

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 25 November 2008

Public Authority: The Office for National Statistics
Address: 4200E Segensworth Road
Tichfield
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 44(1)(a) and 22(1)(a) of the Freedom of Information Act (the 'Act'). The Commissioner's decision is that the ONS has correctly applied the section 44(1)(a) exemption. The Commissioner does not therefore require the ONS to take any steps in relation to this request.

However the Commissioner finds that the ONS did not comply with section 1(1) in that it failed to respond to the request within the statutory timescale.

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. This Notice sets out his decision.

The Request

2. The complainant has advised the Commissioner that on 10 April 2007 he requested the following information ('the requested information') from the ONS under section 1 of the Act:

"I am... writing to ask for permission to access the 1921 census, not personally given my location, but by means of an appointed researcher".

3. The complainant explained to the ONS that his reason for making the request was that he had been trying to ascertain information about a relative.
4. The ONS did not provide a substantive response until 19 September 2007. At this stage the ONS advised the complainant that the requested information was exempt by virtue of sections 44(1)(a) and 22(1)(a) of the Act. Section 44(1)(a) exempts information if disclosure is prohibited by other legislation. Section 22(1)(a) exempts information if it is intended for future publication.
5. 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. The ONS was of the view that this provision constituted a statutory prohibition on disclosure, and therefore the requested information was exempt under section 44(1)(a) of the Act.
6. The ONS also advised the complainant that the Government intended to publish the 1921 census in 2022. The ONS had concluded therefore that it was exempt under section 22(1)(a) and that the balance of the public interest lay in withholding the requested information until then.
7. The complainant was dissatisfied with this response, and requested an internal review on 19 September 2007. The ONS acknowledged the complainant's request, and on 19 November the ONS advised the complainant that the Commissioner had recently issued a Decision Notice in relation to the 1921 census¹. The complainant requested that the ONS continue with his review, and further correspondence followed.
8. On 12 March 2008 the complainant advised the ONS that he wished to make a formal complaint about his request for review, as he felt his correspondence had been ignored. On 12 August 2008 the ONS informed the complainant that the Information Tribunal had now considered the issue of the 1921 census. The Tribunal upheld the ONS's application of the section 44 exemption, so the ONS continued to refuse the complainant's request.

The Investigation

Scope of the case

9. On 13 August 2008 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.

¹ Case reference FS50147944. This Decision Notice upheld the ONS's reliance on the exemption under section 44(1) of the Act.

10. The Commissioner wrote to the complainant on 26 August 2008 to advise that he had already dealt with a number of complaints relating to the 1921 census, including the Decision Notice referred to above. The Commissioner had upheld the ONS's refusal to provide access to the 1921 census, and the issue had been considered by the Information Tribunal in the case of *Barrett*². The Tribunal ruled that the information contained in the 1921 census was exempt from disclosure by virtue of a statutory provision in the Census Act. In light of the Tribunal's decision the Commissioner advised the complainant that it was extremely unlikely that he would be able to uphold his complaint. Nonetheless the complainant requested that the Commissioner make a formal decision in his case. The complainant advised the Commissioner that he felt the Tribunal ought to consider individuals, such as himself, who were seeking access to census records because they had no other way to obtain information about their families.

Chronology

11. As the Commissioner had already undertaken research into the Census Act he did not require further information from the ONS's application of the section 44 exemption. The Commissioner did not inspect the withheld information in this case because the statutory bar identified by the ONS relates to all personal census information in the 1921 census. In addition, the Commissioner has inspected other records which form part of the 1921 census return. Therefore the Commissioner did not consider it necessary to inspect the information in this particular case.

Findings of fact

12. 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 notes that the 1921 census schedule is marked "Strictly Confidential".
13. 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.

Analysis

14. The Commissioner is mindful of the fact that the Information Tribunal has considered the issue of the statutory prohibition on disclosure under the Census

² David Barrett v The Information Commissioner and the Office for National Statistics, appeal no EA/2007/0112

Act in relation to the 1921 census return³. In this case the Tribunal found that information obtained as part of the 1921 census was prohibited from disclosure by section 8(2) of the Census Act. The Tribunal found therefore that the requested information was “not disclosable regardless of any public interest there may be in disclosure”.

15. The Commissioner has adopted the Tribunal’s approach in relation to complaints regarding requests for 1921 census information. Therefore the Commissioner has considered whether the requested information in this particular case falls within the scope of the Census Act .

Section 44: information prohibited from disclosure

16. 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. Section 44 is also an absolute exemption. Therefore, if the Commissioner is satisfied that that section 44 is engaged he is not required to consider the public interest test.
17. Having examined the 1921 census schedule in relation to a previous case the Commissioner is also satisfied that it was collected by the servant or agent of the Registrar General in the course of carrying out a census.

The statutory bar

18. 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 8).
19. 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?

20. 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. 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?

21. The requested information is personal census information within the definition in section 8(7) of the Census Act. The Commissioner must consider therefore

³ Appeal no EA/2007/0112, Barrett v ICO and ONS

whether there in this case there is any lawful authority for disclosure of the information.

22. In considering this issue the Commissioner has been assisted by the Information Tribunal's decision in the case of Barrett (see paragraph 17 above). The Tribunal identified two grounds for disclosure that might constitute lawful authority:

"a) section 2(2) of the Census Act 1920 requires the Registrar-General to comply with any directions given by the Chancellor of the Exchequer and, in theory, he could direct the ONS to release Census information which would amount to lawful authority;

b) a court order, for example under section 17 of the Criminal Appeals Act 1995, might constitute lawful authority".

23. The Tribunal clarified that consent to disclosure by the subject of census information could not in itself constitute lawful authority. Nor could the Act be used to provide the requisite authority.
24. The Commissioner does not consider that the ONS in this particular case has the lawful authority required to disclose the information. Therefore the Commissioner finds 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.

Other exemptions claimed

25. As the Commissioner is satisfied that the requested information was correctly withheld under section 44 of the Act, he is not required to make a decision in relation to the ONS's application of the exemption under section 22(1).

The Decision

26. The Commissioner's decision is that the ONS failed to comply with section 1(1) and section 17(1) of the Act in that it failed to issue a refusal notice within the time limit specified at section 10. However the Commissioner is satisfied that the ONS correctly refused the request in reliance on the exemption under section 44(1) of the Act. The Commissioner finds that section 44(1)(a) does apply to the requested information, and it is therefore exempt from disclosure.

Steps Required

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

Other matters

28. The Commissioner does not uphold the complaint in this case but wishes to draw the ONS's attention to a good practice issue arising from the handling of the complainant's request.

The internal review

29. The complainant requested an internal review of ONS's initial decision on 19 September 2007 but did not receive a substantive response until 12 August 2008.
30. Paragraph 41 of the Section 45 Code of Practice 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.*
31. The Commissioner is concerned that the review took eleven months to complete. The ICO has subsequently issued guidance in February 2007 which recommends that, in most circumstances, a reasonable time for completing an internal review is 20 working days.

Right of Appeal

32. 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 25th day of November 2008

Signed

**Graham Smith
Deputy 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 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.

4. **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.