

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2022

Public Authority: National Archives

Address: Kew
Richmond
TW9 4DU

Decision (including any steps ordered)

1. The complainant has requested disclosure of information from the National Archives ("TNA") of a closed file which relates to perjury and conspiracy to pervert the course of justice.
2. The Commissioner's decision is that all the information in the file engages section 40(2). However, TNA failed to comply with its obligations under section 17 of FOIA.
3. The Commissioner does not require TNA to take any further steps.

Request and response

4. On 13 November 2021, the complainant wrote to the public authority and requested information in the following terms:

"I would like to request copies of the contents of this closed/retained file via the Freedom of Information Act. Request access and review of information contained within a closed file - DPP 2/3349 - Names redacted: Perjury Act 1911 (subordination of perjury and conspiracy to pervert the course of justice)"

Given the age of the file I see no reason why its contents should remain a secret. I would be grateful if you could provide the contents of the file in isolation rather than add those contents to an existing file. That way I will know which documents are being released for the first time."

5. On 10 December 2021 TNA responded stating it needed to consult with another government department to decide if it could open the file. It stated it would respond by 24 December 2021.
6. TNA responded on 4 January 2022 and acknowledged a failure to respond within the timeframes. TNA confirmed it held the information and stated that consideration was been given as to whether some of the information was covered by exemptions in FOIA at section 38(1)(a) requiring a public interest test (PIT) or whether exemptions at FOIA section 40(2) applied.
7. The public authority responded on 12 January 2022. It stated that it had failed to notify progress of the case and extended timeframes in accordance with obligations under FOIA section 17(2). TNA stated that it expected that the timeframes would be extended further before any outcomes of the PIT due to

"the complexities of the processes and sensitivity of the information in question"

8. The public authority responded on 20 January 2022. It stated that

"We previously informed you that we were required to conduct a public interest test in relation to your request. This was because it was considered that some of the information within this record could be covered by section 38(1)(a) of the Freedom of Information Act 2000. As a result of the public interest test, it has been decided that section 38(1)(a) does not apply to some of the information within this file.

However we are unable to open this record because all of the information is exempt under section 40 (2) (by virtue of section 40 (3A) personal data exemption) of the Freedom of Information Act 2000. This means that we cannot make the record open to you, or to the public in general.

In this case the exemption applies because the record contains the personal and the sensitive personal information of a number of identified individuals assumed still to be living. These individuals have a reasonable expectation of privacy which would not include the release of this information into the public domain by The National Archives during their lifetime. To do so would be likely to cause damage and/or distress and would be a breach of the first data protection principle, which is concerned with the fair, lawful and transparent processing of information of this kind.

However, if you are able to provide documentary proof that Gail Corby is deceased, it may be possible to provide you with the information you have requested.”

9. Following an internal review the public authority wrote to the complainant on 11 March 2022 and upheld its original position. It stated that

“Section 40 Exemption (Personal Data)

I am satisfied that information in the file is the personal data of presumed to be living identifiable individuals and is therefore exempt from disclosure by section 40(2) (by virtue of section 40 (3A) personal data exemption) of the Freedom of Information Act (2000).”

Scope of the case

10. The complainant contacted the Commissioner on 15 March 2022 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of his investigation to be to establish whether TNA is entitled to withhold the requested information under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

12. 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.
13. 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’).

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

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. In the circumstances of this case and having considered the withheld information, the Commissioner is satisfied that all the withheld information both relates to and identifies these individuals by name, address and dates of birth and additionally provides information of a highly personal nature and therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
16. The Commissioner's view is that redacting information and disclosing the remainder would render the disclosed information meaningless. Furthermore, the withheld information can be categorised as special category personal data or criminal offence data.

Is the information criminal offence data?

17. Information relating to criminal convictions and offences is given special status in the UK GDPR.
18. Article 10 of the UK GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) *The alleged commission of offences by the data subject; or*
 - (b) *Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
19. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data. He has reached this conclusion on the basis that the file contains details of criminal allegations of perjury against the defendant and other individuals and subsequent proceedings.
20. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
21. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).

22. The Commissioner has seen no evidence or indication that the individuals concerned, who are presumed to still be living as there has been no evidence presented to the contrary, have 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. TNA is not obliged to seek their consent, nor is it obliged to give it.
23. Although some personal information may have been reported in the press on or around the court proceeding dates and could be deemed to have entered the public domain at this time, the Commissioner does not hold a view that this was deliberately or willingly making the information public. The intention would have been to disclose sensitive data about themselves in open court as part of their defence and they would have had no choice in this matter in doing so.
24. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
25. Based on the above factors, the Commissioner has determined that there is no lawful basis for processing and so the disclosure of the information would not be lawful, and he does not need to go on to separately consider whether disclosure would be fair or transparent.

Procedural matters

26. Section 17 of FOIA requires a public authority to issue a refusal notice if it wishes to withhold any of the information that a person has requested. This should normally be done within 20 working days, but this deadline can be extended in certain circumstances.
27. TNA awarded itself additional time to deal with this request in order to consider the balance of the public interest test in respect of a qualified exemption. TNA had already extended the deadline for compliance because it needed to consult with the original owner of the information, which is something it is entitled to do under FOIA.
28. The Commissioner considers in the circumstances of this case that it was unreasonable for TNA to have further extended the deadline in this manner. Given the analysis set out in paragraphs 12 to 26, it should have been obvious to TNA that the information was covered by an absolute exemption.
29. The Commissioner therefore finds that TNA breached section 17 of FOIA.

Reference: IC-161233-T6B9

Right of appeal

30. 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

31. 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.
32. 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

Catherine Fletcher
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