

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 09 November 2009

Public Authority: Driver and Vehicle Licensing Agency
(An Executive Agency of the Department for Transport)

Address: Longview Road
Swansea
SA6 7JL

Summary

The complainant requested information from the DVLA relating to Regulation 27 of the Road Vehicles (Registration and Licensing) Regulations 2002. The DVLA sought to rely on section 12 of the Act in relation to some information requested and withheld other information relevant to the request by virtue of section 42 of the Act. The Commissioner finds that the DVLA was entitled to rely on section 12 and that it had correctly applied the section 42 exemption in relation to the withheld information relating to legal advice. The Commissioner finds that the public interest in maintaining this exemption outweighs the public interest in disclosing the information. However the Commissioner finds that the DVLA breached section 16(1) as it failed to provide reasonable advice and assistance in relation to narrowing down the request. The Commissioner also finds that the DVLA breached section 17(5) of the Act by failing to provide the complainant with an adequate refusal notice.

The Commissioner's Role

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

Background

2. The Vehicle Excise and Registration Act 1994 requires most vehicles used or kept on a public road to be licensed and registered by the Secretary of State. This function is performed by the Driver and Vehicle Licensing Agency (the 'DVLA')

- who maintain a vehicle register which contains information about the vehicle itself and its current and previous registered keepers.
3. Regulation 27 of the Road Vehicles (Registration and Licensing) Regulations 2002 ('Regulation 27') authorises the DVLA to release vehicle keeper information to the police or to a local authority to investigate a criminal offence or non-criminal parking offence. The Regulations also provide for the DVLA to release information to other persons who can prove that they have 'reasonable cause' to have it.
 4. On 16 February 2006 the Department for Transport published a consultation paper on the release of data from the Vehicle Registers. This consultation focused on the release of data under regulation 27 of the Road Vehicles (Registration and Licensing) Regulations 2002. The consultation ran until 31 March 2006 and sought views on which groups should have information from the vehicle register and the reasons for their having it; how access to the register was managed; and the audit regime for those granted access.
 5. Following completion of the review, the Minister of State, Department for Transport, Dr Stephen Ladyman issued a statement on 24 July 2006 announcing 14 major new measures to be implemented in respect of the release of data from the UK Vehicle Registers.
 6. This case relates to the complainant's view that Regulation 27 of the Road Vehicles (Registration and Licensing) Regulations 2002 (or Regulation 15 which preceded it) is not compatible with the European Data Protection Directive 95/46/EC ('the Directive').

The Request

7. The Commissioner notes that under the Act the DVLA is not a public authority itself, but is actually an executive agency of the Department for Transport ('DfT') which is responsible for the DVLA and therefore, the public authority in this case is actually DfT not the DVLA. However, for the sake of clarity, this decision notice refers to the DVLA as if it were the public authority.
8. On 20 November 2007 the complainant wrote to the DVLA requesting:
 1.all the data concerning your discussions, meetings and negotiations with the Information Commissioner in regard to the operation of the Data Protection Act 1998 (and all subsequent Statutory Instruments) especially any material which relates to the legitimacy of 'Regulation 27';
 2.a copy of the "full update" of the measures announced by Stephen Ladyman which was promised for Autumn of the year in which he made his announcement;
 3.a copy of the three year "rolling audit checks";

4. ...a copy of the "Complaints Procedure by which a data subject can notify both DVLA and the Information Commissioner if they believe their data has been used inappropriately";
 5.copies of all data including correspondence with anyone (including all your internal correspondence and communications) concerning the above. This would include correspondence with the Department for Transport".
9. The DVLA responded to the request on 13 December 2007 stating that the costs involved in locating, retrieving and extracting information relating to questions 1 and 5 would exceed the cost limit of £600 and asked the complainant to refine these parts of his request. The DVLA did not specify its reliance on section 12 as the basis for its refusal to comply with the request. In addition, the DVLA asked the complainant to clarify question 3, and provided information in relation to question 4.
10. The DVLA provided information to the complainant relating to question 2 on 20 December 2007.

First refined request

11. The complainant wrote to the DVLA on 22 December 2007 stating that he would temporarily set aside question 1 as he had received the majority of information relating to this part of his request. The complainant also provided clarification in relation to question 3.
12. In relation to question 5, the complainant clarified the scope of this part of the request. The complainant indicated that he wished this to include: "correspondence between departments within DVLA and with the Department for Transport in regard to the legality and operation of Regulation 27".
13. The DVLA responded to the complainant on 22 January 2008 stating that his refined request in relation to question 5 was still too broad and the costs involved in locating, retrieving and extracting information relating to the request would exceed the cost limit of £600. The DVLA explained how and where information relevant to the request was held and confirmed that it was relying on section 12 as the basis of its refusal to comply with the request. The DVLA also provided the complainant with information in relation to question 3.

Second refined request

14. On 1 February 2008, the complainant wrote to the DVLA narrowing the scope of question 5 to:

"the data contained in all types of communication (electronic or paper based) between DVLA departments on the subject of Regulation 27 and between DVLA and the Department for Transport, plus anything between DVLA and the European Commissioner for Data Protection".

- In relation to question 5, the complainant queried the DVLA's application of the cost limit to his refined request.
15. The DVLA responded on 29 February 2008 providing further details of its claim that correspondence relating to the request was stored on personal computers and in manual filing systems located across various departments within the DVLA. The DVLA also stated that it would cost over £600 to search for the information requested and, as such, under the Act, there was no obligation to supply the information. The DVLA did not specify its reliance on section 12 as the basis for its refusal to comply with the request. The DVLA also advised it was unaware of any correspondence between itself and the European Commissioner for Data Protection in relation to Regulation 27.
 16. On 6 March 2008 the complainant asked the DVLA which departments it believed held information in relation to questions 1 and 5 and requested evidence that the costs involved in searching for the information exceeded the £600 limit. The complainant confirmed that he was seeking copies of correspondence between DVLA and DfT in relation to question 5.
 17. The DVLA responded on 8 April 2008 stating it had identified four departments with 2,552 staff members as being most likely to hold the data requested. The DVLA stated that it would need to create and run a bespoke scan in order to extract the information, if it were held. The DVLA estimated this process would take more than six days, which exceeded the limit set out in section 12 of the Act. As the complainant had referred to request 1 in his letter dated 6 March 2008, the DVLA asked the complainant to confirm whether he still required copies of correspondence between DVLA and the Information Commissioner, and if so, whether he could refine this part of the request. The DVLA advised that it would consider any refined request in order to determine whether it could comply within the £600 limit.
 18. In relation to question 5, the DVLA stated that the majority of correspondence between the DVLA and DfT concerning Regulation 27 was likely to relate to the review of the release of data from the Vehicle Registers which took place in 2006 (see background section above). The DVLA advised that to collate this information would exceed the cost limit and therefore it was not obliged to comply with the request under section 12.
 19. The DVLA also stated that any other correspondence between DVLA and DfT concerning Regulation 27 was likely to be a request for legal advice or a response from DfT legal advisers. The DVLA confirmed this information was held but was exempt from disclosure under section 42 and the public interest favoured maintaining the exemption.
 20. The DVLA also stated that some of the correspondence would contain information related to individual cases, and would "contain personal details and specific circumstances that a third party would not expect to be released into the public domain". The DVLA considered these pieces of correspondence to be exempt under section 40(2) of the Act.

Third refined request

21. On 15 April 2008 the complainant further refined his request to cover one of the four departments identified by the DVLA, starting with the information held by the head of this department. The complainant further refined the scope of the request to include any documents created or received by the DVLA, to or from the DfT relating to the legality of Regulation 27. The complainant also stated that he would again temporarily set aside his request for correspondence between the DVLA and the Information Commissioner to further narrow the request. The complainant also requested a list of the correspondence between DVLA and DfT in relation to the legality of Regulation 27 in order for him to determine which documents he required. He also questioned the application of section 42 and section 40 by the DVLA in relation to the information requested.
22. The DVLA responded on 28 April 2008 providing further clarification of its previous statement regarding the number of staff members whose computers could contain information relating to Regulation 27. The DVLA stated that "DVLA and DfT have never questioned the legality of Regulation 27 and therefore does not hold any correspondence or other information in relation to its legality or its compatibility with the European Data Protection Directive". The DVLA confirmed that the information it considered exempt under section 42 consisted of correspondence between itself and its legal advisers relating to the application and operation of Regulation 27, both in general and in relation to individual cases.

Fourth refined request

23. The complainant wrote to the DVLA on 4 May 2008 confirming that he was not interested in any individual cases concerning the application of Regulation 27 or how it was interpreted. He stated that he required any "data relating to any material generated internally or externally by the Department for Transport, DVLA or any other person or body concerning the legality of Regulation 27". The complainant understood that the matter of the legality of Regulation 27 and its compatibility with the Directive had been raised in a DVLA meeting, following which the DVLA sought legal advice. The complainant stated that he wanted a copy of that legal advice. The complainant also confirmed that he had documentary evidence that both DVLA and the Information Commissioner had doubted the legality of Regulation 27 and requested copies of these documents and any others generated as a result of, or in connection with, the issue.
24. The DVLA wrote to the complainant on 16 May 2008 stating that it was treating his correspondence of 4 May 2008 as a request for an internal review.
25. The DVLA wrote to the complainant on 12 June 2008 with the outcome of its internal review. The DVLA upheld its decision that the information requested was exempt under section 42. The DVLA did not address its application of section 12 in its internal review.
26. The complainant continued to challenge the DVLA's position and sent a further letter on 18 June 2008 expressing his dissatisfaction with the lack of information

provided in its internal review letter. He also sent a further email to the DVLA on 20 June 2008 which provided details of documents in his possession concerning the dealings between DVLA and the Information Commissioner. The complainant again requested full disclosure of the information requested.

27. The DVLA responded to the complainant on 25 June 2008 confirming that it had exhausted its internal procedures regarding his complaint and advised that his next recourse would be to contact the Information Commissioner.

The Investigation

Scope of the case

28. On 25 June 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the DVLA's refusal to disclose any information relating to his requests for:
 - a. "correspondence between DVLA and the Information Commissioner in regard to the application of Regulation 27 (and Regulation 15 that preceded it) and related internal correspondence which sprung from this correspondence including legal opinion that the Regulation was compliant with the European Directive" (referred to as request 1 throughout the remainder of this Notice); and
 - b. "copies of the legal opinion in regard to which type of data could be disclosed under Regulation 27 (assuming it was compatible with the Directive and therefore legal), especially the Opinion that disclosure for debt collection purposes was not lawful" (referred to as request 2 throughout the remainder of this Notice).
29. The Commissioner's investigation has focused on the information held by the DVLA in relation to the requests 1 and 2, and whether that information should be disclosed to the complainant. The Commissioner considers that requests 1 and 2 (as defined above in paragraph 28) can be equated with questions 1 and 5 of the complainant's initial request to the DVLA dated 20 November 2007. The complainant wrote to the Commissioner on 21 December 2008 confirming that this interpretation of his complaint was correct.

Chronology

30. On 23 August 2008 the Commissioner wrote to the DVLA requesting copies of the withheld information. The withheld information was provided to the Commissioner on 15 September 2008.
31. On 5 December 2008 the Commissioner wrote to the DVLA asking it to provide further information in relation to its application of section 12 and section 42.

32. The DVLA responded to the Commissioner on 27 January 2009 providing further information about how it had determined the costs involved in locating, retrieving and extracting the information relating to request 1. The DVLA also provided further representations in relation to its application of section 42. The DVLA confirmed to the Commissioner that it did not hold any correspondence or other information relating to the legality of Regulation 27, or its compatibility with the Directive.
33. On 17 April 2009 the Commissioner wrote to the DVLA asking for further information in relation to its handling of the request. The Commissioner did not receive a response to this letter, and he contacted the DVLA again on 20 May 2009.
34. On 17 June 2009, the Commissioner wrote to the DVLA stating, in the absence of a substantive response to the questions raised asked in his letter of 17 April 2009 by 25 June 2009, he intended to issue an Information Notice under section 51 of the Act.
35. The DVLA provided the Commissioner with a submission on 26 June 2009.

Analysis

Substantive Procedural Matters

Section 12

36. The full text of section 12 can be found in the Legal Annex to this Notice.
37. Under section 12(1) of the Act, a public authority is not obliged to comply with a request for information if it estimates that to do so would exceed the appropriate cost limit. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). The cost limit is currently set at £600 for the DVLA. The Regulations allow for a charge of £25 per hour to be attributed to time spent complying with a request for information, so £600 amounts to 24 hours' work.
38. Regulation 4(3) of the Regulations provides that the following factors can be taken into account when formulating a cost estimate:
 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it."
39. In the Information Tribunal case of *Urmenyi v the Information Commissioner and London Borough of Sutton (EA/2006/0093)* the Tribunal said that it was clear

from the wording of section 12 that it was up to the public authority to estimate whether the appropriate limit would be exceeded in carrying out the activities described in regulation 4 but that:

“...the Commission[er] and the Tribunal can enquire into whether the facts or assumptions underlying this estimation exist and have been taken into account by the public authority. The Commission[er] and the Tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account. Furthermore the public authority’s expectation of the time it would take to carry out the activities set out in regulation 4(3) a-d must be reasonable”.

40. The issue of what constitutes a reasonable estimate was considered in the case of *Alasdair Roberts v The Information Commissioner (EA/2008/0042)*. The Commissioner notes the following points made by the Tribunal in this case:

- “Only an estimate is required” (i.e. not a precise calculation)
- The costs estimate must be reasonable and only based on those activities described in Regulation 4(3)
- Time spent considering exemptions or redactions cannot be taken into account.
- Estimates cannot take into account the costs relating to data validation or communication
- The determination of a reasonable estimate can only be considered on a case-by-case basis and
- Any estimate should be “sensible, realistic and supported by cogent evidence”

41. In relation to request 1 the DVLA has advised that any member of staff within four main departments within the DVLA could potentially hold relevant correspondence. The four departments identified were:

- Policy area
- Operational area,
- Local Office Network, and
- Customer Enquiry Group.

The DVLA confirmed that a total of 2,552 staff work within these departments, as each has its own sub-sections and further sections within those sub-sections.

42. The DVLA informed the Commissioner in its letter of 27 January 2009 that to provide information held in electronic format alone in relation to request 1 would require a bespoke scan of 2552 computers on a shared network. It estimated that to collate the information requested via such a scan would take a total of six days to include one day of design work, three days of development work and a further two days of testing. The DVLA provided further clarification of the work involved in running the scan, stating that its IT provider had advised that:

“...the 1 day design stage would ascertain exactly what type of parameters, coding, software, script type would be required to rung the scan against the

relevant shared network database. The 3 days development stage is the actual physical writing/coding of the scan script in the appropriate software tool that will be used. The 2 days unit testing is the stage whereby the scan is run in a test environment and the output checked to make sure it delivers what it has been designed to deliver.”

43. The DVLA confirmed that the bespoke scan was required in order to determine if information relating to request 1 was held. As such, the DVLA advised the Commissioner that it had not carried out any further calculations to demonstrate the further costs of locating, retrieving and extracting the information.
44. The Commissioner asked the DVLA for further clarification as to why a bespoke scan was required in order to determine whether any information was held in relation to request 1. The Commissioner asked the DVLA whether there were any alternative methods it could use, such as an email to all staff asking each person to confirm whether they held any information relevant to the request. In its response to Commissioner dated 26 June 2009, the DVLA stated that asking each of the 2,552 members of staff to search their individual computers would distract them from carrying out core business activities and as such it was deemed more appropriate to run a scan. The DVLA also advised that, even if each individual took 2 minutes to conduct a search, this would equate to 5,104 minutes (or 85 hours at £25 an hour) of staff time spent away from core business, and as such it would exceed the £600 appropriate limit.
45. Having considered the above information, the Commissioner is satisfied that the cost of locating, retrieving and extracting the requested information relating to request 1 would exceed the appropriate limit, and that section 12(1) is engaged.

Exemptions

Section 42

46. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege. The full text of section 42 can be found in the Legal Annex to this Notice.
47. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and their client. The Information Tribunal has defined LPP in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* as:

“...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation.” (paragraph 9)

48. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications

made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

49. The information which the DVLA has withheld under the section 42 exemption in this case consists of seven documents which comprise legal advice requests and responses between DVLA and its legal advisers, and other documents which reveal or record discussions between DVLA and its legal advisers.
50. After reviewing the requested information in this case which was withheld under the section 42(1) exemption, the Commissioner is satisfied that all seven documents which the DVLA has withheld fall within the scope of this exemption. It is clear to the Commissioner that advice sought by the DVLA and received from its legal advisers constitutes communications between a lawyer and a client. In addition, the Commissioner's view is that as certain documents which the DVLA has withheld refer to legal advice which has passed between a lawyer and a client they are also covered by the section 42(1) exemption.
51. Having satisfied himself that the dominant purpose of all the communications being withheld related to the provision of legal advice, the Commissioner has gone on to consider whether there were any circumstances in which privilege may be considered to have been waived. Even if information was privileged, this can be lost (waived) if the client has shared it with third parties and it has lost confidentiality. The DVLA has confirmed that the withheld information has only been disclosed to a distinct group of strategic persons within DVLA and DfT. The DVLA has also confirmed that at no time has the public been made aware that Counsel's opinion had been sought on the application of regulation 27. The Commissioner is satisfied that, in this case, legal professional privilege has not been waived in relation to the withheld information.
52. The Commissioner is satisfied that section 42(1) is engaged in this case. As the section 42 exemption is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

53. The Commissioner is mindful of the Tribunal's decision in *Bellamy v ICO* (EA/2005/0023) in which it was stated:

“...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”.

“The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption.”

54. The Commissioner has therefore considered these comments in the context of this case, and considers that whilst any arguments in favour of disclosing the requested information must be strong, they need not be exceptional.
55. The DVLA has recognised the need for accountability in relation to advice provided to government departments and that there should be mechanisms in place to allow for proper scrutiny of government actions. The DVLA also recognises that there is a general public and media interest in respect of the subject matter to which the legal advice relates, i.e. disclosure of information from the vehicles register.
56. In the Commissioner's opinion there is a strong public interest in the public understanding the reasons behind decisions made by public authorities – in this case, how the DVLA applies and operates regulation 27 in respect of the disclosure of information contained in the vehicle register. Disclosure of the legal advice may assist the public in understanding under what circumstances particulars about vehicles and their keepers are accessed by, and disclosed to third parties.
57. Moreover, the Commissioner accepts that there is a public interest in disclosure of information which aids the understanding and participation in debates on issues of public importance – especially, as in this case, where matters raise questions regarding the use and disclosure of vehicle keeper information.
58. The Commissioner considers that another factor in favour of disclosing the information is the number of people who may be affected by the subject matter. In *Pugh v Information Commissioner and Ministry of Defence (EA/2007/0055)*, the Information Tribunal said that there may be an argument in favour of disclosure where the subject matter of the requested information would affect “a significant group of people”. According to vehicle licensing statistics for 2008 published by DfT, there were 34.2 million licensed vehicles registered in Great Britain at the end of 2008, which represents an increase of 0.7% on the number licensed at the end of 2007. It is therefore clear that the subject matter of this request does have the potential to affect a significant group of people.
59. The DVLA has advised the Commissioner that legal advice had been sought in December 2005 following media attention questioning whether it was acting in accordance with regulation 27 and at no time has the public been made aware that the advice had been requested or received.

Public interest arguments in favour of maintaining the exemption

60. The DVLA's view is that it is of paramount importance that full and frank exchanges with internal and external legal advisers is obtained without fear of such advice being disclosed to the public where it is deemed inappropriate to do

so. The DVLA's view is that releasing the withheld information could undermine the candour in the exchange of advice between itself and its legal advisers in the future, and the result of any breakdown in this relationship would have a harmful effect on policy development, and in turn a detrimental effect on public services.

61. The DVLA have also stated that the legal advice in this case forms part of a developing interpretation and evolving policy in respect of regulation 27 and its application and operation. The DVLA's opinion is that the advice therefore cannot be considered to have served its purpose.
62. The Commissioner recognises that there is a strong and inbuilt public interest in protecting the concept of legal professional privilege. The concept has developed to ensure that clients are able to receive advice from their legal advisers in confidence. This is a central principle in the justice system and there is a strong public interest in maintaining that confidentiality. This ensures that the advice provided is based upon a full exchange of information pertinent to the case. Eroding the principle of legal professional privilege could therefore harm the ability of parties to provide or receive legal advice on a full and frank basis. This in turn could damage the parties' ability to effectively determine their legal opinions, or to defend or seek legal restitution against other parties in accordance with their rights. In the case of *Bellamy versus the Information Commissioner and the DTI (EA/2007/0043)*:

“...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”

63. The conclusion reached by the Commissioner and the MOD in that case was that the public interest in favour of disclosure would have to be “exceptional” where legal professional privilege is engaged. However, the Tribunal did not require “exceptional” factors in favour of disclosure, “...*just as or more weighty than those in favour of maintaining the exemption*”. The Commissioner has considered these comments in the context of this case.
64. The Commissioner believes that Parliament did not intend this exemption to be used as an absolute exemption. Indeed the Tribunal's decision in the case of the *Mersey Tunnel Users Association versus ICO & Mersey Travel (EA/2007/0052)* underlined this point. In that case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. In particular the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore the advice concerned issues which affected a substantial number of people. It stated that:

“We find, listing just the more important factors, that considering the amounts of money involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority's

actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining it..."

65. Despite the somewhat generic responses provided by the DVLA in this case in respect of its application of the public interest test, the principle of legal privilege is one that should be overturned only for compelling reasons. The issues surrounding the disclosure of data by the DVLA have attracted a significant amount of publicity and media focus as it potentially affects almost every vehicle keeper in the UK. Indeed, the Commissioner has published guidance for members of the public on the use and disclosure of vehicle information¹. The Commissioner has also issued compliance advice on the implications of the use and disclosure of vehicle keepers' information² which was issued following a number of enquiries and complaints he had received about the use and disclosure of personal data by the DVLA.
66. When older legal professional privilege is involved disclosure is likely to reduce any potential harm to the privilege holder, and as it is no longer relevant to the decision-making process underpins the argument in favour of disclosure. However, it could not be argued that the passage of time is a factor which favours disclosure in this case; the legal advice in question is relatively recent. The Commissioner considers that if advice has been recently obtained, it is likely to be used in a variety of decision-making processes and have current or future significance. The Commissioner recognises that these decision-making processes would therefore be likely to be affected by disclosure.
67. What might be considered 'recent' is a matter of interpretation. The Mersey Tunnel advice was 10 years old and confidently pronounced "not recent" however in *Kessler v ICO and HMRC (EA/2007/0043)* the advice was 6 years old and described as "still relatively recent". Whether advice is considered 'recent' will very much depend on the specific circumstances. For instance in some cases advice can remain relevant to live decision making for a lengthy period of time, whilst in others it may be less relevant where legislation and case law have changed rapidly.
68. At the time of the request, the Commissioner's view is that the subject matter of the request was still live as the majority of information withheld was less than a year old. In addition, the DfT had also carried out a consultation on the release of data from the UK vehicle registers in March 2006. Ministers considered the consultation responses and subsequently issued a statement and press notice on 24 July 2006 setting out their decisions. The DVLA has confirmed that the new measures which were announced following this 2006 review were implemented for manual requests on 1 November 2006 and for requests received electronically on 1 October 2007. In the Commissioner's view, these

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http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/its_your_information_dvla_vehicle_information_final.pdf

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/vehicle_keepers_information_-_implications_on_use_and_disclosures.pdf

factors also give weight to the fact that the issue to which the legal advice relates was still “live” at the time of the request.

Balance of the public interest arguments

69. In the Commissioner’s opinion there is a strong public interest in understanding the reasons for decisions made by public authorities – in this case, the release of vehicle and keeper details contained within the vehicle register, which has given rise to public concerns regarding the use and security of that register. Disclosure of the legal advice may therefore assist the public’s understanding of the issues surrounding the release of such information by the DVLA. The Commissioner has therefore placed significant weight on the fact that the subject matter of the withheld information affects a significant proportion of people. There is also no doubt that this issue is a matter of public importance and that there has been a degree of public anxiety over the uses to which personal data will be put and who has access to that data, which is difficult to quantify.

70. However, the Commissioner accepts that the established public interest inherent in protecting legal professional privilege must be given due weight. There will always be an initial weighting in favour of maintaining the exemption due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court case of *DBERR v Dermod O’Brien* who said:

“Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41)....The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight” (para 53).

Justice Williams indicated though that section 42 should not accordingly become an absolute exemption “by the back door”. Public interest favouring disclosure would need to be of “equal weight at the very least...” (para 53)

71. The Commissioner is mindful of the fact that the majority of the withheld information in this case was less than a year old when requested by the complainant and accepts DVLA’s view that it forms part of a developing interpretation of the legislation and evolving policy on regulation 27. The Commissioner therefore accepts that the advice can still be considered to be ‘live. The Commissioner has also taken into account that the subject matter in this case, i.e. disclosure of data is very much an issue that it is in the public eye and one which the DVLA needs to ensure it has legally sound policies on.

72. The Commissioner recognises that there is a very strong public interest in protecting the principle of legal professional privilege. If the information in this case were disclosed it would be detrimental to the principle that legally privileged information will remain confidential. This in turn may reduce the willingness of the DVLA to seek and be able to obtain free and frank legal advice. However, taking

legal advice will often be necessary to ensure that it acts lawfully and in the best interests of the public it serves.

73. In balancing the public interest considerations the Commissioner considers that because the legal advice in question affects a substantial number of individuals this is a significant factor in favour of disclosure. However, in favour of maintaining the exemption, the Commissioner is particularly mindful that disclosure could have a detrimental effect on the DVLA's free and frank exchanges with its legal advisers in the future, which in turn could have a detrimental effect on its ability to ensure its policies are legally sound. The Commissioner is also minded that the advice is recent and still being relied upon. After considering all of the above arguments and the information itself the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Procedural Requirements

Section 17: refusal notice

74. Section 17(5) of the Act states that a public authority which is relying on a claim that section 12 or 14 applies must give the applicant a notice stating that fact. In its refusal notice dated 29 February 2008, the DVLA advised that the costs involved in complying with the requests would exceed the appropriate limit but it did not specify its reliance on the application of section 12 of the Act at this stage. The Commissioner therefore finds that the DVLA breached the requirements of section 17(5) of the Act.

Section 16

75. Section 16(1) of the Act requires a public authority to provide reasonable advice and assistance to applicants. Section 16(2) outlines that any public authority which conforms with the Code of Practice issued under section 45 of the Act (the "Code"), is to be taken to comply with the duty imposed by section 16(1).
76. The Code outlines that where an authority is not obliged to comply with a request for information because the cost of complying would exceed the "appropriate limit", the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower or no fee.
77. In the Information Tribunal case of *Barber v The Information Commissioner (EA2005/0004)* the Tribunal stated that it will generally be appropriate for the Commissioner to consider whether it was reasonable to expect a public authority to have provided more advice and assistance and, if had it done so, whether this might have had an impact upon how the request was handled.
78. The Code states that a public authority should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant. The Commissioner thinks that it would not be unreasonable for the DVLA to have

suggested to the complainant how he could have refined his request, for instance by focusing his request on a particular department, or by providing an outline of the different kinds of information which might meet the terms of the request.

79. It is clear from the correspondence, and the history of the request that the complainant refined his request on a number of occasions. The Commissioner notes that the DVLA asked the complainant to refine his request on 13 December 2007 and 8 April 2008 and did provide an explanation as to how the requested information was held such as the paper files and electronic records. The Commissioner accepts that the DVLA signalled its willingness to provide advice to the complainant by asking him to provide specific indications of the information he would like. However, the Commissioner considers that it would have been reasonable to expect the DVLA to consider providing an indication of what it could provide within the appropriate limit.
80. Consequently, the Commissioner has found that the public authority failed to meet the requirements of section 16 of the Act through its handling of the complainant's request.

The Decision

81. The Commissioner's decision is that the DVLA dealt with the following elements of the request in accordance with the requirements of the Act:
- The DVLA correctly applied section 12(1) to request 1 as to comply with the request would exceed the £600 cost limit.
 - The DVLA correctly applied section 42(1) in respect of information held relating to request 2.
82. However, the Commissioner has also decided that the DVLA did not deal with the request for information in accordance with Part 1 of the Act in the following respects:
- Section 17(5) for failing to specify its reliance on the application of section 12(1) in its refusal notice.
 - Section 16(1) in relation to not providing reasonable advice and assistance to the applicant in submitting a new request.

Steps Required

83. The Commissioner requires the DVLA to take the following step to ensure compliance with the Act:
- Contact the complainant and discuss what it can provide within the costs limit, in order to comply with its obligations under section 16(1) of the Act

84. The DVLA must take the step required within 35 calendar days of the date of this notice.

Failure to comply

85. Failure to comply with the step described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

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

Internal review

85. In relation to desirable practice in relation to the conducting of internal reviews, paragraph 39 of the section 45 code (the "Code") states:

"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue...."

86. Paragraph 40 of the Code recommends that, as part of an internal review:

"...The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."

87. The Commissioner considers that the DVLA's internal review response of 12 June 2008 does not demonstrate that the request was properly reconsidered and it does not, therefore, conform to the recommendations of the Code. The Commissioner expects that the DVLA's future internal reviews will conform to the recommendations of the Code and he directs the DVLA to his published guidance in this matter.

Right of Appeal

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

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

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

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 9th day of November 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him”.

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that:

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Duty to provide Advice and Assistance

Section 16(1) provides that:

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

Refusal of request

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 17(5) provides that:

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact”.

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

Statutory Instrument 2002 No 2742

The Road Vehicles (Registration and Licensing) Regulations 2002

Regulation 27 - Disclosure of registration and licensing particulars

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

(a) by a local authority for any purpose connected with the investigation of an offence or of a decriminalised parking contravention;

(b) by a chief officer of police;

(c) by a member of the Police Service of Northern Ireland;

(d) by an officer of Customs and Excise in Northern Ireland; or

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

(2) Particulars may be provided to such a person as is mentioned in paragraph (1)(e) on payment of such fee, if any, of such amount as appears to the Secretary of State reasonable in the circumstances of the case.

(3) In this regulation -

(a) "a decriminalised parking contravention" means any act or omission which would have been an offence but for any of the following provisions of the Road Traffic Act 1991, that is to say -

(i) section 65 (contravention of certain orders relating to parking places in London not to be a criminal offence);

(ii) section 76(3) (provisions creating certain stationary vehicle offences to cease to apply in special parking areas in London);

(iii) paragraph 1(4) of Schedule 3 (contravention of certain orders relating to parking places outside London not to be a criminal offence); and

(iv) paragraph 2(4) of Schedule 3 (provisions creating certain stationary vehicle offences to cease to apply in special parking areas outside London); and

(b) "an officer of Customs and Excise" means an officer as defined in section 1(1) of the Customs and Excise Management Act 1979^[16] and includes any person engaged as mentioned in section 8(2) of that Act.