

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 August 2024

**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 copies of four closed files that relate to the late Rudolph Hess. The National Archives ('TNA') relied on section 37(1)(a) of FOIA (communications with the Sovereign and the awarding of honours) to withhold three of the files and advised that it was withholding the fourth file under section 40(2) of FOIA (third party personal information). TNA later withdrew its reliance on section 40(2) and disclosed the fourth file to the complainant.
2. The Commissioner's decision is that TNA was entitled to rely on section 37(1)(a) of FOIA to withhold the remaining three files.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 11 December 2023, the complainant wrote to TNA and requested information in the following terms:

"I wanted to request access to the contents of the following files/documents which all relate to the late Rudolph Hess (26 April 1894 – 17 August 1987)

FCO 161/24/1 – Closed Extracts Folios 131, 134 and attachments  
FCO 161/50/1 – Closed Extracts Folios, 134

FCO 90/19/1 – Closed Extract: Folio 114  
FCO 33/9189/1 – Closed Extracts: Folios 92.100.”

5. TNA responded on 25 January 2024. It applied section 40(2) of FOIA to FCO 33/9189/1. The same day, it wrote to the complainant again and stated that it was relying on section 37 of FOIA to withhold the remaining requested files.
6. Following an internal review, TNA wrote to the complainant on 18 April 2024 and maintained its position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 25 April 2024 to complain about the way their request for information had been handled.
8. During the course of the Commissioner’s investigation, TNA advised that it had reviewed its response in relation to FCO 33/9189/1 and it had decided to disclose the file to the complainant.
9. The Commissioner considers that the scope of his investigation is therefore to determine whether TNA was entitled to rely on section 37(1)(a) to withhold the remaining requested files.

### **Reasons for decision**

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#### **Section 37 - Communications with the Sovereign and the awarding of honours**

10. Section 37 of FOIA states:

“(1) Information is exempt information if it relates to-

(a) communications with the Sovereign,”

11. The exemption also covers communications made or received by a person or organisation who is acting on behalf of the Sovereign, for example, HRH’s private secretary.
12. Section 37(1)(a) is an absolute exemption – this means if information engages the exemption then it’s automatically exempt. There is no requirement for TNA to consider the public interest in disclosing or withholding the requested information.

13. For the purpose of section 37(1)(a), information only becomes a historic record (in which case section 37 couldn't apply) when the later of the following time periods has passed:
  - Five years from the date of the "relevant death"; or
  - 20 years from the creation of the record containing the information.
14. TNA has explained that the Sovereign in question, for the purpose of section 37, is Queen Elizabeth II. Since Queen Elizabeth II died in September 2022, the Commissioner is satisfied that the later of the above time periods hasn't yet passed and so section 37(1)(a) still applies.
15. The Commissioner has seen the withheld information and he's satisfied that the three remaining files fall under section 37(1)(a), as it constitutes correspondence to and on behalf of the late Queen Elizabeth II.
16. In its submission TNA also considered the complainant's argument that some of the information could be redacted to enable the files to be disclosed. TNA has explained that the majority of the information that is not sensitive has already been disclosed into the open parent pieces (FCO 161/24, FCO 161/50 and FCO 90/19) and that the protection of the remainder of the information is properly served by maintaining the closure of the existing closed extracts under section 37(1)(a).
17. The Commissioner's decision is therefore that the withheld information engages section 37(1)(a) of FOIA. As explained earlier, once engaged there is no requirement to consider the public interest.

## **Other matters**

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18. The Commissioner notes that TNA failed to carry out an internal review within 40 working days. The Section 45 Code of Practice advises all public authorities to carry out internal reviews in a timely manner and within 20 working days. A total of 40 working days is permitted in particularly complex cases only.
19. TNA is reminded of the requirements of the Code and of the importance of carrying out internal reviews in a timely manner and in accordance with the timeframes specified in the Code. The Commissioner has recorded this as part of his routine monitoring of public authorities.

## Right of appeal

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20. 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)

21. 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.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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