Appeal Number
EA/2021/0176

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

FAISAL QURESHI	**Appellant**
- and -	
THE INFORMATION COMMISSIONER	**First Respondent**
-and-	
THE DRIVER AND VEHICLE LICENSING AGENCY	**Second Respondent**

Before:
JUDGE ALISON MCKENNA
ROSALIND TATAM
SUSAN WOLF

Determined on the papers, the Tribunal sitting in Chambers on 3 February 2022

MODE OF HEARING

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules[1].

3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 162. It also considered a closed bundle comprising pages 1 to 19.

DECISION

4. **The appeal is allowed.**

5. **The Tribunal now makes a substituted Decision Notice in the following terms:**

   A. DVLA is not entitled to rely on s. 41 (2) FOIA;

   B. DVLA must issue a fresh response to the Appellant's original information request which discharges its duty to confirm or deny. If information is held, it must either disclose it or claim any exemptions to disclosure on which it relies;

   C. DVLA has 30 days from date appearing below either to comply with this substituted Decision Notice by issuing a fresh response to the information request, or to lodge with the Tribunal an application for permission to appeal against this Decision.

REASONS

Background to Appeal

6. The Appellant made a request to The Driver and Vehicle Licensing Agency ("DVLA") on 25 February 2020 for disclosure of all the information it held about Salman Ramadan Abedi (the deceased Manchester Arena bomber).

7. The fact that Salman Abedi and his brother Hashem Abedi had each applied for provisional driving licences had been placed into evidence in the criminal trial of Hashem Abedi. The Appellant is a journalist with a professional interest in the Abedi brothers.

8. DVLA did not respond until 13 July 2020, when it neither confirmed nor denied that it held any information within the scope of the request (a response known as "NCND") in reliance on s. 41 (2) of the Freedom of Information Act 2000 ("FOIA"). The NCND response was confirmed at internal review on 25

[1] https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules

September 2020. The Appellant complained to the Information Commissioner. It also claimed that any information, if held, would be exempt from disclosure under s. 31 FOIA.

9. The Information Commissioner issued a Decision Notice on 14 July 2021, upholding the DVLA's reliance on s. 41 (2) FOIA. It did not determine the applicability of s. 31 FOIA. The Appellant appealed to the Tribunal.

The Law

10. S. 1(1)(a) FOIA provides that a person making an information request is entitled to be informed in writing whether the public authority holds information within the scope of the request. By virtue of s. 1 (6) FOIA, this is known as "the duty to confirm or deny". S. 1 (1) (a) is disapplied by s. 2(1) FOIA where a relevant exemption in Part II of FOIA is engaged. S. 41 is a relevant provision in Part II FOIA.

11. S. 41 FOIA provides as follows:

> *(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.*
>
> *(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.*

12. We note that the leading textbook on information rights law, "Information Rights Law and Practice", edited by Philip Coppel, comments that '*As a matter of practice, other than where the request is so specific that the mere confirmation that the information is held (without a disclosure of that information) would be to disclose the gist of the information, it is difficult to contemplate circumstances in which a public authority could properly refuse to confirm or deny that it held information under s. 41 (2)'*[2].

13. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*

[2] Fourth edition page 803.

(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

14. The Upper Tribunal's Decision in *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)[3], confirmed that a public authority must pass through the 'gateway' of compliance with ss. 1, 2 and 17 FOIA before being entitled to raise a late exemption before the Tribunal.

15. The applicable time for the public authority, Information Commissioner and Tribunal to assess any relevant public interest balance test is the date on which the public authority complies with s. 1, 2 and 17 of FOIA by issuing a response confirming or denying that information is held and, if held, claiming reliance on any qualified exemptions. This was confirmed by the Upper Tribunal's Decision in *Maurizi v IC and CPS* [2019] UKUT 252 (AAC)[4] paragraphs [61] to [73].

The Decision Notice

16. The Decision Notice concluded at paragraph 27 that the requested information, if held, had the "necessary quality of confidence" because it is not otherwise available and is more than trivial. Furthermore, that it was subject to an implied duty of confidence and that its disclosure would be detrimental to the deceased person's estate. It found at paragraph 34 that "*As…the conditions under section 41 (1) (a) and 41 (1) (b) are met…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".*

17. The Decision Notice found a breach of s. 10 FOIA in DVLA's delay in responding to the information request but required no steps to be taken.

Submissions and Evidence

18. The Appellant's Notice of Appeal dated 15 July 2021 relied on grounds that: (i) the Decision Notice was wrong in law to conclude that disclosure of the information held would constitute an actionable breach of confidence to which

[3] 2018 AACR 29ws.pdf (publishing.service.gov.uk)

[4] Maurizi v The Information Commissioner and The Crown Prosecution Service (Interested Party: Foreign and Commonwealth Office): [2019] UKUT 262 (AAC) - GOV.UK (www.gov.uk)

there was no public interest defence; and (ii) that disclosure was in the public interest in the particular circumstances of this case.

19. The First Respondent's Response dated 4 August 2021 resisted the appeal and maintained the analysis of the Decision Notice. In response to the grounds of appeal, it is submitted that the information (if held) would be likely to include health information and that confirming whether this information was held would constitute an actionable breach of confidence. It is further submitted that the Appellant has not sufficiently particularised his argument as to why the Decision Notice was wrong in law.

20. The Appellant's Reply dated 6 August 2021 stated that the Appellant became aware that the Abedi brothers had applied for provisional driving licences because it was reported by the Manchester Evening News as having been presented as a fact to the jury in the Hashem Abedi trial. He submitted that it was not permissible to NCND information which is already in the public domain. He produced a copy of the Manchester Evening Standard blog which read:

> *"The jurors hear that neither Hashem Abedi nor brother Salman had passed a driving test. Both had applied for provisional licences but had not passed a driving test, the court hears".*[5]

21. The Second Respondent's Response dated 22 October 2021 submitted that any information held had the quality of confidence and that if it were placed into the public domain, it would constitute a breach of confidence to which there was no public interest defence. It explained that its general approach was that the public had a right to expect that information provided to it in connection with driving licences and its subsequent responsibilities would remain confidential and that there is a public interest in not disclosing it. In its Response, the Second Respondent additionally purported to make a late claim to reliance on s. 21 FOIA before the Tribunal.

22. The Second Respondent submitted that the question of whether information is in the public domain is one of fact and degree. It is submitted that because the information contained in a driving licence application has the necessary quality of confidence, it follows that confirmation whether the information is held or not held also has the necessary quality of confidence. It is submitted that any information in the public domain did not emanate from DVLA, therefore any information which DVLA holds is not generally accessible.

23. The Appellant's Reply to the Second Respondent's Response dated 7 November 2021 referred to his FOIA request to the Home Office about Salman Abedi's passport. He states it complied with its duty to confirm or deny, released some information, and claimed relevant exemptions. He describes other ongoing Tribunal cases regarding information requests about Salman Abedi. He

[5] Page A47 of the open bundle.

characterises DVLA's approach as 'penalising standard journalistic practice'. He comments on the new/alternative exemptions claimed by DVLA.

24. The Second Respondent made further submissions dated 6 December 2011 (*sic)*. These reminded the Tribunal that FOIA is 'motive blind'. It submitted that the information in the public domain is extremely limited and was not supplied by DVLA. It is submitted that it is not relevant to compare the approaches of other public authorities.

25. The Tribunal received open and closed witness statements from Robert Toft, Head of Data Protection Policy, Freedom of Information and Police Support Group at DVLA. His open witness statement contained many legal submissions in addition to some evidence of fact. He refers the Tribunal to a 2008 Decision of the First-tier Tribunal which found that knowledge obtained in a criminal trial is likely to be restricted to a limited number of people and relatively short-lived[6]. He invites the Tribunal to reach a similar conclusion in this appeal.

Conclusion

26. It seems to us that the DVLA in its response to the information request and the Decision Notice have both conflated two issues that ought to have been considered separately. These are (i) whether compliance with the duty to confirm or deny would itself constitute an actionable breach of confidence under s. 41 (2) FOIA; and (ii) whether disclosure of any information held would constitute an actionable breach of confidence under s. 41 (1) FOIA. The Decision Notice at paragraph 34 (see paragraph16 above) fails to acknowledge a distinction between the two issues. We contrast that approach with the suggested approach in Mr Coppel's textbook (quoted at paragraph 12 above) which is to consider whether *the mere confirmation that the information is held (without a disclosure of that information) would be to disclose the gist of the information.* This clearly suggests a two-part test, with the question as to reliance on s. 41 (2) FOIA being whether confirming or denying whether information is held would, by itself, serve to disclose the substance of the information which it is sought to protect.

27. The case law to which the parties have referred us confirms that the first question in relation to either part of s. 41 FOIA is whether the information concerned has the necessary quality of confidence. This means, amongst other things, that it must not be information which is available to the public. We have asked ourselves whether the mere confirmation that information is held has the necessary quality of confidence on the unusual facts of this case.

28. We do not know exactly how the 'agreed facts' were presented in the criminal trial of Hashem Abedi. However, we take judicial notice of the fact that the admission of a fact under s. 10 of the Criminal Justice Act 1967 is conclusive evidence of the matters thereby admitted. A written record of the admitted fact is required to be created under rule 25.13 of the Criminal Procedure Rules 2020. It

[6] EA/2008/0026.

seems likely that this procedure was followed at the trial of Hashem Abedi, given the terms in which the information (recorded at paragraph 20 above) was reported.

29. We are not bound by Decisions of differently constituted panels of the First-tier Tribunal, and we disagree with the approach taken in the First-tier case cited by Mr Toft for the following reasons. Any member of the public can sit in the public gallery of a criminal trial and observe proceedings; they can hear agreed facts being read to a jury; they can apply for a transcript of the proceedings; they can request a copy of the written record of the agreed facts; and they can read about the proceedings on the internet or in a newspaper. In this way, a criminal trial is a very public event.

30. It is trite law that a matter referred to in open court is a matter of public record, with many important principles underpinning the policy as to transparency in the justice system. It is anathema to that principle in our view to consider that an agreed fact, read out in open court, has the 'necessary quality of confidence'. The parties have not adequately addressed this issue in their submissions, except for Mr Toft who states in his witness statement that the Second Respondent was not a party to the proceedings (and by implication did not agree to disclosure of the agreed fact). We regard that as a moot point in the context of a criminal trial where the Crown has decided to place agreed facts before a jury.

31. If we are wrong to conclude that an agreed fact read out in open court does not have the 'necessary quality of confidence', then we note that the 'agreed facts' in this case were reported on the BBC and by local newspaper outlets[7]. The evidence before us shows that the Manchester Evening News ran a live blog of events in the criminal trial[8], which we would expect to have been accessed from all over the country, if not the world given the level of interest in this trial. It does not seem to us that Mr Toft's view that the reporting of the agreed facts was regional and minimal can be accepted. In this way also, we take the view that the agreed facts placed into evidence at the criminal trial thereby lost any quality of confidence.

32. It does not seem to us that confirming or denying whether information is held would in itself serve to disclose the gist of any information held in this case. The Appellant understandably took the view that information within the scope of his request would be held by DVLA because it had been publicly confirmed that Salman Abedi had applied for a provisional driving licence. In our view, mere confirmation or denial of whether information is held by DVLA would not in itself reveal anything more than is already in the public domain.

33. For these reasons, we conclude that there is an error of law in the Decision Notice in its acceptance that s. 41(2) FOIA applied in the circumstances of this case. We allow the appeal in respect of the NCND response because we find that

[7] Robert Toft's open witness statement paragraph 46.

[8] Hearing Bundle page A47

s. 41(2) FOIA is not applicable to disapply the duty to confirm or deny under s. 1 (1) (a) FOIA.

34. However, that does not mean that the Tribunal has jurisdiction to move straight on to consider (i) what information is held; and (ii) whether any exemptions to the duty of disclosure apply. The parties have made submissions based on the understanding that the Tribunal would be able to take this path if it allowed the appeal against the NCND response, and the Second Respondent has attempted to raise late exemptions for the first time before the Tribunal after a NCND response to the information request. We regard these submissions as misconceived for the following reasons.

35. Firstly, the Second Respondent's approach of issuing a NCND response to the information request means that it has not yet passed through the "gateway" of compliance with ss. 1, 2 and 17 of FOIA which, following the Upper Tribunal's Decision in *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC), it would have to do before being entitled to raise a late exemption before the Tribunal. As we have concluded that the Second Respondent was not entitled to issue a NCND response, the correct course now is for the Second Respondent to issue a fresh response and at that stage, if it confirms information within the scope of the request is held, it should disclose it or claim any exemptions that it considers apply.

36. Secondly, the applicable time for the Second Respondent, Information Commissioner and Tribunal to assess any relevant public interest balance test (for any qualified exemptions claimed) will be the date on which the Second Respondent complies with s. 1, 2 and 17 of FOIA by issuing a response which claims reliance on those exemptions, following the Upper Tribunal's Decision at paragraphs [61] to [73] in *Maurizi v IC and CPS* [2019] UKUT 252 (AAC) This date had not yet occurred. The public interest balance may of course look different now than it would have done at the time of the original response.

37. It has not been necessary for us to refer to the closed bundle in making this Decision, so there is no closed annexe.

38. We allow the appeal and make the substituted Decision Notice above.

(Signed)

JUDGE ALISON MCKENNA **DATE: 10 February 2022**