

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 May 2007

Public Authority: Driving Standards Agency (an executive agency of the Department for Transport)

Address: Stanley House
55 Talbot Street
Nottingham
NG1 5GU

Summary Decision

The complainant requested information from the Driving Standards Agency (the "DSA") relating to the number of clicks permitted in the Hazard Perception Test of the UK Driving Theory test before the algorithm is activated. Initially the DSA did not treat the request as a request under the Freedom of Information Act 2000 ("the Act"). Following the involvement of the Information Commissioner ("the Commissioner") the DSA considered the matter under the provisions of the Act. The DSA further delayed before issuing a refusal notice, which stated that it was withholding the information under section 36 (2) (c) of the Act. The Commissioner upholds the DSA's decision to withhold the information under section 36 (2) (c) of the Act, however, the Commissioner finds that the DSA breached section 17 of the Act in the handling of the request.

The Commissioner's Role

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

The Request

2. The Commissioner notes that under the Act the DSA is not a public authority itself, but is actually an executive agency of the Department for Transport which is responsible for the DSA and therefore, the public authority in this case is actually the Department for Transport not the DSA. However, for the sake of clarity, this decision notice refers to the DSA as if it were the public authority.
3. The complainant wrote to the DSA on 14 December 2004 requesting “exactly what the inappropriate time is to the nearest 0.01 seconds” (with regard to clicks in a Hazard Perception Test (HPT) before the anti-cheat algorithm they employ will be triggered) (“the information”). The Act was not in operation at this stage as it commenced on 1 January 2005.
4. The complainant did not receive any response to his request from the DSA and the complainant subsequently wrote to the DSA on 6 April 2005 and attached a copy of his letter dated 14 December 2004. When the DSA received this letter it was obliged to consider the request for information under the provisions of the Act, which was then fully in operation.
5. The DSA wrote to the complainant on 11 April 2005 advising that a response would be sent to him on or before 22 April 2005. On 19 April 2005 the DSA further wrote to the complainant advising that it needed to investigate further and that the chief executive would write as “soon as he was able to.” The DSA wrote to the complainant again on 6 June 2005 confirming that it was responding to his letter of 14 December 2004. The response was general and made no reference to any consideration of the Act.
6. The complainant wrote to the DSA on 5 July 2005 expressing his opinion that the content of his letter of 14 December 2004 had been patently ignored. The DSA responded to this correspondence on 11 July 2005 advising that it was receiving attention and that a response would be sent on or before 25 July 2005.
7. On 26 July 2005 the DSA wrote to the complainant generally regarding the Hazard Perception Test but once again failing to address the request for information under the provisions of the Act.
8. The complainant through his M.P. contacted the Parliamentary and Health Service Ombudsman who in turn referred the matter to the Commissioner on 15 December 2005.
9. On 22 December 2005 the Commissioner wrote to the DSA enclosing a copy of the complainants request and making it aware of its obligations under the Act.
10. On 25 January 2006 the DSA acknowledged in writing that it was dealing with the request under the Act but advised the complainant that it would not be able to respond by 27 January 2006 as it was considering withholding the information under section 36 (2) (c) of the Act. The DSA indicated that it was preparing a submission to the Minister for Transport.

11. The DSA further wrote to the complainant on 13 March 2006 confirming that it had considered the request under the Act. The DSA confirmed that it was withholding the information in reliance on the exemption under section 36 (2) (c) of the Act. It advised the complainant that disclosure of the information could enable candidates to develop strategies to beat the scoring mechanism and so prejudice the integrity of the test. In this letter the DSA stated that it “acknowledged that the initial request had not been handled in line with the Act and apologised (to the complainant) for the mishandling of the request.”
12. Section 36 (2) (c) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would prejudice, or be likely to prejudice, the effective conduct of public affairs. The qualified person is set out in section 36 (5) of the Act and in this case the qualified person is the Minister in charge of the Department for Transport as the DSA is an executive agency of the Department of Transport. The DSA confirmed that the Minister in charge of the Department for Transport had given his opinion on the issue of reasonableness.
13. The DSA advised the complainant that he had the right to apply directly to the Commissioner for a decision if he was not content with the outcome of its review but did not suggest that the complainant could request an internal review.

The Investigation

Scope of the case

14. On 18 April 2006 the complainant asked the Commissioner to consider his complaint in light of the decision by the DSA on 13 March 2006 to withhold the requested information.

Chronology of the case

15. The Commissioner wrote to the DSA on 8 March 2007. As well as requesting a copy of the withheld information, the Commissioner requested an explanation as to why the DSA delayed in refusing the request until 13 March 2006. The Commissioner further queried why the DSA had not provided the complainant with details of its internal review procedure on 13 March 2006 as required by section 17 of the Act. The Commissioner also requested further information with regard to the Section 36 exemption applied by the DSA and in particular requested details of the Minister who approved the exemption, the date the request was put to the Minister, the nature of the request and copies of any documentation recording the minister’s considerations regarding the likelihood of prejudice to the effective conduct of public affairs.
16. The DSA wrote to the Commissioner on 12 March 2007. In relation to delay in responding to the complainant’s request, the DSA explained that it took longer than expected to produce a ministerial submission as legal advice was

required. The DSA confirmed that it did not refer the complainant to an internal complaints procedure as it treated the complainant's request as an internal complaint following the intervention of the Commissioner. In relation to the Section 36 (2) (c) exemption applied, the DSA confirmed that Dr Stephen Ladyman MP was the qualifying person for the purposes of the Act and provided a copy of the email received from Dr Ladyman's private secretary confirming that he had approved the application of the exemption. The DSA also provided a copy of the document forwarded to the Minister setting out the factual background and reasons why it considered the section 36 (2) (c) exemption applied as well as the relevant public interest factors to be considered.

Analysis

Procedural

17. Section 17 of the Act sets out the requirements of public authorities when refusing information requests. The relevant text of the legislation can be found in the legal annex to this notice.
18. Section 17 (1) (a) requires that a public authority which is seeking to rely on an exemption in Part II of the Act must inform the person in writing of that fact promptly after receipt of the request or in any event within 20 working days of the receipt of the request. The complainant requested the information from the DSA on 5 April 2005 but the DSA did not inform the complainant of its decision to withhold the information until 13 March 2006. The DSA therefore breached section 17 (1) (a) of the Act because they failed to provide the complainant with a refusal notice within the time stipulated in section 10 (1) of the Act.
19. Under Section 17 (7) of the Act the DSA was required to state on the refusal notice particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the DSA does not provide such a procedure. The Commissioner notes that the DSA did not provide the complainant with details of its complaints procedure but did advise the complainant that he had the right to apply to the Commissioner for a decision. The DSA have confirmed to the Commissioner that it does have an internal complaints procedure and advised that it did not make reference to that procedure as it considered that the matter was being handled as an internal review in the first instance. However, given that the letter of 13 March 2006 was the first notification to the complainant that the information was being withheld it should have offered the complainant a right to seek an internal review of the decision. The Commissioner's view therefore is that the DSA has breached Section 17 (7) of the Act.

Exemptions

20. The Commissioner has considered whether the DSA correctly applied the section 36(2) (c) exemption.
21. For this exemption to be engaged, the Commissioner must be satisfied that a qualified person expressing a reasonable opinion has determined that disclosure of the information requested would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. The Commissioner is satisfied from the evidence provided by the DSA that this exemption was considered by the Minister of Transport, a qualified person for the purposes of Section 36 (5) of the Act. The Commissioner is also satisfied that the Minister was provided with sufficient information to enable him to make an informed determination with regard to reasonableness in this case.
22. The Commissioner has considered whether the opinion of the Minister that prejudice to the conduct of public affairs was a reasonable one. The Act does not define “effective conduct” or “public affairs” but the Commissioner considers that where the disclosure would prejudice the public authority’s ability to offer an effective public service, or to meet its wider objectives or purpose due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure, this would prejudice the effective conduct of public affairs. In order to gauge the impact disclosure of the requested information is likely to have on the DSA, the Commissioner has looked at the wider objectives of the DSA.
23. The DSA publicly claim that their overall mission is to contribute to the public service agreement objective to achieve 40% reduction in riders and drivers killed or seriously injured in road accidents, in the age group up to 24 years, by 2010 compared with the average for 1994-98. The Commissioner understands that the hazard perception element was introduced into the UK driving test in November 2002 as one of the measures aimed at trying to reduce the numbers killed and seriously injured on Britain’s roads by 40 per cent by 2010. The test was designed to encourage appropriate training in scanning the road to recognise at the first opportunity from the clues that a potentially dangerous situation might arise and adopting a driving plan to reduce the risk.
24. The DSA have withheld information regarding the shortest time gap before the anti-cheat algorithm will be triggered on the hazard perception tests as it believes that this information could enable candidates to cheat the test. Having viewed this requested information the Commissioner accepts that the release of this information could potentially enable candidates to cheat on the hazard perception test. As the hazard perception test is aimed at improving hazard perception skills it is unlikely that candidates who successfully cheat would have the necessary hazard perception skills. This could impact severely on the ability of the DSA to meet its wider objective of public safety. Furthermore, the Commissioner understands that a significant amount of time and resources were invested in developing the hazard perception test. The development of the test involved the DSA working closely with the Transport Research Laboratory and the road safety division for the Department for Transport. The Commissioner notes that that a

total of 16,000 volunteer drivers took part in the trials which revealed that 30% of candidates attempted some form of inappropriate keying and of these 60% used continuous rapid responses during the clips. If the DSA needed to develop another hazard perception test as a result of disclosure in this case this would impact on the DSA's resources and could affect the ability of the DSA to deliver value for money to the public, which is another objective of the DSA. In light of this, the Commissioner concludes that the opinion of the Minister for Transport that prejudice to the conduct of public affairs was likely to occur in this case is a reasonable opinion and that the exemption under section 36 (2) (c) is engaged.

25. The Commissioner is mindful of the approach taken by the Information Tribunal ("the Tribunal") on the application of the section 36 exemption in the case of *Guardian Newspapers Limited & Heather Brooke v Information Commissioner & British Broadcasting Corporation* (8 January 2007) Appeal Numbers EA/2006/0011 and EA/2006/0013 in which it stated,

"having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to (prejudice the effective conduct of public affairs), the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgement required, the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which (prejudice to effective conduct of public affairs) will or may occur."

The Commissioner has considered the balancing of the public interest factors in this case as set out in paragraphs 26 to 28 below.

Public Interest Test

26. Section 36 (2) (c) is a qualified exemption which means that even though the exemption may be engaged it is subject to the public interest test as set out at section 2 (2) (b) of the Act. The public interest test requires the DSA to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information. There is a general presumption in favour of releasing information unless the public authority can show on public interest grounds that the information should not be released. If the public interest factors are equally balanced then the information must be disclosed.
27. The Commissioner has taken account of all the public interest reasons for withholding the information which were provided by the DSA to the Minister in this case. These can be summarised as follows:
- a. non disclosure was necessary to protect the effective conduct of its statutory functions, ensure the integrity of the Hazard Perception Test and that its purpose as learning aid was not compromised;
 - b. disclosure would enable candidates to develop strategies to beat the system controls and achieve higher performance scores in their test than justified by their actual level of hazard perception;

- c. Hazard Perception Test is part of an ongoing Road Safety initiative and its compromise could undermine progress in that area; applicants can currently apply for their own test scores and that details of inappropriate responses have been disclosed.

The DSA has also considered the public interest factors supplied to the Minister which favoured disclosure and these can be summarised as follows:

- (i) to promote accountability and transparency for tests it conducted;
 - (ii) to promote confidence in DSA services;
 - (iii) to allow individuals to challenge decisions made by the DSA.
28. The Commissioner considers that there is a public interest in providing information to the public about the hazard perception tests which will enable them to better understand how the hazard perception test works and also to enable the public to assess whether the hazard perception test is fit for purpose.
29. The Commissioner is of the view that public safety is a significant public interest factor in this case which weighs in favour of maintaining the exemption under section 36 (2) (c). He has carefully considered the competing public interests in this case. The Commissioner considers that disclosure of the information would enable candidates to develop strategies to beat system controls and is therefore a risk to public safety. The Commissioner is aware that the hazard perception test was designed to improve hazard awareness and road safety. The Commissioner is satisfied that to disclose the withheld information could compromise road safety. In arriving at this decision the Commissioner is mindful also of the fact that by releasing the withheld information this would enable candidates to cheat the hazard perception test and the DSA would be compelled to develop a new hazard perception test. The Commissioner is mindful of the impact of such further expenditure of public money.
30. In light of this, he considers the balance of the public interest in maintaining the exemption in this case is not outweighed by the public interest in disclosure.

The Decision

31. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
32. The Commissioner has concluded that the DSA were entitled to refuse to provide the requested information on the basis that the information was exempt under Section 36 (2) (c) of the Act.
33. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act.

34. The Commissioner has concluded that the DSA breached section 17 (1) of the Act when it failed to provide the complainant with a refusal notice within the time stipulated in section 10 of the Act.
35. The Commissioner has concluded that the DSA breached section 17 (7) of the Act when it failed to provide the complainant with particulars of its internal complaints procedure.

Steps required

36. In light of his findings on the application of the exemption under s, 36 (2) (c) the Commissioner does not require any steps to be taken.

Right of Appeal

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

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

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

38. Any notice of appeal should be served on the Tribunal with 28 calendar days of the date on which this Decision Notice is served.

Dated this 31st day of May 2007

Signed.....

Marie Anderson
Assistant Commissioner

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