

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2019

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

Decision (including any steps ordered)

1. The complainant requested information relating to the closed extract listed as PREM 11/32/1 held by the National Archives (TNA). TNA withheld the information, citing section 40(2) (third party personal data) and section 41(1) (information provided in confidence) of the FOIA as its basis for doing so.
2. The Commissioner's decision is that TNA has correctly applied section 41(1) to the withheld information.
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 13 August 2018, the complainant wrote to TNA and requested information in the following terms:

"I would like to request access to PREM 11/32/1.

I note a decision has been made to open the closed material at a future date.

But I believe there are strong grounds for releasing it now given that the information contained more than 60 pages old.

In the interest of clarity I would be grateful if you could provide the information in isolation.

Alternatively can you highlight the newly released material before it is added to a pre-existing file."

5. TNA responded on 12 September 2018, refusing to provide the requested information and citing section 40(2) and section 41(1) of the FOIA as its basis for this refusal.
6. The complainant requested an internal review on 12 September 2018, explaining the following:

"I note that the file is 66 years old and is unlikely to contain any information about individuals who are still alive with the possible exception of The Queen.

Sir Winston Churchill the then Prime Minister of the day, the Duke and Duchess of Windsor and the relevant 'Sovereigns' are all deceased.

It is unlikely that those senior civil servants and Royal courtiers who were involved with and or who were mentioned in the correspondence at the time were under 35.

They are likely to have been considerably older and must be presumed to be dead or much older than 100.

If the National Archives had genuine concerns about data protection issues it could have provided a copy of the document complete with the relevant redactions."

7. Following an internal review, TNA wrote to the complainant on 3 December 2018, maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 12 December 2018 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case is to determine whether TNA is entitled to rely on section 41(1) and section 40(2) of the FOIA as a basis to withhold the requested information.

Reasons for decision

10. The information requested is PREM 11/32/1 – Closed extract: Letter dated 10 November 1952 (from open parent file PREM 11/32 – Proposed

press statement to explain why the Duke of Windsor will not attend the Coronation of Queen Elizabeth II, and his wish that no Sovereign or former Sovereign of any State be invited to attend).

11. The Commissioner has viewed the withheld information. She will not provide any further details on the withheld information in this decision notice in case she inadvertently reveals the information itself.

Section 41 – information provided in confidence

12. 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?

13. Section 41(1)(a) requires that the requested information must have been given to the public authority by another person. The Commissioner's guidance¹ 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."
14. The Commissioner has viewed the withheld information within the closed extract. She notes that it consists of a covering memorandum and a personal letter between two parties.
15. It is clear that the information was originally provided from another person(s) or authority to the transferring government department, the Cabinet Office.
16. The Commissioner is satisfied that the information was obtained from another person in this case.

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;

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

- 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 has stated that the information contained within the closed extract has the necessary quality of confidence. It has explained that "*the presumption of confidentiality is implicit in the character of the information and was clearly an essential precondition for the frankness of the communications.* "
20. TNA has confirmed that the withheld information has not been disclosed and stated that the duty of confidence cannot be considered as having been waived.
21. During the investigation of the case, the Commissioner conducted her own searches (by use of an internet search engine), but was unable to find any information in the public domain. The Commissioner is therefore satisfied that the information requested is not otherwise accessible.
22. Having viewed the closed extract, the Commissioner accepts that the information is not trivial as it contains personal opinions and information relating to the open parent file.
23. Given the nature of the information, the Commissioner is satisfied that the information does have the necessary quality of confidence.

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

24. 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.
25. 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”.

26. In its submission to the Commissioner, TNA has stated that it would be assumed that the obligation of confidence is *“implicit in the character of the information and was clearly an essential precondition for the frankness of the communications.”*
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 that this may be put into the public domain in the future.
28. From the nature of the information, the Commissioner considers that that it would have been provided under an expectation of confidence.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

29. TNA has explained that detriment in this context need only be to the extent that an individual is shown the information that the person to whom the duty is owed would not want to be seen.
30. It has gone on to explain that apart from the injury to the confider’s rights, they would suffer loss of privacy. It stated that the disclosure of the withheld information would undermine the trust between the sender and recipient. If the confider came to doubt the assumption that their communications were confidential, they would be more cautious in their communications and would be more reluctant to give their frank views on highly sensitive matters.
31. 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 mentioned in and/or the confiders of the information.

Is there a public interest defence for disclosure?

32. 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.
33. 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 any grounds for breaching confidentiality must be valid and very strong, since the duty of confidence is not one that should be overridden lightly.

34. TNA has stated that there is no viable overriding public interest defence for the disclosure of the withheld information.
35. TNA has stated that the withheld information does not concern misconduct, wrongdoing or risks to the public. Instead, it is a personal opinion and therefore disclosure would not outweigh the public interest in maintaining confidence.
36. 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.
37. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining trust between confider and confidant. 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 therefore cannot conclude that there is a strong enough public interest argument to disclose the requested information.
38. Therefore, the Commissioner finds that the information is exempt under section 41 and TNA was correct to withhold this information.
39. 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(2).

Other matters

40. The Commissioner notes that TNA's response to the internal review exceeded 40 working days. Although there is no statutory time set out in the FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days. In no case should the total time

taken exceed 40 working days. The Commissioner therefore recommends that TNA review the Section 45 code of practice².

² <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

Right of appeal

41. 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

42. 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.
43. 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
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SK9 5AF