

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 July 2011

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

Summary

The complainant requested access to an archive record relating to the tax liability of the Duchy of Cornwall. This information was withheld under sections 40(2) and 41(1). After investigating the case the Commissioner decided that the information should be withheld under section 40(2). However, the Commissioner also decided that the public authority did not meet the requirements of section 17.

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 National Archives ("TNA") on 16 February 2010 and asked to be provided with access to the closed archive file 'IR 40/16619 – Liability of the Duchy of Cornwall to tax: covering dates 1960-1962.'
3. TNA responded to the complainant on 30 March 2010 and informed him that the information he had requested was exempt from disclosure under sections 40(2) and 41.

4. The complainant contacted TNA on 10 April 2010 and asked for an internal review.
5. TNA carried out an internal review, and responded on 19 August 2010. It informed the complainant that it still believed that the requested information was exempt from disclosure under sections 40(2) and 41(1).

The Investigation

Scope of the case

6. On 4 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether TNA was correct to withhold the requested information. The complainant confirmed that he was seeking access to the archive file 'IR 40/16619 – Liability of the Duchy of Cornwall to tax: covering dates 1960-1962.'
7. During the course of the investigation TNA disclosed some of the previously withheld information to the complainant. The Commissioner has not gone on to consider this part of the withheld information any further in this case.
8. Therefore the scope of this case has been to consider whether TNA was correct to withhold the outstanding information from the archive file 'IR 40/16619 – Liability of the Duchy of Cornwall to tax: covering dates 1960-1962'. This information has been withheld under sections 40(2) and 41(1).
9. Although not referred to by the complainant, the Commissioner has also considered whether TNA complied with the requirements of section 17.

Chronology

10. The Commissioner wrote to the complainant on 10 December 2010 and set out his understanding of the complaint. He informed the complainant that he considered the scope of the request to be the archive file 'IR 40/16619 – Liability of the Duchy of Cornwall to tax: covering dates 1960-1962.'
11. The Commissioner wrote to TNA on the same day and asked it to provide him with a copy of the withheld information. He also asked it to provide further submissions to support its use of sections 40 and 41.
12. Following an exchange of correspondence, TNA provided the Commissioner with a copy of the withheld information on 10 February

2011. In a letter dated 25 February 2011 it also provided further submissions to support its use of sections 40 and 41.

Analysis

Exemptions

Section 40

13. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
14. In this case the relevant condition is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. This is an absolute exemption, and is therefore not subject to a public interest test.
15. The full text of section 40 can be found in the legal annex attached to the end of this notice.
16. In this case TNA has sought to rely upon this exemption to withhold all of the requested information. It has argued that it is all the personal data of The Prince of Wales.
17. It has also argued that the disclosure of this information under the Act would be unfair and would therefore be in breach of the first principle of the Data Protection Act 1998 (the "DPA").
18. In order to establish whether this exemption has been correctly applied the Commissioner has first looked at whether the withheld information constitutes the personal data of a third party.
19. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
 - from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
20. TNA has argued that the withheld information represents the personal tax information of The Prince of Wales, in his capacity as the Duke of Cornwall.

21. The Duchy of Cornwall was created in 1337 by King Edward III in order to provide an income for his heir, Edward the Black Prince (who was at that time The Prince of Wales). The eldest son of the reigning British monarch inherits the duchy and title of the Duke of Cornwall at the time of his birth, or of his parent's succession to the throne.¹

22. TNA has explained that,

"The Duchy of Cornwall as an organisation is frequently misunderstood. It is not a separate legal entity but instead is a description of land and other property that is owned by the Duke of Cornwall while he is Duke...the income from which following the Great Charter of 1337 and subsequent Management Acts is used to support the Duke of Cornwall. Thus, the owner of the assets is The Prince of Wales in right of the Duchy."

23. It has gone on to explain that,

"The Duchy is a private estate that funds the activities of The Prince of Wales, who is the sole beneficiary of the net income of the Duchy."

24. Although the Commissioner is unable to detail the contents of the withheld information, given the nature of the request in this case he is able to generalise that it refers to taxation matters relating to The Prince of Wales, in his capacity as the Duke of Cornwall. Bearing this in mind, and given that the Duchy of Cornwall is the private estate of the Duke of Cornwall, the Commissioner is satisfied that the withheld information is the personal data of The Prince of Wales.

25. The Commissioner has gone on to consider whether the disclosure of the withheld information would be in breach of the first principle of the DPA.

26. The first principle requires that personal data is:

- processed fairly and lawfully, and
- that one of the conditions in schedule 2 is met.

27. The Commissioner has first considered whether the disclosure of the withheld information would be fair.

28. As noted above, the withheld information refers to taxation matters relating to The Prince of Wales, in his capacity as the Duke of Cornwall.

¹ <http://www.duchyofcornwall.org/index.htm>

29. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - the individual's reasonable expectations of what would happen to their information; and
 - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the data subject.
30. The Commissioner has initially considered the first two bullet points together.
31. TNA has argued that the withheld information is the personal tax information of The Prince of Wales, and as such is personal and confidential. It has also pointed out that members of the Royal Family are entitled to the same data protection rights as any other individual, and has referred the Commissioner to an earlier decision which upheld the use of sections 40(2) and 40(3)(a)(i) to withhold similar information to that being considered in this case – FS50088853.²
32. The withheld information in this case relates to taxation issues in respect of the Duchy of Cornwall, from the period 1960 to 1962. Whilst the Commissioner acknowledges that this information is around 50 years old, it is still information that relates directly to the financial income of a living individual and taxation matters that relate or related to that income.
33. The Commissioner considers that information relating to an individual's personal finances and associated taxation matters is, by its very nature, of great personal significance to that individual. As such, he considers that disclosure of this kind of information would be likely to result in an invasion of that individual's privacy. He acknowledges that given the status of the individual concerned in this case there are strong countervailing arguments in favour of disclosure. However, he is mindful of the fact that the Duchy of Cornwall provides The Prince of Wales with a financial income, albeit one from which he *"...chooses to use a substantial proportion of...to meet the cost of his public and charitable work."*³

² http://www.ico.gov.uk/~media/documents/decisionnotices/2008/FS_50088853.ashx

³ http://www.duchyofcornwall.org/abouttheduchy_thedukeofcornwall.htm

34. Given that some of the Duchy's income is used to fund the public functions and activities of The Prince of Wales the Commissioner considers that there is an argument for transparency to the extent that this income supports the performance of functions of a public nature. However, since this does not apply to all the income from the Duchy, the force of that argument is not strong. The Commissioner considers that, on the whole, the disclosure of the requested information would amount to an invasion of the privacy of The Prince of Wales.
35. The complainant has argued that there is already a large amount of information in the public domain that directly relates to the income generated by the Duchy of Cornwall, and to the tax status of that income. This would potentially limit or negate any potential damage that may be caused by the disclosure of the withheld information in this case. During the investigation of this case the Commissioner put this argument to TNA, together with the examples provided by the complainant. In response, TNA noted that two of the examples given by the complainant related to the previous Duke of Cornwall, rather than the current Duke. In addition to this it also argued that there is a significant difference between the withheld information in this case and the examples referred to by the complainant.
36. The Commissioner has considered this argument further, with reference to the examples provided by the complainant. In relation to the examples given by the complainant that relate to the previous Duke (the then future King Edward VIII), the Commissioner considers that as these relate to a deceased individual they would not negate arguments regarding the infringement of data protection rights of the current Duke. In relation to the other examples given by the complainant, bearing in mind the contents of the withheld information, the TNA's arguments, and the sensitive nature of taxation information of any individual, the Commissioner does not consider that the information that has already been published on this subject would limit or negate any potential harm that may be caused by the disclosure of the withheld information in this case.
37. In relation to the reasonable expectation of the individual concerned, TNA has pointed out that the withheld information was originally provided to the Inland Revenue by the representatives of The Prince of Wales with a reasonable expectation that this information would be treated in confidence in exactly the same way as details of the tax arrangements of any other person. After considering the withheld information the Commissioner is satisfied that it was either directly provided to the Inland Revenue in this way, or it directly relates to information provided in this way.

38. After carefully considering the nature and content of the withheld information, the Commissioner again notes that the information directly relates to the financial income of an individual and taxation matters related to this income. Bearing this in mind, he is satisfied that there would have been a reasonable expectation that this information would be treated in confidence. Additionally he notes that it dates from the period 1960 to 1962, long before freedom of information legislation was envisaged. Bearing these points in mind, and taking into consideration the established concept of confidentiality for individuals dealing with the tax authorities, the Commissioner is satisfied that there would have been no reasonable expectation on behalf of the individual(s) providing this information to the Inland Revenue, or those commenting on this information, that this information might be put into the public domain in the future.
39. Notwithstanding the data subject's reasonable expectations or any damage or distress that may be 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 public interest in disclosure. Although the complainant has not provided any specific arguments as to why the disclosure of the withheld information would be in the public interest, he has pointed out that a large amount of information has already been put into the public domain about the income generated by the Duchy of Cornwall and the tax status of that income. He has argued that the disclosure of the withheld information would be of interest in establishing whether its contents were consistent with the information that is in the public domain and, in particular, whether it shows a different conclusion.
40. The Commissioner notes that the complainant has not advanced any specific arguments in relation to the specific file – although he accepts that without knowledge of the contents it would be difficult for him to provide such arguments.
41. The Commissioner also notes that the matter of the tax status of the Duchy of Cornwall has been a matter of political and public debate. For example, in 1993 the Prime Minister announced that following the findings of a working party, and discussions between HM Treasury, the Inland Revenue and the Royal Household, The Queen and The Prince of Wales had agreed voluntarily to pay income tax and capital gains tax, and (with certain caveats) inheritance tax. Specifically, The Prince of Wales agreed to pay these duties on that part of the income from the Duchy of Cornwall that was used to meet his personal expenditure.⁴

⁴ <http://www.official-documents.gov.uk/document/hc9293/hc04/0464/0464.pdf>

Therefore, the Commissioner considers that there is a public interest in informing that debate.

42. However, the Commissioner considers that this general public interest argument has – to a certain extent – already been met by information that has already been put into the public domain. In particular, he notes the official Royal Trustees Report and the Memorandum of Understanding that were published in 1993, following the above announcement by the Prime Minister, which put into the public domain a considerable amount of information about the 'public' financial position of The Prince of Wales in relation to the tax status of the Duchy and the arrangements that had been made.
43. Bearing this in mind, the Commissioner considers that this more general public interest argument has already been satisfied to a large extent by information that has already been published, together with the debate that occurred at that time. He also considers that this general public interest argument, in support of informing current public debate, is far less strong in relation to historic information from 50 years ago.
44. Consequently, and taking into account the lack of any specific arguments in relation to the public interest in releasing the withheld information in this case, the Commissioner does not consider that there is a compelling public interest in disclosure. Therefore the Commissioner considers that the disclosure of the withheld information in this case would be unfair and would breach the first data protection principle. Therefore this information should be withheld under sections 40(2) and 40(3)(a)(i).
45. As he has decided that all of the withheld information is exempt from disclosure under sections 40(2) and 40(3)(a)(i), the Commissioner has not gone on to consider the application of section 41(1) to this information.

Procedural Requirements

46. 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 twenty 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.

47. Although TNA informed the complainant that it was seeking to rely upon section 40(2), the Commissioner notes that it did not fully specify, in either the refusal notice or the internal review, which of the conditions of section 40(3) it believed applied. In failing to do this, TNA did not comply with the requirements of section 17(1)(b).
48. The full text of section 17 can be found in the legal annex attached to the end of this notice.

The Decision

49. The Commissioner's decision is that TNA dealt with the following elements of the request in accordance with the requirements of the Act:
 - It correctly relied upon section 40(2), in conjunction with section 40(3)(a)(i), to withhold the requested information.
50. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - 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

51. The Commissioner requires no steps to be taken.

Failure to comply

52. Failure to comply with the steps described above 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.

Other matters

53. 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 80 working days for an internal review to be completed, despite the publication of his guidance on the matter.

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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

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.

Dated the 26th day of July 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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 40

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5) The duty to confirm or deny-
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of

that Act (data subject's right to be informed whether personal data being processed)."

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act."