

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 January 2011

Public Authority: Treasury Solicitor's Department
Address: 1 Kemble Street
London
WC2B 4TS

Summary

The complainant requested the public authority to provide him with information generated by the sale of bona vacantia property (ownerless property which by law passes to the Crown) to a third party. The public authority relied on sections 21, 40(2) 43 and 41(1) to withhold the information. The Commissioner's decision is that the public authority was entitled to withhold the information by reference to sections 40(2), 41(1) and 43(2).

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.

Background

2. The term "Bona Vacantia" is the legal term for ownerless property which by law passes to the crown.
3. Where a company was dissolved prior to 1 October 2009, by operation of section 654 of the Companies Act 1985 any of its assets which it retains at the point of dissolution are passed to the Crown. (Where a company is dissolved on or after 1 October 2009 the relevant provision

for the passing of its assets to the Crown is section 1012 of the Companies Act 2006.)

4. On 1 October 1979 a company, which had held the freehold of a domestic property, was dissolved. In November 2007 solicitors acting for a Mr. and Mrs. Y ("the purchasers") wrote to the Treasury Solicitor's Department ("the public authority") expressing the belief that the freehold of the domestic property had been owned by the now dissolved company and thus by operation of section 654 of the Companies Act 1985 the freehold now reverted to the Crown. After investigation the public authority was of the view that the freehold had belonged to the company at the time of its dissolution. Therefore by operation of section 654 of the Companies Act 1985 the freehold had passed to the Crown and it was subsequently sold by the Crown to the purchasers.
5. The complainant, on discovering the above, successfully claimed that prior to its dissolution the company liquidators had sold the freehold title of the said property to him and that he was its proper legal owner rather than the purchasers referred to above. The Land Registry later granted rectification of the freehold to the complainant.

The Request

6. The complainant made a request to the public authority on 17 August 2009 for a copy of correspondence exchanged between the public authority, the firm of solicitors acting for the purchasers, and the purchasers themselves regarding the said sale of the freehold.
7. The public authority, on 4 September 2009, refused to disclose the requested information on the basis of the exemptions contained in sections 21, 40(2) and 41(1) of the Act. The complainant requested an internal review of the public authority's decision on 8 October 2009. On 5 November 2009 the public authority wrote to him with the details of the result of the internal review it had carried out. The result was the upholding of the original decision.

The Investigation

Scope of the case

8. On 19 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

9. As part of his investigation the Commissioner asked the public authority to supply him with a copy of the withheld information and a detailed explanation of its reliance on the exemptions. The public authority provided a copy of the withheld information and the requested detailed explanations in correspondence to the Commissioner dated 17 February 2010. Additionally in its letter of 17 February 2010 the public authority informed the Commissioner that it also believed that the exemption provided by section 43(2) was applicable to the withheld information that comprised of the correspondence between it and the purchaser's solicitors.

Analysis

10. The withheld information consists of correspondence, regarding the property, between the public authority and the firm of solicitors acting for the purchasers and a copy of the Transfer Deed (Land Registry form TR1). The public authority withheld the correspondence by reference to sections 41(1), 43(2) and 40(2) and the Transfer Deed by virtue of sections 21 and 40(2).

Section 40(2) – Personal information

11. The Commissioner considered whether the information within the Transfer Deed could be withheld from release, in whole or in part, by section 40(2) and also whether the same exemption is applicable to the names of the purchasers and the address of the property in question in the correspondence between the public authority and the purchaser's solicitors.
12. Section 40(2)(a) provides an exemption for information which is the personal data of any third party. In order to rely on this exemption the Commissioner must first determine if the withheld information is the personal data of any third party.

13. The Data Protection Act 1998 (DPA) defines personal information as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention."

Does the redacted information constitute 'personal data'?

14. The Commissioner is of the view that names are personal data within the meaning of the DPA as it, of course, identifies a person.

15. In England & L B of Bexley v the Commissioner the applicant had requested a list of empty houses compiled by the council; these were both empty properties owned by public sector bodies and those owned by private individuals. The council had applied section 40(2) to the addresses of properties owned by individuals. The Tribunal was satisfied that "...knowing the address of a property makes it likely that the identity of the owner will be found". The Tribunal went onto conclude that, "The address alone, in our view, also amounts to personal data because of the likelihood of identification of the owner.... In our view this information amounts to personal data because it says various things about the owner. It says that they are the owner of the property and therefore have a substantial asset. ...The key point is that it says something about somebody's private life and is biographically significant."

16. The Commissioner accepts and adopts this, in that an address of property owned by an individual is also personal data. The Commissioner further notes that the Transfer Deed also contains information (such as covenants) as well as the names of the purchasers and the address of the property in question. This amounts, in the Commissioner view, to data which relates to living individuals who can be identified from data (i.e. the names and addresses of the purchasers and the property respectively). This further information within the Transfer Deed is therefore personal data for the purposes of the DPA.

17. However the public authority argues that disclosure of the withheld information would be in breach of the first data protection principle as

it would be unfair. The first data protection principle has two components:

“1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions of schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met.”

Would disclosure breach the first data protection principle?

18. The purchasers are private individuals who were engaged in the private purchase of the freehold title of domestic property of which they are leaseholders. The Commissioner notes that the purchasers, when purchasing the freehold, were engaged in a private activity. The Commissioner is of the view that the expectations of those individuals would be the retention of their privacy in this matter. The Commissioner therefore accepts that in the circumstances of this case, including that set out in the ‘Background’ section above, it would be unfair to those individuals to publicly disclose their names and the address of property in which they have a legal interest.
19. Notwithstanding the data subject’s reasonable expectations it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. This was acknowledged by the Information Tribunal in *The Corporate Officer of the House of Commons v IC & Norman Baker MP EA/2006/0015 & 0016*. Furthermore the Commissioner notes that, generally, accountability and transparency of public bodies are in the public interest. However in this case, they are not sufficient in themselves to constitute a compelling public interest in disclosure sufficient to outweigh the data subject’s reasonable expectations.
20. The Commissioner’s decision is therefore that it would breach the first data protection principle to process the names of the purchasers and any other information from which they could be identified and consequently the exemption afforded by section 40(2) is engaged. Therefore the Commissioner finds that the public authority correctly withheld personal information, which is the names of the purchasers and the address of the property, by reference to section 40(2).
21. The Commissioner has considered the DPA principles by reference to the context of the potential disclosure on the facts of this matter. In doing so he noted that Transfer Deeds are held by the Land Registry

and, on payment of a small fee, obtainable from them. However where this happens the Commissioner considers that condition 5(b) of Schedule 2 DPA would be satisfied as the processing would be necessary for the exercise of a function conferred on the Land Registry by enactment. Therefore the Commissioner does not consider this to affect his finding in relation to section 40(2) in this case. This is because he is also of the opinion that just because one data controller can release information without breaching the DPA it does not mean that release by another data controller in another context would not breach the DPA.

22. The Commissioner notes that section 21 (information accessible to the applicant by other means) was also applied to the transfer deed. This is because, as mentioned above, it can be obtained from the Land Registry on payment of a small fee. However, as the Commissioner has decided that the public authority in this case was correct to withhold it on the basis of section 40(2), he has not gone on to formally consider whether section 21 was correctly applied.

Section 41 - Information provided in confidence

23. Section 41(1) provides that –

“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.”

24. The public authority contends that the information supplied to it by the firm of solicitors acting for the purchasers is confidential in nature and if they were to disclose it, it would constitute an actionable breach of confidence. The Commissioner therefore restricted his analysis of section 41 to the information supplied to it by the firm of solicitors (excluding any information found to be exempt under section 40(2)).

25. As the information supplied by the firm of solicitors constitutes information obtained from another person, the Commissioner is satisfied that section 41(1)(a) is engaged.

26. For the purposes of section 41 a breach of confidence will be actionable if:

- the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - there was an unauthorised use of the information to the detriment of the confider.
27. This three stage test is taken from the case of Megarry J in *Coco v Clark (Engineers) Limited* [1968] FSR 415. However in light of subsequent legislative developments and case law the Commissioner accepts that detriment – as interpreted in *Coco v Clark* - is not always necessary, for example in cases where the information is personal and private in nature.

Quality of Confidence

28. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible, though it will be if it has been disseminated to the general public. Information which is of importance to the confider should not be considered trivial. The information, being obtained as a result of the client / solicitor relationship, cannot, in the Commissioner's view readily be considered trivial. Furthermore, although a duty of confidence will not be found where the information is freely available, the Commissioner found no evidence that the correspondence was in the public domain. He is therefore satisfied that the information possesses the necessary quality of confidence.

An obligation of confidence

29. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, Megarry J in *Coco v Clark (Engineers) Limited* [1968] FSR 415 suggests that the 'reasonable person' test may be a useful one. That is "if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence".
30. The public authority, in its letter to the Commissioner dated 17 February 2010, averred that any discussions between it and potential purchasers (or their representatives) of property held by the Crown would be reasonably viewed as ones carried out in confidence. The Commissioner's view is that a reasonable man or woman would on reasonable grounds be of the view that the information exchanged between the public authority and the solicitors (there being no

correspondence between the public authority and purchasers) was done so in confidence. The Commissioner's decision is that this limb of the test for a breach of confidence has therefore been met.

Detriment to the confider

31. The Commissioner notes that it was stated in *Coco v Clark* that for a disclosure to constitute a breach of confidence there has to be a detrimental impact on the confider. Whilst this is not always the approach latterly taken by the courts in the context of personal information confidences it still remains the position for commercial confidences. The public authority has not addressed this point in its correspondence with the Commissioner. However, the Commissioner is of the view that a release of the information would have a detrimental impact on the confider (i.e. the firm of solicitors acting for Mr and Mrs Y). The Commissioner believes that the detrimental impact would be a public perception, caused by the disclosure of this information, that the firm of solicitors could not maintain or enforce its confidences. A fair and reasonable extrapolation from this is that the firm of solicitors would likely suffer financial loss by clients or potential clients who would no longer instruct them due to its perceived inability to maintain its confidences.

Public interest defence

32. As the exemption for information provided in confidence is an absolute exemption there is no public interest test to be applied under the Act. However, case law on the common law concept of confidence suggests that action for breach of confidence in the courts will not be successful in circumstances where a public authority can rely on a public interest defence. In *Derry City Council –v- The Information Commissioner (EA/2006/0014)* the Tribunal interpreted a Court of Appeal decision (*London Regional Transport v The Mayor of London*) regarding the public interest defence, in the law of confidentiality, to mean that:
- No exceptional case has to be made to override the duty of confidence that would otherwise exist.
 - All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.
33. The Commissioner interprets this to be that the duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. (This differs from the Act's public interest test for qualified exemptions which assumes that information should be

disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure.)

34. The view of the Commissioner, therefore, is that an express obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. The Commissioner's position is that a consequence of any disclosure of confidential information would, to some degree, undermine the principle of confidentiality which is, in essence, the relationship of trust between confider and confidant. People would be discouraged from confiding in the public authority if they did not have a degree of certainty that such confidences would be respected. Thus, there is a public interest in maintaining trust and preserving this free flow of information to the public authority where this is necessary for the public authority to perform its functions in the public interest.
35. Regarding public interest factors that favour release of the information the Commissioner and/or the public authority identified the following:
 - Aid public understanding of the functions undertaken by the public authority's Bon Vacantia department and operations.
 - Provide public insight and greater transparency and accountability as to how property can be erroneously transferred via bona vacantia, both generally and in relation to the specific circumstances of this case.
36. The Commissioner is aware that the public authority erroneously transferred property from the complainant to the purchasers. However, having regard to all the facts and upon considering the withheld information, the Commissioner's opinion is that this erroneous action would not in itself establish a successful public interest defence to an action for a tortious breach of confidence in respect of the information withheld. Nor does he consider that the more general factors in favour of disclosure would sufficiently add to this factor so as to establish such a defence.
37. Whilst the majority of the information in the correspondence is exempt by section 41(1), the information that did not emanate from the solicitors acting for the purchasers is not, as section 41 relates to information obtained by the public authority from any other person. Thus the information that originates from the public authority and is contained in the correspondence from it to the solicitors acting for the purchasers is not exempt from disclosure by section 41. The

Commissioner went on to consider whether it would be exempted, as argued by the public authority, by virtue of section 43 of the Act.

Section 43 – Commercial interests

38. Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

39. The public authority maintains that the release of the withheld information would, or would be likely to detrimentally affect its ability to achieve the maximum value of bona vacantia property. It explained that this would occur because future prospective purchasers or informants as to potential bona vacantia property will or may be reticent about engaging with the public authority for fear that their communications could be made public. This reticence to engage with the public authority and the consequent reduction of information it is able to obtain would negatively impact on acquiring and selling bona vacantia property.

40. The public authority has failed to specify whether the prejudice specified in section 43(2) would or would be likely to occur. The Commissioner’s view, having regard to the dicta of the Information Tribunal in *McIntyre v The Information Commissioner and the Ministry of Defence (EA/2007/0068)*, is that where a public authority has failed to specify the level of prejudice at which an exemption has been engaged the lower threshold of “likely to prejudice” should be applied, unless there is clear evidence that it should be the higher level. The Commissioner therefore next considered whether the releasing of information, emanating from the public authority, in the correspondence would likely prejudice the commercial interests of any person.

41. Whilst the term ‘commercial interests’ is not defined in the Act the Commissioner has considered his Awareness Guidance No 5¹ on the application of section 43. This comments that:

‘...a commercial interest relates to a person’s ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services’.

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http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

42. The public authority maintains that disclosing the information would be likely to undermine or hamper the relationship of trust between it and prospective informants as to the possible vesting of property as bona vacantia and/or the disposal of bona vacantia property. This denigration of the relationship is, in the Commissioner view, likely to adversely affect the public purse. On the balance of probabilities the Commissioner accepts these assertions and that the exemption is engaged.
43. However, as section 43 is a qualified exemption, the Commissioner has gone on to consider the public authority's determination as to whether the public interest in disclosing the withheld information outweighed the public interest in maintaining the exemption. The public interest arguments considered by the public authority are laid out in the following paragraphs.
44. **Public interest arguments in favour of disclosing the requested information**
- Releasing the information would serve the public interest in demonstrating that the public authority's commercial activities are conducted in an open, transparent and honest way.
45. **Public interest arguments in favour of maintaining the exemption**
- Releasing the information could prejudice future sale negotiations with prospective purchasers, and the effective conduct of commercial activities, which may result in a loss to the public purse.

Balance of the public interest arguments

46. The Commissioner recognises the complainant's angst at the sale of the freehold to the purchasers by the public authority. However personal circumstances are not necessarily operative factors when evaluating the public interest. The Commissioner gives due weight to the public interest arguments that favour the release of the information. Releasing this information would open to public scrutiny how the sale of the freehold to Mr and Mrs Y was conducted by the public authority. Strongly counter poised against this is the wider effect that releasing this information would likely weaken the public authority's ability to maintain public confidence that their negotiations with them would remain confidential. Furthermore the Commissioner, by accepting that the exemption is engaged, recognises that releasing the information will likely dissuade at least some potential purchasers

of bona vacantia property from entering into negotiations with the public authority.

47. On balance the Commissioner's view is that the public interest factors (as distinguished from the complainant's personal interests) for not releasing this withheld information prevail. That is, there is little in the public interest for releasing information about the sale of one particular property when measured against the wider harm to the public interest which has been identified. The Commissioner therefore accepts, as correct, the public authority's arguments that the public interest in maintaining the exemption outweighs the public interest in releasing the information.

Procedural Requirements

48. The public authority first relied on the exemption afforded by section 43(2) in its letter to the Commissioner dated 17 February 2010, some considerable time after it had issued its refusal notice dated 4 September 2009. This omission from the refusal notice, which was not corrected by an internal review, means that the notice is defective and in breach of section 17(1) of the Act.

The Decision

49. The Commissioner's decision is that, apart from the procedural breaches recorded above, the public authority dealt with the request for information in accordance with the Act.

Steps Required

50. The Commissioner requires no steps to be taken.

Right of Appeal

51. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 10th day of January 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
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SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"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."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Information Accessible by other Means

Section 21(1) provides that –

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

Section 21(2) provides that –

"For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information

available for inspection) to members of the public on request, whether free of charge or on payment.”

Personal information

Section 40(2) provides that –

“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.”

Information provided in confidence.

Section 41(1) provides that –

“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.”

Commercial interests

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”