

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 October 2011

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 concerning the network rationalisation of the DVLA, following the publication of a leaked document setting out the options for the network rationalisation. The public authority withheld the requested information by virtue of section 35(1)(a) of the Act. The Commissioner considered the withheld information and the DVLA's application of section 35(1)(a) and concluded in this case that the exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information. The Commissioner has also found that the DVLA breached section 10(1) through its handling of the request. The Commissioner requires no steps to be taken.

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. A leaked document relating to the "network rationalisation" of the DVLA was made available in the public domain. The document appeared to contain various options in relation to the centralisation of certain functions within the DVLA.

The Request

3. The Commissioner notes that under the Act the Driver and Vehicle Licensing Agency (“the DVLA”) is not a public authority itself, but is actually an executive agency of the Department for Transport which is responsible for the DVLA and therefore, the public authority in this case is actually the Department for Transport not the DVLA. However, for the sake of clarity, this decision notice refers to the DVLA as if it were the public authority.
4. On 2 November 2010, the complainant wrote to the DVLA and requested:

“Further to the media announcement of the DVLA Network Rationalisation we request the following information in accordance with the Freedom of Information Act (FOI):

 - *All documents relating to the DVLA Network Rationalisation”.*
5. The DVLA responded to the request on 4 January 2011, confirming that it held information falling within the scope of the request. The DVLA stated that the information in question was exempt from disclosure by virtue of section 35(1)(a) of the Act. The DVLA also made reference to a document which had been made available in the public domain. In its view, this document specifically was exempt from disclosure by virtue of section 21 of the Act, as it was reasonably accessible to the complainant by other means. The DVLA provided a link to this document, and provided copies of letters that had been sent to DVLA staff as a result of the document that had come into the public domain.
6. On 18 January 2011 the complainant contacted the DVLA to request an internal review of its decision to withhold information by virtue of section 35(1)(a) of the Act. The complainant requested a reconsideration of the decision on the basis that the information was required to be provided for the purposes of collective bargaining under the Trade Union and Labour Relations (Consolidation) Act 1992.
7. The DVLA informed the complainant of the outcome of its internal review on 16 February 2011. The DVLA upheld its decision to withhold the requested information by virtue of section 35(1)(a) of the Act.

The Investigation

Scope of the case

8. On 1 March 2011 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 whether the requested information had been correctly withheld by virtue of section 35(1)(a). The DVLA's reliance on the exemption at section 21 of the Act has not been examined further, as it was not a point pursued by the complainant within his complaint to the Commissioner.

Chronology

9. The Commissioner contacted the DVLA on 2 June 2011 and asked it to provide him with a copy of the disputed information along with submissions to support its application of the exemption.
10. The DVLA provided the Commissioner with a copy of the requested information on 22 July 2011, along with arguments to support its application of section 35(1)(a) of the Act to the information.

Analysis

Exemptions

Section 35

11. Section 35(1)(a) provides that:

"information held by a government department or by the National Assembly for Wales is exempt information if it relates to –

(a) the formulation or development of government policy"

12. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of the information in question conforming to the description given in section 35(1)(a). Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
13. Covering first whether the exemption is engaged, the approach of the Commissioner is that the term 'relates to' as it is used in the wording of this exemption can safely be interpreted broadly. This is in line with the

approach of the Information Tribunal in the case *DfES v the Information Commissioner & the Evening Standard (EA/2006/0006)* in which it stated:

“If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable”.

14. In forming a conclusion as to whether this exemption is engaged, the central factor is the content of the information in question. This consists of a large bundle of various documents; including presentations, reports, statistical information, emails and briefings relating to the shape that DVLA's local presence should take. The DVLA explained that this piece of work is part of the government agenda to make more efficient and effective use of public sector resources. As part of that work, ministers have agreed that the DVLA should aim to achieve the specific challenge of saving £100m from its annual running costs by 2015. The work covers one of the opportunities for making savings subject to alternative service delivery arrangements and channels being identified and secured. As such, this remains a fluid piece of work within a larger exercise with no decision yet being made as to direction or scale.
15. The Commissioner recognises that the term 'policy' is not a precise one and to some extent what is regarded as policy depends upon context. However, there would appear to be a general consensus that policy is about the development of options and priorities for ministers, who determine which options should be translated into political action and when. The white paper 'Modernising Government' refers to it as the process by which governments translate their political vision into programmes and actions to deliver 'outcomes' or desired changes in the real world.
16. Policy can be sourced and generated in a variety of ways. For example, it may come from ministers' ideas and suggestions, manifesto commitments, significant incidents such as a major outbreak of foot and mouth disease, European Union policies, public concern expressed through letters, petitions and the like. Proposals and evidence for policies may come from external expert advisers, stakeholder consultation, or external researchers, as well as civil servants. Policy is unlikely to include decisions about individuals or to be about purely operational or administrative matters. For instance, decisions about applications for licenses or grants are not likely to involve the formulation of policy but rather its application.
17. The formulation and development of policy, in the simplest terms, is the government deciding to make changes in the real world and discussing

how best to make and implement those changes. On the basis of the information set out at paragraph 14 above, the Commissioner accepts that the withheld information relates to the government policy process, however whether or not the exemption under section 35(1)(a) is engaged depends upon what stage the policy process has reached. In situations where the information relates to the implementation stage of the policy process as opposed to its formulation and development, the Commissioner will not consider the exemption under section 35(1)(a) to be engaged.

18. With regard to drawing a distinction between the stages of formulation and development, the Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is no longer under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation and development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
19. The DVLA explained that it may propose policies which are decided by the Secretary of State for Transport and his ministerial team. At the time that the request in this case was made, ministers had not been presented with any information about the proposed network rationalisation. Until ministers have had the opportunity to consider the matter, the development of the policy governing how the DVLA will proceed will not be completed. Until the DVLA has received confirmation from ministers about how they wish to proceed, the DVLA considers this to be a policy in development.
20. The Commissioner has reviewed the withheld information itself along with the arguments submitted by the DVLA and considers that it is clear that the information in question does relate to the formulation or development of government policy. The information in question relates to the discussion of various options in relation to the policy in question prior to its ministerial agreement. Even though the information in question relates to how the agency in question organises and structures itself, the Commissioner considers that the fact that the plans were awaiting ministerial approval, and the wider societal impacts of the plans

means that the information in question records part of the process of the formulation and development of this policy and, therefore, the exemption provided by section 35(1)(a) is engaged in relation to this information.

The public interest test

21. Having found that this exemption is engaged, it is necessary to go on to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest, the Commissioner has taken into account those factors that relate to the specific information in question here, including what harm may result from disclosure of the information in question, and whether disclosure of information relating to the formulation and development of policy concerning the future of the DVLA would serve the public interest. This is in addition to the general public interest in transparency and openness in relation to the government policy formulation and development process.
22. That the information is within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard* (EA/2006/0006), where it stated in connection with section 35(1)(a):

"The weighing [of the public interest] exercise begins with both pans empty and therefore level". (paragraph 65)

Public interest arguments in favour of disclosing the requested information

23. The complainant explained that he had come into possession of a leaked document titled "DVLA Network Rationalisation". The document was incomplete, but made reference to the reorganisation/restructuring of the DVLA network, inferring a potential for job losses, and for a reduction in size of the estate. The complainant explained that there are approximately 1500 employees employed in the DVLA network at 250 sites throughout England, Wales and Scotland. A trade union released the document to the national media for public consumption and questions have been raised in the House of Commons.
24. The complainant explained that the leaked document appeared to be in advanced stages of development. Since the document was in the public domain, it was, in the complainant's view, of public concern.
25. The complainant explained that, in his view, approximately 1500 members of staff could be at risk of losing employment. The loss of employment within the communities throughout England, Wales and Scotland, in the complainant's view was of public concern when

considering the potential impact of this on the economy, businesses and social cohesion in the areas affected. The complainant concluded with his findings that the public interest in disclosure outweighed the public interest in maintaining the exemption.

26. The DVLA recognised the public interest for the unions, external stakeholders and the general public to know that it was considering changes to its local office network, particularly in terms of the potential impact on jobs and services that could be caused by the proposed changes. In addition, the DVLA recognised the importance of transparency of options that may be available.
27. The Commissioner has also considered what the content of the information suggests about the balance of the public interest. That the policy formulation process was ongoing at the time of the request is of relevance here. The view of the Commissioner on the content of this information, combined with the stage that the policy formulation process had reached by the time of the request, is that this would provide a genuine insight into the process of policy formulation and development in this important area. The content of this information does, therefore, weigh in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

28. The DVLA considered that, as a public body, it has a duty to examine all options in relation to how it manages and delivers the services it carries out for the public, and to evaluate those options independently. The DVLA explained that the considerations for network rationalisation needed to be looked at, evaluated and fully considered without being influenced prematurely by the views of stakeholders, and that ministers should be allowed to make independent and informed decisions as to the best possible way forward without undue influence. In developing this argument, the DVLA put forward the following submissions:
 - DVLA has a responsibility to ensure that best use is made of resources and expertise to provide a service. Such consideration may be inhibited by early disclosure before decisions are made.
 - There is a public interest in allowing officials time to evaluate and assess all relevant information, which might be prevented by premature disclosure.
 - Good policy making depends upon good advice which should be broad based; to disclose information gathered from discussions between officials may be counter-productive as it could cause a reluctance to participate in frank, open and honest discussion if parties were made aware their views/comments would be made public.

- Policy effects are still being worked through to reach decisions. In order to develop sound and workable decisions, officials need to rigorously explore options without the constraint that early dissemination could introduce.
 - The complete picture is not yet known to allow decisions to be made. Release of information would be counter-productive because it might result in avenues being explored prematurely or inappropriately.
29. The Commissioner considers that the arguments put forward by the DVLA generally fall under the headings of “safe space” arguments; that is the ability for civil servants and ministers to be able to formulate policy and debate “live” issues away from external scrutiny; and “chilling effect” arguments, relating to the impact of disclosure on the frankness and candour of debate.

Balance of the public interest arguments

30. In balancing the public interest, the DVLA explained that it had considered the timing of the request to be of significance. At the time of the request, no decisions about the future shape of the DVLA network had been made, and those with responsibility for making the decision had not been made aware of the possible options available. As further analysis and discussions were still to be undertaken, it was thought to be not in the public interest to release information about untested options that may not arise. The early disclosure of any information, in the view of the DVLA, would influence the development of the policy and could potentially affect the outcome. The DVLA considered there to be a very strong public interest in ensuring that DVLA is able to evaluate and assess fully the information received so that policy on this issue can be properly formulated. The DVLA therefore considered that, in all circumstances of the case, the public interest in withholding the information outweighed the public interest in disclosure.
31. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of the Tribunal in *DFES v Information Commissioner and Evening Standard* (EA/2006/0006) which considered the application of section 35(1)(a).
32. In particular the Commissioner has considered two key principles outlined in the *DFES* decision. The first was the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

“Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are

entitled to hammer out policy without the "...threat of lurid headlines depicting that which has been merely broached as agreed policy".

33. The second being:

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case". (paragraph 75(i))

34. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption.

35. With regard to the safe space arguments, these are only relevant if at the time of the request, the policy formulation and development was ongoing. This is because such arguments are focused on the need for a private space in which to develop **live** policy. As explained above, the DVLA has confirmed that the formulation of the policy in question remained ongoing at the time of the complainant's request.

36. in light of this explanation and on the basis of the content of the information itself, the Commissioner is satisfied that at the time of the request the policy in question was being formulated with options being considered to put before ministers to create the policy. The issue was therefore one that at the time of the request could be correctly described as "live".

37. In line with the comments of the Tribunal quoted above, the Commissioner believes that significant weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. It is clearly in the public interest that the DVLA, and indeed other government departments, can candidly discuss the different policy options. In attributing weight to this argument the Commissioner notes that the information in question is, in places, of a genuinely free and frank nature and includes candid discussions of the pros and cons of a number of policy options.

38. The Commissioner has also taken into account the comments of the Tribunal in *DBERR v the Information Commissioner and Friends of the Earth* (EA/2007/0072) in which it suggested that the weight which should be attributed to safe space arguments diminishes as the policy becomes more certain. In the circumstances of this case at the time of the request the policy was very much at the formulation stage, and so the Commissioner considers that the early stage that the policy

formulation had reached contributes further to the weight that should be given to the safe space arguments.

39. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:
- Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;
 - The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and
 - Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
40. Clearly, in this case as the policy formulation was ongoing at the time of the request, the third scenario is not relevant to this case.
41. In considering the weight that should be attributed to the first two scenarios the Commissioner has taken into account the scepticism with which numerous Tribunal decisions have treated the chilling effect arguments when they have been advanced. The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner* (EA/2007/0047) accurately summarises these views:
- “we adopt two points of general principle which were expressed in the decision in HM Treasury v the Information Commissioner EA/2007/0001. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential.....Secondly, the Tribunal could place some resilience in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity”.*
42. However, the Commissioner has also taken into account the comments of Mr Justice Mitting when hearing an appeal in the High Court against the Tribunal decision *Friends of the Earth v The Information Commissioner and Exports Credits Guarantee Department*

(EA/2006/0073). Whilst supporting the view of numerous Tribunal decisions that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations but rather are likely to be relevant in many cases:

“Likewise, the reference to the principled statements of Lord Turnbull and Mr Britton as “ulterior considerations” was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between”.

43. In light of these various Tribunal and High Court judgements, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the information in question would result in the effects suggested by the public authority.
44. Taking this into account the Commissioner does not believe that any particular weight should be given to the second, broader type of chilling effect. This is because the DVLA has not identified any particular evidence which would demonstrate why there would be a chilling effect on different policy makers when making submissions in the future on different challenging policy issues.
45. The Commissioner is prepared to accept that disclosure of the information withheld on the basis of section 35(1)(a) could have a limited impact on how officials make contributions to future policy discussions on the issue of the future of the DVLA. However, in the Commissioner’s opinion this weight is limited to some extent because as the Tribunal has argued it is reasonable to expect civil servants to continue to provide independent and robust advice: ‘we are entitled to expect of [civil servants] the courage and independence that ... [is] ... the hallmark of our civil service’ as they are ‘highly educated and politically sophisticated public servants who well understand the

importance of their impartial role as counsellors to ministers of conflicting convictions¹.

46. Turning next to the factors that favour disclosure, The Commissioner believes that the generic public interest arguments in favour of disclosing the information identified by the DVLA deserve to be given considerable weight given the fact that transparency of government departments along with improving accountability, is so inherent to the Act.
47. The Commissioner accepts the arguments put forward by the complainant relating to the large numbers of people that could be affected by the proposed changes, and the potential impact on the economy, and on unemployment. However, the Commissioner considers this argument to be in relation to the public interest in the outcome of the decision-making, and the nature of the eventual policy, rather than a public interest in the policymaking process or in the formulation or development of the policy in question. Therefore the Commissioner does not consider this argument to be relevant in this specific case.
48. However, the Commissioner does recognise that the issue at the heart of this matter has received media interest, and has been mentioned in the House of Commons. The deliberations ongoing in the DVLA have come directly from the cuts that have been imposed on it by the government, which is an important issue and is of interest to all individuals across the UK. Disclosure of the requested information could inform the debate around how the imposed cuts could change the DVLA.
49. However, despite the weight that the Commissioner believes should be attributed to the arguments in favour of disclosure, given that the policy formulation was live at the time of this request and the significant weight that should be attributed to the safe space arguments, the Commissioner has concluded that the public interest favours maintaining the exemption.

Procedural Requirements

Section 10 – Time for compliance

50. Section 10(1) of the Act provides that, on receipt of a request for information, a public authority must comply with its obligations under section 1(1) within 20 working days from the date of receipt of the request.

¹ See EA/2006/0006 paragraph 75 (vii)

51. Section 1(1)(a) 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"

52. The complainant made the request on 2 November 2010 and the DVLA issued its formal response on 4 January 2011. Therefore it is evident that the DVLA failed to confirm or deny within the statutory time limit whether it held information falling within the scope of the request, which was a breach of section 10(1).

The Decision

53. 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:

- The DVLA was entitled to rely on section 35(1)(a) in withholding the requested information

54. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The DVLA failed within the statutory 20 working days to confirm or deny whether it held the requested information, and therefore breached section 10(1)

Steps Required

55. The Commissioner requires no steps to be taken.

Right of Appeal

56. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 19th day of October 2011

Signed

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

Legal Annex

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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Formulation of Government Policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.