

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2016

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

Decision (including any steps ordered)

1. The complainant has requested the closed files on the tax affairs of Ian Fleming. The National Archives (TNA) refused to provide the information, citing the exemption section 41 of the FOIA.
2. The Information Commissioner's decision is that the requested information is exempt from disclosure by virtue of section 41 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

3. On 6 November 2015 the complainant requested the following:

'I would like to request access to two closed files both of which relate to the tax affairs of the late Ian Fleming.'

The files are listed on the Discovery catalogue as

IR 59/980- Former department reference F31049/64 part one)

IR 59/981- Former department reference F31049/64 part two)

I see no reason why the files should remain closed particularly as a decision to open them up in principle has already been made. I note that Mr Fleming died more than 50 years ago...I note the National Archives has previously made the tax affairs of other individuals public.'

4. On 4 December 2015 TNA responded and refused to provide the information citing section 41(1) of FOIA:

'The information contained in these documents relates to opinions and information that were given in confidence, the release of which could be actionable. These documents contain tax, financial and business-related information that was provided in confidence to HM Revenue and Customs (HMRC). Unauthorised disclosure of this information would amount to an actionable breach of confidence. Although, for the purposes of the FOI Act, section 41 is an absolute exemption, I can confirm that we have taken into account the public interest test inherent within the common law duty of confidence in reaching this decision.'

5. The complainant requested an internal review on 8 December 2015. He argued:

'The Freedom of Information does not include a blanket ban on material relating to the tax affairs of deceased individuals.'

I note that last year the Treasury/National Archives released material about the tax affairs of the late John Lennon and George Harrison.'

6. On 5 February 2016, TNA provided the outcome of its internal review and upheld its position. It explained that the closed files:

'relate to the death duties of Ian Fleming and as such they detail what happened to his personal estate after death. This includes information about beneficiaries, royalties, literary rights and taxes. This information was supplied in confidence to the Inland Revenue, the predecessor department to HM Revenue and Customs, in circumstances that implied an obligation of confidence, the release of which would be an actionable breach of confidence. HM Revenue and Customs has a duty to uphold that obligation of confidence as part of their public service to assess taxes.'

Scope of the case

7. The complainant contacted the Commissioner on 10 February 2016 to complain about the way his request for information had been handled.
8. The Commissioner therefore considers the focus of the investigation to be whether TNA was entitled to rely upon the exemption at section 41 to withhold the information.

Reasons for decision

Section 41 – information provided in confidence

9. 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?

10. TNA have stated that the information was originally provided from another person(s) or authority to the transferring government department, HMRC.
11. The Commissioner is satisfied that the information was obtained from another person and therefore the requirement of section 41(1)(a) is satisfied.

Would disclosure constitute an actionable breach of confidence?

12. 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?

13. 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.
14. TNA have confirmed that it conducted searches when the original request was made and internal review stage to ascertain that there

exists no information in the public domain matching that contained in the files under consideration.

15. During the investigation of the case the Commissioner also 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. He would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible.
16. TNA has also argued that the information cannot be said to be trivial as it constitutes correspondence between the relevant parties when dealing with a deceased's estate.
17. Having viewed the file, the Commissioner accepts that the information is not trivial as it contains very detailed information about Ian Fleming's estate, taxes and beneficiaries. The Commissioner is therefore satisfied that the requested information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

18. 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.
19. In support of its position, TNA stated that HMRC had 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. The information would have been communicated in confidence to HMRC in its official capacity to assess taxes.'
20. The Commissioner accepts 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. Therefore, the Commissioner 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 of detriment to the confider?

21. TNA and HMRC maintain the position that knowledge of the disclosure of the information pertaining to the deceased's estate and beneficiaries could distress surviving relatives/beneficiaries of the deceased.

'It is reasonable to assume that the estate of an individual of such success and notoriety as Sir Ian Fleming would continue to bear fruit today. A key consideration for The National Archives is that we would treat identified beneficiaries in this case as we would in any other case reviewed; as such there is no obligation for us to undertake further work to identify the beneficiary or inheritance 'path' emanating from the estate details of the deceased, past that identified in the file.'

22. TNA referred to a highly similar previous Decision Notice [FS50456268](#) , where the Commissioner confirmed that an obligation of confidence may survive the death of the individual/s to which the information relates 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 parties.'

23. The loss of privacy can be a detriment in its own right (Bluck v ICO & Epsom and St Helier University Hospital NHS Trust [EA/2006/0090] para 15.) 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.
24. 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.

Is there a public interest defence for disclosure?

25. 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 and HMRC could successfully rely on such a public interest defence to an action for breach of confidence in this case.
26. TNA and HMRC accept that there is likely to be a public interest in any file held at TNA relating to a famous and very popular author. However, in balancing this against the public interest in keeping information confidential, TNA has given priority to the greater public interest in preserving the principle of confidentiality.
27. The role of HMRC necessitates one that is underpinned by expectations of confidence in relation to the tax affairs of individuals and their beneficiaries.
28. TNA have stated that as the information in this document predominately relates not to policy information, but personal financial details, supplied by third parties, there is a reasonable expectation of confidence by these third parties and their descendants.
29. The Commissioner has viewed the files and confirms that the documents detail personal financial information and correspondence between the relevant parties dealing with the estate.
30. The Commissioner acknowledges that there is a public interest in this author but the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant.
31. 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.

32. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant; and that HMRC and TNA would not have a public interest defence for breaching its duty of confidence.
33. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
34. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Other matters

35. The complainant has referred to a previous FOIA request that he made to another department in 2014 (tax affairs of the late John Lennon and George Harrison) and asked why the FOIA requests have been treated differently.
36. It has been established that the file was retained by the Treasury (TNA did not hold the information) and it was the Treasury who made the decision to provide access to some of the information.
37. It is not appropriate to ask one government department (HMRC) to comment on why a disclosure decision, broadly relating to such a wide topic as taxation, made by another department (Treasury) might differ. Each case hinges on its particular context and is treated on a case by case basis.
38. If the complainant wishes, he should make any further enquiries about why this access was granted to the Treasury.

Right of appeal

39. 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

40. 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.
41. 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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SK9 5AF