

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 05 March 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 file listed as BS 28/61 held by The National Archives.
2. The Commissioner's decision is that The National Archives (TNA) has correctly applied section 41(1) - provided in confidence to the withheld information. The Commissioner found that TNA breached section 10.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 24 April 2018 the complainant requested the following file:
'BS 28/61 - Lord Denning's Inquiry into the Profumo Affair: Prime Minister's Office and police documents.'
5. After a number of letters updating the complainant, TNA responded on 10 August 2018 that it was unable to open the file and cited section 27(2) - international relations for some of the information, section 41 for all of the information and section 40(2) - personal data for some of the information.
6. On 16 August 2018, the complainant requested a review. He disputed that disclosure would cause any significant harm to international relations given the passage of time.

7. On 9 October 2018 TNA provided the internal review, upholding the original decision.

Scope of the case

8. On 19 October 2018 the complainant wrote to the Information Commissioner to complain about the way his request for information had been handled.
9. He argued that TNA's *'public interest test seriously understates the pivotal role and great importance of these historic events and thus the likely benefit to public understanding of the course of British political history that would follow from disclosure'* and that *'Given the passage of time and the fact that all those involved are probably dead, I am not persuaded that disclosure would involve any significant harm to the public interest, nor that any alleged breach of confidence is "actionable", in the sense that there would be anyone actually in a position to take action. TNA appear to have made no attempt to establish whether this is the case.'*
10. As TNA has applied section 41 to all of the withheld information (and cited sections 27(2) and 40(2) for some of the information), the Commissioner will initially consider, whether TNA is entitled to rely on section 41 as a basis for refusing to provide the withheld information.

Reasons for decision

Section 41 – information provided in confidence

11. 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 that 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?

12. TNA, in consultation with the transferring department, the Cabinet Office, stated that the information was provided to Lord Denning as part of his Inquiry. The Inquiry was held in the strictest confidence and assurances were given to all who participated that the collected information was solely for the purpose of his report:

'Like the other records from the Denning Inquiry, an assurance of confidentiality was provided, meaning the nature of the material and the manner in which it was collected contribute to its existing sensitivities as confidential personal information.'

13. The Commissioner has viewed the information within the withheld file and notes that it details unsubstantiated allegations of sexual activity, police documents and information from another state.
14. The Commissioner is satisfied that the information was obtained from another person in this case.

Would disclosure constitute an actionable breach of confidence?

15. 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?

16. 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.
17. TNA stated that the information contained within BS 28/61 relates to opinions and information that was provided in private on the understanding of strictest 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.'

18. The Commissioner asked TNA if the other state had made the information public and TNA confirmed that if the information was publicly available elsewhere it would not have been in connection with the Lord Denning report. The Commissioner will not provide any further detail on this part of the file in case she inadvertently reveals the nature or source of this information.
19. 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?

20. 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".

21. TNA considers that the circumstances, nature of and way in which the withheld information was provided by the individuals to the Inquiry impliedly and expressly confirmed that it would retain a confidential quality.
22. 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>)
23. 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?

24. The complainant argued that given the passage of time *'I cannot accept that disclosure would cause any significant harm to international relations'* 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.
25. TNA argued that *'it is hugely important to protect the UK's ability to receive confidential information'* and *'release of some of the information in this file – received in confidence - would harm UK relations with the country which provided the information and the UK's ability to conduct its relations with other governments. This would be detrimental to the operation of government and would not be in the UK's interest.'*
26. 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 29/61.'
27. Because of the age of the disputed information, some of the 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 such individuals.
28. 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/individual 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 parties¹.

29. The Commissioner has then considered whether disclosure of the information would be to the detriment of the confider.
30. The loss of privacy can be a detriment in its own right.² The Commissioner considers that allegations of sexual activity constitute information of a sensitive 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.
31. 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.
32. 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.
33. 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'*.
34. The Commissioner considers that disclosure of the requested information, which, as stated above, contains information received in confidence from another state and sensitive personal data, would be an unauthorised use of the information to the detriment of the confider. Given the explicit understanding to all of the strict confidence and limited purpose of the collection of information as solely for the Inquiry, it is reasonable to consider that, if disclosed, personal representatives would bring an action for a breach of confidence.
35. Therefore, the Commissioner considers that disclosure would constitute an actionable breach of confidence.

¹ Beswick v Beswick [1968] A.C. 58

² Bluck v ICO & Epsom and St Helier University Hospital NHS Trust [EA/2006/0090] para 15.

Is there a public interest defence for disclosure?

36. 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.
37. 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.
38. The complainant 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. He provided further evidence from another file (PREM 19/4711 from 1993) relating to the preservation of Denning Inquiry records. *'In it the then Cabinet Secretary Sir Robin Butler wrote ... that the papers "reflect an extraordinary episode and evoke the character of the 1960s in a very powerful way".'*
39. 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.
40. TNA referred to the information from another state and argued that *'any public benefit through release is outweighed by the impact to the United Kingdom's ability to discuss sensitive issues in confidence with foreign governments and law enforcement.'*
41. 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. TNA and the Cabinet Office therefore maintained that the *'detriment that would arise from disclosure of the disputed information would far outweigh any public interest in disclosure.'*
42. 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.

43. 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.
44. 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.
45. Therefore, the Commissioner finds that all the information was correctly withheld under section 41 of the FOIA and has not gone on to consider sections 40(2) and 27(2).

Procedural matters

46. 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 of receipt.
47. There are a number of special provisions in respect of public records offices such as TNA which provides for additional time to consult with the body which transferred the record to their keeping and for the responsible authority to carry out the public interest test.
48. It is apparent in this case that although TNA provided regular updates to the complainant, it took 77 working days to respond to the request and so breached section 10(1) of the FOIA.

Right of appeal

49. 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

50. 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.
51. 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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