



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0112
Information Commissioner's Ref: FS50147944

Heard at Procession House, London, EC4
On 11th March 2008

Decision Promulgated
23rd April 2008

BEFORE

CHAIRMAN

ANNABEL PILLING
and

LAY MEMBERS

HENRY FITZHUGH
IVAN WILSON

Between

DAVID BARRETT

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE OFFICE FOR NATIONAL STATISTICS

Additional Party

Representation:

For the Appellant: David Barrett
For the Respondent: Mark Thorogood
For the Additional Party: Helen Mountfield

Decision

The Tribunal upholds the Decision Notice dated 23rd October 2007 and dismisses the Appeal.

Reasons for Decision

Introduction

1. This is an Appeal by Mr. David Barrett against a Decision Notice issued by the Information Commissioner dated 23rd October 2007. The Decision Notice relates to a request for information made by Mr. Barrett to the Office for National Statistics (the 'ONS') under the Freedom of Information Act 2000 (the 'FOIA').

The request for information

2. By letter dated 27th June 2006, Mr. Barrett requested that the ONS provide him with a copy of a record from the 1921 Census relating to his great-uncle and aunt, George and Elizabeth Barrett of 9 Green Lane, Thatcham, Newbury, Berkshire.
3. The ONS replied on 26th July 2006 and advised Mr. Barrett that the information was exempt from disclosure by virtue of sections 40(2), 41 (1) and 44(1)(a) of FOIA.
4. Mr. Barrett was dissatisfied with this response and requested internal review on 29th July 2006. Mr. Barrett did not receive any communication about the outcome of the internal review.

The complaint to the Information Commissioner

5. Mr. Barrett contacted the Information Commissioner on 18th October 2006 to complain about the way his request had been handled. He claimed that the ONS had withheld the requested information incorrectly and he also complained that he had not received any response to his request for an internal review of the decision.
6. The Information Commissioner made enquiries of the ONS in February 2007. The ONS indicated that an internal review had been conducted in December 2006 but had not yet advised Mr. Barrett of the outcome. The internal reviewer had concluded that the original refusal was correct. Although there is no statutory time limit within which public authorities must complete an internal review of a refusal to

provide information, the Information Commissioner reminded the ONS of its obligations under Paragraph 41 of the Code of Practice issued pursuant to section 45 of FOIA and subsequently issued guidance on the reasonable time for completing an internal review.

7. The Information Commissioner then investigated the substantive complaint and concluded that the disputed information was exempt from disclosure under section 44(1)(a) of FOIA as there was a statutory prohibition on disclosure of the disputed information; that prohibition being contained in section 8(2) of the Census Act 1920 and that, therefore, the ONS had dealt with the request in accordance with FOIA. A Decision Notice was issued on 23rd October 2007. The Information Commissioner had cause to consider the application of the exemption contained in section 41(1) of FOIA and Census information in relation to a wholly separate request concerning the 1911 Census. The Information Commissioner decided that it would be helpful to the ONS and members of the public to set out his findings in relation to the application of section 41 of FOIA and Census information in this case, notwithstanding the fact that he had decided the information was exempt under section 44 of FOIA.
8. The Decision Notice also records that the Information Commissioner found that the ONS had failed to comply with section 17(7) of FOIA in that it did not issue an adequate refusal notice.

The Appeal to the Tribunal

9. Mr. Barrett appealed to the Tribunal in October 2007.
10. The grounds of appeal can be summarised as there being no reason why the disputed information should not be provided and that the present rules regarding the future release of Census information are unfair.
11. The Tribunal joined the ONS as an Additional Party.
12. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents.

13. In addition, the Tribunal was provided with a copy of the disputed information. This was not made available to Mr. Barrett, as to disclose it to him would defeat the purpose of this Appeal.

14. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

The Powers of the Tribunal

15. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

16. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different

conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

17. The question of whether the exemption in section 44 of FOIA is engaged, that is, whether disclosure is prohibited by section 8(2) of the Census Act 1920, is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

18. The Tribunal has concluded that the relevant issue in this Appeal is as follows:

a) Is disclosure of that disputed information prohibited by any enactment so that the exemption provided by section 44 of FOIA is engaged?

19. If the Tribunal were to determine that disclosure of the disputed information is not prohibited by any enactment so that the exemption provided by section 44 of FOIA is not engaged, only then would the Tribunal need to go on to consider the following issues:

a) Is the disputed information exempt from disclosure under section 40(2) of FOIA because it might be personal data relating to a living individual?

b) Is the disputed information exempt from disclosure under section 41 of FOIA because it was gathered in confidence?

c) Is the disputed information exempt from disclosure under section 22 of FOIA because it was held with a view to its publication at some later date and it was reasonable in all the circumstances that the information should be withheld from disclosure until that date?

Evidence

20. We were provided with a statement prepared by Mr. Glen Watson, the Director of Census at the ONS which set out in some detail the history and practice relating to the conducting of the Census and the disclosure of information provided for the Census.

21. The England and Wales Census is conducted by the Registrar for England and Wales (the 'Registrar General'), whose statutory functions in relation to Censuses are set out in the Census Act 1920. The Census is planned and carried out by the ONS and the Census returns retained by the Registrar General. A Census of people and households has been held on one day, every ten years, since 1801, with the exception of 1941. The latest Census was held on Sunday 29th April 2001. It is the only survey which provides a detailed picture of the entire population because it covers everyone at the same time and asks the same core questions everywhere. The information collected allows central and local government, local authorities and other organisations to target resources more effectively to plan public services such as housing, education, health and transport services for the future. There is a statutory obligation to complete the Census form and a number of people after each Census have been prosecuted for failing to comply.
22. The Census Act 1920 does not prescribe the questions that should be asked during the taking of the Census; these are instead proposed by the Government of the day in a Census White Paper. This means that the questions asked in the Census vary from time to time; they have always asked the names of people in the household, their ages, occupations and the relationships between the people living in the household. The data required has become more extensive over time and some or all of this data may be considered personal or private data.
23. Every Census has been undertaken on the basis of an assurance of confidentiality. Mr. Watson states that although the vast majority of the population is currently prepared to make information available for the Census for the specific statistical purposes for which it is supplied, every time there is a Census the ONS receives a number of enquiries or expressions of concern as to the means by which Census information is kept confidential. He states that if there was any widespread public perception that providing information to the Census might render that information accessible upon request and thereby put the information in the public domain, there is a real risk that public confidence in the confidentiality of Census answers would be undermined, response rates would fall and the accuracy and integrity of the statistical data would be seriously compromised.

24. However, attitudes to disclosing Census information in the early and middle years of the twentieth century were not as strict as they are now and Census information was occasionally supplied for genealogical purposes, or for the establishing of pedigrees or inheritance rights, or – usually with explicit consent – in order to establish entitlement to state age-related benefit entitlements. Whilst information may have been given, entire Census records were not released in this manner.

25. As mentioned above, the Registrar General retains custody of the Census returns. By virtue of section 3(4) of the Public Records Act 1958, the Registrar General has applied to retain, and retains, custody of the Census returns beyond the normal “30 year rule”. Once the records are 100 years old, the Registrar General passes the records to the Keeper of Public Records and the National Archives can release the records under the Public Records Act.

26. This “100 year rule” is intended to balance the competing interests of maintaining the confidentiality of information provided for the Census and the disclosure of material that may be of interest to the public.

27. The “100 year rule” appears to have been adopted in relation to the disclosure of Census information since about 1957. In response to a question posed by a member of parliament about the 1861 Census, the then Minister of Health, Mr. Vosper, stated that government policy in relation to the release of Census returns was that they should be released after 100 years:

“..having regard to the general undertaking given in 1861, it seems that it would hardly be justifiable on any line of argument to make the 1861 records generally available to the public before the lapse of 100 years.”

28. In 1961, a paper was prepared by members of the General Registrar Office and presented to the Particular Instance Paper Committee of the Public Record Office during a discussion on potential disposal of Census schedules and enumeration books for 1861-1951. This paper included the following:

“ use by persons outside Departments has always been severely restricted because of the official guarantee of confidentiality given when the Census Schedules were completed, but it has been most commonly made in the

earlier Censuses were the guarantees are less strict, and always with the agreement, or implied agreement, of the persons concerned or their descendents.”

29. The Committee recommended that the records should not be destroyed and that they should be open to public inspection after 100 years.

30. This recommendation was formalised in 1966 by Instrument 12 of 1966 under the Public Records Act 1958, requiring the Public Records Office to keep Census returns closed for 100 years rather than 50 years. This applies to data within the custody of the Public Records Office, not the Registrar General. The 1921 Census data will not pass to the Public Records Office until 2022 in any event.

31. In our opinion, this amounted to a significant change to the period after which the public has access to Census information that does not appear to be consistent with the principles of freedom of information or the spirit of the FOIA and we have not been provided with the explanation as to why this figure was decided upon. However, we accept that the “100 year rule” is government policy, adopted to reflect the undertaking of confidentiality that Census information should only be released to the National Archives after 100 years and not before.

Legal submissions and analysis

32. A public authority need not comply with the duty to disclose under section 1 of FOIA where any of the absolute exemptions provided for by FOIA apply. Section 44 of FOIA is an absolute exemption. This means that the information is not disclosable regardless of any public interest there may be in disclosure.

33. Section 44 of FOIA provides as follows:

(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.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Is disclosure of the disputed information prohibited by any enactment so that the exemption provided by section 44 of the FOIA is engaged?

34. Section 8(2) of the Census Act 1920 provides as follows:

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.

35. Disclosure in contravention of section 8(2) of the Census Act 1920 is a criminal offence with a maximum liability of a fine and/or imprisonment for a term not exceeding two years (section 8(5)).

36. There is no dispute that the ONS is a “person” under the control of the Registrar-General for England and Wales.

37. Census information is defined in section 8(7) of the Census Act 1920 as any information that is collected by the Registrar General in the course of carrying out a census, or which has been acquired under section 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.

38. We note that this is a much broader definition of what amounts to “personal” information or data than that contained within section 1 of the Data Protection Act 1998 (the ‘DPA’). Under the DPA, “personal data” means data which relate to a living individual, thus excluding data relating to the deceased.

39. We are satisfied the disputed information is personal census information within the meaning of the Census Act 1920.

40. No arguments have been presented to us that there is lawful authority for the disclosure of the disputed information.

41. Lawful authority is not defined in the Census Act 1920 itself. Certain routes or gateways that might amount to lawful authority have been suggested, but this list is not exhaustive:

- 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.

42. Consent to disclosure by the subject of Census information could not, in itself, constitute lawful authority.

43. FOIA itself cannot provide lawful authority for disclosure because the wording of section 44 of FOIA specifically refers to authority "otherwise than under this Act".

44. We note that prior to the FOIA coming into force, the Department for Constitutional Affairs (now the Ministry of Justice) conducted a review of statutory bars to disclosure of information. The intention of the review was to consider which, if any, of the prohibitions could be removed or relaxed using an order under section 75 of FOIA. The review identified 210 statutory provisions which prohibited disclosure of information under section 1 of FOIA. (Another 116 statutory provisions had already been repealed or amended during the course of the review.) This review listed several criteria, any one of which, in the Government's view, could justify retention of a statutory bar to disclosure. The first was where the provision protected information that had been obtained under compulsion. Another is where it is an

offence to release the information. Both these are true of personal Census information.

46. With particular reference to section 8 of the Census Act 1920, it was concluded that:

“This provision makes it an offence for the Registrar-General for England and Wales (or the Registrar-General for Scotland) or any of their staff to disclose information which has been gathered in the course of the decennial census of population. It is government policy that this information, which is gathered under compulsion, should be released at the National Archives after 100 years and not before. Recent census forms have given an undertaking not to release information any earlier. This provision will therefore be retained.”

45. While Mr. Barrett may be critical of the existence of the prohibition on the disclosure of information contained in section 8(2) of the Census Act 1920, this is a prohibition for which Parliament has considered fit to provide and has not repealed.

46. For the reasons set out above, we have concluded that disclosure of the disputed information is prohibited by section 8(2) of the Census Act 1920. The exemption in section 44 of the FOIA is therefore engaged and this is an absolute exemption from disclosure. This means that the information is not disclosable regardless of any public interest there may be in disclosure.

47. We do not need therefore to go on to consider other exemptions raised by the ONS.

48. However, we do consider that we should pass comment in relation to the ONS submissions regarding the exemption provided in section 22 of FOIA. This exemption may only be relied upon where “it is reasonable in all the circumstances that the information should be withheld from disclosure until” the date of future publication, that is, until 100 years have elapsed. It should be noted that the disputed information is that relating to George and Elizabeth Barrett only, both of whom, it is accepted by all the parties, are deceased. It is questionable whether it would be reasonable in all the circumstances to withhold this information until 2021 under section 22 of FOIA.

Conclusion and remedy

49. Mr. Barrett has complained additionally about the handling of his request by the ONS and the handling of his complaint by the Information Commissioner. A number of recommendations were made by the Information Commissioner following the procedural defects by the ONS and the Tribunal has no jurisdiction in relation to these. The complaints made against the Information Commissioner are, perhaps, not particularly substantial and are, in any event, also not within the jurisdiction of the Tribunal.

50. For the reasons set out above, we have concluded that disclosure of the disputed information is prohibited by section 8(2) of the Census Act 1920. The exemption in section 44(1)(a) of FOIA is therefore engaged and this is an absolute exemption from disclosure. The Tribunal dismisses the Appeal and upholds the Decision Notice.

51. Our decision is unanimous.

Signed

Annabel Pilling

Deputy Chairman

Date 12th March 2008

Annabel Pilling

Deputy Chairman

Corrected on 28th April 2008