



**NCN: [2024] UKFTT 00767 (GRC)**

Case Reference: EA/2023/0513

**First-tier Tribunal  
General Regulatory Chamber  
Information Rights**

**Decided without a hearing**

**Decision given on: 5 September 2024**

**Before**

**JUDGE HAZEL OLIVER  
MEMBER SUZANNE COSGRAVE  
MEMBER EMMA YATES**

**Between**

**CHRIS NESS**

Appellant

**and**

**(1) INFORMATION COMMISSIONER  
(2) CHIEF CONSTABLE OF LANCASHIRE CONSTABULARY**

Respondents

**Decision:** The appeal is Dismissed.

## **REASONS**

### **Background to Appeal**

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 31 October 2023 (IC-260136-Q0M4, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about evidence presented by a named police officer at the inquest into the death of Nicola Bulley requested from the Chief Constable of Lancashire Constabulary (the “Constabulary”).
2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 29 June 2023, the Appellant wrote to the Constabulary and requested the following information (the "Request"):

*"Having attended the inquest into the death of Nicola Bulley where the digital evidence was presented by DC [name redacted] way [sic] of powerpoint slides*

*Under Freedom of Information Act I would like to request the following information:*

*\* A copy of the presentation file itself including all the relevant slides presented relating to the mobile phone & Fitbit*

*Additionally, the source data file that was summarised in the presentation relating to the Fitbit steps shown in 15-minute intervals between 08:00 and 09:30".*

4. The Constabulary responded on 3 August 2023 and refused to provide the requested information under section 32(1)(a) FOIA on the grounds that the information was held by them only by virtue of it being contained in documents filed with the Coroner for an inquest. The Appellant requested an internal review. The Constabulary maintained its position on the grounds that, "*the information / report to which you prefer [sic] was produced as instructed by the Coroner's Inquest and not for a policing purpose*".

5. The Appellant complained to the Commissioner on 24 September 2023. The Commissioner decided that the Constabulary was entitled to rely on section 32(1)(a) FOIA as the requested source file and PowerPoint were both created for the purpose of the Coroner's Court. This was on the basis of the Constabulary's submission that the extraction of data from the Fitbit and the subsequent presentation were undertaken purely at the request of the Coroner.

### **The Appeal and Responses**

6. The Appellant appealed on 23 November 2023. His grounds of appeal are based on the Constabulary not having provided accurate information. He accepts that the Constabulary were requested to provide Fitbit data by the Senior Coroner on 16 June and produced a PowerPoint for presentation on 19 June to be used at the inquest. However, he says the following in relation to the source data:

- a. The extraction of the data from the Fitbit and the PowerPoint were simply the production in a user-friendly format of data and information that had been available to the police since January, and was not the result of extraction work.
- b. The detailed data as presented in the PowerPoint was available on the Fitbit device in June, as it is routinely backed-up online due to the device's limited memory, with anyone with the account credentials being able to login.
- c. The College of Policing independent external review of the Constabulary's operational response confirms that on Day 5 (31 January 2023) the SIO oversaw enquiries based on GPRS phone and Fitbit data.

7. The Commissioner's response maintains that the PowerPoint presentation is exempt under section 32(1)(a). In relation to the source data file, he suggested that the Constabulary be joined as a party to the proceedings so they could address some specific questions.

8. The Constabulary was joined as a party to the proceedings and submitted a response which addresses the Commissioner's questions. The key points from this response are set out below. They rely on section 32(1) FOIA. In the alternative they also relied on section 40 FOIA (personal data) and section 38 FOIA (health and safety). In final submissions they refer specifically to section 32(1)(c)(ii) FOIA (any document created by a member of the administrative staff of a court). They also rely on section 41 FOIA (information provided in confidence),

9. The Appellant submitted a reply to the Constabulary's response which disputes their position (as discussed further below). He also does not accept that sections 40, 41 or 38 can be relied on.

10. On 10 April 2024 the Commissioner confirmed that, having considered the subsequent submissions provided by the other parties, he maintains the position set out in his Decision Notice; that section 32 FOIA is engaged in respect of both the PowerPoint presentation and the source data, for the reasons set out by the Constabulary.

### **Applicable law**

11. The relevant provisions of FOIA are as follows.

**1 General right of access to information held by public authorities.**

(1) 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.

.....

**2 Effect of the exemptions in Part II.**

(2) In respect of any information which is exempt information by virtue of any provision 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.

.....

**32 Court records, etc.**

(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by—
  - (i) a court, or
  - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.

.....

**41 Information provided in confidence**

(1) Information is exempt information 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 a breach of confidence actionable by that or any other person.*

12. **Section 32(1)(a)**. This is an absolute exemption (so no public interest test applies). The information must be contained in or obtained from a court document. It must also be held only by virtue of being contained in that document. The exemption still applies if the information is used later for other purposes, but does not apply if the information was originally acquired in another way, and the question of purpose is to be determined when the relevant information came to be filed with or placed with the public authority (*Peninsula Business Services v ICO and SOS for Justice and Lord Chancellor* [2014] UKUT 284 (AAC)).

13. **Section 41**. The basic requirements for establishing a breach of confidence are as set out in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41:

- a. The information must have the necessary quality of confidence about it. The Commissioner's guidance on section 41 states that, in order to have the necessary quality of confidence, information must be more than trivial and not otherwise accessible in the public domain.
- b. The information must have been imparted in circumstances conferring an obligation of confidence. This can be explicit, or can be implied from the circumstances in which the information is imparted.
- c. There must be an unauthorised use of that information to the detriment of the person communicating it. Separate detriment may not be necessary where the confidential information is personal in nature.

14. Section 41 also requires the information to have been obtained by the public authority from another person. It is an absolute exemption. However, the public interest must still be taken into account in determining whether disclosure would constitute an actionable breach of confidence. The public interest may constitute a defence to an action at common law for breach of confidence. There is an assumption that the information should be withheld unless the public interest in disclosure outweighs the public interest in upholding the duty of confidence.

15. Section 41 can apply where the information was originally obtained from a deceased person. An action for breach of confidence can be brought by the personal representative of a deceased person. This exemption had been applied a number of times in relation to medical records and social care records – see the Commissioner's guidance "Information about the deceased" at paragraphs 11 to 19.

## **Issues and evidence**

16. The issues are:
- a. Was the Constabulary entitled to rely on section 32(1)(a) and/or (c)(ii) FOIA to withhold the requested information?
  - b. If not, was the Constabulary entitled to rely on section 41 FOIA or section 38 FOIA to withhold the requested information?

17. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. A closed bundle of documents containing the withheld PowerPoint presentation.
- c. Additional written submissions from the Constabulary and final written submissions from the Appellant.

18. The appeal was initially listed for determination without a hearing on 14 June 2024. It was postponed so that the Constabulary could provide the following in accordance with directions made by Judge Buckley:

- a. A closed bundle containing a copy of the withheld information.
- b. Submissions on the basis on which it is argued that the information requested from the source data file is “contained in ... any document filed with, or otherwise placed in the custody of a court”.
- c. Full submissions on any alternative exemptions relied on, taking into account the matters set out in the reasons for this order below.

19. The Constabulary provided the requested further submissions, and these together with the Appellant’s additional submissions are discussed below.

20. The Constabulary also provided the withheld PowerPoint in a closed bundle, and applied for this to be held on a closed basis under Rule 14(6). This is a copy of the full PowerPoint presentation, which is part of the information requested by the Appellant. We are satisfied that disclosure of this document will prematurely reveal the nature/content of the disclosed information or otherwise defeat the purpose of the appeal. The closed bundle will be held under Rule 14(6) on the basis that it will not be disclosed to anyone except the Commissioner and the Constabulary.

21. The index to the closed bundle says that it also contains source data files. However, the Tribunal panel has not seen the source data files. We do not consider that it is necessary to do so in order to decide the appeal fairly. The directions made by Judge Buckley were based on the need for the Tribunal to see the PowerPoint. We have therefore proceeded to make a decision based on the information and submissions available to us.

## **Discussion and Conclusions**

22. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner’s Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

23. The following are the key points from the Constabulary’s response to the appeal:

- a. Ms Bulley went missing on 27 January 2023. The Fitbit app on her phone, which was retrieved on that date, only contained synced information until 26 January 2023.
- b. The Constabulary obtained the Fitbit on 19 February 2023 when Ms Bulley was found. It was passed to the Digital Media Investigation Unit on 23 February. They accessed the full data set by synchronising the Fitbit with a donor device, and the data was transferred to a secure computer for examination. The full download was completed on

27 February 2023. These source data files are currently retained in compliance with the Force Retention Schedule.

- c. The Coroner opened the inquiry into Ms Bulley's death on 22nd February 2023. The downloading of the data was undertaken for the purpose of the inquiry and the results of the investigation were provided to the inquest under the direction of the Coroner.
- d. The Constabulary says that the results of the investigative work undertaken on the Fitbit source data file were presented to the inquest in the form of a PowerPoint. The source data file was downloaded on the 27 February 2023, five days after the inquiry began, and as such the source data file was held by the Constabulary for the purposes of the inquiry before the findings were presented to the inquest. No other investigation was undertaken after Ms Bulley had been found.
- e. In clarification of the information previously provided to the Commissioner, the Constabulary was not instructed to investigate the Fitbit data by the Coroner on 16 June 2023. This was when the Coroner communicated what findings in relation to the Fitbit he wanted to be presented at the inquiry, and on 19 June the Constabulary sent the final presentation of the Fitbit data to the Coroner following his previous direction.
- f. The Fitbit data the College of Policing report mentions on page 113 Appendix B (Investigation timeline) was a reference to the data available within the Fitbit App, not the source data files.

24. The Appellant says the following in his Reply: *"The Coroner opened the inquest on 22nd February but the same Coroner would have been compelled to suspend the process and adjourn the inquest had the digital evidence recovered provided a reason for Lancashire Constabulary to open a criminal investigation for example. The Constabulary carried out policing due diligence to assess no third-party involvement. The coronial process was able to continue, the inquest taking place some four months later in June"*.

25. The Constabulary's additional written submissions repeat that the source data file was created for the purpose of the coronial inquest. They say that the investigation of the Fitbit, the interrogation of the subsequent data files and the creation of the PowerPoint were undertaken at the direction of the Coroner. They argue that Constabulary staff are regarded as "administrative staff" of the court as they carried out the investigation and created the PowerPoint on behalf of the Coroner. They also maintain that section 32(1)(a) applies. The Constabulary explains that the PowerPoint was *"created using summarised information gathered following the examination of the source data"* from the Fitbit, and the slides *"contain the information from the source data"*.

26. The Appellant's final submissions dispute that the source data file was obtained at the direction of the Coroner. He says that it was independently obtained by the police force to support their working hypothesis and enable closure of the missing person investigation. He says that the Coroner simply asked for the police to produce information gathered during the search. The duty lay with the police to review the information and close their case, and any criminal prosecution would have taken priority over the inquest. The Fitbit documents for court records were only created on 16 June 2023 in response to the specific request from the Coroner.

27. **Section 32(1)(a) (court documents)**. The key issue is whether the requested information is only held because it is contained in court documents. It is clear that this is the case for the

PowerPoint slides themselves, and the Appellant does not dispute the application of the exemption to these slides. It is also not disputed that a coroner's inquiry is a court proceeding under this exemption. The dispute is about the original source data.

28. There are two potential items of source data:

- a. The data on the Fitbit app on the phone which was retrieved on 27 January 2023 and covered the period up to 26 January.
- b. The downloaded data from the Fitbit itself which was retrieved on 19 February 2023 and fully downloaded on 27 February.

29. The data on the Fitbit app was obtained before any instructions were issued by the Coroner. This means that it cannot only have been held because it was contained in court documents. It was initially held for the purposes of the missing persons inquiry. However, this data appears to be outside the scope of the Request. The Appellant asked for, "*the source data file that was summarised in the presentation relating to the Fitbit steps shown in 15-minute intervals between 08:00 and 09:30*". This relates to the recording of steps on 27 January 2023. The Fitbit app did not contain this information, because it only contained data recorded up to 26 January. This is the Tribunal's view of the limited scope of the Request. As this sentence could also be read more widely as applying to all source data referred to in the PowerPoint, for completeness we have gone on to consider the alternative exemptions below.

30. The downloaded data from the Fitbit itself is contained in the PowerPoint presentation, which is a court document. We accept the Constabulary's position that this was done solely for the purpose of the Coroner's inquiry, and as directed by the Coroner. We have considered the Appellant's submissions about how and why the source data file was obtained. However, the timeline shows that the Fitbit data was only downloaded on 27 February 2023, which was after the Coroner had requested the Constabulary to produce information gathered during the search. This was why the source data file was downloaded and created. There was no ongoing missing person investigation or criminal investigation at this time.

31. The Constabulary has explained that the PowerPoint summarises information gathered following examination of the source data. As this is a summary, there is likely to be additional information in the source data itself that is not actually contained in the PowerPoint court documents. However, the Request is specifically about steps shown in 15 minute intervals. We have seen the PowerPoint, and this sets out that specific information. This indicates that the source information about steps and the information in the PowerPoint are the same. This information is effectively in two places – the source data files and the PowerPoint itself. But, the only reason this information is held at all is because it is contained in a court document. It was downloaded for this purpose and was then put into the PowerPoint. We find that this meets the test in section 32(1)(a). This is an absolute exemption and so the requested source data can be withheld.

32. Again, as the Request could be read more widely, for completeness we have gone on to consider alternative exemptions below.

33. **Section 32(1)(c)(ii) (documents created by administrative staff of a court).** The Constabulary relied on this part of the exemption in its additional submissions. "Administrative staff" can include third parties who do not work directly for a court, but we are not persuaded that

the Constabulary was carrying out administrative duties for the Coroner. They were preparing evidence to be presented at the inquiry. We do not find that this exemption applies.

34. **Section 41 (information provided in confidence).** The first part of the test is whether the information was obtained by the public authority from any other person. As noted above, this can apply to information about or obtained from a deceased person. The Appellant disputes this in his final submissions because the data was extracted from Ms Bulley's own Fitbit account. We do not agree that this is a relevant point. The Constabulary obtained the information from Ms Bulley by accessing and downloading it from her Fitbit app and recovered Fitbit. The information was originally hers. The information is about her when she was alive. We do not consider that the fact it was obtained after she was deceased would prevent it from being information obtained from her.

35. The second part of the test is whether the disclosure of the information to the public by the Constabulary would constitute a breach of confidence actionable by that or any other person. We have considered the parts of the test for breach of confidence as follows:

- a. The information must have the necessary quality of confidence about it, and it must be more than trivial and not otherwise accessible in the public domain. The Constabulary says that this is personal/private information about Ms Bulley and her health, and it covers steps, oxygen levels and heart rate. The Appellant says that a Fitbit is not a medical device. However, it does provide very personal information about an individual. Even if the Request is only for source data about steps, this is detailed information about a person's movements. It is not trivial and is not in the public domain. We find that the information does have the necessary quality of confidence about it.
- b. The information must have been imparted in circumstances conferring an obligation of confidence. This was not explicit in this case, but we find it is implicit from the circumstances. Where information is provided to the police during a missing person investigation, or for the purposes of an inquest, these are circumstances where an obligation of confidence would be expected to apply. This does not prevent the information being used appropriately for the purpose of an inquest, but Ms Bulley and her personal representatives would have otherwise expected this information to be kept confidential and not disclosed to the public.
- c. There must be an unauthorised use of that information to the detriment of the person communicating it. The confidential information in this case is personal in nature, and detriment to Ms Bulley (and her personal representatives) can be assumed despite the fact she is deceased. As noted in the Constabulary's additional submissions, there was much public scrutiny and criticism of the disclosure of private information about Ms Bulley's health during the missing person investigation. Release of the Fitbit data information under FOIA would not be expected or authorised by Ms Bulley or her personal representative. The Appellant suggests that this is information that would willingly have been broadcast at a police press conference to show what had happened. We do not agree. There is a difference between using the information to explain to a Coroner's court what happened, and publishing the detailed information itself to the world at large under FOIA.



36. The final part of the test is whether disclosure would be an actionable breach of confidence. The public interest can be a defence to an action for breach of confidence. We find that there is not sufficient public interest in disclosure under FOIA to provide a defence.

- a. In relation to the data on the Fitbit app on the phone, which was retrieved on 27 January 2023 and covered the period up to 26 January, there is no public interest in this information even if it is within the scope of the Request. It relates to the period before Ms Bulley went missing.
- b. In relation to the downloaded data from the Fitbit itself which was retrieved on 19 February 2023 and fully downloaded on 27 February, the Appellant has not suggested any public interest in disclosure of the information at the time of his Request. There may be some public interest in verifying the evidence about what happened. However, the source data file was summarised and presented in the PowerPoint presentation at the public inquest. This included full information about the steps, which are the focus of the Request. Any public interest in disclosure is minimal in these circumstances.

37. We find that the exemption at section 41 applies and the requested source data can be withheld.

38. It is not necessary for us to consider the other exemptions relied on by the Constabulary. We note that section 40 would only apply to information about a living individual (which the Constabulary now acknowledges in their additional submissions). In relation to section 38, we note that this would require some evidence of actual endangerment to mental health, as opposed to upset or distress.

39. We therefore find that the Constabulary was entitled to withhold the requested information under sections 32(1)(a) and also under 41 FOIA. We dismiss the appeal.

Signed Judge Hazel Oliver

Date: 19 August 2024