner will consider the following:
  - whether the information has the necessary quality of confidence;
  - whether the information was imparted in circumstances importing an obligation of confidence; and
  - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

### **Does the information have the necessary quality of confidence?**

44. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
45. The Commissioner is satisfied that the information is not trivial and is not otherwise accessible. He is therefore satisfied that it has the necessary quality of confidence. More information about the withheld information is set out in a confidential annex to this notice.

### **Was the information imparted in circumstances importing an obligation of confidence?**

46. The Commissioner is satisfied that the relevant information in this case was imparted in circumstances importing an obligation of confidence. This is information about a sensitive issue, namely, Anthony Blunt and the information to which section 41 has been applied was clearly recorded in confidence.

### **Would disclosure be of detriment to the confider?**

47. The Commissioner is satisfied in the circumstances of this case that disclosure would be entirely contrary to the confider's expectation and that there would be detriment to the confider.

### **Is there a public interest defence for disclosure?**

48. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Cabinet Office could successfully rely on such a public interest defence to an action for breach of confidence in this case.
49. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. That is not applicable here.
50. The Commissioner does not consider that, in the circumstances of this case, there is a more weighty argument in favour of disclosure. Having considered all the circumstances of this case, and the withheld information itself, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.

### **Section 41 - Conclusion**

51. Further detail of the Commissioner's reasoning can be found in a Confidential Annex to this Notice. For the reasons stated, the Commissioner finds that the information to which the exemption was applied, was correctly withheld under section 41 of the FOIA.

## Right of appeal

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52. 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)

53. 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.
54. 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**