

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 October 2018

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the Thorpe trial papers. The National Archives (TNA) initially refused the request under section 38 (health and safety) and section 40(2) (third party personal data) but during the course of the Commissioner's investigation cited section 31 – law enforcement.
2. The Commissioner's decision is that TNA has demonstrated that sections 31(1)(a)(b) and (c) are engaged in relation to the withheld information and the public interest favours maintaining the exemption. The Commissioner has not gone on to consider the application of the exemptions at section 38 and 40. The Commissioner also found that TNA breached section 10(1) of the FOIA. She requires no steps to be taken.

Request and response

3. On 28 July 2017 the complainant requested access to the following file of information:
'DPP 2/6549: David Malcolm HOLMES, George William Alfred DEAKIN, John William LE MESURIER and John Jeremy THORPE: conspiracy to murder Norman SCOTT between 1 January 1973 and 18 November 1977. All not guilty.'
4. On 25 August and 11 September, TNA informed the complainant that there would be a delay to its response. On 5 October TNA informed the complainant that there would be a further delay as it was required to

conduct a public interest test as some of the information was covered by section 38 (health and safety). Some of the information was also covered by section 40 (personal data). On 6 November TNA informed the complainant that there would be a delay to its response.

5. On 20 November 2017 TNA cited the exemptions section 38 and section 40 to refuse to make the record open to the public. The public interest test was considered in consultation with the Crown Prosecution Service (CPS) as required by section 66 of FOIA.
6. The complainant requested an internal review on 23 November 2017.
7. On 21 December 2017 TNA informed the complainant that there would be a delay to its response.
8. TNA sent the outcome of its internal review on 22 January 2018 upholding the decision to cite sections 38 and 40. TNA accepted and apologised that it did not comply with the timeframes set out in section 10 of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 31 January 2018 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation TNA informed the Commissioner in June 2018 that '*following a further review of the file as a result of this complaint and in the light of very recent media interest in this case*' it was applying, in consultation with the CPS, the additional exemption of section 31.
11. Once the Advisory Council on National records and Archives (ACNRA) had agreed that the public interest favoured maintenance of the additional qualified exemption, TNA informed the complainant on 17 August 2018 and offered an internal review. On 21 August, the Commissioner advised the complainant that as he had already been through the internal review process, the Commissioner would not expect him to go through a second internal review for this additional exemption.
12. The Commissioner invited the complainant to withdraw his case as it was her initial view that if the case proceeded to a formal decision notice that it would likely uphold the position of TNA. However, the complainant declined to withdraw his case and provided supporting arguments on the citing of the new exemption.

13. The Commissioner invited TNA to provide any further and more detailed arguments (including the public interest arguments) for the additional exemption and these were provided on 12 September and 15 October 2018.
14. The Commissioner considers the scope of her investigation to be to determine if TNA has correctly applied the provisions of section 31 and if so to determine where the balance of the public interest lies. The Commissioner will only consider the original exemptions of section 38 and 40 if the Commissioner finds that TNA did not correctly cite the exemption at section 31 to the withheld file.

Reasons for decision

Section 31(1)(a)(b) and (c) – law enforcement

15. TNA is relying on sections 31(1)(a)(b) and (c). These state that:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders
- (c) the administration of justice...”

16. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed but, before the information can be withheld, the public interest in maintenance of the exemption must outweigh the public interest in disclosure.
17. In order to be engaged, the following criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.

18. For this exemption to be engaged it is necessary to prove that disclosure would involve a level of harm. The harm/prejudice test for this exemption involves the consideration that release could put at risk law-enforcement matters, including preventing or detecting crime, the apprehension or prosecution of offenders and the proper administration of justice.
19. TNA has explained its arguments in detail to the Commissioner and the Commissioner has viewed the withheld file. The Commissioner will not discuss the contents of the file in detail in this decision notice to avoid any inadvertent disclosure. In summary TNA has explained:
 - The withheld file relates to the 'Thorpe Scandal' and contains a large amount of personal and distressing material as it explores in detail the events that led to the alleged conspiracy to murder.
 - Although this is a high profile case, the specific information and level of detail contained within the file would not have been in the public domain.
 - The court case was re-opened by Gwent Police in 2015 but it was not pursued as it was assumed that the main suspect, Andrew Newton was deceased.
 - The recent media interest in this case has indicated that Andrew Newton is in fact still living.
 - Following consultation with the CPS to determine the risk of releasing this information, it is the opinion of CPS and TNA that this record relates to an unsolved crime (attempted murder) and release of the material would potentially prejudice any future investigations that may occur. This was already a high profile case before the recent media attention, which has only served to increase the speculation of a potential investigation taking place and this should not be ruled out from occurring at a future date.
20. TNA argued that that *'new evidence can throw light onto any aspect of the original investigation, it is not possible to identify particular information that might be released into the public domain without the risk of compromising any future police actions. Information within the [redacted types of information] may have significance to an experienced investigator that is not immediately obvious to the lay reader; or may assume a new significance in the light of newly discovered evidence or developments in forensic or investigative techniques. The evolution of new scientific techniques, especially the technology of DNA, means that cases hitherto considered unsolvable, are being examined afresh. The premature release of these records into the public domain might*

therefore be detrimental to any future investigation and subsequent prosecution.'

21. TNA and the CPS considered that

- subsection (a) has been engaged as the crime that this relates to is of such a serious nature that it would merit further investigation should new evidence come to light.
- releasing material contained within this file into the public domain, such as [redacted types of information] would risk prejudicing any future investigation and/or prosecution against other individuals inextricably linked to this matter, thus subsection (b) is engaged.
- The release of any information within these files would therefore be likely to prejudice the resolution of an unsolved crime should a future investigation take place. As a result of this, subsection (c) is engaged as release would prejudice the administration of justice

22. The complainant stated his surprise that this exemption had been applied at such a late stage. He argued that subsection 1 is weak as there is no serious argument that release of the Thorpe papers represents a real and significant risk to prejudicing the prevention or detection of crime.

23. TNA argued that the additional exemption was considered as a direct and appropriate response to the very current events and to mitigate the risk of disclosure prejudicing a future investigation. *'The complainant has acknowledged that both Newton and Dennis Meighan have previously been identified as suspects and are both still living; as is Mr Deakin who was one of the original 4 defendants. Since this file contains information relating to all of these individuals it is believed that these documents could certainly have some significance to a future investigation.'*

24. The Commissioner is satisfied that the prejudice alleged by TNA is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect. She must however establish whether disclosure would be likely to result in the prejudice alleged (ie the third criterion).

Likelihood of prejudice occurring

25. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."(paragraph 33)

26. In this case, TNA has confirmed that it is relying on the lower threshold to engage the exemption - 'would be likely to occur'.
27. In considering this exemption TNA acknowledged that in this case '*a main suspect linked to the plot to murder was believed to be deceased and has now been found to be still living. Fuelled by the very recent media interest, this case now more than ever has the potential to be re-investigated.*'
28. TNA stated that '*it is impossible to distinguish which information, however trivial it may appear in isolation, could in fact be critical. As a result of this, it is necessary for this exemption to apply to the whole of this file.*'
29. The Commissioner notes that there has been an ongoing interest in the 'Thorpe scandal' since the trial and that media interest increased during the summer of 2018 with the TV mini-series 'A Very English Scandal'.
30. Having had the benefit of examining the withheld information the Commissioner accepts it is likely that the information could be useful to a future police investigation. Consequently, she is satisfied that its disclosure would be likely to represent a real and significant risk to law enforcement. Therefore, the Commissioner is satisfied that the exemptions contained at sections 31(1)(a)(b) and (c) are engaged.

Public interest test

31. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions contained at sections 31(1)(a)(b) and (c) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

32. The complainant has argued for disclosure as there is no serious argument that release of the Thorpe papers represents a real and significant risk to prejudicing the prevention or detection of crime. He accepted that material contained in the TNA Thorpe documents may potentially have some future significance to an investigation but disputed that '*it is impossible to distinguish what could and couldn't be critical*'. He considered that information relating to the deceased

(Thorpe, Holmes, Le Mesurier and Bessell) could be released with redactions.

33. He also argued that the Thorpe case and its aftermath '*revealed very serious concerns about the actions of the courts, the prosecuting authorities, politicians and the police. Over the years the case significantly undermined public confidence in these organisations and the public are reminded of this every time it is mentioned in the media (which is regularly). In terms of the administration of justice, the CPS and TNA position is very hard to justify. They are supposedly protecting some future possible prosecution of a possible suspect who hasn't been prosecuted for 40 years on the grounds that releasing documents would be prejudicial...*'
34. TNA provided the following public interest arguments in favour of disclosure:
- There is a presumption of openness under FOI.
 - The interest surrounding criminal cases and transparency of the criminal justice system will increase public awareness of the criminal prosecution process.
 - Releasing information about the decision making process in this case will increase public awareness and accountability of the Criminal Justice System.

Public interest arguments in favour of maintaining the exemption

35. TNA have argued that the public interest arguments in favour of maintaining the exemption are:
- The file concerns the 'Thorpe scandal' and its culmination in the trial for the conspiracy to murder Norman Scott. As a high profile affair it has continued to receive media attention from the time of the events right up until present day. The specific information contained within the file would not have been in the public domain.
 - To this date the crime remains unsolved. Although Mr Thorpe is now deceased, other suspects (such as Newton) are known to be still living. The release of this material to the world at large would therefore risk prejudicing any future investigation and/or prosecution against any other individuals inextricably linked to this matter, thus also prejudicing the administration of justice.
 - While there is a strong public interest in not prejudicing the prosecution process generally, there is a particularly strong public

interest in not prejudicing any potential prosecution for such a serious offence.

Balance of the public interest arguments

36. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and TNA.
37. She accepts there is a legitimate public interest in informing the public about criminal cases and the general accountability of the Criminal Justice System.
38. Balanced against this is the public interest in not prejudicing any potential investigation and/or prosecution for this particular offence, the conspiracy to murder Norman Scott.
39. The Commissioner notes the complainant's view that potentially some of the file could be disclosed as some of the individuals are deceased but accepts TNA's view that it is very difficult to anticipate and separate what is potentially significant in a future investigation from what is not significant.
40. Therefore, the Commissioner is satisfied that the public interest arguments in favour of maintaining the exemption outweighs the public interest arguments in favour of disclosing this information.
41. The Commissioner therefore finds that the exemptions contained at sections 31(1)(a)(b) and (c) are engaged in relation to the withheld information and the public interest favours maintaining the exemption. The Commissioner has not gone on to consider the application of the exemptions at section 38 and 40.

Procedural matters

42. Section 10(1) of the FOIA states that a public authority should respond to a request promptly and in any event no later than 20 working days following receipt. The Commissioner understands that TNA has to consult with the original owners of the files but it is apparent in this case that TNA took nearly 4 months to respond to the complainant's request and so breached section 10(1) of the FOIA.

Right of appeal

43. 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

44. 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.
45. 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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