

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2023

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

Decision (including any steps ordered)

1. The complainant has requested from the National Archives (TNA) 'closed' information relating to the Elgin Marbles¹. TNA refused to provide this information, citing section 40(2)(personal information) and section 41(1)(information provided in confidence) of FOIA.
2. The Commissioner's decision is that TNA has correctly withheld the requested information under section 40(2) and 41(1) of FOIA. However, TNA breached section 17(1) of FOIA by providing its refusal notice late.
3. The Commissioner does not require further steps.

¹ The Elgin Marbles are ancient Greek sculptures that are on display in the British Museum. They were removed from Greece on behalf of the 7th Earl of Elgin in the early nineteenth century.

Request and response

4. On 24 April 2023 the complainant made the following request for information in the following terms:

"I would like to request copies of the following three documents/extracts listed on the Discovery Catalogue as being closed.

ED 245/233/1
FCO 9/4090/1
FCO 13/1578/1

All three documents, which are held by the National Archives relate to the so-called Elgin Marbles. All three documents are more than 20 years old, and I can see no reason why they continue to be held back. I note one of them is due to be opened next year.

In the case of each document, I would like to request a copy of each and every page including any pages which are for whatever reason blank. Could you also provide copies of the front, back and inside covers of any document. If you are minded redacting any material for whatever reason, could you please redact the material where it appears in the file. That way I will be able to judge the extent and location of the material.

Please redact the names and personal details of any person known or presumed to be living.

But please do not redact the names of any individuals known to be deceased... "

5. TNA responded on 9 June 2023 after consultation with the transferring department the FCDO² and refused to provide the requested information (FCO 13/1578/1 closed extracts), citing sections 40(2) and section 41(1) of FOIA. The open parent piece being FCO 13/1578 - Return of cultural property to its country of origin: Greece's claim for the Elgin Marbles (Parthenon Marbles).
6. On 13 June 2023 the complainant requested an internal review. The complainant was unhappy with the information being withheld but
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² The Foreign, Commonwealth and Development Office

restated that they accepted that personal data could be redacted and queried whether the Environmental Information Regulations had been considered.

7. On 11 July 2023 TNA wrote to the complainant explaining that the review was ongoing.
8. TNA provided an internal review on 9 August 2023 in which it maintained its position. The review also stated that none of the withheld information contained material that would fall under the EIR.

Scope of the case

9. The complainant contacted the Commissioner (in a letter dated 21 August 2023) to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to consider TNA's citing of section 40(2) and 41(1) of FOIA. He will also consider whether any of the information falls within the EIR and whether any procedural breaches occurred.

Reasons for decision

Is the requested information environmental?

11. The complainant asked TNA to consider whether any of the requested information fell within the EIR.
12. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies,

legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

13. TNA has had the chance to review this matter several times and concluded that none of the information fell under the EIR:

“The context of the information being withheld is not related to the state of the elements of the environment; factors or measures affecting those elements or economic analyses relating to such measures; nor is it about environmental legislation or the state of human health and safety.”

14. Having seen the requested information, the Commissioner agrees with TNA that none of the information is environmental information within the meaning of the definition in paragraph 12 above.

Section 40 - personal information

15. The complainant had stated that personal data could be redacted. However, TNA explained to the Commissioner that the parent record had already been redacted as far as it was feasible under FOIA. The Commissioner agrees with TNA that it would not be possible to anonymise the information by redacting names, as the complainant suggested, because this could not be done without rendering it meaningless.
16. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

17. In this case the relevant condition is contained in section 40(3A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

20. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
24. TNA explained to the Commissioner that the requested information dates from 1982. TNA repeats the "standard government practice" to assume that individuals are still living if they have not yet reached the age of 100. Where a date of birth is unknown it is estimated and the same rule then applies.
25. The Commissioner notes that some of the individuals named are now deceased so this analysis does not apply to them. However, several of

³ As amended by Schedule 19 Paragraph 58(3) DPA

them are still alive or their current status is unknown so the above rule would apply and they would be treated as living individuals.

26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names of the data subjects are clearly information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
28. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. Article 5(1)(a) of the GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
30. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

32. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"⁴.

⁴ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

33. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

35. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
36. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

Is disclosure necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

38. TNA argues that “a justification is needed for disclosure” which it does not believe exists. It suggests that there is a differentiation between information that benefits the public good and information that meets public curiosity. On this basis, the information should not be disclosed. TNA quotes part of paragraph 10 from [EA/2012/0030](#), the Commissioner has reproduced the entire paragraph below for clarity:

“A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principles, including the determination of what is “necessary” for the purpose of identifying a legitimate interest. In order to qualify as being “necessary” there must be a pressing social need for it - Corporate Officer of the House of Commons v Information Commissioner and others [2008] EWHC 1084 (Admin).”

39. Although TNA recognises “that there is a general public interest in government accountability and transparency... release of this material would add to the historical account”. However, it contends that there is “no pressing need” that “would outweigh the public interest in protecting the information, and the rights and freedoms of the individuals...”
40. The complainant is focused on obtaining an undisclosed part of a historical record pertaining to the Elgin Marbles.
41. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject’s interests or fundamental rights and freedoms

42. It is necessary to balance the legitimate interests in disclosure against the data subject’s interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
43. TNA has conducted the balancing test. It acknowledged that the release of this material could add to what has been disclosed, but that it constitutes individuals’ personal information and there is a “requirement to protect personal data”. TNA referred the Commissioner to a previous decision notice to support its position:

“The Commissioner has also considered the circumstances in which the personal data was obtained and notes that, at the time this

information was recorded, the first legislation regarding data protection had yet to be passed. Data subjects would not therefore have been provided with any fair processing notices and it is unlikely that they would have had any expectations that these details would have been disclosed into the public domain.”⁵ (paragraph 42)

44. TNA goes on to say that,

“While such living individuals may have been content to provide information to be used for a specific purpose they may not wish for it to be used for any additional purpose.”

Its view is that, “given the private nature of the information it is reasonable to assume that consent to disclosure would not be granted by the data subjects, and that disclosure would be considered unfair and would contravene the first data protection principle”.

45. TNA’s view is that “it is in the legitimate interests of the public to uphold the rights of the living individuals to whom this record relates”. It contends that -

“personal information of a confidential nature could be classed as an unwarranted interference with an individual’s privacy and there would be no expectation that such information would be released to the public during their lifetime”.

TNA argues that “the same criteria for processing personal data applies to personal information relating to public figures as for private individuals”. TNA has to “observe our obligations to these living individuals and their rights under Data Protection Legislation”. Its view is that “damage or distress may be caused” to these living individuals and that disclosure would not be lawful and therefore breach data protection principles. It has to be “very sure that releasing further information from closed extracts would be of use by adding something meaningful to the information already available in the public domain”.

46. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;

⁵ [fs_50314844.pdf \(ico.org.uk\)](#)

- whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
47. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
48. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
49. The Commissioner gives some weight to the argument that TNA has provided regarding the expectations of individuals before the passing of the first DPA in 1984 but he notes that some of the evidence to support this view relates to a different type of request. He also notes that this approach would rule out the disclosure of any historical information containing the personal data of a living individual prior to that date.
50. However, in this instance, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
51. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent. TNA was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).
52. As the Commissioner has earlier noted, several of the individuals whose names appear in this information are deceased, this exemption therefore cannot apply to them. However, TNA has also cited section 41(1) of FOIA to all the requested information.

Section 41 – information provided in confidence

53. Section 41(1) of FOIA provides that –

“(a) Information is exempt information if it was obtained by the public authority from any other person (including another public

authority); and, (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”.

54. The Commissioner’s advice on section 41 states that -

“information will be covered by Section 41 if –

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence.
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed.”⁶

Was the information obtained from any other person?

55. Section 41(1)(a) states that the information must have been obtained from “any other person”.

56. Having seen the withheld information, it is clear that the information was originally provided from another person(s) or authority to the transferring government department, the Foreign, Commonwealth and Development Office. The Commissioner therefore accepts that TNA received this information from another party.

57. The Commissioner must next consider whether or not its disclosure to the public (otherwise than under FOIA), would constitute a breach of confidence ‘actionable’ by that or any other person.

Would disclosure constitute an actionable claim for breach of confidence

58. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:

⁶ [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider.

59. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. TNA believes that "release would amount to an actionable breach of confidence".

60. TNA says Section 41(1) exempts information from any other person if releasing that information would constitute an actionable breach of confidence. FCO 13/1578/1 contains what TNA describes as "confidential communications". Release would amount to an actionable breach of confidence.

Does the information have the necessary quality of confidence?

61. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.

62. TNA states that the information – FCO 13/1578/1

"was provided in private correspondence on the understanding of strict confidence. This information would not be accessible by other means and therefore has the necessary quality of confidence".

Was the information imparted in circumstances importing an obligation of confidence?

63. TNA has argued in relation to personal data that this information predated information rights legislation and has made clear that individuals concerned would have assumed confidentiality for that reason.

Would disclosure be detrimental to the confider?

64. TNA has stated that the FCDO has not agreed to its release:

"the Courts and the Tribunal have recognised that it is in the public interest that confidences should be respected and furthermore, it has been held that detriment need not be demonstrated".

Is there a public interest defence for disclosure?

65. TNA has concluded that it would have no public interest defence if it disclosed this information as there is “no overriding public interest defence for disclosure of the withheld information”. The grounds for disclosure according to the courts rests on information that “highlights misconduct, wrongdoing or risks to the public”, none of which applies regarding this information. TNA maintains that the “detriment that would arise from disclosure of the disputed information would far outweigh any public interest...”

The Commissioner’s view

66. The Commissioner accepts that there might be some historical interest in the requested information, however it is not of sufficient public interest to provide a defence for breach of confidence. He has concluded that TNA was correct in withholding this information.

Procedural matters

67. The complainant had been informed by TNA that their request had been responded to in 30 working days (TNA has up to 10 extra working days to comply with requests). TNA acknowledged that this was an error and it actually took 31 working days which was a breach of section 17(1) of FOIA.

Right of appeal

68. 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

69. 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.
70. 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
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