

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 11 December 2006

Public Authority: The National Archives
Address: Kew
Richmond
Surrey
TW9 4DU

Summary

The complainant requested information from the National Archives relating to the 1911 census schedule. The National Archives withheld the requested information, relying on the exemption under section 41 of the Freedom of Information Act 2000 (the 'Act'). In this case, the Commissioner's decision is that the National Archives wrongly claimed section 41 in relation to the requested information and he therefore upholds the complaint. The Commissioner requires the National Archives to disclose the requested information to the complainant.

The Commissioner stresses that that this Decision must be confined to the circumstances relating to the information requested in this case. This is not - and cannot be - a decision that the entirety of the 1911 census must now be disclosed. Nor does it create any precedent in the sense that all other requests for specific information within the 1911 or other census schedules must succeed. This Decision concludes with more general guidance about situations where section 41 of the Act may apply in this context. Each request for 1911 census information will need to be treated separately on its merits.

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 Act. This Notice sets out his decision.

The Request

2. The complainant has advised the Commissioner that on 20 May 2005 he requested the following information from the National Archives under section 1 of the Act.

“A copy of the 1911 decennial population census for 12 High Street, Bottesford, Leicestershire” (the ‘requested information’).

3. On 27 May 2005 the complainant was advised by the National Archives that the requested information was exempt by virtue of section 41 of the Act. This section 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. The National Archives further advised the complainant that his request related to personal information supplied by citizens about themselves, the disclosure of which would constitute a breach of good faith. They also confirmed that the relevant 1911 census schedule contained an undertaking that the information would be treated as confidential.
4. Although the complainant did not make a formal request for an internal review, he did make a second request for the same information on 28 May 2005. This was treated by the National Archives as a request for a review, since it appeared that the complainant had expressed dissatisfaction with the original decision.
5. On 31 May 2005 the National Archives again refused to release the requested information citing the section 41 exemption. On the 6 November 2005 the complainant, rather than raise a complaint to the Commissioner, sought a further review of this decision by the National Archives.
6. By letter dated 5 December 2005, the National Archives informed the complainant of the second review decision to refuse his request.

Relevant statutory obligations

7. **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.
8. **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.

The Investigation

Scope of the case

9. On 5 December 2005 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 National Archives incorrectly withheld the requested information from him, and he did not accept that the disclosure of the requested information by the National Archives would constitute an actionable breach of confidence.
10. The Commissioner's decision in relation to this complaint is set out at paragraph 33 of this notice. More general considerations in relation to other requests and complaints about the 1911 census information are set out at paragraph 36 to 54 of this decision notice. The Commissioner is mindful of the particularly sensitive nature of the information contained in the 1911 census, and of the unique position of this particular census. The Commissioner's decision in relation to the issues raised in this complaint therefore relates solely to the 1911 census and not to any other census data.

Chronology

11. The Commissioner wrote to the National Archives on 23 August 2006 in relation to the complainant's application for a decision under section 50 of the Act. In that letter the Commissioner asked for a copy of the requested information. In addition, the Commissioner asked the National Archives a number of detailed questions on the application of the section 41 exemption.
12. On 21 September 2006, the Commissioner received a detailed response to the questions raised as well as background information on the 1911 census. The National Archives in that letter provided to the Commissioner information on the so-called '100 year' rule, its origins and status. The National Archives also advised the Commissioner that a copy of the requested information would be sent by courier. This was provided to the Commissioner by way of a CD-ROM because of the need to ensure confidentiality. A copy of the requested information was received by the Commissioner on 21 September 2006 and due to difficulties in accessing the information a further copy was received on 28 September 2006.
13. On 7 November 2006, the National Archives wrote to the Commissioner, providing their views in response to points which had been raised by the Commissioner. These comments were discussed at a meeting on 8 November 2006 with the Commissioner and his staff. Further information was sought by the

Commissioner at that meeting in relation to the application of the 100 year rule to the 1911 Census and other issues relating to the complaint. In response, the National Archives provided additional information and crystallised their comments by letter dated 24 November 2006.

Findings of fact

14. The collection of 1911 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 1911 Census schedule:

“The contents of the Schedule will be treated as confidential. Strict care will be taken that no information is disclosed with regard to individual persons...”

- The Registrar General held the 1911 census schedules until they were deposited with the Public Record Office (now the National Archives) in August 1966 for preservation and safekeeping. These schedules included the requested information. The National Archives has advised the Commissioner of their intention to release the entirety of the 1911 census schedules in 2012, in accordance with the non-statutory ‘100 year rule’ which was adopted to reflect the undertaking of confidentiality. The practice of employing the 100 year rule has been in place for the census since 1962 (for the 1861 census) and since 1981 the public have been explicitly assured that census information will be held in confidence for 100 years. The National Archives advised the Commissioner that in 1966, following consultation with the General Registry Office, the Public Record Office and the Minister of Health, the census schedules were closed for 100 years by virtue of Statutory Instrument 12 made under the Public Records Act 1958.
15. Although the maintenance of this position has been government policy since 1966, the Commissioner notes that there was no such explicit assurance given to the householders in respect of the 1911 census. Furthermore, the Commissioner notes that Statutory Instrument 12 was revoked by the Act in November 2000.
16. In relation to the requested information, the census schedule contains information relating to two individuals who were aged 10 and 43 at the time of the census schedule. This information comprises the names of the individuals, their relationship to the head of the family, age, occupation, marital status, birthplace and nationality. If still alive, these persons would now be aged 105 and 138 respectively. The National Archives has confirmed to the Commissioner that it is unlikely these persons are still alive, and the Commissioner’s decision in this case is based on the assumption that these persons are not alive.
17. The Commissioner is aware that the 1911 census captures a range of personal information, including that relating to an individual’s health or ‘infirmity’. However, he notes that in this particular case information of that nature was not recorded on the schedule for 12, High Street, Bottesford.
18. The National Archives has advised the Commissioner 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.

19. The Commissioner notes that, in this case, the National Archives have not placed any reliance upon section 40 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 relates to a *living individual*". Where a person is deceased then information about that person cannot constitute personal data and the section 40 exemption does not apply.

Analysis

Section 41: Information provided in confidence

20. The National Archives have 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 .
21. 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 National Archives in dealing with future requests for the 1911 census information, the Commissioner has extended this analysis to include other categories of information which appear on the face of the 1911 census schedules.
22. 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, who then deposited it, along with other 1911 census schedules, with the Public Record Office (now the National Archives). The requested information was not created by the National Archives. The Commissioner is satisfied in those circumstances that the information was obtained from another person or authority, in this case the Office of National Statistics.
23. 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

24. 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 Act¹, in relation to the meaning of '*actionable*'.
25. The requirements for a claim for breach of confidence are set out in the case of *Coco v Clarke*.² 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) 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'

26. 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 1911 census information is not in itself sufficient to confer on the information the necessary quality of confidence.
27. The Commissioner is mindful of the impact of the House of Lords' judgment in the *Campbell*³ 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 where personal information is in issue has been '*reshaped*' into an action for misuse of personal information⁴. 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 a person's health or infirmity is a clear example of personal information in the 1911 census schedules 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

¹ *Hansard* HL (series 5) Vol 617, col 92 (17 October 2000)

² *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41

³ *Campbell v Mirror Group Newspapers (MGN) Ltd* [2002] EWCA Civ 1373

⁴ *Clerk and Lindsell on Torts*, 19th edition, 2006, at paragraph 28 - 01

- to less sensitive personal information, whose disclosure would not infringe any individual's privacy.
28. 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 12, High Street, Bottesford, and their relationship to the head of the family, their age, occupation, marital status, birthplace and nationality. The individuals in question were born in the UK, and there is no information relating to any infirmity suffered by the particular individuals.
 29. 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 Commissioner's view that such information clearly cannot have the necessary quality of confidence.
 30. Other information on the face of the relevant census schedule 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.
 31. The Commissioner is advised by the National Archives that some personal information on the face of other 1911 census schedules will relate to an individual's health or 'infirmity'. The Commissioner considers that such information would be sufficiently private that its publication would amount to an invasion of privacy. Such information clearly requires the protection of the law of confidence. At paragraph 39 below, the Commissioner has outlined broad categories of private information which - where they appear on the face of a 1911 census schedule - would in his view have the necessary quality of confidence.
 32. 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

33. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

34. The Commissioner requires the public authority to disclose to the complainant the requested information within 35 calendar days of the date of this notice.

Failure to Comply

35. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other Matters

36. The Commissioner recognises the considerable interest in this complaint and other cases relating to the 1911 census. Although he need not continue with his analysis of section 41 and the law of confidence for the purposes of this complaint, he believes it would be helpful to provide more general guidance about situations where section 41 of the Act may be applicable to justify non-disclosure of information. The key questions for these purposes, reflecting the elements required for an action for breach of confidence, are:

- What information may have the quality of confidence?
- Is there an obligation of confidence in relation to 1911 census data?
- Will an obligation of confidence survive the death of the confider?
- Would disclosure of the 1911 census information be an unauthorised disclosure so as to meet the third element of an action for breach of confidence?
- What is meant by "actionable by that or any other person"?

What information may have the quality of confidence?

37. As indicated above, the Commissioner accepts that there may be categories of information recorded on the face of the 1911 census schedules which have the quality of confidence because they are likely to give rise to an expectation of privacy. This is the kind of information which will meet the *Campbell* criteria of

'private' information and which will be 'confidential' in nature. In such cases - taking into account that expectations can change from one generation to another - the individuals concerned would have had a reasonable expectation of privacy at the time of completion of the census schedules.

38. The Commissioner considers that there are two main categories of information where this is likely to arise in the context of the 1911 census. In both cases the nature of the information should be apparent from the face of the census schedule:
- (1) information which, if the individual was alive, would be sensitive personal data within section 2(1) of the DPA;
 - (2) other information which is obviously private information and which, on any objective test, will be confidential in nature.
39. Although not a definitive list, examples of personal information which may appear on the face of a 1911 census schedule and which fall within one of these categories are as follows:
- details of infirmity or other health-related information;
 - information about family relationships which would usually have been kept secret, for example: information that a child who was being raised as the child of the head of the household was in fact the offspring (perhaps illegitimate) of another family member;
 - information relating to very young children who were born in prison and whose birthplace is not recorded on their birth certificate.

Is there an obligation of confidence in relation to 1911 census data?

40. As noted above, the following statement appears on the 1911 census schedule:
- "The contents of the Schedule will be treated as confidential. Strict Care will be taken that no information is disclosed with regard to individual persons..."*
41. The Commissioner considers that the promise of confidentiality is insufficient by itself to import the necessary quality of confidence in relation to the information. However, the confidentiality of this relationship between the confider and confidant in relation to the 1911 census material is strengthened by the fact that any disclosure by a person employed in the taking, of that information, would have constituted a breach of the Official Secrets Act 1889.
42. In light of this, the Commissioner is satisfied that the 1911 census information was imparted in circumstances giving rise to an obligation of confidence.

Will an obligation of confidence survive the death of the confider?

43. In many instances, because of the age of this census data, the confider of the information as well as the individuals to whom the information relates will be

deceased. The Commissioner has considered whether an obligation of confidence will survive the death of the confider and such individuals.

44. While there is no case law on this point which relates specifically to census data, the Commissioner is of the view that an obligation of confidence survives in such circumstances for the following reasons:
- (i) The Commissioner is mindful of the basis of the common law claim for breach of confidence, which is that the defendant's conscience is affected by the disclosure. An action for breach of confidence is based on the equitable principle of good faith. The courts have in the past prevented the disclosure of confidential information where such disclosure is 'unconscionable' and there was no likely damage to the confider.⁵ The Commissioner considers therefore that disclosure of confidential information after the death of the confider may still be unlawful, because it is unconscionable of the defendant to disclose it.
 - (ii) The Commissioner has considered the judgment of the High Court in the case of *R (Addinell) v Sheffield City Council* (CO/3284/2000) in which the court denied access to a parent of a deceased child to social service records. The court held that disclosure would breach the deceased person's privacy under Article 8 of the European Convention of Human Rights and would constitute a breach of confidence. The Commissioner considers that the nature of the information in that case is similar to some of the information recorded in the 1911 census schedules such as information about family circumstances or health information.
 - (iii) The Commissioner draws support for this approach from the fact that it is consistent with the recognised ethical obligation placed on health professionals to maintain confidentiality after the death of a patient.
 - (iv) In circumstances where there is a contractual obligation of confidence, the courts have found that there is no reason in principle why a contract cannot be enforced by personal representatives after the death of one of the parties.⁶

Would disclosure of the 1911 census information be an unauthorised disclosure so as to meet the third element of an action for breach of confidence?

45. The Commissioner having concluded that there is a duty of confidence which can survive the confider in relation to the 1911 census data, has considered whether disclosure of such information would be unauthorised and breach that duty. Having regard to the above noted wording on the face of the 1911 census

⁵ See *Smith Kline & French Laboratories (Australia) Limited v Secretary to the Department of Community Services and Health* [1990] FSR 617 (Federal Court of Australia); *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 255-6.

⁶ *Beswick v. Beswick* [1968] A.C. 58

schedule the Commissioner is satisfied that such disclosure would be unauthorised.

46. The Commissioner has also considered the circumstances in which such disclosure might be authorised such as consent of the confider or where the law compels disclosure. The Commissioner is satisfied that in relation to most of the 1911 census data it will not be possible to obtain consent because the individuals will be deceased. However, the Commissioner accepts that if an action for breach of confidence can be brought by the personal representatives of the confider or other individual to whom the information relates, then consent to disclosure of the information could be provided by such persons.
47. The Commissioner has investigated the issue as to whether any law exists that would require disclosure of the 1911 census data. He has invited submissions from the National Archives on this point and is satisfied that no such law exists.
48. Although not a prerequisite in every action for a breach of confidence, the Commissioner considers that it is both legitimate and necessary to consider potential detriment to the confider of the 1911 census schedule, to others included in the schedule and to their surviving relatives. The Commissioner considers that where the information relates to an individual this condition will be met where confidential information is disclosed to persons against the expectations of the confider. Having regard to the above noted wording on the census schedule, the Commissioner considers that detriment could be established in relation to that information contained in the 1911 census schedules which has the necessary quality of confidence as outlined at paragraph 27 above.
49. The Commissioner considers that a public authority should not seek to rely upon section 41 in relation to any request for information if it believes that it would be able to successfully defend an action for breach of confidence. In order to properly decide in any case whether a breach of confidence is 'actionable' in relation to the 1911 census data, the National Archives must also consider if there is a public interest defence to any proposed disclosure. The Commissioner considers that the National Archives may do so having regard to the particular facts of any case, the identity of the individuals, nature of the information as well as the impact and timing of the disclosure to the world at large. The Commissioner recognises, however, that it will only be in very exceptional circumstances that disclosure of confidential census information would be required in the public interest.

What is meant by “actionable by that or any other person”?

50. The Commissioner is of the view that an obligation of confidence can survive the death of the confider and that therefore, in principle, it must be actionable. On the basis of the arguments outlined above, the Commissioner considers that this duty is owed both to the living and the deceased. The Commissioner does not consider it necessary therefore for the National Archives to determine in any case whether the subject of the information is in fact living or dead.

51. In relation to the 1911 census information, since the basis of an action for breach of confidence will in the main be a duty owed to the deceased, any such action could be brought by the deceased's personal representatives. However, the Commissioner does not consider that in every case it would be necessary for the National Archives to determine whether there were in fact surviving personal representatives who would be legally capable of asserting the right to confidentiality on behalf of the deceased. The Commissioner considers that for the purposes of section 41(1) a breach of confidence would remain 'actionable' even if in fact no living individual can be identified who was in a position to bring the action. The Commissioner recognises that this would often be a very difficult enquiry to be made by a public authority seeking to rely on section 41 and considers that it is sufficient for the purposes of section 41 if a suitable person or class of persons would be able to raise an action for breach of confidence.

General considerations relating to other requests and complaints about the 1911 Census

52. The Commissioner stresses that that this Decision must be confined to the circumstances relating to the requested information. This is not - and cannot be - a decision that the entirety of the 1911 census must now be disclosed. Nor does it create any precedent in the sense that all other requests for specific information within the 1911 or other census schedules must succeed. The complainant has succeeded in this case because the requested information did not have the necessary 'quality of confidence'. It has been made clear, however, that the Commissioner considers that all the elements for a claim for breach of confidence could be met in a particular case to justify non-disclosure of at least some of the information requested.
53. It should be noted moreover that this decision relates solely to the 1911 census data; a different result may occur in relation to other census data. The Commissioner also stresses that his decision has been reached in this case on the assumption that those identified in the census schedule are no longer alive. Anyone included in the 1911 census must now be 95 years old, and indeed there will happily be many such individuals. If there is any suggestion that a particular census schedule requested under the Act does, or could, relate to an individual who is still alive, section 40(2) of the Act may well apply and that exemption should then be considered. The National Archives should take the greatest care before making any disclosure in circumstances where this would be a real possibility. Although this may be even more difficult to establish, the National Archives should take similar care before making a disclosure of information which could constitute personal information about a living individual born after 1911.
54. The Commissioner concludes by emphasising that each request for 1911 census information must be treated separately on its merits. The National Archives will need to consider the substance of the information which has been requested in each case, will need to review what is stated on the face of the relevant census schedule and may need to make further enquires. Although this cannot be a requirement under the Act, the Commissioner considers that it would not be

unreasonable for the National Archives to ask requesters (who will often be seeking information about their own genealogy) to provide information – for example that they are not aware that any of the circumstances outlined in the previous paragraph - which would help to deal with their particular request in line with the guidance given in this Decision Notice.

Right of Appeal

55. 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 11th day of December 2006

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
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SK9 5AF**