

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2015

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested a file catalogued at the National Archives with the reference CAB/164/1508 but which is still retained by the Cabinet Office. The Cabinet Office cited section 22 (information intended for future publication), section 37 (communications with the Royal Family), section 40 (unfair disclosure of personal data) and section 41 (information provided in confidence) as its basis for refusal. It upheld this position at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on the exemptions it has cited as its basis for refusing to provide the information contained in file CAB/164/1508.
3. No steps are required.

Request and response

4. On 15 April 2014, the complainant requested information of the following description:

"I would like to request access to the following file under the Freedom of Information Act.

The file is listed on the National Archives catalogue as CAB/164/1508.

According to the NA catalogue the file is still held by the Cabinet Office.

Its former departmental reference was 291/4 part 3.

The file is about Funerals of members of the Royal Family (other than the Duke of Windsor).

I note that the information in the file(s) is more than 30 years old and it is my contention that the file should now be opened”.

5. The complainant chased this up on 28 May 2014 and eventually received a response from the Cabinet Office on 11 June 2014. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

section 22(1) – Information intended for future publication

section 37(1)(a) – Royal Family correspondence

section 40(2) – unfair disclosure of personal data

section 41(1) – information provided in confidence

6. The complainant requested an internal review on 24 June 2014. The Cabinet Office sent him the outcome of its internal review on 8 August 2014. It upheld its original position and explained that there had been a settled intention to transfer the file in question with redactions before it had received the request.

Scope of the case

7. The complainant contacted the Commissioner on 10 September 2014 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the Cabinet Office is entitled to rely on the provisions of section 22, 37, 40 and 41 that it has cited as a basis for refusing to provide the requested information.

Reasons for decision

9. Section 22 provides an exemption from the duty to disclose in relation to information that is intended for future publication. This exemption includes the caveats that the requested information must have been held with a view to publication at the time that the request was made, and it must be reasonable in the circumstances to withhold the information from disclosure until the date of the intended publication.
10. Consideration of section 22 is a two-stage process. First, for the exemption to be engaged the public authority must be able to

demonstrate a clear intention to publish the requested information and the caveats referred to above must be satisfied. Secondly, this exemption is qualified by the public interest test, which means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure at the time of the request, the information must be disclosed.

11. Covering first whether the exemption is engaged, the first issue to consider is whether there was a settled intention on the part of the Cabinet Office to publish the information.
12. The Cabinet Office asserted that there was. It explained to the Commissioner that it held a copy of an email showing an intention to open the file (with redactions) at The National Archives ("TNA") in 2010 and said that it had planned to transfer most of the file by the end of February 2015. It implied that the process of handling the request, the internal review and the section 50 complaint investigation process had interrupted the process by which documents were to be transferred to TNA.
13. It also provided general information about the process by which information is transferred to TNA. It said that the process was quite lengthy and involved consideration by the Lord Chancellor's Advisory Council which met quarterly to consider and, where appropriate, to recommend the retention of any of the information contained in documents considered for transfer to TNA.¹ Opportunities to submit the documents to the Panel are therefore somewhat limited. It explained that the process was well advanced by the time the request came in and it did not consider it reasonable to interrupt the process for the benefit of one person when the purpose of the process was to make information available to all at TNA.
14. The Commissioner accepts this position up to a point. However, disclosure under FOIA is, in effect, disclosure to the world at large and not just to one person. The benefit of disclosure would not therefore be for one person. The Commissioner accepts that there was a clear intention to publish relevant information at the time of the request. He also considers it reasonable to wait until the intended date of publication (given that it is relatively soon) rather than disrupt an ongoing process which is aimed at facilitating public access to this information. This process is an accepted practice in line with legislation. Information must

¹ <http://www.nationalarchives.gov.uk/advisorycouncil/meetings.htm>

be prepared prior to transfer to TNA and then prepared for publication at TNA.

15. He has therefore concluded that the information intended for transfer to TNA is exempt from disclosure under section 22(1). For clarity, the Commissioner would stress that it is not engaged in relation to the information in the file which the Cabinet Office intends to keep back from TNA. The Cabinet Office did not apply section 22(1) to this information. It applied other exemptions which are considered later in this notice.

Balance of public interest test

The complainant's arguments

16. The complainant's arguments focussed on disputing that there was a settled intention to publish any of the file. As noted above, the Commissioner has concluded that there was a settled intention to do so such that section 22(1) is engaged.

The Cabinet Office's arguments

17. The Cabinet Office acknowledged a public interest in the disclosure of information about Royal funerals. It also acknowledged the benefits of openness to increase "public trust in and engagement with the government".
18. However, it argued that there was a greater public interest in maintaining the confidence of journalists as a whole (the complainant is a journalist), scholars and the public by ensuring the regular transfer of records to TNA. It said that given the impending transfer of the majority of the requested file to TNA there was no justification to make a disclosure of the same information ahead of time to one person. It stressed the complexity of the process involved in preparing a file for transfer to TNA particularly where it is considering redactions (as is the case here) and there is little wider public benefit in disrupting this process for one person.
19. It said that the majority of the file would be opened at the end of February 2015 that the public interest factors in disclosure that it had identified would be satisfied then.

The Commissioner's position

20. The Commissioner's approach when considering the public interest in relation to this exemption is that this is more likely to favour disclosure where the planned date of the publication is far in the future, or where there is no firm indication of a likely date of publication.

21. In this case, the Commissioner is satisfied that there is a settled intention to disclose a large portion of the requested file in early 2015. The remaining question is whether it was in the public interest for the disclosure of this information to have been delayed for about a year from the date of the request, or whether the public interest would have been better served by publication at that time.

Section 22(1) - Conclusion

22. In the Commissioner's view, there was and is no pressing public interest in disclosing the relevant information in advance of the normal timescale. There was no particular public interest requirement for it to have been published during the interim period between the making of the request and anticipated publication at TNA.
23. Preparation for transfer was already underway at the time of the request and the public interest would not be well served by interrupting that process in the circumstances. The transfer process itself supports the principle of public access to information generally. Therefore, the conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in earlier disclosure in response to the complainant's request.

Sections 37(1)(a)

24. Section 37(1)(a) states that information is exempt information if it relates to communications with the Sovereign.
25. Section 37(1)(a) is a class-based and absolute exemption. This means that if the information in question falls within the class of information described in the exemption in question, it is exempt from disclosure under FOIA. It is not subject to a balance of public interest test.
26. Having seen the withheld information, the Commissioner is satisfied that the information to which this exemption has been applied falls within the description of information set out in section 37(1)(a). That information is therefore exempt from disclosure under section 37(1)(a).

Section 40(2)

27. Section 40(2) of FOIA states that personal data (which is not the personal data of the requester) is exempt if its disclosure would breach any of the data protection principles contained within the Data

Protection Act ("DPA"). The term "personal data" is defined specifically in the DPA.²

28. The first question of the Commissioner is therefore whether the information to which section 40 has been applied is personal data. Personal data is information relating to a living, identifiable individual and which is biographically significant about them.
29. In determining whether information is the personal data of individuals other than the requester, that is, third party personal data, the Commissioner has referred to his own guidance and considered the information in question.³ He has looked at whether the information relates to living individuals who can be identified from the requested information and whether that information is biographically significant about them.
30. To avoid inadvertent disclosure of the information itself, the Commissioner does not propose to go into further detail as to why the information is personal data. Suffice is to say that he is satisfied that it relates to living, identifiable individuals and is biographically significant about them.
31. The next question for the Commissioner is whether disclosure of that personal data would contravene any of the DPA data protection principles.

Would disclosure contravene any of the DPA data protection principles?

32. The data protection principle that is normally considered first in relation to section 40 is the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

at least one of the conditions in Schedule 2 is met, and

² <http://www.legislation.gov.uk/ukpga/1998/29/contents>

³

http://www.ico.org.uk/for_organisations/data_protection/the_guide/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

33. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - the particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor, the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
34. Furthermore, notwithstanding the individual in question's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
35. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the individual in question, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure outcome as an all or nothing.

36. The Commissioner is satisfied that the data subjects in question – the individuals to whom the personal data relates – would expect the information to be withheld and that this expectation is reasonable. The information relates both to their professional lives and their personal lives – information about an individual's funeral is inevitably personal to that person or to their family. The information was clearly collected in circumstances where confidentiality was expected. The relative age of the information does not diminish that expectation in the circumstances of this case. As to the damage or distress that may be caused by disclosure, again the Commissioner accepts that despite the passage of time, there is a general and reasonable expectation that such information would not be made publically available and disclosure could cause distress.
37. The Commissioner has considered whether partial disclosure would be possible in this case and has concluded that it would not.

Section 40(2) - Conclusion

38. The Commissioner agrees that disclosure of any of the personal data in the withheld information would contravene the first data protection principle of the DPA. This information is therefore exempt from disclosure under section 40(2).

Section 41(1)

39. Information is exempt on the basis of section 41(1) if it was obtained by the public authority from any other person and the disclosure of the information by the public authority would constitute a breach of confidence actionable by that or any other person.
40. The Cabinet Office asked the Commissioner not to reproduce in this notice a description of the information specifically withheld under this exemption or key parts of its submissions in support of the application of section 41(1) to that information. Therefore, although the Commissioner has considered the public authority's submissions in full and has also inspected the withheld information, the brevity of his findings below is an unavoidable consequence of complying with the public authority's request, which he considers to be reasonable in the circumstances.
41. In order to successfully engage the exemption at section 41(1), the withheld information must have been obtained from a third party and the disclosure of the information must constitute an actionable breach of confidence.

Was the withheld information obtained from a third party?

42. The Commissioner is satisfied that the withheld information to which this exemption has been applied was obtained by the Cabinet Office from third parties.

Would the disclosure of the withheld information constitute an actionable breach of confidence?

43. In the Commissioner's view, a breach will be actionable if the information has the necessary quality of confidence, was communicated in circumstances importing an obligation of confidence and (in some cases), unauthorised disclosure would cause a specific detriment to the confider or any other party.

Does the information have the necessary quality of confidence?

44. The Cabinet Office argued that the withheld information possesses the necessary quality of confidence. The presumption of confidentiality is implicit in the character of the information and was clearly an essential precondition for the frankness of the communications.
45. The Commissioner is satisfied there was a presumption of confidentiality arising from the nature of the information itself and the circumstances in which it was obtained. He is therefore satisfied that the withheld information possesses the necessary quality of confidence.

Was the information communicated in circumstances importing an obligation of confidence?

46. As indicated above, the information was communicated in circumstances importing an obligation of confidence.
47. The Commissioner is satisfied that in the circumstances in which the withheld information was provided by those to whom it relates, there was an implied obligation on those in receipt of the information to hold it in strict confidence.

Would disclosure cause a specific detriment to the confider or any other party?

48. The public authority submitted that disclosure would be detrimental to the confiders.
49. The Commissioner is satisfied for the reasons given by the Cabinet Office and given the nature of the information that disclosing the withheld information would be detrimental to the confiders.

50. Although section 41 is an absolute exemption, the law of confidence contains its own built in public interest with one defence to action being that disclosure is in the public interest.
51. The Cabinet Office argued that it would not be able to mount a successful defence by relying on the public interest should the withheld information be disclosed.
52. The Commissioner is satisfied for the reasons provided by the Cabinet Office that in the circumstances, it would be highly unlikely for it to be able to successfully defend disclosure of the withheld information on public interest grounds.
53. The Commissioner therefore finds that the public authority was entitled to rely on the exemption at section 41(1) in respect of the information to which it was applied.

Right of appeal

54. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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