

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 March 2021

**Public Authority:** Information Commissioner's Office

**Address:** Wycliffe House  
Water Lane  
Wilmslow  
SK9 5AF

**Note:** This decision notice concerns a complaint made against the Information Commissioner ('the Commissioner'). The Commissioner is both the regulator of the FOIA and a public authority subject to the FOIA. She is therefore under a duty as regulator to make a formal determination of a complaint made against her as a public authority. It should be noted, however, that the complainant has a right of appeal against the Commissioner's decision, details of which are given at the end of this notice. In this notice the term 'ICO' is used to denote the ICO dealing with the request, and the term 'Commissioner' denotes the ICO dealing with the complaint.

### **Decision (including any steps ordered)**

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1. The complainant has requested communications from the ICO about its investigation into the Driver and Vehicle Licensing Agency's release of keeper data. The ICO has withheld the information under section 31(1)(g) of the FOIA (law enforcement) and considers the public interest favours maintaining this exemption.
2. The Commissioner's decision is as follows:
  - At the time of the request for it, the information was exempt information under section 31(1)(g) of the FOIA and the public interest favoured maintaining that exemption.
3. The Commissioner does not require the ICO to take any remedial steps.

## Request and response

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4. On 26 April 2020 the complainant wrote to the ICO and requested information in the following terms:

*"under the FOIA disclose all correspondence in the last 3 years with the Dept. of Transport/DVLA, regarding the DVLA releasing data under reg 27(1)*

*(e) road vehicles (registration and licensing) regulations 2002 without checking the request for reasonable cause for wanting the data before release.*

*Disclosure of Information*

*27 Disclosure of registration and licensing particulars*

*(1) The Secretary of State may make any particulars contained in the register available for use--*

*(e) by any person who can show to the satisfaction of the Secretary of State that he has reasonable cause for wanting the particulars to be made available to him.*

*I want to change broaden the request to:*

*"Please disclose all correspondence, internal ICO memos, reports and other communications etc. in the last 3 years with the Dept. of Transport/DVLA, regarding the DVLA releasing keeper data under reg the road vehicles (registration and licensing) regulations 2002."*

*IF THIS EXCEEDS COST LIMIT THEN CHANGE 3 YEARS TO 18 MONTHS."*

5. The ICO issued a refusal notice on 26 May 2020. It withheld the information under section 31(1)(g) of the FOIA and advised that it considered the public interest favoured maintaining the exemption.
6. The complainant requested an internal review on 26 May 2020 and sent further arguments for disclosure on 27 May 2020.
7. The ICO provided an internal review on 23 June 2020. It upheld its original response.

## Scope of the case

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8. The complainant contacted the Commissioner on 23 June 2020 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether the ICO is entitled to rely on section 31(1)(g) of the FOIA to withhold the information the complainant has requested.
10. The ICO has provided the Commissioner with a copy of the information it is withholding. The Commissioner did not request a separate submission from the ICO on this occasion as she considered its correspondence to the complainant provided sufficient detail and reasoning. Had she had any questions, she would, of course, have put these to the ICO.

## Reasons for decision

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11. Section 31(1)(g) of the FOIA says that information is exempt information if its disclosure under Act would or would be likely to prejudice the exercise by any of public authority of its functions for any of the purposes specified in subsection (2).
12. In its correspondence to the complainant the ICO has referred to the purposes under sections 31(2)(a) and (c); namely the purpose of ascertaining whether any person has failed to comply with the law and the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise
13. The information the ICO is withholding comprises:
  - An internal ICO handover note – March 2020
  - Correspondence exchanged between the ICO and DVLA August 2018 – August 2019
  - Legal advice provided in September 2018, October 2019, and December 2019
  - Minutes of internal Tasking and Coordinating Group meeting – October 2019
  - Internal email exchanges – February 2020
  - Agenda and minutes of a meeting – February 2020
  - Internal correspondence – January 2020
  - Draft Senior Leadership Team briefing paper – February 2020
  - DVLA options paper – February 2020
  - Draft letter from ICO Deputy Commissioner to DVLA CEO – February 2020

14. In its refusal notice the ICO advised the complainant that, at that time, it was considering the issue of reasonable cause with regards to the release of personal data by the DVLA under regulation 27(1)(e) of the Road Vehicles (Registration and Licensing) Regulations 2002. The ICO explained that its investigation was ongoing, and no conclusion had been reached. It said it would consider the issues raised in line with its usual processes, and it would decide whether or not regulatory action is appropriate in accordance with its Regulatory Action Policy.
15. The ICO went on to explain that the purposes at section 31(2)(a) and (c) apply when the ICO is determining whether or not there has been a breach of the legislation it regulates, and whether any further action is appropriate.
16. Given that its investigation into the disclosure of personal data by the DVLA by virtue of regulation 27(1)(e) and the implications for data subjects remained ongoing and no decision about formal regulatory action had been made, the ICO took the view that to release the information could prejudice the ICO's ability to constructively engage with the DVLA in the resolution of any data protection matters.
17. The ICO considered it was probable that any disclosure at that stage would discourage ongoing discussions and could damage its ability to conduct and conclude the process fairly and proportionately. The ICO also considered that disclosure could jeopardise its ability to obtain information either relating to that case or others in the future. In the ICO's view harm could be caused if data controllers were reluctant to enter into discussions if the ICO established a pattern of early disclosure in response to information requests.
18. Finally, the ICO advised that it needed a 'safe space' in which to consider regulatory actions, which was free from external influences. This would ensure the confidentiality of its deliberations and analysis. As the matter in question required consideration of the interrelationship between different legislative frameworks, the ICO considered it was entirely appropriate for it to undertake a comprehensive and frank assessment of any data protection matters arising from the DVLA's use of regulation 27(1)(e) in order to inform any consideration of regulatory action.
19. In his internal review correspondence the complainant disputed that regulatory action was ongoing and that disclosure would compromise the ICO's ability to take formal action. He also queried whether the ICO had considered whether it could redact certain information and disclose the remainder.

20. In its internal review response, the ICO explained that it exercises a number of statutory functions for the purpose of ascertaining whether a data controller or public authority has failed to comply with the law and/or for the purpose of ascertaining whether circumstances exist or may arise which would justify regulatory action in relation to relevant legislation.
21. The ICO said that a considerable proportion of its regulatory work is concerned with ascertaining whether data controllers and public authorities have complied with the statutory requirements placed upon them by both the data protection legislation and the FOIA.
22. In this case, the ICO advised, the requested information formed part of an ongoing ICO investigation. It followed therefore that the purposes referred to in subsection (a) and (c) above applied in relation to the requested information. Disclosing this information about the ICO's regulatory work would, in the ICO's view, be likely to prejudice the ICO's regulatory functions both in relation to the current investigation and future investigations.
23. The ICO told the complainant that it had carefully considered his comments regarding releasing redacted information or correspondence sent by the ICO, but it did not consider that this would be possible without the likelihood of prejudice to the ongoing investigation.
24. In addition to the factors it had explained in detail previously, the ICO gave as an example that disclosing the requested information may reveal potential lines of enquiry in relation to the ongoing discussions. The ICO therefore confirmed that it did not consider that the complainant's argument undermined either the fact that the exemption is engaged or, which will be discussed below, that the balance of the public interest is in favour of maintaining the exemption.

#### *Commissioner's conclusion*

25. The Commissioner has decided that the information the complainant has requested engages the exemption under section 31(1)(g), with subsection 2(a) and (c). The ICO is formally tasked with regulatory functions to ascertain whether any person has failed to comply with the law or whether circumstances would justify regulatory action. The request in this case was submitted to the ICO on 26 April 2020. The investigation into DVLA, to which the withheld information relates, was still live at the time of the request. The Commissioner therefore considers that although not certain to occur, the likelihood of prejudice occurring; that is, by affecting the ICO's ability to discharge its regulatory functions for the reasons it has given, was real and significant.

## **Public interest test**

### Public interest in disclosing the information

26. The complainant has not put forward any public interest arguments for the information's disclosure, either in his correspondence to the ICO or to the Commissioner.
27. In its correspondence to the complainant the ICO had identified the argument for increased transparency in the way in which it carries out its regulatory functions and the understandable interest of those members of the public aggrieved by the sharing of personal data by the DVLA.

### Public interest in maintaining the exemption

28. In its correspondence to the complainant the ICO argued that disclosing information while regulatory action is ongoing would likely compromise its ability to conduct future investigations and therefore affect the discharge of its regulatory function in vital areas, including its ability to influence the behaviour of data controllers and to take formal action.
29. The ICO said there is a public interest in it being able to maintain effective and productive relationships with the parties it communicates with. The ICO considered it to be essential that organisations continue to engage with it in a constructive and collaborative way without fear that the information they provide it will be made public if it is inappropriate to do so.
30. The ICO also argued that there is a public interest in the ICO maintaining its ability to conduct its regulatory activities as it sees fit without external interference. Finally the ICO confirmed it has a demonstrable history of sharing information about its enforcement and regulatory activities when it is appropriate to do so, in line with its published 'Communicating Regulatory and Enforcement Activity Policy'.

### Balance of the public interest

31. The Commissioner considers that there is a strong public interest in the ICO being effective in its role as a regulator and in carrying out its statutory functions. As such, the Commissioner is satisfied that there is also a strong public interest in not disclosing information which would be likely to impede the ICO's ability to carry out its functions effectively.
32. In the absence of any public interest arguments from the complainant, the Commissioner is satisfied that the general public interest in the ICO being open and transparent in its role as regulator is met through its

adherence to its 'Communicating Regulatory and Enforcement Activity Policy'.

33. As such, the Commissioner finds that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the application of the section 31(1)(g) exemption, with subsection (2)(a) and (c).

## Right of appeal

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34. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**