

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2017

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

Decision (including any steps ordered)

1. The complainant requested a copy of the closed extract from a file. The request was refused by the National Archives (TNA) on the grounds of health and safety (section 38 of FOIA). The Commissioner has found that section 38(1) is engaged and that in all the circumstances the public interest in disclosure is outweighed by the public interest in maintaining the exemption. The Commissioner does not require the public authority to take any remedial steps to ensure compliance with the legislation.

Request and response

2. On 12 January 2016 the complainant requested to review a file as he was interested in updating his biography about Guy Burgess:
'FCO 158/3/1 – Guy Burgess and Donald Maclean: post disappearance papers 1-100; Closed extract: Folio 62; 1951.'
3. This file was part of a request to review 26 files and on 15 January 2016 it was agreed to consider the requests in batches of six. This file was part of the first of six requests. The other five files have not been considered by the Commissioner here as they have not been brought as part of this complaint.

4. On 16 August 2016 TNA refused the request citing section 38 as, if it was released, would endanger the physical or mental health or safety of any individual.
5. The complainant requested an internal review on 22 August and TNA sent him the outcome of its internal review on 20 September 2016. It upheld its position.

Scope of the case

6. The complainant contacted the Commissioner on 21 September 2016 to complain about the way his request for information had been handled.
7. Therefore the focus of the Commissioner's investigation is to determine whether section 38 of FOIA was applied correctly by TNA as a basis for refusing to disclose the withheld information under FOIA.

Reasons for decision

Section 38 – Health and safety

8. Section 38(1) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to:
 - (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual
9. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
10. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of disclosure of the information in question is "*real, actual and of substance*", rather than trivial or insignificant. As part of this he must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
11. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that is envisaged would, or would be likely

to occur relates to the applicable interests described in the exemption. Secondly, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

12. In this case TNA's justification for applying section 38(1) of FOIA rests on the following:

- The extract contains personal sensitive information relating to a named deceased person with living relatives. It is these known living relatives of the named known to be deceased person within the extract that the exemption being relied upon is designed to protect.
- Disclosing information now, which may not have been known by or shared with living relatives, many years after the event, may be highly distressing to the living relatives.
- Disclosure of information relating the named person to the Burgess/Maclean Crisis, implying implications with regards to their sexuality and unfounded espionage activities, is likely to endanger the relatives' mental well-being.

13. The complainant disputes that the extract should be withheld on grounds of health and safety. He argues that

- TNA do not say to whom the information applies, what information it is or the exact relationship of the 'living relatives' to the subject.
- It is ludicrous to suggest that after this passage of time that disclosure would endanger the physical or mental health of any individual. This is a very extreme line to take.
- He also argued that the file could be redacted.

14. Having viewed the extract, the Commissioner is satisfied that the nature of the harm referred to by TNA is relevant to the exemption and that to redact the personal data within the extract would be extremely difficult to do. The Commissioner will not discuss the extract in detail in case some of the withheld information is revealed.

15. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between

disclosure and the harm referred to by TNA. In his guidance on the prejudice test¹, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice would or would be likely to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.

16. In this case TNA have relied on the second limb of the exemption: that mental endangerment is 'likely to occur'. Whilst unable to provide definitive or evidential link between disclosure of the information and any endangerment, TNA argue that the nature, context and implied substance of the material under consideration, if released, would potentially cause extreme personal anguish, and significant distress to the relatives.
17. This 'link' is further evidenced and compounded by the fact that one particular relative is well-known and within the public-eye. There is, therefore, an obvious and clear potential that the release of this information may cause mental distress to the relative.
18. Her analysis of the arguments provided has led the Commissioner to conclude that section 38(1)(a) is engaged on the basis that the risk of endangerment is substantially more than remote. As section 38 is a qualified exemption, however, consideration must be given to the balance of the public interest in disclosure.

Public interest arguments in favour of disclosure

19. TNA considered the following arguments in favour of disclosure:
 - There is a public interest in showing a true and open account of the historical record.
 - This thereby makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with political life.

¹http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf

- There is a general public interest in being able to evaluate the foreign and defence policy of government.

20. The complainant has argued that there are lots of files at TNA which relatives might find upsetting but that has not prevented them being made available. He believes 'the public interest argument...trumps the vague notion that descendants of the person may be upset'.

Public interest arguments in favour of maintaining the exemption

21. TNA considered the following arguments in favour of maintaining the exemption:

- Release of the material would be highly distressing for living relatives of certain individuals named in the extract
- There is no indication that relatives were ever made aware of the withheld information in the extract and it is quite possible that the named individual would not have disclosed or discussed it with them. Disclosure of such information is likely to endanger the relatives' mental well-being.

Balance of the public interest

22. TNA, with consideration from the transferring department the Foreign and Commonwealth Office, have balanced the need for governmental accountability and an open historical record against safeguarding and considering the mental health needs of individuals. Additionally, the passage of time in this instance is not seen as a factor in favour of release. A release now could be as damaging or distressing to living relatives as if made at the time; potentially more so.

23. This balance between enabling greater accountability of the working of government and safeguarding members of the public's mental well-being can be seen by the fact that the main parent file is open and accessible.

24. During the public interest test phase TNA considered what information is already within the public domain on the Burgess and Maclean Crisis and the publically available material falls short of the withheld information in the extract. Therefore, whilst it may appear overly cautious, TNA considered that the balance must lie with protecting members of the public's mental well-being.

25. The 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.

26. The Commissioner considers that the strength of the arguments for disclosure (governmental accountability and an open historical record as evidenced in the open main parent file) is outweighed by the public interest in maintaining the exemption to safeguard the withheld information in the extract.
27. Therefore, in all the circumstances, the Commissioner has decided that the balance of the public interest favours maintaining the exemption.

Section 10 – time for compliance

28. Section 10 of FOIA requires that a public authority should respond to a request for information within 20 working days. In this case, TNA responded 7 months after receiving the request. It therefore breached section 10(1) of FOIA.

Right of appeal

29. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

30. 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.
31. 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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