

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2021

Public Authority: Driver and Vehicle Licensing Agency (an Executive Agency of the Department for Transport)

Address: Longview Road
Swansea
SA6 7JL

Decision (including any steps ordered)

1. The complainant has requested all information concerning the driving licence of a deceased named individual.
2. The Driver and Vehicle Licensing Agency (DVLA) refused to confirm or deny if any such information was held, relying on section 41(2) of the FOIA (information provided in confidence). The DVLA also stated that section 31(1)(a) and (c) of the FOIA (law enforcement) would be applicable to any information if held.
3. The Commissioner's decision is that the DVLA is entitled to rely on the exemption from the duty to confirm or deny if information is held under section 41(2) of the FOIA, and that the inherent public interest test within the duty of confidentiality favours protecting the confidence. However, the Commissioner has recorded a procedural breach of section 10 of the FOIA as the DVLA failed to respond to the complainant's request within the statutory time limit.
4. The Information Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

5. On 25 February 2020, the complainant wrote to the DVLA and made the following request for information:

"I am looking for all information for a deceased person known as Salman Abedi (b. 31/12/1994 - 22/05/2017). He lived at – [address redacted] when he died. ("...")

I am looking at all information concerning his driving licence, from application to internal correspondence to its processing including any points that it earned. I would also be interested in photos that were sent with the application."

6. The DVLA acknowledged receipt of the information request on 26 February 2020 and provided the complainant with a reference number. The DVLA informed the complainant that it expected to respond to the request by 25 March 2020.
7. The DVLA wrote to the complainant on 23 March 2020, advising that it was considering whether any information that may be held would be exempt from disclosure under section 31 of the FOIA (law enforcement). The DVLA explained to the complainant that it required further time to consider the public interest test and expected to provide the outcome by 15 April 2020.
8. The DVLA provided the complainant with a further update on 15 April 2020, advising that it was not in a position to provide a response but hoped to provide it by 15 May 2020.
9. The complainant wrote to the DVLA on 9 July 2020, chasing a response to his request for information. The DVLA responded on the same day stating that it would look into the matter and send a response as soon as possible.
10. The DVLA responded to the request for information on 13 July 2020 advising that the response should have been sent to the complainant on 5 May 2020 and apologised that it was overlooked. It refused to confirm or deny whether the requested information was held, on the basis of section 41(2) of the FOIA (information provided in confidence). The DVLA referred to an earlier decision notice (FS50590149¹) as assisting it in reaching its decision. This request related to MPs who had licence revocations and named Charles Kennedy specifically. In that case, the DVLA relied on the exemption from the duty to confirm or deny under section 41(2) and the Commissioner upheld this. The DVLA also stated that section 31(1)(a) (prevention or detection of crime) and section

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560109/fs_50590149.pdf

31(1)(c) (the administration of justice) would be applicable to any information held within the scope of the request.

11. The complainant wrote to the DVLA on 13 July 2020, requesting a review of its decision.
12. Following an internal review the DVLA wrote to the complainant on 25 September 2020, maintaining its original position.

Scope of the case

13. The complainant initially contacted the Commissioner on 28 August 2020 to complain about the way his request for information had been handled and the fact that he had still not received a decision regarding the internal review he had requested.
14. The Commissioner wrote to the DVLA on 9 September 2020 and requested that it issue an internal review decision as soon as was practicable and within 20 working days.
15. Following receipt of the outcome of the DVLA's internal review, the complainant wrote to the Commissioner on 29 September 2020, asking for the matter to be investigated by her.
16. In the first instance, the Commissioner considers the scope of her investigation to be to determine if the DVLA has correctly applied the exemption under section 41(2) from the duty to confirm or deny whether information is held and will only consider the application of section 31(1) if necessary.

Reasons for decision

Section 1 – general right of access

17. Section 1(1)(a) of the FOIA states that an individual who asks for information is entitled to be informed whether that information is held. This is known as "the duty to confirm or deny". However, some of the exemptions within the FOIA apply to the duty to confirm or deny in certain circumstances.

Section 41 – information provided in confidence

18. Section 41(1) says that information is exempt if it was obtained by the public authority from any other person (including another public

authority) and disclosing it would constitute an actionable breach of confidence by that or any other person.

19. Section 41(2) says that a public authority is not obliged to confirm or deny that it holds information if doing so would itself constitute an actionable breach of confidence.
20. In order to determine whether section 41(2) applies, it is not necessary for the Commissioner to know whether the requested information is held or not, but she does need to determine whether the information, if held, would have been obtained from a third party by the DVLA.
21. The exemption does not cover information that has been generated by the authority itself. The information must have been given to the public authority by another person. As the Commissioner's guidance on section 41 stated, "In this context the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity."²
22. The Commissioner has considered the conditions under section 41(1) in order to decide if the DVLA is entitled, under section 41(2), to neither confirm nor deny that it holds the requested information.

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

23. In this case, if held, the information would have been obtained by the DVLA from a third party, the deceased individual in the request to whom the information requested relates.

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

24. In considering whether disclosure of information, if held, would constitute 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

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-inconfidence-section-41.pdf>

- Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
25. With regards to the first limb of this test, 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 asks for all information held on the deceased individual. 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, is not trivial.
 26. The DVLA stated that *"information of this nature is not publicly available and would only be provided, in controlled circumstances, to law enforcement bodies and the courts; to the individual, or their personal representative; or to relevant medical professionals to help establish the applicant's medical fitness to hold a driving licence"*.
 27. The Commissioner is therefore satisfied that, if held, information provided to the DVLA would have necessary quality of confidence because it is not otherwise accessible and it is more than trivial.
 28. With regards to the second limb of the test, the Commissioner considers that an obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself and/or the relationship between the parties.
 29. The DVLA stated there is an implied duty of confidence. The DVLA argued in the earlier decision notice (FS50590149) that, if held, the 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.
 30. Turning to the third limb of the test, the DVLA has argued that unauthorised disclosure of the requested information, if held, would be detrimental to the deceased individual's estate/personal representative. The DVLA stated that it could also be detrimental to legal proceedings in whatever form they might take whether or not related directly or indirectly to the Manchester Arena bombing.
 31. In the earlier decision notice (FS50590149) 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.

32. As the request in this case asks for all information held on the deceased 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.
33. The Commissioner would also like to highlight, as she did in the previous decision notice cited, that the Tribunal³ 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.
34. As the Commissioner is satisfied that the conditions under section 41(1)(a) and 41(1)(b) are met, she is also satisfied that the 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.
35. 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

36. The DVLA has argued that it is reliant on its customers informing it of any changes to their circumstances. The DVLA's customers therefore need to be able to continue to trust it, and it considers that disclosing information from its records or confirming whether or not information is held would undermine this important principle of confidentiality.
37. The DVLA stated that it must satisfy itself that an individual is entitled to drive and to do that it must rely on information it receives. It stated that information therefore needs to be provided honestly and without fear

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

that it will be disclosed to the public. If the DVLA cannot be trusted to keep information it receives confidential, individuals may not provide the information it requires to properly consider the grant of a driving licence. This would prevent the DVLA from effectively performing its statutory function of licensing drivers.

38. The DVLA argued that any loss of public confidence in the DVLA's ability to securely handle information would result in a detrimental impact to its performance of its wider statutory functions.
39. The DVLA stated that its records form the central basis to help law enforcement bodies etc. contact the registered keepers of vehicles that may have been involved in serious crime, road traffic offences and other important issues such as fuel theft, bus lane and parking contraventions. The DVLA also relies on the accuracy of its records to collect road tax for the Exchequer.

Public interest in confirming or denying the information is held

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

Balance of the public interest

41. Having considered all the arguments and taking into account the inverse nature of the public interest test under section 41, the Commissioner is satisfied that in this particular case, the public interest in protecting the duty of confidence outweighs the public interest in confirming or denying whether the information is held.
42. The Commissioner recognises that there may be some public interest in the DVLA confirming or denying whether the requested information is held about the deceased individual, as this may help to further the public's understanding of the events that ultimately led to his actions on 22 May 2017. However, the Commissioner considers that it is not a strong enough public interest to override the public interest in maintaining the duty of confidence in this case. The Commissioner is therefore satisfied that the public interest favours maintaining the duty of confidence and that the DVLA is entitled to rely on the exemption under section 41(2) from the duty to confirm or deny whether the requested information is held.
43. Because the Commissioner has found that the DVLA is entitled to rely on this exemption, it is not necessary for her to consider the DVLA's reliance on section 31(1) of the FOIA.

Procedural matters

Section 10 – Time for compliance

44. Section 10(1) of the FOIA states that a public authority shall respond to information requests promptly and, in any event, no later than 20 working days from receipt.
45. The Commissioner notes that, from receipt of the request, the DVLA took over four months to respond to the request for information. The Commissioner has therefore recorded a breach of section 10 of the FOIA against the DVLA as a result.

Other matters

46. The Commissioner notes that the DVLA's response to the internal review exceeded 40 working days. Although there is no statutory time set out in the FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days. The Commissioner therefore recommends that the DVLA review the Section 45 code of practice⁴.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF