

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 November 2015

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

Decision (including any steps ordered)

1. The complainant has requested information in a closed file listed as 'FCO 28/4199/1' that concerns defectors to and from the former Soviet Union. The National Archives (TNA) has refused to release the information under section 40(2) of the FOIA as it says it is the personal data of third persons.
2. The Commissioner's decision is that TNA is correct to withhold the information under the exemption it has cited. He does not require TNA to take any steps.

Request and response

3. On 13 March, the complainant wrote to TNA and requested information in the following terms:

"FCO 28/4199/1 – Closed extract: Folio 1 from Defectors to and from the Soviet Union, including Kim Philby"
4. TNA initially contacted the complainant to say it considered that the requested information was exempt under section 27 (international relations) and it would need more time to consider the public interest test with regard to this exemption. However, in correspondence to the complainant dated 3 June TNA revised its position. It said the information is exempt from disclosure under section 40(2) as it is the personal data of third persons.

5. Following an internal review TNA wrote to the complainant on 1 July. It maintained this position.

Scope of the case

6. The complainant contacted the Commissioner on 6 June to complain about the way his request for information had been handled.
7. The Commissioner has focussed his investigation on TNA's application of section 40(2) to the information it is withholding.

Reasons for decision

8. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of a third person ie someone other than the requester, and the conditions under either section 40(3) or 40(4) are also satisfied.
9. The Commissioner therefore first considered whether the requested information is the personal data of a third party.

Is the information personal data?

10. The Data Protection Act says that for data to constitute personal data, it must relate to a living individual, and that individual must be identifiable.
11. TNA explained in its internal review that where it does not have evidence that an individual under 100 is deceased, it has to conclude that they are still living and that this is standard practice. It directed the complainant to the archivists' code of practice that it follows in this respect.
12. Although this is a cautious approach, the Commissioner accepts it is a reasonable and responsible one. He is therefore satisfied with the conclusion TNA has drawn: that the individuals concerned are living. Having seen the withheld information in question, he also considers that those individuals could be identified from it. The Commissioner is satisfied that the requested information is the personal data of third persons.

Would disclosure breach one of the conditions under section 40(3)?

13. TNA says that disclosing the information would breach the first condition; namely that it would contravene the first Data Protection

principle which says that personal data should be processed fairly and lawfully.

14. In assessing fairness, the Commissioner considers whether the individuals concerned have given their consent to disclosure, their reasonable expectations and what might be the likely consequences resulting from disclosure.
15. Regarding consent, TNA has referred to the aforementioned code of practice which says that archivists are not generally expected to inform data subjects of data processing they undertake ie it would not be expected to ask the individuals in this case for their consent to release the information.
16. TNA has confirmed to the Commissioner what it told the complainant in its review; namely that the information in question was provided for a specific purpose, to discuss political defection. Those involved shared the information with a limited audience and TNA argues that there remains a reasonable expectation that the information would not be shared beyond this. It would therefore be protected within the individuals' lifetime. Releasing it may be detrimental to individuals and may cause them damage and distress. TNA therefore argues that the 100 year principle applies and that the information should be withheld until the individuals can be considered deceased.
17. The Commissioner has noted his decision in earlier and similar cases: [FS50566659](#) and [FS50554685](#). He is satisfied that in the current case TNA has correctly applied the exemption under section 40(2) to the information the complainant has requested because releasing the information would be unfair and so breach the first Data Protection principle.
18. He also considers that if certain information were redacted, such as the names of individuals, it may still be possible to identify those individuals through other information contained within the requested file or when combined with other information that may already be in the public domain.
19. Despite the factors above, the requested information may still be disclosed if there is compelling public interest in doing so that would outweigh the legitimate interests of the data subjects. Although the Commissioner recognizes that the information is of particular interest to the complainant, disclosure under the FOIA is effectively disclosure to the world at large. 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 could cause damage and distress, any legitimate public interest would not outweigh the legitimate interests of the data subjects

20. The Commissioner is therefore satisfied that TNA has correctly applied the exemption under section 40(2) of the FOIA to the information it is withholding, because it is the personal data of third persons and releasing it would contravene the Data Protection Act.

Right of appeal

21. 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

22. 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.
23. 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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