

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 July 2022

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

Decision (including any steps ordered)

1. The complainant requested information relating to the name on p35 of closed file DEFE-24-1940-1_2. The National Archives (TNA) withheld the information under section 40(2) (third party personal data) of FOIA.
2. The Commissioner's decision is that TNA was entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner does not require any further steps.

Request and response

4. On 28 July 2021, the complainant made the following request for information under FOIA:

"I wish to be given access to an unredacted copy – electronic and/or physical – of page 35 of file DEFE-24-1940-1_2. The page itself is a lined, handwritten sheet beginning, 'UFO Incident: Saturday 4th August..'"
5. TNA responded on 3 September 2021 stating that it withheld the information under Section 40(2).
6. The complainant sought an internal review of TNA's decision on 15 September 2021 stating that they were "now only seeking the name of the witness as shown on the handwritten sheet of page 35".
7. TNA provided the complainant with its response to the internal review request on 12 October 2021 in which it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 13 December 2021 to complain about the way their request for information had been handled.
9. On 30 June 2022, the Commissioner wrote to the complainant to ask for clarification regarding the information they were requesting. The complainant confirmed that it was solely the name of the witness they were seeking.
10. The Commissioner then wrote to the complainant, on 5 July 2022, to offer his preliminary view of their complaint. The Commissioner explained that it was his view that the information requested was personal data and therefore exempt from disclosure under FOIA.
11. The complainant requested that the Commissioner issue a decision notice.
12. The Commissioner considers the scope of his investigation is to determine whether TNA is entitled to withhold the requested information under section 40(2) of FOIA.

Reasons for decision

Section 40 personal information

13. Section 40(2) of 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.
14. In this case the relevant condition is contained in section 40(3A)(a).¹ 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 DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
15. 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 FOIA cannot apply.
16. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

17. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA

20. 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.
21. The information being withheld in this case is the name of a specific individual. Clearly such information would be that individual's personal data so would fall within the definition of 'personal data' in section 3(2) of the DPA, if that individual is still living at the time of the request.
22. In line with its usual practice, where it is not clear whether an individual named in a document is living or dead, TNA has advised that it is standard government practice to assume that an individual is still living if they would not have reached the age of 100.
23. The Commissioner has agreed that, where it cannot be determined that an individual is alive or dead, this is a cautious but pragmatic approach.
24. The fact that information constitutes the personal data of an identifiable living individual does not, however, automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
25. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

26. 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".

27. In the case of a 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.
28. 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.

Lawful processing: Article 6(1)(f) of the GDPR

29. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
30. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."²

31. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
32. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

33. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (displaying the legitimate interests gateway in relation to public authorities) were omitted".

34. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
35. In correspondence to the Commissioner, the complainant has argued that the information is significant in terms of defence.
36. The complainant also added that there is huge public interest in the information as it will ensure that the Ministry of Defence is held accountable and will enhance the public's understanding of unidentified aircraft and military aerospace developments.
37. Furthermore, the complainant has outlined that they have a personal interest in the information being disclosed for, as a historical researcher, they would like to be able to speak to the witness whilst they are still alive.
38. TNA state that they cannot identify a legitimate interest that would favour disclosure; differentiating between information that would benefit the public good and information that would "meet public curiosity".
39. The Commissioner accepts that there is a legitimate interest in disclosure and has therefore gone on to consider whether this is necessary in order to meet the legitimate interest.

Is disclosure necessary?

40. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
41. TNA have confirmed that the name of the witness is not in the public domain and that the file remains closed until 2076.
42. The Commissioner is therefore satisfied that there are no less intrusive means of achieving the legitimate aims identified. It is therefore appropriate to consider the balancing test in this case.

Balance between legitimate interests and the data subject's interests fundamental rights and freedoms

43. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
44. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
45. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. This expectation can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as an individual and the purpose for which they provided their personal data.
46. In this case, even though the witness voluntarily gave their details to The Scottish Daily Record in 1990, we do not know that they gave their consent for their details to be published alongside the pictures they took. Therefore the releasing of their personal data may result in unwarranted attention and distress.
47. Furthermore, in its response, TNA states that "given the general public interest in the paranormal and the specific public interest in UFO's...there is sufficient likelihood that the aforementioned individual would be contacted if their personal information was released into the public domain".

48. The Commissioner has not seen any evidence to suggest that the individual involved would have a reasonable expectation that their personal data would be disclosed in response to an information request. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subject as it would reveal information about the data subject which is not otherwise in the public domain.
49. The law provides that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate.
50. In its internal review, TNA state the potential value of the requested information, to the public, does not outweigh the public interest in protecting the data subjects rights and freedoms.
51. The Commissioner notes the complainant's arguments that they would not publicise or publish the witnesses name, however he is mindful that disclosure under FOIA is disclosure to the world at large and not just to the requester.
52. Furthermore, the Commissioner does understand the complainant's need for wanting to obtain this information and accepts that there is a general public interest in the paranormal.

The Commissioner's Conclusion

53. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
54. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
55. The Commissioner therefore finds that section 40(2) of FOIA is engaged in respect of the withheld information.

Right of appeal

56. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. 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

Phillip Angell
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