

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 September 2011

Public Authority: The Office for National Statistics
Address: Segensworth Road
Titchfield
Fareham
Hampshire
PO15 5RR

Summary

The complainant requested information from the Office for National Statistics relating to the 1921 census return. The public authority withheld the requested information, relying on the exemptions under sections 44(1)(a) and 22(1)(a). The Commissioner's decision is that the public authority has correctly applied section 44(1)(a), and does not therefore require the public authority to take any steps in relation to this request. However, the public authority failed to meet the requirements of section 17 when dealing with this request.

The Commissioner's Role

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

The Request

2. The complainant contacted the Office for National Statistics (the "ONS") on 30 July 2010 and requested the following information:

"...a copy of data relating to Theophilus Collins Baldwin (born 1847 and dies 1948) from the 1921 census returns. In 1921 he resided at 34 Gilford Road, Deal, Kent and had business premises at 74 High Street, Deal, Kent."

3. The ONS responded on 2 August 2010. It stated that the requested information was exempt under section 44(1)(a) of the Act, as it was prohibited from releasing it by section 39 of the Statistics and Registration Service Act 2007. In addition to this, as the 1921 census returns would be published in 2022, the requested information was also exempt under section 22(1) of the Act.
4. The complainant contacted the ONS on 2 August 2010 and requested an internal review. This was resent on 28 August 2010.
5. On 23 November 2010 the ONS contacted the complainant with the results of the internal review. It upheld its previous use of sections 22(1) and 44(1) to withhold the requested information.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 12 January 2011 to complain about the way that his request had been handled.
7. In this complaint there was a large amount of information and correspondence, which included other requests for information to the ONS (other than that quoted above). However, in his letter of complaint the complainant specifically referred to the request of 30 July 2010 and request for internal review of 2 August 2010, and the ONS' responses – as referred to above.
8. The Commissioner wrote to the complainant on 13 June 2011 and informed him that he considered his complaint to be focused on this specific request. He asked the complainant to contact him if there were any other issues he wished to be addressed. He did not receive any response from the complainant. Therefore, this case has focused on the ONS' use of sections 22(1) and 44(1) to refuse to disclose the information requested on 30 July 2010.

Chronology

9. The Commissioner contacted the ONS on 13 June 2011 and requested its submissions in relation to its use of section 22(1) and 44(1).
10. The ONS responded on 11 July 2011 and provided its submissions in relation to these exemptions.

Analysis

Exemptions

11. The Commissioner has first considered the ONS' application of section 44(1).

Section 44 – prohibitions on disclosure

12. In this case the ONS has stated that the requested information is exempt under section 44(1) as its disclosure is prohibited by section 39 of the Statistics and Registration Service Act 2007 (the "SRSA").¹
13. Section 44(1) states that requested information is exempt if its disclosure – other than under the 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.
14. Bearing in mind the ONS' reference to the SRSA, the Commissioner has proceeded on the basis that he considers the requested information is exempt under section 44(1)(a) of the Act.
15. The full text of section 44 can be found in the Legal Annex at the end of this notice.
16. The Commissioner has previously considered cases regarding requests for access to information from the 1921 census, and has previously ordered this information withheld under section 44(1)(a).² In these previous cases the statutory bar was contained in section 8 of the Census Act 1920 – which contained a prohibition from disclosure similar to that contained in the SRSA (see paragraph 18 below). The use of this exemption was also upheld by the Information Tribunal on appeal.³
17. The SRSA came into force in April 2008. One of its provisions amends section 8 of the Census Act 1920 in such a way as to effectively remove

¹ <http://www.legislation.gov.uk/ukpga/2007/18/contents>

² Case References – FS50147944, FS50164048 and FS50213881.

³ Barrett v ICO & The Office of National Statistics [EA/2007/0112], <http://www.informationtribunal.gov.uk/DBFiles/Decision/i121/Barrett.pdf>

the effect of the Census Act's disclosure prohibition from the Registrar General for England and Wales.⁴ Instead, the amended disclosure prohibition only applies to the Registrar General for Scotland. The effect of this is to repeal this prohibition for England and Wales, allowing the statutory prohibitions of section 39 of the SRSA to have effect instead.

18. Section 39(1) of the SRSA states that personal information held by the Statistics Board in relation to the exercise of any of its functions must not be disclosed by any member or employee of the Board, a member of any committee of the Board, or any other person who has received it directly or indirectly from the Board. Any person who contravenes this is guilty of an offence (section 39(9) SRSA).
19. During the course of the investigation the ONS confirmed that it is the executive office of the Board responsible for the production of statistics. As ONS does not have a separate "legal identity" all employees of ONS are actually employees of the Statistics Board. Therefore, for the purposes of section 39(1) of the SRSA, the personal information contained in the 1921 census is held directly by the Board (by way of it being held by the ONS).
20. For section 39(1) to apply, the information in question has to fall under the definition of 'personal information' as set out in section 39(2) – which defines personal information as,

"...information which related to and identified a particular person (including a body corporate); but it does not include information about the internal administrative arrangements of the Board (whether relating to its members, employees or other persons)."

21. Section 39(3) adds that,

"For the purposes of [section 39(2)] information identifies a particular person if the identity of that person –

- (a) is specified in the information,*
- (b) can be deduced from the information, or*
- (c) can be deduced from the information taken together with any other published information."*

The Commissioner notes that this definition does not contain any differentiation for information relating to deceased people. Therefore, information which falls under the description as set out in sections 39(1)

⁴ Schedule 2 para 1

and 39(3) of the SRSA, is personal information for the purposes of the SRSA whether it relates to a living or a deceased individual.

22. Bearing in mind the description of the information as set out in the request, the Commissioner is satisfied that it falls under the definition of personal information as set out in section 39(2) of the SRSA.
23. Section 39(4) of the SRSA provides a number of circumstances in which the prohibition in section 39(1) does not apply. These are when disclosure –
 - a. is required or permitted by any enactment,
 - b. is required by a Community obligation,
 - c. is necessary for the purposes of enabling or assisting the Board to exercise any of its functions,
 - d. has already lawfully been made available to the public,
 - e. is made in pursuance of an order of a court,
 - f. is made for the purposes of a criminal investigation or criminal proceedings (whether or not in the United Kingdom),
 - g. is made, in the interests of national security, to an Intelligence Service,
 - h. is made with the consent of the person to whom it relates, or
 - i. is made to an approved researcher.
24. The ONS has argued that none of these conditions apply. After considering the facts of the case the Commissioner is satisfied that none of these conditions apply. In particular, he notes that for the purposes of condition (a), the Act cannot provide lawful authority for disclosure because the wording of section 44 of FOIA specifically refers to authority “otherwise than under this Act”. He also notes that he has not been provided with any evidence from either party that the requestor is an approved researcher, as referred to in condition (i).
25. Therefore, after considering the circumstances of this case the Commissioner finds that section 39(1) of the SRSA applies to the requested information. As such, this information is exempt from disclosure by virtue of section 44 of the Act.
26. Section 44 is an absolute exemption, and as such is not subject to a public interest test.

27. As the Commissioner has decided that this information is exempt by virtue of section 44(1)(a) he has not gone on to consider section 22(1).

Procedural Requirements

28. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within 20 working days 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.
29. Although the ONS informed the complainant that it was seeking to rely upon section 44(1), the Commissioner notes that it did not fully specify, in either the refusal notice or the internal review, which of the conditions of this exemption it believed applied (i.e. section 44(1)(a)) . In failing to do this, the ONS did not comply with the requirements of section 17(1)(b).
30. The full text of section 17 can be found in the legal annex attached to the end of this notice.

The Decision

31. The Commissioner's decision is that the ONS dealt with the following elements of the request in accordance with the requirements of the Act:
- a. It correctly relied upon section 44(1)(a) to withhold the requested information.
32. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- a. It failed to meet the requirements of section 17(1) in that it failed to fully cite one of the exemptions that it was seeking to rely upon.

Steps Required

33. The Commissioner requires no steps to be taken.

Other matters

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

35. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm>

36. 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.
37. 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 5th day of September 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
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Cheshire
SK9 5AF**

Legal Annex

Section 17

- (1) 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.
- (2) Where—
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
 - (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
- the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
 - (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- (5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.
- (6) Subsection (5) does not apply where –
- (a) the public authority is relying on a claim that section 14 applies,
 - (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
 - (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.
- (7) A notice under section (1), (3) or (5) must –
- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
 - (b) contain particulars of the right conferred by section 50.

Section 44

- (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).