

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 April 2023

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

### Decision (including any steps ordered)

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1. The complainant has requested information from The National Archives ("TNA") in relation to copies of all transcripts and court documents about a specific murder investigation. TNA refused to provide the withheld information, citing section 38 of FOIA – health and safety and section 40(2) of FOIA – personal information.
2. The Commissioner's decision is that section 38(1) of FOIA is engaged and that the public interest lies in maintaining the exemption. However, as TNA did not respond to the request within the legislative timeframe, it has breached section 10 of FOIA.
3. The Commissioner does not require TNA to take any steps as a result of this decision notice.

### Request and response

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4. On 26 March 2022, the complainant wrote to TNA and requested information in the following terms:  

"I would like all copies of all transcripts & court documents related to this case..."
5. TNA responded on 5 October 2022. It stated that some of the information in the record is covered by the exemption under section

38(1)(a) of FOIA and that other information is covered by the exemption under section 40(2) of FOIA. Prior to this response, TNA had contacted the complainant frequently to advise that due to the need for a public interest test to be completed, there would be delays in providing a full response.

6. Following an internal review TNA wrote to the complainant on 7 December 2022. It stated that the information is withheld under section 38(1)(a) and section 40(2) of FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 18 February 2023, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of this complaint is to determine if TNA is correct to cite section 38(1)(a) of FOIA and, if the exemption is engaged, whether the public interest lies in withholding the information or in disclosure.
9. Depending on the Commissioner's findings, he may then go onto consider TNA's application of section 40(2).

### **Reasons for decision**

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#### **Section 38 – health and safety**

10. Under section 38(1) information is exempt information if its disclosure would or would be likely to a) endanger the physical or mental health of any individual or b) endanger the safety of any individual.
11. The Commissioner's guidance 'Health and Safety- section 38'<sup>1</sup> states 'In section 38 the word "endanger" is used rather than the word "prejudice" and 'The use of the phrase "any individual" in section 38 includes any specific individuals, any member of the public, or groups within society'.
12. In the Commissioner's view, three criteria must be met in order to engage section 38:
  - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-guidance/section-38-health-and-safety/>

relevant exemption;

- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the endangerment which the exemption is designed to protect. Furthermore, the resultant endangerment which is alleged must be real, actual or of substance; and,
  - Thirdly, it is necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in endangerment or disclosure 'would' result in endangerment.
13. Consideration of the exemption at section 38 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### The applicable interests

14. TNA considers that the release of the material would be likely to significantly distress the surviving relatives of the victim, most notably their children. As such, the release of the material and its availability to members of the public is likely to cause shock, harm and distress to such an extent that mental endangerment may be rendered to these individuals.

#### The nature of the endangerment

15. The Commissioner's guidance states 'Endangering mental health means it must have a greater impact than causing upset and distress.'
16. The Commissioner must now consider if there is a causal link between the requested information and the endangerment that section 38(1)(a) is designed to protect. In order to do so, the Commissioner has reviewed the withheld information.
17. Returning to paragraph 12, the Commissioner recognises that a public authority will not necessarily be able to provide evidence in support of this causal link, this is because the endangerment relates to events that have not occurred. However, there must be more than a mere assertion or belief that disclosure would lead to endangerment; there must be a logical connection between the disclosure and the endangerment in order to engage the exemption.

18. TNA has explained that the disclosure of the requested information would be likely to cause shock, harm and distress to such an extent that mental endangerment may be rendered to the individuals concerned.
19. TNA has explained that the exemption has been applied to information pertaining to the murder of an individual within the post-mortem report, [redacted], and descriptions of the murder by witnesses within police reports, witness statements and interview transcripts with the defendants.
20. The complainant has stated that due to the time passed since the murder, "...no one is in any danger in relation to a case that occurred [redacted] years ago...".
21. The complainant has explained that there is a significant amount of information already in the public domain, such as the victim's name, the names of the defendants, the addresses of those individuals and quotes from the court case.
22. The Commissioner acknowledges that some information relating to the murder investigation will already be in the public domain, but it would not be to the same extent as the "graphic" information contained within the withheld file.

### **Likelihood of endangerment**

23. TNA is relying upon the lower threshold of endangerment 'would be likely to'. The Commissioner's guidance states 'this means that even if there is below a 50% chance, there must be a real and significant likelihood of the endangerment occurring.'
24. The Commissioner accepts that the exemption is engaged at the lower threshold of endangerment. However, there may be a public interest in disclosing this information that outweighs the public interest in non-disclosure which he will now go on to consider.

### **Public interest test**

#### Considerations favouring disclosure

25. TNA has explained that there is a presumption in favour of openness under FOIA.
26. TNA has also explained that it is aware of the interest surrounding criminal cases and the transparency of the Criminal Justice System will increase public awareness of the criminal prosecution process.

27. TNA has also advised that releasing information about the decision-making process in this case will increase public awareness and accountability of the Criminal Justice System.

### **Considerations favouring withholding the information**

28. TNA has explained that the file concerns the murder of a named individual and includes references to events leading up to, during and following the murder.
29. TNA has stated that the detailed information about the circumstances leading up to the murder would not have been in the public domain. It added that it is not known how much detail the victim's surviving family has been told about the death of the victim and release of the material may cause extreme mental distress.
30. TNA has also argued that the release of the material after such a prolonged period would be likely to have the same endangering effect on the mental health of the victim's family and the defendants' families.

### **Balancing the public interest**

31. The Commissioner agrees that there is a public interest in the transparency of the Criminal Justice System. However, he agrees with TNA that if such information were to be released, it may cause significant mental distress to the family of the victim, as well as the witnesses and the defendants' families.
32. The Commissioner therefore considers that the public interest lies in maintaining the exemption at section 38(1)(a), and the continued closure of the case file. The Commissioner has previously dealt with requests of a similar nature and found that the files should remain closed<sup>2</sup>.
33. The Commissioner notes that TNA has submitted evidence in support of its application of section 40(2). However, as the Commissioner has upheld the exemption at section 38, he has not gone on to consider section 40 in this decision notice.

### **Section 10**

34. Under section 10(1) of FOIA a public authority must comply with section 1(1) promptly and within the timeframe stated by the legislation, following the date of receipt of the request.

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<sup>2</sup> [ic-178849-v6t6.pdf \(ico.org.uk\)](#) and [ic-97448-z5s3.pdf \(ico.org.uk\)](#)

35. In this case, TNA did keep the complainant regularly updated on why there were delays in providing a response (it was carrying out a public interest test). However, it still exceeded the time permitted and as such, TNA breached section 10(1) of FOIA

### **Other matters**

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36. The Commissioner is aware that TNA took an unacceptable length of time to respond to the complainant, even when taking into account the extra time TNA has as an archive to respond to an information request and the additional time allowed to consider the public interest. However, the difficulties TNA has had in complying with the legislative timeframe have been highlighted by the Commissioner in a recent [Practice Recommendation](#).

## Right of appeal

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37. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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 .....**

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**