

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 06 March 2019

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

Decision (including any steps ordered)

1. The complainant requested a copy of the closed extract from the file AIR 81/1953. The request was refused by the National Archives (TNA) on the grounds of health and safety (section 38(1) of FOIA) and third party personal data (section 40(2) of FOIA). The Commissioner has found that sections 38(1) and 40(2) are engaged. The Commissioner found a procedural breach of section 10.
2. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

3. On 4 July 2017 the complainant requested the following information:
'AIR 81/1953 - Pilot Officer A Obolensky (Polish): killed; aircraft accident, Martlesham, Hurricane L1946, 504 Squadron, 29 March 1940'
4. On 8 November 2017 TNA responded and cited section 38 of the FOIA which exempts information from disclosure if that disclosure would, or would be likely to, endanger the physical or mental health of any individual.
5. The complainant requested an internal review on 20 November 2017 which was acknowledged on the 24 November 2017.
6. On 30 January 2018 TNA concluded its review and overturned the original decision in part: *'having re-examined this information in consultation with the Ministry of Defence, it has been decided that the majority of the information can be released.'*

7. TNA explained that the redacted version of the file would be made available to the public on 7 February 2018. It stated that section 40(2) and Section 38(1)(a) still applied to a small part of the information within the file and this information remained closed. TNA also apologised for the delays in this case.

Scope of the case

8. On 16 August 2018 the complainant wrote to the Commissioner and after he provided an explanation for his delay in bringing the complaint to the Commissioner, the complaint was accepted on 24 September 2018.
9. The focus of the Commissioner's investigation is to determine whether sections 38(1) and 40(2) of FOIA were applied correctly by TNA as a basis for refusing to disclose the withheld information under FOIA.

Reasons for decision

Section 38 – Health and safety

10. Section 38(1) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to:
 - (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual
11. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
12. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of disclosure of the information in question is "real, actual and of substance", rather than trivial or insignificant. As part of this she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
13. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that is envisaged would, or would be likely to occur relates to the applicable interests described in the exemption.

Secondly, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

14. The Commissioner has viewed the withheld information. She will not provide any further detail on the withheld information in case she inadvertently reveals the nature or source of this information.
15. In this case TNA's justification for applying section 38(1) of FOIA rests on the following:
 - Whilst it is widely reported that Pilot Officer Obolensky was killed due to a broken neck, the specific details of the injuries included in the file are not in the public domain. Therefore the release of this information would be likely to be highly distressing for surviving family members, causing them significant mental anguish.
 - It is for these living individuals who have suffered – and may be at risk of future suffering – that this exemption is designed to protect.
 - Disclosing information now, which may not have been known by or shared with living relatives, many years after the event, may be highly distressing to the living relatives.
16. The complainant disputes that the extract should be withheld on grounds of health and safety. He argues that
 - He has been in contact with surviving members of the family and believed that the mental anguish would not be significant. They are already aware of the information in the public domain.
17. Having viewed the withheld information, the Commissioner is satisfied that the nature of the harm referred to by TNA is relevant to the exemption. The Commissioner will not discuss the injuries in detail in case some of the withheld information is revealed.
18. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by TNA. In her guidance on the

prejudice test¹, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice would or would be likely to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.

19. In this case TNA have relied on the second limb of the exemption: that mental endangerment 'would be likely to occur'. TNA referred to the complainant's intention to write a biography of Pilot Officer Obolensky and a previous decision notice (FS50121803) linking the significance of publicity/media coverage of disclosed information to mental endangerment. TNA argued that there was an obvious and clear potential that *'with the release of this information and the possible media interest in any disclosed material, the risk of mental distress ... is significantly more than remote'*.
20. Whilst unable to provide definitive or evidential link between disclosure of the information and any endangerment, TNA argued that release of the graphic descriptions of the accident would be likely to evoke painful and disturbing thoughts, thus endangering the mental well-being of the family individuals.
21. Her analysis of the arguments provided has led the Commissioner to conclude that section 38(1)(a) is engaged on the basis that the risk of endangerment is substantially more than remote. As section 38 is a qualified exemption, however, consideration must be given to the balance of the public interest in disclosure.

Public interest arguments in favour of disclosure

22. TNA considered the following arguments in favour of disclosure:

- The aircraft crash in which Pilot Officer Obolensky was killed took place over 77 years ago.
- Details of all air accidents are of legitimate historic interest and, in this case, contribute to the history of the Second World War.

¹http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf

23. The complainant stated that *'it is in the public interest to understand what happened in the accident, to facilitate the truest possible account of these historical events.'* He also said that he has spoken with surviving members of the family and believed that the mental anguish would not be significant.

Public interest arguments in favour of maintaining the exemption

24. TNA considered the following arguments in favour of maintaining the exemption:

- This file includes a detailed description of the injuries which killed Pilot Officer Obolensky which, if released, is likely to be highly distressing for the victim's surviving family and cause them significant mental anguish.
- The specific details of Pilot Officer Obolensky's injuries would not have been in the public domain. Release of this material after such a prolonged period of time would have the same endangering effect on his surviving family's mental health as releasing it for the first time.
- There is a profound public interest in not endangering the mental health of a victim's surviving family members.

Balance of the public interest

25. TNA balanced the need for an open historical record against safeguarding the mental health needs of individuals. Additionally, the passage of time in this instance is not seen as a factor in favour of release. A release now could be as damaging or distressing to living relatives as if made at the time.
26. The Commissioner notes that the balance for public interest between an open historical record and safeguarding members of the public's mental well-being can be seen by the fact that the majority of the file was opened as a result of this FOIA request in February 2018. Section 38(1) remains applied to a very small part of the original file.
27. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.
28. The Commissioner considers that the strength of the arguments for disclosure (an open historical record as evidenced in the majority being in an open file) is outweighed by the public interest in maintaining the exemption to safeguard the members of the public's mental well-being by withholding the information in the extract.

29. Therefore, in all the circumstances, the Commissioner has decided that the balance of the public interest favours maintaining the exemption.

Section 40(2) Personal information

30. The public's right of access to the personal data of third parties is in effect governed by the Data Protection Act. At the time the request was made and dealt with by TNA the relevant Data Protection Act was the 1998 Act. Since that time the Data Protection Act 2018 has come into force and section 40(2) of the FOIA has been amended to accommodate the changes it has introduced. However the Commissioner's role is to determine whether TNA correctly applied the legislation that was in force at the time it was handling the request.
31. At that time section 40(2) of the FOIA provided that a public authority is entitled to refuse a request for information which constitutes the personal data of someone other than the person making the request, if disclosing that information would breach any of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the DPA).

Section 40(2)

32. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.’
33. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.
34. 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.

Is the information personal data?

35. 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.
36. 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 rule². This has previously been explained to the complainant.
37. 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.
38. The Commissioner has reviewed the withheld information and notes that there are a number of individuals identified by name, who following the 100 year rule must be assumed to still be living. Therefore, the Commissioner is satisfied that the remaining withheld information in this case constitutes personal data as it relates to individuals who are assumed to be still living.
39. The next question for the Commissioner is whether disclosure of that personal data would contravene any of the data protection principles.

Would disclosure contravene any of the data protection principles?

40. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully".

² www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf

41. 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.
42. TNA have stated that whilst the facts surrounding the identities of the individuals cannot be verified, it is TNA's position that to release the withheld information would risk exposing these individuals, assumed still living, to a level of scrutiny and speculation that they may wish to avoid.
43. TNA argues that these individuals would have reasonable expectations that their personal data would be protected and had not given consent:

'The persons mentioned in this file would have no knowledge that their information and communications with the MoD would be used for any other purpose. There is no indication within the file that any of those mentioned gave at the time or subsequently, their consent that their information would be used or processed in any other way.'

44. The complainant has stated that he is *'NOT seeking to have redactions removed that deal with the sending of telegrams and letters AFTER the accident.'*
45. As stated previously, to avoid inadvertent disclosure of the information itself, the Commissioner does not propose to go into further details in this decision notice and will not confirm if the personal data relates to correspondence after the accident. However, she is satisfied that the individuals to whom the personal data relates would expect the information to be withheld and that this expectation is reasonable. Therefore, to disclose the information would breach the first data principle.

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

46. 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.
47. TNA considers that the public interest would not favour disclosure. The judiciary have differentiated between information that would benefit the public good and information that would meet public curiosity.
48. TNA referenced a Tribunal case EA/2012/0030 which highlighted 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'.

49. TNA argued that the potential value that this could add to the public knowledge does not outweigh the public interest in protecting this data and the rights and freedoms of the individuals involved. It is in the legitimate interests of the public to uphold the rights of living individuals or individuals presumed to still be alive whose personal information are included within this file.
50. Whilst the Commissioner acknowledges that there is a legitimate public interest in disclosing information which would add to the historical account and further public knowledge, she does not consider that this outweighs the interests of the data subjects in this context.
51. The Commissioner therefore considers that section 40(2) FOIA was correctly applied in this case to the withheld information.

Procedural matters

52. Section 10(1) of the FOIA states that a public authority should respond to a request promptly and in any event no later than 20 working days of receipt.
53. There are a number of special provisions in respect of public records offices such as TNA which provides for additional time to consult with the body which transferred the record to their keeping and for the responsible authority to carry out the public interest test.
54. It is apparent in this case that although TNA provided regular updates to the complainant, it took 91 working days to respond to the request and so breached section 10(1) of the FOIA.

Right of appeal

55. 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

56. 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.
57. 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
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