

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2015

Public Authority: Driving 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 information about MPs who have been subject to licence revocations. The Driving and Vehicle Licensing Agency (DVLA) says it does not hold some of the information that has been requested. It said it neither confirmed nor denied that it held the remainder by virtue of section 41(2) of the FOIA (information provided in confidence).
2. The Commissioner's decision is that DVLA does not hold some of the information that has been requested and has met its obligations under section 1(1) of the FOIA.
3. He has also decided that DVLA is correct to neither confirm nor deny it holds the remainder of the information under section 41(2) and that the inherent public interest favours protecting the confidence.
4. The Commissioner does not require the public authority to take any steps.

Request and response

5. On 12 June, the complainant wrote to DVLA and requested information in the following terms:

"How many MPs (current and former-names withheld) have been subject to your Agency's medical enquiries/licence revocations in the past 2 years?"

Did your Agency at any time revoke Mr [Charles] Kennedy's driving licence and if not, why?"

6. DVLA responded on 23 June. It said that it does not hold the information referred to in the first part of the request. It said it neither confirmed nor denied that it holds the information requested in the second part, by virtue of section 41(2) of the FOIA.
7. Following an internal review DVLA wrote to the complainant on 20 July. It maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 21 July to complain about the way his request for information had been handled.
9. The Commissioner has focussed his investigation on whether or not DVLA holds some of the requested information and is entitled to rely on section 41(2) with regards to the remainder.

Reasons for decision

Section 1 – information held/not held

10. Section 1(1) of the FOIA says that anyone requesting information from a public authority is entitled to be told by the authority whether it holds the information and, if so, to have the information communicated to them.
11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request, at the time of the request.
12. DVLA has told the Commissioner that, with regard to the first part of the request, it does not hold information on how many members of Parliament have been subject to DVLA's medical enquiries/licence

revocations in the past two years. DVLA says that its driving licence application form does not ask for the occupation of the applicant. The Commissioner has had sight of the Form D1 application form and notes this is correct. DVLA says it therefore does not record the occupation of driving licence holders unless an individual specifically requests that 'MP' appears on their licence. In these cases, 'MP' would appear within the name field on the driving licence record and not as a separate identifiable field that could be searched for. DVLA says that there is therefore no method available to identify from its 46 million driver records those that relate to MPs. If DVLA became aware that a driving licence holder was an MP and subject to a medical enquiry/licence revocation it would not record that fact. It says all cases are treated equally and whether a driver is an MP has no relevance in assessing their fitness to drive.

13. The Commissioner finds the DVLA's explanation convincing. He is satisfied, on balance, that it does not hold information on how many members of Parliament have been subject to DVLA's medical enquiries/licence revocations in the past two years and has met its obligations under section 1(1).

Section 41 – information provided in confidence

14. 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.
15. 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.
16. In the second part of his request, the complainant has requested information concerning Charles Kennedy MP, formerly the leader of the Liberal Democrat party. He says that his own investigation suggests that Mr Kennedy was driving in the period up to his death. The complainant is concerned that, given Mr Kennedy's known health problems, he may (or may not) have been driving without a licence.

DVLA says that it can revoke a licence for a number of reasons but, given the first part of the request and Mr Kennedy's known personal circumstances, it has taken revocation in this case to mean revocation on medical grounds.

17. DVLA says that to confirm or deny whether it holds information concerning whether it, at any time, revoked Charles Kennedy's driving licence would provide the complainant with information that would allow him to conclude whether or not Mr Kennedy had notified DVLA of a medical condition that affected his fitness to drive. It had explained this to the complainant in its internal review.
18. 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.

41(1)(a) - Was the information, if held, obtained from a third person?

19. DVLA has told the Commissioner that, if held, the information would have been provided by Charles Kennedy MP and therefore DVLA would have obtained it from a third person.

41 (1)(b) - Would disclosure constitute an actionable breach of confidence by that or another person?

20. 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

21. For information to have the necessary quality of confidence it must not be trivial or be otherwise available to the public.
22. DVLA says that information provided in a driving licence application or as evidence of medical fitness to drive that could lead to a revocation would ordinarily be considered sensitive data – and therefore is not trivial. DVLA says the information would not be otherwise accessible and the Commissioner agrees, noting that it is now being requested under the FOIA.

Whether the information, if held, was imparted in circumstances importing an obligation of confidence

23. DVLA has told the Commissioner that there is an implied duty of confidence; namely that, if held, DVLA will not make information public that has been provided to it by someone making an application for a driving licence, or supporting their application.

Whether disclosure would be an unauthorised use of the information to the detriment of the confider

24. DVLA says that unauthorised disclosure of the requested information, if held, would be detrimental to Mr Kennedy's estate/personal representative. The Commissioner considers that as information about an individual's health constitutes information of a personal nature there is no need for there to be any detriment to the confider, in terms of any tangible loss, in order for it to be protected by the law of confidence. He has not therefore considered this issue any further.
25. With regard to 41(1)(b), the Commissioner notes that the Tribunal in *Bluck*¹ confirmed that even though the person to whom the information relates may have died, action for a breach of confidence could be taken by the personal representative of that person, and therefore the exemption continues to apply. The Commissioner considers that in the circumstances of this case the duty of confidence is similarly capable of surviving the death of the confider. It is the Commissioner's view that in determining whether confirming or denying whether DVLA holds the requested information 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 take action.
26. Since the Commissioner is satisfied that the conditions under section 41(1)(a) and 41(1)(b) are met, he 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.

¹ *Bluck v the Information Commissioner & Epsom St Helier University NHS Trust*
EA/2006/0090
<http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

27. Section 41 of the FOIA is an absolute exemption and not subject to the public interest test contained at section 2 of FOIA. However, as noted above, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld/the authority should not confirm or deny it holds the information unless the public interest in disclosure/confirming or denying outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).

Inherent public interest test

Public interest in maintaining the confidence

28. DVLA says that it is trusted with information provided to it and that disclosing information or confirming whether or not it is held would undermine the principle of confidentiality.
29. DVLA says it must satisfy itself that an individual is entitled to drive and to do that it must rely on information it receives. Information therefore needs to be provided honestly and without fear that it will be disclosed to the public. It argues that if it cannot be trusted to keep information it receives confidential, individuals will not provide information it needs. This would prevent DVLA from effectively performing its function of licensing drivers who have the right to drive.

Public interest in confirming or denying the information is held

30. DVLA recognises that there is some public interest in DVLA demonstrating transparency and that it is performing its function correctly. The complainant also considers there is public interest in road users having confidence in the system used by DVLA and seeing that the law is applied fairly no matter what office or status an individual may have held in the past.

Balance of the public interest

31. 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 confidence outweighs the public interest in confirming or denying the information is held. The complainant has his own interest in and concern about Mr Kennedy but has not presented to the Commissioner any firm evidence that would substantiate that concern. The Commissioner is therefore satisfied that the public interest favours maintaining the confidence in this case.

Right of appeal

32. 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

33. 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.
34. 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

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