

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2013

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

Decision (including any steps ordered)

1. The complainant has requested information relating to HM King Feisal Ibn Ghazi Ibn Feisal of Iraq (King Faisal II of Iraq).
2. The Commissioner's decision is that The National Archives has correctly applied section 41 of the FOIA.
3. The Commissioner does not require The National Archives to take any steps.

Request and response

4. On 23 February 2012, the complainant wrote to The National Archives (TNA) and requested information in the following terms:

'I am currently doing some research (out of personal interest) about King Faisal II of Iraq and his relationship with the British government during the 1950s and the end of the Iraqi monarch. I see that this document is closed and not available for viewing until 2066. This seems absurd and I'd be grateful if you could explain why it is not available for viewing? If there is any way that it can be viewed, I'd be grateful if it could be disclosed'.

5. TNA responded on 22 March 2012. It stated that it was unable to open the file because it had been determined to be exempt under section 40(2) and section 41 of the FOIA.

6. Following an internal review TNA wrote to the complainant on 25 May 2012. It maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 28 June 2012 to complain about the way his request for information had been handled.
8. Following intervention by the Commissioner, TNA issued a further refusal notice to the complainant on 31 October 2012. TNA stated that it did not consider any of the information in the file fell within the scope of the request.
9. A further internal review was carried out on 29 November 2012. TNA stated that it had consulted with HMRC as required by virtue of section 66 of the FOIA, and further stated that none of the information held fell within the scope of the request.
10. The complainant remained dissatisfied with this further refusal and on 29 November 2012 submitted an amended request to state:

'Please disclose this file as I am interested in researching the disposal and death duties payable on the estate and financial assets of the last King of Iraq'
11. TNA issued a further letter to the complainant on 13 December 2012 advising that it would not be progressing the request further as it was essentially a request for the same information. TNA reverted to its original position of applying section 40(2) and section 41 of the FOIA.
12. The Commissioner considers the scope of this case to be to determine if TNA has correctly applied section 40(2) and section 41 of the FOIA.

Reasons for decision

13. Section 41 of FOIA states that:
 - (1) Information is exempt information if-
 - (a) it was obtained by the public authority from any other person (including another public authority,) and
 - (b) the disclosure of the information to the public (otherwise that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

14. This exemption is absolute and therefore it is not subject to a public interest test.
15. The Commissioner notes that the requested information was originally provided to the Inland Revenue, currently known as HMRC. The requested information was not created by TNA. The Commissioner is satisfied in those circumstances that the information was obtained from another person or authority, in this case HMRC. Therefore the requirement of section 41(1)(a) is satisfied.
16. TNA consulted with HMRC by virtue of section 66 of the FOIA.

Section 66 states:

(1) this section applies to any information which is (or, if it existed, would be) contained in a transferred public record, other than information which the responsible authority has designated as open information for the purposes of this section.

17. HMRC advised TNA that it was of the opinion that were the requested information still to be held by HMRC, then disclosure of the information would be prohibited under section 18 of the Commissioners for Revenue and Customs Act (CRCA) 2005 which imposes a strict statutory duty of confidentiality on HMRC officials.
18. Section 44(1)(a) of the FOIA provides that information is exempt information if its disclosure by the public authority holding it is prohibited by or under any enactment. In this case HMRC would be prohibited from disclosing the information by the CRCA.
19. Having established that the requested information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.
20. 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 the disclosure would be an unauthorised use of the information and of detriment to the confider.

21. 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.
22. During the investigation of the case the Commissioner conducted his own searches (by use of an internet search engine), but was unable to find any information in the public domain relating to the information requested. The Commissioner is satisfied that the information requested is not otherwise accessible.
23. The information constitutes correspondence between the relevant parties when dealing with a deceased's estate. Given the nature of the information, the Commissioner is satisfied that the information is not trivial.
24. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
25. 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.
26. In its response to the Commissioner TNA explained that the information would have been communicated in confidence to HMRC in its official capacity to assess taxes.
27. Furthermore, the Commissioner notes that the information significantly pre-dates the FOIA. Bearing this in mind, the Commissioner is satisfied that there would have been no reasonable expectation on behalf of the confiders, or those commenting on this information, that this may be put into the public domain in the future.
28. The Commissioner considers that it is apparent from the nature of the information that it would have been provided under an expectation of confidence. The Commissioner also considers that an implicit obligation arose in the circumstances of this case.
29. In many cases, because of the age of this information, the confider of the information as well as the individuals to whom the information relates will be deceased. The Commissioner has considered whether an obligation of confidence will survive the death of the confider and such individuals.
30. While there is no case law on this point, the Commissioner is of the view that an obligation of confidence survives in such circumstances for the following reasons:

- The Commissioner is mindful of the basis of the common law claim for breach of confidence, which is that the defendant's conscience is affected by the disclosure. An action for breach of confidence is based in the equitable principle of good faith. The courts have in the past prevented the disclosure of confidential information where such disclosure is 'unconscionable' and there was no likely damage to the confider¹. The Commissioner considers therefore that disclosure of confidential information after the death of the confider may still be unlawful, because it is unconscionable of the defendant to disclose it.
 - The Commissioner has considered the judgement of the High Court in the case of R (Addinell) v Sheffield City Council (CO/3284/2000) in which the court denied access to a parent of a deceased child access to social service records. The court held that disclosure would breach Article 8 of the European Convention of Human Rights and would constitute a breach of confidence.
 - In circumstances where there is a contractual obligation of confidence, the courts have found that there is no reason in principle why a contract cannot be enforced by personal representatives after the death of one of the parties².
31. The Commissioner has then considered whether disclosure of the information would be to the detriment of the confider.
32. The loss of privacy can be a detriment in its own right³ and so the Commissioner considers that as tax and asset information constitute information of a personal nature there is no need for there to be any detriment to the confider, in terms of tangible loss, in order for it to be protected by the law of confidence.
33. It follows then that where the disclosure would be contrary to the deceased's reasonable expectation of maintaining confidentiality in respect of his private information, the absence of detriment would not defeat a cause of action.

¹ See *Smith Kline & French Laboratories (Australia) Limited v Secretary to the Department of Community Services and Health* [1990]; *A-g v Guardian Newspapers (no 2)* [1990] 1 AC 109 at 255-6.

² *Beswick v Beswick* [1968] A.C. 58

³ *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust* [EA/2006/0090] para 15.

34. The Commissioner considers that while disclosure would cause no positive harm to the confider, knowledge of the disclosure of the information pertaining to the deceased's estate and beneficiaries could distress surviving relatives of the deceased.
35. Therefore, in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether, as a matter of fact, the deceased person has a personal representative who would take action.
36. The Commissioner has next considered whether there is a public interest defence for a breach of confidence.
37. In the Commissioner's view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.
38. In a correspondence to TNA, dated 1 November 2012, the complainant stated that his request clearly stated that he was "*also interested in the fall of the Iraqi monarchy. As the King was assassinated, and the fall of the Iraqi monarchy followed from his death, any documents post death are of enormous interest and could provide important clues as to why the King was murdered and why the monarchy collapsed*".
39. TNA responded on 29 November 2012 and advised that the file did not contain any details or information about the life and times of King Faisal or his relationship with the British government. It further stated that the file did not contain any information relating to the fall of the Iraqi monarchy, nor give any details or clues about the death of King Faisal. Having viewed the information the Commissioner is satisfied that this is the case.
40. The Commissioner accepts that there is likely to be a public interest in assassination of King Faisal and the fall of the Iraqi monarchy.
41. In weighing this against the public interest in keeping information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality.
42. It is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence⁴. The

⁴ Bluck v ICO & Epsom and St Helier University Hospital NHS Trust [EA/2006/0090] para 8

Commissioner is mindful of the need to protect the relationship of trust between confider and confidant and not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.

43. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant.
44. In light of all the information at hand, the Commissioner considers that TNA would not have a public interest defence for breaching its duty of confidence. The Commissioner cannot conclude that there is a strong enough public interest argument to disclose the requested information.
45. Therefore, the Commissioner finds that the information is exempt under section 41 and TNA was correct to withhold this information.
46. As the Commissioner has found the information to be exempt under section 41 he has not gone on to consider the application of section 40 to this information.

Right of appeal

47. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

48. 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.
49. 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
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Wycliffe House
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SK9 5AF