

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2022

Public Authority: The National Archives

Address: Kew
Richmond
Surrey
TW9 4DU

Complainant: Ciarán MacAirt

Address: info@mcgurksbar.com

Decision (including any steps ordered)

1. The complainant has requested information relating to the 1971 McGurk's bar bombing.
2. The National Archives disclosed the majority of information that was requested but relied upon section 38 (health and safety) and section 40(2) (personal information) to withhold certain information.
3. The Commissioner's decision is that TNA is entitled to rely upon section 38 to withhold the information in question.
4. The Commissioner does not require TNA to take any steps.

Background information

5. On 4 December 1971, a bomb exploded at McGurk's bar in Belfast, killing 15 people. McGurk's bar was frequented by Irish Catholics and nationalists.
6. The British Security forces claimed that the bomb had exploded prematurely whilst being handled by a member of the Irish Republican Army ('IRA') which implied it was an 'own goal' for the IRA.

7. In 1977 a member of the Ulster Volunteer Force ('UVF'), a loyalist group who opposed Irish republicanism, was sentenced to life imprisonment for their involvement in the McGurk's bar bombing.
8. In 2011 the Police Ombudsman for Northern Ireland ('PONI') undertook an investigation into the way that the Royal Ulster Constabulary ('RUC'), the police in Northern Ireland at the time, investigated the bombing. The subsequent report¹ found that the RUC was so preoccupied by the theory that the IRA were responsible for the incident, that it failed to consider any loyalist groups involvement and the investigation was ultimately biased.
9. The Commissioner understands that the families of the victims of the McGurk's bar bombing continue to pursue the matter today.

Request and response

10. On 17 October 2017 the complainant wrote to TNA and requested the following information:

"Re: WO 305/4733/1 May I make an FOI request for information pertaining to the McGurk's Bar Bombing (before and after) please, as it will refer to [REDACTED] - one of 15 civilians killed in the blast. I can give you further information about the file - this is the 39 Brigade Operational Log/Diary for December 1971. It includes contemporaneous and chronological info (including police and British Army reports regarding the McGurk's Bar Bombing of 4th December 1971).

I know that the main file will contain indexes which will refer to the incident in question such as A. Duty Officers Logs; B. Messages Connected with the Log; C. Operation Orders etc E. Sitreps up to Z. Top Secret Supplementary Diary. [REDACTED]."

11. On the same day the complainant made the exact same request for WO 305/4733/2, which also relates to the McGurk's bar bombing. The complainant also requested seven other closed records.
12. On 17 October 2017 TNA wrote to the complainant and explained that it intended to 'stagger' these nine requests and process them in batches. The complainant did not take issue with TNA's proposal to stagger the

¹ [8b63d4ea-7575-4015-b9bf-1548536a9f2f.pdf \(policeombudsman.org\)](https://www.policeombudsman.org/8b63d4ea-7575-4015-b9bf-1548536a9f2f.pdf)

requests but did ask that TNA prioritise the McGurk's bar bombing records and process them in the first batch.

13. On 16 October 2018 TNA provided the complainant with a final response in relation to the McGurk's bar bombing records. It disclosed a redacted version of the record, with redactions made under section 38(1)(b) and section 40(2). This redacted record was given the reference WO 305/4733.
14. On 22 October 2018 the complainant raised their concern about TNA's continued withholding of information contained within 'Serial 105' of WO 305/4733.
15. On 2 July 2021 TNA provided the outcome to its internal review for all of the batched requests. It disclosed further information but upheld its application of section 38(1)(b) and section 40(2) in relation to serial 105.

Scope of the case

16. The complainant contacted the Commissioner on 22 December 2021 to complain about TNA's decision to withhold information contained within serial 105.
17. The complainant expressed concern that, after fifty years, there is no reason for the information to still be withheld. The complainant also expressed concern that they are already aware of the withheld information and, essentially, it is already in the public domain. The complainant argued that such information should not be withheld from the family members of a victim of the McGurk's bar bombing.
18. The Commissioner will first consider TNA's application of section 38(1)(b) of FOIA. Then, depending on his findings, the Commissioner may go onto consider TNA's application of section 40(2).
19. The withheld information in this case is part of a sentence. The Commissioner will not describe the withheld information because, in doing so, he would reveal it and this would impact upon either party's ability to appeal the Commissioner's decision. However, as part of this investigation, the Commissioner has seen the withheld information.

Reasons for decision

20. Section 38 of FOIA states:

(1) "Information is exempt information if its disclosure under this Act would be likely to –

(a) Endanger the physical or mental health of any individual, or

(b) Endanger the safety of any individual."

21. In the Commissioner's view, three criteria must be met in order to engage section 38:

- Firstly, 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;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the endangerment which the exemption is designed to protect. Furthermore, the resultant endangerment which is alleged must be real, actual or of substance; and,
- Thirdly, it is necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met – ie disclosure 'would be likely' to result in endangerment or disclosure 'would' result in endangerment.

22. The Commissioner will conduct his analysis but, again, cannot disclose the substance of the information that is being withheld.

23. Section 38 is a qualified exemption which means that consideration of the exemption is a two-stage process. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The applicable interests

24. TNA is relying upon section 38(1)(b) in this instance, on the basis that disclosure would be likely to endanger the safety of those to whom the information relates.
25. The Commissioner is therefore satisfied that the first criteria within paragraph 21 has been met.

The nature of the endangerment

26. TNA won't be able to prove that disclosure would be likely to endanger the safety of any individuals, because the endangerment relates to events that have not yet happened. In order to prove if the safety of individuals would be compromised, the withheld information would have to be disclosed, which would defeat the purpose of the exemption.
27. However, the Commissioner must be satisfied that there is a causal link between the withheld information and the endangerment. There must be more than a mere assertion or belief that disclosure would lead to endangerment; there must be a logical connection between the two.

The complainant's position

28. The complainant has repeatedly expressed concern that the withheld information is already in the public domain. The complainant has repeatedly communicated to TNA, and the Commissioner, what they believe the withheld information is.
29. Disclosure under FOIA is disclosure to the world at large and TNA must be satisfied that any member of the public can receive the requested information, not just the requestor. Even if the requestor might have their suspicions about what the withheld information is, TNA must carefully consider the consequences of disclosure to the world at large.

TNA's position

30. The withheld information reveals information that cannot be disclosed in this decision notice.
31. However, TNA is concerned that, even after 50 years, disclosure of the withheld information presents a security concern and endangers the safety of certain individuals.
32. TNA has also indicated that the current terrorism threat level in Northern Ireland is classed as substantial. It has elaborated that in recent years there have been a substantial number of paramilitary style incidents and arrests made under the Terrorism Act 2000.

33. TNA is concerned that these incidents have shown intent to identify those with opposing political views and have shown an ability to use information in the public domain to target individuals for reprisal, even for events that occurred 50 years ago.
34. Section 66 of FOIA sets out how public authorities should consider requests for records transferred to archives such as TNA. In line with its section 66 obligations, TNA has consulted the Ministry of Defence ('MoD') from whom the withheld information originated.

Likelihood of the endangerment

35. In conjunction with the MoD, TNA has engaged section 38(1)(b) on the lower threshold of endangerment, 'would be likely to'. The Commissioner's guidance states 'this means that even if there is below a 50% chance, there must be a real and significant likelihood of the endangerment occurring.'
36. The Commissioner recognises that the endangerment outlined by the MoD and TNA is not absolutely certain. However, having reviewed the withheld information the Commissioner is satisfied that it relates to potentially endangering information.
37. As previously discussed, the complainant has their suspicions about what the withheld information is and has put these suspicions into the public domain.
38. The Commissioner must consider whether the withheld information is already in the public domain and, if it is, whether it has been confirmed by an official source, such as the MoD or TNA, or whether it is speculative.
39. TNA's guidance² 'Information in the public domain and access to Historical records at The National Archives' considers when information can be considered to be within the public domain and to what extent that fact would support the disclosure of any closed records.
40. The guidance states 'Partial information may have also been released via leaks, unattributed sources to journalists or unauthorised memoirs. Again this is not sufficient to conclude that similar official or more detailed information on a topic should be released.'

² [Information in the public domain and access to \(nationalarchives.gov.uk\)](https://nationalarchives.gov.uk)

41. TNA has gone through the information that is in the public domain and explained to the Commissioner why it considers it speculative.

Is the exemption engaged?

42. Having viewed the withheld information and TNA's arguments, the Commissioner is satisfied that the withheld information engages section 38(1)(b).
43. Ultimately, the Commissioner is satisfied that the withheld information is not within the public domain and, taking into account the political significance and the notoriety of the McGurk's bar bombing, he is satisfied that disclosure of the information would gain significant attention.
44. It is the MoD, with its knowledge of the current political situation in Northern Ireland, that is best placed to gauge the likelihood of endangerment. Ultimately the Commissioner is satisfied that there is a causal link between disclosure and the endangerment described and he is satisfied with the threshold that TNA has applied to this endangerment.
45. The Commissioner is therefore satisfied that the remaining two criteria within paragraph 21 have been met.
46. Since the Commissioner is satisfied that the exemption is engaged he has gone onto consider whether the public interest lies in disclosure or in maintaining the exemption.
47. Even though section 38 is engaged, the Commissioner may still require TNA to release the requested information if the public interest in doing so outweighs the public interest in maintaining the exemption.

The public interest test

Public interest in disclosure

48. TNA has acknowledged the broad principles that underpin FOIA, accountability and transparency, and is aware of its obligations to 'disclose as much information as possible in order to inform public debate.'
49. TNA has also acknowledged that 'The British Army's role in Northern Ireland is a matter of historic and legitimate public interest. It is desirable that its conduct should be as open to public scrutiny as security considerations will allow.'

50. Finally, TNA has acknowledged that the withheld information may 'potentially aid the peace, reconciliation and healing process for those involved' in the McGurk's bar bombing.
51. The Commissioner echoes TNA's sentiment. Not only would disclosure increase public understanding, and encourage healthy debate, regarding the McGurk's bar bombing; it would also assist families of the victims in their pursuits.
52. The Commissioner is sympathetic to the cause of the complainant and family members of the victims of the McGurk's bar bombing, and has assigned appropriate weight to disclosure in his consideration of the public interest.

Public interest in maintaining the exemption

53. The only argument that TNA has put forward, in favour of maintaining the exemption, is that disclosure would be likely to endanger the safety of any individual.
54. Obviously the Commissioner must assign considerable weight to protecting the safety of individuals.

Balance of the public interest

55. In this instance, the Commissioner considers the public interest lies in maintaining the exemption.
56. The Commissioner considers the balance of the public interest to be fine in this case. Not because he believes TNA and the MoD have overestimated the likelihood or severity of any endangerment but because he recognises the public interest in this information.
57. For information to be in the public interest, it must be in the greater good of the public to disclose – it doesn't necessarily mean it's information that the public will find interesting. Whilst the public might be interested in the McGurk's bar bombing, even fifty years later, the Commissioner also considers it would be within the public interest to disclose as much information as possible relating to the incident so politicians, historians and the family members of the victims can process this information.
58. The Commissioner understands that the complainant, and other family members of the victims of the McGurk's bar bombing, have pursued this matter tirelessly, both independently and through the courts.
59. However, the Commissioner will always assign considerable weight to protecting the safety of individuals, including those who may be at risk

of reprisal attacks. The Commissioner has taken into account the recent reprisal attacks that TNA has referred to within paragraph 30 when making his decision.

60. The Commissioner has also taken into account TNA's overall handling of the request in reaching his decision. TNA has revisited, on more than one occasion, the information that was originally withheld and has provided further disclosure. Looking at the redacted record WO 305/4733, the Commissioner is satisfied that TNA hasn't applied section 38(1)(b) overzealously, or in a blanket manner, but on a case by case basis.
61. Since the Commissioner is satisfied that the exemption is engaged, and the public interest lies in maintaining the exemption, he does not consider it necessary to go on to consider TNA's application of section 40(2).

Right of appeal

62. 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

63. 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.
64. 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 *A Gradwell*

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