

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2013

Public Authority: The Office of National Statistics
(an executive office of the Statistics Board)

Address: Government Buildings
Cardiff Road
Newport
South Wales
NP10 8XG

Decision

1. The complainant has requested a census return from the 1951 Census for a particular address. The Office of National Statistics (ONS), an executive office of the Statistics Board has relied on sections 44(2), 22(2) and 40(5) to refuse to confirm or deny whether it held a census return for that address.
2. The Commissioner's decision is that the Statistics Board, and the ONS, was entitled to refuse to confirm or deny whether it held the information requested under sections 44(2) and 22(2).
3. However when refusing the request the public authority failed to advise the applicant of its internal review procedure or the applicant's right to complain to the Commissioner. This is a breach of section 17(7).
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 21 April 2012, the complainant wrote to the ONS and requested information in the following terms:

"I hereby request, pursuant to said Act [FOIA], that I be supplied with a copy of the return made for the 1951 Census relating to the property at [a particular address]."

6. The ONS responded on 25 April 2012. It initially refused to provide the information, citing the exemption provided by section 44(1) as its basis for doing so. This exemption provides that information is exempt if its disclosure is prohibited under any enactment. In this case the ONS claimed that the disclosure was prohibited by section 39 of the Statistics and Registration Service Act 2007.
7. The complainant requested an internal review 26 April 2012, unfortunately the ONS failed to provide one.

Scope of the case

8. The complainant contacted the Commissioner on 18 January 2013 to complain about the way his request for information had been handled.
9. He complained that the ONS had not stated whether it held the information he requested in breach of section 1(1)(a) FOIA.
10. He complained about the decision to withhold the information he requested and argued that his request had not been properly considered. He argued that this was apparent from the contents of the refusal notice which, he believed, revealed a predisposition against disclosure. He also argued that irrelevant factors had been taken into account.
11. He complained that the ONS had breached section 17(7) of FOIA because its refusal notice failed to include details of the ONS's internal review procedures or his right to complain to the Information Commissioner.
12. Upon receiving the complaint the Information Commissioner wrote to the ONS. At this stage the ONS withdrew its application of section 44(1) and informed the Commissioner that it believed it was not obliged to confirm or deny whether it held the information. The ONS cited section 44(2) – confirming or denying would itself communicate information in breach of a statutory prohibition on disclosure, section 22(2) – confirmation or denial would involve the disclosure of information which the public authority intended to publish in the future, section 40(5) – confirmation or denial would disclose personal data in breach of the Data Protection Act 1998, as grounds for refusing to confirm whether the information is held.
13. In light of these developments the Commissioner considers that the issues which need to be addressed by his investigation are:

- whether the ONS is required to confirm or deny whether the information is held in accordance with section 1(1)(a) or whether it can refuse to do so by relying on the exemptions provided by section 44(2), 22(2) and 40(5) to refuse to do so,
- whether the ONS breached section 17(7) by failing to include details of its internal review procedure or the complainant's right to appeal to the Information Commissioner in the refusal notice it issued.

Reasons for decision

Section 44(2) – prohibitions on disclosure

14. As far as is relevant to this decision, section 44(1) states that information is exempt information if its disclosure (otherwise than under this Act [FOIA]) by the public authority holding it –
 - a) is prohibited by or under any enactment,
15. Section 44(2) states that the duty to confirm or deny does not arise if the confirmation or denial that would be given to comply with section 1(1)(a) would (apart from this Act [FOIA]) fall within paragraph (a) of subsection (1).
16. The ONS has claimed that under section 39(1) of the Statistics and Registration Service Act 2007 (SRSA) it is prohibited from disclosing whether it holds the census returns. In broad terms section 39(1) makes it an offence for any member or employee of the Statistics Board (including the ONS's staff) to disclose personal information which the Board holds for any of its functions. This would obviously include information held through the collection and analysis of census information.
17. The relevant parts of section 39 of the SRSA are set out in full below:

Section 39 - Confidentiality of personal information.

 - (1) Subject to this section, personal information held by the Board in relation to the exercise of any of its functions must not be disclosed by-
 - a. any member or employee of the Board,
 - b. a member of any committee of the Board, or

- c. any other person who has received it directly or indirectly from the Board.
 - (2) In this Part "personal information" means information which relates to and identifies a particular person (including a body corporate); but it does not include information about the internal administrative arrangements of the Board (whether relating to its members, employees or other persons).
 - (3) For the purposes of subsection (2) information identifies a particular person if the identity of that person –
 - a. is specified in the information,
 - b. can be deduced from the information, or
 - c. can be deduced from the information taken together with any other published information.
18. The application of section 39(1) has previously been considered by the First Tier Tribunal in Mr Steven Smyrl v the Information Commissioner and the Statistics Board EA/2011/0241. In Smyrl the prohibition had been used to withhold information from an actual census form, as opposed to being the basis for the ONS refusing to confirm or deny whether a particular census return was even held. However the Smyrl decision did clarify a number of points.
19. Firstly at paragraph 16 it confirmed that section 39(1) SRSA did apply to ONS staff.
20. Secondly the Tribunal concluded at paragraph 19 that the term "personal information" includes not just living individuals but also the deceased.
21. Section 39(1) SRSA applies to information which is actually held by the ONS. Therefore the Commissioner must consider if the ONS does hold information which would confirm whether or not a census return was provided for the address in question.
22. The ONS has explained that it does hold the records created by those collecting the census returns in 1951, known as Enumerators Record Books. It is understood that these simply record, street by street, the addresses from which returns have been collected. Although the organisation of these books is described as being "random" by the ONS and they cannot easily be used as an index, they do form records of whether a census return was completed by the householder a particular address.

23. Even if these Enumerators Record Books were not held, the ONS still holds the actual census returns themselves from which it can be determined whether a return was completed for the address in question. Therefore the Commissioner is satisfied that ONS does hold the recorded information which would be necessary to confirm or deny whether requested information is held.
24. The next question is whether simply confirming whether or not a census return was completed for the particular address in question would be "personal information". The Commissioner considers that if it is possible to identify who was living at the address at the time in question, confirmation or denial would constitute the disclosure of personal information. This is because, if a return was completed, confirmation would reveal the head of the household, the person legally responsible for completing the return, had fulfilled his legal obligation to do so. If the ONS denied a return had been completed, it would reveal that the head of the household had failed to meet their legal obligation, which could be an offence. The Commissioner is satisfied that either response is information relating to the head of the household.
25. However it is still necessary to be able identify the occupants of the address in question and, in particular the head of the household. It could be argued that it can be presumed that the requestor would already know the identity of the occupants. Such a presumption makes sense as census information is very often used to track down information about known individuals, usually the ancestors of the researcher. Indeed in this particular case the requestor has named two individuals which he believes the information relates to. Unfortunately it would not be possible to confirm whether the two individuals named by the applicant are those referred to in the requested census return without actually examining the return itself, and to do so would undermine the application of the exemption. Without confirmation that the researcher has correctly deduced who the information would relate to, the Commissioner considers it would be too speculative to rely on section 39(3)(b) SRSA as the basis for saying that confirmation or denial that the census return is held would both relate to, and identify, an individual person.
26. Section 39(1) SRSA will still prohibit confirmation or denial if, under section 39(3)(c), the identity of the head of the household could be deduced from that information taken together with any other published information.
27. The ONS maintained that there was a variety of publicly available information which would identify the people residing at any particular address in 1951. In particular the ONS has explained that for most areas the 1951 electoral rolls are available from either the archives of the

relevant local authority, or the British Library. In the ONS's experience both sources are usually happy to release such records.

28. The Commissioner notes that section 39(3)(c) provides for the identity of an individual to be deduced from a combination of the disclosed information and other 'published' information. He has therefore gone onto consider whether or not the 1951 electoral roll can be described as having been published. Although the electoral rolls may not be accessible via the internet, they are easily accessible to, and available for inspection by, the public from reliable sources. Therefore they can be considered to be published information for the purposes of section 39(3)(c).
29. The ONS has also suggested that the birth and death records could be used to deduce who was residing at a given address. Under the Registration Services Act 1953 both birth and death certificates are available to anyone upon payment of a fee. Although it is not so obvious that such records would help identify the head of a household they may have a role to play in deducing who that person would be in some circumstances. This information is publicly available and the need to pay a fee for them is not a barrier to these records being 'published' for the purposes of section 39(3)(c).
30. In light of the above the Commissioner is satisfied that confirming or denying whether a census return for the particular address is held would, itself disclose information which relates to an individual whose identity can be deduced from the information when taken with other published information, primarily the information available from the publicly available electoral rolls.
31. The exemption provided by section 44(2) is engaged and therefore the ONS is not obliged to confirm or deny whether the information is held. This exemption is absolute, ie there is no need to consider the public interest in disclosing the information.

Section 22 (2) – Information intended for future publication.

32. Section 22(1) provides that information is exempt information if –
 - a. the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - b. the information was already held with a view to such publication at the time when the request for information was made, and

- c. it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1)
33. For information to fall within section 22(1) it is not necessary that the public authority holding the information, and to whom the request has been made to, has the intention to publish the information, it can be another body. This is made clear in section 22(1)(a). It is understood that The National Archives will publish the 1951 census on the 1 January 2052. This is in line with the government policy which requires that census information is retained by the ONS for 100 years after its creation. The origins of this policy are vague but it was certainly established policy by 1966 when a Lord Chancellor's Instrument, made under section 5(1) of the Public Record Act 1958, closed all census information for 100 years. The reason for adopting such a policy, known as the 100 year rule, is to ensure that those completing the census forms can be confident that their information will remain private for the duration of their lives. This is necessary to ensure that the forms are completed fully and honestly, which is important if the census is to fulfil its main function of providing quality information on which to base government policy.
34. The ONS is claiming that to confirm or deny whether a census return for a particular address is held would disclose information that will be published in the future. As explained at paragraph 24, the census returns themselves record whether a return is held for the particular address. The numerators record books will also be published. Furthermore section 22(2) can be applied to information that is not already recorded at the time of the request. It is understood that the 1951 census would be published with some form of index which would provide direct confirmation of whether a return for a particular address is held.
35. Therefore the Commissioner is satisfied that at the time of the request there was a settled intention to publish the information required to confirm whether the requested information was held or not.
36. For information to be covered by section 22(1) the test set out in section 22(1)(c) has to be met. The test requires it to be reasonable in all the circumstances to withhold the information until the intended date of publication.

37. The ONS recognises that there is a demand for census information such as that held in the 1951 census. If it was obliged to comply with this request a precedent would be set and it could be obliged to deal with a vast number of similar requests. The Commissioner accepts that part of the purpose behind section 22 is to allow public authorities to plan and manage the release of information in such a way that its disclosure does not disrupt their work.
38. The 1951 census information is all held on paper. The ONS has explained that these records are fragile, a problem exasperated by the fact that the paper used in 1951 was of a poor quality, being produced when raw materials were in short supply after the war. The forms themselves are held in A1 sized folios containing 200 – 300 forms. Because of the way in which these folios are organised finding the return for a particular address could require up to 20 folios to be searched. The forms themselves are folded within those folios and opening the forms up could easily tear them. Very similar problems would be encountered if it was attempted to use the numerators record books as a rough index.
39. There is a real risk that searching the records in their existing format would result in the records being damaged. When the census information is made public in January 2052 it will be digitised and the problem of the fragility of the records will be overcome.
40. Although the fragility of the records is an issue, the Commissioner does not suggest that the process of digitising the records could not be completed before 2052 without disrupting the work of the ONS. The real issue is the need to preserve the confidentiality of the census returns. As explained in paragraph 35 the reason for having a 100 year rule is to ensure that the public is confident that the information they provide in census returns will most probably remain private throughout their lifetime. This is necessary to ensure that accurate information is provided on which to base government policy.
41. The Commissioner recognises that the impact of simply revealing whether a census form was completed for a particular address may have less of an impact on the public's cooperation with the collection of census information than disclosure of the actual, completed, forms would. Nevertheless he considers that any erosion of the principle that information relating to an individual's participation in the collection of census information should remain confidential, could damage future cooperation.
42. In light of the above the Commissioner is satisfied that it is reasonable in all the circumstances to wait until 2052 for the publication of the

information required in order to confirm or deny whether the requested information is held.

Section 22 - Public Interest test

43. Section 22 is subject to the public interest test as set out in section 2 of FOIA. This means that the ONS can only rely on the exemption from the duty to confirm or deny whether the information is held if in all the circumstances of the case, the public interest in maintaining the exclusion outweighs the public interest in disclosing whether the public authority holds the information.
44. To a great extent the public interest arguments in favour of maintaining the exclusion are the same issues are those relevant to section 22(1)(3) ie consideration of whether it is reasonable to wait until 2052 to release the census information and therefore confirm whether the requested information is held. Those issues are the value in preventing the disruption to the work of the ONS if it was required to provide access to 1951 census information before its planned release date. Secondly the damage to the paper records that could be caused by allowing access now. The Commissioner is satisfied that there is the risk that even confirming or denying whether the requested information is held could damage records.
45. Finally and most importantly is the public interest in maintaining the public's trust in the confidentiality of the census process and the importance this has on the quality of information available to the public planning and policy making process. This is the very reason why census information is collected.
46. The ONS struggled to identify any public interest factors in favour of disclosure. The Commissioner recognises that many of those individuals who access census information will be pursuing their own personal interest in their family history. The Commissioner accepts that there is a demand from such individuals and to some extent there is a public interest in allowing people to pursue this hobby. However this, on its own would not be sufficient to equal the public interest in maintaining the exclusion from the duty to confirm or deny.
47. It is possible that access to the census forms themselves would facilitate other research that might have wider public benefits. There would clearly be a value in allowing such research. However the Commissioner is aware that under section 39(3)(i) SRSA access to census information can be granted to approved researchers under certain conditions. The Commissioner is therefore satisfied that public interest in facilitating more valuable research is already catered for.

48. In light of the above the Commissioner is satisfied that the public interest in maintaining the exclusion from the duty to confirm or deny whether the requested information is held outweighs any public interest in confirming whether the information is held.
49. Since the Commissioner has found that the duty under section 1(1)(a) to confirm or deny whether the information is held is removed by the application of sections 44(2) and 22(2) he has not gone onto consider whether the exclusion provided by section 40(5) – personal information, also applies.

Section 17(7) - The requirement, when refusing a request, to provide details of the public authority's internal review procedure and their right to complain to the Information Commissioner.

50. The ONS responded to the request by letter on the 25 April 2012. That letter refused to provide the requested information, relying on section 44(1) to do so. Where a public authority refuses a request it is obliged under section 17(7)(a) to inform the applicant of any procedures it has for dealing with complaints about its handling of the request. Under section 17(7)(b) it is also obliged to inform the applicant of their right to complain to the Information Commissioner.
51. The ONS's letter of the 25 April 2012 failed to comply with both these obligations. The ONS has therefore breached section 17(7) of FOIA.
52. However the Commissioner does require the ONS to take any steps in respect of this breach.

Other matters

53. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
54. In this case it appears that the request was not recognised as a Freedom of Information Request and therefore was not passed through the appropriate channels within the public authority. This resulted in the inadequate refusal notice being issued and, later, a failure to recognise a request for an internal review and to provide such a review. It is important that where a public authority refuses a request for information it deals with the matter appropriately under the FOIA.

Right of appeal

55. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

56. 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.
57. 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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