

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 October 2019

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested the documents contained within a specific archived file. The National Archives (TNA) withheld the requested information as it claimed that the information was the personal data of a third party and that disclosure would contravene one of the principles under Article 5(1) of the General Data Protection Regulation (GDPR).
2. The Commissioner's decision is that TNA has correctly applied section 40(2) of the FOIA to withhold the information.
3. The Commissioner does not require any further steps.

#### **Request and response**

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4. On 3 June 2019, the complainant wrote to TNA and requested access to a specific archived file which was part of a larger set. Other documents in the set (presumably relating to the same matter) were open but this particular file was closed.
5. TNA responded on 25 June 2019. It stated that the information represented the personal data of third parties and that its disclosure under the FOIA would contravene one of the principles under the GDPR.
6. Following an internal review TNA wrote to the complainant on 21 August 2019. It maintained its original position.

## Scope of the case

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7. The complainant contacted the Commissioner on 2 September 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers that the scope of her investigation is to determine whether TNA is entitled to rely on section 40(2) of the FOIA to withhold the requested information.

## Reasons for decision

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9. The documents in question appear to form part of a broader court case involving an individual (the defendant) charged with rape.

### Section 40 – personal information

10. Section 40(2) of the 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 section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (the principles), as set out in Article 5 of the GDPR.
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the principles.

### *Is the information personal data?*

14. Section 3(2) of the DPA defines personal data as:
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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

*"any information relating to an identified or identifiable living individual".*

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The withheld information clearly identifies the defendant as well as other individuals because they are all named within the withheld information.
19. Even if the names themselves were redacted, the Commissioner notes that the withheld information contains numerous references to the defendant's lifestyle and facts which would link the defendant either to the broader court case or to the particular geographical area where he was then living. Whilst the complainant has not suggested that he has any personal connection to this case, the Commissioner must consider the effect of disclosure of the information to the world at large. She considers it likely that there would be a small group of people, who would be familiar with the broader case and who would be able to deduce the identity of one or more of the individuals – even if their names were removed.
20. As well as information relating to an alleged criminal offence (which the Commissioner has dealt with below) the withheld information also contains details about the defendant's personal life and, by implication, that of his partner.
21. It is not known whether any of the individuals identified in the withheld information have since died – and the complainant has not sought to argue that any of them have. As it would be unreasonable to expect TNA to know whether the individuals are still alive (and as establishing this may not be easy), TNA takes the view that, in the absence of evidence presented to the contrary, all adults are deemed to still be alive if they

have not yet reached their hundredth birthday.<sup>2</sup> This approach has been explained to the complainant. Whilst the Commissioner accepts that this is a conservative approach, she also recognises the risks of disclosing information about any living individual who is thought to be deceased. She has therefore upheld this approach on numerous occasions.<sup>3</sup>

22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information “relates to” the defendant as well as the other individuals. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the principles.
24. The most relevant principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

25. Article 5(1)(a) of the GDPR states that:

*“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.*

26. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
28. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

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<sup>2</sup> [www.nationalarchives.gov.uk/documents/information-management/dp-code-ofpractice.pdf](http://www.nationalarchives.gov.uk/documents/information-management/dp-code-ofpractice.pdf)

<sup>3</sup> See, for example: <https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2614505/fs50776907.pdf>

*Is the information criminal offence data?*

29. Information relating to criminal convictions and offences is given special status in the GDPR.
30. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:
  - (a) *The alleged commission of offences by the data subject; or*
  - (b) *Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
31. Having considered the wording of the request, and having viewed the withheld information, the Commissioner finds that the withheld information *is* criminal offence data. The documents have been created as part of "proceedings" relating to an offence alleged to have been committed by the defendant. In addition, the Commissioner notes that the withheld information contains details of the offence which the defendant is alleged to have committed and contains details of other proceedings in relation to the alleged offence.
32. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.
33. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
34. The Commissioner has seen no evidence or indication that the defendant had specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
35. The Commissioner does not know whether the defendant in this case was convicted or acquitted of the crime he was charged with – however she considers this irrelevant to her considerations on this point. The withheld information is, because of its nature, information which would almost certainly not have been disclosed during the trial itself – as it was created after the alleged offence took place and would have had no bearing on the outcome of the trial.

36. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
37. TNA also noted that it considered that some of the withheld information contained special category data about the individuals. Special category data can include information relating to an individual's health or sex life. Like criminal offence data, special category personal data is deemed to be particularly sensitive and, as such, receives special protection under GDPR.
38. As the Commissioner has already determined that all of the withheld information is criminal offence data and that there is no lawful basis on which to process this data, she does not need to make any further determination. However, even if none of the information was criminal offence data, she considers it unlikely that disclosure would have been necessary to satisfy a legitimate interest and thus disclosure would be unlawful.
39. The complainant, in his submission to the Commissioner, cited the recent Supreme Court case of *Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38* as a precedent for disclosure of court papers. The Commissioner does not accept that *Cape* assists the complainant in this case. *Cape* did not advocate all court records being made immediately available, unlimited and regardless of the motive of those seeking the information – which is what is required under the FOIA. Rather, the Supreme Court held that a person (or organisation) had right to make an application, to a court, for documents relevant to the case that court was considering.

*"although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle."* (paragraph 45)

40. The Commissioner is therefore satisfied that TNA was correct to cite section 40(2) of the FOIA to withhold the information.

## **Right of appeal**

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41. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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 .....**

**Sarah O’Cathain**  
**Senior Case Officer**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**