

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 September 2022

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

Decision (including any steps ordered)

1. The complainant has requested the closed record, MEPO 2/10062.
2. The National Archives ('TNA') refused to provide the requested information, citing section 40(2) (personal information) of FOIA.
3. The Commissioner's decision is that TNA is entitled to withhold the whole record under section 40(2).
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 9 June 2021 the complainant wrote to TNA, via its catalogue, and requested the following information:

"MEPO 2/10062 - Murder of PC Leslie MEEHAN by 'Gypsy' Jim SMITH on 2 March 1960."
6. On 7 September 2021 TNA responded. It stated that the entire record was exempt under section 38 (health and safety). TNA also applied section 40(2) (personal information) to the record.
7. The complainant requested an internal review on 8 September 2021.

8. TNA sent the outcome of its internal review on 5 October 2021. It revised its position slightly, explaining that it now considered only some information was exempt under section 38. It upheld its previous position regarding section 40(2).

Scope of the case

9. The complainant contacted the Commissioner on 1 November 2021 to complain about the way that their request for information had been handled.
10. The complainant argued that disclosure was in the public interest and was necessary to inform an academic piece surrounding the treatment of the gypsy and traveller community within the criminal justice system.
11. The complainant emphasised that their focus lay with the defendant and not the victim and that they would be happy to receive a redacted version of the record, minus the information that engages section 38.
12. Since it is TNA's position that section 40(2) applies to the record, to the extent that anonymisation is unachievable and precludes disclosure of a redacted copy, the Commissioner will consider section 40(2) first.
13. Then, depending on his findings, he may move on to consider TNA's application of section 38.
14. As part of the Commissioner's investigation he has reviewed record MEPO 2/10062 ('the withheld information'). He will not provide a detailed summary of the withheld information, as doing so would reveal the substance of that information.
15. However, the Commissioner can reveal that the withheld information is a paper, historic record that relates to the death of PC Leslie Meehan, who was killed in the line of duty on 2 March 1960. Jim Smith was initially convicted of the murder of PC Meehan. The sentence was subsequently commenced to manslaughter and then amended to murder.

Reasons for decision

Section 40 – personal information

16. Section 40(2) of FOIA states:

"Any information to which a request for information relates is also exempt information if-

- (a) It constitutes personal data which does not fall within subsection (1), and
- (b) The first, second or third condition below is satisfied."

Subsection (1) refers to exempt information that constitutes personal data of which the applicant is the data subject.

17. In this instance the relevant condition is contained in section 40(3A)(a) which states:

"The first condition is that the disclosure of the information to a member if the public otherwise than under this Act-

- (a) Would contravene any of the data protection principles."

18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA18'). If this is not the case then section 40 cannot be used as a basis for refusing to disclose the information.
19. Secondly, and only if the Commissioner is satisfied that the requested information constitutes personal data, he must establish whether disclosure of that information would breach any of the data protection principles.

Is the requested information personal data?

20. Part 1, Section 3(2) of the DPA18¹ defines personal data as:

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable from that information.
22. 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.

¹ [Data Protection Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)

23. An identifiable living individual is one who can be identified, either 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 more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
24. TNA has explained to the Commissioner that 'Personal data within this record belongs to the defendant, as well as witnesses and third parties mentioned in witness testimonies.' The punishment for murder, at the time of the defendant's sentencing, was the death penalty. However, it is unclear to the Commissioner if the defendant is still alive.
25. Even so, the Commissioner is satisfied that the withheld information contains a large amount of personal data. This personal data takes the form of: names, addresses, descriptions of events, opinions and other identifying information.
26. In line with TNA's usual practice, where it is not clear whether an individual named in a document is living or dead, and where their age is unknown, it is standard practice to assume that the individual was at least 16 years old at the time of the record, and is still living if they would not have reached the age of 100.²
27. The Commissioner agrees that, where it cannot be determined if an individual is alive or dead, this is a cautious but pragmatic approach.

Special category data

28. Special category data is personal data that requires more protection because it is sensitive. Personal data revealing an individual's ethnic or racial origin is classed as special category data.
29. TNA has explained the withheld information reveals the ethnic and racial origin of an individual and, therefore, contains special category data. Whilst there are several references to the defendant's ethnicity and race in the public domain, and even TNA's catalogue references 'Gypsy' Jim Smith' (paragraph 5), consideration must be given to the other special category data that is contained within the record.
30. Gypsy and traveller communities are protected against racial discrimination because they are regarded as ethnic groups under the Equality Act. Therefore this is special category data.

² [Guide to archiving personal data \(nationalarchives.gov.uk\)](https://nationalarchives.gov.uk)

31. Special category data cannot be processed, including disclosure under FOIA, unless one of the strict conditions listed in Article 9 of the UK General Data Protection Regulation ('UK GDPR')³ can be met.
32. The Commissioner considers that the only conditions in Article 9 that could allow the disclosure of special category personal data under FOIA are:
 - a) the data subject has given explicit consent to the disclosure;
 - e) the personal data in question has been manifestly made public by the data subject.
33. The Commissioner has seen no evidence or indication that the data subject concerned has explicitly consented to this data being disclosed under FOIA.
34. The Commissioner is also not aware of any evidence which shows that the data subject had deliberately made this data public at the time of the request.
35. As none of the conditions required for processing special category data are satisfied, disclosing the special category data within the withheld information would breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Criminal offence data

36. Like special category data, criminal offence data is particularly sensitive and is therefore given individual status in the UK GDPR. Like special category data, criminal offence data also requires special protection.
37. Article 10 of the UK GDPR defines 'criminal offence data' as personal data relating to criminal convictions and offences. Under section 11(2) of the DPA, this includes personal data relating to:
 - (a) The alleged commission of offences by the data subject; or

³ [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data \(United Kingdom General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](#)

- (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
38. Having viewed the withheld information, the Commissioner is satisfied that it includes details of previous criminal convictions of the defendant and subsequent proceedings. The withheld information also contains criminal allegations against an associate of the defendant.
39. Again, because criminal offence data is particularly sensitive it can only be processed, including disclosure under FOIA, if one of the stringent conditions at Schedule 1, Parts 1 - 3 of the DPA18⁴ can be met.
40. The Commissioner considers that the only Schedule 1 conditions that could be relevant to disclosure of criminal offence data under FOIA are:
- Schedule 1, Part 3, paragraph 29 - consent from the data subject, or
 - Schedule 1, Part 3, paragraph 32 - data manifestly made public by the data subject.
41. The Commissioner has seen no evidence or indication that the data subject concerned has explicitly consented to this data being disclosed under FOIA.
42. The Commissioner is also not aware of any evidence which shows that the data subject had deliberately made this data public at the time of the request.
43. Again, as none of the conditions required for processing criminal offence data are satisfied, disclosing the criminal offence data within the withheld information would breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Third party personal data

44. The fact that information constitutes personal data does not automatically exclude it from disclosure under FOIA. Like special category data and criminal offence data, the Commissioner must now consider whether disclosure of the remaining personal data would contravene any of the data protection principles.

⁴ [Data Protection Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)

Would disclosure contravene principle (a)?

45. Personal data is processed when it is disclosed in response to the request. This means that a public authority can only disclose personal data in response to an FOI request if to do so would be lawful, fair and transparent.
46. In order to be lawful, one of the lawful bases listed in Article 6(1)⁵ of the UK GDPR must apply to the processing.

Lawful processing: Article 6(1)(f) of the UK GDPR

47. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states: "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data."
48. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made under FOIA, it is necessary to consider the following three-part test:

i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test

⁵ [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](https://legislation.gov.uk/eur/2016/679)

49. The Commissioner must first consider the legitimate interest in disclosing the personal data to the public and what purpose this serves. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be the requester's own interests as well as wider societal benefits. These interests can include the broad principles of accountability and transparency that underpin FOIA, or may represent the private concerns of the requestor.
50. It is important to remember that disclosure under FOIA is effectively disclosure to the world at large. The Commissioner is of the opinion that, if the requester is pursuing a purely private concern which is unrelated to any broader public interest then disclosure is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).
51. In this case it is clear that the complainant is seeking access to the withheld information for a specific reason: they wish to create a piece of academic work that focuses on the treatment of gypsy and traveller communities by the criminal justice system.
52. TNA has explained that, whilst it acknowledges the complainant's intentions, 'The judiciary have differentiated between information that would benefit the public good and information that would meet public curiosity.' Even so, compliance with FOIA will always demonstrate accountability and transparency and the requested information would contribute to a historical account.
53. With the above in mind, the Commissioner is satisfied that there is both a private, and broader, legitimate interest being pursued.

Necessity test

54. The Commissioner must also consider if disclosure is necessary for the purpose that this legitimate interest represents or if there is an alternative method of doing so.
55. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure under FOIA is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.
56. Since the record in question is currently closed, the withheld information is not in the public domain. TNA has not clarified to the Commissioner when it expects to open the record, although it has explained that it

envisages the record will be closed for the lifetime of the data subjects involved.

57. The Commissioner is satisfied that the specific information requested in this case has not otherwise been made available to the public. Therefore, there are no less intrusive means of achieving the legitimate aims identified in stage (i).

Balancing test

58. Since the Commissioner is satisfied that disclosure is necessary for the purpose that this legitimate interest represents, he will now go onto consider whether the identified interests in disclosure outweigh the interests or fundamental rights and freedoms of the data subjects.
59. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
60. In performing this balancing test, the Commissioner has considered the following:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
61. In the Commissioner's view, the balancing test should take into account whether the data subjects' concerned have a reasonable expectation that their information would not be disclosed. This expectation may be influenced by a number of factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose which this personal information serves.
62. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
63. When conducting the balancing test, both TNA and the Commissioner are in agreement that it is important to consider the circumstances in which the personal data was obtained. In this case, the personal data was collected as part of a murder investigation and, as part of this

investigation, data subjects were either questioned as witnesses or experts, or interrogated as suspects.

64. When personal data is gathered in this way, there is clearly an expectation of confidence. Whilst an individual may be happy to cooperate with a police investigation, this does not mean they will be happy for the same personal data to be released into the public domain.
65. As TNA has explained, if there is a reasonable expectation that the information provided to the police would remain closed for their lifetime, disclosure under FOIA may cause distress or harm to the data subject. The Commissioner agrees with TNA when it says 'due to the passage of time and the number of data subjects typically appearing in archival collections the time needed to trace these individuals and consult them is prohibitive.'

The Commissioner's view

66. The Commissioner does not believe that the identified interests in disclosure outweigh the interests or fundamental rights and freedoms of the data subjects. The complainant wishes to explore how gypsy and traveller communities have been historically treated by the criminal justice system but it does not seem proportionate to disclose the personal data, given the capacity in which it was given, in order to do so.
67. Whilst there is a clear private, legitimate interest being pursued here, the Commissioner does not believe the broad legitimate interest outweighs the data subjects' right to privacy. There must be a pressing social need to justify the interference with privacy rights and such interference must be proportionate.
68. Having looked at the personal data contained within the withheld information, and considering the data subjects' involvement in the matter, the Commissioner does not consider disclosure is proportionate.
69. Ultimately, the Commissioner is aware that academic research often involves drawing upon multiple sources and there will be alternative ways to fulfil the private, legitimate interest that the request represents that do not interfere with the privacy of individuals.
70. Therefore, there is no Article 6 basis for processing and disclosure of the personal data contained within the record would be unlawful. Having decided that disclosure would be unlawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.

Anonymisation

71. The complainant has indicated that they would be happy to receive a redacted copy of the withheld information. Whilst they were talking about the redaction of any information that might engage section 38, the Commissioner must also consider whether TNA could redact the personal data from the withheld information and disclose the remainder.
72. TNA has explained that 'Where we cannot be sure if anonymisation is achievable we have to take the line that this information remains sensitive and should be withheld. In order to achieve and maintain this we have to make a careful assessment of the material to ensure any consideration of redaction is balanced between the need to be transparent and the need to protect individuals' rights.'
73. TNA is mindful that there is already information about this case in the public domain and that makes redaction more difficult. For example, from information already available in the public domain, an individual may be able to deduce the identity of a data subject referred to within the withheld information, even if their names were removed. This could lead to special category data or criminal offence data being released.
74. TNA has also explained that 'The releasable material from this file makes up only a small fraction of the total content of the files due to the number of identifiers within the record, such as events, dates, known associates, and employment. Therefore, the redaction of this record would severely limit the understanding of the remaining information within the record.' The Commissioner is mindful that if a large amount of information is redacted, this is going to affect the extent to which the information meets the legitimate interest of the request.
75. The Commissioner is also aware that the withheld information in this case is a physical, historical record which makes redaction more difficult.
76. Looking at the withheld information, the volume of exempt material, the scarcity of releasable material and considering the effect redaction would have on a reader's ability to understand the historical narrative of the record; the Commissioner is satisfied that redaction is not possible in this instance.
77. With the above in mind, the Commissioner does not consider it necessary to go onto consider TNA's application of section 38.

Right of appeal

78. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

79. 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.
80. 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

Alice Gradwell
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