Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2022

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

Decision (including any steps ordered)

1. The complainant has requested copies of information relating to Ian Brady. The National Archives ("TNA") variously relied on sections 31 (law enforcement), 38 (health and safety), 40(2) and 41 of the FOIA to withhold the requested information.

2. The Commissioner's decision is that TNA is entitled to rely on sections 31, 41 and 40(2) of the FOIA in the manner that it has done.

3. The Commissioner does not require further steps.

Request and response

4. On 16 September 2021, the complainant wrote to TNA and requested access to the closed file logged under TNA reference number HO 336/933/2. The description of this particular file is:

> *"From open parent piece HO 336/933 - Ian Brady: inmate correspondence."*

5. TNA responded on 26 April 2021. It withheld the requested information and relied on sections 31, 38, 40(2) and 41 of the FOIA in order to do so.

6. Following an internal review TNA wrote to the complainant on 17 May 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 20 May 2021 to complain about TNA's refusal to provide information.

8. TNA explained to the Commissioner that the request for access to this particular file was the 18th such request it had received from the complainant over a period of three months. Rather than risk refusing these requests as imposing a grossly oppressive burden by dealing with them together, TNA had agreed with the complainant that the 18 requests could be dealt with sequentially over a longer period of time, with later requests put "on hold" until earlier requests had been dealt with. This explained why it had taken in excess of 18 months to issue its refusal notice. As the complainant does not appear to have objected to this course of action (and would have received no benefit had TNA refused the request promptly as too burdensome), the Commissioner has not looked at the timeliness of TNA's refusal notice as part of his decision.

9. The Commissioner considers that the scope of his investigation is to determine whether TNA is entitled to rely on the cited exemptions.

Reasons for decision

10. Section 31 of the FOIA states that:

> *Information…is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
>
> *(a) the prevention or detection of crime,*

11. The exemption can be engaged on the basis that disclosing the information either "would" prejudice the law enforcement function, or the lower threshold that disclosure only "would be likely" to prejudice that function. For the Commissioner to be convinced that prejudice "would" occur, he must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility. If the higher threshold is engaged, this will carry more weight in the public interest test.

12. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Hogan and Oxford City Council v*

the Information Commissioner (EA/2005/0026 and 0030). This involves the following steps:

- Identifying the "applicable interests" within the relevant exemption.
- Identifying the "nature of the prejudice". This means:
    - Showing that the prejudice claimed is "real, actual or of substance";
    - Showing that there is a "causal link" between the disclosure and the prejudice claimed.
- Deciding on the "likelihood of the occurrence of prejudice".

TNA's position

13. The information that TNA relied on this exemption to withhold comprises of two letters Ian Brady wrote to Myra Hindley in 1971.

14. TNA explained that, having consulted the MoJ, it considered that Greater Manchester Police's (GMP's) investigation into the 1964 disappearance of Keith Bennett remained ongoing and would remain ongoing until his body could be recovered. Although Brady and Hindley both confessed to the little boy's murder, his body has never been found – despite numerous searches. TNA argued that it was important that this crime was detected and the body recovered, so the case could be closed.

15. TNA went onto explain that disclosure of the information could harm the conduct of this investigation because:

> *"Given that new evidence can throw light onto any aspect of the original investigation, it is not possible to identify particular information that might be released into the public domain without the risk of compromising any future police actions. Information within the letters, whilst apparently innocuous, may reveal different meanings in different contexts. Information that appears innocuous may have significance to an experienced investigator that is not immediately obvious to the lay reader, or may assume a new significance in the light of newly discovered evidence or developments in forensic or investigative techniques. The premature release of this extract into the public domain might therefore be detrimental to any future investigation."*

The complainant's position

16. The complainant was sceptical that there was a genuine prospect of disclosure compromising the investigation – given the age of the

material involved and the length of time the police had already had in which to examine it.

17. On the contrary, the complainant argued, disclosure of the information could bring about precisely the breakthrough that would be needed in order to resolve the case. Wider dissemination of the information would bring it to the attention of fresh eyes and thus increase the chances of a new interpretation of old evidence.

18. In particular, the complainant pointed to the investigation into the disappearance of Mary Bastholm – where a group of private investigators took a fresh look at the original evidence. The group's findings led to Gloucestershire Police carrying out a search in 2021 – 43 years after Miss Bastholm was last seen.

The Commissioner's view

19. The Commissioner accepts that disclosure of this information would be likely to prejudice the detection of a crime.

20. In reaching his decision, the Commissioner is mindful that GMP would have had access to the withheld letters for a considerable time and have thus had ample opportunity to consider any clues the letters might contain. To a certain extent it is difficult to envisage, even with further forensic breakthroughs, what further use the letters could realistically be put to.

21. That having been said, the Commissioner recognises that the more recent searches for Keith Bennett's body have utilised equipment capable of detecting unnatural disturbances of the ground. He recognises that for such technology (or even an advancement of the existing technology) to remain effective in this search, meticulous records would need to be kept of the precise areas that had already been searched and the methods used.

22. TNA has argued that there is a real prospect of intensifying so-called "dark tourism", in which people are drawn to sites linked to death and the Commissioner accepts that this is a real possibility. The prospect of encouraging people to carry out their own "searches" in the area, without supervision or proper record-keeping would risk compromising the ability to use existing and future technology effectively. That would, in turn, reduce the chances of the body being recovered.

23. The Commissioner considers that GMP's investigators are already able to call upon the expert skills or local knowledge of individuals to assist them in their searches without disclosing the information more widely. Unfettered access would mean that GMP would lose control over the information and compromise a potential crime scene.

24. The Commissioner also notes that, whilst a fresh search was carried out for Mary Bastholm's body, based on the evidence suggested by private investigators, this search was unsuccessful.

25. Whilst the Commissioner considers that the prospect of the withheld information containing genuinely useful information is likely to fade over time, he does not consider that the point has yet been reached where it can confidently be said that withholding the information no longer serves a useful purpose. He therefore accepts that disclosure would be likely to prejudice the detection of crime.

Public interest test

26. Even where disclosure of information could prejudice the prevention or detection of crime, the information must still be disclosed unless the balance of the public interest favours maintaining the exemption.

27. Having found that disclosure would be likely to cause prejudice, there will always be an inherent public interest in preventing that prejudice from occurring. However, the weight to be assigned to that interest will depend on the likelihood and severity of the prejudice occurring.

28. TNA accepted that there would always be a public interest in transparency – as an end in itself. It recognised that information should only be withheld where there were clear reasons to do so.

29. However TNA pointed out that in this particular case, there were clear reasons for withholding the requested information – namely the ongoing police investigation into Keith Bennett's disappearance. There was a very strong public interest in allowing GMP to continue investigating and in withholding any information whose disclosure might prejudice that investigation.

The Commissioner's view

30. In the Commissioner's view the balance of the public interest favours maintaining this exemption.

31. The Commissioner reminds himself that public interest and public curiosity are not the same thing. The withheld information may well be of interest to the general public, but that does not mean that disclosure would serve a public interest.

32. Brady and Hindley were two of the most notorious murderers of the twentieth century. Their crimes shocked the nation and successive Home Secretaries reached the view that neither should ever be released from prison.

33. The Commissioner does not consider that either letter contains material which is particularly shocking. Equally, he does not consider that either letter offers any genuine insight into why the crimes were committed. Therefore he considers that the public interest in disclosing the requested information is weak.

34. Set against that is the very strong public interest in being able to close the police file on Keith Bennett's disappearance. The Commissioner has already noted his concerns about the likelihood of the letters contributing to the conclusion of that investigation – however, he accepts that, if the letters genuinely do contain clues, the potential severity of the prejudice caused by disclosure is high.

35. In addition, the Commissioner considers that, the recovery of the fifth victim notwithstanding, there is also a public interest in allowing this particular chapter of history to be closed. Regular disclosure of information prevents the case from being properly laid to rest – especially when that disclosure adds very little to public understanding of the crimes. Equally the Commissioner consider that there is a strong public interest in preventing the crimes from being either trivialised or sensationalised.

36. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining this exemption.

Section 41 – actionable breach of confidence

37. Section 41(1) of the FOIA states that:

> *Information is exempt information if—*
>
> *(a) it was obtained by the public authority from any other person (including another public authority), and*
>
> *(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

38. The Commissioner's guidance states that, in order for this particular exemption to apply, four criteria must be met:

- the authority must have obtained the information from another person,
- its disclosure must constitute a breach of confidence,

- a legal person must be able to bring an action for the breach of confidence to court,
- that court action must be likely to succeed.

39. TNA has relied upon this exemption to withhold a memo that was written by a prison medical office ("the PMO") to the Governor of HMP Parkhurst.

40. The Commissioner accepts that this document has been received, by TNA, from another party – although, unusually, the party that provided the information is not the party whose confidence might be breached.

41. Having accepted that the document was obtained, by TNA, from another party, the Commissioner must next determine whether disclosure of that information would constitute a breach of confidence.

42. The three step test for the necessary conditions for a breach of confidence was set out in 1968 by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:

- the information must have the necessary quality of confidence,
- it must have been imparted in circumstances importing an obligation of confidence, and
- there must have been an unauthorised use of the information to the detriment of the confider.

43. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. In this particular case the memo in question contains a mixture of facts already in the public domain and some sections which constitute a medical assessment of Brady.

44. The Commissioner recognises that medical information about a person is not trivial and this particular information does not appear to be in the public domain. He is therefore satisfied that the information has the necessary quality of confidence.

45. TNA argued that the fact that the PMO had written (in that capacity) to the Governor was, in itself, a circumstance that implied a duty of confidence. The Commissioner is somewhat sceptical of such a claim.

46. The Commissioner recognises that the FOIA did not exist at the time this memo was sent and public officials had few expectations that information they created would be disclosed to the world at large. However, this is not the same as an expectation of confidence. The

document is not some form of whistleblowing complaint, but a memo, to the Governor, from a subordinate, discussing prison matters.

47. That having been said, the Commissioner recognises that the memo contains medical information about Brady. That information appears to have been obtained or derived out of a doctor-patient relationship – which the Commissioner recognises as being circumstances implying a duty of confidence. Whilst Brady may have expected such information to be shared with the Governor, he would not have expected it to have been disseminated more widely.

48. The Commissioner is therefore satisfied that the memo does contain information that was imparted in circumstances importing an obligation of confidence.

49. Finally, for the conditions to be met, the Commissioner must consider whether disclosure would cause detriment.

50. Criminals, even the most notorious criminals, do not entirely forfeit any rights to privacy. Certainly while he was alive, Brady would have had a reasonable expectation that some information – particular information of the sort contained in this memo, would be kept private.

51. The Commissioner also recognises that a duty of confidence does not automatically end when an individual dies. Detriment would arise as a result of the breach of confidentiality and therefore all three conditions necessary for a breach of confidence are met.

52. Having established that a breach of confidence could be made out, the Commissioner must next determine whether a person could bring an action for a breach.

53. Brady's long term solicitor is the executor of his estate. According to news reports, the solicitor still retains two locked briefcases of Brady's possessions. Whether this individual would decide to bring an action in such circumstances need not be determined. As executor of Brady's will, the solicitor would, in theory, be able to bring about an action.

54. Finally, the Commissioner must determine whether the breach would be an actionable breach.

55. As Lord Falconer (the promoter of the FOIA as it was passing through Parliament) said during the debate on the FOIA

> *"...the word "actionable" does not mean arguable…It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and,*

therefore, that is enough to prevent disclosure'. That is not the position. The word used in the Bill is 'actionable' which means that one can take action and win."

56. The Commissioner therefore considers that it is not sufficient to merely claim that a breach of confidence might be brought. Any action must be likely to succeed.

57. To determine whether an action would be likely to succeed, the Commissioner must assess whether the public authority might be able to put forward a public interest defence.

58. This is not the same as the sort of public interest test that would be applied to a qualified exemption. There must be clear and compelling public interest reasons that would override the duty of confidence.

59. The Commissioner does not see any clear and compelling reason that would override the duty of confidence in this instance. As he noted earlier, he considers that the public interest in disclosure is weak. TNA would therefore not have a reliable public interest defence against an action for breach of confidence and it thus follows that such an action would be likely to succeed.

60. Whilst the Commissioner recognises that some parts of the (relatively short) memo contain facts that are already in the public domain, he notes that, once the medical information has been removed, the small amount of remaining information would lose its meaning and context.

61. The Commissioner is therefore satisfied that the entire body of the memo engages section 41 of the FOIA.

Section 40(2) – third party personal data

62. In addition to the contents of the memo, TNA has also relied on section 40(2) of the FOIA to withhold the name and signature of the PMO who wrote it. Clearly, both name and signature would be the personal data of the PMO if that individual were still alive.

63. TNA noted that, in line with its usual practice, where it is not clear whether an individual named in a document is living or dead, it attempts to estimate their current age and, if that age is less than 100, it presumes the individual to be alive. The Commissioner has agreed that, where it cannot be determined that an individual is alive or dead, this is a cautious but pragmatic way forward.

64. The memo in question was written fifty years ago – therefore if the PMO was aged 50 or under at the time, they would be under the age of 100 if currently alive.

65. The Commissioner has not been provided with any information that indicates definitively that the PMO is alive or dead. Nor is there any indication of how old the PMO was at the time, or would be today.

66. Given the seniority of the position, the Commissioner considers that, if the PMO were still alive today they would be at least 80 years old and more likely closer to (or even over) the age of 100.

67. However, in the absence of any definitive evidence, the Commissioner must assume that the PMO is still alive and therefore covered by data protection laws.

68. Section 40(2) of the FOIA provides an exemption for any information which is the personal data of a third party if disclosure of that information would be unlawful. Specifically, disclosure will be unlawful if there is no lawful basis permitting dissemination of the personal data to the world at large.

69. Given that there is no evidence demonstrating that the PMO has consented to the disclosure of their personal data and the information is not in the public domain, the Commissioner considers that the only lawful basis that would allow for such a disclosure would be if it were necessary to satisfy a legitimate interest.

70. As the contents of the memo are exempt from disclosure, having the name of its author would add nothing to public understanding of the matters it discusses. Nor would it add anything to public understanding of the crimes. Therefore disclosure would not satisfy a legitimate interest and would thus be unlawful.

71. If there is no lawful basis for the information to be disclosed, section 40(2) of the FOIA is engaged.

Other matters

72. At the outset of the investigation, TNA drew the Commissioner's attention to his previous decision notice (FS50699237) in which he had found that similar information engaged section 38 of the FOIA. It invited the Commissioner to reach the same conclusion in this case without the need for a further investigation.

73. The Commissioner notes that the caselaw relating to this particular section of the FOIA has evolved since that decision notice – in particular the judgement of the First Tier Tribunal in *Lownie v the Information Commissioner & The National Archives & The Foreign and Commonwealth Office* (EA/2017/0087). Consequently, he no longer considers that it will be sufficient for a public authority to cite the possibility of distress in order to engage this particular exemption.

74. Whilst the Commissioner makes no formal finding on the matter (as the withheld information engages another exemption), he considers it unlikely that, had he been required to do so, he would have agreed that section 38 was engaged on the facts of the case.

Right of appeal

75. 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

76. 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.

77. 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 .....

Roger Cawthorne
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