First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0180

Determined on the papers without an oral hearing
On 14th November 2018

Promulgation Date 02/01/2019

Before

JUDGE
FIONA HENDERSON

TRIBUNAL MEMBERS
ANNE CHAFER
And
NIGEL WATSON

Between

EDWARD WILLIAMS

Appellant

- and –
THE INFORMATION COMMISSIONER

First Respondent

- and –
DRIVER AND VEHICLE LICENSING AGENCY

Second Respondent

DECISION AND REASONS

Introduction

1. In the Commissioner's decision notice FS50685170 dated 14th August 2017, the Commissioner held that the Driver and Vehicle Licensing Agency (DVLA) were entitled to withhold the disputed information relying upon s31(1)(g) with 31(2)(b) FOIA. That matter was considered by this Tribunal following an oral hearing on 9th March 2018 and additional written submissions. The Tribunal allowed the Appellant's appeal against that aspect of the decision notice in a decision dated 26th June 2018.

2. Prior to the oral hearing the DVLA had applied to be permitted to rely upon further exemptions. These were dealt with in the Tribunal's Judge's ruling of 21st August 2018 in which the application to amend (so as to rely upon s41 in relation to certain specified documents) was allowed.

S40(2) FOIA

3. In light of the Tribunal's ruling relating to s31FOIA, the Information Commissioner (ICO) raised the issue of names, addresses and vehicle registration details for a number of private individuals who submitted complaints to DVLA[1]. Without a further ruling from the Tribunal that information was due to be disclosed. In their letter of 16th October 2018, the DVLA went beyond the point identified by the ICO stating:
*"In addition, the individual names and telephone number of **all other individuals** named in the closed bundle should be redacted pursuant to section 40(2) in DVLA's submission".*
The views of the other parties and the definition of the personal data that was encompassed within this application was canvassed by the Tribunal in its CMD of 13th November.

4. All parties have confirmed that they are content for the scope of the personal data to be as defined below and that they have no objection to redactions pursuant to s40(2) in these terms. Namely:

i. The redaction of the names and job titles (for the names can be derived from job title) of employees of the DVLA or other organisations in their work capacity who have neither a public facing role nor hold a position of seniority (and hence accountability) within their organisation.

ii. The redaction of direct line telephone numbers (rather than company switchboard numbers).

iii. The redaction of a replication of a redacted name in an email address (but not the rest of the email address) so ordinarily the organisation or domain name would remain unredacted.

5. The Tribunal is satisfied that redactions pursuant to s40(2) FOIA should be made in these terms prior to disclosure because these individuals would not expect this personal data to be disclosed to the world at large, and such disclosure would be unfair to those individuals. The Tribunal has given examples of the application of this determination in the closed schedule.

S41 FOIA

Background

6. The DVLA provides vehicle keeper details to private entities where they have 'reasonable cause' for wanting them. It uses an electronic service for this process called the KADOE ('Keeper At Date Of Event') service, which allows authorised organisations (Customers) to obtain vehicle keeper details electronically through an automated system. The facility is provided under the KADOE contract.

[1] see closed bundle pp.70A-L

7. The terms of the KADOE contract are in the public domain and include provision for disclosure of data received pursuant to the KADOE contract by a Customer to be disclosed to a sub-contractor[2] by that Customer if there is a written contract that requires the sub-contractor as Data Processor of the Customer to abide by:
    - the requirements in Schedule 2 of the KADOE contract,
    - the FCA Debt Collection Guidance and
    - the terms for sub-contractors set out in schedule 3.

    The prior written agreement of the DVLA is also required.

8. The DVLA became aware in 2015 that some parking companies were providing vehicle keeper information that had been provided by the DVLA to them under the KADOE contract, onwards to MIL Collections Ltd, a debt collection company that buys unpaid debts from private car parking companies. It is the Appellant's case that these Penalty Charge Notices are then pursued aggressively and unfairly leading to significant additional cost and distress to a motorist.[3] The DVLA commenced an investigation to consider these debt-purchasing arrangements, and whether or not they were done in compliance with the KADOE Contract. This investigation has considered:
    - Contractual compliance,
    - The position of the sub-contractor as data controller or processor.
    - The contractual arrangements between the party to the KADOE Contract (Customer) and MIL Collections Ltd.

    We are satisfied from the oral and written evidence that at the date of the DVLA's consideration of the request, the investigation was not yet complete.

Information Request

9. The Appellant's request was:
"Please provide all records relating [to] the action taken by the DVLA to prevent organisations selling driver details accessed under KADOE to MIL Collections Ltd."

10. The information that has been identified arising from this request comprises the entirety of the disputed information. For the purposes of consideration of s41 FOIA the Tribunal has only been asked by the DVLA to consider a limited portion, namely pages: 14, 19, 23-24B, 28, 29, 30-40 and 46-49, 50 and 53, 57-8, 60, 60A-K, 61-61A, 62-4[4] . The DVLA have provided a gist in tabular form[5]. The documents withheld pursuant to s41 can be summarised as information consisting of:
"*submissions made to the DVLA by third parties (and attachments to those submissions), in response to enquiries made by DVLA regarding the KADOE contract and compliance with it."*[6]

11. It is the DVLA case that[7]:

[2] P245 OB clause D5
[3] P31 OB
[4] As identified in the 3rd witness statement of Robert Toft, the DVLA gist of 3rd September 2018 (p 56bg OB) and the DVLA letter of 16th October 2018 (p56 br OB)
[5] P56bg OB
[6] ICO submissions para 8 p 56 bk OB
[7] Letter 3rd September p 56 bf OB

"*All of the above relate to the commercial arrangements between private third parties, … the information is commercially confidential and was provided to DVLA in confidence as part of its investigation*."

The Law

12. S41(1) FOIA provides an exemption to disclosure under FOIA if disclosure would constitute "an actionable breach of confidence". Section 41 states:

(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.

13. The Tribunal has divided the s41 withheld material into categories apparent from the gist as provided by the DVLA to enable it to deal with the arguments and its findings in general terms (without direct reference to the contents of the closed material) in the open document. It has provided a closed schedule which makes direct references to the contents of the withheld material.

Information provided by a third party

14. The majority of the documents in issue are documents that have been provided to the DVLA by a third party. To the extent that some of the information relates to the contents of emails generated by the DVLA, the Tribunal is satisfied that where it refers to information that has been provided to it by a third party, that is also covered but if it is information provided by the DVLA it is not. The Tribunal has therefore distinguished between:
    i. The information provided by a third party (e.g. the identity of the parking companies involved);
    ii. The information provided by the DVLA that discusses information provided by a 3rd party (e.g. comments informed by knowledge of the terms of the contract by the DVLA);
    iii. As opposed to the DVLA's input e.g. the direction of their investigation.

15. In our judgment whilst the Tribunal is satisfied that the majority of the information falls within i) and ii) above s41 is not engaged in some instances because the information that it is sought to withhold falls within iii).

Actionable Breach of Confidence

16. We now go on to consider whether its disclosure under FOIA would constitute "an actionable breach of confidence". The test for this was set out in *Coco v Clark [2968] FSR 415* which can be summarised as:
    a. The information must have the necessary quality of confidence.
    b. The information must have been imparted in circumstances importing an obligation of confidence.
    c. Disclosure of the information must to the detriment of the confider.
    d. There must be no defence to the action.

The information must have the necessary quality of confidence.

17. The s41 withheld information includes[8] the actual contracts between MIL and various parking companies. The DVLA's case is that it is apparent from those documents that the parties had agreed a very high degree of commercial confidentiality and that it would be wrong for the DVLA (as the recipient) to go behind that commercial sensitivity. The ICO's case is that the identified material has the necessary quality of confidence. They are not trivial, and contain information which would not otherwise be accessible to the public.

18. Where a document is explicitly marked confidential or the information is derived from a document which is explicitly marked confidential, and the information is not widely circulated or in the public domain, we are satisfied that the information will have the necessary quality of confidence. We accept from the face of these documents that the contents of the contract are intended to remain confidential.

19. In reaching this conclusion we accept that:

i. There is no evidence before us to suggest that these contracts are in the public domain.

ii. Commercial contracts are not generally available. They can be expected to include prices, structures, timetables and to demonstrate the concessions that are sought or given by the contracting parties and thus their commercial tolerance levels and thresholds.

iii. From the terms of the contracts these were not intended to be widely available.

iv. From the terms of the contracts and the fact that they were disclosed to the DVLA (who were not a party) it is reasonable to conclude that the expectation was that they would only be accessible to those bound by the contract and those who had an investigatory, regulatory or practical role which would impact upon the ability of the parties to fulfil the terms of the contract.

20. However, we find that some of the s41 disputed information does not pass this test as we are not satisfied that the identity of the parking companies involved is or was intended to remain confidential. In assessing this we look at the factual position at the date of the information request (rather than when the information was disclosed to the DVLA).[9] Additionally we do not accept that the extent to which obligations from the KADOE contract (which is in the public domain) are imported into the contracts with MIL have the necessary quality of confidence about them even if that information is derived from or contained within clauses of the confidential contract[10].

21. This is because:

i. We are satisfied that due to way that debts purchased by MIL were pursued, the companies whose debts it had purchased would be widely known in the public domain.

[8] P390 OB and p 56 bf OB

[9] APPGER v ICO and Foreign and Commonwealth Office (UKUT 0377 (ACC), 2 July 2015) at or around the time when the request was considered by the public authority.

[10] Eg p 390 OB

ii. We have also had regard to the extent to which this information has already been placed in the public domain without restriction.

iii. Similarly, the KADOE contract puts certain obligations on the contracts that parking companies have with sub-contractors[11]. The extent to which these are reflected in the contracts or documentation in our judgment would not have the necessary quality of confidence about it because it would be self-evident.

iv. We have also had regard to information that was already in the public domain and without restriction which in our judgment would not pass this threshold.

The information must have been given in circumstances importing an obligation of confidence.

22. The DVLA argue that the information was provided to the DVLA subject to the commercial confidentiality being respected. They argue that this is apparent both from the face of some of the documents but also because of the nature of the contents. The ICO agrees that a reasonable person would have realised that such submissions were made to DVLA on the assumption that DVLA would keep them confidential.

23. We are satisfied that an explicit marking of confidentiality would import an obligation of confidence. We accept that where there is no explicit condition or marking, the test is whether a reasonable person in the position of the recipient would have realised that the information was provided in confidence[12].

24. We are satisfied that the majority of the information reaches this threshold and have had regard to:

- *The circulation of the document* (e.g. was it between DVLA and one organisation or was it cascaded further). In our judgment there is less expectation of confidentiality if a document is widely circulated amongst multiple organisations even if it is within a closed group.
- *The reason for the provision of the information or the purpose of the document.* The DVLA were conducting an investigation, with the power to withhold the use of DVLA data. We are satisfied that this meant that there was an inequality of bargaining power in that companies had to co-operate and disclose documentation that ordinarily the DVLA or outside parties would not expect to see in order to preserve their business model.
- *What the recipients can be seen to have done with the information*. Whether they sought permission to share it, whether they shared it with or without restriction.
- *Whether the contents of the documents are likely to inform the expectations of the parties*. Receipt of a document which on its face is clearly sensitive brings with it a clearer expectation that the document is intended to be treated confidentially.

Disclosure of the information must to the detriment of the confider.

25. The ICO argues that there is a considerable public interest in how KADOE data is used by organisations, and with whom it may be shared. Disclosure of third parties' views

[11] E.g. D5.1a which requires sub-contractors to abide by Schedule 2, Schedule 3 and D5.1b FCA Debt Collection Guidance and D5.1.c to have the prior written agreement of the DVLA. P245 OB

[12] Coco v Clark, p.420-421

and details about how they use such data would be likely to attract interest, which would result in reputational damage or the expenditure of resources in responding to further enquiries.

26. The Appellant disputes that disclosure would be detrimental[13]. He argues that there is no obligation to respond to further enquiries. As set out above the Tribunal repeats its findings as set out in paragraph 24 above in terms of the reasons why the parking companies would have had to provide information e.g. to preserve their access to KADOE and seek clarity as to the acceptableness of their business model.

27. The Appellant argues that 3rd parties who have acted without impropriety have nothing to fear as regards their reputations. The Tribunal is not satisfied that impropriety is necessary for reputational damage to occur. The sharing of personal data, especially in the context of the enforcement of parking fines, is an emotive issue which is likely to attract some negative attention. Additionally, we accept that the details of the arrangement would both attract interest, and increase discussion (some of this would also be negative in light of the emotive response that debt pursuit prompts and the public comments apparent from the information before the Tribunal) which in our judgment would amount to reputational damage.

28. The Appellant also argues that if the DVLA followed Road Vehicles (Registration and Licensing) Regulations 2002 to check each request they would not need to rely upon 3rd parties. However, this is not material to the issues before this Tribunal which must deal with the facts as they are (namely the KADOE contract is in use). This argument does not address the arrangements for the pursuit of debt once disclosure has taken place in the first instance.

29. In assessing detriment, the Tribunal also considers the commercial impact upon the disclosers. In our judgment it would provide commercial inequality if MIL's rivals were able to examine their business model, fee structures, cashflow, concessions and demands without reciprocity. Similarly, the parking companies who have entered into agreement with MIL would be prejudiced in seeking to negotiate different arrangements with MIL's competitors having demonstrated their commercial tolerance thresholds and what they were prepared to agree to.

There must be no defence to the action.

30. Although this is an absolute exemption (without the statutory requirement for consideration of the public interest pursuant to s2 FOIA), the Tribunal must nevertheless consider whether the public interest in disclosure overrides the public interest in maintaining the duty of confidence[14]. This is because the "public interest defence" to breach of confidence must NOT be available if the exemption is to be upheld.

31. The Commissioner's view is that the public interest in disclosure is outweighed by the public interest in maintaining the duty of confidentiality. The factors identified in favour of maintaining the confidentiality of the information are:

[13] email 28.9.18

[14] Associated Newspapers Ltd v HRH Prince of Wales [2006] EWCA Civ 1776, [2008] Ch 57, paras 67-68

There is strong public interest in maintaining the confidentiality of information received in confidence.

32. As was recognised in *Associated Newspapers Ltd v HRH Prince of Wales* the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law. We therefore give it due weight but recognise that the nature of the right is not absolute and is capable of being outweighed by some other countervailing public interest which favours disclosure. We have had regard as set out above to the consequences of disclosure and the significance of the information in informing the public debate.

33. *There is public interest in ensuring information is only used and accessed appropriately via the KADOE service. DVLA's enquiries into how information is used require the co-operation of third parties, who may be unwilling to provide submissions in future if they are disclosed to the public.*
The Tribunal does not consider that this factor carries significant weight. There is a commercial incentive to co-operate in order to ensure access to the data. The DVLA are the sole source of this information which they can withhold, the parties therefore have no option but to co-operate if they wish to continue to have access to the information. Failure to provide the information may lead the DVLA to suspect a breach in which case they can withhold future data and refer the matter to the ICO in its regulatory capacity. As such the Tribunal is not satisfied that co-operation is a significant factor in the proper investigation and regulation of this issue.

34. *Transparency and accountability do not require this level of detail and the public interest can be met in less intrusive ways.*
The ICO argues that the public interest in disclosure of DVLA's position as to how information can be shared, and its actions in ensuring information is only shared to that extent; can be met without disclosure of the disputed information in ways that do not compromise the confidentiality of third parties who have assisted DVLA in its enquiries.

35. The DVLA agrees arguing that the Appellant is already aware that there were arrangements in place between MIL and some private parking companies from the First witness statement of Robert Toft[15]. We take into account that it is also evident in the public domain that an operative consideration was whether there were in existence valid "sub-contractor" agreements[16]. However, we are satisfied that disclosure would provide more detail and greater clarity of the legal protections surrounding the onward disclosure of personal data and the legal justification for this.

36. We consider that this factor holds more weight in relation to items such as specific contract terms which provide more detail than is necessary for the purposes of debate and transparency.

37. The Commissioner argues that notwithstanding the significant interest in third party submissions, most weight should be given to the public interest in DVLA's policy and

[15] P107 OB
[16] P390 OB

actions, and not the views of third-party contractors. In our judgment this information is not so clearly separated. The extent to which their policy and actions are informed by some of these submissions and the way in which the DVLA has responded to them will inform the public debate as to the vigour, thoroughness and depth of the DVLA's investigation into ensuring appropriate use and disclosure of personal data with which it has been entrusted.

38. The following public interest factors in favour of disclosure were identified by the Commissioner:

    a. *There is a considerable public interest in how driver details are disclosed via the KADOE service particularly in the context of the enforcement of parking fines.*

    The Tribunal agrees and adds that the fact that drivers who provide this information to DVLA do so not out of choice or voluntarily (as it is a legal requirement) significantly increases the weight of this factor.

    b. *Disclosure of third-party submissions on this topic would allow the public to understand, to at least some extent, how organisations currently share information obtained through the KADOE service*.

    The Tribunal repeats its observations at 33-34 above and are satisfied that disclosure of this information would add transparency and scrutiny that would not be possible without more detailed disclosure than that already in the public domain.

    c. *Disclosure would also enable the public to see part of DVLA's enquiries into, and consideration of, the sharing of KADOE information.*

39. The Tribunal gives weight to all of these factors and adds that the extent to which and circumstances in which onward disclosure has been allowed to happen and the DVLA's knowledge of any safeguards; in our judgment is an important factor in DVLA transparency, accountability and public confidence. Similarly, the vigour, speed and depth of any investigation is also of importance for the same reasons.

40. Additionally, we have had regard to the likely impact of onward disclosure for data subjects. We accept the Appellant's submissions that there was public concern relating to the practices of some debt recovery companies[17] who were believed to pursue debts unfairly. We are satisfied that the consequence of the debt sales for data subjects would be direct correspondence and potentially, litigation from an additional company (in the context of fears of unfair pursuit). In our judgment this is of high public interest which merits a high degree of transparency.

41. Having weighed all these factors, we are satisfied that in relation to much of the disputed information[18] the public interest outweighs the maintenance of confidentiality and that as such a defence to the action would be likely to succeed.

Conclusion

[17] This is not a finding relating to MIL but a finding relating to the levels of public concern relating to debt recovery companies in general.
[18] As set out in the closed annex

42. For the reasons set out above and in the closed annex we allow the appeal in part and have determined that apart from the information identified as properly withheld under s40 FOIA[19] and s41 FOIA[20] the rest of the information appearing in the closed bundle should be disclosed by DVLA to the Appellant within 35 days.

43. Following confirmation of the disclosure by DVLA as ordered in the closed table, it is intended that a redacted version of the closed document will be provided to the Appellant upon further order.

44. The Tribunal Judge confirms that all appeal rights associated with this decision, the decision of 26th June 2018 and the ruling dated 21st August 2018 now start to run.

Signed Fiona Henderson

Judge of the First-tier Tribunal
Date: 17th December 2018

[19] The scope of which is set out in the open decision and closed annex
[20] As defined in the closed annex (which largely relates to direct reference to the terms of the contract)