

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2018

Public Authority: Driver and Vehicle Licensing Agency
Address: Longview Road
Morrison
Swansea
SA6 7JL

Decision (including any steps ordered)

1. The complainant has requested information relating to the audits carried out by or on behalf of the Driver and Vehicle Licensing Agency (DVLA) in the first three months of 2017 of members of either the British Parking Association (BPA) or of the International Parking Community (IPC or equivalent).
2. The DVLA provided some information but refused to disclose the remainder citing section 31(2)(a) – (c) by virtue of section 31(1)(g) and section 40(2) of the FOIA.
3. The Commissioner's decision is that the DVLA has incorrectly relied on sections 31(2)(a) – (c) by virtue of section 31(1)(g) of the FOIA. However, the DVLA has correctly applied section 40(2) of the FOIA to the personal data of third parties referenced throughout the withheld information.
4. The Commissioner therefore requires the DVLA to take the following steps to ensure compliance with the legislation.
 - The DVLA should disclose the withheld information to the complainant with the personal data of third parties redacted under section 40(2) of the FOIA.
5. The public authority must take these steps 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.

Request and response

6. On 4 April 2017, the complainant wrote to the DVLA and requested information in the following terms:

"Would you be kind enough to supply copies of the audit reports for audits carried out by the DVLA or on behalf of the DVLA in the first 3 months of 2017. These are the audit reports of members of either the British Parking Association (BPA) or of the International Parking Community (IPC or equivalent).

For all the companies for which you supply a copy audit, may I also have a copy of their latest "Data Governance Assessment" which they have supplied.

Would you also supply a list of companies from the BPA and the IPC who have had their access to the Registered Keeper database removed in 2017 and the reasons for this.

And similarly would you also supply a list companies from the BPA and the IPC who have had their access to the Registered Keeper database allowed or reinstated in 2017 and the reasons for this

Could I also add that they last time I requested this information, FOIR5078, the DVLA supplied what might have been called a "sanitised" version of the audit report. Would you be kind enough to supply the version which contains the initial audit report prior to issue rectification as well as the "sanitised"/all clear version."

7. The DVLA issued a partial response on 5 May 2017. It stated that it wished to rely on section 31 of the FOIA but required additional time to consider the public interest test.
8. The DVLA responded in full on 5 June 2017. It confirmed that no companies had their ability to enquire of the DVLA's vehicle database "removed" or "reinstated" in 2017. So, for this element of the request no recorded information is held. The DVLA provided a copy of the final audit letters sent to the relevant private car parking companies with personal data redacted under section 40(2) of the FOIA. However, it refused to disclose the remaining information, including the "Data Governance Assessment", citing section 31(2)(a) – (c) by virtue of section 31(1)(g) of the FOIA.

9. The complainant requested an internal review on 5 June 2017.
10. The DVLA carried out an internal review and notified the complainant of its findings on 5 September 2017. It upheld its application of section 40(2) and section 31(2)(a) – (c) by virtue of section 31(1)(g) of the FOIA and referred the complainant to the Commissioner.

Scope of the case

11. The complainant first contacted the Commissioner on 31 July 2017. At this time his complaint was that the DVLA's internal review process had not been completed. The case was not allocated to a case officer until 9 September 2017 and by this time the DVLA had completed the internal review process and notified the complainant of its findings. The complainant's concerns were then that the DVLA continued to refuse to disclose the requested information. He referred to five previous requests to the DVLA where the information had been provided and questioned why section 31 of the FOIA had been applied in this instance.
12. The Commissioner's investigation has focussed on the application of section 31(2)(a) – (c) by virtue of section 31(1)(g) and section 40(2) of the FOIA.

Background

13. The theme of the request is the auditing of private car parking companies who receive vehicle keeper data from the DVLA. The DVLA is able to disclose that information from its vehicle record if a person can demonstrate 'reasonable cause' to have it. Disclosure of this information under 'reasonable cause' is permitted under Regulation 27(1)(e) of the Road Vehicles (Registration & Licensing) Regulations 2002. The audit process is necessary to ascertain whether any person has failed to comply with this legislation and the Data Protection Act 1998.
14. The private car parking companies can only request vehicle data from the DVLA if they are a member of an Accredited Trade Association. The request concerns The British Parking Association (BPA) and the International Parking Community (IPC) each which operate their own Code of Conduct.
15. If a private car parking company ceases to be a member of an Accredited Trade Association their access to data can be suspended. Similarly, if the DVLA has concerns about the conduct of a particular car parking company and its compliance with the relevant legislation it can suspend access and even terminate an existing contract with a company on a permanent basis.

Reasons for decision

16. Section 31(1)(g) of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

17. Subsection (2) states that the purposes referred to in subsection 31(1)(g) are –

(a) The purposes of ascertaining whether any person has failed to comply with the law.

(b) The purpose of ascertaining whether any person is responsible for any conduct which is improper.

(c) The purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

(There are further 'purposes', (d) to (j), but these have not been referred to here as they are not relevant to the circumstances of this case).

18. Section 31 is also a qualified exemption. It is therefore subject to the public interest test whereby the public authority must consider the arguments for and against disclosure and demonstrate that the public interest rests in maintaining the exemption.

19. The DVLA has stated that disclosure would be likely to prejudice its ability to audit the car parking companies falling within the scope of the request; a function designed to ascertain whether they have complied with the relevant legislation referred to in paragraph 13 above, whether they are responsible for any conduct which is improper and whether there are any circumstances which would justify regulatory action.

20. The Commissioner is satisfied that the DVLA is entrusted with the function of ensuring that vehicle data is only disclosed to those that demonstrate 'reasonable cause' and in accordance with the legislation referred to in paragraph 13 above. She acknowledges that an efficient audit process is required in order for the DVLA to do that. The remaining issue now is whether disclosure of the requested information would or would be likely to prejudice the DVLA's ability to audit efficiently and therefore perform this function.

21. The DVLA stated that disclosure of the withheld information would allow those being audited and any new companies to be forewarned or foresee

what the audit process would consist of and allow them to obfuscate or withhold information during the audit process. It explained that the DVLA has the function to audit members of the BPA or IPC and take a decision on the outcome of that audit, taking appropriate action as a result. To do this effectively it needs the room to explore all relevant facts and issues that arise. It confirmed that it would not be appropriate to disclose information about the audit process into the public domain which could be used by third parties to hinder this process. It referred to various online forums which regularly discuss vehicle records and private car parking companies, advising that this demonstrates there is a real risk to such a hindrance occurring.

22. The DVLA confirmed that the audit process relies on the voluntary supply of information from private car parking companies and there is a need to have effective dialogue between the parties. The independent and voluntary supply of information is required without the influence of knowing how other audits have been carried out or concluded. It explained further that if a company were aware that a specific action was needed to resolve an issue in order to obtain an acceptable audit score, it would be likely that with the appropriate knowledge that company would advise the DVLA that that action had been taken when in fact it may not have.
23. It acknowledged that it had supplied the requested information to the complainant in the past with personal data redacted. However, it stated that it considered the circumstances surrounding the disclosure of this information on a regular basis had since changed. It informed the complainant in its internal review response that the change in circumstances is, specifically, a change in audit processes for private car parking companies which have come into place since the date of his last request. It argued that while many companies will have been the subject of an 'audit' already, some more than once, the new process will be new to all those companies subject to it for the first time.
24. Dealing with this aspect first, the DVLA has confirmed to the complainant that the process has changed (in its internal review response of 5 September 2017) but does not wish for any further information to be disclosed or any further discussion to take place about this change in this decision notice, as it considers such information to be confidential.
25. The Commissioner has therefore produced a confidential annex to enable her analysis of this argument to take place in private. She is however able to confirm that she does not consider the arguments presented about the change in the audit process to be sufficient to demonstrate that section 31(2)(a) – (c), by virtue of section 31(1)(g) of the FOIA is engaged.

26. Turning now to the arguments presented by the DVLA that can be discussed in the main body of this notice, the Commissioner does not agree that disclosure would be likely to prejudice the DVLA's ability to audit private car parking company's compliance with the legislation referred to in paragraph 13 above or its ability to carry out the functions described in section 31(2)(a) – (c), by virtue of 31(1)(g), of the FOIA. She will now explain why.
27. On further review the DVLA accepted that disclosure of the withheld information would not provide additional information to those private car parking companies that have already been audited. It accepted therefore that disclosure would not enable these companies to tailor their responses accordingly and only provide 'what is needed' or 'what will' get them a good audit rating. However, it stated that disclosure would be likely to assist new companies that wish to access this data and which to date have not be subject to an audit. They could review the withheld information in this case, know what to expect and the types of responses that produced a particular outcome. It said it would essentially be placing into the public domain a 'how to pass a DVLA audit' reference guide.
28. With prior knowledge of how another company responded to issues identified during a past audit and going on to obtain a green/pass rating, a company being audited may provide the DVLA with the same kind of explanations as that provided previously by other companies. The DVLA stated that while its processes are likely to identify any false or fraudulent evidence or information being provided, a company that might be desperate to pass an audit (driven perhaps by the criticality of the supply of DVLA data to its business) might be tempted to resort to such undesirable tactics.
29. But the Commissioner notes that the DVLA has also stated that an audit is conducted at a specific point in time regardless of any previous knowledge of the process. Should it be found on initial enquiry that a company has failed an audit, they will be required to rectify those failings themselves and not rely on the practices of other companies that may have rectified a similar or identical failing. This argument seems to contradict what is stated above and how *useful* the information could be to new companies and therefore how *likely* prejudice is to occur to the DVLA's overall ability to audit and ensure compliance with the relevant legislation.
30. The Commissioner also notes that the DVLA requests evidence to support any rectification made by the relevant companies if this is indeed appropriate and requests evidence that they have fully complied with the legislation for a random selection of requests. It has clear, defined and robust procedures in place for those that fail to respond, fail

to provide the necessary evidence or potentially supply responses that mimic those previously supplied by other companies on which a satisfactory audit rating was obtained. These include a red warning so the company is immediately on notice of its failings and the DVLA's concerns, a repeat audit in close succession, suspension of service for a specified period and even permanent exclusion from obtaining this data.

31. Private car parking companies rely heavily on access to this information in order to process parking offences and collect the relevant fines. It is not in their commercial interests to flout the audit process, provide false information or indeed fail to cooperate or supply the information and evidence the DVLA requires. The DVLA has referred itself to the 'criticality' of this information for their businesses. There is no benefit in resorting to such tactics considering the consequences of doing so. The likelihood seems remote and in any event the DVLA has the relevant processes and procedures in place to pick this up and address it. If a company is suspended from using the service it is unable to access vehicle keeper data for the entire period of its suspension. Even when service is reinstated, at a cost currently set at £445.44 for all companies, the company is not able to access the vehicle data for any alleged offences that have taken place during the suspension period. This could equate to a significant loss in revenue for the companies involved.
32. For the above reasons the Commissioner is not satisfied that disclosure of the requested information would be likely to prejudice the DVLA's ability to carry out the functions outlined in section 31(2)(a) to (c), by virtue of section 31(1)(g) of the FOIA. As she has decided that the exemption is not engaged, there is no requirement to go on to consider the public interest test.

Section 40

33. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach any of the data protection principles outlined in the Data Protection Act (DPA).
34. Personal data is defined as:

..."data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

And includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual..."

35. The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle states -

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

36. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of section 40(2) of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

Is the requested information personal data?

37. The DVLA has redacted the names and contact details of junior staff from the information it disclosed to the complainant on 5 June 2017. The Commissioner also notes that the withheld information contains the names and contact details of a number of employees at the various private car parking companies it audited.
38. The Commissioner considers the name and contact details of a DVLA employee or an employee of a private company is information from which that individual can easily be identified. She is therefore satisfied that this information constitutes the personal data of these third parties.

Would disclosure be unfair?

39. With regards to the personal data of junior members of staff, the Commissioner is satisfied that junior staff in a public authority will have less or even little expectation that their personal data could be disclosed to the world at large when compared to more senior members of staff. Generally speaking junior staff will not hold positions of sufficient seniority to warrant the transparency and accountability FOIA can provide. Whereas, senior staff often make important decisions, are

responsible for carrying out public functions or managing public funds. They are seen to hold positions of autonomy and responsibility or have public facing roles and therefore will or should expect public scrutiny and their personal data to be disclosed into the public domain.

40. As junior members of staff hold little expectation that their personal data could be disclosed to the world at large, the Commissioner is satisfied that if this were to happen it could cause them distress and upset and would be intrusive.
41. Similarly, the personal data of private organisations' staff, these individuals will hold little expectation that their names and contact details could be released into the public domain. Instead they will hold the expectation that this information will be treated as private and confidential by the public authority they are corresponding with. They will expect their personal data to be used and shared specifically for the purposes of which they are communicating and nothing more. Again, the Commissioner is therefore satisfied that disclosure could cause these data subjects' distress, upset and be an unwarranted intrusion into their private lives.
42. For the above reasons, the Commissioner is satisfied that disclosure of this information would be unfair and in breach of the first data protection principle. She has therefore concluded that section 40(2) of the FOIA applies to the information described in paragraph 37 and 38 above.

Other matters

43. The Commissioner notes that the DVLA took three months to carry out its internal review and notify the complainant of its findings. The section 45 code of practice advises public authorities to complete an internal review within 20 working days and certainly no later than 40 working days even in complex or voluminous cases.
44. The Commissioner would therefore like to remind the DVLA of the requirements of the section 45 code of practice and ask it to ensure that such reviews are completed within the recommended timeframe in the future.

Right of appeal

45. 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

46. 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.
47. 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

Samantha Coward
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