

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 August 2014

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Cross Street
Beverley HU17 9BA

Decision (including any steps ordered)

1. The complainant has requested information about former pupils of the Boulevard Nautical School, Kingston upon Hull. East Riding of Yorkshire Council ('the Council') cited the exemption under section 40 of the FOIA (personal data) and withheld the information.
2. The Commissioner's decision is that the Council has correctly applied this exemption and does not require it to take any further steps.

Background

3. With the support of others, the complainant is petitioning for a commemorative plaque to any old boys of Boulevard Nautical School who fell in World War II. The School is now closed but the listed building is used by Hull City Council. Cross referencing the information they have requested with the casualty list held by the Commonwealth War Graves Commission would enable the complainant to identify any casualties who attended the Nautical School.

Request and response

4. On 2 May 2013, the complainant wrote to the Council and requested information in the following terms:

"...the full name, home town and date of birth of those who attended the Boulevard Nautical School in Kingston upon Hull for the period 1920 (which I believe is the earliest records which are available - if there are more going back earlier would you please go back to that date) until 1945... It would be appreciated therefore if you would consider providing this information - Full Name, Home town (this will help identify a casualty if there is more than one casualty with the same name(s) - for example John Smith. The Date of Birth also would be most helpful as this will again help eliminate any casualty with the same name."

5. The Council responded to the information request on 20 May. It said the requested information was the personal data of third parties and was therefore exempt from disclosure under section 40(2) of the FOIA.
6. The Council referred to section 4.1.5. of National Archives guidance¹. This says that in instances where it is not known whether a data subject is alive or dead, it is reasonable to assume a lifespan of 100 years. If the age of an adult data subject is not known, it is reasonable to assume they were 16 at the time of the records. The Council therefore considered it likely that some of the individuals included in the request would still be alive and so protected by the Data Protection Act (DPA).
7. The Council also cited a decision the Commissioner had made on a similar case.²
8. Following an internal review the Council wrote to the complainant on 16 January 2014. It upheld its original position.
9. On the advice of the Commissioner, the complainant approached the Council in April and asked if it would release the information outside of the Freedom of Information Act. The Council confirmed that it would not, for the reasons it had previously given.

¹ [Code of Practice for Archivists and Record Managers](#)

² [FS50314844](#)

Scope of the case

10. The complainant had contacted the Commissioner on 27 March to complain about the way their request for information had been handled.
11. The complainant referred to an Office of National Statistics statistic that '*The most common age at death in England and Wales in 2010 was 85*'. They argued that those students who left the School at 15 years old in 1945 would now be approximately 85. Those who left at 15 in 1920 would be approximately 109, would very likely have died and therefore would not be subject to the Data Protection Act.
12. The complainant also argued that some personal information of individuals covered in their request may already be available through the 1901 and 1911 census. And in addition, they referred to Maritime and Coastguard Agency literature that explains where personal information about individual seamen can be found.
13. However, without the information they have requested from the Council, the complainant is unable to identify any World War II casualties who attended Boulevard Nautical School specifically.
14. The complainant is frustrated that the Nautical School registers appear to be subject to the '100 year rule', when much personal information about the individuals concerned may already be in the public domain. The Commissioner has therefore focussed his investigation on whether the Council is correct to apply the exemption under section 40(2) to the specific information the complainant has requested.

Reasons for decision

15. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of a third party (ie someone other than the requester) and the conditions under either section 40(3) or 40(4) are also satisfied.
16. The Commissioner therefore first considered whether the requested information is the personal data of a third party.
17. The Data Protection Act defines personal data as '*...data which relate to a living individual who can be identified... from those data and other information which is in the possession of...the data controller*'.

18. The Commissioner is satisfied that the individuals concerned could be identified if their names, date of birth and home town were all to be released so that this information could be cross referenced with the information held by the Commonwealth War Graves Commission. He therefore considers that the requested information is the personal data of the individuals concerned.
19. Having decided that the requested information is third party personal data, the Commissioner then turned his attention to the conditions under section 40(3).
20. The first condition under section 40(3)(a)(i) says that personal data is exempt from disclosure to a member of the public if doing so would contravene one of the data protection principles set out in Schedule 1 of the DPA. The Commissioner considered whether the Council was correct when it argued in its submission to him that disclosing the information would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully...'.
 21. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:
 - Have the individuals concerned (ie the data subjects) given their consent to disclosure?
 - What reasonable expectation do the individuals have about what will happen to their personal data?
 - What might be the likely consequences resulting from disclosure?
 22. Assessing fairness however, also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so (condition 6 in Schedule 2 of the Data Protection Act). The Commissioner therefore also finally considered these interests.
 23. Consent: The Commissioner considers that it is entirely reasonable to assume that some of the individuals concerned may still be alive at approximately 85 years old. However, the Council has told the Commissioner that it has not contacted any of these individuals to ask if they consent to their personal information being disclosed. This is because many decades have passed since the individuals left the School and, having first had to identify those individuals still living, it would be extremely difficult, if not impossible, to find out where these individuals might now all live.

24. Expectation: Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to the individual in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
25. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, with privacy being one of these. It is accepted that every individual has the right to some degree of privacy and this right is enshrined in Article 8 of the European Convention on Human Rights.
26. The Council has told the Commissioner that the information in this case concerns individuals when they were children and young adults, and were pupils at the Nautical School. Their personal data would have been recorded and processed purely for purposes connected with their attendance at the School. In its submission, the Council has argued that at the time they enrolled at the School, these individuals would not have expected that their personal data would become public.
27. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules, it says that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."
28. The right to privacy and family life is of particular relevance to the requested information as it relates to the personal life of each individual. Because the information relates to the private lives of the data subjects, the Commissioner considers it deserves more protection than if it related to their public or professional lives. In addition, the information was recorded when the data subjects were children and this further increases the expectation that it would be protected from disclosure to the world at large.

29. The Commissioner has therefore come to the conclusion that the Council is correct when it says that the individuals in question would not have expected their personal data to be made public.
30. Consequences: The length of time involved since the information in question was recorded makes it difficult to speculate on the possible consequences of now releasing it and the Council has not proposed any. The Commissioner considers that there exists the possibility – albeit a remote one – that one or more of the living individuals concerned may be distressed if they were to learn that their personal data had been disclosed to a third person.
31. Legitimate interest: Notwithstanding the data subjects' reasonable expectations and possible consequences of disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. For example, in the case involving MPs' expenses, the former Information Tribunal commented that:
- "79. ...in relation to the general principle application of fairness under the first data protection principle, we find:*
- (..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives."*
32. Any legitimate interest in this case lies in disclosing information that is not actually subject to the restrictions of the Data Protection Act – the names of people who have died. However the difficulty is that to identify those deceased individuals it is necessary to process the personal data of *all* those individuals who attended the School in the period specified by the complainant. Some of those individuals may still be alive and living people are protected by the Data Protection Act.
33. Both the Council and the Commissioner appreciate that the complainant's aim – to create a war memorial – is one that many people would consider to be of value and they have considered the possible legitimate interest in disclosing all the information requested in order to achieve this wider objective.
34. However, World War II ended nearly 70 years ago and, as detailed in paragraph 23, it is not possible now to seek consent from any of the individuals concerned who may still be alive, or from any family members of those who have died. Without these consents or views it would be wrong to assume that they would all consent to this personal

data being processed in a way that the data subjects themselves are unlikely to have anticipated.

35. In addition, while the Council is sympathetic to the complainant's objective, it is not convinced that a memorial such as that proposed by the complainant, although a worthwhile local project, is of sufficient wider public interest to override the right to privacy of the individuals concerned.
36. The Commissioner is satisfied that releasing the requested information would contravene one of the conditions under section 40(3)(a)(1); it would be unfair to do so and therefore breach the first data protection principle. It has not been necessary to go on to consider the conditions under section 40(4).
37. Having given this case much consideration, and irrespective of whether some information about the individuals concerned may be available elsewhere, it is the Commissioner's view that the Council is therefore correct to apply the exemption under section 40(2) to the specific information that it holds.

Other matters

38. The Commissioner notes that the Council has considered and proposed alternative ways of realising the complainant's overall aim, for example a memorial to any who fell in WWII, and who attended Boulevard Nautical School, that does not include the names of specific individuals.

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: 0300 1234504

Fax: 0116 249 4253

Email: grc@hmcts.gsi.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.

Signed

Pamela Clements
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