

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2017

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

Decision (including any steps ordered)

1. The complainant requested information relating to the closed file WO 71/1062. The National Archives (TNA) released some information and refused to provide the remaining information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so. During the course of the Commissioner's investigation TNA also applied section 38 (health and safety) to the withheld information. The Commissioner's decision is that TNA has correctly applied section 40(2) of FOIA to the withheld information. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

2. On 17 February 2016 the complainant requested a copy of the records of the court martial of Sir Herbert Paul Latham which occurred in September 1941 (file WO 71/1062 – Latham, H.P. Offence: Indecency.)
3. On 29 February 2016 TNA responded that they were unable to open the file and cited section 40 (2) (by virtue of section 40 (3) (a) (i)) of FOIA.
4. On 3 March 2016, the complainant requested a review. He provided additional information that Sir Latham died in 1955 and argued that
'The continued suppression of this file goes against the public good as it perpetuates an historical wrong which must now be rectified.'
5. During the internal review process, TNA released a large amount of information relating to the deceased Sir Paul Latham. *' Information which relates specifically to him, which is anonymised to the degree that*

no living individual may also be identified from it, cannot be held exempt under section 40(2) FOIA, which only protects information relating to living individuals.' This became the main open parent file WO 71/1062.

6. TNA withheld the remaining information under section 40(2) and (3) (a)(i) of the FOIA and this became file WO 71/1062/1 Closed extracts.
7. TNA argued that *'although Latham died in 1955, the charges levelled against him related to homosexual sexual relations he had undertaken with identified individuals assumed still to be living. The file is made up of the court martial records, listing the charges and those involved, depositions from each of the men describing these sexual encounters and a transcript of the trial in which each man gave testimony. There is also information contained within the file which relates to the personal and private family lives of identified individuals assumed still to be living. Because this information represents the personal and sensitive personal information of these individuals, it must be withheld whilst they are known still to be living. Information which is still considered to be sensitive will be placed in a closed extract until a period of 100 years from the date of birth of the youngest individual identified in this way.'*

Scope of the case

8. On 21 September 2016 the complainant wrote to the Information Commissioner and argued:
 - TNA violated the Act as well as its own internal timelines
 - TNA greatly exceeded its ability to redact the document
 - TNA's contention that the individuals named may be assumed still to be living is without basis
9. The complainant states that he had conducted an exhaustive review of the military and civilian records and can find no evidence that any gunner from the 70th Sussex Searchlight Regiment survives. This information was provided to TNA during the investigation for its comments.
10. TNA also applied section 38 (health and safety) to the withheld information during the Commissioner's investigation and informed the complainant on 27 March 2017.
11. The Commissioner considers the scope of this case to be to determine if TNA has correctly applied section 40(2) and section 38 of FOIA to the withheld information (the closed extract WO 71/1062/1).

Reasons for decision

Section 40(2) – Third party personal data

12. 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

13. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
14. 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.
15. TNA have explained that the closed extract relates to identified individuals assumed still to be living.
16. Although the main subject is deceased, TNA considered section 40(2) was applicable to the personal data of the third parties mentioned in the extract who it is reasonable to assume may still be alive adopting the 100 year rule¹. This has previously been explained to the complainant.
17. For it to be safe to assume an individual is dead it is standard practice for TNA to apply a life expectancy of 100 years. If the date of the individual's birth is known then the matter is simple. Where their date of birth is not known their current age is calculated on the assumption that if they were a child at the time the information was created they were less than one year old at that time. If they were an adult, it is assumed they were 16 years old at the time the information was created. If, based on those assumptions, they would now be over 100 years old they are assumed to be dead. Although this is a cautious approach the Commissioner accepts it is a reasonable and responsible one.
18. The research undertaken by the complainant was considered by TNA: the opinion of local experts and no-one listed in the voluntary list of ex-

¹ www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf

servicemen in the Royal Artillery Association do not sufficiently or definitively prove that all those involved are now deceased. TNA requires the following definite proves:

- Copies of death certificates
- Published obituaries
- Entries in official histories

19. Furthermore, TNA stated that they are unable to provide a list of names which alludes to the personal data being protected as this contributes to the 'jigsaw effect' as described by the Tribunal in their decision EA/2012/0141:

'70. As was demonstrated to us through a number of examples in the closed session, this would permit "jigsaw" identification of personal and sensitive personal data that would be unfair processing under the terms of the Data Protection Act, 1998. It would permit the Appellant to build up a matrix of information which he could then use to narrow down specific individuals in breach of the Data Protection principles.'

20. From the complainant's research, TNA is aware that the complainant has, upon review of the released material, been able to determine that the individuals the applied exemption is designed to protect were gunners within the Searchlight Regiment.
- If, therefore, the complainant is able to provide to TNA definitive proves of deaths (as listed above) for members of the Searchlight Regiment this information could be cross referenced with the material held on the closed extract and a decision based on an individual proven to be deceased could be reconsidered by TNA.
21. Meanwhile, the Commissioner considers that the information withheld under section 40(2) is information from which living data subjects would be identifiable.

Sensitive personal data

22. 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.

23. The majority of the requested information clearly falls into category (f) of sensitive personal data.

Would disclosure breach the Data Protection Principles?

24. 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.

25. 'Fairness' is a difficult concept to define. It involves consideration of:

- The possible consequences of disclosure to the individual.
- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

26. Having viewed all the withheld information, the Commissioner finds that disclosing this sensitive personal data would be unfair. It relates to the sexual and personal lives of the data subjects. The individuals concerned would not expect that such information, supplied at the time in order to provide evidence for the specific court case, would be disclosed to the world at large. There is no indication within the file that any of those involved gave at the time or subsequently, their consent that the information provided would be used or processed in any other way other than for the original prosecution.

27. The Commissioner is satisfied that disclosure would intrude on the privacy that the individuals have a right to expect and would be very distressing.

28. The complainant has argued that the level of redaction was excessive. TNA disputed this and stated that their approach was to disclose as much information as possible.

- When permitted within documents identifying personal data of individuals was redacted – for example names, military rank and/or military number – what remained, the vast majority of the information, was thereby released.

- The 77 full page redactions are due to the fact that it is difficult to completely anonymise information when it relates to a small group of people, in a small geographical location, over a relatively small time frame. Simply removing the name, military rank and/or military number from the top of a witness statement, for example, is not sufficient in fully anonymising the information. The remaining contextual information, in the hands of a skilled, determined researcher, could lead to the identification of the individual(s) the exemption is designed to protect.
29. TNA has followed the guidance from the Commissioner for this level of complex unstructured personal data:
- 49. "Anonymization of the file would not be an adequate way of protecting the vulnerable individuals in this case." 51. The Commissioner accepts that it would be extremely problematic to achieve complete anonymization and to remove all sensitive information in a way that any material of value from a research perspective would remain." - [FS50617945](#)*
30. TNA stated that the amount and level of redaction was, and is, necessary in order to protect individuals' personal and personal sensitive (sexual life) data.
31. Having looked at the withheld information the Commissioner considers that the level of redaction is appropriate to avoid breaching the first data protection principle. Complete anonymization would be extremely problematic to achieve. The information within the closed extract is of such a personal nature that disclosing into the public domain would cause damage and distress to the individuals identified.

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

32. 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.
33. 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.
34. In conclusion, 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 named individuals concerned. The Commissioner upholds TNA's application of the exemption provided at section 40(2) of the FOIA.
35. The Commissioner notes the late application of Section 38(1) of FOIA which states that information is exempt information if its disclosure under the legislation would, or would be likely to:
- (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual
36. TNA stated that this exemption is being applied as it has been identified that Sir Latham is recorded as having a son. It is known that his son was born in 1934. Furthermore it cannot be definitively proven that this son is now deceased and therefore TNA assume that he is still alive. Additionally it is known that at least one of the gunners subsequent to the events of the trial went on to have at least three children. Therefore the exemption is applied to protect the mental wellbeing of these children.
37. TNA argued that although the fact that Sir Latham was tried and found guilty in 1941 is widely known, the graphic details of the case are not. Therefore in order to protect the mental wellbeing of these children the exemption has been engaged with respect to this information: the graphic sexual details as described in the withheld extract.
38. TNA and the transferring authority (The Ministry of Defence) are relying on the second limb that endangerment is 'likely to occur'. TNA argue that, whilst it is unable to provide definitive or evidential link between disclosure of the information and any endangerment, the nature, context and substance of the material under consideration, if released, would potentially cause extreme personal anguish and significant distress to surviving relatives.
39. The Commissioner has not investigated this late application of section 38 as she has concluded that under the 100 year rule the withheld information relates to living individuals and therefore should be withheld under section 40.

40. However, if the complainant is able to provide evidence to TNA that the named third party individuals are deceased (see paragraph 20 above) then the fact that the Commissioner has not found it necessary to consider section 38 on this occasion would not prevent TNA citing section 38 in a future request.

Section 10

41. Section 1(1) of FOIA requires a public authority in receipt of a request for information to confirm whether it holds the requested information, and, if so, disclose it to the applicant. Section 10(1) of FOIA provides that this must be done within 20 working days of receiving a request.
42. In this case the original request was made on 17 February 2016 and TNA responded on 29 February 2016. Therefore there is no breach of section 10(1) of the FOIA.

Other matters

43. The complainant also raised concerns over the length of time taken to carry out the internal review and provide the released information. He requested an internal review on 9 March 2016 and TNA provided the outcome of that review on 16 May 2016 and apologised that the time taken had exceeded their best practice standards.
44. There is no statutory time limit on the length of time a public authority may take to carry out an internal review. However the Commissioner has issued guidance that public authorities should aim to complete a review within 20 working days and, in any event, take no longer than 40 working days. On this occasion TNA took 44 working days to carry out the review. When carrying future reviews TNA should make every effort to comply with the Commissioner's guidance.
45. The Commissioner cannot comment on the time taken for TNA to format and release the information into the parent file WO 71/1062.

Right of appeal

46. 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

47. 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.
48. 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

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