

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2015

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

Decision (including any steps ordered)

1. The complainant has requested file reference: CRIM 1/1569. The National Archives (TNA) refused to provide the requested information under section 38 and 40(2) FOIA.
2. The Commissioner's decision is that the TNA has correctly applied section 40(2) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 30 June 2014 the complainant requested information of the following description:

"I would greatly appreciate all available records associated with this case (Document reference: CRIM 1/1569) apparently heard at the Old Bailey in February 1944, including details of any subsequent decisions taken in respect of whether or not such records should be sealed and for how long, especially such decisions reached in or around 1995."
5. On 4 November 2014 the National Archives responded. It refused to disclose the requested information under section 38 and 40(2) FOIA.
6. The complainant requested an internal review. The National Archives sent the outcome of its internal review on 15 December 2014. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 6 January 2015 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, TNA provided the complainant with information relating to any subsequent decisions taken in respect of whether or not such records should be sealed and for how long.
9. The Commissioner has considered whether the TNA correctly applied section 38 or section 40(2) FOIA to the withheld information, the contents of file reference: CRIM 1/1569.

Reasons for decision

Section 40(2)

10. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
11. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

"data which relate to a living individual who can be identified –

(i) from those data, or

(ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."
12. 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.

13. TNA explained that the withheld information is a criminal file which contains the following information:
 - List of exhibits
 - Witness statement of accused
 - Witness List
 - Charge sheet
 - Statement and Particulars of Offence
 - Depositions
 - Indictment
14. Personal data is defined as being information which both relates to and identifies a living individual. It is important to note that the information must relate to a living individual. If the individual is no longer living the information is not personal data and so cannot be withheld under section 40(2). Therefore the Commissioner has first considered whether the information in question does relate to an individual who is still living, or whether there is persuasive evidence that they are dead, or it can be assumed that they are dead.
15. 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. 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. Although this is a cautious approach the Commissioner accepts it is a reasonable and responsible one.
16. TNA explained that the age of the accused was not given in the file. However in December 1943 the accused had a 9 year old daughter so assuming she had this child at the age of 18, it can be said that she was born no later than 1916. Based on the 100 year rule outlined above, the accused cannot yet be presumed dead. Furthermore the accused youngest child was 16 months old at the time of the offence in 1944. TNA argued that applying the 100 year principle, the information should be withheld until 2047.
17. Upon viewing the withheld information the Commissioner considers it would be the sensitive personal data of the accused and the personal data of the children of the accused and witnesses to the incident. The Commissioner considers that the information withheld under section

40(2) is information from which living data subjects would be identifiable.

18. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

Likely expectation of the data subject

19. TNA argued that these individuals would have no reasonable expectation that this information would be made public during their lifetimes.
20. Collectively, this personal data covers a wide range of issues including aspects of the relationships and activities individuals were involved in at the time. Some of the information would constitute sensitive personal data as defined in section 2 of the DPA. It is not possible to go into any greater detail here about the nature of the information without risking revealing the information itself or identifying the individuals concerned.
21. The Commissioner considers that these individuals would have no reasonable expectation that this information would be made public during their lifetimes.

Damage and distress

22. TNA argued that disclosure of the contents of the file into the public domain would be distressing for the accused and the accused's children.
23. Upon viewing the contents of the withheld information, the Commissioner accepts that disclosure would be distressing for the accused and the accused's children.

The legitimate public interest

24. The Commissioner considers that there is a legitimate public interest in openness and transparency, however due to the nature of the withheld information, the fact that the data subjects would not expect it to be disclosed during their lifetime and that disclosure would cause damage and distress, any legitimate public interest would not outweigh the legitimate interests of the data subjects.

25. As no schedule 2 conditions can be met in this case the Commissioner has not gone on to consider the schedule 3 conditions.

26. The Commissioner therefore considers section 40(2) FOIA was correctly applied to the withheld information in this case.

27. As the Commissioner considers that section 40(2) FOIA was applied correctly in this case, he has not gone on to consider the application of section 38 FOIA any further.

Right of appeal

28. 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

29. 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.
30. 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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