



**Appeal number: EA/2021/01007**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**PATRICK CONHEADY**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Before:  
JUDGE ALISON MCKENNA  
TRIBUNAL MEMBER SUSAN WOLF  
TRIBUNAL MEMBER JO MURPHY**

**Determined on the papers, the Tribunal sitting in Chambers  
on 17 December 2021**

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## DECISION

**The appeal is allowed in part. The requested information is exempt from disclosure under s. 40 (2) FOIA 2000.**

**The requested information may be disclosed in a redacted form.**

**The redacted passage on page E212 of the open bundle is amended to read as follows:**

***“one.....under the age of 14 years...at...”***

## REASONS

### *Mode of Hearing*

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber’s Procedure Rules<sup>1</sup>.
2. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 217. The withheld information is redacted on page E212 of the open bundle. We also considered a closed bundle (pages 1-3), containing the unredacted withheld information. We refer to the contents of closed bundle in a closed annexe to this Decision.

### *Background to Appeal*

4. The Appellant on 12 April 2020 made a request to The National Archives (‘TNA’) for information relating to the Metropolitan Police’s dealings with Gerrard Conheady in 1928. The Appellant is a relative of Gerrard Conheady, and is researching the family history for the purposes of writing a book. His request was in the following terms:

*I think that our last communication was in March 2015 when you sent me the releasable aspects of the following file; MEPO 3/34 Gross indecency and suspected murder of his brother in the Irish Free State on 18 July 1928; warrant executed in United Kingdom, against Gerrard Conheady, London Mental Home patient.*

*Part of the file could not be released in 2015 because it could not be safely assumed that the person to whom that particular section related was deceased...your detailed explanation for the non-disclosure contained a paragraph/sentence which stated and I quote ‘The information will continue to be withheld until 2019 when this this individual can be considered deceased’ end of quote...*

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<sup>1</sup>  
<https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

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*In view of the content of the quoted statement and because it is now the year 2020 i.e. one year past the year to which the undisclosed section of the file could be withheld I am now requesting that the unreleased section of the file be released to me as the final part of the file which file I applied to be released under the Freedom of Information Act 2014.*

5. TNA refused to supply the requested information on 27 May 2020, in reliance upon s. 40(2) of the Freedom of Information Act 2000 (“FOIA”). TNA explained to the Appellant that the redacted information contains identifying details of the victim of a sexual assault in 1927. When the Appellant had originally requested the file in 2014/15, it has been assumed that the victim had been ‘around 14 years of age’ on the date of the assault. However, this issue had been re-visited in 2018 and it was then noted that in the file, the victim was described as ‘under 14’ and ‘a child’, but with no age given. It was therefore considered that the victim could have been as young as one in 1927. The ‘100 year’ rule was therefore re-calculated so that the file could be opened in 2028 when the individual would be 100 and assumed to be deceased. TNA confirmed its position following an internal review on 27 August 2020.
6. The Appellant complained to the Information Commissioner on 19 September 2020, in particular that the ‘*assumptions relating to the age of the victim are without foundation*’. He states that ‘*My research and investigations into the case have shown that the persons involved in the case were siblings all of who I can prove to be deceased*’.<sup>2</sup>
7. The Information Commissioner issued Decision Notice IC-72629-T4T4 on 6 April 2021, upholding TNA’s reliance on s. 40(2) FOIA in the circumstances of this case.
8. The Appellant appealed to the Tribunal on 13 April 2021. He relied on the sole ground that the Information Commissioner had erred in law by concluding that the withheld information was the personal data of a living person because he had supplied to the Information Commissioner (and the Tribunal) copies of the death certificates of all persons involved in the case.

### *The Law*

9. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

*“In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –*

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

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<sup>2</sup> Open bundle page C74.

10. Where s.40(2) FOIA is engaged, it provides an ‘*absolute exemption*’ to disclosure<sup>3</sup>, so there is no applicable public interest balancing exercise. Section 40(2) 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 s. 40 (3A) (3B) or (4A) is satisfied. In this case, the relevant condition is s. 40 (3A) (a), which provides that where the disclosure of information would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation (‘GDPR’). In these circumstances, the ‘*processing*’ would be the disclosure of the requested information by TNA to the Appellant.
11. ‘*Personal data*’ is defined by s. 3(2) of the Data Protection Act 2018 (‘DPA’)<sup>4</sup> as:
- “any information relating to an identified or identifiable living individual”.*
12. Article 5 (1) (a) GDPR provides that:
- ‘Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject’.*
13. In order for the processing to be lawful, one of the bases listed in Article 6 (1) GDPR must apply. If the personal data is ‘*special category*’ data, it must also comply with an Article 9 GDPR condition. ‘*Special category*’ data is data which concerns (inter alia) the data subject’s health, sex life or sexual orientation.
14. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:
- “If on an appeal under section 57 the Tribunal considers -*
- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
- On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*
15. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

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<sup>3</sup> [Freedom of Information Act 2000 \(legislation.gov.uk\)](http://legislation.gov.uk)

<sup>4</sup> During the course of the Appellant’s dealing with TNA the Data Protection Act 1998 was superseded by the Data Protection Act 2018.

### *Submissions and Evidence*

16. In the Decision Notice, the Information Commissioner found that the requested information was exempt from disclosure under s. 40 (2) FOIA as it was the special category data of a third person and disclosure would be unlawful.
17. The Decision Notice explains at [21] that the information was considered to constitute '*personal data*' as the individual may have still been alive at the time of the information request. At [18] it is explained why the requested information relates to an identified or identifiable individual, however that paragraph misdescribes the nature of the data, referring to the 'age, gender and location' of the individual. In fact, the withheld information is the victim's name, gender and location only, as the precise age is unknown. The fact that the victim was under fourteen had already been disclosed to the Appellant in correspondence and is referred to at [19] of the Decision Notice.
18. The Decision Notice does not explain why the requested information was considered to constitute '*special category*' data, merely recording at [30] that she did so find but did not intend to detail her reasoning on that point. It seems likely that the identity of the juvenile victim of a sexual assault would have been regarded by the Information Commissioner as '*special category*' data as it relates to that person's health and sexual life.
19. At [19] the Decision Notice approves TNA's policy of assuming that an individual was still living if they had not yet reached 100 and at [21] the application of that policy in the circumstances of this case.
20. The Appellant's Notice of Appeal dated 14 April 2021 relied on grounds that the Appellant considered he knew the identity of the person whose data had been withheld and that he had supplied copies of death certificates and photographs of gravestones to the Information Commissioner so that there was no doubt the person in question was deceased. We understand this to be a submission that the definition of '*personal data*' is not met in this case, so the information requested can lawfully be processed and disclosed.
21. The Respondent's Response dated 19 May 2021 maintained the analysis as set out in the Decision Notice. At [32] it is further stated that, having liaised with the Metropolitan Police and TNS, the Information Commissioner can now confirm that the data subject whose information is in dispute does not have the surname 'Conheady'. At [34] it is submitted that the location of the data subject should be withheld due to the risk of a 'jigsaw' identification of that person.
22. The Appellant's Reply dated 27 May 2021 asks some rhetorical questions of the Information Commissioner, whom it is alleged has moved the goalposts during this appeal. At [31] the Appellant acknowledges an error in his own identification of the victim of the assault, to the extent that he considers he has used her maiden-name rather than her married name. The Reply emphasised that the Appellant feels he has been 'drip-fed' information which has been conflicting and non-factual, whereas he submits that his own case is based on reliable evidence that the data subject is deceased.

23. The Appellant accepts at [33] of the Reply that the ‘100 year principle’ is a reasonable one. He does not take issue with the Information Commissioner’s exposition of the applicable law but submits that it has been mis-applied in this case. He describes himself as the only person with an interest in the information he has requested.

### *Conclusion*

24. The key question for the Tribunal in this appeal is whether the withheld information consists of ‘*personal data*’ within the definition of that term at [11] above. We are satisfied that information consisting of a person’s name, gender and location are in principle ‘*personal data*’ because they identify that individual or make them identifiable. We are also satisfied that the withheld information is in principle ‘*special category*’ data, because it involves the data subject’s health and sex life.
25. The statutory definition involves consideration of the question of whether the data subject is ‘*living*’. The Information Commissioner had before her (as do we) evidence of the death of several members of the Conheady family, consisting of death certificates and photographs of graves. We are grateful to the Appellant for providing us with this evidence. However, none of the names on the death certificates and gravestones matches the name of the data subject with whom we are concerned. The Appellant can be reassured that it is this failure to match the names that is responsible for the failure of his appeal. It is not that the information he supplied has been ignored, but that it does not discharge the evidential burden which rests on him in this appeal.
26. We have no information before us to indicate whether the data subject is alive or dead. In circumstances where it is unknown whether the data subject is living, TNA policy is to apply the ‘100 year’ rule, which allows it to release documents at the date when the data subject would reach 100 and be presumed deceased. In this case, it is impossible to know precisely when that date will be, but we agree that the description of the data subject as ‘*under the age of 14 years*’ in the file means that they could have been as young as one. In these circumstances, we see no error in the Decision Notice’s approval of TNA’s decision to withhold the information until 2028.
27. We agree with TNA and the Information Commissioner that a redacted version of page E212 of the open bundle should be disclosed. However, we disagree as to the extent of that redaction. We find that the name, gender and location of the victim should be redacted, but that the information that the person was ‘*under the age of 14 years*’ should be disclosed. This is principally because that information has already been disclosed in correspondence and in the Decision Notice, but we also note that the Appellant has been exercised by the varying descriptions of the victim’s age as ‘around 14’ or ‘under 14’, so we consider that in fairness it be made clear to him exactly what information about age is given in the file. This will allow him to be sure of the basis on which the decision was taken that the victim could have been as young as one. We do not accept his submission that a one-year-old could not have remembered or indicated that a sexual assault had taken place or that if they had no memory of it, there would be no reason to keep it private. We remind the Appellant that disclosure to him would in effect be disclosure to the world.

28. For these reasons we now allow the appeal in part and make the substituted Decision Notice above.

**(Signed)**

**JUDGE ALISON MCKENNA**

**DATE: 23 December 2021**

