

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 July 2024

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

Decision (including any steps ordered)

1. The complainant has requested information from a file held by the National Archives (TNA). TNA disclosed the majority of the information and withheld the remainder under sections 38(1)(a) and 40(2) of FOIA, which concern endangerment to mental health and personal data, respectively.
2. The Commissioner's decision is that TNA has correctly withheld the information to which it's applied the two exemptions and it's not necessary for it to take any corrective steps.

Request and response

3. The complainant made the following information request to TNA on 13 October 2023:
"MEPO 3/1875 - Summary of Disciplinary Boards held showing findings and punishments"
4. TNA's final position at its internal review of 6 February 2024 was that the majority of the information could be disclosed but that the remainder was exempt under sections 38(1)(a) and 40(2) of FOIA.
5. As a result of the complaint to the Commissioner, on 11 July 2024 TNA wrote to the complainant again. It advised that it had consulted with the Metropolitan Police Service as the transferring department and was able to disclose some of the information it had previously withheld. TNA

confirmed that it's continuing to withhold the remaining information, across nine pages, under sections 38 and 40.

Reasons for decision

6. This reasoning covers TNA's application of section 38(1)(a) and section 40(2) of FOIA to the information that it's withholding.
7. In their complaint to the Commissioner the complainant has said that TNA has redacted too much of the information – entire ledger entries rather than just specific columns/sections. The Commissioner has reviewed the information TNA is withholding, which TNA has annotated with the reasons why it's applied the exemptions. His decision concerns all the redacted information.

Section 38 – health and safety

8. Under section 38(1)(a) of FOIA information is exempt information if its disclosure would or would be likely to endanger another person's physical or mental health.
9. As above, the Commissioner has viewed the information and in its submission to him, TNA has described the nature of the information to which it's applied this exemption. To protect the individuals concerned, he doesn't intend to reproduce that description here although it is broadly discussed elsewhere in this notice.
10. TNA has explained whose mental health it considers would be endangered if the information were to be disclosed, and why. Again, the Commissioner won't reproduce that explanation. TNA has also confirmed that it considers the envisioned endangerment would be likely to happen, rather than would happen.
11. In its submission, TNA also provided the following justification for its reliance on section 38:

"TNA is guided by previous ICO Decision Notices such as FS50770460, which outlined how '[t]he 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.' TNA and the Metropolitan Police Service do not believe that such a compelling reason exists in this case which would justify the release of material, which would be likely to endanger the mental health of the children concerned.

Furthermore, in the ICO Decision Notice IC-97448-Z5S34, 'the Commissioner acknowledges that TNA's policy may seem cautious, she agrees that the balance must (and always will) lie with protecting an individual's mental well-being. Any surviving relative of the victim or defendant will already have suffered as a result of their involvement or affiliation with such events and, for this reason, the passage of time since the event itself is not a significant factor in this instance'.

Although, the topic of the file subject to this appeal does not pertain to a criminal investigation case and is dated between 1932-1940, the endangerment to the mental health of the children concerned would be likely to still occur, as the information within the file may be as distressing, if released now, as at the time of the event.

In the 2023 published 'Guidance on responding to disclosures of non-recent (historic) child sexual abuse: Safeguarding and support implications¹' explains that (in relation to a therapy based scenario, '[i]t is important that clients cannot and should not be compelled or pressurised to supply information they do not feel ready to give.' Additionally, 'The impact of disclosure on the victim should never be underestimated; disclosures may be made by people at a time of intense distress, and the disclosure process itself may increase the risks of self-harm and suicide'. Whilst this concerns the disclosure made by the individuals themselves, the same risk to their mental health applies."

12. In correspondence to the Commissioner, the complainant has noted that the First-Tier Tribunal (Information Rights) ('the FTT') in both Lownie (2018) and Phillips (2013) ruled that a hypothetical risk to mental health is inadequate grounds for invoking section 38. The FTT had also ruled that, as well as requiring "objective medical evidence" of a risk to health, TNA should consider "the passage of time and the information that is already in the public domain" before applying section 38 to historical records.
13. The FTT's decisions aren't binding, and the Commissioner considers each complaint on a case by case basis, as in IC-209631-P3G4 (2023)² and

¹ <https://www.bps.org.uk/guideline/guidance-responding-disclosures-non-recent-historic-child-sexual-abuse-safeguarding-and>

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025938/ic-209631-p3g4.pdf>

IC-178849-V6T6 (2022)³ as examples. In his published guidance on section 38, the Commissioner also advises that clinical evidence of a psychiatric condition isn't always necessary.

14. In this case, the Commissioner has considered both the complainant's and TNA's arguments and accepts TNA's reasoning, and the level of likelihood it envisions. He considers that there's a significant and weighty chance that individuals' mental health could be endangered if the information, which is extremely sensitive, were to be disclosed to the world at large under FOIA.
15. The Commissioner's is therefore satisfied that TNA correctly applied section 38(1)(a) of FOIA to information within scope of the request. He's gone on to consider the associated public interest test.

Public interest test

16. The Commissioner has found that disclosing the information would be likely to endanger other individuals' mental health. The public interest in disclosing the information would need to be very significant indeed to justify this consequence.
17. There is, of course, a general public interest in public authorities demonstrating that they're transparent. And, in relation to section 40(2) of FOIA, TNA has acknowledged that releasing the redacted material could add to the historical account regarding disciplinary proceedings within a particular sector. However, the Commissioner considers that TNA has demonstrated sufficient transparency by disclosing the majority of the information the complainant requested.
18. The Commissioner doesn't consider there's a compelling public interest argument for disclosing this specific information and is satisfied that the public interest favours maintaining the section 38(1)(a) exemption in this case.

Section 40 – personal data

19. Under section 40(2) information is exempt information if it's the personal data of another individual and disclosure would contravene one of the data protection principles. The most relevant principle is under

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023028/ic-178849-v6t6.pdf>

Article 5(1)(a) of the UK General Data Protection Regulation (UK GDPR). This states that:

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

20. Personal data is information which relates to a living individual and from which they can be identified.
21. In their request for an internal review the complainant noted what they considered to be the latest date of birth for certain individuals referred to in the file and argued that, under the 100-year principle, those individuals must be dead and so the information couldn't be personal data.
22. TNA has described to the Commissioner the nature of the information it's withholding under section 40(2) of FOIA. As above, he doesn't intend to detail that in this notice. From TNA's description the Commissioner is satisfied that the individuals concerned can be assumed to be living, that they're easily identifiable from the information and therefore the information can be categorised as the personal data of those individuals – the data subjects.
23. In addition, some of the information can also be categorised as special category personal data, which is particularly sensitive and warrants special protection.
24. The Commissioner considers that the only conditions that could be relevant to a disclosure of special category personal data under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9 of the UK GDPR.
25. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to FOIA request or that they have deliberately made this data public.
26. As none of the conditions required for processing special category data are satisfied there's no legal basis for its disclosure. Processing this special category data – ie disclosing it under FOIA - would therefore contravene Article 5(1)(a) and so this information is exempt under section 40(2) of FOIA.
27. Regarding the remaining personal data, the Commissioner has gone on to consider whether disclosing this personal data would contravene any of the data protection principles. This involves considering three 'tests': the legitimate interest test, the necessity test, and the balancing test.

28. The Commissioner appreciates that the complainant has an interest in this information and considers it's a legitimate interest for them to have. TNA has acknowledged that releasing this material could add to the historical account regarding disciplinary proceedings within a particular sector. There's also a general interest in public authorities demonstrating they're transparent.
29. Regarding necessity, the Commissioner will accept that in order for the complainant's interest in the matter of the request to be fully addressed, and for TNA to be fully transparent, it would be necessary to disclose the information.
30. Finally, the Commissioner has balanced the above legitimate interests against the data subjects' rights and freedoms.
31. The information is of interest to the complainant and has a degree of wider public interest.
32. In their complaint to the Commissioner the complainant noted that, from 2016 to 2017 when the file had been re-closed, the information had been in the public domain and had been viewed by TNA users twice. As such, they considered that TNA couldn't now withhold information in the file. They also note that the UK GDPR has provision for personal data to be processed for research purposes.
33. In its submission, TNA explained that the legal frameworks allowing access to historical records have changed over time and records transferred to The National Archives in the past weren't subject to the same considerations as they are now. This can mean that in a collection of over 15 million records, there may be instances where information has been opened under an earlier access regime – for example the Open Government Initiative in the 1990's – but if it were to be considered now, since the introduction of legislation such as the Freedom of Information Act 2000 and the Data Protection Act 2018, it would not be released.
34. TNA says that MEPO 3/1875 – the file in question - was previously closed for 75 years under the Lord Chancellor's Instrument and opened on 1 January 2016. It says it's standard practice for government departments to re-review their transferred records prior to their opening date, but sensitivities are not always identified. This [file] was brought to the FOI Centre's attention on the 25 January 2016 and the information was subsequently temporarily removed from public access whilst an assessment could be undertaken. The record was reviewed and reclosed in 2017. The information was available to the public for 25 days.

35. TNA says it has a duty under its Reclosure Policy to assess information in open records which engages any exemptions under FOIA, when brought to its attention. The case for this is strengthened by the presence of the personal data of children, which identifies them as victims of sexual and domestic abuse, their health data, and their identity as illegitimate children.
36. Regarding processing the personal data in this case for research purposes, TNA has noted that FOIA is a public access regime. This means that any information released to a requester by definition becomes available to the wider public. In other words, releasing information under this legislation can be thought of as "open to one, open to all." Where exemptions are engaged, they will be applied, and the legislation obliges public authorities to be both motive and applicant blind in relation to FOI requests. As such, TNA says, there are no exemptions for those seeking access to records for their own personal use.
37. The Commissioner considers that TNA has satisfactorily addressed the complainant's arguments. Given the data subjects' circumstances and that the issues involved are sensitive, the Commissioner is satisfied that the data subjects in this case would reasonably expect that their personal data wouldn't be disclosed to the world at large under FOIA. Disclosing it would therefore be very likely to cause those individuals harm or distress. The Commissioner doesn't consider the weight of the complainant's interests and the general public interest in transparency in this case is sufficient to justify overriding the data subjects' rights and freedoms. He's satisfied that the information TNA has disclosed addresses the public interest in transparency to a satisfactory degree.
38. The Commissioner therefore finds that disclosing the withheld information would be unlawful as it would contravene the data protection principle set out under Article 5(1)(a) of the UK GDPR. TNA has therefore also correctly applied section 40(2) of FOIA to the information it's withholding.

Right of appeal

39. 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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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