IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2014/0123**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

BETWEEN

JOHN CIESLIK

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE DRIVER AND VEHICLE STANDARDS AGENCY

Second Respondent

and

THE DEPARTMENT FOR TRANSPORT

Third Respondent

and

PORSCHE CARS GREAT BRITAIN LIMITED

Fourth Respondent

Tribunal

Brian Kennedy QC
Paul Taylor
Anne Chafer

Hearing: **14 October 2014 (Oral Hearing), 12 December 2014 (Oral Hearing), 11 & 12 May 2015 (oral & deliberations) & 4 August (deliberations)**
Location: **Bedford House, Belfast.**
Decision: **Appeal Allowed.**

Date of decision: 4 August 2015

Appearances:

Appellant: Lauren Cheshire of Counsel.
Fourth Respondent: Fiona Fee of Counsel.

Subject Matter: **The Freedom of Information Act 2000 ("FOIA") and engagement of section 44 of FOIA (prohibitions on disclosure) and in the alternative; The Environmental Information Regulations 2004 (EIR) and engagement of regulations 12(3), 12(4)(a), 12(4)(b), 12(4)(c), 12(4)(d), 12(4)(e), 12(5)(a), 12(5)(d), & 12(5)(e.)**

Introduction:

This decision relates to an appeal brought under section 57 of the FOIA. The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("the DN") dated 7 May 2014 (reference FS50527543), which is a matter of public record.

Several oral hearings have taken place after which the Tribunal deliberated on the issues in this appeal. The Tribunal and parties have been provided with paginated and indexed Open Bundles ("OB") containing all relevant papers together with Closed Bundles ("CB"), which contain the withheld information, which for obvious reasons is not in the public domain, or with the appellant. We have also been provided with extensive and comprehensive submissions from all parties.

Background:

On 6 November 2013 the Appellant requested information from the Second Respondent ("the DVSA"). The DVSA withheld the information under section 44 FOIA (prohibitions on disclosure) by virtue of the Enterprise Act 2002.

The Appellant contacted the Commissioner on 12 January 2014 to complain about the way this request for information had been handled. The Commissioner, in the DN at paragraph 17 confirms that he focused his investigation on whether the DVSA had correctly applied the exemption under section 44(1)(a) of the FOIA. The EIR does not seem to have been considered at this stage. In fairness to the Commissioner, the Appellant had made the request specifically under FOIA. However the relevant Public Authority and the Commissioner have a duty to assist a requestor and we find the failure to identify the issues and assist at an early stage have led to a protracted and unnecessarily frustrating and costly appeal in this case.

In relation to the Request and response the Commissioner at paragraph 8 of the DN noted that: *" - - under FOIA the DVSA is not a public authority itself, but is an executive agency of the Department for Transport ("DfT") which is responsible for the DVSA".*

The EIR Regulations:

Regulation 5 (1) EIR requires the following:

'"a public authority that holds environmental information shall make it available on request".,

Environmental information is defined in Regulation 2 as including:

(a) the state of the elements of the environment, such as air and the atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and it's components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a)

(c) measures (including administrative measures), such as policies, legislation, plans, programs, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures are activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);:

The Information Commissioner's Office provides a helpful Guide in which the Overview states inter-alia, the following generalities pertinent to this appeal.;

EIR contains exceptions from the duty to make information available, but Public authorities are to apply a presumption in favour of disclosure as per rule 12 subsection 2.

The exceptions in regulation 12(4) relate to the nature of the request or the type of information; those in regulation 12(5) relate to an adverse effect on a particular interest.

To engage an exception in regulation 12(5) public authorities must show that disclosure *would* have an adverse effect i.e. that it is more likely than not.

All the exceptions in regulations 12(4) and 12 (5) are subject to a public interest test.

The public interest test means what is in the public interest, not what is of interest to the public.

Public interest arguments for an exception must be inherent in the exception.

When deciding whether to apply an exception, public authorities must assess all the circumstances of the case and not simply make blanket rulings.

There is always a general public interest in disclosure, deriving from the purpose of EIR.

There may also be a public interest in transparency about the issue the information relates to. Arguments in favour of disclosure of the specific information should also be considered.

A suspicion of wrongdoing can give rise to a public interest in disclosure but there should be a plausible basis for the suspicion.

There is always some public interest in disclosing information to present a full picture.

The Request:

1. As indicated the Appellant made his request on 6th November 2013 making direct reference to the FOIA.

2. The request specifically asked for:

   a. *"... all information held by VOSA [DVSA] regarding the Porsche Cayman..."*

   b. *"...in particular the VOSA safety evaluation of the vehicle throttle malfunction."*

   c. *"...all information you have regarding the VOSA test of the Porsche Cayman throttle malfunction with particular reference to:*

   the vehicle transmission
   the vehicle exhaust system
   the vehicle model (Cayman S or Cayman R)
   the date and duration of the test
   the vehicle VIN number
   the location of the test
   the gears used in the test
   the vehicle speed when the test was performed

d. *"...all other test data and correspondence with the member(s) of the public who requested the test, government ministers, VCA, other government departments and Porsche Cars Great Britain Limited,"*

3. It is useful to break the request down into the following specific aspects:

   a. all information held by VOSA about the Porsche Cayman
   b. all information held about the VOSA safety evaluation
   c. all correspondence with members of the public requesting a test
   d. all correspondence with government ministers (in the context of a safety test)
   e. all correspondence with VCA (in the context of a safety test)
   f. all correspondence with other government departments (in the context of a safety test)
   g. all correspondence with Porsche Cars Great Britain Limited (in the context of a safety test)

4. From this we can see that whereas categories "b" - "g" relate specifically to the safety evaluation, category "a" relates to all information held by VOSA about the Porsche Cayman.

5. It should be noted that in his skeleton argument (Para. 6) the Appellant clarified that the request did not include any information relating to "*type-approval*" or MOT test.

6. The DVSA refused the request on the 8th November 2013 claiming exemption under s44(1)(a) (Disclosure *prohibited by or under any enactment. The enactment in this case referred to the Enterprise Act 2002 specifically s237 and the General Product Safety Regulations 2005)* and following a request for internal review on 9th November 2013, the DVSA responded on the 4th December upholding their original decision.

7. Further to a complaint to the Commissioner, his DN upheld the DVSA'S reliance on the basis that the exemption afforded by s44(1)(a) FOIA was properly engaged.

The Appeal:

8. In the Appellant's Grounds of Appeal dated 18 May 2014, he indicated that he now believed that the appropriate access regime should be the Environmental Information Regulations 2004 (EIR). He had concluded that as his request concerned an activity that directly affected the environment, namely an activity to regulate vehicle noise emissions, the Commissioner should have considered the complaint under the EIRs. His belief stemmed from copies of correspondence he had obtained, both were sent to a third party who also owns a Cayman R. The letter from Porsche Germany GmbH dated approximately 1st November 2012 makes direct reference to a Cayman R and states that "*the entire motor control and in particular the fuel mixture preparation has been adapted to reduce vehicle noise and emissions*". It refers to a test drive of a "comparable Cayman R, which showed the same response, it was stated that this "*is the typical state of the series in this model*". Whilst an email dated 25th September 2012 from Porsche Switzerland AG does not mention a Cayman R specifically (note it is known to the Tribunal that this was sent to the same person as the letter referred to above) and this also refers to the same engine characteristic put in place to make the vehicle compliant with regulations governing vehicle noise emissions (ECE 51 - 02 United Nations regulation 'Uniform provisions concerning the approval of: Motor vehicles having at least four wheels with regard to their noise emissions').

9. The Commissioner's response was that he was not persuaded that the requested information could be said to meet the relevant criteria for engaging the EIR. He based this conclusion on the fact that the disputed information concerned a safety test of a certain vehicle *"which is not an activity which affects, or is likely to affect, the elements and factors described in Regulation 2(1)(a) or (b) EIR"*. The Commissioner also commented on the Appellant's allegation that the manufacturer had modified the engine to circumvent vehicle noise emissions regulations. It was his view that this was an argument, which may be relevant to the public interest in disclosure of the disputed information however; it was irrelevant to the question of whether or not the testing of a vehicle for safety defects is environmental information.

10. The DVSA made scant submissions in response to the Appellant's notice of appeal, observing that it is the requested information, which should determine the correct regime. They stated that they did not consider the test drive, undertaken as part of their investigation, to meet the relevant criteria for engaging the EIRs.

The First Hearing:

11. At the first hearing on 14 October 2014, the Tribunal also considered that the action of carrying out the safety test itself involves ignition of the vehicle engine at the very least (which was not disputed) and that in itself involves the emission of gases and noise into the environment as a direct result of that procedure. Consequently we found, on balance, that information about the safety test comes within EIR Reg. 2(1)(a) (b) and (c).

12. As the Appellant alone was in attendance at the first hearing and having noted the significant issues and concerns about this appeal, the Tribunal adjourned the hearing and directed the Appellant to provide a skeleton argument and submissions as to why the EIRs applied and invited a response from the Commissioner and the DVSA on the engagement of the EIR.

The Second Hearing:

13. At the second hearing on 7th December 2014, where again it was only the Appellant in attendance, the Tribunal considered the further submissions.

14. The Appellant referred the Tribunal to the guidance issued by the Department for Environment, Food and Rural Affairs entitled *'What is covered by the Regulations?*'. In particular, paragraph 3.1 - 3.3 which states that what constitutes 'environmental information' is a question of fact to be interpreted broadly. Paragraph 3.4 sets out the limits to interpretation noting in particular, that the purpose of the information is relevant to the consideration. He went on to say that "*data held by the second respondent in relation to this defect falls under the definition of environmental information as set out in EIR 2(1)(b),(c), (d) and (f)*." Specifically, he argued that:-

    (i) The throttle defect was created in the Cayman R to affect noise emissions bringing the information under EIR (2)(1)(b).

    (ii) Test data relates to measures taken by both Porsche Cars GB Ltd and the second respondent to comply with (or indeed circumvent) their legal obligations under UNECE 51.2 and Directive 2007/46/EC bringing the information under EIR 2(1)(c).

    (iii) Test and other data held regarding the throttle malfunction will report on how the second respondent and Porsche Cars GB Ltd are implementing environmental legislation, namely UNECE 51.2 and Directive 2007/46/EC bringing the information under R. 2(1)(d). This is of particular significance, as the Appellant believes that DVSA has deliberately or mistakenly tested the wrong vehicle.

(iv) Noise emissions from vehicles are evidently such a potential hazard to human health, safety and human conditions of life that the United Nations and European Commission felt the need to legislate on what constitutes acceptable noise emission limits. The information, he argued, therefore falls under R2(1)(f).

15. In relation to the part of his request for correspondence the Appellant argued that this falls under Reg.2(1)(c) and (d). He based his arguments on a letter from VOSA, the predecessor of the DVSA, to Porsche Cars (GB) Ltd ("Porsche") dated 8th March 2012 (pg 19 of the OB). The Appellant states that the letter suggests that there are relevant pieces of correspondence relating both to policy on investigating potentially intentional defects designed to circumvent environmental legislation and reports to customers and Ministers on the implementation of said legislation.

16. The Commissioner maintained reliance on his earlier submissions and in addition, addressed the Appellant's new arguments in relation to the proposed engagement of Reg.2(1)(d) and (f). In relation to Reg.2(1)(d) the Commissioner stated that the information itself must be on a report on the implementation of environmental information. The test data was produced as a result of DVSA's obligations under The General Product Safety Regulations 2005 which cannot be considered to be a piece of environmental legislation. For the same reasons, the Commissioner is of the view that the requested correspondence also does not fall within the remit of Reg.2(1)(d).

17. Regarding Reg.2(1)(f) the Commissioner took the view that *"health and safety refers to a collective state of human health and safety to include information on such things as diseases, medical conditions or risks to human safety where these are, or may be affected, by an element of the environment, a factor, measure or activity.*" The Commissioner further considered that conditions of "*human life*" will cover such things as information on housing, poverty, employment, social welfare,... (See page 54 of OB) where these are, or may be affected, by an element of the environment, a factor, measure or activity.

18. In their further submissions dated 6th November 2014, the DVSA do not consider that the information held in relation to the test drive to be environmental information as defined in Reg.2(1). The information the DVSA holds is about determining if a component of a Porsche Cayman is likely to cause death or serious injury. The DVSA does not consider this activity and the information coming from it to meet the relevant criteria for engaging the EIR. The investigation did not, and was not, they argue, about looking at compliance with environmental legislation.

19. The Tribunal considered these submissions at the hearing and informed the Appellant (and subsequently all parties by Directions dated 14 January 2015) that they were of the view that on the balance the EIRs did apply.

Joinder of the Department for Transport and Porsche GB Ltd:

20. The Tribunal issued Directions dated 14th January 2015. These joined the DfT as a party. We indicated that we were of the view that; "*on the balance of probabilities, the EIRs were the applicable regime*" but clearly it was necessary to hear from all parties. We asked for submissions from the Commissioner, the DVSA and the DfT

in relation to whether the appropriate regime was the EIR rather than the FOIA and to consider which relevant exceptions should apply.

21. At the same time, the Tribunal asked the parties to search for any information within the scope of the request, which had not previously been located.

22. Porsche was joined to these proceedings on 26 February 2015 at their request and have also provided comprehensive submissions.

Application by the Third Respondent, 5 March 2015:

23. Prior to the third hearing on 11 May 2015, the DfT submitted an Application Notice dated 5 March 2015. They applied for a Direction to vary, set aside or suspend the Tribunal's Directions of the 14 January 2015. They requested a preliminary hearing prior to the full hearing scheduled for 11th May 2015 to determine the following points:

    (a) Whether there are proper grounds for joining the Third Respondent to this appeal

    (b) Whether as a matter of law the EIR apply to the request for information made by the Appellant in this case

    (c) Whether, if Freedom of Information Act 2000 (FOIA) applies to the request for information by the Appellant in this case, section 44 of FOIA applies to exempt the said information from disclosure.

24. The DfT argued that it was not a proper party to the appeal. Their position was that the Appellant's request was directed at the Second Respondent (DVSA) and thus it was not necessary or appropriate to join the Third Respondent. They further claimed that they had been joined on the basis of submissions made by the Appellant at the second hearing and in relation to which they received no notice. Accordingly, they stated, the Direction was made without the benefit of submissions from the relevant party.

25. They went on to argue that whether the EIRs did apply was a matter of law rather than something to be decided on a balance of probabilities. It was suggested that by determining this point all parties could avoid expenditure on a full hearing. In their view the EIRs did not apply.

26. They requested a transcript or record of the submissions made at the second hearing (12 December 2014), arguing that as a matter of fairness, and for the purposes of its own submissions, they should be provided with a copy.

Case Management Note, 11 March 2015:

27. Through a Case Management Note ("CMN") issued by the Tribunal's Registrar, the DfT's Application Notice was refused. Her reasons were:

- The Tribunal has already decided that the regime under which this case will be considered is the *Environmental Information Regulations 2004*.

- The request from the Department of Transport (in effect supported by Porsche Cars GB Limited) for a preliminary hearing on this issue is therefore refused

- The Department of Transport may include in their response their objections about being joined, but it may be a better use of time to simply respond to the issues that the Tribunal Judge's directions highlighted in his directions of 14 January 2015.

28. The Tribunal observes that the Registrar's case management note was in essence both constructive and helpful, particularly in the light of delays to date and the additional expense to which the Appellant has already been put given the apparent inertia and reluctance on the part of the respondents. A preliminary hearing would probably only increase the delay in light of our indications and his expense given that the Appellant had since felt the need to retain a legal team.

29. Consequently the DfT subsequently asked the Tribunal Judge to consider its application.

Telephone Directions Hearing, 19 March 2015:

30. A telephone directions hearing was held with me on the above date, attended by the parties save for the Commissioner and the DVSA. It was clarified that the question as to which regime applied (EIR or FOIA) had yet to be finally determined by the Tribunal, after hearing submissions from all parties. Therefore it was directed that this issue and the question of whether the DfT were a proper party to the appeal be determined at a full hearing in May 2015. At the same time, any issues flowing from the Tribunal's determination of the applicable access regime could be fully addressed and considered; this would include whether any exceptions applied if the EIRs were said to be the correct regime or any exemptions under FOIA in the alternative position.

The Third Hearing – 11 & 12 May 2015:

Should the Department for Transport be joined in this case:

31. As indicated above, Mr. Cieslik made his request to the DVSA. In his DN the Commissioner noted that:

> *"...under FOIA the DVSA is not a public authority itself but is an executive agency of the Dept for Transport (DfT) which is responsible for the DVSA. The public authority in this case is actually therefore the Dept for Transport not the DVSA. However, for the sake of clarity this decision notice refers to the DVSA as if it were the public authority."*

32. The Tribunal was concerned as to the strict definition of public authority as set out under FOIA and how this could be said to apply to DVSA. Furthermore, consideration at the second hearing in December of the limited response to the request by the DVSA, e.g. no mention of ministerial correspondence, led the

Tribunal to consider whether the request should have been responded to on behalf of the wider public authority, as defined under FOIA, i.e. the DfT.

33. Having satisfied itself that the DfT was the appropriate public authority under FOIA, the Tribunal issued directions after the second hearing that the DfT be joined as a party. The DfT however, submitted that the correct respondent for this appeal was the DVSA which, they argue, is a part of the public authority and is itself to be treated as the public authority, drawing the Tribunal's attention to previous decision notices in which the DVSA had been considered to be the public authority.

34. The DfT also explained that if the central department at the DfT received a FOIA request they would consider this to cover relevant information held by their executive agencies where relevant whereas the converse was not true. Requests made to their executive agencies are responded to by that agency without reference to the wider department.

35. They also submitted that:

> "*it cannot be a sufficient reason for joining a party which was not the recipient of the FOIA request - and/or is not in practice the public authority concerned - that the appellant considers the actual recipient has failed to address the request adequately*."

36. At the hearing in May 2015, the Tribunal clarified that the issue of joinder of the DfT was at its own initiative and not the appellant's. The Tribunal had to rely on the written submissions of the DfT on this matter, as the DfT did not attend the May hearing. The fourth respondent indicated that they did not seek to make any submissions of their own on this point.

Whether the DVSA is a Public Authority for the purposes of FOIA:

37. The Tribunal referred to s.3 FOIA which defines 'public authority' for the purposes of the Act. It is clear from this that 'public authority' means: -

(a)... any *body which, any other person who, or the holder of any office which-*

(i) is listed in Schedule 1, or
(ii) is designated by Order under section 5, or

(b) a publicly owned company as defined by section 6

38. The Tribunal is satisfied on the evidence before it that the DVSA does not fall into any of these categories. Similarly the Tribunal has been provided with no evidence to suggest that the DVSA has been designated a public authority by virtue of an Order of the Secretary of State in accordance with s.5 FOIA.

Tribunal Ruling:

39. Having considered the above and all evidence before it, the Tribunal has concluded that the DfT *is* the relevant public authority for the purposes of this appeal.

40. Although the DfT contended this point, the Tribunal are of the opinion, given its finding that DVSA is not a public authority (as defined by FOIA), that the DfT, being the relevant public authority, are an appropriate party for the purposes of this appeal. In our view it is only by joining the DfT that the Appellant's right of access can be fully and properly considered. That is not to say that there may be cases where it is appropriate for an agency to take the place of, or represent the Public Authority when all parties agree and where it is appropriate as the DfT state is the practice regularly adopted. Each case must be considered on its merits.

41. However this requires important consideration and the application of caution because as provisions under FOIA/EIRs apply strictly to public authorities, as defined. There is no mechanism by which an organisation or part of an organisation can be treated as if it were a public authority. It either is or is not. Furthermore, as in this case, treating an executive agency as a public authority can lead to confusion on the part of the public as to where information is held and to whom a request should be addressed. Taking this further, there is a risk, through this approach, that an agency might lose sight of its obligation to provide advice and assistance in relation to requests for information which it doesn't hold but which is or may be held by the wider public authority of which it is part. Such an obligation flows from the duties conferred under either section 16, FOIA or regulation 9, EIRs. This is what appears to have happened in the instant case in relation to that part of the appellant's request, which seeks relevant ministerial correspondence. The DVSA did not directly hold such information so did not seek to establish whether it was held by the wider public authority (the DfT) of which it is a part (or if it did this was taken no further).

42. The Third Respondent argues that as the appellant directed his request to the DVSA it did not have to look any further than its own information holdings to assess whether relevant information was held. However, that is to argue that a requestor should himself know in which part of a public authority the information he seeks is held. This cannot be the correct approach. Where, because of their distinct role, different parts of a public authority deal with FOIA/EIR requests, each information access team must be alert to the possibility that some relevant information may be held within other parts of the public authority and make necessary enquiries. Where information is so held a response should be made by the relevant part(s) of the public authority, or on their behalf by the recipient of the request or co-ordinated in some other way.

Applicable access regime, EIRs or FOIA:

43. For the third hearing in May 2015, the Appellant provided submissions and was now legally represented. The Commissioner relied on his written submissions and did not attend. The DVSA had provided a witness statement on which they intended to rely but declined to tender the witness, whom we understand was present as an

observer, for cross examination. The DfT provided a witness statement and submissions but were not present. The fourth respondent, Porsche, also provided submissions and a witness statement and was legally represented at the hearing.

The Appellant's Case:

44. The Appellant provided his third submissions, dated 5th May 2015. These again referred to correspondence including confirmation by both Porsche GmbH and Porsche Switzerland AG that the throttle delay is typical in the Cayman R model regardless of the country of sale and that this is a measure taken by the manufacturer to comply with noise emission regulations. The Tribunal is satisfied to the requisite standard of proof that this is genuine and valid correspondence.

45. In the Appellant's skeleton argument he introduced *Southwark v ICO and Landlease* (EA/2014/0162) which held that in determining the applicability of EIR one should engage in a "*purposive*" application" to the facts of a case under the EIR. (Paragraph 30). The Appellant suggests that adopting a purposive approach as per Southwark, the Tribunal should consider the "*purpose of the defect as the test was the information gathering exercise*."

46. He also refers to another case, *Department of Energy and Climate Change and Mr. Alex Henney v IC* (EA/2014/0103, paras.1 - 22) which states that when determining which regime applies the whole context should be considered not just the particular aspect on which the request is focused.

The Commissioner's Submissions:

47. The Commissioner's skeleton dated 8th May 2015 supported his earlier submissions and went on to submit that "*this decision should not be made by reference to a balance of probabilities test but rather determined definitively*." In short, the IC said that "*The material information is either environmental information or it is not*."

The DVSA's Submissions:

48. The DVSA provided an open bundle and closed bundle with a witness statement from Colin Maddock (Head of the Chief Executive's Office) dated 25 April 2015 (Tab 41). The witness statement included the history to the request and then went on to explain that following a fresh search for information (in January 2015, some 14 months after the request and two oral hearings) relevant to the request, a further 28 documents were discovered in addition to the 3 already in the closed bundle before the Tribunal.

49. This witness did not address the question of whether EIR or FOIA applied but merely stated that the DVSA did not consider that any of the information was environmental information.

The DfT's Submissions:

50. The DfT also submitted a witness statement, from Melinda Johnson (Director of Group Services), dated 23rd April 2015 (Tab 39); submissions dated 24th April 2015 (Tab 40) and additional open and closed bundles. In their submissions the DFT reminded the Tribunal that it is a question of law which regime applies (rather than a balance of probabilities) because the question goes to the existence of the jurisdictional gateway for this appeal and it must be decided definitively. They referred the Tribunal by analogy to *Google Inc v Vidal - Hall and Others* [2015] EWCA Civ 311 at para.15).

51. The DfT adopted the IC's submissions and added that:

    a. " It is critical to focus on the requested information itself in determining if the EIR apply and not for example, on submissions or evidence put before the FTT by the Appellant to try to encourage the FTT to interpret the request as being about environmental information merely in some loose sense.

    b. In determining whether the EIR apply the FTT has to adopt a strict approach to the definition under Regulation 2(1). In particular, the requirements in that regulation must be strictly satisfied and information will not fall into one of the categories in Regulation 2(1) if it merely "relates to" or has "minimal connection" to those elements/factors or measures. They refer the Tribunal in particular to Flachglas Torgau GmbH v Germany (ECJ), Case C-204/09 at para.32 and cited in Green v IC and DfT, FTT, EA/2014/0014 at para.17).

    c. In this case the requested information is very specific, namely information on the safety evaluation of the vehicle throttle malfunction of the Porsche Cayman. It is squarely about an alleged defect in a product, the test for the defect and whether there may be safety issues as a result of any such defect. It is not about any of the environmental matters referred to in EIR 2(1) (a), (b),(c), (d) or (f) which appear to be those relied upon by the Appellant in this appeal.

    d. Regulation 2(1)(c) requires a nexus between the measure or activity identified in the information and the elements in paragraph 2(1)(a) or the factors in 2(1)(b) otherwise it will not apply. The DfT referred the Tribunal to Coppel on Information Rights (4th Ed, 2014) at 6-010, p195. The safety test which is the subject of the request, they argue, is not a measure or activity which affects, or is likely to affect, the elements/factors referred to in EIR 2(1)(a) or (b) and therefore those regulations and regulation 2(1)(c) do not apply."

Porsche GB Limited's Submissions:

52. Porsche GB Ltd provided its response on 29th April 2015.

53. They submitted that the Tribunal should determine definitively whether or not the EIRs apply rather than on a balance of probabilities.

54. As to whether the EIRs or FOIA applied, Porsche adopted the Commissioner's response and the DVSA's submissions on this point. They noted that in their view the fact that the Appellant had only raised the EIRs at the point of his Notice of Appeal was an indication of weakness in his case. This is absurd in our view. They went on to argue that it is inappropriate to consider whether his request falls under the EIRs at a late stage given that the Appellant has made no request under the Regulations. Again we are of the view that this is absurd and evasive. There is an ongoing duty on a public authority and to an extent the Commissioner, to assist a requestor.

55. Porsche argue that the requested information relates to product safety rather than the environment and that consequently it does not sit within any of the categories of the definition of environmental information under Regulation 2(1). They say that it is the nature of the requested information itself, which determines whether or not it is environmental information rather than the wording of the request. Further, they argue: "*Even on the terms of the Appellant's request for information, it is focused upon vehicle safety/alleged throttle malfunction rather than anything environmental in nature*." Consequently, they say *"...the information in question in this case could not fall under even a wide interpretation of the definition, as the information relates solely to matters of product safety*."

56. Regarding the specific context of the requested information, Porsche argue that the vehicle safety test *"...is not an activity which affects or is likely to affect the elements and factors set out in the Regulations*."

Tribunal Ruling:

57. The Tribunal accepts that this issue is one which should be determined definitively rather than on a balance of probabilities. The panel is grateful to all parties for submissions in this respect. The prima facie finding was intended not to pre-empt submissions from all other parties absent from the first or second hearings.

58. As indicated at para.4, the Tribunal identifies two distinct categories of requested information; one seeking all information held about the Porsche Cayman (qualified by the Appellant to exclude all type-approval and MOT test related information) and the other seeking information relating specifically to the safety test of the same motor vehicle.

59. We address the larger of the two categories, information relating to the safety test, first.

Whether the safety test affects, or is likely to affect, the elements and factors of the environment:

60. As the DVSA put it, the disputed information is about determining whether a component of a Porsche Cayman is likely to cause death or serious injury. Indeed,

all respondents have asserted that the safety test in this case is not an activity, which can be said to affect the elements of the environment.

61. The Tribunal respectfully disagrees. Whilst being careful not to reveal the contents of closed material, it is clear to anyone that in order to test the issue complained of (i.e. the vehicle throttle response under specific conditions) the vehicle must be driven, or at the very least the engine must be running.

Consequently, by conducting the safety test:

- the DVSA caused emissions by driving the vehicle (r.2(1)(b));

- at the very least those emissions affected the air (r.2(1)(a));

- they did so through a measure (a safety test) which was likely to affect the elements (air) (r.2(1)(c));

62. From this analysis it is clear that even if the Tribunal were to reject the argument that the safety test was undertaken due to an environmental concern, the method by which it was undertaken was itself an interaction with the environment and thus caught by the definition of environmental information.

63. Turning to the wider context of the safety test, as argued by the appellant, we have considered the approach adopted in the *Southwark v Land Lease* case ("Southwark"). In response to the proposition (in that case) that the EIRs are overused and often said to apply to anything, the Tribunal noted:

"30. The answer to this tendency, it seems to us, is not the development of the vague notion of "remoteness". Rather it lies in a purposive application to the facts of a case of the definition of "environmental information" in Reg 2(1) EIR..."

64. We also refer to the *Department for Energy and Climate Change* ("DECC") case, specifically para.21 which developed the reasoning in *Southwark*:

> *"The Tribunal noted the approach of the FTT in the Land Lease case - firstly it looked at the programme as a whole and whether that fell within the definition (para.33), even though that was not in itself the focus of the request. Secondly it decided that the viability assessment (which was the focus of the request) is a form of economic analysis used within the framework of that measure and activity and thus falls within part (e) of the definition."*

65. The Appellant asks us to consider the purpose of the defect following this approach. However, we are not persuaded that this is correct. In our view the focus must be on the purpose of the test, which was to check the safety of the vehicle whilst being driven. The purpose was not to test whether the defect / modification had been put in place to circumvent noise emission regulations. The Appellant's reliance on "Southwark and "DECC" is not redundant however. Applying this approach to the instant case, it is clear to the Tribunal that the DVSA is an executive agency within

the Department for Transport. On their website,[1] the DVSA summarise what they do as:

> *"We improve road safety in Great Britain by setting standards for driving and motorcycling, and making sure drivers, vehicle operators and MOT garages follow roadworthiness standards. We also provide a range of licensing, testing, education and enforcement services."*

66. The equivalent Department for Transport statement,[2] reads:

> *"We work with our agencies and partners to support the transport network that helps the UK's businesses and gets people and goods travelling around the country. We plan and invest in transport infrastructure to keep the UK on the move."*

67. Therefore, whether one looks at DVSA alone or as part of the wider department, both are concerned with matters, which have a considerable impact on the environment, i.e. transport.

68. It is inescapable that the safety test relates to the safety of the vehicle whilst being driven. Driving is an activity, which has a direct impact on the environment. Government policy on "*Reducing greenhouse gases and other emissions from transport*" [3], states:

> *"Transport is a major source of greenhouse gases. Around a quarter of domestic carbon dioxide (CO2) and other greenhouse gas emissions in the UK come from transport. Transport is also a source of emissions which make air quality worse."*

69. The safety test, set in its wider context, is therefore a measure (reg.2(1)(c)) which is likely to affect the elements of the environment (i.e. the air - reg.2(1)(b)) through specific factors such as noise and emissions (reg.2(1)(b)).

70. Porsche argue that the disputed information is about product safety rather than the environment. With respect we say that whilst the central issue is undoubtedly concerned with product safety, the product in question is a motor vehicle. As we have indicated at paras.62-63, motor vehicles have an impact on the environment, even whilst being tested (contrary to their argument), a measure which we find to be within the definition of environmental information.

71. Having considered the above and all evidence before it, and as indicated at the third hearing, the Tribunal rules that the EIRs are the correct access regime in relation to information about the safety test (our categories 2-7).

<u>Whether data in relation to the throttle defect / modification is environmental information</u>

[1] https://www.gov.uk/government/organisations/driver-and-vehicle-standards-agency
[2] https://www.gov.uk/government/organisations/department-for-transport
[3] https://www.gov.uk/government/policies/reducing-greenhouse-gases-and-other-emissions-from-transport

72. The appellant's arguments in this respect are set out at paras.45-47, above. In summary he claims that information in relation to the throttle defect falls under reg.2(1)(b), (c), (d) and (f) for the reasons stated.

73. Respectfully, the Tribunal disagrees with this analysis. The Appellant's request is clearly focused on the safety test. The only parts which specifically mention the throttle are:

    a. *"...in particular the VOSA safety evaluation of the vehicle throttle malfunction."*

    b. *"...all information you have regarding the VOSA test of the Porsche Cayman throttle malfunction with particular reference to:...*

    Both of these elements set the focus squarely on the safety test rather than the reason the defect was put in place. If the test had been carried out to assess whether the vehicle's noise emissions were compliant with relevant legislation then this would have been different.

74. The Appellant says that the throttle defect was created in the Cayman R to affect noise emissions, bringing the information under reg.(1)(b). However, the disputed information is not about noise emissions, it is about the safety of the vehicle in relation to the throttle defect.

75. Next, the Appellant submits that the test relates to measures taken by both Porsche Cars GB Ltd and DVSA to comply with (or circumvent) their legal obligations under UNECE 51.2 and Directive 2007/46/EC. Consequently he says it falls under reg.2(1)(c). Again though, the disputed information is about a safety test, it does not mention measures taken or alleged to have been taken with regard to the specified legal obligations.

76. Regarding reg.2(1)(d) the Appellant says that test and other data held regarding the throttle malfunction will report on how the second respondent (DVSA) and Porsche Cars GB Ltd are implementing environmental legislation. He states his belief that this is of particular significance as the DVSA have deliberately or mistakenly tested the wrong vehicle. It is clear to us however that the disputed information is not a report on the implementation of environmental information, such as that referred to by the appellant. Neither can it be said to report on the issue of noise emissions. It relates solely to the safety of the vehicle whilst being driven.

77. Finally the Appellant states that noise emissions, being such a potential hazard to human health, safety and conditions of life, gave rise to the implementation of legislation on acceptable limits. Consequently, he argues, the disputed information falls under reg.2(1)(f). In our view however, it is clear that the safety test in question was to determine whether the vehicle was safe to drive rather than safe in terms of noise levels.

78. The Tribunal agrees with the Commissioner that, whilst not relevant to the question of whether the disputed information is environmental information, the Appellant's arguments are nonetheless important public interest factors. We address this matter later in our decision.

79. Having determined that the Regulations are the applicable access regime we have not gone on the consider exemptions under FOIA claimed by the parties. However we note that the Commissioner has raised section 21 FOIA in their submissions of 8 May 2015. This arises from exchanges between the Appellant and DVSA and was first raised by the DfT in their submissions of 24 April 2015 and the witness statement of Melinda Johnson where the exemption under section 21 FOIA is claimed. The correspondence in question is exhibited in the Open Bundle supplied by the DfT. We will refer to it later on (see para 154), but for the purposes of claiming an exemption we say that such information should have been considered as an exemption under section 40(1) because it is the Appellants personal data and we suggest section 21 is inappropriate because his personal data is not accessible to *members of the public*. We suggest the Commissioner notes this distinction as it is not the first time we have noted the possible mis-application of section 21

Final Submissions:

Appellant:

80. The Appellant argues that his request is not manifestly unreasonable, as claimed by Porsche, stating that it is not only in his interest to know if this model has a hesitation. He strenuously denies that he has behaved in an inappropriate or vexatious manner in any of his dealings with any of the Respondents.

81. He also addressed Porsche's argument that reg.12(4)(b) extends to cover information which under FOIA would be covered by a statutory bar (i.e. s.44(1) FOIA). The Appellant disagrees with this approach stating that reg.5(6) is clear that any other enactment that would preclude disclosure shall not apply.

82. The Appellant does not accept that disclosure of details of a positive safety test would in any way adversely affect public safety, as it would not change the second and third respondents' statutory powers and duties in relation to ensuring vehicle safety. He argues that the effect on the safe space and voluntary engagement is over stated.

83. He goes on to argue that disclosure would not constitute a breach of confidence between the second and fourth respondents as no such relationship exists in an absolute fashion. In the Appellant's opinion, all information that vehicle manufacturers pass the second respondent is given in full knowledge that the second respondent retains the right to disclose any and all material of its choosing, in the public interest. He also argues that because of the EIRs and FOIA there can never be an absolute guarantee of confidentiality.

84. A further argument is that the requested information will neither damage commercial interests or the relationship between the second and fourth respondents. The Appellant states that it is not clear to envisage how details of a safety test, where the vehicle passed the test, would damage the fourth respondent's commercial interests. There is nothing to prevent a competitor of the fourth respondent, once the vehicle is publicly released to the market, purchasing one and conducting its own tests. It does not appear that the fourth respondent

provided any sensitive commercial information to the second respondent, they merely provided a vehicle.

85. So far as any adverse impact on matters of public safety, the confidentiality of any proceedings or commercial confidentiality, the Appellant denies that there would be such effect. He stresses that it is insufficient to raise the potential of an adverse effect; the respondents must prove that there would be such adverse effect. Further, he suggests that no adverse effect can arise through the disclosure of a safety investigation with a positive outcome i.e. where the vehicle passed the test.

86. In the Appellant's view, even if an adverse effect is found, he submits that the public interest is in favour of disclosure. In particular, the Appellant highlights the clear public interest in seeing information on the safety test and the rigor of the second respondent in relation to its duties to undertake such tests.

Information Commissioner (Skeleton Argument):

87. The Commissioner reminds the Tribunal of agreement between parties to the extent that the scope of the Appellant's request does not include all Porsche Cayman type approval or MOT data held by the VCA and DVSA. Instead it focuses on ministerial correspondence and correspondence between the Second Respondent and others relating to the safety test.

88. In his skeleton of 8 May 2015 the Commissioner raises the discussion that if the Tribunal concludes that the disputed information is to be considered under EIR and that the information is on emissions of gases and/or noise, then any exceptions contained within regulations 12(5)(d) – 12(5)(g) are rendered unavailable by virtue of regulation 12(9). We refer to paras. 72 -79 above wherein we find the focus of the request in on the safety test rather than emissions and accordingly in our view reg. 12(9) is not engaged in the circumstances of this case.

89. Regarding Porsche's reliance on reg.12(4)(b) and mindful of the similarities between s.14, FOIA and this exception, the commissioner refers the Tribunal to the case of *Information Commissioner v Devon County Council & Dransfield* (GIA/3037/2011). This deals with s.14, FOIA which can be applied when a request is said to be vexatious. In particular, the Commissioner draws our attention to the four broad issues or themes identified by judge Wikely in that case as being indicators of whether a request can be said to be vexatious. These are:

    (a) the burden placed on the public authority and its staff;
    (b) the motive of the requestor;
    (c) the value or serious purpose of the request, and
    (d) any harassment of, or distress caused to, the public authority's staff.

90. Regarding DVSA's claim that reg.12(4)(d) is engaged, the Commissioner states that this exception does not require any adverse effect to be caused by the disclosure of an unfinished document in order to engage the exception. The commissioner will say that it is for the Tribunal to decide if these documents are unfinished documents.

91. Turning to the exception at reg.12(4)(e), applicable to internal communications, the Commissioner notes that DfT claim this exception on the basis that the versions of the draft letter were internal. The Commissioner further notes that there does not have to be any adverse effect through disclosure for the exception to apply; the Tribunal accepts that point.

92. The Commissioner then addresses Porsche's claim that reg.12(5)(a) applies given that disclosure would adversely affect public safety. He states that in order to find that this is engaged some adverse effect on public safety must be more likely than not. The extent or severity of that adverse effect is not relevant to the engagement of the exception, there just has to be some effect. He also suggests that disclosure of all the withheld information would have to have the adverse effect. In other words, if parts of the withheld information would not have the adverse effect claimed then the exception is not engaged in respect of those parts.

DVSA (and Witness Statement):

93. At para.17 of the witness statement of Colin Maddock, for the DVSA, he argues that reg.12(3) is engaged in relation to personal data of persons other than the Appellant. He claims that this applies in respect of information in documents he describes at paras. 9(iii) and 9(iv). He states that this particularly relates to the personal information of junior officials and employees of Porsche who have a legitimate expectation, in accordance with the first data protection principle, that their names will not be placed in the public domain.

94. Regarding reg.12(5)(d), Mr. Maddock claims that DVSA's investigation into the defect complaint are conducted using its powers under reg.9(4) of the *General Product Safety Regulations* ("GPSR"). This, he says, requires enforcement authorities to maintain confidentiality in relation to their dialogue with producers in respect of product safety. In addition, reg.10(5) provides DVSA with powers to take enforcement action where voluntary action by manufacturers has not been possible. Under the "*Vehicle Safety Defects and Recalls Code of Practice 2011*" it can compel manufacturers to inform DVSA of any safety issues with their products. The Code states; "*DVSA will not disclose publicly information on matters of commercial confidence unless there appear to be overriding safety considerations*."

95. DVSA emphasise the need for close relationships with manufacturers in order to operate effectively. They say this enables them to receive more information regarding possible safety defects and allows them to work in a safe space with manufacturers to resolve problems. The disclosure of commercially sensitive information supplied as part of this process would adversely affect such working relationships, which would be detrimental to DVSA's ability to function and protect the public from potentially dangerous vehicles, and this is not in the public interest.

96. Regarding reg.12(5)(e), DVSA argue that in order to investigate the alleged defect under the GPSR, it was necessary for Porsche to provide specific information relating to the vehicle in question. Particularly, the information is specific to the Porsche Cayman and contains details of the test carried out to assess the impact of the alleged throttle malfunction. This, they claim, is commercially sensitive information. They further argue that confidentiality of this information is provided by

law, specifically the GPSR and that this is protecting a legitimate commercial interest. They further argue that disclosure, in breach of confidentiality, could adversely affect their ability to work effectively as manufacturers would be less willing to share such information with them unless ordered to do so. Ultimately this could even lead to road safety issues not being actioned in a timely manner, contrary to the public interest.

97. At para.27 of his witness statement Mr. Maddock describes why he says reg.12(4)(d) applies to handwritten notes made by a DVSA engineer during the safety test in question. These, he says, include comments and aide memoirs to assist him when compiling the final report. He goes on to say that these were never intended for public consumption and could be interpreted in a number of ways, which would cause confusion. He also stresses concerns that routine publication of such personal notes would be discouraging to investigators who would be less willing to write candidly. This would affect investigations adversely as not all information, needed to make accurate assessments, would be available.

Department for Transport:

98. The DfT say that if the request is interpreted widely, to include all information about the Porsche Cayman, then this is manifestly unreasonable and reg.12(4)(b) would apply because of its broad scope.

99. Their witness, Melinda Johnson, goes on to state that reliance on reg.12 (4)(c) is linked to the above contention, in that the request is formulated in too general a manner. In relation to this point the DfT reiterate their argument that the proper public authority for the purposes of this request is the DVSA and consequently the duty to provide advice and assistance under s.16 FOIA or reg.9 EIRs does not apply to them.

100. Regarding reg.12(4)(d), the DfT say that working drafts of responses to the Appellant include comments made by a junior VCA official. They refer the Tribunal to another case: *Department for Transport v IC* (EA/2008/0052) where it was ruled that a document remains unfinished even where a final version of it exists.

101. In relation to their reliance on reg.12(4)(e), the DfT claim that draft versions of a letter in the closed bundle were internal. They say it would not be in the public interest for officials to be inhibited from contributing comments upon draft correspondence; an effect they claim would be caused by disclosure.

102. The Tribunal would point out that the DVSA have disclosed the letter at Tab 8 with only two comments remaining withheld.

103. Turning to reg.12(5)(d), the DfT refer to the Type Approval Process which is carried out by the VCA. They claim that it is fundamental to the confidentiality arrangements with manufacturers, such as Porsche, that confidential information relating to Type Approvals is not disclosed. The confidentiality of the Type Approval Process is provided by Directive 2007/46/EC. (app 2 para.2). DfT argue that this makes the Type Approval Process a confidential proceeding as defined by European law, which is binding in this jurisdiction.

104. The DfT did not link the exceptions quoted in their skeleton argument or submissions to specific information in their closed bundles. For example, reference is made by Ms Johnson in her witness statement (at para.30) to two editing comments but no reference is made to which documents, yet alone which specific editing comments, so the Tribunal is unable to identify which two editing comments this refers to.

Porsche:

105. In relation to the exception at reg.12(4)(b), Porsche argue that this justifies the withholding of information where disclosure is expressly prohibited under another enactment. They say that it would be perverse for such information, which would be exempt under FOIA, to be capable of release under the EIR.

106. Porsche also comment that the Appellant has engaged in a long campaign against them both on-line and via the courts in Northern Ireland. They submit that the present information request, when viewed in the light of the relevant context and history, is vexatious within the meaning of FOIA and thus disclosure would be manifestly unreasonable under the EIRs.

107. Turning to reg.12(5)(a), Porsche stress the confidential working relationship with the second and third respondents, fostered under provisions of the Enterprise Act through which they have proactively engaged. They say that such a relationship has been built on trust and on the understanding that information is confidential between the parties. The undermining of this relationship would adversely affect Porsche and would fundamentally change the manner in which Porsche would engage with the Second Respondent. This would reduce proactive engagement, which inevitably would reduce the proactive testing functions, which the Second Respondent could carry out.

108. Regarding reg.12 (5)(e), Porsche say that it is clear that the disputed information clearly relates to a product of theirs, which has been available for sale to the public. Therefore, this is clearly relevant to their commercial interests and it is contended that the confidentiality in the information, through the statutory framework, exists in order to protect the legitimate interests of the manufacturers. To disclose the disputed information would therefore have a fundamental, adverse effect on the confidentiality.

Tribunal Ruling on Claimed Exceptions:

Regulation 12(3) - Requested information includes personal data of which the applicant is not the data subject:

109. The DVSA have claimed this exception in relation to names of employees of all parties appearing in the disputed information along with those of members of the public with whom they have corresponded.

110. The Appellant indicated in his request (p.55): "*You may redact names where appropriate*." He further confirmed this in his third submissions dated 5th May 2015 at para.9 (p.165). Consequently it is apparent that he does not wish to see personal details thus this exception does not apply and these may be redacted.

Regulation 12(4)(b) - Request is manifestly unreasonable:

111. The DfT have said that a wide interpretation of the request, to include all information about the Porsche Cayman, would render it manifestly unreasonable. However, such an interpretation would be to ignore both the context of the Appellant's request and his submissions.

112. The context of the request is the Appellant's desire to clarify the safety evaluation of the Porsche Cayman and to better understand what has led to the engine characteristics he and others have experienced. He also seeks correspondence from others affected in the same way and to know how ministers have reacted to what, in his opinion, is a deliberate attempt to circumvent emission regulations. Finally he seeks all information held by VOSA/DVSA about the Porsche Cayman. One can argue therefore that this category is not wide ranging given that he has restricted it to information held within the agency.

113. The Appellant's submissions of the 5th May 2015 make the scope of his request clear.[4] Here he says that "*the...request does not include all Porsche Cayman Type Approval or MOT data held by VCA and DVSA*."

114. Turning to Porsche's argument that reg.12(4)(b) can apply in circumstances where information is expressly prohibited under another enactment. The EIRs specifically dis-apply any statutory bar to disclosure by virtue of regulation 5(6), which says:

"*Any enactment or rule of law that would prevent the disclosure of information in accordance of these Regulations shall not apply*."

115. In the Tribunal's view it would be somewhat contrary to this regulation if we were to take into account the statutory bar in consideration of manifest unreasonableness. In any event, we note that the statutory bar in question, under s.238(1)(c) of the *Enterprise Act 2002*, applies to information which has come to the DfT/DVSA in the exercise of a function it has under subordinate legislation, namely "*The General Product Safety Regulations 2005*". In this case however, we have seen no evidence that any of the disputed information has *come to* the DfT/DVSA from Porsche. The fact is that the DfT/DVSA created the information in question themselves. Even if we take account of the fact that Porsche provided a Cayman vehicle for testing, that in itself is not information, nor can there be said to be anything confidential about the vehicle, which was, or at least had previously been, on general sale at the time of the test.

[4] Third Submissions of the Appellant (5th May 2015), para.4

116. Porsche also claimed that the Appellant's long campaign against them, both on-line and via the courts rendered his request manifestly unreasonable. The Tribunal rejects this argument. We have seen no evidence which would move us to conclude an adverse effect within the four factors from *Dransfield* which are said to be good indicators as to whether a request is vexatious or manifestly unreasonable (i.e. burden, motive, value or serious purpose and harassment or distress).

117. There has been no claim that a heavy burden would be placed on the DfT/DVSA in responding to the request, save in connection with a wider interpretation, which we have already ruled against. The Appellant clearly has a good motive as he has stated that it is in the interest of all owners of the Cayman vehicle to know more about the vehicle's hesitation, the reasons for it and what measures the DfT/DVSA have taken to test its safety. Transparency in matters relating to safety and which aids a better understanding of the engine characteristics in question clearly has value for owners of this vehicle type; the Appellant has a serious purpose in making such information more widely available as well as requiring it for his legal action against Porsche. There is no evidence of any harassment or distress, indeed the Appellant made clear in his request that he did not wish to see any personal information. It would therefore be difficult to accept any claim that he was unreasonably targeting particular staff. Similarly it would be unreasonable to rule that the Appellant was harassing Porsche through litigation. Undoubtedly the Courts would not allow this in any event. So far as comments posted on the Internet of which Porsche disapprove, we have been provided with no evidence that they have made any attempt to have such content taken down.

118. In view of the above, the Tribunal finds that the request is not manifestly unreasonable and consequently that this exception does not apply.

Regulation 12(4)(c) - Request is formatted in too general a manner:

119. The DfT claim this exception alongside their contention that the proper public authority for the purposes of this request is the DVSA. They argue that consequently, the duty to provide advice and assistance under s.16 FOIA or reg.9 EIRs does not apply to them. We have already ruled that the DfT are the proper authority for the purposes of this request (see paras.30-41). We have also ruled that the request does not need to be interpreted widely. We do not accept therefore that the request was formulated in too general a manner. In any event, by their own admission the DfT didn't offer any advice and assistance (because they didn't handle the request); therefore, as application of the exception is conditional upon this, it cannot be claimed.

Regulation 12(4)(d) - Request relates to unfinished documents (i.e. drafts):

120. Both the DfT and DVSA claim that this exception applies in relation to working drafts of responses to the Appellant because they include comments made by a junior VCA official. However, versions of the same draft appear at tab 8 of DVSA's open bundle of documents. Having made a comparison of the various versions we have established that only two comments remain undisclosed. What this means of

course is that the exception applies and that consequently we must consider public interest factors. In passing we note discrepancies (identified in paras 120 and 156 – 181 herein) between the Open and Closed bundles provided by the DVSA & the DfT. We also note the DVSA were inconsistent in the redactions applied in their Open Bundle (see for example para. 162 herein).

121. DVSA recognise that there may be a public interest in understanding how safety inspections are carried out and that the notes give an insight into the progression from initial observations to final report. The DfT comment that there is a public interest in knowing whether a particular product has been type-approved and is therefore more likely to be safe.

122. Turning to public interest factors against disclosure, the DVSA say the manner in which the information is presented means that it could easily be misinterpreted and passages, which are either questions or the result of research, could be read as statements of fact, which would call into question the veracity of the final report. Consequently, they argue, this would be a misrepresentation of facts and the public interest in understanding whether specific issues are safety concerns would not be best served by introducing inaccurate or misinformed theories into the debate.

123. The DfT say that type-approval may be extended many times for various reasons including upgrades or modifications, to introduce or remove a product descriptor or to add additional variants, which fall within scope of the original type-approval. They say that to reveal the number of extensions issued might incorrectly suggest faults or weaknesses in the original product and potentially weaken it's standing. Accordingly they argue that the extension number is treated as commercially confidential. They further argue that there is no strong public interest in the release of comments made by junior officials on a draft response.

124. Having considered the above factors the Tribunal firstly notes that the Appellant does not seek any information relating to type-approval, thus any redactions on this are out of scope.

125. We consider that the public interest in disclosure outweighs that in favour of withholding. The comments by the junior official reflect a diligent approach in that they challenge the author to establish facts. This is reassuring to the public and alongside the remainder of the comment in question makes clear the department's impartial approach. In our view, the public interest is served in knowing that the department behaves in this way, particularly in view of the extant concerns.

Regulation 12(4)(e) - Request involves the disclosure of internal communications:

126. The DfT claim that draft versions of a letter were internal. They say it is not in the public interest for officials to be inhibited from contributing comments upon draft correspondence in fear that these might be disclosed at some point.

127. The Tribunal notes that the right of access to information both under FOIA and the EIRs had, at the time of the request, been in force for almost nine years. In that time employees and persons dealing with public authorities have had ample time to realise and adjust to the fact that comments they make may be disclosed at some point. In other words, this possibility already exists and disclosure at this juncture

should not give rise to further concerns. We also note that, in any event, the comments in question are unattributed and thus the author will not be publicly identifiable.

128. The Tribunal would observe that this would not, by any means, be a routine publication. Furthermore, investigators should never be discouraged from writing candidly about the nature and extent of any potential defects and there is no justification for suggesting that they would do so. We say further that it would be a dereliction of their duty if they were not to write candidly about results of investigations about safety. The whole purpose of the investigation is to make accurate assessments of all the information available and it can only be in the public interest that this is so.

129. The Tribunal noted the points, which have been made, and none of the points raised by any of the respondents persuade us that there would be harm resulting from disclosure of the subject of the disputed information. On the contrary, we find that it is profoundly in the public interest that this information is disclosed.

Regulation 12(5)(a) - Disclosure would adversely affect public safety because the DVSA would not be able to perform its statutory functions:

130. Porsche have claimed that this exception applies. They say that it is in the public interest to have confidence that DVSA is carrying out relevant testing of vehicles. They go on to say that it is of equal importance that manufacturers engage with DVSA in order to advance this goal. They also point to their understanding, given the provisions by the *Enterprise Act 2002*, that results of safety testing would not be released into the public domain.

131. They raise concerns that:

> *"...if manufacturers considered that testing information would be released, it would have a chilling effect on the sector, reducing proactive engagement with the [DVSA] which inevitably would reduce the proactive testing functions it could carry out."*

132. Pausing here, the Tribunal finds the suggestion that manufacturers would be reluctant to engage proactively in safety investigations to be disconcerting in the extreme. At the hearing in May 2015, Counsel for Porsche refuted the suggestion that they were threatening safety tests and we welcome this clarification. However, the fact remains that Porsche have made this submission so it falls to us to consider it.

133. We repeat our findings from where we indicate that the results from safety testing did not come from Porsche, they were created by officers of the DVSA. Consequently the statutory bar under s.238(1)(c) *Enterprise Act 2002* does not apply.

134. The Tribunal finds that, in this case, the public interest in favour of disclosure outweighs that of withholding. We say this because there is a clear public interest in

informing drivers of the vehicles in question of the particular engine characteristic. We note that the case made that the DVSA has found there to be no safety defect. However, they do acknowledge that a maximum lag of 2.5 seconds is caused by this characteristic (as made public in DVSA's response to a complainant, dated 25 April 2012). This lag was still enough to affect the Appellant, who, according to his evidence before this Tribunal was consequently placed in what he regarded as a dangerous position whilst attempting to carry out an overtaking manoeuvre. While it is a subjective assessment, we have no reason to doubt his evidence in this regard.

135. Furthermore, we cannot, in any circumstances, imagine a situation where a manufacturer would jeopardise the safety of not only its customers but also of other road users and pedestrians, as suggested. We also add that disclosure in this case would not amount to or indicate routine disclosure; rather it would be disclosure on the facts of this case alone. We cannot see why manufacturers would be deterred from proactive engagement by a case such as this, which in our opinion clearly demonstrates the need for disclosure.

Regulation 12(5)(d) - Disclosure would adversely affect the investigation of safety complaints:

136. Both the DfT and DVSA say that they are required to maintain confidentiality in relation to their dialogue with producers. However, whilst the DVSA state that this is in connection with the investigation of safety complaints, the DfT say that in their case it relates to the type-approval process. In light of the Appellant's lack of interest in such information the Tribunal has only considered the arguments put forward by the DVSA.

137. DVSA recognise the need for transparency in how it conducts its activities. Against this however they say that there is no public interest in disclosing confidential information, especially where such confidentiality has been provided by statute. Further, they argue that whilst they have powers to require manufacturers to provide certain information (and it is an offence not to provide information so required), to have to rely on these powers would put a huge strain on limited resources. They also say that use of the powers in question is slow and cumbersome. In their opinion, disclosure would pose a real danger that manufacturers would be deterred from cooperating, being candid and freely providing DVSA with information when involved in enquiries or investigations. To quote DVSA directly:

> "*The impact of this on public safety is of great concern as it risks causing severe harm to the ability of DVSA to perform its statutory functions, consequently having a detrimental impact on all road users and pedestrians.*"[5]

138. As already noted, Porsche have raised this argument in relation to regulation 12(5)(a) but we see their comments as being equally relevant to this exception.

[5] Witness Statement of Colin Maddock, para.23

139. The Tribunal repeats its comments from para.132. It is disconcerting in the extreme to suggest that manufacturers would be reluctant to engage proactively in safety investigations. We cannot in any circumstances imagine a situation where a manufacturer would jeopardise the safety of not only its customers but also of other road users and pedestrians, as suggested by the DVSA. We also add that disclosure in this case would not amount to or indicate routine disclosure; rather it would be disclosure on the facts of this case alone.

140. We cannot see why manufacturers would be deterred from proactive engagement by a case such as this, which in our opinion clearly demonstrates the need for disclosure in the public interest. We note that the DVSA found there to be no safety defect. However, the acknowledged maximum lag of 2.5 seconds is still enough to affect drivers, as has been noted in para.134.

141. We repeat our findings from para.115 where we indicate that the results from safety testing did not come from Porsche, they were created by officers of the DVSA. Consequently the statutory bar under s.238(1)(c) *Enterprise Act 2002* does not apply. We also note that the Appellant has been provided with a copy of a letter between Porsche Cars GB and the DVSA (p.15 of the open bundle), which runs contrary to DVSA's argument that correspondence between themselves and manufacturers is regarded as confidential. This is particularly relevant in this case given that the letter discloses the only information, which we find, could be regarded as confidential. Namely, a description of the effect of the engine characteristic.

142. We note that the DVSA has statutory power to enforce the provision of information and that it is a criminal offence not to supply it. Again we find it difficult to accept that a manufacturer, faced with enforcement powers of this nature, would readily accept the negative publicity, which would flow from non-compliance and, as in this case, risk sales of its vehicles.

143. Finally, we reiterate earlier comments in relation to the existence of both FOIA and the EIRs. Manufacturers dealing with public authorities have had ample time to realise and adjust to the fact that information may be disclosed at some point. The EIRs permit disclosure of so called confidential information where it is in the public interest to do so. Consequently there can be no absolute guarantee of confidentiality. In short, the possibility of disclosure already exists thus to do so at this juncture should not give rise to any new concerns.

144. In view of the above, we find the balance of public interest favours disclosure.

<u>Regulation12(5)(e) - Disclosure would adversely affect the legitimate economic interests of Porsche:</u>

145. The DVSA claims that in order for it to investigate the alleged defect properly, it was necessary for Porsche to provide specific information relating to the vehicle in question. They go on to say that this was provided under the *General Product Safety Regulations 2005*.

146. They followed another first tier Tribunal case in determining whether this exception is engaged (*Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* - EA/2010/0012). In particular they noted:

    i. is the information industrial or commercial in nature? - The information is specific to the Porsche Cayman and contains details of the test carried out to assess the impact of the alleged throttle malfunction.

    ii. is confidentiality provided by law? - the provisions of the GPSR require that manufacturers provide information to DVSA so that it can fulfill its statutory obligations. The 2011 Code of Practice on Safety Recalls makes it clear that the information is confidential.

    iii. is the confidentiality protecting a legitimate economic interest? - the test was carried out to determine whether the alleged throttle malfunction was a safety matter that would require further action by Porsche...

    iv. would confidentiality be adversely affected by disclosure? - ... a disclosure of information that has been obtained through a confidential process could affect DVSA's ability to operate effectively as manufacturers will be less willing to share commercially sensitive information unless ordered to do so. This would include information about vehicle safety notification which could be delayed due to manufacturers being reluctant to inform DVSA of potential issues until the manufacturer had conducted its own testing; without this information DVSA would not be able to assess the impact of the issue and arrange timely recall notices with manufacturers. This would have an impact on the trust between manufacturers and the regulator resulting in possible road safety issues not being actioned in a timely manner, which is not in the public interest.

147. Porsche say that engagement between themselves and the DVSA has been based on trust and a common law duty of confidence. They go on to say that as the disputed information is about one of their products, it is clearly relevant to their commercial interests. They argue that confidentiality of the information and the protection thereof through the Enterprise Act 2002 is designed to protect the legitimate interests of manufacturers. Disclosure, they say, "...*would therefore have a fundamental, adverse affect on the confidentiality*."

148. In relation to public interest arguments, Porsche say that the public interest is satisfied through DVSA conducting a safety test and confirming the outcome to the public. They further say that it is in the public interest that manufacturers engage with the DVSA and that if such engagement were to be undermined through disclosure of information this would be very much contrary to the public interest. They say that any such decision could have far-reaching implications way beyond the present matter.

149. The Tribunal has found no evidence, which indicated that Porsche had provided any of the disputed information under the provisions of the Enterprise Act 2002. We repeat our findings from para.115.

150. We further repeat our comments from para.132 where we say that the suggestion manufacturers would no longer cooperate proactively with safety investigations is disconcerting in the extreme.

151. We acknowledge Mr. Moloney's witness statement at para.8 (p.174) where he sets out that the vehicle in question utilises technology common to many other Porsche products and follow-on technologies and is considered competitively and commercially sensitive for the manufacturer and its third party technology partners. However, we cannot accept that disclosure would reveal anything, which a competitor would not be able to glean by purchasing the vehicle in question and examining for itself.

152. Our assessment of the public interest is as set out under paras.134-135. Consequently, in our view, the balance lies in favour of disclosure.

The disputed information:

153. The Tribunal now has three closed bundles of disputed information; one provided by the DVSA at the beginning of the appeal which consists of three pages; another from the DVSA consisting of forty-six pages (including blanks) and referred to at para.48 and one from the DfT consisting of eight pages, referred to at para.50.

154. Pausing here, the Tribunal is concerned to note that Mr. Cieslik's personal data has been disclosed in both DVSA's and DfT's open bundle of documents discovered during the course of this appeal. This included his name, postal and email addresses, mobile telephone number and details of his motor vehicle, including VIN and registration numbers. Disclosure of these bundles to Mr. Cieslik under either FOIA or the EIRs is effectively disclosure to the general public. Therefore his personal data should not have been disclosed in this way. This is clearly provided for, on an absolute basis, in both FOIA (s.40(1)) and the EIRs (r.5(3)). A redacted version of the relevant documents ought therefore to have been placed in the open bundle together with an explanatory note that the personal data of the requestor is exempt from the Regulations by virtue of reg.5(3). **We herby direct that all parties securely contain all papers used in this appeal in order to prevent the disclosure of any personal data and that such personal data be redacted from any Open Bundles.**

155. We have already ruled on the application of the claimed exceptions. We now provide below a brief overview of each item of disputed information along with comments and specific instructions regarding disclosure.

DVSA's first closed bundle:

156. *"Vehicle/Component Examination Record Sheet" (VSD REF' Number: 24143), dated 3 April 2012.* This goes directly to the heart of the request given that it is the report completed by DVSA following the safety test of the Porsche Cayman on the 3rd April 2012. It demonstrates the methods and findings of the DVSA operatives concerned. As we found, there is a significant public interest in drivers of such vehicles being made aware of the engine characteristic. Also, in clarifying which variant of the Cayman was actually tested as the alternative, untested variant may have differing characteristics. We considered whether the vehicle identification

number ("VIN") ought to have been redacted given that this could be used to clone a stolen vehicle of the same type. We leave that as an option to the DVSA. **To be disclosed (subject to preceding commentary about the VIN)**.

157. *Two pages of emails with the subject "Meeting 3 April 2012- VSD 24143".* Whilst these emails only deal with the arrangement of the safety test, they nonetheless provide an insight into the date and location that it took place and the level of cooperation from Porsche. They also shed light on the issue of whether it was Porsche who undertook the test or the DVSA. It is clear from this and the document above that it was in fact the DVSA who did so, albeit using Porsche's facilities. **To be disclosed with personal data redacted as proposed**.

DVSA's second closed bundle:

Tab 1

158. *Letter from VOSA (now DVSA) to Porsche Cars (GB) Limited, 8th March 2012,.* A redacted version of this letter appears in DVSA's open bundle at Tab 3. This confirms that it was the DVSA who intended to test the vehicle and that there had been three reports received by VOSA (now DVSA) as well as the involvement of the VCA and Ministers. The Tribunal queries whether the involvement of VCA and Ministers, as referred to, is recorded information and if so, why this has not been produced in response to the request/appeal. DVSA's reference is redacted in the open version; however the same reference appears on the first document within Tab 3 of DVSA's open bundle. **The proposed redactions of personal data are approved but the reference number is to be disclosed**.

159. *Email from DVSA to Porsche Cars (GB) Limited, 13th March 2012 at 11:33, Subject: "VSD 24143 - Engine Hesitates at Certain RPM in 3rd Gear*". A redacted version of this letter appears in DVSA's open bundle at Tab3. The reference number redacted from the preceding document (i.e. described at para.158) has been disclosed in this document. **The proposed redactions of personal data are approved.**

160. *Mechanical Defect Report, Defect No: 24118 (4 pages) with covering email dated 13th September 2011 at 16:00*. A redacted version of this document appears in DVSA's open bundle at Tab 3. The Tribunal is concerned to note that Mr. Cieslik's own personal data has been disclosed in the open version, as disclosure is to the general public. A redacted version ought to have been placed in the open bundle together with an explanatory note that the personal data of the requestor is exempt from the Regulations by virtue of reg.5(3). **The proposed redactions of personal data are approved but Mr. Cieslik's own personal data must also be redacted. This to include his vehicle registration and full chassis/VIN number.**

161. *Email dated 23rd November 2011at 10:08 with subject: "VSD - Engine Hesitates at Certain RPM in 3rd and 4th Gear"*. A redacted version of this document appears in DVSA's open bundle at Tab 3. **The proposed redactions of personal data are approved.**

162. *Email chain commencing with message dated 28th February 2012 at 17:54 (7 pages) with subject: "VSD24143 - "Engine Hesitates at Certain RPM in 3rd Gear".* A redacted version of this document appears in DVSA's open bundle at Tab 3. The

redacted reference number has been disclosed in other documents. **The proposed redactions of personal data are approved but the reference number is to be disclosed**.

163. *Letter from Porsche Cars (GB) Limited to Martin Ryder (VOSA) dated 6th March 2012*. A redacted version of this document appears in DVSA's open bundle at Tab 3. **The proposed redactions of personal data are approved.**

164. *Email chain commencing with message dated 17th April 2012 at 14:48 (3 pages) with subject: "Re: VSD 24143 - Engine Hesitates at Certain RPM in Third Gear".* A redacted version of this document appears in DVSA's open bundle at Tab 3. **The proposed redactions of personal data are approved.**

165. *Letter from Vehicle Safety Branch to Porsche Cars (GB) Limited dated 1st May 2012.* A redacted version of this document appears in DVSA's open bundle at Tab 3. The redacted reference numbers have been disclosed in other documents. **The proposed redactions of personal data are approved but the reference numbers are to be disclosed**.

Tab 2:

166. *Email chain commencing with message dated 26th March 2012 at 08:41 (1 page) with subject: "Re: Cayman R".* A redacted version of this document appears in DVSA's open bundle at Tab 4. **The proposed redactions of personal data are approved along with the single redaction relating to type-approval in the second email (which is out of scope).**

167. *Email chain commencing with message dated 2nd April 2012 at 11:18 (1 page) with subject: "Re: Cayman R".* A redacted version of this document appears in DVSA's open bundle at Tab 4. The Tribunal is concerned to note that Mr. Cieslik's name has been disclosed in the open version, as disclosure is to the general public. This ought to have redacted and an explanatory note provided stating that the personal data of the requestor is exempt from the Regulations by virtue of reg.5(3) or s.40(1) FOIA. **The proposed redactions of personal data are approved but Mr. Cieslik's own personal data must also be redacted.**

Tab 3:

168. *Letter from VOSA dated 25th April 2012 with subject: "Porsche Cayman - Engine Hesitates at Certain RPM in 3rd Gear"*. A redacted version of this document appears in DVSA's open bundle at Tab 5. VOSA (DVSA) reference is redacted in the open version; however the same reference has been disclosed elsewhere in the open bundle. **The proposed redactions of personal data are approved but the reference number is to be disclosed**.

169. *Letter from Vehicle Safety Branch dated 19th September 2011 with subject: "Porsche Cayman - Engine Hesitates at Certain RPM in 4th Gear".* A redacted version of this document appears in DVSA's open bundle at Tab 5. The reference number is a proposed redaction; however the Tribunal fails to see how this can be said to be excepted from disclosure in light of our analysis of the exceptions

claimed. **The proposed redactions of personal data are approved but the reference number is to be disclosed**.

Tab 4:

170. *Mechanical Defect Report (5 pages).*

A redacted version of this document appears in DVSA's open bundle at Tab 6. Text from the "Closure Summary" section on the second page of this document is proposed as a redaction; however, the Tribunal, having found that either the claimed exceptions do not apply or that the public interest favours disclosure, order that this be disclosed. The information in question describes the circumstances in which the engine characteristic takes effect and the extent of that effect. As stated above there is a clear public interest in disclosure, not only in order to inform and alert other owners of this vehicle to these characteristics but also to demonstrate the measures taken by the DVSA to investigate and their findings. **The proposed redactions of personal data are approved but the text within "Closure Summary" is to be disclosed.**

171. *Mechanical Defect Report (4 pages).*

A redacted version of this document appears in DVSA's open bundle at Tab 6. Text from the "Action Log" on the third page of this document is proposed as a redaction; however, the Tribunal, having found that either the claimed exceptions do not apply or that the public interest favours disclosure, order that this be disclosed. The information in question describes the circumstances in which the engine characteristic takes effect and the extent of that effect. As stated earlier, there is a clear public interest in disclosure, not only in order to inform and alert other owners of this vehicle to these characteristics but also to demonstrate the measures taken by the DVSA to investigate and their findings. Part of this text relates to information about a complainant's vehicle, along with his name, which is unconnected to the safety test and describes his actions or inaction. This is out of scope of the Appellant's request. **The proposed redactions of personal data are approved; however, text within "Action Log" is to be disclosed except for the fourth sentence beginning "Porsche" and ending "Finish".**

Tab 5:

172. *Handwritten note with "3 April 2012" shown at the top:*

A redacted version of this document appears in DVSA's open bundle at Tab 7. A considerable amount of text is proposed as a redaction from this document; however, the Tribunal, having found that either the claimed exceptions do not apply or that the public interest favours disclosure, order that this be disclosed. The information in question describes the circumstances in which the engine characteristic takes effect and the extent of that effect. As stated earlier, there is a clear public interest in disclosure, not only in order to inform and alert other owners of this vehicle to these characteristics but also to demonstrate the measures taken by the DVSA to investigate and their findings. This is particularly relevant to the document in question given that it appears to be a set of notes taken at the time of the safety test. **The proposed redactions of personal data are approved;**

however, the remaining text is to be disclosed except for "Cieslik" which ought to have been redacted under r.5(3).

Tab 6:

173. *Draft letter to Appellant (1 page).* A redacted version of this document appears in DVSA's open bundle at Tab 8. Two redactions are proposed, one in the first comment box and another in the fourth. The first relates to type-approval and is therefore out of scope. The second is a comment made by someone reviewing the document. The Tribunal, having found that either the claimed exceptions do not apply or that the public interest favours disclosure, order that the second comment be disclosed. There is nothing contentious about the comment in question; in fact it reveals DVSA's vigilance in ensuring that comments within public correspondence can be substantiated. **The proposed redaction in the first comment box is approved; the proposed redaction in the fourth comment box is rejected and the text is to be disclosed. The text "Mr. Cieslik" is to be redacted under r.5(3) and should not have been placed in the open bundle.**

DfT's closed bundle:

Tab 1:

174. *Email chain dated 26th March 2012 at 13:25:00 with subject: "Re: Cayman R" (1 page).* A redacted version of the second email in this chain (dated 26th March 2012 at 08:41) appears in DVSA's open bundle at Tab 4. The redactions are identical except for the telephone number at the foot of the second which is revealed in the DVSA version. **The proposed redactions of personal data are approved; however as the telephone number has already been made public this is to be disclosed.**

175. *Draft letter commencing "Thank you for your emails of the 10th and 16th April which update your situation*." A later version of this appears at Tab 14 in DfT's open bundle. This refers in its entirety to type-approval, which is out of scope of the Appellant's request. **This document may be withheld in full**.

176. *Draft letter to the Appellant (undated) (1 page).* Another version of this letter was disclosed by DVSA in their open bundle at Tab 8. The majority of the text has therefore already been disclosed. That which the Tribunal has identified as not in DVSA's version (the underlined text in the penultimate paragraph) refers to type-approval and is therefore out of scope. **The document should therefore be disclosed with the text identified above redacted, along with the Appellant's name, which is excepted by virtue of Regulation 5(3).**

177. *Letter to Appellant (undated) commencing "Thank you for your email of 13 February."* An unredacted version of this is in DVSA's open bundle at Tab 2. It has therefore already been disclosed, despite it being on the subject of type-approval and thus out of scope. **This document may be withheld in full.**

178. *Email from VOSA dated 13th April 2012 at 10:04:27 with subject: "Mr. Cieslik.doc" (2 pages).* The Tribunal have not been able to verify whether or not this is an internal email because the recipient has been redacted. In any event, as we have

found that the public interest favours disclosure where reg.12(4)(e) has been applied (see above) the contents of this document should be disclosed. It contains the outcome of the vehicle safety test and sheds light on discussions with Porsche as part of the investigation. It also demonstrates Porsche's willingness to cooperate with the VCA. **The document should therefore be disclosed with the three instances of the Appellant's name redacted as this is excepted by virtue of Regulation 5(3).**

179. *Letter to Porsche Cars (GB) Limited dated 6th January 2012.* This letter appears in DVSA's open bundle at Tab 2 with exactly the same redactions. It has therefore already been disclosed, despite it being on the subject of type-approval and thus out of scope. **This document may be withheld in full.**

Tab 2:

180. *Draft letter to the Appellant (undated) (1 page).* Another version of this letter was disclosed by DVSA in their open bundle at Tab 8. The majority of the text has therefore already been disclosed. That which the Tribunal has identified as not in DVSA's version (the underlined text in paragraph two) has not been disclosed however. **The document should therefore be disclosed. The Appellant's name should be redacted as this is excepted by virtue of Regulation 5(3).**

181. *Draft letter to the Appellant (undated) (1 page).* Another version of this letter was disclosed by DVSA in their open bundle at Tab 8. The majority of the text has therefore already been disclosed. That which the Tribunal has identified as not in DVSA's version is the underlined text in the first paragraph. There appears to be no good reason to withhold this as it consists of an apology for delay and an explanation for this. **The document should therefore be disclosed. The Appellant's name should be redacted as this is excepted by virtue of Regulation 5(3).**

Conclusion:

182. For all of the above reasons the appeal succeeds. The DVSA and DfT are therefore ordered to disclose the disputed information in accordance with instructions, which the Tribunal has set out at paras.156-181. Our decision is unanimous.

Brian Kennedy QC
4 August 2015.