



Neutral citation number: [2024] UKFTT 00218 (GRC)

First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights

Appeal Number: EA/2022/0412

Considered on the papers  
On 20 February 2024

Decision given on: 15 March 2024

Before

JUDGE OF THE FIRST-TIER TRIBUNAL SWANEY  
TRIBUNAL MEMBER SHAW  
TRIBUNAL MEMBER SIVERS

Between

DR PHILIP WISE

Appellant

and

DRIVER AND VEHICLE LICENSING AGENCY

First Respondent

and

INFORMATION COMMISSIONER

Second Respondent

### DECISION

1. The appeal is dismissed.
2. The decision that the DVLA does not hold the requested information and that the DVLA did comply with section 16(1) is confirmed.

### REASONS

#### **Background**

3. The appellant's request for information stems from the requirement when applying for renewal of his driving licence that he cut his existing licence in half and return it to the first respondent (the DVLA). This prompted the appellant to write to the DVLA and ask the following question:

Why has the DVLA not reconsidered the costs and benefits of requiring the return of expiring driving licences and come to a similar conclusion to the banks i.e. to discontinue an outdated practice where costs exceed its benefits?

4. The DVLA appears to have treated this as a request for information made pursuant to FOIA. In a preamble to the supplementary open bundle, the appellant states that this is not in fact his Freedom of Information (FOI) request. He states that the question set out above was an enquiry made on 12 November 2021 via the DVLA website and was made in advance of his FOI request, which he says was made on 22 January 2022. The respondent replied to his online enquiry by email dated 22 November 2021 in the following terms: 'I can confirm that we are reviewing our current procedures around all documents being returned to us, however it is required for now'.
5. On 12 January 2022 the appellant wrote to the DVLA making what he considers to be the request for information pursuant to FOIA:

I've attached a copy of my original enquiry to DVLA in relation to the requirement to return expiring/expired driving licences (see attached Word document) and the response received from DVLA contact centre (see attached Outlook item). As you can see the response includes the words in quotations in your e-mail below. Since good practice requires that all such reviews are carried out in accordance with pre-specified Terms of Reference, I would like to receive a copy of those. Please let me know if this does not provide sufficient clarification.

6. The DVLA responded on 12 January 2022 seeking further information:

Thank you for contacting the DVLA, I would be grateful if you can clarify, you have stated (case reference number 05636763) that DVLA is "reviewing our current procedures around all documents being returned to us". I would like to receive a copy of the terms of reference for that review.

Can you state what your case is in regards to and which copy of the terms of reference for that review is in regards to?

7. The appellant replied on 12 January 2022:

I was advised on 22/11/21 (case reference number 05636763) that DVLA is "reviewing our current procedures around all documents being returned to us". I would like to receive a copy of the terms of reference for that review.

8. In a letter dated 24 January 2022 the DVLA responded to this question, stating that while it holds information which falls within the scope of the appellant's request, it was withheld pursuant to section 35(1) of the Freedom of Information Act 2000 (FOIA), as information relating to the formulation or development of government policy. The DVLA stated:

Outside the FOIA, we can advise that it is a long-standing requirement to return the previous driving licence to the DVLA when a new licence has been issued. This helps to reduce the number of previous driving licences in circulation and to ensure that drivers only have one licence at any time. This requirement is currently under consideration.

9. By email dated 25 January 2022 the appellant requested a review of the decision. The appellant disputed that the balance fell in favour of withholding the information and contended that the DVLA had failed to discharge its duty to assist him refine his request pursuant to section 16 of FOIA.
10. This led to a response dated 11 February 2022 in which the DVLA maintained that the information requested was exempt from disclosure pursuant to section 35(1) of FOIA.
11. The appellant complained to the second respondent (the Commissioner) on 12 February 2022. The appellant disputed that the DVLA had carried out the public interest balancing test correctly and contended that it ought to have been possible for the DVLA to provide a response with redactions relating to information in respect of which there were genuine concerns pursuant to section 35(1).
12. During the course of the Commissioner's investigation, the DVLA revised its position stating that the requested information is not held. The Commissioner therefore considers that the scope of the appeal is whether the DVLA has complied with sections 1 and 16 of FOIA.

### **The respondent's decision**

13. In his letter dated 21 November 2022 the Commissioner decided that the DVLA does not hold the requested information, but has failed to comply with section 1 of FOIA. The Commissioner found that the respondent had complied with section 16 of FOIA. The Commissioner decided that the DVLA was not required to take any action and gave the following reasons for his decision:
  - (i) Having reviewed the DVLA's submission, the DVLA initially failed to have proper regard to the parameters of the appellant's request and initially failed to conduct proper searches based on those parameters. This is because:
    - (a) the DVLA stated that there are no pre-specified terms of reference for the policy review in question;
    - (b) the DVLA has provided a document it seeks to withhold which appears to be unrelated to the parameters of the request; and
    - (c) the information the DVLA is seeking to withhold was created in September 2022, nine months after the request for information.
  - (ii) The DVLA failed to comply with section 1(1) of FOIA.
  - (iii) The DVLA subsequently conducted proper searches.
  - (iv) There is no available evidence to suggest that the DVLA holds a terms of reference document as requested by the appellant and the DVLA does not hold information within the parameters of the appellant's request.
  - (v) The Commissioner's guidance on the application of section 16(1) of FOIA shows that there are three main circumstances where the duty under that provision arises. The first and third circumstances do not apply, leaving the second, which is when the request is ambiguous and requires clarification as to the information sought.

- (vi) With respect to the appellant's request, it is not ambiguous; he asks for a specific document, namely the 'terms of reference' for a review of the policy to require the return of a previous licence once a new one has been issued.
- (vii) The DVLA provided the appellant with some information outside the provisions of FOIA explaining that the requirement was under review and the reasons why the return of a previous licence was required.
- (viii) In all the circumstances, the DVLA complied with the duty under section 16 of FOIA.

### **The appellant's case**

- 14. In his notice of appeal dated 6 December 2022 the appellant set out detailed grounds of appeal. He highlights the contradiction between the DVLA's initial position that it held the requested information but that it was exempt from disclosure pursuant to section 35(1) of FOIA and questioned how something which was said to exist no longer existed on further investigation. He contends that the Commissioner failed to give reasons for his conclusion that on the balance of probabilities the requested information is not held.
- 15. The appellant complains that he first became aware that the parameters of the Commissioner's investigation had changed from whether the exemption applied to whether the DVLA had complied with section 1(1) of FOIA when he received the decision under appeal. He states that this prevented him from making representations which might have been relevant to the Commissioner's investigation.
- 16. The appellant contends that the Commissioner has failed to give adequate reasons for his finding that the DVLA has now carried out adequate searches.

### **The law**

- 17. Section 1 of FOIA provides where relevant:
  - 1.— General right of access to information held by public authorities.
    - (1) Any person making a request for information to a public authority is entitled—
      - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
      - (b) if that is the case, to have that information communicated to him.
- 18. Section 1(1) is subject to any exemptions that may apply. In deciding whether a public authority holds information falling within the scope of the request the standard of proof is the balance of probabilities. In other words the tribunal must be satisfied that it is more likely than not that the public authority holds (or held at the time of the request) the requested information.
- 19. Section 16 of FOIA provides where relevant:
  - 16.—Duty to provide advice and assistance.

- (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.
- (2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

## Findings and reasons

20. The issues for determination in this appeal are:
  - (i) Does the DVLA hold the requested information?
  - (ii) Did the DVLA comply with section 16(1) of FOIA?
21. We must begin by saying that we do not consider that either the open or the closed hearing bundles in this case contained all of the documents that are referred to in the correspondence which is before us. In particular, in his response, the Commissioner refers to a document provided by the DVLA as potentially coming within scope of the appellant's request which is described as a draft submission to government Ministers outlining the policy and legal issues arising from the potential removal of the requirement to return a previous licence. It is stated that there are two versions of this document, one dated January 2022 and one dated August 2022. It may well be that the Commissioner decided that the August 2022 version was out of scope because it was created after the appellant's request. The same cannot be said of the January 2022 version with certainty. The appellant's request was made on 12 January 2022 and without having sight of the document or knowing the precise date of its creation, we cannot be certain that it is out of scope of the request for that reason.
22. In his decision notice the Commissioner refers to the DVLA seeking to withhold a document created in September 2022. It is unclear as to what document this is. We do not have any document dated September 2022 before us. In any event, the document was created after the date of the appellant's request for information and so we find that it is not within the scope of the request.
23. It is unacceptable that the Commissioner should fail to provide copies of all documents relevant to consideration of this appeal. Having considered the matter however, we find that even if the document which is a draft submission to Ministers was created before the appellant's request for information, it is not within the scope of his request. This is because his request was very specific, He requested a copy of the terms of reference for the review into the requirement to surrender a licence. A draft submission to Ministers is not to be equated with the terms of reference for a review.
24. Having been informed that a review was being undertaken, the appellant made a request for a copy of the terms of reference. We find that this request is based on nothing more than the appellant's *assumption* that a document containing terms of reference for a review exists at all. This is apparent from his communication with the DVLA.
25. Having considered the open and closed evidence, it appears that the DVLA identified a number of documents relating to the requirement to return a previous licence and confirmed

their existence without first considering whether they were in fact within the scope of the appellant's request. This is of course regrettable, but we do not consider that it is indicative of the DVLA seeking to retrospectively deny the existence of documents that they had previously said existed. Rather, it is indicative of the DVLA giving proper consideration to the nature of the documents identified and determining that they were not what the appellant had requested. There is nothing in the evidence before us to suggest that the DVLA holds the information requested by the appellant and we find that it does not.

26. We therefore move on to consider whether the DVLA complied with section 16(1) of FOIA. That provision requires a public authority to provide advice and assistance to any individual making a request where it would be reasonable to do so.
27. The Commissioner gives reasons for finding that the DVLA complied with section 16 with reference to his guidance on that provision. The guidance provides that there are three main ways in which a duty under section 16(1) arises. The first is where the public authority has reason to believe an applicant has not given their real name. This is not applicable here.
28. The third is where the request would exceed the appropriate limit beyond which the public authority would not be required to provide the information. Again this is not applicable.
29. The second is where the request is ambiguous and requires clarification as to the information sought. This is potentially applicable in the present case. Following the appellant's request, the DVLA wrote to him seeking further information as to precisely what terms of reference he was seeking. The appellant simply referred them back to their own correspondence in which they state that a review was taking place. The DVLA once again tried to clarify what the appellant was asking for and again he referred them back to their own correspondence.
30. The respondent made two attempts to clarify precisely what it was the appellant was seeking and given that the appellant's request was based on his own assumption, it is hard to see how the DVLA could have advised or assisted the appellant to re-frame his request any further. We find that the DVLA complied with the duty in section 16(1) of FOIA.

Signed J K Swaney

Date 4 March 2024

Judge J K Swaney  
Judge of the First-tier Tribunal