



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**Case No. EA/2011/0241**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice No: FS50368663**

**Dated: 5<sup>th</sup> September 2011**

**Appellant: Mr Steven Smyrl**  
**Respondent: Information Commissioner**  
**Second Respondent: The Statistics Board**

**Determined on the papers at Field House on 21<sup>st</sup> March 2012**

**Date of decision: 3rd April 2012**

**BEFORE:**

**Fiona Henderson (Judge)**

**Andrew Whetnall**

**And**

**Alison Lowton**

**Subject matter:**

S44 FOIA – prohibitions on disclosure

**Cases:**

*David Barrett v IC and ONS* 2008 UKIT EA/2007/0112

Decision Notice FS50368663 11<sup>th</sup> December 2006

**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER**

**Case No. EA/2011/0241**

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal refuses the appeal and upholds Decision Notice FS50368663 for the reasons set out in main body of the Decision.

Signed:

[Signed on original]

Fiona Henderson (Judge)

Dated this 3<sup>rd</sup> day of April 2012

## REASONS FOR DECISION

### Introduction

1. The census of people and households has been held on one day every 10 years since 1801 with the exception of 1941. It is collected as a snapshot of the United Kingdom population for statistical purposes. In order to ensure the completeness and accuracy of the data, there has always been a statutory obligation to complete a return. The data for the 1921 Census was collected by the Registrar General under powers and regulations made under the 1920 Census Act. The census form stated that the information contained within it would be “strictly confidential”.
2. Current Government policy is that Census Records should be opened to the public once 100 years have elapsed. The 1921 Census is due to be opened in January 2022.

### The request for information in this appeal

3. On 30<sup>th</sup> July 2010 Mr Smyrl (on behalf of the Council of Irish Genealogical Organisations) asked the Office for National Statistics (ONS)<sup>1</sup> for:  
*“.. a copy of data relating to Theophilus Collins Baldwin (born 1847 and died 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.”*
4. The ONS refused the request relying upon s44(1)(a) FOIA as there was a prohibition upon disclosure pursuant to s39 of the Statistics and Registration Services Act 2007 (SRSA). They further relied upon s22 (1) FOIA, namely information intended for future publication as it was intended to transfer the data to the National Archive in 2022.
5. This decision was upheld in an internal review as communicated to the Appellant by email on 23<sup>rd</sup> November 2010.

The complaint to the Information Commissioner

6. Mr Smyrl complained to the Commissioner on 12th January 2011 and following an investigation the Commissioner issued decision notice FS50368663 which upheld the prohibition pursuant to s44 FOIA and did not go on to consider s22. He also identified a breach of s 17 FOIA which is not the subject of this appeal.

The appeal to the Tribunal

7. The Appellant appealed to the Tribunal on 20<sup>th</sup> October 2011<sup>2</sup>. His grounds can be summarized as follows:
  - a) The information sought from the 1921 Census relates to a person dead since 1948 and does not therefore constitute personal information under s39(1) SRSA.
  - b) S39(4)(a) SRSA permits disclosure where “*required or permitted by any enactment*”, FOIA is such an enactment.
  - c) There is no statutory basis for the requirements that Census records be withheld for 100 years.
  - d) The ONS policy of withholding 1921 Census Data until 2022 is unjustified because:
    - i) There was no promise of permanent secrecy given at the time,
    - ii) Early disclosure of the 1911 Census data was given.<sup>3</sup>He also advanced grounds in relation to s22 FOIA.

8. The Public Authority was joined as the Second Respondent by the Tribunal.<sup>4</sup>
9. With the consent of the parties, the Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents. Neither the Commissioner nor the Tribunal has seen a copy of the disputed information. The public authority has not searched the census data for the requested information and cannot therefore confirm that it holds it because:

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<sup>1</sup> See paragraph 12 below

<sup>2</sup> An extension of time having been granted by the Principal Judge

<sup>3</sup> Grounds as summarised from IC’s reply

<sup>4</sup> See paragraph 12 below

- a) The index to the 1921 Census records was destroyed in a fire during World War 2 and there is no reliable straightforward way of accessing any individual record.
- b) The records are generally fragile and this slows searching.
- c) The nature of the information is not material to s 44 FOIA.

10. Having seen a blank 1921 Census form which shows the type of information that was collected in the Census, and in light of the nature of the exemption claimed, we are satisfied that the appeal can be determined without sight of the disputed information.

11. Although the Tribunal does not refer to every document before it in this Decision, the Tribunal has considered all of the material before it.

#### Legal submissions and analysis

12. The public authority named in the Decision notice was the Office for National Statistics (ONS). On 1<sup>st</sup> April 2008 pursuant to s55a and 56 of the SRSA the ONS ceased to function and its property, rights and liabilities were transferred to the Statistics Board. ONS is now the executive office of the Statistics Board responsible for the production of statistics. The Statistics Board is a government department within the meaning of paragraph 1 of Part I of Schedule 1 to FOIA Board. We are therefore satisfied that for the purposes of this appeal the second respondent should be the Statistics Board.

13. Section 44 FOIA provides:

*(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,...*

14. Section 2(3)(h) FOIA specifies that s44 is an absolute exemption and not subject to the public interest test.

15. The prohibition relied upon by the Statistics Board is contained in s 39(1) of the Statistics and Registration Services Act 2007 (SRSA) which came into force in

April 2008. Disclosure in contravention of s 39(1) SRSA is a criminal offence punishable with a fine and/or term of imprisonment<sup>5</sup>. Prior to this the prohibition was enshrined in s8(2) Census Act 1920 (as amended by the Census (Confidentiality) Act 1991)<sup>6</sup>. Schedule 2<sup>7</sup> paragraph 1 of SRSA amends s8 of the Census Act 1920 so as to remove the Census Act's disclosure prohibition from the Registrar General for England and Wales. This means that disclosure is now governed by s39(1) SRSA instead.

16. Section 39 (1) SRSA provides:

*“Subject to this section, personal information held by the Board in relation to the exercise of any of its functions must not be disclosed by—*

*(a) any member or employee of the Board...”*

The evidence is that the Census information was originally held by the Registrar General but it has been held by the Statistics Board since the Registrar General's powers were transferred to the Statistics Board under SRSA 2007 in April 2008. The Statistics Board is responsible for the production of statistics and oversight for the statistical system. To keep these functions separate two distinct “brands” were created, ONS and the UK Statistics Authority. The ONS 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 employees of the Statistics Board, consequently the 1921 Census is held directly by the Board. Consequently the Tribunal is satisfied that the terms of s39 SRSA apply to the public authority who hold the disputed information.

**Ground i**

17. Section 39(2) SRSA defines personal information as:

*“...information which relates to and identifies a particular person (including a body corporate); but it does not include information about the internal*

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<sup>5</sup> S39(9) SRSA

<sup>6</sup> Section 1 of the CCA did not “replace” section 8(2) of the Census Act 1920, it amended the wording of s8(2) which then took effect with the substituted wording. S1 CCA ceased to have effect in England and Wales when s8(2) of the Census Act was amended by the SRSA.

<sup>7</sup> The Appellant has referred to Schedule 1 of the SRSA when listing the sections of the Census Act that have been repealed. The amendment to s8(2) is found in a different schedule namely Schedule 2.

*administrative arrangements of the Board (whether relating to its members, employees or other persons)."*

Whilst it is not in dispute that the disputed information would identify a particular person (indeed that is the terms of the information request) Mr Smyrl argues that the disputed information does not fall within this definition as it relates to someone who is deceased.

18. The Tribunal notes that s39(2) SRSA does not distinguish between those who are alive and those who are deceased. This is in contrast to s 1 of the Data Protection Act which defines personal data as data:

*"which relate to a living individual".*

The Data Protection Act pre dates the SRSA and could be expected to be in the contemplation of those drafting the SRSA. The Tribunal is satisfied from this difference in drafting that had the SRSA definition been restricted to living individuals it would have said so.

19. The Commissioner argues in the alternative that the terms of the request are such that it might also relate to others still living. The Tribunal has not seen the Census data relating to the address of this individual and does not therefore make a finding on this point. The Tribunal bases its finding on the construction of s39 as not distinguishing between the living and the deceased and not on the potential for the request to disclose information relating to those still living.

## **Ground ii**

20. The exemptions to the prohibition in s39(1) are set out in s39(4)<sup>8</sup>. Mr Smyrl relies upon 39(4)(a) namely that disclosure is:

*"required or permitted by any enactment."*

He argues that s1 of FOIA means that disclosure of this information is required by FOIA and that consequently s39(4)(a) applies.

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<sup>8</sup> Although Mr Smyrl has only referred to the exception set out in s39(4)(a) SRSA the Statistics Board did submit evidence to the Commissioner and the Tribunal setting out why they argued that none of the other exemptions were applicable in this case. The Tribunal accepts these arguments.

21. The Tribunal disagrees. FOIA cannot provide lawful authority for disclosure of the disputed information because the terms of s44 FOIA refer to disclosure “*otherwise than under this Act*” which explicitly excludes disclosure under FOIA as a means of defeating a statutory prohibition.

**Ground iii**

22. Mr Smyrl argues that there is no statutory basis for the requirements that Census records be withheld for 100 years. The Policy was not in place at the date of the 1921 Census but was enshrined in law by Statutory Instrument 12 of 1966 made pursuant to s5(1) of the Public Records Act 1958 (PRA).
23. However, the 100 year policy remains in practice. Section 3(4) PRA provides:
- “Public records selected for permanent preservation under this section shall be transferred not later than thirty years after their creation either to the Public Record Office or to such other place of deposit appointed by the Lord Chancellor under this Act as the Lord Chancellor may direct:*
- Provided that any records may be retained after the said period if, in the opinion of the person who is responsible for them, they are required for administrative purposes or ought to be retained for any other special reason and, where that person is not the Lord Chancellor, the Lord Chancellor has been informed of the facts and given his approval.”*
24. This section sets out the statutory basis for departing from the 30 year rule, namely the Lord Chancellor’s approval for the records to be retained longer. The approval presently in force was given on 21<sup>st</sup> January 2006 and applies until 2015. Once 100 years have passed it is intended that no further approval will be sought under s 3(4) of the PRA to honour assurances given to the public in relation to confidentiality of census data.
25. The Tribunal accepts that there is no statutory basis for the choice of 100 years as the timescale prior to transfer to the National Archive, but observes that there is a statutory basis for withholding the information beyond 30 years. Regardless of this distinction, this does not amount to a ground of appeal since s3(4) PRA



gives discretion to the Lord Chancellor in the matter and acts so as to suspend the 30 year rule.

**Ground iv**

26. Mr Smyrl argues that the public authority's policy of withholding 1921 Census Data until 2022 is unjustified because:

- i) There was no promise of permanent secrecy given at the time
- ii) Early disclosure of the 1911 Census data was given.

The Tribunal notes the public interest arguments in favour of disclosure raised by Mr Smyrl and accepts that no promise of permanent secrecy was given at the time and that in any event it is envisaged that the information will be disclosed in 2022. Whilst early disclosure of 1911 Census was given this was because it had already been transferred to the National Archive in 1966 and once s 5(4) PRA was repealed by FOIA there was no longer a statutory 100 year rule, there was no applicable prohibition on disclosure.<sup>9</sup>

27. From the statement of Mr Watson<sup>10</sup> it appears that in 1926 disclosure of a census extract from both 1911 and 1921 was disclosed to a firm of Solicitors seeking to determine next of kin in an inheritance case. However, these are all arguments relating to the reasonableness and consistency of the Lord Chancellor's decision. This is not a matter within the Tribunal's jurisdiction and none of these arguments bring the Census data within any of the exemptions in s39(4) SRSA.

28. Mr Smyrl argues that future disclosure in 2022 is inconsistent with a statutory prohibition upon disclosure. The Tribunal is satisfied that there is no inconsistency in relation to this approach. When the Lord Chancellor ceases giving his approval to the withholding of the records (presently predicted to be 2022), the Board will be under a statutory obligation to transfer the 1921 records to the National Archive pursuant to s3(4) PRA, and consequently the exemption at s39(4)(a) SRSA will apply. SRSA does not apply to the National Archive.

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<sup>9</sup> See Decision Notice FS50101391

<sup>10</sup> Exhibited in this case but prepared in relation to David Barrett v IC and ONS 2008 UKIT EA/2007/0112 a case where s44 FOIA was considered in relation to s8(2) of the Census Act 1920.

Conclusion

29. Whilst Mr Smyrl clearly disagrees with there being a prohibition on the disclosure of information as provided for by s39(1) SRSA, it was enacted after the advent of FOIA and in the knowledge of its provisions. The Tribunal is satisfied that disclosure of the disputed information is prohibited pursuant to s39(1) SRSA and consequently s44 FOIA is engaged. This exemption is absolute and not subject to any public interest there may be in disclosure. We therefore refuse this appeal.

30. Given the Tribunal's decision we have not dealt with s22 FOIA.

31. The Tribunal's decision is unanimous.

[Signed on original]

**Fiona Henderson**

Judge

Dated this 3rd day of April 2012