

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2016

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

Decision (including any steps ordered)

1. The complainant has requested information relating to two FCO files listed as closed. The National Archives (TNA) refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that TNA has correctly applied sections 40(2) of FOIA to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 12 January 2016 the complainant requested to review some files as he was interested in updating his biography about Guy Burgess:
'FCO 158/240/1 – Guy Burgess and Donald Maclean: briefing and questions; Closed extracts: Appendices H and I; 1954.'
'FCO 158/246/1 – Closed extract: Letter of 14/8/1951; Letter from Sir William Strang (Permanent Under- Secretary of State, Foreign Office) to Heads of Missions concerning the disappearance of Guy Burgess and Donald Maclean, July 1951.'
5. These files were part of a request to review 26 files and on 15 January 2015 it was agreed to consider the requests in batches of six. These files were part of the second batch of six requests and work began on 14 April 2016 upon completion of the previous batch of requests. One of

the other four files has been brought to the ICO as a complaint (reference FS50640239) but the remaining three files have not been considered by the Commissioner as they have not been brought as a complaint.

6. On 18 May 2016 TNA responded that they were unable to open the files to the public and cited section 40 (2) (by virtue of section 40 (3) (a) (i)).

FCO 158/240/1

'In this case the exemption applies because the document contains the personal and sensitive personal data of a number of identified individuals assumed still to be living. The exempt material includes unsubstantiated allegations, employment information and the political views of a number of identified individuals.'

FCO 158/246/1

'In this case the exemption applies because the document contains the personal and sensitive personal data of an identified individual assumed still to be living. '

7. On 18 May 2016, the complainant requested an internal review asking for proof that the individuals are still alive and that release of the name outweighs the public interest in the Burgess and Maclean case.
8. On 20 May 2016 TNA provided a response to 5 internal review requests on the topic of providing evidence that individuals within the files are still living. TNA explained the provisions of the Code of Practice for Archivists and Record Managers which the complainant disputed.
9. On 27 May 2016 TNA provided the outcome of the internal review which upheld the original decisions in both cases.

Scope of the case

10. On 1 June 2016 the complainant wrote to the Information Commissioner. He argued that *'it is hardly rocket science that after Burgess fled M16/FCO would interview armies of colleagues. The fact that someone was interviewed doesn't in itself give rise to any imputations of wickedness.'*
11. The Commissioner considers the scope of this case to be to determine if TNA has correctly applied section 40(2) FOIA to the withheld information.

Reasons for decision

Section 40(2) – Third party personal data

12. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data?

13. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
14. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
15. TNA has explained to the complainant and in more detail to the Commissioner, that the closed files contain the personal data of identified individuals. The files contain claims that are unsubstantiated.
16. The Commissioner has viewed the withheld information and is satisfied that the entirety of each file is comprised of the personal data of identified individuals.
17. The individuals are believed to be still living. If an individual is no longer living the information is not personal data and so cannot be withheld under section 40(2).
18. 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. (see page 28 of www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf) 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.
19. Although this is a cautious approach the Commissioner accepts it is a reasonable and responsible one. (see decision notice [FS50566659.pdf](#))
20. The Commissioner considers that the information withheld under section 40(2) is information from which living data subjects are identifiable.

Sensitive personal data

21. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
- (a) racial or ethnic origin
 - (b) political opinions
 - (c) religious beliefs
 - (d) trade union membership
 - (e) physical or mental health
 - (f) sexual life
 - (g) criminal offences, sentences, proceedings or allegations.
22. The requested information falls into some of these categories of sensitive personal data. The files contain details of unsubstantiated claims concerning political opinions and private life information.
23. Upon viewing the withheld information the Commissioner considers that both files contain sensitive personal data.

Would disclosure breach the Data Protection Principles?

24. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
25. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

26. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
27. The information in this case concerns the sensitive personal information of named individuals and there is no expectation from these living individuals that their personal information would be made publicly available during their lifetimes. TNA have stated that:

'The documents do not state that the individuals concerned had been contacted when the information about them was being compiled. The papers have been compiled by others about said individuals. The National Archives can only review information requests on the merits of the documentation under consideration. As the documents do not show any explicit consent we are unable to assume that any was given or taken at the time or subsequently.'

28. In addition TNA referred to the Code of Practice for Archivists and Records Managers under section 51(4) of the Data Protection Act 1998; Section 4.2.7 on the matter of contacting named individuals who appear in these records to ask for their consent to disclosure of their personal data:

'...Except when they themselves collect data for the purposes of administering their offices, archivists will generally not be expected to inform data subjects of processing they undertake for research purposes because to do so would involve disproportionate effort. The unfairness of not so informing data subjects is minimal where the relevant conditions are observed and records either kept closed for an appropriate period or used only for research which will be anonymised.'

29. To avoid inadvertent disclosure of the information itself, the Commissioner does not propose to go into further details in this decision notice. However, she is satisfied that the individuals to whom the personal data relates would expect the information to be withheld and that this expectation is reasonable.

Consequences of disclosure

Damage and distress

30. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the named individuals.
31. TNA argued that disclosure of the contents of the file into the public domain would be distressing for the identified individuals:

'the named individuals had little to no involvement with the Burgess/Maclean crisis ... need to protect individuals who through virtue of their own personal private life choices would be, if the information was released, potentially subjected to undue distress.'

32. In addition, TNA explained that redaction/anonymisation had been considered but was not a viable option. The documents contain personal identifiers on almost every page and the nature of the personal information contained – unstructured and integral to its understanding – means that any redaction would make the remaining information of little contextual, historical or public interest value.

33. Upon viewing the contents of the withheld information, the Commissioner accepts that disclosure would be distressing for the named individuals and that complete anonymisation would be extremely problematic to achieve.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

34. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
35. TNA responded to the complainant's argument that *'the fact that someone was interviewed doesn't in itself give rise to any imputations of wickedness'*. TNA stated that in withholding this information it *'is not passing judgement or commenting on any perceived level of guilt, blame or in deed "wickedness"'. The National Archives can only review information requests within the constraints for the Freedom of Information Act and the documents at hand. In withholding the information held within these extracts we are simply trying to safeguard the personal data of named identifiable individuals.'*
36. The complainant argued that there was a public interest in the disclosure of this information.
37. TNA has argued that
- the named individuals had little to no involvement with the Burgess/Maclean crisis
 - the passage of time may be considered as mitigating circumstances for disclosure... However the impact of any release of this personal information into the public domain upon the individuals concerned... would be unfair ... Personal sensitive data remains as such for the lifetime of the individual.
 - much of the personal information held within these records may not have been shared by the individuals; a release now would be as damaging as at the time.
 - the sensitivity of the information in question has not been reduced by the passage of time (TNA referred to decision notice [FS50497015](#))
38. In this case, the Commissioner is not convinced that the specific information requested, while of interest to the complainant, is of

sufficient wider public interest to warrant overriding the protection of the third party sensitive personal data of those concerned.

39. Having considered TNA's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that TNA has put forward for protecting the individuals' sensitive personal data, namely:
- the individuals' likely expectation about how their personal and sensitive personal data will be managed
 - the individuals' lack of consent to its release; and
 - the possible negative consequences to the individuals of releasing the information.
40. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the individuals named within the file and that it would not be fair to disclose the requested information in this case.

Conclusions

41. The Commissioner is satisfied that the withheld information is sensitive personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned. The Commissioner upholds TNA's application of the exemption provided at section 40(2) of the FOIA to both files.

Right of appeal

42. 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

43. 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.
44. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF