

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2015

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the file listed as closed HO 287/1003 Crime prevention: co-operation with insurance companies; arson and fraud on insurance companies. The National Archives (TNA) refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that The National Archives (TNA) has correctly applied sections 40(2) of FOIA to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 21 January 2015, the complainant requested (in person) to review a file as he was interested in fraudulent arson and the career of [redacted name] sentenced in 1934:

'HO 287/1003 Crime prevention: co-operation with insurance companies; arson and fraud on insurance companies'
5. TNA responded on 9 February 2015. It was unable to open the file and cited section 40 (2) (by virtue of section 40 (3) (a) (i)) of FOIA as its basis for doing so:

'the exemption applies because it contains the personal and sensitive personal data of identified individuals believed still living. Personal information contained within these documents includes details of the personal financial lives of a number of identified individuals. Sensitive personal data contained within these documents includes information about the health of identified individuals, as well as details of unsubstantiated allegations made against named individuals.'

6. Following an internal review TNA wrote to the complainant on 8 April 2015 and maintained its position.

Scope of the case

7. The complainant contacted the Commissioner on 11 July 2015 (and after providing additional documents the case was accepted on 7 August 2015) to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if TNA has correctly applied section 40(2) FOIA to the withheld information.

Reasons for decision

Section 40(2) – Third party personal data

9. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data?

10. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
11. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
12. TNA has explained that the closed file relates to unsubstantiated allegations into fraudulent insurance claims and the majority of the file is comprised of the personal data of identified individuals. The

Commissioner has viewed the file and the individuals are clearly identified by name.

13. The individuals are believed to be still living. If the individual is no longer living the information is not personal data and so cannot be withheld under section 40(2).
14. Although the complainant has stated that the main subject that he is interested in [redacted name] is deceased, TNA considered section 40(2) was applicable to the personal data of the third parties mentioned in the file who it is reasonable to assume may still be alive adopting the 100 year rule¹. This has previously been explained to the complainant.
15. 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.
16. The Commissioner considers that the information withheld under section 40(2) is information from which living data subjects would be identifiable.

Sensitive personal data

17. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
 - (a) racial or ethnic origin
 - (b) political opinions
 - (c) religious beliefs
 - (d) trade union membership
 - (e) physical or mental health
 - (f) sexual life
 - (g) criminal offences, sentences, proceedings or allegations.

¹ www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf

18. The requested information falls into some of these categories of sensitive personal data. TNA has stated that the file contains details of unsubstantiated allegations made against named individuals, as well as information about prior convictions and medical health.
19. Upon viewing the withheld information the Commissioner considers it would be sensitive personal data.

Would disclosure breach the Data Protection Principles?

20. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
21. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

22. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
23. The information in this case concerns the sensitive personal information of named individuals and there is no expectation from these living individuals that their personal information would be made publicly available during their lifetimes.

'These individuals would not have any expectation that this information would be made available within the public domain during their lifetimes and to do so would be unfair to them. The file does not go on to inform as to whether any conviction was ever achieved. Thus the charges remain unsubstantiated allegations and represent sensitive personal data as defined by the DPA.'

24. The Commissioner understands that TNA would not routinely make public such information.
25. To avoid inadvertent disclosure of the information itself, the Commissioner does not propose to go into further details in this decision notice. However, he is satisfied that the individuals to whom the

personal data relates would expect the information to be withheld and that this expectation is reasonable.

Consequences of disclosure

Damage and distress

26. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the named individuals.
27. TNA argued that disclosure of the contents of the file into the public domain would be distressing for the identified individuals where unsubstantiated allegations have been made.

'Disclosing details on the possible crimes individuals may have committed would be unfair. This data was collected for the specific purpose of assessing how potential criminal prosecutions are made from private investigations into insurance fraud. In such an event that any of the suspect criminal offences went to trial, an individual would have the opportunity to defend such allegations, which they do not have at the initial investigation stage.'

28. TNA had explained to the complainant that redaction was not possible.

'We are conscious of the jigsaw effect which could occur with the partial release of information from this record. Any release which alludes to identities we were, or are protecting could contribute to the jigsaw effect, as described by the Tribunal in paragraphs 69-70 of their decision – EA/2012/0141².

"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."

Information within this record would only lose that quality of being personal data if anything that could identify the individuals were redacted. Therefore the full closure of this document has not just been applied for the protection of names of individuals, but to protect the personal and confidential information it holds in relation to living and identifiable individuals. Where we cannot be sure if anonymisation is

² <http://www.hendersonchambers.co.uk/wp-content/uploads/pdf/ea-2012-0141-decision-2013-02-151.pdf>

achievable we have to take the position that this information remains sensitive and it should be withheld.'

29. Upon viewing the contents of the withheld information, the Commissioner accepts that disclosure would be distressing for the named individuals. Information exempt under section 40(2) is scattered throughout the documents and makes up the majority of the file. Therefore complete anonymization is extremely problematic to achieve.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

30. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
31. In this case, the Commissioner is not convinced that the specific information requested, while of significant interest to the complainant, is of sufficient wider public interest to warrant overriding the protection of the third party sensitive personal data of those concerned.
32. Having considered TNA's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that TNA has put forward for protecting the individuals' personal data, namely:
- the individuals' likely expectation about how their sensitive personal data will be managed
 - the individuals' lack of consent to its release; and
 - the possible negative consequences to the individuals of releasing the information.
33. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the individuals named within the file and that it would not be fair to disclose the requested information in this case.

Conclusions

34. The Commissioner is satisfied that the withheld information is sensitive personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned. The Commissioner upholds TNA's application of the exemption provided at section 40(2) of the FOIA.

Right of appeal

35. 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

36. 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.
37. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF