

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 October 2007

Public Authority: The Office for National Statistics
Address: 4200E Segensworth Road
Titchfield
Fareham
Hampshire

Summary

The complainant requested information from the Office for National Statistics ('the ONS') relating to the 1921 census return. The ONS withheld the requested information, relying on the exemptions under sections 40(2), 41 and 44 of the Freedom of Information Act. In this case, the Commissioner's decision is that the ONS has correctly applied the section 44 exemption. The Commissioner does not therefore require the ONS to take any steps in relation to this request.

However, the Commissioner also finds that the ONS failed to comply with section 10(1) of the Act as it did not respond promptly to the complainant's request. The ONS also breached section 17(7) of the Act by failing to provide the complainant with adequate details concerning the right to appeal to the Commissioner. Finally, the Commissioner finds that the ONS failed to meet the requirements of the section 45 Code of Practice in relation to its internal review in this case.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. The complainant has advised the Commissioner that on 27 June 2006 he requested the following information ('the requested information') from the ONS under section 1 of the Act:

“... a copy of the record from the 1921 census. The record is for George and Elizabeth Barrett of 9 Green Lane, Thatcham, Newbury, Berkshire. George and Elizabeth Barrett are my great uncle and aunt.”

3. On 26 July 2006, the complainant was advised by the ONS that the requested information was exempt by virtue of sections 40(2), 41(1) and 44(1)(a) of the Act. Section 40(2) exempts information which is the personal data of a third party (ie someone other than the requester), where disclosure would breach any of the data protection principles. Section 41(1) exempts information obtained from any other person or public authority where disclosure would constitute a breach of confidence actionable by that or any other person. Section 44(1)(a) exempts information if disclosure is prohibited by other legislation.
4. The ONS advised the complainant that the 1921 census was taken under the terms of the Census Act 1920 (the Census Act). Section 8(2) of the Census Act specifies that if the Registrar General, or any person under his control or supplying services to him, discloses any personal census information to another person without lawful authority, he is guilty of an offence.
5. The ONS also advised the complainant that the 1921 census return contained personal information about individuals who might still be alive, as it included all individuals present at an address at the time of the census. The ONS explained that it had to consider the rights of these individuals, and it had concluded that disclosure of the requested information was exempt under section 40(2).
6. Finally, the ONS advised that the information contained in the census returns was collected under a duty of confidence, and that it was therefore exempt under section 41(1) of the Act.
7. The complainant was dissatisfied with this response, and requested an internal review on 29 July 2006.
8. The complainant did not receive any response from ONS in relation to his request for an internal review.

The Investigation

Scope of the case

9. On 18 October 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant claimed to the Commissioner that the ONS had incorrectly withheld the requested information from him. The complainant also advised the Commissioner that he had requested an internal review of the ONS's decision to withhold the requested information on 29 July 2006, but that he had not received any response.

Chronology

10. The Commissioner wrote to the ONS on 8 February 2007 to advise it of the complaint. The Commissioner was concerned that the ONS did not appear to have conducted an internal review in relation to the complainant's request, and he asked the ONS for an explanation.
11. The ONS indicated to the Commissioner by letter dated 14 February 2007 that it had in fact conducted an internal review in December 2006, but that it had not yet advised the complainant of the outcome. In fact the internal reviewer had concluded that the original refusal was correct, and that the ONS was right to withhold the requested information.
12. The Commissioner wrote to the ONS on 16 February 2007 to remind it of its obligations under the section 45 Code of Practice in relation to internal reviews. This issue is dealt with in "Other Matters" at paragraph 55 below.
13. Although the complainant had not been kept informed, the ONS had now had an opportunity to review its original refusal, so the Commissioner considered it appropriate to continue with the section 50 investigation. The Commissioner wrote to the ONS on 16 February 2007 to obtain a copy of the requested information. The Commissioner also requested further information on the ONS's reliance on the exemptions cited. The ONS's arguments in relation to each of the exemptions are summarised below.

Section 44 exemption

14. The ONS explained its view that the requested information was prohibited from disclosure by virtue of section 8(2) of the Census Act. Section 8(2) states that:

"If the Registrar-General for England and Wales or the Registrar-General for Scotland ("the Registrars") or any person who is –

 - (a) under the control of either of the Registrars; or
 - (b) a supplier of any services to either of them,

discloses any personal census information to another person, without lawful authority, he shall be guilty of an offence".
15. The Registrar General is the head of the ONS, and uses ONS staff to conduct the census, therefore the ONS argued that it was under the control of the Registrar General. The ONS further argued that the Act did not provide the requisite "lawful authority" for disclosure of census information.

Section 40(2) exemption

16. The Commissioner notes that, in this case, the ONS sought to rely on section 40(2) of the Act (the exemption relating to requests for information that constitute personal data). The definition of personal data in section 1 of the Data Protection Act 1998 (the DPA) refers to "data which relate to a living individual". Where a

person is deceased, as in this particular case, then information about that person cannot constitute personal data and the section 40 exemption does not apply.

17. The ONS acknowledged that the complainant in this particular case was seeking personal information relating to his own deceased relatives. However, the ONS explained to the Commissioner that census returns record information for an entire household, including guests and visitors. The ONS was of the view that, as it could not be certain that all the persons referred to in the census return were deceased, it ought to consider the exemption under section 40(2) of the Act in relation to any persons who might still be alive.
18. The ONS further advised the Commissioner that it was unable to seek consent from any of the individuals referred to in the census return, and that, given the risk of breaching the data protection principles, it should therefore withhold the information.

Section 41 exemption

19. The ONS advised the Commissioner that information provided for the census is done so under strict conditions of confidence. The 1921 census form is marked "Strictly Confidential" and there is no indication on the form that the information will ever be released.
20. The ONS also advised the Commissioner that the 1921 census record may contain sensitive information relating to individuals, and that the census record had the 'necessary quality of confidence' as outlined in the case of *Coco v Clarke*¹.

Section 22 exemption

21. The ONS did not initially apply this exemption to the requested information, either at the time of the request or at the internal review stage. The ONS sought to introduce this exemption when it responded to the Commissioner's enquiries regarding the application of the exemptions already cited. The Commissioner has not considered fully the application of the section 22 exemption in this case because of his conclusions in relation to section 44 of the Act. However, the Commissioner has commented on this late application of the exemptions by ONS in the "Other Matters" section of this Decision Notice at paragraph 55.

Findings of fact

22. The collection of 1921 decennial population census information was undertaken by officers of the Registrar General who gathered information from the head of each relevant household. The Commissioner has had sight of the requested information and notes the following statement on the 1921 census schedule:

"The contents of the Schedule will be treated as strictly confidential."

¹ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41

The ONS has advised the Commissioner of its intention to release the entirety of the 1921 census returns in 2022, in accordance with the non-statutory '100 year rule' which was adopted to reflect this undertaking of confidentiality. The practice of employing the 100 year rule has been in place for the Census since 1962 (for the 1861 Census). Since 1981 the Registrar General has assured the public that census information will be held in confidence for 100 years. The ONS has advised the Commissioner that, in its view, response rates for future census returns will be adversely affected if it fails to honour this pledge.

23. The requested information relates to members of the complainant's family. Although not relevant for the purposes of the Act, the complainant has confirmed to the Commissioner that he is seeking this information for genealogical reasons, ie to complete a family tree.
24. In relation to the requested information, the census schedule contains information relating to individuals who are now deceased. This information comprises the names of the individuals, their relationship to the head of the household, age, sex, occupation, marital status, places of birth and nationality, as well as details of their places of work.
25. The Commissioner is aware that the name, age and marital status of individuals is generally available to the public through researching the registers of births, deaths and marriages, although the names of persons who were born, married or died outside the UK would not appear in such registers. The Commissioner has been further advised that names and addresses of men over the age of 21 on the electoral roll would also be available to the public, albeit subject to the limits to suffrage imposed by wealth and status.

Analysis

Procedural matters

Section 17 – refusal notice

26. The Commissioner considered whether the refusal notice issued by the ONS complied with section 17(7) of the Act. Section 17(7) states that a refusal notice issued in response to a request must contain:
 - details of the public authority's complaints procedure in relation to requests made under the Act, or a statement that the authority does not provide such a procedure, and
 - details of the right to complain to the Commissioner under section 50 of the Act.
27. In this case, the refusal notice issued by the ONS on 26 July 2006 did not contain either of these required elements. For this reason, the Commissioner finds that the ONS's refusal notice did not comply with section 17(7) of the Act and was therefore inadequate.

Section 44: information prohibited from disclosure

28. Information is exempt by virtue of section 44(1)(a) of the Act if its disclosure (otherwise than under the Act) is prohibited by or under any enactment. The full text of section 44 is set out at the legal annex to this Decision Notice (see page 13). Section 44 is also an absolute exemption. Therefore, if the Commissioner is satisfied that that section 44 is engaged in any case, he is not required to consider the public interest test. In this case the ONS has claimed that disclosure of the requested information is prohibited by section 8(2) of the Census Act (as substituted by section 1 of the Confidentiality Act 1991).
29. The Commissioner has had sight of the requested information which comprises the census schedule for 9 Green Lane. Having examined that schedule he is also satisfied that it was collected by the servant or agent of the Registrar General in the course of carrying out a census. Further, he has had sight of the actual census returns completed by the head of the household at 9 Green Lane, and is satisfied that it comprises information relating to now deceased persons.

The statutory bar

30. Section 8(2) creates an offence in circumstances where the Registrar General for England and Wales, or the Registrar General for Scotland, or any other person (who is under the control of either of the Registrars, or who is a supplier of any services to either of them) discloses any personal census information without lawful authority. The full text of this provision is set out at the legal annex (see page 13).
31. In his investigation, the Commissioner has enquired into the relationship between the Registrar General and the ONS. The ONS has confirmed to the Commissioner that the Registrar General has had responsibility for conducting every census in England and Wales since 1847. In 1972 the General Register Office became one division of the newly-created Office of Population Censuses and Surveys (the OPCS), and the head of the OPCS took the title of Registrar General. The ONS has confirmed to the Commissioner that the Central Statistics Office and the OPCS were merged in 1996, to form the ONS. At that time the General Register Office became a division of the ONS and the head of the ONS became the new Registrar General. ONS staff are used by the Registrar General to collect census information.
32. In light of this history, the Commissioner is satisfied that the ONS was a legal person under the control of the Registrar General for England and Wales at the time of the complainant's request, so as to satisfy the first limb of the statutory bar.

Is the requested information personal census information?

33. Census information is defined by section 8(7) of the Census Act, as any information that is collected by the Registrar General in the course of carrying out a census, or which has been acquired under sections 2, 4 or 5 of the Census Act

1920. Personal census information is any census information that relates to an identifiable person or household, whether living or deceased.

Is there lawful authority to disclose the requested information in this case?

34. The Commissioner is mindful of the provisions of the Census Act which permit the Registrar General to release personal census information where there is lawful authority to do so. In investigating this complaint, the Commissioner asked the ONS to clarify its understanding of the meaning of lawful authority in the context of the Census Act.
35. In response the ONS confirmed to the Commissioner that one example of the Registrar General's authority to disclose personal census information may be found at section 17 of the Criminal Appeals Act 1995. ONS has advised the Commissioner that this is the sole source of lawful authority available to the Registrar General which allows for disclosure to a member of the public.
36. The requested information is clearly personal census information within the definition in section 8(7) of the Census Act. The Commissioner must consider therefore whether there in this case there is lawful authority for disclosure of the information. The Commissioner is mindful in this instance of the conclusions of the Information Tribunal in the Dey case² to the effect that section 44 of the Act stipulates that information is exempt from disclosure if its disclosure (otherwise than under this Act) is prohibited by or under any enactment. In this case, the Tribunal clarified that an authority cannot rely on disclosure under the Act to avoid the prohibition (para 17). Therefore the Commissioner does not consider that the Act itself provides the necessary lawful authority to permit disclosure of personal census information.
37. The Commissioner is of the view that consent is a valid ground for disclosure of personal census information. That is because the Commissioner has been provided with examples of instances where there has previously been disclosure of 1921 census information. During the 1940s, census information was released to the Ministry of National Insurance to verify the age of pension claimants. In that instance the consent of the individuals concerned was obtained, but this information was not disclosed to the public.
38. In this case, the Commissioner notes that it is not possible to obtain the consent of the individuals, since they are deceased. In such circumstances the Commissioner considers that the consent of their personal representatives would be sufficient to provide the necessary 'lawful authority'. The complainant has confirmed to the Commissioner that he is not the legal representative of the deceased persons whose information is captured on the census return for 9 Green Lane. In those circumstances the Commissioner is of the view that the complainant cannot give valid consent to the disclosure of the requested information. The Commissioner finds therefore that the statutory bar in section 8(2) of the Census Act applies in this case, and that the ONS is prohibited by that provision from disclosing the requested information.

² Dey v ICO & Office of Fair Trading, Appeal No. EA/2007/0057

Section 41: Information provided in confidence

39. The ONS has relied upon section 41 of the Act, which is an absolute exemption, as the reason for not disclosing the requested information. Information is exempt by virtue of section 41 if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under this Act) by the authority holding it would constitute a breach of confidence '*actionable*' by that or any other person.
40. This particular decision calls for detailed analysis of the wording of section 41 and the common law relating to breach of confidence as it applies to the requested information. However, in order to provide guidance to the ONS in dealing with future requests for the 1921 census information, the Commissioner has extended this analysis to include other categories of information which appear on the face of the 1921 census returns.
41. In relation to the application of the section 41 exemption, the Commissioner must first consider whether or not the requested information was in fact obtained from another person. This is to satisfy the requirements of section 41(1)(a). The Commissioner notes that the requested information was originally provided to officers of the Registrar General, by the head of the household at 9 Green Lane. The requested information was not created by the ONS. The Commissioner is satisfied in those circumstances that the information was obtained from another person, the head of the household.
42. Having established that the requested information was in fact obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the Act), would constitute a breach of confidence '*actionable*' by that or any other person.

An '*actionable*' claim for breach of confidence

43. The Commissioner takes the view that the word '*actionable*' in the context of section 41 means that all the requirements for a successful claim for breach of confidence must be fulfilled. In other words: if a claim were brought, would it succeed? A mere chance of success is not sufficient to satisfy section 41. The Commissioner has also taken into account the observations of Lord Falconer during the Committee stage of the Bill, which became the Act³, in relation to the meaning of '*actionable*'.
44. The requirements for a claim for breach of confidence are set out in the case of *Coco v Clarke*.⁴ A claim for breach of confidence can be established where:
- (1) the information has the necessary 'quality of confidence',
 - (2) was imparted in circumstances giving rise to an obligation of confidence, and

³ Hansard HL (series 5) Vol 617, col 92 (17 October 2000)

⁴ *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41

(3) there has been (or would be) an unauthorised disclosure of the information.

All three elements must be present for a claim to be made out. However, for that claim to be 'actionable' within the meaning of section 41(1) (b) of the Act requires a further consideration in any case, namely, whether or not there would be a defence to such a claim.

The necessary 'quality of confidence'

45. The Commissioner has had sight of the requested information and has carefully considered whether or not it has the necessary quality of confidence. The Commissioner is satisfied that a promise of confidentiality as in the case of the 1921 Census information is not in itself sufficient to confer on the information the necessary quality of confidence.
46. The Commissioner is mindful of the impact of the House of Lords' judgment in the *Campbell*⁵ case, on the development of the law of confidence where personal information is an issue, and the fact that the values enshrined in articles 8 and 10 of the European Convention on Human Rights are now part of that law. The Commissioner accepts that the action for breach of confidence in such circumstances has been "*reshaped*" into an action for misuse of personal information⁶. In this case, the Commissioner has considered the *Campbell* test for what constitutes 'private information' – the question in any case is whether, in relation to that information, the individual had a reasonable expectation of privacy. The Commissioner considers that information relating to the relationship to the head of household, such as whether that relationship was one of step-son or daughter, is a clear example of personal information in the 1921 Census returns which an individual would expect to be kept private. The Commissioner considers that such information would be confidential in nature. However, the Commissioner is not satisfied that this expectation would normally exist in relation to less sensitive personal information, whose disclosure would not infringe any individual's privacy.
47. The Commissioner has considered these issues in the context of the requested information. In this case, the requested information comprises the name and surname of the residents of at 9 Green Lane, and their relationship to the head of the family, their age, occupation and place of work, marital status, birthplace and nationality.
48. Having carefully considered the nature and content of the requested information, the Commissioner is satisfied that it is not sufficiently private in nature to meet the *Campbell* criteria, and has concluded therefore that this information does not have the necessary quality of confidence. The Commissioner is mindful of the fact that some of the requested information such as the name, address, age, and marital status of the individuals concerned is publicly available through researching the registers of births, deaths and marriages. It is the

⁵ *Campbell v Mirror Group Newspapers (MGN) Ltd* [2002] EWCA Civ 1373

⁶ Clerk and Lindsell on Torts, 19th edition, 2006

Commissioner's view that such information clearly cannot have the necessary quality of confidence.

49. Other information on the face of the relevant Census return such as the occupation and nationality of the individuals, is not available to the public at large. However, the Commissioner does not consider that an individual's occupation or nationality will normally be of such sensitivity as to give rise to an expectation of privacy. Although such information is not published or otherwise in the public domain, the Commissioner does not consider that the release of this less sensitive information would normally constitute an infringement of the privacy of the individuals concerned. It cannot therefore attract the protection of the law of confidence.
50. The Commissioner is advised by the ONS that some personal information on the face of other 1921 Census returns may relate to an individual's relationship to the head of household, such as whether they are a stepson or daughter. The Commissioner considers that such information would be sufficiently sensitive that its publication would amount to an invasion of privacy. Such information clearly requires the protection of the law of confidence.
51. The Commissioner is satisfied that such considerations do not apply to the requested information. In light of this, the Commissioner has concluded that the first requirement for an action for breach of confidence, the 'necessary quality of confidence', has *not* been met in this case. The Commissioner is not therefore required to consider whether the remaining elements of an action for breach of confidence are met in relation to the requested information.

The Decision

52. The Commissioner's decision is that the ONS dealt with the request for information in accordance with the Act. The Commissioner finds that section 44(1)(a) does apply to the requested information, and it is therefore exempt from disclosure.
53. However, the Commissioner also finds that the ONS failed to comply with section 17(7) in that it did not issue an adequate refusal notice to the complainant.

Steps Required

54. The Commissioner does not require the public authority to take any steps.

Other matters

55. The Commissioner does not uphold the complaint in this case but wishes to draw the ONS's attention to a number of procedural deficiencies and other good practice issues arising from the handling of the complainant's request.

The internal review

56. The complainant requested an internal review of ONS's initial decision on 29 July 2006 but received no response. On 14 February 2007, as part of the investigation of the complaint, the ICO was informed that a review had taken place on 12 December 2006 but that as yet the outcome had not been communicated to the complainant.

57. Paragraph 41 of the Code of Practice issued under Section 45 of the Act states that:

"In all cases, complaints should be acknowledged promptly and the complainant should be informed of the authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the applicant and explain the reason for the delay. The complainant should always be informed of the outcome of his or her complaint."

58. The Commissioner is disappointed that the ONS failed to communicate either the progress or the outcome of the review to the complainant. Furthermore, he is concerned that the review took 19 weeks to complete. The ICO has subsequently issued guidance on this matter (see link below) which recommends that, in most circumstances, a reasonable time for completing an internal review is 20 working days.

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

59. The Commissioner is aware that this is not the only time the ONS has failed to handle an internal review properly and would therefore recommend that the authority review its FOIA complaints procedure and ensure that the relevant staff receive adequate training.
60. In addition, the Commissioner recommends that the ONS publish its FOIA complaints procedure and the associated contact details on its website and/or via its publication scheme.

Right of Appeal

61. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 23rd day of October 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

(1) Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

2. **Section 22** provides that:

(1) Information is exempt information if-

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1).

3. **Section 40** provides that:

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

4. **Section 41** provides that:

(1) Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

5. **Section 44** provides that:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

6. **Section 8 of the Census Act 1920** provides that:

1) If any person –

- (a) neglects or refuses to comply with or acts in contravention of any of the provisions of this Act or any Order in Council or regulations made under this Act; or
- (b) being a person required under this Act to make a statutory declaration with respect to the performance of his duties, makes a false declaration; or
- (c) being a person required by an Order in Council or regulations made under this Act to make, sign or deliver any document, makes, signs, or delivers, or causes to be made, signed, or delivered a false document; or
- (d) being a person required in pursuance of any such Order in Council or regulations to answer any question, refuses to answer or gives a false answer to that question;

he shall for each offence be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

2) If the Registrar-General for England and Wales or the Registrar-General for Scotland (“the Registrars”) or any person who is –

- (a) under the control of either of the Registrars; or
- (b) a supplier of any services to either of them, discloses any personal census information to another person, without lawful authority, he shall be guilty of an offence.

(3) If any person discloses to another person any personal census information which he knows has been disclosed in contravention of this Act, he shall be guilty of an offence.