

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2018

Public Authority: Ministry of Justice

Address: 102 Petty France

London

SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information about parties who have deposited funds to satisfy section 144 of the Road Traffic Act 1988 (RTA).
2. The Ministry of Justice (MoJ) provided some information within the scope of the request but refused to provide the remainder, citing section 41 (information provided in confidence) of the FOIA.
3. The Commissioner's decision is that the MoJ failed to demonstrate that the exemption in section 41 of the FOIA is engaged.
4. The Commissioner requires the MoJ to take the following step to ensure compliance with the legislation:
 - disclose the withheld information to the complainant.
5. The MoJ must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. In consideration of the context of this request, the MoJ told the Commissioner that, under the terms of section 144 of the RTA:

"The requirement to have an insurance policy against third party risks does not apply to the owner of a vehicle who deposits £500,000 with the Accountant General".

7. In that respect it explained:

"The Court Funds Office provides a banking and investment service to the civil courts in England & Wales, including the Court of Protection".

Request and response

8. On 28 March 2018, the complainant wrote to the MoJ and requested information in the following terms:

"Please advise for the period commencing 01/01/2014, all parties who at any time (please specify the periods) have deposited and kept deposited with the Accountant General of the Supreme Court sufficient funds to satisfy section 144 of the RTA '98".

9. The request was made using the 'whatdotheyknow' website.

10. The MoJ responded on 25 April 2018 confirming that the Courts Funds Office holds 4 accounts, all of which had held the required sum since 1 January 2014. However it refused to disclose the names of the relevant parties, citing section 41 (information provided in confidence) of the FOIA.

11. Following an internal review the MoJ wrote to the complainant on 14 May 2018 maintaining that position.

Scope of the case

12. The complainant contacted the Commissioner on 3 July 2018 to complain about the way his request for information had been handled.

13. The Commissioner understands that the complainant had further correspondence with the MoJ on this subject matter prior to him making his complaint in this case.

14. The complainant disputed the MoJ's application of exemptions on the basis that *"the entities are likely commercial entities"*.

15. He told the Commissioner:

"There is no reference to 'confidentiality' being agreed and in turn whether this would be appropriate. It appears the intention is to undermine my request, not to adopt a transparent approach".

16. The analysis below considers the MoJ's application of section 41 of the FOIA to the withheld information.
17. That information comprises details of the parties that have deposited monies with the Accountant General in accordance with section 144 of the RTA. For the purposes of this decision notice, they will be referred to as 'the parties'.

Reasons for decision

Section 41 information provided in confidence

18. Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.
19. Section 41(1) of the FOIA states that information is exempt from disclosure 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."*
20. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information must constitute an actionable breach of confidence.
21. In her guidance on section 41¹, the Commissioner acknowledges:

"[Section 41] is designed to give those who provide confidential information to public authorities, a degree of assurance that their confidences will continue to be respected, should the information fall within the scope of an FOIA request".

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Was the information obtained by the MoJ from another person?

22. Section 41(1)(a) requires that the requested information must have been obtained by the public authority from another person. The Commissioner acknowledges that 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.
23. During the course of her investigation, the MoJ explained:

"Monies are deposited with the Court Funds Office under various Rules, such as the Civil Procedure Rules, and Statutes such as the Road Traffic Act 1988".

24. It provided the Commissioner with details of the withheld information in this case.
25. The Commissioner is satisfied that the information was obtained by the MoJ from another person.

Would disclosure of the information constitute an actionable breach of confidence?

26. With regard to whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. That judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:
- whether the information had the necessary quality of confidence;
 - whether the information 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.
27. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Does the information have the necessary quality of confidence?

28. For the information to have the necessary quality of confidence it must not be trivial and not otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.

29. The Commissioner recognises that the information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.
30. In support of its application of section 41 of the FOIA, the MoJ explained that money may only be paid into court under the RTA following receipt of written authority, known as a warrant.
31. The Commissioner is not aware, from the searches she has undertaken, that the requested information is in the public domain. Similarly, she considers that the complainant's further correspondence with the MoJ in relation to this subject matter also suggests that the information is not otherwise accessible.
32. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such considers that this limb of the confidence test is met.

Was the information imparted in circumstances importing an obligation of confidence?

33. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
34. The Commissioner's guidance recognises that there are essentially two circumstances in which an obligation of confidence may apply:

*"The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); **or***

The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules".

35. The MoJ did not provide any evidence that the parties attached explicit conditions to any subsequent use, or disclosure, of the disputed information.
36. In her guidance, the Commissioner recognises that some of the circumstances which typically give rise to an implicit obligation of confidence are reasonably well known. By way of example, she cites, for instance, where information is provided in the context of the relationship between:

- a patient and doctor;
- a client and lawyer;
- a penitent and priest;
- a customer and bank; or
- a client and social worker.

37. In support of its application of section 41 of the FOIA, the MoJ told the Commissioner that, given that the parties have voluntarily chosen to deposit funds in court under section 144 of the RTA 98:

"... it is reasonable to infer that this would import an obligation of confidence on the Accountant General not to disclose the names involved".

38. The MoJ also explained to the Commissioner that the Court Funds Office adheres to the accepted practices applied to the banking industry, including client confidentiality.

39. Having considered the MoJ's submission, the Commissioner accepts that there is an obligation of confidence in this case.

Would disclosure be of detriment to the confider?

40. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the confider.

41. The Commissioner considers that if the requested information is commercial in nature then the disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider. In that respect, her guidance on section 41 states:

"It therefore follows that, for commercial information, the authority will be expected to put forward an explicit case for detriment. Usually the detriment to the confider in such cases will be a detriment to the confider's commercial interests".

42. In this case, the MoJ told the complainant:

"...the parties involved would reasonably expect the Accountant General to keep this information confidential. Disclosure would be a breach of confidence and may also harm any commercial interests of the parties involved".

43. In correspondence with the Commissioner it argued that it was reasonable to infer that:

"...disclosure of [the names of the parties] for an unknown purpose may be potentially detrimental and constitute a breach of confidence".

44. The Commissioner noted that the MoJ's submission did not provide any evidence in support of that view.

Is the exemption engaged?

45. Given the nature of the information in this case, the Commissioner considered that disclosure would only constitute a breach of confidence if it would have a detrimental impact on the confider.
46. Where an authority fails to provide sufficient evidence in its submissions, or does not otherwise explain why information should be withheld, the Commissioner does not consider it is her role to generate arguments on its behalf.
47. In this case, having considered the relevant facts, the Commissioner has concluded that the MoJ, while arguing generically that disclosure has the potential to be detrimental to the parties, failed to identify any tangible detriment to those parties.
48. In the absence of any detail provided in support of the ascribed detriment in the context of section 41, the Commissioner considers that it has not been shown that disclosure would result in detriment to the confider.
49. It follows that she considers that the MoJ failed to prove that disclosure of the information withheld by virtue of section 41(1) would constitute an actionable breach of confidence.
50. The Commissioner has, therefore, concluded that section 41 is not engaged.

Right of appeal

51. 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

52. 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.

53. 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

**Deborah Clark
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