

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 April 2016

**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 information relating to the 1955 minutes concerning the disappearance of the late Guy Burgess and Donald Maclean in the file listed as FCO 158/228/1 Closed extracts. The National Archives (TNA) refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that TNA has correctly applied sections 40(2) of FOIA to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### Request and response

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4. On 7 November 2015, the complainant requested the following file:

*'I would like to request access to the closed extracts listed on the Discovery catalogue as FCO 158/228/. I understand these extracts relate to the late Guy Burgess and the late Donald Maclean. I note a decision has already been made to open the file and or these extracts at a later date. But I believe there are strong public interest reasons for opening up the file now. I note both the named individuals have been deceased for a period of time.'*

5. TNA responded on 4 December 2015 and refused to open the file and cited section 40 (personal data) as its basis for doing so:

*'FCO 158/228/1 Closed extracts: Minutes of 29/10/1955, 31/10/1955, 18/11/1955 (from parent file FCO 158/228: Parliamentary questions concerning the disappearance of Guy Burgess and Donald Maclean and related security issues)*

*We are unable to open this document because all of the information is exempt under section 40(2) (by virtue of section 40(3)(a)(i)) of the Freedom of Information Act 2000...*

*In this case the exemption applies because the document contains the personal and the sensitive personal information of a number of identified individuals assumed to be still living, including political opinions and information about the private lives of individuals. These individuals would have no expectation that this information would be made available in the public domain during their lifetimes: to do so would be unfair and would risk causing damage and distress, which would contravene the first data protection principle.'*

6. On 8 December 2015, the complainant requested an internal review. He argued that:

*'the closed extracts of the minutes are sixty years old.*

*I note that both Burgess and Maclean are now dead and that I cannot see any data protection implications as far as they are concerned.*

*If the National Archives was worried about the personal data of other individuals it could have redacted their names and addresses.*

*But I note previous NA guidance about the 100 years old rule when it comes to individuals who are not known to have died.'*

7. Following an internal review TNA wrote to the complainant on 5 February 2016 and maintained its position.

8. TNA explained that the extracts from the parent file:

*'consists of four pages of minutes which contain the employment details and political opinions of identified individuals assumed still living and information about their private lives....*

*The persons identified...are not Guy Burgess and Donald Maclean, both of whom are now deceased.'*

## Scope of the case

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9. The complainant contacted the Commissioner on 10 February 2016 to complain about the way his request for information had been handled. He asked that:

*'1. Could the extracts have been released with redactions to protect the names and identities and private lives of people assumed to be still living. The reference to minutes implies there may be information which is above and beyond personal data.*

*2. Is there any information in the documents which give details of the ages of these individuals at the time. Could there be reasonable grounds for thinking these individuals are now dead?*

*3. Are any of the individuals assumed to be living actual well known persons who are known to be dead?*

*4. Has the National Archives previously released information about any of the individuals it claims may still be alive.'*

10. The Commissioner considers the scope of this case to be to determine if TNA has correctly applied section 40(2) FOIA to the withheld information.

## Reasons for decision

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### Section 40(2) – Third party personal data

11. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

#### **Is the withheld information personal data**

12. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
13. 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.

14. TNA, in consultation with the transferring department, consider this to be personal data and therefore exempt from disclosure. TNA have explained that the closed file lists named individuals (not Guy Burgess and Donald Maclean), relates to their employment details and implied political opinions and all are assumed to still be living<sup>1</sup>. *'It is The National Archives' opinion that the entirety of the redacted material is comprised of third party personal data.'*
15. If the individual is no longer living the information is not personal data and so cannot be withheld under section 40(2). TNA considered section 40(2) was applicable to the personal data of the third parties mentioned in the file who it is reasonable to assume may still be alive adopting the 100 year rule. This has previously been explained to the complainant.
16. The Commissioner considers that the information withheld under section 40(2) is information from which living data subjects would be identifiable.

### **Sensitive personal data**

17. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
  - (a) racial or ethnic origin
  - (b) political opinions
  - (c) religious beliefs
  - (d) trade union membership
  - (e) physical or mental health
  - (f) sexual life
  - (g) criminal offences, sentences, proceedings or allegations.
18. The requested information falls into some of these categories of sensitive personal data. Having viewed the withheld information the Commissioner considers it is clearly sensitive personal data.

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<sup>1</sup>. Section 51(4) of the DPA 1998 Code of Practice for Archivists and Records Managers explains how archive bodies such as TNA treat personal information if it is not known whether individuals are deceased:

### **Would disclosure breach the Data Protection Principles?**

19. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
20. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

### **Reasonable expectations**

21. Whether an individual might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to an employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
22. The information in this case concerns the sensitive personal information of named individuals and there is no expectation from these individuals that their personal information would be made publicly available during their lifetimes. TNA stated that:

*'The manner in which this personal information was collected and communicated and its intended purpose make it personal in nature and as a result there would be a legitimate expectation from the individual that this would not be placed into the public domain during their lifetime. Reasonable expectations were that this would be used for a specific purpose ([redacted wording] political affiliations [redacted wording]) and certainly no expectation that would be preserved, and moreover, made available in public domain during their lifetimes'*

23. The Commissioner understands that TNA would not routinely make public such information.
24. TNA did not contact the named individuals who appear in the file to ask for their consent to disclosure of their personal data. Under the Code of practice for archivists and records managers under section 51(4) of the Data Protection Act 1998 ([www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf](http://www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf) )

Section 4.2.7 states:

"...Except when they themselves collect data for the purposes of administering their offices, archivists will generally not be expected to inform data subjects of processing they undertake for research purposes because to do so would involve disproportionate effort. The unfairness of not so informing data subjects is minimal where the relevant conditions are observed and records either kept closed for an appropriate period or used only for research which will be anonymised."

25. To avoid inadvertent disclosure of the information itself, the Commissioner does not propose to go into further details in this decision notice. However, he is satisfied that the individuals to whom the personal data relates would expect the information to be withheld and that this expectation is reasonable.

### **Consequences of disclosure**

#### **Damage and distress**

26. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the named individuals.
27. TNA argued that disclosure of the contents of the redacted extracts from the file into the public domain would be distressing for the identified individuals:

*'The judiciary have differentiated between information that would benefit the public good and information that would meet public curiosity. It does not consider the latter to be a "public interest" in favour of disclosure. Thus to release information where there would be no expectation that such information would be released to the public, we would consider unfair processing of these individual's personal data.'*

28. Upon viewing the contents of the withheld information, the Commissioner accepts that disclosure would be distressing for the named individuals. Information exempt under section 40(2) makes up the entirety of the file and therefore complete anonymization is extremely problematic to achieve.

#### **Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure**

29. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.

30. In this case, the Commissioner is not convinced that the specific information requested is of sufficient wider public interest to warrant overriding the protection of the third party sensitive personal data of those concerned.
31. Having considered TNA's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that TNA has put forward for protecting the individuals' personal data, namely:
  - the individuals' likely expectation about how their sensitive personal data will be managed
  - the individuals' lack of consent to its release; and
  - the possible negative consequences to the individuals of releasing the information.
32. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the individuals named within the file and that it would not be fair to disclose the requested information in this case.

### **Conclusions**

33. The Commissioner is satisfied that the withheld information is sensitive personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned. The Commissioner upholds TNA's application of the exemption provided at section 40(2) of the FOIA.

### **Other Matters**

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34. Although they do not form part of this decision notice, the Commissioner would draw the complainant's attention to the following point.
35. The complainant has requested that the Commissioner establish if the internal review was carried out by an individual not involved with the original request and held the view that any review should be carried out by an individual who is independent of the FOI process. As the Commissioner has previously explained to the complainant, there is nothing within the Code of Practice Section 45 to provide for this:

'These communications should be handled in accordance with the authority's complaints procedure... The complaints procedure should provide a fair and thorough review of handling issues ... It should enable a fresh decision to be taken on a reconsideration of all the factors

relevant to the issue... Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint.' (Paragraphs 38-40 [code-of-practice-on-the-discharge-of-public-authorities-functions-under-part-1-of-the-freedom-of-information-act-2000](#))

36. The Commissioner is satisfied that TNA has provided an internal review in line with the Code of Practice.



## Right of appeal

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37. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

38. 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.
39. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**