

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2021

Public Authority: **Driver and Vehicle Licensing Agency (Executive Agency of the Department for Transport)**

Address: **Longview Road
Morrison
Swansea SA6 7JL**

Decision (including any steps ordered)

1. The complainant has requested correspondence between the Driver and Vehicle Licensing Agency (DVLA) and the Information Commissioner's Office (ICO) from 2019 to 13 March 2020 regarding its release of data under the Road Vehicles (Registration and Licensing) Regulations 2002. The complainant also requested any legal advice regarding that regulation from the five years prior to March 2020. The DVLA refused to provide any of this information, citing section 35(1)(a) FOIA (the formulation of government policy etc) and section 42(1) FOIA (legal professional privilege).
2. The Commissioner's decision is that the DVLA has incorrectly cited section 35(1)(a) and that the exemption is not engaged. However, she accepts that the exemption at section 42(1) is engaged and that the public interest favours non-disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information that was withheld under section 35 of the FOIA, with the exception of any third party personal data relating to junior staff and the contact details of all staff.

4. 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.

Background

5. The context within which this request has been made is the DVLA sharing vehicle keeper data with private parking companies. Clearly this issue is a controversial one but it has also raised data protection issues.
6. The following information about the DVLA's releasing of information is from the government publishing service –

"We receive requests for information from individuals and private organisations as diverse as car parking and trespass management companies, solicitors, finance houses and property managers. We check all paper applications to make sure they meet reasonable cause.

Organisations and companies that request data through a secure electronic link must first serve a six month probationary period making manual requests only. Strict contractual terms describe when information may be requested and how it can be used. When we do release data it is always for a specified purpose...

DVLA provides data to allow landowners or their agents to pursue their legal rights and resolve disputes.

To make sure motorists are treated fairly when any parking or trespass charge is pursued, DVLA will only provide vehicle keeper details where the company is a member of an Accredited Trade Association (ATA).

ATAs enforce a code of practice which covers many aspects of a car parking operator's business. While complying with the code of practice is an important consideration for DVLA when releasing vehicle keeper data, not all requirements of the code affect reasonable cause.

DVLA will not disclose data to parking or trespass companies who are not members of an ATA. We expect the ATAs to monitor adherence to the code of practice and investigate and address non-compliance when it arises.”¹

7. The request refers to Regulation 27 of the Road Vehicles (Registration and Licensing) Regulation 2002. This legislation,

“... covers the release of information from DVLA’s vehicle register to private and public sector organisations providing they can demonstrate reasonable cause to receive it. Reasonable cause is not defined in law but the government’s policy is that it should relate to the vehicle or its use, following incidents where there may be liability on the driver’s part.”²

Request and response

8. On 13 March 2020 the complainant made the following request for information under the FOIA –

“Provide all information which is correspondence between you and the Information Commissioner's Office from 2019 to date regarding you releasing data under Regulation 27(1)(e), The Road Vehicles (Registration and Licensing) Regulations 2002. Provide all legal advice you have received regarding this regulation in last 5 years. Provide the date you are going to start complying with GDPR/DPA18 by checking for reasonable cause before releasing data under this regulation.”

9. The DVLA responded on 6 April 2020 and explained that it was citing section 35 and section 42 but that it needed more time to consider the public interest.
10. On 28 April 2020 the DVLA refused to provide the information relating to part one of the request, citing section 35 of the FOIA which concerns the formulation and development of government policy. The DVLA also refused the information requested at part two of the request, citing section 42 which relates to legal professional privilege (LPP). The DVLA explained that part three was not a request for recorded information but gave advice. The public interest in respect of section 35 was set out in
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¹ [inf266-release-of-information-from-dvlas-registers.pdf \(publishing.service.gov.uk\)](#)

² [Personal information charter - Driver and Vehicle Licensing Agency - GOV.UK \(www.gov.uk\)](#)

Appendix A and in respect of section 42 was set out in Appendix B of the refusal notice.

11. On the same day the complainant asked for an internal review to be carried out.
12. On 2 June 2020 the DVLA sent an internal review outcome (dated 1 June 2020) in which it maintained its original position.

Scope of the case

13. The complainant contacted the Commissioner on 3 June 2020 to complain about the way his request for information had been handled.
14. The Commissioner wrote to the DVLA on 9 February 2021, 23 April 2021 and finally on 19 May 2021 in order to investigate the reasons why the DVLA believed that these exemptions were appropriately cited.
15. The Commissioner considers that the scope of this case concerns the DVLA's citing of section 35(1)(a) and section 42(1).

Reasons for decision

Section 35(1)(a) – formulation of government policy etc

16. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to-

(a) The formulation or development of government policy...

The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

17. The Commissioner's guidance states that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated

and developed within a single government department and approved by the relevant minister.

18. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world;
 - and the consequences of the decision will be wide-ranging.
19. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
20. The exemption does not cover information relating purely to the application or implementation of established policy.
21. The Commissioner's guidance on section 35³ says the following:

"In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives." (paragraph 26)

"To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy." (paragraph 33)

The term "relates to" in section 35 means the information does not

³ [government-policy-foi-section-35-guidance.pdf \(ico.org.uk\)](https://ico.org.uk/government-policy-foi-section-35-guidance.pdf)

itself have to be created as part of the activity. Any significant link between the information and the activity is enough. Information may 'relate to' the activity due to its original purpose when created, or its later use, or its subject matter. Information created before the activity started may still be covered if it was used in or affected the activity at a later date. Information created after the activity was complete may still be covered if it refers back to the activity. Note that the timing of the request is not relevant here. The question is whether the information relates to the activity, irrespective of when the request was made.

22. The Commissioner's guidance explains that,

"...even after a policy decision has been made, issues arising during implementation may then feedback into a policy improvement process, and some details may be adapted on an ad hoc basis during implementation. However, fine-tuning the details of a policy does not automatically amount to policy development, and sometimes may more accurately be seen as adjustments to its implementation. Whether a particular change amounts to policy development will depend on the facts of that case." (paragraph 36)

23. The Commissioner does however recognise that there are no universal rules. Policymaking models are always evolving, and may vary widely between departments and situations. It is likely that some policy areas will follow a more rigid, formal development process to maintain stability and certainty, while other policy areas are inherently more fluid and need to evolve more quickly. Depending on the context, policymaking may also be proactive or reactive, formalised or management.

24. The DVLA has explained to the Commissioner that the government policy that this relates to is the DVLA's data protection policy which it does not consider as settled because the ICO and the DVLA have been considering the data protection issues under Regulation 27(1)(e) of the Road Vehicle (Registration and Licensing) Regulations. The Commissioner has been provided with more detail by the DVLA but she is unable to refer to it except in general terms in this decision notice.

25. The Commissioner wrote to the DVLA on 9 February 2021, 23 April 2021 and finally on 19 May 2021 in order to interrogate fully the reasons why the DVLA believed that this exemption was engaged. She quoted her guidance as in paragraph 22 above.

26. The Commissioner's final correspondence with the DVLA asked additional questions concerning how the withheld information falls within the formulation and development of government policy in itself. She questioned whether this could not be considered as the implementation of government policy. The Commissioner asked the DVLA to consider the criteria outlined in paragraph 18 and respond more specifically.
27. The DVLA repeated its view that the government policy was its data protection policy as set out in paragraph 24 above. The DVLA considered that the consequences could be wide-ranging and explained its reasoning which cannot be reproduced here in its entirety. It argued that the nature of the subject meant that it would be engaging with relevant government ministers on this issue. The DVLA contended that it was not considering an ad-hoc adjustment or fine-tuning an existing policy.
28. The Commissioner has consulted her own guidance and concluded that she is not satisfied that the DVLA has demonstrated that the withheld information concerns the development rather than the implementation of government policy. Her view is that any consideration of an adjustment to data protection policy in this context is unlikely to alter the original objective but rather to avoid unintended consequences and consequently that it is an implementation decision as opposed to a policy decision. The Commissioner notes that the DVLA has said it will "*be engaging with*" relevant ministers but this falls short of confirming that the Cabinet or the relevant minister will make the final decision.
29. For these reasons, the Commissioner has concluded that section 35(1)(a) is not engaged and she has not therefore gone on to consider the public interest,

Section 42 – Legal professional privilege (LPP)

30. Section 42(1) states that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

31. The Commissioner has been provided with the information within the scope of part two of the request that has been withheld by the DVLA under section 42.

32. In [Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry \(EA/2005/0023, 4 April 2006\)](#) the FTT described LPP as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation." (paragraph 9)

33. LPP protects an individual's ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered. For these reasons LPP evolved to make sure communications between a lawyer and his or her client remained confidential.
34. Section 42 is a class based exemption. The requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information. However, this exemption is subject to the public interest test.
35. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
36. The DVLA has explained to the Commissioner that it took advice in respect of the lawful disclosure of vehicle keepers' personal data to private parking operators. It considers therefore that the withheld information falls under the category of LPP. The advice was given by a professional legal adviser, named by the DVLA. The advice was offered in the legal adviser's professional capacity and was made for the sole purpose of obtaining legal advice about this matter.
37. Having read the withheld information, the Commissioner agrees that it consists of confidential communication between client and lawyer and it was made for the dominant purpose of seeking or giving legal advice.

The Commissioner is not aware that the withheld information has been made public and therefore privilege has not been waived. The exemption is consequently engaged.

38. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the information

39. The DVLA has stated that there is an assumption in favour of disclosure and the rationale behind the assumption is based on accountability, transparency, furthering public debate etc.
40. The complainant contends that the public interest favours the disclosure of the withheld information but he does not specify why, except to say that the public interest was wrongly applied.

Public interest in maintaining the exemption

41. The DVLA argues that the exemption should be maintained to ensure the frankness and openness between the legal adviser and the DVLA which would otherwise be compromised by releasing the information. It adds that the advice is recent and live.
42. The DVLA also pointed the Commissioner to her own guidance –

*"The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice."*⁴

The balance of the public interest

43. In *Calland v Information Commissioner & the Financial Services Authority* (EA/2007/0136, 8 August 2008), the Tribunal commented:

"The general public interest in disclosure of communications within public authorities has been referred to, usually under the headings of 'transparency' and 'informing the public debate', in a number of decisions of this Tribunal. What is quite plain, from a series of

⁴ [legal_professional_privilege_exemption_s42.pdf\(ico.org.uk\)](#)

decisions beginning with Bellamy v IC EA/2005/0023, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential.”⁵

44. The Commissioner has not been provided with compelling reasons by the DVLA why the information should be withheld but this may be because specific argument might reveal something about the content of that advice. She has not been provided with clear, compelling and specific justification by the complainant for disclosing this information. Although she accepts that a significant number of people might well have an interest in this matter she does not consider that this is sufficient to override the confidentiality between lawyer and client. The information was recent and live at the time of the request and the DVLA was engaged in the ongoing consideration of legal issues surrounding it. The withheld information should therefore not be disclosed.

⁵ [Microsoft Word - Document in Microsoft Internet Explorer \(tribunals.gov.uk\)](#)

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@justice.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

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