Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**19 August 2022**
Public Authority:	**Department for Transport**
Address:	**Great Minster House** **33 Horseferry Road** **London** **SW1P 4DR**

Decision (including any steps ordered)

1. The complainant requested correspondence between various bodies regarding the processing of vehicle keeper data. The Department for Transport ("the DfT") relied variously on section 42 (Legal Professional Privilege) and section 35 (formulation or development of government policy).

2. The Commissioner's decision is that the DfT has correctly engaged section 42 of FOIA and that the public interest favours maintaining that exemption. However, he does not consider that section 35 is engaged.

3. The Commissioner requires the DfT to take the following steps to ensure compliance with the legislation.

   - Disclose all of the information it has withheld apart from that which engages section 42 of FOIA.

   - Disclose, to the complainant, the information it originally identified to the Commissioner as being disclosable.

4. The DfT 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 Driver and Vehicle Licensing Agency ("the DVLA") is responsible for maintaining a register of the registered keeper of every motor vehicle in the UK – making it one of the largest processors of personal data.

6. Section 27(1) of the Road Vehicles (Registration & Licensing) Regulations 2002 ("the 2002 Regulations") provides that:

> 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.

7. Under both the Data Protection Act 1998 and the UK General Data Protection Regulation ("UKGDPR"), a data controller may only process personal if they have a lawful basis for doing so. Under the 1998 Act, one of those conditions was that the processing was necessary for a public authority to discharge its functions (including those functions prescribed by law). However, UKGDPR includes two separate conditions for processing: either that the processing is necessary for compliance with the law or; that it is necessary for the performance of a public task or exercise of official authority.

8. Since the UKGDPR came into force, the DVLA has argued that, when it releases the details of registered keepers, it is complying with a legal obligation to process that personal data – because the 2002 Regulations require the Secretary of State for Transport (or the DVLA acting in the Secretary of State's shoes) to make the data available to anyone who can show reasonable cause. The ICO, on the other hand, has argued that the 2002 Regulations do not require the DVLA to process personal data – only that they set conditions for doing so. Therefore the appropriate lawful basis should be the performance of a public task. The ICO issued a formal opinion confirming this view on 13 June 2022[1] – although the Commissioner understands that the DVLA (and the DfT) remains of the view that it is required by law to process the personal data.

[1] https://ico.org.uk/media/about-the-ico/documents/4020676/dvla-opinion-20220613.pdf

9. Whilst both the DVLA and the ICO agree that one of the two bases will apply (and therefore the DVLA does have a lawful basis for its processing), the choice of lawful basis does come with consequences. Where a data controller is carrying out a public task, a data subject has the right to object to their personal data being processed in this manner, if the data controller is processing because of a legal obligation, the right to object does not arise.

Request and response

10. On 8 July 2021 the complainant requested information of the following description:

> "Disclose all communications between (both ways) David Coker (of DfT) between the DVLA and/or the ICO in the last 5 years regarding the lawfulness (or otherwise) of DVLA releasing driver keeper details to private parking companies."

11. On 13 August 2021, the DfT responded. It refused to provide the requested information. It relied on sections 35 and 42 of FOIA in order to do so.

12. The complainant requested an internal review on 13 August 2021. The DfT sent the outcome of its internal review on 9 September 2021. It upheld its original position.

Scope of the case

13. The complainant contacted the Commissioner on 9 September 2021 to complain about the way his request for information had been handled.

14. The DfT responded to the Commissioner's investigation on 12 July 2022. Following a further review of the withheld information, it had decided that some of the information was no longer sensitive and identified to the Commissioner a number of emails that it was now prepared to disclose.

15. Having reviewed the withheld information, the Commissioner contacted the DfT again. He explained that he was sceptical that section 35 of FOIA would be engaged on the facts of the case. However, given that he recognised that the withheld information did represent "internal thinking" between the DfT and DVLA and that the DfT's public interest arguments on the need to protect such internal thinking had merit, rather than issue a decision on section 35, he invited the DfT to consider

consulting its Qualified Person to decide whether section 36 of FOIA (prejudice to the effective conduct of public affairs) might be more appropriate. Alternatively, he asked several more questions about the DfT's use of section 35 which are considered below. Finally, he asked the DfT to disclose the information it now considered suitable for disclosure as soon as possible.

16. The DfT responded on 9 August 2022. It confirmed that, whilst it had considered section 36, it was satisfied that section 35 was the appropriate exemption on which to rely. However it now considered that it could disclose even more information than it had previously identified – although the Commissioner is not aware that it had disclosed any information whatsoever to the complainant at the date of this notice.

17. As the Commissioner will explain below, he is not satisfied that section 35 is engaged. As the DfT is a large, experienced public authority and has been given three opportunities to revise its stance, the Commissioner considers that a decision notice is now necessary.

18. The Commissioner considers that the scope his investigation is to determine whether section 35 is engaged. If he concludes that it is not, he will assess whether any of the remaining information engages section 42.

Reasons for decision

19. Section 35(1) of FOIA states that:

> Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
>
> (a) the formulation or development of government policy

20. the exemption is a class-based exemption meaning that any information of a particular type will automatically be covered. Section 35 is also a qualified exemption, meaning that, even where it is engaged, the information can still only be withheld if the balance of the public interest favours maintaining the exemption.

21. The Commissioner's guidance states that information will relate to the formulation of government policy if it relates to the generation and evaluation of new ideas. Information will relate to the development of

government policy if it relates to reviews of the effectiveness of existing policy or considers whether the existing policy is fit for purpose.[2]

22. However, the guidance also states that section 35 will not cover information relating to the implementation of existing policy. Not every decision will necessarily be a policy decision. Whilst the term "policy" is not defined in the legislation, the Commissioner interprets the term as referring to a framework or set of rules designed to effect a change likely to affect substantial numbers of people. Policy decisions will usually need to be taken by a minister or even the full Cabinet.

The DfT's position

23. In its submission to the Commissioner, the DfT was asked to explain what policy (or policies) the withheld information related to. It responded to say that:

> "The matter in question here is the government policy operated by the Driver and Vehicle Licensing Agency (DVLA) regarding which of the available lawful processing bases, under Article 6(1) of the UK GDPR, is most appropriate for the disclosure of the contact details of the registered keepers of vehicles to enable the management of parking on private land.
>
> "Your comment about you interpreting this to be a subject of legislation rather than policy notwithstanding, at the time of the request, there were ongoing discussions central to the future shape of this policy. Any final outcome or decision on the policy issue in question will require Ministerial approval. The Department therefore considers some of the information, which amounts to emails discussing this matter, relates to the improvement and adjustment of an existing policy."

24. The Commissioner was not satisfied with this explanation and asked the DfT to provide more detail about why the information related to a "policy" decision (as opposed to an administrative decision) and about any ministerial involvement in the matter. The DfT responded to say that:

> "At the time of the request, the DVLA was in ongoing discussion with the ICO over the most appropriate lawful basis under the GDPR for

[2] https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf

the provision of vehicle keeper data to private parking management companies…The key issue under review was then, and is now, whether the Secretary of State for Transport should rely on Article 6(1)(c) – legal obligation – or Article 6(1)(e) – public task – as the lawful basis for that processing…

"You have noted that the ICO Opinion on this matter has now been published and has provided a firmer and more settled view from the Commissioner on the most appropriate lawful basis to rely on in this context. The availability of this more certain position has naturally triggered a policy review and, in particular, what the Department's response should be to the following passage of the Opinion:

> 'The Commissioner considers that the most appropriate way forward is for the government to review the relevant legislation. They should look to address the interaction between different pieces of legislation to provide legal certainty on the correct approach. If the Department for Transport and the DVLA believe that Regulation 27(1) gives the DVLA a legal duty rather than a power to share keeper information, the government might choose to consider a legislative remedy that puts this issue beyond doubt. This would provide certainty to both the DVLA and to vehicle keepers.'

"A range of options are being considered as part of the review, including a change to the legislation that governs the disclosure of data for private parking management. Weighing up the benefits, risks, political, economic, social, legislative factors and potential resource burdens of these options is clearly activity that falls within the development and formulation of government policy. When further developed, options will need to be offered to ministers for their consideration and the decision on the way forward will be taken by them."

25. Specifically in relation to ministerial involvement, the DfT explained that:

"no fresh decision on this matter has yet been taken by the minister because the policy is under review now. I hope it is clear that if the outcome of the policy review is that a change in legislation should be pursued, that will not be achievable without ministerial backing and subsequent adherence to the policy making and legislative process. If the ministerial decision arising from the policy review is to not seek a legislative change, it is expected to at least provide the Department's settled view on the lawful basis relied on, thereby delivering a real world outcome having an effect on the information rights exercisable by millions of data subjects each year…

"…Ministers' views are not usually sought on routine matters such as the most appropriate lawful basis to use for a particular processing activity. In this particular case, ministers were not consulted during the majority of the time before a settled view from the ICO was received. However, the issue developed and grew in profile as the issue moved towards the publication of a disagreement on a matter of data protection law and policy between the regulator and a central government department. The topic involves the large scale release of personal data for a highly controversial purpose and so can be seen to be unusual and worthy of ministerial attention.

"The DVLA has written to ministers on this matter three times so far this year, in February, March and following the ICO Opinion becoming settled, again in June. The Agency will write again to ministers once the options and recommendations on the way forward arising from the review of the policy are clearer. In the meantime, the issue is subject to ongoing work to develop government policy."

The Commissioner's view

26. In the Commissioner's view this particular information does not relate to the formulation or the development of government policy and therefore is incapable of attracting the section 35 exemption.

27. In decision notice IC-42172-D5T1, the Commissioner was asked to consider correspondence on the same subject matter but exchanged between the DVLA and ICO. In that case the Commissioner concluded that the exemption was not engaged:

"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.

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.

> 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."[3]

28. The Commissioner considers that the circumstances considered in decision notice IC-42172-D5T1 are the same as those that prevail in respect of this request – although the correspondence here involves a government department as well.

29. As the DfT has explained, decisions about what lawful bases for processing should be used are not normally referred to ministers for decision – they are administrative decisions which can be taken at a much lower level. The only reason ministers have been kept informed here is because, given the ICO's opinion, any decision is likely to cause controversy.

30. The DfT has argued that it is contemplating legislative change, but both its submission and the withheld information make clear that this has only come about because of the issuing of the ICO's opinion – which had not happened at the point that the request was made. The DVLA and DfT were not contemplating any policy change prior to the issuing of the ICO's opinion and have only begun "developing" this policy since that date. Therefore the Commissioner does not consider that the withheld information "relates to" any government policy decision that the DfT had taken, was taking, or intended to take – rather it relates to an administrative decision as to how to implement its existing policy.

31. The DfT has put forward public interest arguments in favour of withholding the particular information which the Commission accepts have merit. However, as section 35 is not engaged and as the DfT has declined the opportunity to rely on section 36, the Commissioner is unable to give those arguments formal consideration.

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[3] https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619908/ic-42172-d5t1.pdf

32. The Commissioner therefore finds that section 35 of FOIA is not engaged in relation to any of the withheld information.

33. The Commissioner will next consider whether any of the withheld information engages section 42 of FOIA.

Section 42 – legal professional privilege (LPP)

34. 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."

35. In Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023) the First Tier Tribunal 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."

36. 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 their client remained confidential.

37. 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.

38. 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.

39. The withheld information in this case comprises a series of emails between the DVLA, DfT and the Government Legal Department (GLD). The emails set out a process of the DVLA (with assistance from the DfT) seeking guidance from the GLD on the lawful basis question and, through the GLD, seeking to engage external counsel to provide an opinion. The emails cover both the choice of counsel and the instructions that would be provided to them – as well as the advice ultimately provided.

40. In the circumstances, the Commissioner is satisfied that this information is covered by LPP and therefore section 42 is engaged.

Public interest test

41. Information that is covered by LPP must still be disclosed under FOIA unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

42. In Cabinet Office v Information Commissioner [2014] UKUT 461 (AAC), the Upper Tribunal ruled that section 42 of FOIA carried a stronger inherent weight against disclosure than most other FOIA exemptions for two reasons:

> "The first is because it exempts "information in respect of which a claim to legal professional privilege...could be maintained in legal proceedings". The exemption is coterminous with the doctrine of legal professional privilege, which the exemption is designed to protect. The "relates to" complication is not present.
>
> "The second reason is that it has been accepted in case law under s.42 that any compulsory disclosure of legally privileged information will to some extent weaken the important doctrine of legal professional privilege in relation to future cases, with detrimental consequences to the ability of persons to obtain legal advice on a full and frank basis."

43. In its submission, the DfT recognised that the issue around lawful processing was one of public interest and would potentially affect a large number of people. However it argued that there was a stronger public interest in protecting the rights of public bodies to seek and receive high quality legal advice when they consider it appropriate to do so – without worrying that that advice will be disclosed.

44. Having viewed the withheld information and considered the arguments, the Commissioner is satisfied that the balance of the public interest favours maintaining the exemption.

45. As the relevant case law makes clear, section 42 is not an absolute exemption, but there must be very strong public interest grounds to justify disclosing information that attracts LPP.

46. The Commissioner recognises that, due to the large number of requests for vehicle keeper data the DVLA receives every year, the lawful processing information has the potential to affect large numbers of people.

47. However, as the ICO's opinion explains, there has never been any dispute that the DVLA was entitled to share vehicle keeper data (subject to reasonable cause being shown), the issue was whether the DVLA was relying on the correct basis for doing so.

48. Furthermore, the ICO explained that, even if it were to be established that data subjects had the right to object to the DVLA's processing of their personal data in this manner, because of other legal obligations on the DVLA, it was likely that any objections could be refused. The ICO concluded that the likelihood of harm was "very low."

49. The Commissioner accepts that some of this information – particularly the opinion itself – could shed some light on the DfT and DVLA's position. However, legal advice is not a definitive statement of the law – it is only the opinion of one (legally-qualified) individual. The law is made by Parliament and interpreted by the courts. It will ultimately be for a court to issue a definitive view on whether or not the DVLA is relying on the correct lawful basis for processing personal data.

50. Disclosing the withheld information would infringe on the right of the DfT and DVLA to seek and receive legal advice on matters of public concern. That is not in the public interest.

51. In the circumstance of this case, the Commissioner is satisfied that, where the DfT has cited section 42, the exemption is engaged and the public interest favours withholding the information.

52. However, the remaining information is not covered by any exemption and must be disclosed.

Right of appeal

53. 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: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.

55. 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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