

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 April 2021

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

Decision (including any steps ordered)

1. The complainant has requested information from the closed file MEPO 3/341. The National Archives (TNA) has withheld the information under section 40(2) of the FOIA because it says it is the personal data of a third person.
2. The Commissioner's decision is as follows:
 - The requested information is exempt from disclosure under section 40(2) of the FOIA as it is the special category personal data of a third person and disclosure would be unlawful.
3. The Commissioner does not require TNA to take any remedial steps.

Request and response

4. On 12 April 2020 the complainant wrote to TNA and requested information in the following terms:

"I think that our last communication was in March 2015 when you sent me the releasable aspects of the following file;

MEPO 3/34 Gross indecency and suspected murder of his brother in the Irish Free State on 18 July 1928: warrant executed in United Kingdom, against Gerrard Conheady, London Mental Home patient.

Part of the file could not be released in 2015 because it could not be safely assumed that the person to whom that particular section related was deceased.. your detailed explanation for the non-disclosure contained a paragraph/sentence which stated and I quote "The information will continue to be withheld until 2019 when this individual can be considered to be deceased" end of quote.. I shall enclose a copy of the page containing the relevant statement which I have quoted above.

In view of the content of the quoted statement and because it is now the year 2020 ie one year past the year to which the undisclosed section of the file could be withheld I am now requesting that the unreleased section of the file be released to me as the final part of the file which file I applied to be released under the Freedom of Information Act in 2014."

5. TNA issued the complainant with a refusal notice on 27 May 2020. It withheld the requested information under section 40(2) of the FOIA noting that it related to a particular individual and particular circumstances.
6. TNA went on to explain that the individual's date of birth is not given in the file and on initial review in 2014/15, it had been estimated that they were around 14 years of age at the date of the file. However, the closure status of the extract was revisited in 2018 and the estimation of the individual's age was reconsidered. As the individual was described as a child at the time a particular event occurred, it was considered that, in fact, they could have been as young as one. The opening date on 'Discovery', TNA's document search engine, had been updated accordingly to 2028, by which point, TNA said, the individual would be over 100 years of age and could be safely assumed to be deceased. TNA confirmed that this closure status and opening period were considered to remain valid following this additional review.
7. TNA provided the complainant with an internal review on 27 August 2020. It upheld its original position, explaining in some detail why it did so.

Scope of the case

8. The complainant contacted the Commissioner on 26 June 2020 to complain about the way his request for information had been handled.

9. The Commissioner's investigation has focussed on whether TNA correctly applied section 40(2) of the FOIA to the information the complainant has requested.

Reasons for decision

Section 40 - personal information

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Second, 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 (DP) principles.

Is the information personal data?

14. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The information being withheld in this case is the name, an indication of age, gender and location of a specific individual. Clearly such information would be that individual's personal data if that individual was still living at the time of the request. This is the factor that is in dispute; the complainant considers that the individual would not still be alive.
19. As it did in its correspondence to the complainant, in its submission to the Commissioner, TNA has noted that the age of the individual is not provided in the file in question, but they are described as being aged under 14 years. TNA has therefore taken the assumption that the individual could be aged at least one at the time the record was created in 1928. TNA has advised that it is standard government practice to assume that an individual is still living if they would not yet have reached the age of 100. Where an individual's birth date is not given in a file, it is estimated and the 100 year principle applied.
20. TNA says it has long relied on this practice and that the Commissioner has previously been content that it does so, as paragraph 37 of her decision in [FS50776907](#) attests.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the individual in question. The Commissioner also considers that TNA's approach with regard to the possible age of the individual at the time the record was created is appropriate. She agrees that the individual may still have been alive at the time of the complainant's request. The Commissioner is therefore satisfied that this information falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

25. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
27. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

28. Information relating to special category data is given special status in the GDPR.
29. Article 9 of the GDPR defines ‘special category’ as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation.
30. The Commissioner does not intend to detail her reasoning in this notice but having considered the wording of the request and viewed the withheld information, the Commissioner finds that the requested information can be categorised as special category data.
31. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
32. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
33. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

34. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

The Commissioner's view

35. The Commissioner has decided that TNA was entitled to withhold the information under section 40(2) of the FOIA, by way of section 40(3A)(a).

Right of appeal

36. 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@justice.gov.uk

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

37. 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.
38. 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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Wycliffe House
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