

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 sections 41(1) and 40(2) of the FOIA.
2. The Information Commissioner's decision is that TNA has correctly applied section 41(1) - provided in confidence - to the withheld information. The Commissioner found that TNA breached section 10. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

3. On 3 May 2018 the complainant made the following request for information:
'IR 40/6187 – Finance Bill 1939: tax evasion by companies: report of evasion committee 1938-1939.'
4. On 10 July 2018 TNA disclosed the majority of the information in a redacted version of the file (IR40/6187). It refused to provide the remaining requested information (the closed extract - IR40/6187/1) citing the exemptions at section 40(2) - personal information and section 41(1) - provided in confidence.
5. On 26 July 2018, the complainant requested an internal review of all of the redactions. He argued that the names of the Companies were not personal data, that there was no indication of confidential informants

and that other government departments had not redacted similar information.

6. On 21 September 2018 TNA provided the outcome of the internal review and upheld the decision to withhold the information under sections 40(2) to a small amount of information and 41(1) of the FOIA to the majority of the withheld information.
7. TNA also responded to the complainant's queries on the accessible information in the other files and stated that the files would be reviewed in full under the TNA Reclosure Policy:

'Redaction is always given very careful consideration when we are reviewing any file. As previously advised, the vast majority of the information in this file was released as a result of your original FOI request (F0052497), leaving the main substance of the information intact and comprehensible. Since the remaining information engages one of the exemptions explained above, it is simply not possible to release any further information, given the amount of overlapping information covered by the two exemptions applied.'

Scope of the case

8. The complainant contacted the Commissioner on 2 October 2018 to complain about the way his request for information had been handled.
9. 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.

Reasons for decision

Section 41 – information provided in confidence

10. 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?

11. TNA provided both the open file (IR40/6187) and the withheld information (the closed extracts in IR40/6187/1) to the Commissioner. The open file consists of information relating to the drafting of the Finance Bill in 1939, including *'clauses intended to capture companies responsible for sur-tax evasion'*. The closed file consists of information

relating to named companies and associated individuals who were suspected of evading the payment of sur-tax, which was provided in confidence to the Inland Revenue, the predecessor department to HM Revenue and Customs (HMRC) in the late 1930s.

12. 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.'
13. It is clear to the Commissioner that in this case the information was provided by another person(s) to the Inland Revenue/HMRC and therefore the requirement of section 41(1)(a) is satisfied.
14. However, some of the withheld information could be considered as not provided by another person but as comments and analyses of the potential methods of tax evasion which was generated within the department itself.
15. The Commissioner has again referred to her own guidance and considers that these comments and analyses 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).
16. Therefore, the Commissioner concludes that the requirement of section 41(1)(a) is satisfied for the whole of the withheld information.

Would disclosure constitute an actionable breach of confidence?

17. 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?

18. 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.
19. TNA explained that it had sought the expert opinion of 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.'*
20. TNA have also referred to previous decision notices (including [ICO Decision Notice FS50456268](#)) and the Information Rights Tribunal case [Case No. EA/2011/0185](#) which considered another TNA file in the IR40 series. The tribunal 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'*.
21. 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 specific withheld information.
22. 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?

23. 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.
24. 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".

25. 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:

- 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. Confidentiality is a fundamental aspect of HMRC information, and relates to all information held in connection with HMRC's functions, not just taxpayer/customer information. Information which identifies a person (natural or legal) is subject to a higher level of protection, in that it is protected by the criminal offence of wrongful disclosure in section 19 of CRCA.
- If the information was held by HMRC, the names of the companies would be exempt from disclosure under section 44 of FOIA because disclosure would specify the identity of the person to whom the information relates. The reach of this exemption is wide and can catch information that seems innocuous or is already in the public domain. This applies to both companies either undertaking legal tax avoidance or advising on tax avoidance measures.
- It is imperative that HMRC maintains the confidence and trust of third parties which provide information in such circumstances. Disclosure of such material would also damage its standing in dealing with individuals who would not have confidence to engage with TNA in future, and may decide to take action against TNA.

26. 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.'*

27. The Commissioner recognises that the withheld information was provided by the third parties to the Inland Revenue/HMRC as part of the consideration of the tax assessment process 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?

28. As above, HMRC explained to TNA that whilst the information would have been provided with a reasonable expectation of discussion and action within the department, there would also have been a reasonable expectation that it would not be disclosed to the public.
29. Having viewed the withheld information, and without detailing any specifics within this decision notice in case of inadvertent disclosure, the Commissioner is satisfied that there are examples of information being provided by a third party in very specific confidential circumstances.
30. TNA acknowledged the realistic expectation that any disclosure to the public would be withheld 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 for the redacted and closed part of the file 'IR50/6187/1').
31. TNA argued that release of the information in this redacted part of the record would therefore amount to an 'actionable breach of confidence, which, under section 41(1)(b), could be actionable not just by the party from whom it was obtained, but also by "any other person". Thus, such a breach could be actioned not only by the companies and individuals named in the record, but also by HMRC.'
32. 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?

33. 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.
34. The complainant argued there was an overwhelming public interest for understanding the UK government tax evasion/avoidance policy. 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.

35. 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.'*
36. 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.
37. The information in the open file IR 40/6187 predominantly relates to policy information and was therefore released as a result of this FOIA request. However, the information in the closed extract IR 40/6187/1 consists of the names of companies and individuals who were suspected of involvement in tax evasion, the details of which were provided to the Inland Revenue in confidence: *'the individuals would have had no knowledge that their details were being discussed.'*
38. TNA stated that there is a reasonable expectation of ongoing confidence by the third parties involved: *'disclosure could be detrimental to any of the companies (or subsequent subsidiaries) and associated individuals that are still trading'.*
39. 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.
40. The Commissioner accepts the historical interest of the redacted file 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

41. Having considered the factors in her guidance and the arguments presented by both parties, and the withheld information, the Commissioner is satisfied that the information held within the closed file was provided by another person(s) 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 that are still trading or even by HMRC themselves. This information is therefore exempt under section 41.
42. As the Commissioner has found that all of the withheld information is exempt under section 41 she has not gone on to consider the application of section 40 to the very small amount of personal data within the closed file IR 40/6187/1.

Procedural matters

43. Section 10(1) of the FOIA states that a public authority should respond to a request promptly and in any event no later than 20 working days following receipt. It is apparent in this case that TNA failed to respond to the complainant's request within 20 working days and so breached section 10(1) of the FOIA.

1

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/SEC41_CONFIDENCE_PUBLIC_INTEREST_TEST_V1.ashx

Right of appeal

44. 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

45. 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.
46. 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