

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 04 November 2009

Public Authority: The Driver and Vehicle Licensing Agency (DVLA) (an executive Agency of the Department for Transport (DfT))

Address: Longview Road
Swansea
SA6 7JL

Summary

The complainant requested various information from the DVLA regarding its Continuous Registration (CR) scheme. The DVLA provided much of the information but withheld some on the basis of section 31(1)(d) and section 21 of the Act. It also refused some information on the basis that it was not held. Following intervention from the Commissioner, the DVLA provided part of the information it had previously withheld by virtue of section 31(1)(d) but continued to withhold the remainder of the information on the basis of this exemption. The Commissioner finds that following his intervention, the DVLA applied the section 31(1)(d) exemption correctly and based on the balance of probabilities it does not hold the information refused on this basis of 'information not held'.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

Background

2. The Commissioner notes that under the Act the DVLA is not a public authority itself, but is actually an executive agency of the Department for Transport which is responsible for the DVLA and therefore, the public authority in this case is actually the Department for Transport not the DVLA. However, for the sake of clarity, this decision notice refers to the DVLA as if it were the public authority.

3. Vehicle Excise Duty (VED) is a tax on vehicle ownership enshrined under section 29 of the Vehicle Excise and Registration Act (VERA) 1994. Under this Act, any vehicle used or kept on a public road is liable to VED with the DVLA having sole responsibility for both the collection and enforcement of VED.

The DVLA's Annual Report for 2007 to 2008 referred to the following two specific targets it was required to meet in relation to VED.

- To collect an extra £70m by bearing down on evasion
 - To bring evasion down to 2.5 per cent or lower.
4. To do this, the DVLA has a number of enforcement tools at its disposal including its Continuous Registration (CR) scheme.
 5. The CR scheme was introduced in January 2004 with one of its stated aims being reducing the evasion of VED by placing the onus on the vehicle owner to either re-license the vehicle or complete a formal Statutory Off Road Notification (SORN) declaration.
 6. As part of the CR enforcement scheme, a monthly scan of the vehicle record is carried out to identify vehicles without a valid license or SORN declaration. This scan automatically generates a letter from the DVLA inviting settlement out of court by payment of a Late Licensing Penalty (LLP).
 7. Following the issue of an LLP the DVLA has explained that, in some cases, it receives representations from vehicle owners putting forward mitigating circumstances as to why it was not possible to re-license or complete a SORN declaration on time. Each of these cases is given individual consideration and some LLPs are withdrawn by the DVLA on the basis of the information provided. Some of the 'exceptional circumstances' require supporting evidence whilst a small number do not.

The Request

Request 1

8. On 30 March 2007 the complainant contacted the DVLA to request the following information in relation to its CR appeals process

"What in general constitutes 'exceptional circumstances'"

9. The complainant also asked the DVLA for:

"a copy of your enforcement concordat / policy."

10. On 1 May 2007 the DVLA responded to this request. The DVLA advised the complainant that information relating to "the interpretation of exceptional circumstance is not available to the public". The DVLA therefore sought to refuse

this part of the request as it considered the information to be exempt under section 31(1)(d) of the Act.

11. In respect of the complainant's request for a copy of the DVLA's enforcement policy, the DVLA informed the complainant that it had:

"...taken your reference to 'enforcement concordat/policy' to mean the enforcement actions taken by DVLA under CR."

12. The DVLA added that the legislation providing for the scheme is held under Section 7A and Section 31A of the Vehicle Excise and Registration Act 1994 (VERA). It further explained that when the CR scheme was formulated, the primary enforcement channel was considered to be via the civil court which had already been successfully introduced for violation of parking restrictions. It was therefore understood that CR could mirror this approach. The DVLA therefore stated:

"As such, there are no policy or guidance documents available."

13. The DVLA provided the complainant with details of where to access further information in respect of the legislation which authorises the DVLA to charge a LLP and cited section 21 of the Act on the basis that it was reasonably accessible to the complainant.

Request 2

14. The complainant was dissatisfied with this response, and on 5 May 2007 he made further requests for information in respect of exceptional circumstances. In terms of the DVLA's enforcement policy, the complainant enclosed a copy of the enforcement policy from the Health and Safety executive and stated:

"This is the type of document that I was referring to. Again, I ask, do you have such a policy?"

15. On 7 June 2007 the DVLA responded to the complainant. The DVLA repeated its previous assertion that that it did not hold an enforcement policy. However the DVLA did refer the complainant to its Strategic Agenda for the period 2007 to 2012 and provided the link to this document.
16. Following various correspondence between the complainant and the DVLA, the complainant contacted the public authority on 16 August 2007 to challenge its refusal to provide information in relation to exceptional circumstances.
17. On 12 October 2007 the public authority communicated the outcome of its internal review to the complainant. The internal review concurred with the decision in the original refusal notice to withhold the information about exceptional circumstances on the basis of section 31(1)(d).

The Investigation

Scope of the case

18. On 15 October 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled:
 - The complainant wished to appeal against DVLA's refusal to provide the information relating to exceptional circumstances in reliance on the section 31(1)(d) exemption.
 - The complainant did not accept that the DVLA did not hold an enforcement policy.
 - The complainant also raised a number of procedural complaints in relation to the DVLA's handling of his request.
19. During the course of the Commissioner's investigation the DVLA provided the complainant with details of its exceptional circumstances where supporting evidence is required therefore the Commissioner's decision relates only to the remaining withheld information; i.e. details of exceptional circumstances where the DVLA does not require the vehicle owner to provide supporting evidence.
20. The Commissioner notes that, since the internal review, (and after making his complaint to the Commissioner), the complainant has continued to communicate with the DVLA regarding the issue of Continuous Registration (CR) scheme and voluminous correspondence has been exchanged between them. However the Commissioner's decision in this case can only relate to the DVLA's handling of the requests of 30 March 2007 and 5 May 2007, as detailed above.

Chronology

21. On 7 August 2008 the Commissioner contacted the DVLA and asked it to provide him with the withheld information in respect of exceptional circumstances and asked the DVLA to explain how it had determined that it did not hold information regarding its Enforcement Policy in respect of the CR scheme.
22. On 28 August 2008 the DVLA responded to the Commissioner's enquiries.
23. The Commissioner contacted the DVLA on 13 and 17 October 2008 requesting further information regarding the exceptional circumstances. The Commissioner also asked the DVLA whether it held any information which might answer the complainant's request with regard to the Enforcement Policy.
24. On 25 November 2008 the DVLA responded to the Commissioner's requests for further information and confirmed that some of the exceptional circumstances required supporting evidence whilst others do not. The DVLA also confirmed that it does not have an appropriate substitute to an Enforcement policy document.
25. The Commissioner met with the DVLA on 18 February 2009 to discuss this complaint.

Analysis

Substantive procedural matters

Section 1(1)(a) – information not held

26. The DVLA has consistently stated to the Commissioner that it does not hold an Enforcement policy document. The DVLA has explained to the Commissioner that when the CR scheme was first established it was decided that the primary enforcement channel would be via the civil court. It was not therefore considered necessary to have a separate enforcement policy document. The DVLA has also confirmed that it does not hold anything which could be used as a substitute for this document. It has further explained that its 'Operating Instructions' contains internal procedural instructions as opposed to policy considerations.
27. The complainant has provided the Commissioner with no strong arguments as to why the DVLA should hold such a policy document. The Commissioner therefore accepts that based on the balance of probabilities, which is the appropriate test in such circumstances, the DVLA does not hold an enforcement policy document.

Exemptions

28. All sections of the Act referred to in this Notice are reproduced in full in the attached Legal Annex.

Section 31: Law enforcement

29. Section 31 provides a general exemption for information under the Act which relates to law enforcement. Section 31(1)(d) relates specifically to the assessment or collection of any tax or duty. To engage section 31(1)(d) the public authority must therefore be reasonably able to demonstrate that disclosure of the requested information would or would be likely to prejudice the collection of taxes.

The prejudice test

30. In considering the prejudice test for this exemption the Commissioner is assisted by the Information Tribunal's view as expressed in *Hogan v the ICO and Oxford City Council (EA/2005/0026, 0030)*. The Tribunal stated that the application of the 'prejudice' test should be considered as involving three steps. Firstly, the need to establish the applicable interest(s) within the exemption, secondly there must be consideration of the nature of the 'prejudice' being claimed and finally the likelihood of occurrence of prejudice.
31. The prejudice test is not a weak test and the public authority must be able to point to prejudice which is 'real, actual or of substance' and to show some causal link between the potential disclosure and the prejudice.
32. The prejudice test has two limbs, 'would be likely to prejudice' means that the possibility of prejudice should be real and significant, and certainly more than

hypothetical or remote, whereas 'would prejudice' places a much stronger evidential burden on the public authority and must be at least more probable than not. In the present case the limb being relied on is 'likely to prejudice'.

33. In his assessment of the likelihood of this occurring, the Commissioner has taken into account the decision of the Information Tribunal in the case of *John Connor Press Limited v The Information Commissioner* [EA2005/0005], in which the Tribunal confirmed that:

"...the chance of prejudice being suffered must be more than a hypothetical possibility; there must have been a real and significant risk." (para 15).

34. This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that 'likely' connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests.
35. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not. Therefore, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
36. The DVLA has argued that section 31(1)(d) is engaged for the disputed information as it considers that disclosing details of the disputed information would be likely to prejudice the collection of penalties or fines. It has argued that this in turn would be likely to prejudice its ability to collect VED.
37. The DVLA considers that knowledge of the particular exceptional circumstances which do not require supporting evidence would be likely to increase the instances of late and non-payment of VED. The DVLA has therefore concluded that to disclose the disputed information would be extremely detrimental to the collection of VED and that section 31(1)(d) of the Act is engaged.
38. However, the complainant disagrees that section 31(1)(d) is engaged. He has argued that the stated purpose of the CR scheme is to increase the accuracy of the DVLA's vehicle records and that the LLP's imposed on vehicle owners under the CR scheme are fines not taxes. The complainant appears to have dismissed the argument that one of the purposes of the CR scheme is to reduce the evasion of VED.
39. The Commissioner has considered both the arguments put forward by the DVLA and the complainant in respect of this exemption. During the course of his investigation, the Commissioner became aware of a number of blogs and forums dedicated to people who are dissatisfied with the DVLA, including the issue of the CR scheme. These sites are also used by members to share information on ways in which individuals can avoid paying penalties in relation to LLPs.
40. In the Commissioner's opinion, public awareness of these particular exceptional circumstances would be likely to reduce the deterrent effect of the LLPs and in

doing so, reduce the incentive of the individual to either license their vehicle or declare SORN, which in turn would be likely to prejudice the collection of VED.

41. In view of his investigation, the Commissioner therefore considers that section 31(1)(d) of the Act is engaged for the disputed information. As section 31 is a qualified exemption, the Commissioner has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

42. The Commissioner acknowledges that there is a strong public interest in the DVLA being accountable for its decisions and that it is as transparent as possible about the ways in which it makes its decisions.
43. Disclosure of what constitutes 'exceptional circumstances' would promote transparency in the CR process and demonstrate to the public at large and drivers in particular, that the DVLA is exercising its enforcement responsibilities in respect of the CR scheme in a reasonable and consistent manner.
44. Disclosure would also demonstrate that the provisions within the CR scheme allow for it to be administered in a fair and flexible manner when the circumstances are appropriate.

Public interest arguments in favour of maintaining the exemption

45. Although the Commissioner accepts that disclosure of the exceptional circumstances would promote transparency and accountability and therefore increase the confidence in the CR system in general, he is also mindful of the fact that the DVLA's accounts are subject to external audit by the National Audit Office (NAO). The public interest in disclosure of the disputed information is therefore mitigated to some extent by this. Indeed, a NAO Report on VED for 2006 -2007 states:

"VED related regulations and procedures remain adequate and proportionate for the vast majority of compliant procedures".

46. The DVLA is concerned that disclosure of the disputed information could result in the information being published, enabling those who are particularly opposed to the CR scheme to attempt to evade their liability. Furthermore, if details of the exceptional circumstances were in the public domain, it would be likely to act as a disincentive to a number of vehicle owners to either re-license or declare 'SORN'. This in turn would be likely to prejudice the collection of VED.
47. The Commissioner accepts there is a strong public interest in the government being able to collect the correct amount of VED in order to support public services. If disclosure of the 'exceptional circumstances' resulted in less VED being collected by the DVLA, over time there would be less money for the government to spend on public services.

48. Furthermore, the Commissioner also accepts that an efficient and cost effective process of collecting VED is in the interests of the tax payer. However, the increased evasion of VED would ultimately be likely to increase the costs of VED itself to fund the consequent loss of revenue and extra enforcement action that would be necessary to counteract this. This increased evasion would therefore place a greater burden on the vast majority of compliant drivers who pay the required VED.

Balance of the public interest arguments

49. The Commissioner accepts that the arguments both for and against disclosure of the information are valid. However, he must determine where the public interest lies in this particular case.
50. The Commissioner has been particularly persuaded by the strong public interest in the DVLA being able to collect VED in the most efficient and cost effective manner in order to ensure sufficient funds for the government to provide public services. The Commissioner is also particularly concerned about the negative impact on the vast majority of compliant tax payers if the information was in the public domain. Further, the Commissioner considers that the argument that disclosure of the disputed information would ensure the transparency and accountability of the DVLA's administration of the CR scheme is partly mitigated by the external auditing the DVLA is subject to.
51. For the reasons set out above, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

52. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:
- The DVLA correctly withheld some information in reliance on section 31(1)(d).

Steps Required

53. The Commissioner requires no steps to be taken.

Other matters

54. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

55. The complainant expressed dissatisfaction with the DVLA's response to his original request for information on 5 May 2007 which, in accordance with Part VI of the Code of Practice issued under section 45 of the Act, should therefore have prompted an internal review. However, it was not until 29 June 2007 and after the complainant's letter of 15 June 2007 that the DVLA informed him that it intended doing so. To complicate matters further, the complainant informed the DVLA on 4 July 2007 that he did not want such a review at that time. However, following further exchanges of correspondence between the complainant and the DVLA, he formally requested an internal review on 16 August 2007.
56. The outcome of the internal review was finally communicated to the complainant on 12 October 2007. Although there is no requirement under the Act, the Section 45 Code of Practice recommends that the internal review should be considered promptly.
57. The Commissioner has also produced guidance in relation to this matter and considers 20 working days from the date of the request for a review to be a reasonable time in most cases. He does nevertheless recognise that there may be a smaller number of cases where it may be reasonable to take longer. However, the Commissioner expects the public authority as a matter of good practice to notify the applicant and explain why more time is needed. The Commissioner's view is that no case should exceed 40 working days.
58. The Commissioner notes that the internal review took 40 working days from the time the complainant formally requested an internal review and that the DVLA offered no explanation for this to the complainant.
59. The internal review did not however make any reference to the complainant's request for a copy of the DVLA's enforcement policy.

Right of Appeal

60. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 4th day of November 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

“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.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Law enforcement.

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”