

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2017

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

Decision (including any steps ordered)

1. The complainant has requested access to a closed file at TNA which contained correspondence between Sir Robert Mark, Commissioner of the Metropolitan Police and Lord Mountbatten. TNA opened much of the file for inspection, but ultimately withheld information from sixteen documents under the exemptions provided by section 24 – national security, section 27 – international relations, section 37(1)(b) – conferring of honours, section 40(2) – personal information and section 41 – information provided in confidence.
2. The Commissioner's decision is that TNA is entitled to rely on the exemptions provided by sections 27, 37, 40(2) and 41 to withhold all the disputed information apart from one document. That document, labelled as document 14 by TNA, was withheld under section 40(2). The Commissioner has concluded that the information in question does not constitute personal data and therefore cannot be withheld under that exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose document 14.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 February 2016 the complainant completed an online form requesting access to the following file:

"MEPO 10/30

Description:

Miscellaneous correspondence between Sir Robert MARK, Commissioner, and the Earl Mountbatten of Burma

Date 1967 -1976"
6. On 20 April 2016 TNA responded. It confirmed it held information falling within the scope of the request and made some of that information available for inspection. It withheld other information under the exemptions provided by section 27(1) – prejudice to international relations, section 37(1)(b) – information relating to the conferring of honours, section 40(2) – personal information and section 41 - information provided in confidence.
7. TNA also refused to confirm or deny whether it held additional information under section 23 – information relating to security bodies and section 24 – national security.
8. The complainant requested an internal review the same day, ie on 20 April 2016. TNA sent him the outcome of its internal review on 27 June 2016. TNA revised its position slightly. It withdrew its application of the neither confirm nor deny provisions provided by sections 23 and 24. However it now cited the following exemptions as being grounds for withholding the information from the sixteen documents:
 - Section 24(1) – national security
 - Section 27(1)(a)(c)(d) – international relations
 - Section 37(1)(b) – information relating to the conferring of honours
 - Section 40(2) – personal information
 - Section 41 - information provided in confidence
9. Not all the exemptions have been applied to each piece of withheld information. Information from some of the correspondence has been withheld under a number of exemptions whereas only one exemption has been applied to the information in other documents.

Scope of the case

10. The complainant contacted the Commissioner on 11 July 2016 to complain about the way his request for information had been handled. As well as challenging the application of sections 24 and 27 he argued that the application of section 40(2) was incorrect because he understood that it had only been assumed that the individuals named or referred to in the correspondence were still alive whereas given the age of the file it was unlikely they were still alive. In any event, he argued names could simply be redacted. In respect of section 37, the complainant argued that there was a strong public interest argument in favour of knowing who was lobbying in favour of such honours being conferred.
11. The Commissioner considers that the matter to be decided is whether the information in question can be withheld under any of the exemptions cited.

Reasons for decision

Section 27 – international relations

12. Section 27(1)(a) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice relations between the United Kingdom and any other state.
13. This means that the exemption can be engaged on the basis that the alleged prejudice either 'would' occur or, the lower threshold, that the prejudice would only be 'likely' to occur. In this case TNA is relying on the lower threshold. However this still means that TNA needs to satisfy the Commissioner that the chance of international relations being prejudiced is more than a hypothetical possibility; there must be a real and significant risk.
14. The exemption has been applied to information contained in six pieces of correspondence from the file. Five of these have been withheld in their entirety under section 27. In respect of the remaining document section 27 has been applied to the majority of the letter with additional redactions being made under section 40 – personal information. The combined effect of which is that this is also withheld in its entirety. The application of section 40(2) to the contents of this letter will be dealt with later.
15. In broad terms the correspondence relates to visits to the UK by foreign royalty and visits abroad by members of the UK royal family. They concern the adequacy of the arrangements that are in place for such visits. It is not appropriate to reveal more about the contents of this correspondence.

16. TNA has argued that disclosing the information would be likely to damage relations with the relevant countries ie those countries whose Royals the UK was hosting and those being visited by members of our royal family. This is clearly a prejudice which the exemption provided by section 27(1)(a) is designed to protect against. However before accepting the exemption is engaged the Commissioner must be satisfied that there is a causal link between the disclosure of the withheld information and the alleged prejudice.
17. When considering whether it is likely that relations with the countries in question would be prejudiced the Commissioner has been guided by the Information Tribunal's observation that in the context of section 27(1), prejudice can be real and of substance "if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise been necessary."¹
18. Having viewed each of the six documents the Commissioner is satisfied that if their contents were disclosed there is a real chance that it would make relations with the countries in question more difficult or require some response from the UK government in order to mitigate any damage. For example, in respect of the correspondence regarding a visit abroad by members of our royal family, the information includes the views of an agency of the state to be visited. TNA argue that that agency would have no expectation of their views being shared with anyone other than the original recipients. The Commissioner finds that the exemption is engaged in respect of all six documents to which it has been applied.

Public interest

19. Section 27 is however subject to the public interest test, which means that even where the exemption is engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
20. There will always be some public interest in transparency and disclosing information in order to provide as full a picture as possible of the matters to which it relates. This helps to build trust in the public authorities that serve us.
21. The Commissioner recognises that some of the correspondence may be of particular interest from a historical point of view; however this is also the more sensitive of the correspondence. Other than this limited historical interest though, the Commissioner does not consider there would be any particular value in disclosing the information withheld under section 27.

¹ Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81.

22. The public interest in favour of withholding the information concerns the value in the UK maintaining strong relations with other countries, through which to promote the interests of the UK. There is also a public interest in other countries having confidence that they can make arrangements, either for their royalty to visit the UK, or to receive members of our royal family, without information on the consideration of the proposed arrangements being disclosed later. Even allowing for the passage of time since the visits took place, the Commissioner is satisfied that disclosing the withheld information would damage both the flow of information from other states and the candid consideration of that information. This would clearly hamper the UK's dealings with these countries.
23. The Commissioner finds that the public interest in maintaining the application of section 27(1)(a) is greater than the public interest in disclosing the information. TNA is entitled to withhold this information.

Section 40(2) – personal information

24. So far as is relevant, section 40(2) provides that information which constitutes the personal data of someone other than the person making the request, is exempt from disclosure if doing so would breach any of the data protection principle set out in the Data Protection Act 1998 (DPA).
25. TNA has applied this exemption to information contained in nine pieces of the withheld correspondence. This includes the letter referred to in paragraph 14 above. Only one document, a postcard labelled document 14 by TNA, has been withheld in full under section 40(2).
26. The first issue to consider when looking at section 40(2) is whether the information constitutes personal data. Personal data is defined by the DPA as being information which both identifies and relates to a living individual.
27. In respect of the postcard which has been withheld in its entirety under the exemption the Commissioner is not satisfied that the information does constitute personal data. It is evident from the information in the open version of the file that the correspondence is a post card addressed to someone with a title that could only be borne by a member of the Mountbatten family. There was no person of that title within the Mountbatten family and so the postcard was passed to the police as it seemed possible that either the intended recipient was posing as a member of the Mountbatten family or the sender was posing as a friend of the family.
28. As the intended recipient is fictitious and the sender only signed the card using only their first name, the Commissioner is not satisfied that any individual can actually be identified by the names used. It is not clear to

the Commissioner whether the address used was an actual residence of the Mountbattens, or whether it was redirected to Lord Mountbatten because that was fictitious too. In either case the address would not allow any individual to be identified. In light of this the Commissioner finds that the post card does not constitute personal data and therefore cannot be withheld under section 40(2). TNA are required to disclose this information.

29. The Commissioner is satisfied that the other information to which section 40(2) has been applied does constitute personal data. The information relates to named individuals. The complainant has argued that given the age of the information at least some of the individuals concerned would now be dead. However some of the people named are known to be still alive and the others can be assumed to be still living under what is sometimes referred to as the 100 year rule. For it to be safe to assume an individual is dead it is standard practice for TNA to apply a life expectancy of 100 years. If the date of the individual's birth is known then the matter is simple. Where their date of birth is not known their current age is calculated on the assumption that if they were a child at the time the information was created they were less than one year old at that time. If they were an adult, it is assumed they were 16 years old at the time the information was created. If, based on those assumptions, they would now be over 100 years old they are assumed to be dead. Although this is a cautious approach the Commissioner accepts it is a reasonable and responsible one.
30. The actual personal data relates to members of the royal family, those connected quite innocently with police cases and others. TNA has argued that to disclose this information would breach the first data protection principle. This states that personal data shall only be processed fairly and lawfully, and in particular shall only be processed if a condition in Schedule 2 of the DPA can be met.
31. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness, or whether a Schedule 2 condition can be satisfied.
32. 'Fairness' is a difficult concept to define. It involves consideration of:
 - The possible consequences of disclosure to the individual.
 - The reasonable expectations of the individual regarding how their personal data will be used.
 - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

33. Having viewed all the withheld information the Commissioner finds that disclosing this personal data would be unfair. Some of it relates to the personal lives of the data subject. The individuals concerned would not expect that such information, volunteered about them in letters written by others, to be disclosed to the world at large. Having considered the contents of this information the Commissioner is satisfied that its disclosure would intrude on the privacy they have a right to expect and in one case would be very intrusive. Furthermore disclosure of the information would add very little if anything to the public's understanding of events of any significance. Therefore the Commissioner is satisfied that the data subjects' rights and freedoms override the very limited interests in the public having access to this information and therefore its disclosure would be unfair.
34. Other information concerns criminal cases. The redacted information is the personal data of those caught up in events, for example as witnesses, rather than those who committed any criminal act. In respect of one particular piece of information it is evident from the information in the open file that the personal data relates to witnesses in a notorious murder case. It is also evident from the open file that one of those convicted of the murder claims he is innocent and essentially that there was a miscarriage of justice. The Commissioner considers that those who provided witness statements would do so on the understanding that their information would remain confidential until such time as they were required to provide evidence in open court. In this instance the Commissioner understands that the witness statements were not considered in court. The witnesses would not now expect their statements to become the focus of speculation as to how the authorities responded to claims that there had been a miscarriage of justice. This is a real possibility and the Commissioner is aware that there is still an active campaign to prove the innocence of those convicted of the murder. Therefore the Commissioner is satisfied that disclosing the names of the witnesses referred to in the correspondence would not only go against the expectations of those individuals, but could also prove very intrusive. However it is important to balance this impact on the legitimate right of the public to have access to this information.
35. The withheld information relates to an alleged miscarriage of justice and there is a heightened public interest in revealing information which would allow an informed public debate of the issues such a possibility raises. However the information contained in the open file details how the matter was dealt with by Lord Mountbatten and Sir Robert Mark. Furthermore the Commissioner is aware that the matter has been considered through the proper channels ie the Criminal Case Review Commission where doubtless the issues raised in the correspondence were fully aired. In light of this the Commissioner considers that

disclosing the names of the two witnesses would not inform the public debate of the issue to any great extent, nor is the disclosure necessary to ensure the matter is properly considered by the appropriate authorities.

36. The Commissioner concludes that it would be unfair to disclose the personal data contained in the remaining eight pieces of correspondence to which it has been applied; to do so would breach the first data protection principle. TNA are entitled to withhold this information under section 40(2).
37. The Commissioner notes that the complainant has argued that where the information does contain personal data, the names could be redacted so as to anonymise the information. Having looked at the information the Commissioner considers that where it would be possible to do so, TNA has already adopted this approach. In other cases the correspondence contains information other than names which would allow individuals to be identified and it is therefore necessary to withhold this contextual information as well as the names to avoid breaching the first data protection principle.

Section 37 – conferring honours

38. Section 37(1)(b) of FOIA provides that information is exempt if it relates to the conferring by the Crown of any honour or dignity.
39. The exemption has been applied to two pieces of correspondence which have been withheld in full. Having viewed the information contained in these two pieces of correspondence the Commissioner is satisfied that they do both relate to the conferring of honours. The exemption is therefore engaged. However it is subject to the public interest test.

Public interest test

40. The public interest test provides that exempt information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption is greater than the public interest in disclosure.
41. TNA recognises that there is a general public interest in transparency in government which encourages public interest in, and interaction with, the work of government. Disclosing the information would serve that interest.
42. The Commissioner also considers it is important that the public has confidence in the honours system and that it properly recognises those deserving of an award. Therefore there is public interest in disclosing information which would shed light on this process and reveal the extent

to which establishment figures seek to influence the system. This argument is reflected in the complainant's submission.

43. However in this particular case the particular information being withheld would not assist the public's understanding of these issues. Therefore the Commissioner considers there is only limited public interest in disclosing the information.
44. The public interest in maintaining the exemption takes in to account the value in preserving the principle that confidentiality is central to the operation of the honours system. It is important that the identity of those nominated for an honour remains confidential in order to preserve the integrity of the system and allows recommendations to be properly considered. For example it would be inappropriate to disclose information about a decision not to confer an honour as this might be seen as a reflection on that individual.
45. Having considered the public interest arguments above, the Commissioner finds that the public interest favours maintaining the exemption and withholding the information.

Conclusion

46. The Commissioner has now considered the redactions from all sixteen pieces of correspondence pieces. Redactions from five have been considered solely under section 27, eight have been considered solely under section 40(2), one has been considered under both sections 27 and section 40(2) and two have been considered solely under section 37. The Commissioner is satisfied that the majority of the information can be withheld under those exemptions. The only exception being the postcard, labelled as document 14 by TNA. This was withheld in its entirety under section 40(2). The Commissioner has found that the information contained in that postcard is not personal data and therefore is not exempt under that exemption. TNA is required to disclose the postcard.

Right of appeal

47. 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

48. 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.

49. 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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