

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 October 2010

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Summary

The complainant requested a photocopy of the service record of an individual who served in the Royal Air Force during the Second World War. The public authority provided certain information from the record in transcribed form as part of its publication scheme. However, it withheld other information from the record citing exemptions at section 38 (Health and Safety), section 41 (Information provided in confidence) and section 44 (Statutory bar) as its basis for doing so. The Commissioner has decided that the public authority entitled to withhold some of the information within the record by virtue of section 41. However, the public authority failed to provide certain information within the record in contravention of section 1(1)(b) of the Act. The Commissioner requires the public authority to provide the complainant with a copy of the service record of the individual in question but agrees that it is entitled to redact certain information that is specified in this Notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 17 July 2008 the complainant made the following request for information via the public authority's website¹

"I should be grateful if you would release the following WW2 personal record under the terms of FOI.

*Flying Officer Stuart Wykes Foster No 128627
His death is recorded at the national Archives, Kew under the RAF War Deaths as having occurred in 1943 reference – Volume 5 Page 275.*

His death is also shown on the CWGC² web site with the following details:-

F/O Stuart Wykes Foster, 28 Squadron, died 9th Aug 1943."

3. The complainant repeated his request via an email dated 28 August 2008 and by conventional mail dated 7 September 2008.
4. Much of the complainant's initial correspondence on this matter was with the Royal Air Force (RAF) branch of the public authority. On 16 September 2008 this branch of the public authority wrote to the complainant asking for payment of £30 as its fee for research and administration. The public authority informed the complainant that on payment of this fee the public authority would send him an extract of Flying Officer Foster's service record. The public authority's email stressed that the complainant is not Flying Officer Foster's next of kin nor did he have the authority of the next of kin to allow the public authority to send him a full copy of the original record of service.
5. On 18 September 2008 the public authority wrote to the complainant in response to an email in which he had expressed concerns about its unwillingness to release Flying Officer Foster's full service record. The public authority provided the complainant with a description of what it defines as a 'service record' and advised him that a service record contains the personal information of both the service person and their family. The public authority stressed that it is not permitted to disclose this information to third parties without the consent of the next of kin.

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<http://www.mod.uk/DefenceInternet/ContactUs/RequestForInformationInformationRequestEmailResponse.htm>

² Commonwealth War Graves Commission - <http://www.cwgc.org>

6. Additionally the public authority's 18 September email informed the complainant that:

'In providing an unredacted copy of the service record to you we might:

- i. cause distress to relatives, and thus be exempt from release under section 38 of the FOI Act (the exemption for Health and Safety)*
- ii. infringe article 8 – right to respect for private or family life – of the European Convention on Human Rights (as embodied in the Human Rights Act 1998), and thus be exempt from release under section 44 (prohibitions on disclosure) of the FOI Act*
- iii. be held to breach a duty of confidence under which the information was provided, and thus be exempt from release under section 41 of the FOI Act.*

It is difficult to establish authoritatively whether, or to what extent, any of these apply in any particular case, even if we had the current addresses, approaching relatives to try to find out might itself cause distress. This has led to the general policy of releasing personal information about the deceased only to, or with the consent of, the next of kin. This policy is currently under review, and as such, and in line with the proposed policy, we have released to you details from the service record that you would not iaw [sic] with the current policy be entitled to receive without the written consent of the next of kin.

Further, guidance from the Department of Constitutional Affairs advises that the FOIA entitles individuals to have access to information from the documents held, not necessarily the actual document.'

7. With the same communication, the public authority sent the complainant a transcript of details extracted from Flying Officer Foster's service record which was not being withheld in reliance of sections 38, 41 and 44 of the Act.
8. The complainant wrote to the public authority on 10 October 2008, asking it to undertake an internal review of its decision not to supply Flying Officer Foster's full service record. The complainant argued that the extracted details the public authority had sent him do not meet the terms of the Act. The complainant sent the public authority copies of information he had received following requests for information made to the Army and Navy branches of the public authority. He stressed that he had routinely received photocopies of records, occasionally with one or two minor redactions, and that he hoped the internal review would result in the same disclosure from the RAF branch of the public authority.

9. The head offices of the public authority informed the complainant of the outcome of its internal review on 9 December 2008. The public authority's conclusions are outlined below:
- It had dealt with the complainant's request of 28 August 2008 within the time for compliance required by the Act. It advised the complainant that it had no record of his request which he had made on 17 July 2008 and apologised for this.
 - The complainant's provision of evidence of Flying Officer Foster's death had been recorded and therefore the provisions of the Data Protection Act do not apply.
 - The public authority had provided the complainant with a transcript of information relating to Flying Officer Foster's service career. This information had been extracted from a variety of original documents. The remainder of the information in the original documents was withheld under sections 38 and 44 of the Act and the public authority had determined that these exemptions had been correctly applied. It did not make reference to section 41.
 - It had, through the RAF Air Historical branch, provided the complainant with clarification of some of the abbreviations used in the transcript. In providing this information it had provided advice and assistance to the complainant which satisfied the requirements of section 16 of the Act.
 - It had correctly answered the complainant's information request through its provision of the extracted information.

The Investigation

Scope of the case

10. The complainant contacted the Commissioner on 9 January 2009 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- a) The failure of the public authority to respond to the request made via the public authority's website on 17 July 2008.
 - b) The public authority's refusal to supply a photocopy of the Flying Officer Foster's service record and its insistence that the Act

- provides for access to information and not access to specific documents.
- c) The public authority's assertion that he was only entitled to receive extracted information from Flying Officer Foster's service record as he is not the next of kin.
 - d) The public authority's insistence that applicants for service records provide evidence of the data subject's death, where the service person's date of birth is less than 116 years prior to the date of the application.
 - e) The public authority's insistence that applicants for service records require written authority from the next of kin if the death of the ex-service man/woman occurred within 25 years prior to the date of the application.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

12. The Commissioner wrote to the complainant on 24 January 2009 to confirm receipt of his complaint. On the same day he wrote to the public authority to advise it of the complaint. Unfortunately, due to a backlog of complaints at the Commissioner's office, investigation of the complaint did not start until nine months later.
13. On 30 October 2009, the Commissioner wrote to the complainant setting out his understanding of the complaint and to obtain further evidence of correspondence exchanged between the parties prior to the complaint.
14. The Commissioner wrote to the public authority on 12 November 2009 with a series of questions arising from the complaint.
15. The public authority responded to the Commissioner's enquiries on 24 November 2009. In this letter, it set out a list of the information which had been withheld.
- a. Flying Officer Foster's occupation prior to joining the RAF in 1942.
 - b. Flying Officer Foster's home address.
 - c. The cause of Flying Officer Foster's discharge.
 - d. The name and address of his next of kin.
 - e. Information under the heading "medical boards".
 - f. Flying Officer Foster's service number.

- g. A 'stamp' referring to the place where Flying Officer Foster was trained.
 - h. Flying Officer Foster's religion.
 - i. Miscellaneous annotations – withheld only by virtue that a microfiche copy of the record was not disclosed.
- 16. It withdrew reliance on section 38 acknowledging that "*mere distress is not a sufficient threshold to justify the use of s38*". It re-introduced reliance on section 41. It emphasised that it owed a duty of confidentiality to service personnel and their families which did not cease when the service man or woman died.
- 17. A representative of the Commissioner met with an officer of the public authority on 25 November 2009 to discuss the issues raised by this complaint and a related complaint. During this meeting the Commissioner's representative examined the withheld information. He was also provided with a photocopy of the withheld information.
- 18. The Commissioner wrote to the public authority on 2 July 2010 asking a series of questions about its application of section 41 and about its initial refusal to provide a photocopy of the service record. The case had raised a number of novel issues for the Commissioner to consider before he approached the public authority for its further comments.
- 19. The public authority responded on 14 July 2010. It set out its arguments regarding section 41 and also revised its basis for relying on the provisions of section 38. It argued that it should have relied on section 38(2) as a basis for withholding one piece of information within the service record, the cause for discharge. It believed it was entitled in every case to refuse to confirm or deny whether such information was held. It argued that this was the section where disciplinary matters (where they apply) would be recorded. Other more innocuous reasons for discharge would also be recorded. It argued:

"If [the public authority] relied only on s38(1) to withhold sensitive disciplinary information resulting in discharge from Service, a third party requester could draw the conclusion that we had withheld information under this exemption because of its sensitive nature related to discharge from Service on the grounds of some form of serious wrongdoing. If such an assumption were put into the public domain, this could cause a significant amount of stress and anxiety for the family concerned despite the fact the information was withheld".
- 20. The public authority also reproduced the list it had provided in its letter of 24 November 2009.

21. The public authority conceded that it had no basis for withholding Flying Officer Foster's service number (item f)) and noted that it made this information available via its publication scheme. The Commissioner would note that the complainant had, in fact, provided this information to the public authority as part of his request.
22. Although it formed part of the service record (item g)), the public authority explained that it provided details of where individuals had served as part of its publication scheme and without the consent of next of kin 25 years after the death of the individual. It noted that "*in line with this policy we have already released to [the complainant] the following: 'No. 205 Flying Training School Rh'' on supply*".
23. The public authority made a series of comments about the difficulties that regularly arose when seeking to provide copies of originals. It explained that the originals themselves could be too fragile to copy or would be so faint that a legible copy could not be made. However, it acknowledged that this was not the case here and commented that it "*would be willing to provide [the complainant] with a redacted copy once the Information Commissioner has issued his decision in this case*".
24. The public authority also expressed a willingness to provide item i) where it discloses a photocopy of the document containing the information requested in this case.

Findings of fact

Publication scheme

25. Public authorities are required to adopt and maintain a publication scheme in accordance with section 19 of the Act. A publication scheme must specify classes of information the public authority routinely publishes or intends to publish and must specify whether the information is available to the public free or on payment of a charge. At the time of the complainant's request, the public authority had adopted and maintained a publication scheme which had been approved by the Commissioner. The relevant extract of the public authority's publication scheme, in place at the time of the complainant's request, may be found in an Appendix to this notice.
26. As can be seen in the extract, at the time of the complainant's request the public authority offered access to certain information within the scope of that request via its publication scheme. It described such information as arising from "Genealogical Enquiries". This information fell within the class of information described as "Services we offer".

27. Elsewhere on its website, the public authority provided more detail about its genealogical enquiry service under the heading, 'Making a request for service details of deceased ex-service personnel':

"Note that if you are not the Next of Kin and do not have the consent of the Next of kin, then for a period of 25 years following the date of death the only information that will be disclosed to you is: Surname, Forename, Rank, Service Number, Regiment/Corps, Place of Birth, Age, Date of Death, the date an individual joined the service and the date of leaving.

After this period then, depending on what information is held, an individual's record of service can be disclosed, this information is likely to consist of: an account of the dates that the individual served with the Armed Forces, the units in which he/she served and the locations of those units, the ranks in which the service was carried out and details of any orders of chivalry and gallantry medals (decorations of valour) some of which may already have been announced in the London Gazette.'

Proof of death is required before a request can be accepted. However, if the date of birth of the individual was more than 116 years ago the requirement will be waived.'

There is a charge of £30 per record for provision of this service. Only the widow/widower or civil partner at the time of death will receive information free of charge.'

The information that is held on individuals varies, and until the search has been undertaken there is no way of knowing what information is held. In a small number of cases no information is found. If a search is unsuccessful we are unable to refund payment.'

28. The applicant is required to complete two forms; a 'Request for Service Details of Deceased Ex-Service Personnel', which outlines the information which may be provided and details of the £30 fee, and a 'Request for Service Details of Deceased Ex-Service Personnel Disclosure to Next of Kin or with Consent of Next of Kin'.
29. Information relating to how the public authority deals with requests for information at the time of this notice can be found on the public authority's website at:

<http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/ServiceRecords/MakingARequestForInformationHeldOnThePersonnelRecordsOfDeceasedServicePersonnel.htm>

Analysis

30. The Commissioner believes the complainant's complaint has three main themes:
- The public authority's procedure for accessing service record information via its publication scheme is too onerous;
 - The public authority has improperly relied on exemptions as a basis for withholding information within the scope of the request.
 - The public authority should have provided him with a photocopy rather than a transcript of Flying Officer Foster's service record;

Application of exemptions

Section 21(3) – information available via a publication scheme

31. Under section 1(1) of the Act, any person making a request for information to a public authority is entitled—
- "(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him."*
32. By virtue of section 2 of the Act these rights under section 1 are subject to certain exemptions set out in Part II of the Act. Section 2 is set out in full in a legal annex to this Notice.
33. Section 21 provides that information is exempt from disclosure under section 1 of the Act if it is reasonably accessible to the applicant (section 21 is set out in full in a Legal Annex to this Notice). At section 21(3), it states that information *"is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, **unless** [the Commissioner's emphasis] the information is made available in accordance with the public authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."*
34. Put another way, if information can be obtained via a public authority's publication scheme it can be regarded as "reasonably accessible" for the purposes of section 21(3). It would therefore be exempt from disclosure to the requester under section 1 of the Act by virtue of section 21(3). The mechanism for accessing that information under the Act would be through a public authority's publication scheme in accordance with section 19 and not through the right of access set out in section 1.

35. Although the public authority did not seek to rely on section 21 (other than to allude to it in passing), it is clear that the interplay between section 19 (publication scheme) and section 21 is applicable in this case.
36. The complainant obtained some information within the scope of his request via the public authority's publication scheme. However, he has raised concerns about the process by which information of this type is obtained under the public authority's publication scheme. Information about the public authority's publication scheme is set out in Findings of Fact above.
37. Specifically, the complainant objected to the requirement to provide proof of death where the service person's date of birth is less than 116 years prior to the date of request for information. He has also objected to the public authority's insistence that, where proof of death is available, there should be written authority from the next-of-kin where the request post-dates the service person's date of death by less than 25 years.
38. In this case, the complainant was able to overcome those obstacles. He provided proof of death and his request post-dated Flying Officer Foster's date of death by more than 25 years. However, he remains concerned that he was required to do so at all.
39. As noted in Findings of Fact above, the Commissioner had approved the publication scheme which was in place at the time of the complainant's request (as well as the scheme which is in place at the time of the notice). He is therefore satisfied that certain information within the scope of the complainant's request was reasonably accessible to the complainant despite the obstacles that he was required to overcome and to which he has objected. The Commissioner has therefore concluded that any information which the complainant was able to obtain via the public authority's publication scheme was exempt from disclosure to him under section 1 of the Act by virtue of section 21(3).
40. As a consequence of the above, any information which was not available to the complainant in accordance with the public authority's publication scheme constitutes information which must be considered for disclosure under section 1 of the Act. The Commissioner has made further comment on this point in Other Matters below.

Section 38 – health and safety

41. The public authority sought to apply section 38(2) to information at item c) in the public authority's letter of 24 November 2009. This is

information about the cause of the subject's discharge in September 1942. Section 38 is set out in a legal annex to this Notice.

42. The public authority has sought to apply a general principle to information of this kind. It explained that this section of its service records might well include sensitive information about the serviceman or woman to whom it related. It gave, as an example, the fact that where an individual was discharged on the grounds of their sexual orientation such information would be recorded here. It also noted that there might be other reasons for discharge which might put the individual in a bad light.

43. It set out further arguments as follows:

"We would not wish to pursue a course where we would only withhold information that was sensitive in these terms, since this would prejudice the information we were trying to protect. We therefore withhold all information in this category. I accept that since this information was generated by the public authority, [the public authority] cannot claim that this information is exempt by virtue of section 41 of the Act. This is the reason that s38 was quoted in [the public authority's] internal review letter dated 9 December 2008 to [the complainant], and when [the public authority] applies this to disciplinary information, a fully complainant [sic] response should attract the use of section 38(2) (Neither to confirm or deny the existence of the information)."

"If [the public authority] relied only on section 38(1) to withhold sensitive disciplinary information resulting in discharge from Service, a third party requester could draw the conclusion that we had withheld information under this exemption because of its sensitive nature related to discharge from the Service on grounds of some form of serious wrongdoing. If such an assumption were put into the public domain by the requester, and this should come to the family's attention, this could cause a significant amount of stress and anxiety for the family concerned despite the fact that information was withheld. Individuals may well not disclose information about any disciplinary offences they have committed whilst in the services and release of such information could, depending on the information cause a significant amount of stress and shock to the family, particularly if the individual concerned had given the impression when they were alive that his or her career in the services had been exemplary. The possible impact and detriment to the family, would be identical to that as described from the undesirable disclosure of information [the public authority] argues is withheld under the s41 exemption and in some cases, given the scope of information that might be included under "Reasons for Discharge", even more so."

44. The Commissioner would note that, in this particular case, the public authority has already provided the cause of Flying Officer Foster's discharge on 11 September 1942 to the complainant. This information is contained in the transcript it provided to him of Flying Officer Foster's service record. It would appear that the public authority did not notice this when preparing the transcript or when writing to the Commissioner. Nevertheless, because of this prior disclosure the Commissioner does not agree that, in this case, section 38(2) can apply.
45. The Commissioner would also observe that, even if this disclosure had not been made, it would have been difficult for him to accept the public authority's arguments.
46. It is important to distinguish here between a public authority's obligations under section 1(1)(a) and section 1(1)(b) as set out above. A public authority is obliged under section 1(1)(a) to provide either confirmation or denial that it holds information that is described in a request. Under section 1(1)(b) it is obliged to provide that information.
47. The public authority firstly applied section 38(1) to its duty under section 1(1)(b) to provide information about the reason why Flying Officer Foster was discharged that was within the scope of the complainant's request. It then revised this position and sought to apply section 38(2) to its duty under section 1(1)(a) to confirm or deny whether it held any information about the reason why Flying Officer Foster was discharged that was within the scope of the complainant's request.
48. As also noted above and as set out in full in the Legal Annex to this Notice, these obligations under section 1 are each subject to certain exemptions set out in Part II of the Act by virtue of section 2 of the Act. The Act recognises that in certain circumstances, prejudicial outcomes may arise where a public authority even confirms or denies that it holds requested information. It also recognises in certain cases that there can be a public interest in avoiding the prejudicial outcome described in the exemption which outweighs the public interest in providing confirmation or denial that information is held.
49. However, the Commissioner does not necessarily accept that the public authority could sustain a general principle of refusing to confirm or deny in all cases whether it held a record of the reason why a deceased serviceman or woman had been discharged from any of its service branches. It seems logical to conclude that in the vast majority of cases, the public authority will have made such a record. The Commissioner recognises the difficulties that could arise in cases where

a record contains information that is particularly sensitive and is not generally known to others. However, he does not accept that those difficulties can legitimately be addressed by the blanket application of section 38(2) to all requests for such information.

Section 41 – Information provided in confidence

50. Section 41(1) provides that information is exempt from disclosure 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 than under this Act) by the public authority holding it would constitute an actionable breach of confidence”.

51. The Commissioner will now consider the application of this exemption in relation to the following information using the public authority's numbering system of 24 November 2009:

- a. Flying Officer Foster's occupation prior to joining the RAF in 1942
- b. Flying Officer Foster's home address.
- d. The name and address of his next of kin.
- e. Information under the heading "medical boards".
- h. Flying Officer Foster's religion.

52. The question of access to the other items in the list set out in the public authority's letter of 24 November 2009 have already been addressed earlier in this notice, namely:

- c. The cause of Flying Officer Foster's discharge (information already provided in transcript).
- f. Flying Officer Foster's service number (already known to the complainant).
- g. A stamp referring to the place where Flying Officer Foster was trained (information already provided in transcript).
- i. Miscellaneous annotations (to be disclosed when complainant receives a photocopy of requested information).

53. As set out above, in order to engage section 41 two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

54. When considering whether or not a breach of confidence is itself actionable, the Commissioner has decided that it is appropriate in this case to follow the test set out by Megarry J in *Coco v A N Clark*

(Engineers) Limited (1968) FSR 415 and cited by the Information Tribunal in *Bluck v the Information Commissioner & Epsom St. Helier University NHS Trust* (EA/2006/0090) (the “Bluck case”)³. Megarry J stated that:

“....three elements are normally required, if apart from contract, a case of breach of confidence is to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of the information to the detriment of the party communicating it...”

The Commissioner will refer to this as the “Coco test”.

55. In order to determine whether disclosure would give rise to an actionable breach of confidence, the Commissioner therefore considered whether the above three factors could be met in this case.
56. Although section 41 is an absolute exemption and thus not subject to the public interest test under section 2, the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. With this in mind, the Commissioner will also consider whether the public authority could rely on a public interest defence where it might be subject to an action for breach of confidence.
57. Finally, the Commissioner will consider the impact of the only High Court case to date to deal with the application of section 41. The High Court case involved a request submitted to the Home Office by the British Union for Abolition of Vivisection (BUAV) (the “BUAV case”)⁴ for applications for licenses to conduct animal experimentation. In his judgement in the BUAV case, Eady J confirmed that the *Coco* test was not the only test of confidence that existed and that recognition had to be given to how misuse of private information may give rise to an actionable breach of confidence and furthermore any assessment of confidence had to take into account the impact of the Human Rights Act.
58. The judgement of the High Court in the BUAV case is analysed in considerable detail in the Commissioner’s decision notice ref FS5011475⁵.

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

⁴ *The Home Office v British Union for the Abolition of Vivisection and Information Commissioner* [2008] EWCH 892 (QB) 25 April 2008.

⁵ http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50114757.pdf

59. Following the High Court's ruling in the BUAV case and his own decision notice ref. FS5011475, the Commissioner believes that when considering whether personal and private information is confidential he should also consider the impact of Article 8 (individual's right to respect for their privacy and family life) and Article 10 (the right to freedom of expression) of the Human Rights Act 1998 (HRA). He must do so in particular when analysing any public interest defence to an actionable breach of confidence.

Item e) – Information under the heading “Medical Boards”

60. Before considering the application of section 41 in relation to items a), b), d) and h), the Commissioner will consider the information at item e).
61. In the Commissioner's view, the information at item e) constitutes a health record about Flying Officer Foster. In reaching this view, the Commissioner is mindful of the definition of a health record set out in section 1(1) of the Access to Health Records Act 1990:
- “(1) ...'health record' means a record which—*
- (a) consists of information relating to the physical or mental health of an individual who can be identified from that information, or from that and other information in the possession of the holder of the record; and*
 - (b) has been made by or on behalf of a health professional in connection with the care of that individual”*
62. The Commissioner is satisfied that this information was obtained from Flying Officer Foster following a medical examination conducted by a health professional. The Commissioner is therefore satisfied that the first limb of section 41(1) is satisfied in relation to item e).
63. As regards the question of whether disclosure would constitute an actionable breach of confidence, the Commissioner would note that the question of access under the Act to the medical records of a deceased person has been dealt with directly and at length in the Bluck case referred to above.
64. At paragraphs 22 – 27, the Tribunal considered previous case law and commentary by relevant sources. It commented that two recent decisions of the European Court of Human Rights were the most helpful to it in reaching its own decision. These were *Z v Finland* (1997) 25 EHRR 371 and *Plon v France* [2004] ECHR 200.

65. Having considered previous case law, commentary from relevant sources and, in particular, decisions of the European Court of Human Rights, the Tribunal concluded that:

"the Trust would breach the duty of confidence owed to [the named deceased person] if it disclosed the Medical Records other than under the terms of the FOIA and that the breach would be actionable by the personal representatives of [the named deceased person]. Accordingly the Medical Records constitute exempt information for the purposes of FOIA section 41 and should not be disclosed to the Appellant."

66. It is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would be able to take action. This is because it should not be the case that a public authority should lay itself open to legal action because at the time of a request it is unable to determine whether or not a deceased person has a personal representative.
67. Having considered all the above, the Commissioner decided that disclosure of the information would constitute an actionable breach of confidence. However, before reaching a conclusion as to whether section 41 applied to the information at item e), the Commissioner considered whether there was a public interest defence to an action for breach of confidence.

Item e) – is there a public interest defence to an action for breach of confidence

68. The Commissioner would stress that the public interest defence in relation to an actionable breach of confidence is not analysed in the same way as the public interest test is analysed under section 2 of the Act (see Legal Annex). The public interest test under the Act assumes that information should be disclosed unless the public interest in maintaining one of the qualified exemptions that may be engaged in any case outweighs the public interest in disclosure. However, the public interest test in relation to an actionable breach of confidence, assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
69. Using the considerations set out in the Tribunal's decision in the Bluck case, the Commissioner is satisfied that, on the balance of probabilities, a public interest defence could not be established in relation to any action for breach of confidence that might be brought. The Commissioner is mindful of the Tribunal's observations in relation to *Z v Finland*. At paragraph 26 it commented:

"... the European Court of Human Rights stressed that medical data was of fundamental importance to a person's rights under Article 8, not only to protect a person's privacy, but also to preserve confidences in health services. It then said:

' Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal even intimate nature as may be necessary in order to receive appropriate treatment and, even seeking such assistance, thereby endangering their own health, and, in the case of transmissible diseases, that of the community'."

70. The Commissioner is also mindful of the Tribunal's summary of *Plon v France*. The widow and children of the late President Mitterand brought an action to prevent the distribution of a book written by the late President's doctor. At paragraph 27 it commented:

" The court acknowledged that the lapse of time since the death of a major public figure might lead to the public interest ultimately overriding the late president's right to medical confidence, it was nevertheless acknowledged the survival of that right and that it was appropriate for action to protect it to be brought on behalf of the deceased after his death."

Item e) – Conclusion

71. For the reasons set out in the Tribunal's decision in the *Bluck* case, the Commissioner is satisfied that the information in Flying Officer Foster's service record which also constitutes a health record about him. The Commissioner believes it is reasonable to assume that Flying Officer Foster consented to a medical examination with the expectation that the resulting information would be held in confidence. The information was obtained by the public authority from a third party, namely Flying Officer Foster himself, and disclosure of that information would constitute an actionable breach of confidence. The Commissioner has also concluded that there is no public interest defence to an action for breach of confidence in relation to this information. He is therefore satisfied that the information at item e) is exempt under section 41(1) of the Act.

Items a), b), d) and h)

72. The Commissioner is satisfied that the information at a), b), d) and h) were provided to the public authority by another person, namely Flying Officer Foster himself. As such, section 41(1)(a) would be satisfied.

73. As set out above, the Commissioner has first applied the *Coco* test when considering whether disclosure would give rise to an actionable breach of confidence.
74. In the BUAV case, Eady J made the following observation at paragraph 33:
"... [it was] beyond question that some information, especially in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence".
75. In the case of *S v the Information Commissioner and the General Register Office* (EA/2006/0030)⁶, the complainant argued that the information requested in that case was trivial, but the Tribunal rejected this. It commented in conclusion, and in general terms, that *"Information cannot be said to be trivial if it is of importance to the person whose privacy has been infringed."* (para 36).
76. The information in question appears to be relatively innocuous, particularly when viewed over 60 years after the date it was provided by Flying Officer Foster. However, taking into account Eady J's comments in the BUAV case and the Tribunal's comments in *S*, the Commissioner believes that the information does have the necessary quality of confidence to meet the first limb of the *Coco* test. In the Commissioner's view, it is reasonable to assume that information about Flying Officer Foster's civilian occupation, his contact details and those of his next-of-kin and, most significantly, information about his religious affiliation would have been of personal significance to Flying Officer Foster when he provided that information to the public authority.
77. The public authority advised the Commissioner that service families have an expectation that it would treat certain information (such as the information withheld in this case) in confidence until its records enter the public domain in The National Archive by virtue of the Public Records Act 1958. It commented that:
"[the public authority has] an implied duty of confidence to the Service Community, including the families or former veterans to maintain the confidentiality of all information contained in a Record of Service except where [the public authority] has publicly stated that it will provide certain items of information under the publication scheme".

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http://www.informationtribunal.gov.uk/Documents/decisions/Svinformationcommissioner_9_may2007_.pdf

78. The public authority also argued:

"When an employee joins an organisation and provides information about himself and his family there is an obligation on the part of the employer to keep such information confidential and not to disclose it to a third party without the consent of that person ... it is unreasonable to believe that because an individual's statutory rights [under the Data Protection Act 1998] fall away on death that the employer's obligation of confidentiality[to an employee] also falls away."

79. In addition, the public authority pointed out that some of the information contained in Flying Officer Foster's service record would also be included in the 1921 census. It explained that there was a statutory bar on the disclosure of information gathered in the census under the Census Act. It noted that information gathered in the 1921 Census was due to be disclosed in 2022 (100 years after the birth of the youngest person recorded on the census record). It noted that following that principle and in accordance with its own policy, it would not disclose the information in Flying Officer Foster's service record until 2015 (100 years after Flying Officer Foster's birth). It argued that there was no compelling reason to bring the date of disclosure forward. The Commissioner would observe in passing that this argument appears somewhat at odds with the public authority's stated view that records should be withheld until 116 years after the date of birth of the individual service person.

80. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the Commissioner is also mindful of Megary J's comments in the *Coco* case:

"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 given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence".

81. Having considered the public authority's arguments, the Commissioner believes it is reasonable to conclude that Flying Officer Foster provided information about his previous occupation, his home address, the name and contact details of his next-of-kin and his religious affiliation with the expectation that it would be kept confidential. In reaching this view, the Commissioner has had particular regard for the public authority's analogy of an individual providing such information to the Human Resources department of their employer.

82. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The Commissioner would

note that in the Bluck case, the Tribunal concluded that loss of privacy is, of itself, sufficient detriment.

83. The withheld information under consideration here is private domestic information relating to Flying Officer Foster. As set out above, the Commissioner believes it is reasonable to conclude that he provided that information with an expectation of confidentiality. As such, the Commissioner believes that unauthorised disclosure of such private information would, of itself, give rise to a detriment to the privacy of Flying Officer Foster and his family.
84. In light of the above, the Commissioner is satisfied that the information at items a), b), d) and h) was obtained by the public authority from another person and that disclosure of that information would amount to an actionable breach of confidence.

Items a), b), d) and h) - Is there a public interest defence to an action for breach of confidence?

85. As already discussed in relation to item e) before the Commissioner can decide if information is exempt by virtue of section 41, he must consider whether a public interest defence to an actionable breach of confidence could be established.
86. As with all domestic law, the law of confidence has to be read in the context of the HRA which enacts the European Convention on Human Rights into UK law. At paragraph 31 of the BUAV case, the court quoted Patten J from *Murray v Express Newspapers Plc (2007)* as saying;
- "The incorporation of convention values in this branch of law widens the focus of the cause of action to include private information which would never have been regarded as confidential by a court in the days of ... Coco v AN Clark (Engineers) Ltd 1969..."*
87. The Commissioner has already made reference to Article 8 of HRA and the right to have ones privacy and family life respected. However there is a competing human right, Article 10 of HRA, the right to freedom of expression, which includes the freedom to receive and impart information. At paragraph 10 of the Bluck case, the Tribunal cited the test of confidentiality for private information as set out in *Ash v McKennitt* [2006] EWCA Civ 1714 comprising of two questions:

"First, is the information private in the sense that it is in principle protected by Article 8?... If yes, the second question arises: in all the circumstances, must the interest of the owner of the private

information yield to the right of freedom of the expression conferred on the publisher by Article 10".

88. The complainant has a research interest in following the military careers of private individuals during the extraordinary period of the Second World War. The Commissioner notes that this interest is not confined to the complainant and reflects a growth in interest in this subject as more public records from this era become available, particularly on-line. In formal legal terms, the complainant is seeking to exercise his Article 10 HRA rights to receive and impart information relating to this subject area.

89. The Commissioner would observe that the duty of confidence is explicitly referred to in Article 10 HRA as a possible restriction on freedom of expression:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

90. In the Commissioner's view, the privacy of those individuals who are the subject of the complainant's interest (and the privacy of their families) must be taken into account, particularly where the information imparted by those individuals was given with the reasonable expectation that it would be kept confidential, as was the case here.

91. The Commissioner believes that there is a general and very compelling public interest in protecting confidences even if the information which is confided is relatively innocuous and was obtained many decades ago.

92. The Commissioner also believes there is a public interest in ensuring that an employee can give their employer all necessary private or domestic information about themselves with the certainty that it will be

held by the employer in confidence and only used for specific purposes that are within an employee's reasonable expectations. He does not consider that the complainant's Article 10 rights (as he seeks to exercise here) carry sufficient weight to override that compelling public interest.

93. Aside from the due weight that can be given to the complainant's Article 10 rights, the Commissioner is unable to identify any other compelling argument in support of a public interest defence against an action for breach of confidence.

Items a), b), d) and h) – Conclusion

94. Aside from information about Flying Officer Foster's religious affiliation, the Commissioner would accept that much of the withheld information at a), b), d) could be characterised as innocuous. However, given the current state of the law and previous decisions of the Information Tribunal, he believes that information at a), b), d) and h) should be considered confidential and exempt from disclosure under the Act by virtue of section 41(1). He has concluded that disclosure of the information at a), b), d) and h) would give rise to an actionable breach of confidence and has also concluded that, on the balance of probabilities, a public interest defence to such an action would be unlikely to succeed.
95. The Commissioner recognises that the outcome of his deliberations on the application of section 41 may seem surprising given the relatively innocuous nature of most of the withheld information and the time that has passed since Flying Office Foster provided it to the public authority. The Commissioner notes the complainant's reports of greater success previously with various branches of the public authority. However, the Commissioner believes that this reflects an inconsistency of approach that the public authority is now seeking to resolve. The Commissioner accepts that such inconsistencies have proved frustrating for the complainant in his researches. It is the Commissioner's understanding that this information will eventually be transferred to the National Archives from where it can be readily accessed. He recognises that this may be of little comfort to the complainant where he faces obstacles to any line of research that he is conducting.

Section 44 – Statutory bar

96. Given that the Commission has found that the information at a), b), d) and h) is exempt from disclosure under the Act by virtue of section 41(1) he has not gone on to consider whether the same information is exempt from disclosure under section 44.

Procedural Requirements

Time of response

97. The complainant has complained about the public authority's failure to respond to his email request of 17 July 2008. The public authority claims not to have received this email. The Commissioner has no reason to dispute the complainant's assertion that he sent an emailed request on 17 July 2008 using a mechanism that the public authority itself provided. However, he is unable to find that the public authority failed to respond to that request in a timely manner in the absence of any proof of sending or record of receipt.

Transcript versus photocopy

98. In his request for an internal review, the complainant specifically requested a photocopy of the original documents. The public authority admitted in its letter to the Commissioner dated 14 July 2010 that, in this case, it could provide the complainant with a photocopy of the original documentation.
99. In the Commissioner's view, the request for a particular document should generally (unless the context makes it clear) be interpreted as a request for all the information in that document. In practice, if a copy of a document has been requested, the easiest and most reliable way to ensure that all the information within it has been provided will therefore be to provide a copy. However, in some cases it may also be possible to provide an accurate transcript of the contents of a document. The Commissioner believes that the key consideration in such cases is whether all of the information contained in the document has been provided. In this case, the public authority did not include items f) and i) with its transcript. It later acknowledged it had no basis for withholding that information.
100. In failing to provide those items, the public authority has contravened its duty under section 1(1)(b) of the Act. The Commissioner requires the public authority to provide the complainant with a photocopy of Flying Officer Foster's service record, subject to certain redactions, in accordance with its own undertaking set out in its letter to the Commissioner of 14 July 2010.

The Decision

101. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It was entitled to withhold the information itemised as a), b), d), e) and h) in the public authority's letter to the Commissioner dated 14 July 2010 by virtue of section 41(1).
- Information that it made available to the complainant via its publication scheme was exempt from disclosure under section 1 of the Act by virtue of section 21(3).

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority did not disclose the information set out in items f) and i) of its letter to the Commissioner dated 14 July 2010. Its failure to do so constituted a contravention of its obligations under section 1(1)(b) of the Act.

Steps Required

102. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Supply the complainant with a photocopy of Flying Officer Foster's service records. When doing so, it is entitled to redact the information itemised as a), b), d), e) and h) in the public authority's letter to the Commissioner dated 14 July 2010

103. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

104. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

105. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Publication scheme

106. In this case, the complainant was able to meet some of the criteria set out in the public authority's publication scheme in order to gain access to service records via that route.

107. The complainant has argued that the criteria which requesters must meet in order to access information via the public authority's publication scheme are unreasonable. The Commissioner would comment that the criteria form part of an approved publication scheme and that, as such, he has already deemed them satisfactory. He would also note that, in this case, the criteria did not present an obstacle to the complainant. However, the Commissioner has identified an anomaly for the public authority to consider further.

108. At present, the public authority can charge a requester £30 before it will embark on a search for records provided that requester can meet certain criteria regarding timing and next-of-kin authorisation. Such a search may or may not result in information being found and disclosed. Where a requester cannot meet that criteria they may choose to apply under section 1 of the Act. Where they do so, the public authority is obliged to search for that information and, where it is available, to disclose it (subject to exemptions) without charging an up-front fee of £30 although the provisions of The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004⁷ may apply. Arguably, this situation could prove more disadvantageous to the public authority than to a requester who cannot meet the criteria set out in the publication scheme.

Format of request

109. The complainant has advised the Commissioner that the public authority has insisted that he submit requests for information in hard copy format by post rather than electronically.

110. The Commissioner's website sets out what requesters should do in order to make a request for information under the Act⁸. The Commissioner believes that a request made in writing is a valid request regardless of whether that format is electronic or by hard copy. A

⁷ <http://www.opsi.gov.uk/si/si2004/20043244.htm>

⁸ http://www.ico.gov.uk/for_the_public/official_information/how_access.aspx

public authority is entitled to direct complainants to the contact route it considers to be most expedient. However, it must be aware that any request for information submitted to it in writing would still constitute a valid request.

Right of Appeal

111. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 18th day of October 2010

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Appendix

Extract from the public authority's Publication Scheme in place 17 July 2008

| Title | Description | Branch Owner | Class of Information | Organisation/Scheme | Format | Charge |
|---|--|--------------|-----------------------|---------------------|---------|------------------|
| Army Genealogical Enquiries Relating to Former Army Personnel | Genealogical Enquiries Relating to Former Army Personnel: Army. This includes general requests from the public for information contained in Service personnel records. There is a charge of £30.00 for this service. | LF Sec | The services we offer | Armed Forces | Website | Charge may apply |

Legal Annex

Section 2 – Effect of Exemptions in Part II

Section 2 provides that: -

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either -

- (a) the provision confers an absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section (1)(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any of the provisions of Part II, section 1(1)(b) does not apply if or to the extent that -

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption -

- (a) section 21,
- (b) section 23,
- (c) section 32,
- (d) section 34,
- (e) section 36 so far as relating to information held by the House of Commons or House of Lords,
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
- (g) section 41, and
- (h) section 44.

Section 21 - Information accessible to applicant by other means.

Section 21 provides that: -

- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1)—
 - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

Section 38 – Health and Safety

Section 38 provides that: -

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to—
 - (a) endanger the physical or mental health of any individual,or
 - (b) endanger the safety of any individual.
- (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).