

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2019

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the closed files listed as BS 28/83 and BS 28/45 held by The National Archives. During the Commissioner's investigation The National Archives (TNA) reassessed the information in one of the files (BS 28/83, the transcript index) and decided to disclose the names of individuals known to be deceased. To date this has not happened.
2. The Commissioner's decision is that The National Archives (TNA) has correctly applied sections 40 and 41(1) to the remaining withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Commissioner requires the public authority to now disclose the names of the individuals known to be deceased in file BS 28/83.
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 24 April 2018 the complainant requested the following 2 files:

'BS 28/83 - Lord Denning's Inquiry into the Profumo Affair: transcript index

BS 28/45 - Lord Denning's Inquiry into the Profumo Affair: Transcripts of evidence: A'

6. On 23 May 2018 TNA responded that it was unable to open the files to the public and cited section 40(2) (by virtue of section 40(3)(a)(i)) and section 41 (provided in confidence) of FOIA:

'Section 40 exempts personal information about a third party (someone other than the requester), if revealing it would breach the terms of the Data Protection Act (DPA) 1998. The DPA prevents personal information from release if it would be unfair or at odds with the reason why it was collected, or where the subject had officially served notice that releasing it would cause them damage or distress.

In this case the exemption applies because these records contain the personal and sensitive personal information of one or more identifiable individuals reasonably assumed still to be living.'

7. On 14 June 2018, the complainant requested a review. He disputed that the information related to living individuals (section 40) and that the overall balance of the public interest for section 41 would favour disclosure.
8. On 8 August 2018 TNA provided the internal review, upholding the original decision. Section 41 applied to all of the requested information within the 2 files and section 40 applied to some of the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 16 August 2018 to complain about the way his request for information had been handled. He argued that he was *'not convinced that TNA has given sufficient weight to the substantial historical importance of these events and therefore to the substantial benefits that disclosure could bring to the public understanding of British political history'* and that *'most (if not all) of those involved must now be dead, I do not accept that any alleged breach of confidence is "actionable"'*.

10. During the Commissioner's investigation, TNA reassessed the information in one of the files. (BS 28/83, the transcript index) TNA intends to disclose the names of the individuals known to be deceased and therefore these names will no longer be part of this investigation. TNA continued to withhold the remaining names in this file and this information, along with file BS 28/45 consists of the withheld information.
11. The Commissioner considers the scope of this case to be to determine if TNA has correctly applied sections 40 and 41 to the withheld information in the 2 files.

Reasons for decision

Section 40(2) Personal information

12. The public's right of access to the personal data of third parties is in effect governed by the Data Protection Act. At the time the request was made and dealt with by TNA the relevant Data Protection Act (DPA) was the 1998 Act. Since that time the Data Protection Act 2018 has come into force and section 40(2) of the FOIA has been amended to accommodate the changes it has introduced. However the Commissioner's role is to determine whether TNA correctly applied the legislation that was in force at the time it was handling the request.
13. At that time section 40(2) of the FOIA provided that a public authority is entitled to refuse a request for information which constitutes the personal data of someone other than the person making the request, if disclosing that information would breach any of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the DPA).
14. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means data which relate to a living individual who can be identified –

 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other

person in respect of the individual.'

15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.
16. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.

Is the information personal data?

17. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
18. TNA considered section 40(2) was applicable to the personal data of the third parties mentioned in the files who it is reasonable to assume may still be alive adopting the 100 year rule¹. This has previously been explained to the complainant.
19. For it to be safe to assume an individual is dead it is standard practice for TNA to apply a life expectancy of 100 years. If the date of the individual's birth is known then the matter is simple. Where their date of birth is not known their current age is calculated on the assumption that if they were a child at the time the information was created they were less than one year old at that time. If they were an adult, it is assumed they were 16 years old at the time the information was created. If, based on those assumptions, they would now be over 100 years old they are assumed to be dead. Although this is a cautious approach the Commissioner accepts it is a reasonable and responsible one.
20. The Commissioner has reviewed the withheld information in the 2 files. The index (BS 28/83) is a list of the remaining names that TNA has withheld as the persons are assumed to be still living. Those names known to be deceased will be disclosed.

¹ www.nationalarchives.gov.uk/documents/information-management/dp-code-of-practice.pdf

21. The transcripts in the other file (BS 28/45) identifies those giving evidence and third parties including some who may not have given evidence. As some of the names are now known to be deceased and TNA has disclosed the information from the index the Commissioner considers that it is appropriate to view the information within the transcript file as if in 2 parts - information relating to individuals who are known to be deceased (BS 28/45 deceased) and information relating to individuals who are assumed to be still living based on the 100 year rule above. (BS 28/45 living)
22. Therefore, the Commissioner is satisfied that the information relating to individuals who are known to be deceased (BS 28/45 deceased) is not personal data as it does not relate to living identifiable persons.
23. However, the Commissioner is satisfied that the remaining withheld information in this case constitutes personal data as it relates to individuals who are assumed to be still living.
24. The next question for the Commissioner is whether disclosure of that personal data would contravene any of the data protection principles.

Sensitive personal data

25. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
 - (a) racial or ethnic origin
 - (b) political opinions
 - (c) religious beliefs
 - (d) trade union membership
 - (e) physical or mental health
 - (f) sexual life
 - (g) criminal offences, sentences, proceedings or allegations.
26. Most of the withheld information details unsubstantiated allegations of sexual activity and of rumours surrounding multiple identifiable individuals and therefore falls into category (f) of sensitive personal data as it relates to sexual life.
27. Having viewed the withheld information the Commissioner considers it is clearly sensitive personal data.
28. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a

detrimental or distressing effect' on the data subject, the Commissioner considers that it would be unfair to disclose the requested information.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

29. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
30. TNA considers that the public interest would not favour disclosure. The judiciary have differentiated between information that would benefit the public good and information that would meet public curiosity.
31. TNA referenced a Tribunal case EA/2012/0030 which highlighted that '*A broad concept of protecting, from unfair or unjustified disclosure, the individuals whose personal data has been requested is a thread that runs through the data protection principle, including the determination of what is "necessary" for the purpose of identifying a legitimate interest. In order to qualify as being "necessary" there must be a pressing social need for it..." And if a public or legitimate interest does exist this must be balanced against the rights, freedoms and legitimate interests of the individuals whose information is sought*'.
32. TNA acknowledged that release of this information would provide insight into the Denning Inquiry. However, '*while the information remains the personal and private information of living individuals, this addition to the public knowledge does not outweigh the public interest in protecting this data*'.
33. Whilst the Commissioner also acknowledges that there is a legitimate public interest in disclosing information which would add to the historical account and further public knowledge, she does not consider that this outweighs the interests of the data subjects in this context.
34. The Commissioner therefore considers that section 40(2) FOIA was correctly applied in this case to the withheld information.
35. The Commissioner will now consider the application of section 41 as applied by TNA to the whole of the withheld information and in particular to the information identified by the Commissioner as information relating to individuals who are known to be deceased (BS 28/45 deceased).

Section 41 – information provided in confidence

36. Section 41(1) of the FOIA states that:

"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 than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

Was the information obtained from another person?

37. TNA, in consultation with the Cabinet Office, stated that the information relates to the interviews conducted by Lord Denning as part of his Inquiry. During each of the interviews it was explicitly explained to all who participated that the information was being collected solely for the purpose of his report.
38. The Commissioner is satisfied that the information was obtained from another person in this case.

Would disclosure constitute an actionable breach of confidence?

39. 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?

40. 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.
41. TNA stated that the information contained within BS 28/45 relates to opinions and information that was provided on the understanding of strict confidence and collected solely for the purpose of the report. *'To inform the Report, Lord Denning heard evidence in private and in strict confidence. Paragraph 7 of his report states:*

'In order to enable every witness to speak frankly and truly to me, I have assured each one that what they tell me is in strict confidence and will be used only for the purpose of my inquiry report. This means that, whatever I say in this report, it should not be used for any other purpose; in particular none of it should be used for the purpose of any prosecution or proceeding against anyone.'

42. 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. 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?

43. The Commissioner's guidance refers to the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

"...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".

44. TNA considers that the circumstances, nature of and way in which the withheld information was provided by the individuals to the Inquiry implied and expressly confirmed that it would retain a confidential quality.

45. The Commissioner has viewed the withheld information and the link provided by TNA to the speech of the Prime Minister of the time: *'Lord Denning has asked those who have information for his report to communicate with him and has stated that any information he receives will be treated by him with the strictest confidence and used by him only for the purposes of his inquiry and report.* (<https://api.parliament.uk/historic-hansard/commons/1963/jun/27/lord-denning-inquiry>)

46. The Commissioner accepts that information was clearly exchanged under an expectation of confidence and under an obligation of confidence; there is both an implied and explicit obligation of confidence on the part of the Denning Inquiry that it will not share the information provided.

Would disclosure be of detriment to the confider?

47. The complainant argued that given the passage of time and that most of those involved must now be dead, he did not accept that disclosure

would cause significant harm to the public interest or that any alleged breach of confidence is actionable.

48. TNA considered that disclosure of the highly personal nature of the information would be detrimental to the confiders:

'While some of the individuals involved would now be deceased; given the highly personal nature of the information and that this may cause damage and distress to their families, we would consider that personal representatives of some of these individuals would bring action for release of the information contained within BS 29/45.'

49. Because of the age of the disputed information, the principal confider(s) 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(s) and such individuals.

50. 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 confider.
- 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.
- 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.

51. The Commissioner has then considered whether disclosure of the information would be to the detriment of the confider.

² Beswick v Beswick [1968] A.C. 58

52. The loss of privacy can be a detriment in its own right.³ The Commissioner considers that allegations of sexual activity constitute information of a personal nature and 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.
53. It follows then that where the disclosure would be contrary to the deceased's reasonable expectation of maintaining confidentiality in respect of their private information, the absence of detriment would not defeat a cause of action.
54. 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.
55. TNA referred to a previous decision notice (FS50497015), which explained why *'the sensitivity of the information in question has not been reduced by the passage of time'*. In this case, TNA argued that given the scandal surrounding the case at the time, releasing information *'which would lead to those involved being identified, could even 50 years after the event be distressing to these individuals'*.
56. The Commissioner considers that disclosure of the requested information, which, as stated above, contains sensitive personal data, would be an unauthorised use of the information to the detriment of the confider. Given the explicit understanding provided to each interviewee of strict confidence and that the collection of information was solely for the purpose of the Inquiry, it is reasonable to consider that, if disclosed, personal representatives would bring an action for a breach of confidence.
57. Therefore, the Commissioner considers that disclosure would constitute an actionable breach of confidence.

Is there a public interest defence for disclosure?

58. 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

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

successfully rely on such a public interest defence to an action for breach of confidence in this case.

59. In weighing the public interest arguments for and against disclosure, the Commissioner is 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.
60. The complainant has argued for sufficient weight to be given to the substantial historical importance of these events and therefore to the benefits that disclosure could bring to the public understanding of British political history.
61. TNA stated that the disputed information does not concern misconduct, wrongdoing or risks to the public. The Denning Inquiry concluded that there was no security risk to the public and therefore disclosure would not outweigh the public interest in maintaining a confidence.
62. In addition, while the individuals may have been content to provide personal information in a confidential setting to be used for the specific purpose of the Inquiry, they may not wish this to be used for any additional purpose.
63. For her part, the Commissioner accepts that there is a general public interest in understanding British political history but this does not outweigh the public interest in maintaining a confidence. 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 confidence.
64. The 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.
65. Having considered all the circumstances of this case, and the withheld information, 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.
66. Therefore, the Commissioner finds that the information is exempt under section 41 and section 40 and TNA was correct to withhold this information.

Right of appeal

67. 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

68. 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.
69. 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

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