

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 05 June 2017

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

Decision (including any steps ordered)

1. The complainant requested access to a closed file. The request was refused by the National Archives (TNA) on the grounds of health and safety (section 38 of FOIA). The Commissioner has found that section 38(1) is engaged and that in all the circumstances the public interest in disclosure is outweighed by the public interest in maintaining the exemption. The Commissioner does not require the public authority to take any remedial steps to ensure compliance with the legislation. The Commissioner also finds that TNA breached section 10.

Request and response

2. On 9 July 2016 the complainant requested access to the following information: file DPP 2/1508 – ANDERSON: Murder.
3. On 14 November 2016 TNA cited section 38 (health and safety) of FOIA to refuse the information under the FOIA. The complainant was advised to apply to the Crown Prosecution Service for privileged access.
4. The complainant requested an internal review on 16 November 2016. TNA provided the outcome of its internal review on 28 November 2016 upholding the refusal to provide the requested information under sections 38 and 40 (personal data) of FOIA. It repeated the advice to apply to the Crown Prosecution Service for privileged access.

Scope of the case

5. On 22 November 2016 and 11 February 2017 the complainant wrote to the Commissioner to complain about the way her request for information had been handled.
6. Given the individual circumstances of the case, the Commissioner invited the complainant to withdraw the case on 23 May 2017 as it was her preliminary opinion that the closed file could not be opened to the public under FOIA. The Commissioner explained that she can only consider concerns within the scope of the FOIA: the Commissioner has no jurisdiction outside of the FOIA. For example, the Commissioner cannot order TNA (or anyone else) to allow a private review of a specific file.
7. The Commissioner stated that it would appear that the Crown Prosecution Service (CPS) (who transferred the file to TNA) are the only ones that could give authority for privileged access to their files (outside of FOIA) in the complainant's particular circumstances. Therefore the Commissioner urged the complainant to follow the advice provided by TNA and contact the CPS to seek access.
8. The complainant declined to withdraw the FOIA case.
9. Therefore the focus of the Commissioner's investigation is to determine whether section 38 of FOIA was applied correctly by TNA as a basis for refusing to disclose the withheld information under FOIA.
10. TNA has explained to the Commissioner that it did not make clear to the complainant that it also applied section 40 in the initial response to the complainant and in the internal review. Section 40 will only be considered by the Commissioner if section 38 has not been applied correctly.

Reasons for decision

Section 38 – Health and safety

11. Section 38(1) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to:
 - (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual

12. For the exemption to be engaged it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
13. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of disclosure of the information in question is *"real, actual and of substance"*, rather than trivial or insignificant. As part of this she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
14. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that is envisaged would, or would be likely to occur relates to the applicable interests described in the exemption. Secondly, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.
15. In this case TNA's justification for applying section 38(1) of FOIA rests on the following:
 - The file contains personal and sensitive personal information relating to a named deceased person with living relatives. It is these living relatives of the deceased person within the file that the exemption being relied upon is designed to protect.
 - Disclosing information now, which may not have been known by or shared with living relatives, many years after the event, may be highly distressing to the living relatives.
 - Disclosure of the information (reports, witness statements and images) are of such graphic content that they are likely to evoke painful and disturbing memories for the surviving relatives and is likely to endanger the relatives' mental well-being.
16. The complainant disputes that the file should be withheld and provided reasons for disclosure. The Commissioner understands these reasons

but will not detail these reasons in this decision notice in case it reveals information about the complainant.

17. Having viewed the file, the Commissioner is satisfied that the nature of the harm referred to by TNA is relevant to the exemption and that to redact the personal and sensitive personal data within the file would be extremely difficult to do.
18. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by TNA. In her guidance on the prejudice test¹, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice would or would be likely to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.
19. In this case TNA have relied on the second limb of the exemption: that mental endangerment (the likelihood of causing significant upset or distress) is 'likely to occur'. Whilst unable to provide definitive or evidential link between disclosure of the information and any endangerment, TNA argue that the 'nature, context and substance of the material under consideration, if released, could potentially cause extreme personal anguish, and significant distress to surviving family members'.
20. Her analysis of the arguments provided has led the Commissioner to conclude that section 38(1)(a) is engaged on the basis that the risk of endangerment is substantially more than remote. As section 38 is a qualified exemption, however, consideration must be given to the balance of the public interest in disclosure.

Public interest arguments in favour of disclosure

21. TNA considered the following arguments in favour of disclosure:

¹http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.pdf

- There is a presumption of openness under the terms of the Freedom of Information Act.
- The interest surrounding criminal cases and transparency of the criminal justice system will increase public awareness of the criminal prosecution process.
- Opening this file would contribute towards an historic public record of crime.

Public interest arguments in favour of maintaining the exemption

22. TNA considered the following arguments in favour of maintaining the exemption:

- This file concerns the details of a child's murder and includes references to events leading up to the murder and details and images of the crime scene.
- Release of this information after such a prolonged period of time would have the same endangering effect on the mental health of the victim's surviving relations as if releasing it at the time. Due to the age of the victim's surviving relations it cannot be known how much they knew about the murder or preceding events.
- There is a profound public interest in not endangering the mental health of a victim's family.

Balance of the public interest

23. In balancing the need for governmental accountability against safeguarding the mental health needs of surviving relations, TNA considered that to 'potentially endanger even just one person would be irresponsible'. Also, the passage of time was not seen as a factor in favour of release. A release now could be as damaging or distressing to living relatives as if made at the time; potentially more so.
24. Therefore, TNA concluded, with consideration from the transferring department CPS, that although the balance was very fine it was ultimately decided that the cautionary approach of 'precautionary protection' had to be taken to protect members of the public's mental well-being.
25. The Commissioner will invariably place significant weight on protecting individuals from risk to their physical and mental well-being. The natural consequence of this is that disclosure will only be justified where a compelling reason can be provided to support the decision.

26. The Commissioner considers that the strength of the arguments for disclosure (transparency of the criminal justice system) is outweighed by the public interest in maintaining the exemption to safeguard the mental health needs of surviving relations.
27. Therefore, in all the circumstances, the Commissioner has decided that the balance of the public interest favours maintaining the exemption at section 38.
28. The Commissioner notes that TNA has submitted evidence in support of its application of section 40(2) (by virtue of section 40(3)(a)(i) personal data exemption) but as the Commissioner has upheld the exemption at section 38, she has not gone on to consider section 40 in this decision notice.

Section 10 – time for compliance

29. Section 10 of FOIA requires that a public authority should respond to a request for information within 20 working days. In this case, TNA responded 4 months after receiving the request. It therefore breached section 10(1) of FOIA.
30. TNA provided the Commissioner with a timeline and although the Commissioner understands that TNA has rights to additional time, the Commissioner is concerned that the process takes so long:
 - 09 July 2016 FOI request received
 - 11 July 2016 Request logged (first working day)
 - 08 August 2016 TNA emailed complainant to confirm 10 day extension as set out in section 4(2) of Time for Compliance Regulations for FOI:
<http://www.legislation.gov.uk/ukxi/2004/3364/contents/made> as required by section 66 of FOIA the transferring department (CPS) were consulted by TNA
 - 22 August 2016 TNA emailed that section 38 was being considered, which required a Public Interest Test (PIT)
 - 20 September 2016 Two PIT extensions were applied and complainant informed. FOIA stipulates that this test should be conducted 'within a reasonable timeframe'. Whilst it is noted that this process required several months TNA 'do not believe it was unduly protracted'.
 - 14 November 2016 Final response sent.
31. The Commissioner does not consider this to be satisfactory and trusts that TNA will make improvements in this regard in the future.

Right of appeal

32. 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

33. 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.
34. 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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