



Neutral citation number: [2024] UKFTT 00016 (GRC)

Case Reference: EA/2022/0448

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

**Heard on GRC - CVP
Heard on: 6 December 2023.
Decision given on: 9th January 2024**

Before:

**Tribunal Judge: Brian Kennedy KC
Tribunal Member: Paul Taylor and
Tribunal Member: Dave Sivers**

Between:

FAISAL A QURESHI

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

**THE DRIVER AND VEHICLE LICENSING AGENCY
(The Department for Transport)**

Second Respondent

Representation:

For the Appellant: Faisal A Qureshi, a researcher and journalist, acting as a Litigant in Person.

For the First Respondent: Remi Reichhold, of Counsel in writing in the Response dated 7 February 2023.

For the Second Respondent: Jennifer Thelen, of Counsel in writing in the Response dated 4 August 2023.

Decision: The appeal is dismissed.

REASONS

Introduction:

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) as, against the Commissioner’s decision notice of 21 November 2022 with reference number IC 170725-X5S6 (the “DN”), which is a matter of public record.
2. The Tribunal heard this appeal on the papers and in a form of consolidation we heard this appeal immediately after a similar appeal - Ref: EA/2022/0403 on 6 December 2023. The parties are the same in both appeals and the issues also similar, and in the interests of saving time and costs together with the interests of Justice being served through consistency, mean that this Tribunal heard this appeal immediately after EA/2022/0403 and we refer to our reasoning therein.
3. Full details of the background to this appeal, the Appellant’s request for information, and the Commissioner’s decision are set out in the DN. The Appellant requested information on 26 February 2020 seeking disclosure of the driving licence application for Salman Abedi from the Driver & Vehicle Licensing Agency (“the DVLA”). The DVLA is an Executive Agency of the Department for Transport being the Public Authority herein.
4. The DVLA responded on 11 March 2022 following the Decision of the First Tier Tribunal Judgment in the appeal EA/2021/0176. In line with that decision, the DVLA refused to comply with the request, citing section 41(1) and s31(1)(c). The Appellant lodged a complaint with the Commissioner about the way that their request for information had been handled.
5. In the DN (Open Bundle A5), the Commissioner’s Decision is that the DVLA was entitled to apply the exemption at section 41(1) of the FOIA for withholding the information and the public interest favours maintaining this exemption and has set out his reasoning in the DN and further in his Response dated 7 February 2023 to the Grounds of Appeal dated 13 December 2022 (see Open Bundle pA10) The Appellant replied to the Commissioners Response (see Open Bundle pA33) and the DVLA set out their Response to the Appellants Grounds of Appeal in their Written Response dated 4 August 2023.
6. The Commissioner in his DN reasoned;

- a. *The requested information would have been obtained by the DVLA from a third party, namely Mr Abedi, who was deceased (§11).*
- b. *The requested information - provided by way of a driving licence application – is “communicated in circumstances importing an obligation of confidence” and was more than trivial (§13-14).*
- c. *The duty of confidence can survive the death of the confider and it is not necessary to establish whether there is personal representative of the deceased to accept that s.41 is engaged (§16).*
- d. *The Commissioner could not identify any significant public interest to outweigh the public interest in maintaining the confidence of the information sought.*

7. The Commissioners’ reasoning was that for the exemption from disclosure in s.41(1) of FOIA to apply, the following conditions need to be met;

- “a. First, the information must have been given to the public authority by another legal person (whether an individual, a company, another public authority, or any other legal entity). The exemption will only apply to information provided to the public authority in confidence by another legal person and not information generated by the public authority itself. However, the exemption is likely to encompass information generated by the public authority to the extent that it refers to the content of information provided by the other legal person in confidence (Department for Business, Enterprise and Regulatory Reform v IC and Friends of the Earth (EA/2007/0072) at §78; endorsed in JWv Information Commissioner and Nottinghamshire Health Care NHS Trust [2013] UKUT 648 at §38).*
- b. Second, the requested information must constitute an actionable breach of confidence which is likely to succeed. The factors that will give rise to an equitable action for breach of confidence were laid out by Megarry J in Coco v A N Clark (Engineers) Limited [1968] FSR 415 as follows:*
 - i. the information must have the ““necessary quality of confidence””,*
 - ii. the information must have been imparted in circumstances importing an obligation of confidence; and*
 - iii. there must have been an unauthorised use of the information to the detriment of the confider.”*

8. Taking each of these in turn (§27-35 of the DN) the Commissioner. determined that s41(1) was engaged, which is an absolute exemption. and although an absolute exemption meaning that it does not entail the public-interest balancing exercise under s.2(2) of FOIA. This reflects the fact that there is a strong inherent public interest in respecting any legal duty of confidence - whether express or implied - which is owed by a public

authority to a third party. However, it is a defence to an action for breach of confidence that the disclosure of confidential information is in the public interest. If the public interest defence applies, there would be no actionable breach of confidence (i.e. such a claim would not succeed) and the exemption in s.41(1) of FOIA would not apply. As such, whether there is a public interest defence for a breach of confidence involves a determination as to whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

9. Accordingly, information that would otherwise be confidential may cease to be so if there is an overriding public interest in its disclosure. As opposed to the public- interest balancing exercise pursuant to s.2(2) of FOIA:
 - a. the starting point under s.41(1) is that confidentiality should be maintained; and
 - b. purely private interests in maintaining confidentiality can weigh against disclosure.
10. Finally, the Commissioner relied upon *Bluck v IC and Epsom and St Helier University NHS Trust* (EA/2006/0090, 17 September 2007) where the FTT decided that where a legally enforceable duty of confidentiality is owed to a living individual, after death it can be enforced by the deceased's personal representative, the identity of whom it is not necessary to establish. It must be established, in principle, that if such a representative existed, they would be capable of taking action.

The Grounds of Appeal:

11. The Appellant advanced four grounds of appeal:
 - a. the Commissioner and the DVLA "*have sided too close to caution when it comes to making their decision*" ("Ground 1");
 - b. the Commissioner "*did not address the fact that the DVLA did not follow the ICO's own guideline when it came to departments conducting an internal review as the same officer is continually used*" ("Ground 2");
 - c. a "*similar request concerning passport applications was answered by the Home Office*" ("Ground 3"); and
 - d. "*given that the family of the subject are currently abroad and actively avoided any involvement in an independent inquiry looking into the 2017 Manchester Arena bombing and are therefore very unlikely to go after any agency that release information about their dead brother, a suicide bomber*" ("Ground 4").
12. The Commissioner dealt comprehensively with each of the four grounds at (§42-56 of the DN). For the avoidance of doubt this Tribunal accept and adopt this reasoning in its

entirety as provided in Paragraphs 42 to 56 of the Commissioners Response (dated 7 February 2023) to the Appellants Grounds of Appeal (See Open Hearing Bundle pages A26 to A31) and accordingly we agree that the appeal does not impugn the DN.

13. The Tribunal also take cognisance of and accept the evidence in the witness statement of Robert Toft dated 29 October 2021 and his correspondence dated 17 May 2022.
14. Finally, the Commissioner dealt with the public interest in disclosure finding the public interest favoured non-disclosure of the requested information in the DN and see also the comprehensive reasoning in the written Response from the DVLA (to the Grounds of Appeal) dated 4 August 2023 at (*§24 - 28 Open Bundle A94 to A96 of the DN*). This Tribunal accept and adopt the above reasoning in its entirety.
15. In all the circumstances and for the reasons referred to above, this Tribunal unanimously accept and adopt the Commissioners' reasons within the DN, we can find no error of Law, nor in the exercise of his discretion therein. We also accept and adopt the reasoning of both Respondents in their respective written Responses referred to above in that we accept that the DVLA were entitled to rely on section 41(1) of the FOIA as an applicable exemption in this case and that the public interest test favours withholding the requested information.
16. For all the above reasons we must dismiss this appeal.

Brian Kennedy KC

29 December 2023.