

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2018

Public Authority: Driver and Vehicle Licensing Agency (An executive agency of the Department for Transport)

Address: Longview Road
Morrison
Swansea
SA6 7JL

Decision (including any steps ordered)

1. The complainant has requested all information held by the DVLA on a specific named individual. The DVLA refused to confirm or deny if information was held by virtue of section 41(2) of the FOIA.
2. The Commissioner's decision is that the DVLA has correctly applied the exclusion from the duty to confirm or deny if information is held at section 41(2) of the FOIA and that the inherent public interest favours protecting the confidence.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 3 July 2017, the complainant wrote to the DVLA and requested information in the following terms:

"Please sent me all information you hold on the late [name redacted] (maiden name [redacted]) who was born on [date of birth redacted] and died on 1 April 2016 at [address redacted], which was her place of residence."

5. The DVLA responded on 19 July 2017 and refused to either confirm or deny if it held this information on the basis of section 41(2) of the FOIA. DVLA referred to an earlier decision notice (FS50590149) as assisting in reaching its decision. This request related to MPs who had licence revocations and named Charles Kennedy specifically. The DVLA relied on the exclusion from the duty to confirm or deny at section 41(2) in this case and the Commissioner upheld this.
6. The complainant requested an internal review on 24 July 2017 but after several months did not receive a substantive response. The Commissioner agreed to accept the complaint for investigation.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner accepted the complaint for investigation on 7 March 2018.
8. The Commissioner considers the scope of her investigation to be to determine if the DVLA has correctly applied the exclusion from the duty to confirm or deny if information is held at section 41(2) of the FOIA.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41(1) says that information is exempt information if (a) it was obtained by the public authority from a third person and (b) disclosing it would constitute an actionable breach of confidence by that or any other person (ie the aggrieved party would have the right to take the authority to court as a result of the disclosure). Although section 41 is an absolute exemption and is therefore not subject to a public interest test under the FOIA, the common law duty of confidence contains an inherent public interest test.
10. As discussed above, section 1(1)(a) of the FOIA places public authorities under a duty to confirm or deny whether they hold requested information. Section 41(2) says that this duty to confirm or deny information is held does not arise if confirmation or denial would constitute an actionable breach of confidence. The Commissioner has considered the conditions under section 41(1) in order to decide if DVLA is correct, under section 41(2), to neither confirm nor deny that it holds the requested information.

11. The request asked for all information on a deceased individual. DVLA, in line with the decision of the Commissioner in FS50590149, refused to confirm or deny if any information was held. In the request for an internal review the complainant indicated his request was focused on information on addresses or name changes and he expressed his belief that section 41 of the FOIA would have a limited application to health and financial information, not addresses and name changes.
12. DVLA argues that the application of section 41 is not dependent on the information being sensitive and the main consideration is whether there could be an actionable breach of confidence from, in this case confirming or denying it is held, regardless of whether it is sensitive or not.
13. As mentioned above, for the exemption at 41(2) to be engaged, the two criteria at 41(1) have still to be met. Namely, if held, 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.

Was the information, if held, obtained from a third party?

14. In this case, if held, the information would have been provided by the specified individual and DVLA would have obtained it from a third party.

Would disclosure constitute an actionable breach of confidence by another person?

15. In considering whether disclosure of information, if held, constitutes an actionable breach of confidence, the Commissioner considers the following:
 - Whether the information, if held, has the necessary quality of confidence;
 - Whether the information, if held, 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.
16. For the first of these bullet points; the Commissioner considers that for information to have the necessary quality of confidence it must not be trivial or be otherwise available to the public. In this case the request ask for all information held on the named individual. Whilst the complainant did suggest in his internal review request he was focused more on addresses and name changes than the more obviously sensitive information such as health and financial information; the DVLA has maintained that information provided in driving licence applications

which is where it obtains a great deal of its information from will contain sensitive data. And if held, this information is not trivial. The Commissioner also notes that even if the request was restricted to names and addresses any information held could still be said to not be trivial as it is personal information that is not otherwise accessible.

17. Section 41 is not restricted to only sensitive data, it can be used on a case by case basis and where there is personal information involved it can often be said the information is not trivial, particularly as in this case the information, if held, would include any information provided to the DVLA as part of the licence application process.
18. For the second bullet point; DVLA states there is an implied duty of confidence. DVLA argued in the earlier decision notice that, if held, DVLA would not make information public that has been provided to it by someone making an application for a driving licence or supporting their application, or updating licence details with the DVLA. The Commissioner agreed with this position in the earlier case and sees no reason to change her position in this instance.
19. Turning to the final bullet point; DVLA argues that unauthorised disclosure of the requested information, if held, would be detrimental to any representative of the deceased. In the earlier decision notice the Commissioner argued that as the information, if held, may contain details of an individual's health there was no need for there to be any detriment to the confider in terms of tangible loss, for it to be protected by the law of confidence.
20. As the request in this case asks for all information held on a named individual it is reasonable to assume that, if held, the information would contain some health information collected as part of the licence application and update process. That being said, if the request had been restricted to only address information and any name changes the Commission still accepts there is a case of arguing there would be detriment if the information were held and disclosed. Whilst this information may not be as sensitive it is information not otherwise available that is used to identify and trace individuals. The Commissioner has included some additional detail on this in the confidential annex provided to the public authority.

21. The Commissioner would also like to highlight, as she did in the previous decision notice cited, that the Tribunal¹ has confirmed that action for a breach of confidence can be taken by the personal representative of the deceased person and therefore section 41 can apply after the death of an individual. The Commissioner has previously accepted the duty of confidence can survive the death of the confider and it is not necessary to establish there is personal representative of the deceased to accept section 41 can be engaged.
22. As the Commissioner is satisfied that the conditions under section 41(1)(a) and 41(1)(b) are met, she is also satisfied that DVLA is correct not to confirm or deny whether it holds the requested information under section 41(2) because, if held, it is information that would have been provided in confidence.
23. Section 41 of the FOIA is an absolute exemption and not subject to the public interest test. However the common law duty of confidence contains an inherent public interest test. This test assumes that a public authority should not confirm or deny it holds the information unless the public interest in confirming or denying outweighs the public interest in maintaining the duty of confidence. In other words, the test is the reverse of that normally considered under the FOIA and the emphasis is on maintaining the duty of confidence unless it can be proved there is a stronger public interest in confirming or denying the information is held.

Public interest in maintaining the duty of confidence

24. DVLA argues it is in the public interest that it issues driving licences and maintains an accurate record of licence holders for road safety purposes. The information provided to DVLA needs to be provided honestly and without fear that it would be unduly disclosed to the public, even after death. The driving licence database is a closed record and DVLA is entrusted with the information it holds and undermining this confidence would not be in the public interest.

Public interest in confirming or denying the information is held

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

25. The DVLA accepts there is some public interest in demonstrating transparency and that it is performing its functions correctly.

Balance of the public interest

26. The Commissioner is satisfied the public interest in protecting the duty of confidence by neither confirming nor denying if the information is held outweighs any public interest in confirming or denying. The Commissioner does not consider there is any obvious public interest in confirming or denying if the information is held. Although it seems the complainant has interest in this information this is not indicative of there being any wider public interest.
27. Therefore the Commissioner is satisfied the public interest favours maintaining the duty of confidence and DVLA has correctly applied the exemption from the duty to confirm or deny if information is held at section 41(2) of the FOIA.

Right of appeal

28. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.
30. 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

Jill Hulley
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Wycliffe House
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