

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 June 2019

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

Decision (including any steps ordered)

1. The complainant has requested information about a closed file. The National Archives (TNA) refused to disclose the information citing the exemptions in section 41(1) - information provided in confidence and section 40(2) - personal information of the FOIA.
2. The Information Commissioner's decision is that TNA has correctly applied section 41(1) to the majority of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose 'The Accountant Tax Supplement' dated 3 June 1933.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 May 2018 the complainant made the following request for information:
'IR 40/4577 Boards Evasion of Tax Committee: British company evasion.'

6. On 11 June 2018 TNA refused to provide the requested information citing the exemptions at section 40(2) - personal information and section 41(1) - provided in confidence.
7. On 19 June 2018, the complainant requested an internal review. He argued that there was an overwhelming public interest for understanding how the Inland Revenue addressed the growth of tax evasion/avoidance. He also noted that similar information was accessible in another file.
8. On 12 September 2018 TNA provided the outcome of the internal review. It upheld the decision to withhold the information under sections 40(2) and 41(1) of the FOIA. TNA also responded to the complainant's query on the accessible information in the other file: the information is not the same but the file would be reviewed in full under the TNA Reclosure Policy.

Scope of the case

9. The complainant contacted the Commissioner on 12 October 2018 to complain about the way his request for information had been handled.
10. During the Commissioner's investigation, TNA advised the complainant that some of the material in this large file had not previously been reviewed as only one of the two boxes had been delivered from the file repository. Both parties agreed that this complaint to the Commissioner would continue and would only consider parts 1 and 2 of file IR 40/4577. If appropriate, a separate complaint could be raised at a later date by the complainant on the contents of the other box (parts 3, 4 and 5 of the file).
11. The Commissioner therefore considers the focus of the investigation to be whether TNA was entitled to rely upon the exemptions at sections 41 and 40 to withhold the requested information in parts 1 and 2 of file IR 40/4577.

Reasons for decision

Section 41 – information provided in confidence

12. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

13. TNA provided the withheld information to the Commissioner. Parts 1 and 2 of this record largely consists of lists of companies and associated individuals thought to be avoiding/evading tax considered by the Evasion of Tax Committee, which was provided in confidence to the Inland Revenue, the predecessor department to HM Revenue and Customs (HMRC).
14. Section 41(1)(a) requires that the requested information must have been given to the authority by another person. The Commissioner's guidance (<https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>) explains that the 'term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.'
15. It is clear to the Commissioner that in this case the majority of the information was provided by another person(s) to the Inland Revenue/HMRC and therefore the requirement of section 41(1)(a) is satisfied.
16. Some of the withheld information could be considered as not provided by another person but was generated within the department itself. The Commissioner has again referred to her own guidance and considers that these pages can also be considered under section 41 as disclosure of the detail within these pages would reveal the content of the information it obtained from the other person(s).
17. However, there is a section in part 1 of the file named 'The Accountant Tax Supplement dated 3 June 1933' (16 pages) that has not been provided in confidence as it is from a newspaper and has been published. The Commissioner considers that this section should be disclosed.
18. TNA has stated that it prefers not to publish small parts of a file in an open file for public viewing leaving the majority of the file as the closed file. TNA tries to avoid rendering the entire document as nonsensical and follows its own redaction toolkit. (https://www.nationalarchives.gov.uk/documents/information-management/redaction_toolkit.pdf)
19. The Commissioner understands how TNA holds the open and closed files and the potential difficulties in separating the original file into two separate files (open and closed) but her concern is only whether or not the information is exempt under FOIA. In this case, it is clear that The Accountant Tax Supplement dated 3 June 1933 has been previously published and therefore cannot be exempt under section 41 as it has not been provided in confidence by another person. It is a discrete set of

information that can be viewed separately from the remainder of the file (IR 40/4577 part 1)

20. The Commissioner concludes that the requirement of section 41(1)(a) is satisfied for the remainder of the withheld information. The following paragraphs refer to the withheld information except for the section identified in paragraph 17 above.

Would disclosure constitute an actionable breach of confidence?

21. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

22. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
23. TNA explained that it had sought the expert opinion of the transferring department HMRC: its position generally is that *'the confidentiality of tax records is a fundamental feature of the UK tax system, enshrined in legislation to assure the public that personal details will remain confidential. HMRC has a duty to uphold that obligation of confidence as part of their public service to assess taxes.'*
24. TNA have also referred to previous decision notices and the Information Rights Tribunal case [Case No. EA/2011/0185](#) which concluded that *'discussions with individuals or with companies or other legal entities in relation to their specific tax affairs are treated as private and in confidence'*.
25. During the investigation the Commissioner conducted her own searches based on some phrases from the withheld information (by use of an internet search engine) but was unable to find anything in the public domain relating to the requested information.
26. Therefore, having regard to the above, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. In addition, the

Commissioner accepts that the information is not trivial as it contains quite detailed information about tax affairs. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

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

27. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.

28. The test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41* is useful:

"...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 provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".

29. As above, HMRC explained to TNA that there is both an implied and explicit obligation of confidence that it will not share information provided as part of the tax assessment process:

- For HMRC, it is a legal requirement to protect taxpayers' confidentiality; as such discussions with individuals, companies or other legal entities in relation to specific tax affairs are treated as private and in confidence. A general duty of confidentiality is owed by officers of HMRC; as a result, information provided to HMRC is strictly confidential and should not be disclosed. The Inland Revenue merged with HMRC in 2005. Officials of HMRC are now subject to a statutory duty of confidentiality under section 18 of the Commissioners for Revenue and Customs Act 2005 ("CRCA"). Disclosure of the information would be prohibited under section 18 of the Commissioners for Revenue and Customs Act (CRCA) 2005 if it is held by HMRC.
- The recommendation to close the file for 100 years until 2039 is a clear indication that the confidentiality attaching to the information in the hands of HMRC was intended to continue notwithstanding the transfer to TNA.

30. In a previous decision notice FS50618324, the Commissioner accepted that *'the information would have been communicated in confidence to HMRC in its official capacity to assess taxes. He is also satisfied that there would have been no reasonable expectation on behalf of the confiders at the time, that this may be put into the public domain in the future.'*

31. The Commissioner recognises that the withheld information was provided by the third parties to the Inland Revenue/HMRC and she accepts that there is both an implied and explicit obligation of confidence on the part of HMRC that it will not share information provided as part of this process.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

32. As above, HMRC explained to TNA that whilst the information would have been provided with a reasonable expectation of discussion in the Committee, there would also have been a reasonable expectation that the individual tax details would not be disclosed to the public.
33. TNA acknowledged the realistic expectation that this would be for a reasonable period until release would no longer cause any detriment to entities or individuals and their descendants. TNA referred to its guidance on [Access to Public Records](#): "*if they are to be transferred as closed a date at which the closure period will be ended or reviewed should be specified*" (in this case, 100 years).
34. TNA argued that release of the information in this record would therefore amount to an actionable breach of confidence which '*could be actioned not only by the companies and associated individuals mentioned in this file, but also by HMRC*'.
35. The Commissioner accepts that disclosure of the requested information would be an unauthorised use of the information and as such could be of detriment to the persons/confiders of the information.

Is there a public interest defence for disclosure?

36. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether TNA could successfully rely on such a public interest defence to an action for breach of confidence in this case.
37. The complainant argued there was an overwhelming public interest for understanding how the Inland Revenue addressed the growth of tax evasion/avoidance. He also argued that the TNA reference to Information Rights Tribunal Case No. EA/2011/0185 was irrelevant as it referred to a living person and covered a much more recent period. He was requesting access to files of purely historical interest.
38. TNA accepts that there is likely to be some public interest in any historical record which has been transferred for permanent preservation

and which may have value for historians and academic researchers.

However, in balancing this against the public interest in keeping information confidential, TNA gave priority to the greater public interest in preserving the principle of confidentiality: *'the role of HMRC necessitates one that is underpinned by expectations of confidence in relation to tax matters.'*

39. TNA explained that as the information in parts 1 and 2 of the file predominantly relates not to policy information, but information relating to suspected tax evasion, which was provided to the Inland Revenue investigation committees in confidence, there is a reasonable expectation of ongoing confidence by the third parties involved.
40. Both TNA and HMRC note that the Courts and the Tribunal have recognised that it is in the public interest that confidences should be respected.
41. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
42. The Commissioner accepts the historical interest of the files but does not consider that the historical value is of sufficient public interest to provide a defence to an action for breach of confidence in this case: *'There is a public interest in maintaining trust and preserving a free flow of information to a public authority where this is necessary for the public authority to perform its statutory functions'*.¹

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/libr

43. Having considered all the circumstances of this case, and the withheld information, the Commissioner is therefore satisfied that the information held within the closed file was provided by another person and that disclosing it would be a breach of confidence regarding which action could be taken by persons such as the companies and associated individuals and their descendants. This information, apart from the section identified in paragraph 17 above, is therefore exempt under section 41.
44. The Commissioner notes that TNA also applied section 40 to refuse to disclose the personal details within the file such as the names and financial transaction details of individuals suspected of tax avoidance/evasion. However, as the Commissioner has concluded that the information is exempt under section 41, she has not gone on to consider if TNA was also entitled to rely on section 40 to withhold the requested information in parts 1 and 2 of file IR 40/4577.

Other matters

45. The code of practice produced under section 45 of the FOIA recognises that there are no statutory time limits on how long an internal review should take to complete. Nevertheless it provides that any deadlines set by the public authority should be reasonable.
46. The Commissioner considers that generally an internal review should take no longer than twenty working days to complete. In exceptional circumstances it may be necessary to extend that to forty working days. (<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>)
47. In this case the complainant requested an internal review on 19 June 2018 and TNA provided the outcome of its internal review on 12 September 2018.
48. The Commissioner does not consider this to be satisfactory and would expect TNA to deal with reviews within the suggested deadlines in the future.

Right of appeal

49. 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@justice.gov.uk

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

50. 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.
51. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF