

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2014

Public Authority: The Driver and Vehicle Standards Agency
(an Executive Agency of the Department for Transport)

Address: Berkeley House
Croydon Street
Bristol BS5 0DA

Decision (including any steps ordered)

1. The complainant requested information about a safety test carried out on a particular vehicle. The Driver and Vehicle Standards Agency (DVSA) stated that the information was exempt from disclosure under section 44 of the FOIA (prohibitions on disclosure), by virtue of the Enterprise Act 2002.
2. The Commissioner's decision is that the DVSA has correctly applied this exemption and does not need to take any further action.

Background

3. The complainant is concerned that a throttle defect has been deliberately created in particular Porche vehicles in order to circumvent EU legislation designed to limit vehicle noise emissions. He had submitted a defect report about a Porsche Cayman vehicle to the DVSA (formally the Vehicle and Operator Services Agency (VOSA)) in September 2011. The DVSA had dismissed this report and closed the case.
4. In unrelated correspondence to Porsche dated 8 March 2012, which the complainant and Commissioner have had sight of, the DVSA confirmed that it would test one of the vehicles concerned, in response to three defect reports it had received, and the involvement of government ministers and the Vehicle Certification Agency.

5. Although the DVSA had dismissed the complainant's defect report, the complainant believes that his report is one of the three reports the DVSA mentions in this letter. However, the DVSA told the complainant in a letter dated 4 October 2013, that the test that was subsequently carried out in April 2012 was a separate investigation and not a response to the vehicle defect report that the complainant had submitted in 2011.
6. While resolving this disagreement is not the Commissioner's role, he notes the complainant's claim that it has had the effect of undermining his confidence in the DVSA's response to his information request.
7. However, the focus of the complainant's concern is whether the DVSA has colluded in testing a variant of the vehicle concerned that it knew would not evidence the throttle defect the complainant has identified, so as to return a more favourable safety result to the manufacturer.

Request and response

8. The Commissioner notes that under the FOIA the DVSA is not a public authority itself, but is an executive agency of the Department for Transport which is responsible for the DVSA. The public authority in this case is actually therefore the Department for Transport not the DVSA. However, for the sake of clarity, this decision notice refers to the DVSA as if it were the public authority.
9. The complainant wrote to the Driver and Vehicle Standards Agency (formally VOSA) on 6 November 2013, and requested information in the following terms:

"I request under the Freedom of Information Act all information held by VOSA regarding the Porsche Cayman vehicle, and in particular the VOSA safety evaluation of the vehicle throttle malfunction."
10. The DVSA responded to the complainant's request on 8 November 2013. It refused to disclose the requested information and cited section 44(1)(a) of the FOIA as its basis for doing so. However, although the opening paragraphs of the letter addressed the complainant's request, the concluding paragraphs erroneously discussed a completely different case.
11. Following an internal review, the DVSA wrote to the complainant on 4 December 2013. It acknowledged that it had mistakenly conflated two unrelated cases in its letter of 8 November and apologised for doing so.

12. The DVSA then referred the complainant to the letter the complainant had received from its Vehicle Safety Branch dated 4 October 2013. This was in response to a letter from the complainant dated 30 September 2013 concerning the testing in 2012, of which the complainant had recently become aware. The DVSA's letter said that the test of the Porsche Cayman vehicle in question was conducted as part of a separate safety investigation and that the resulting report also included personal and confidential information. In its review, the DVSA re-stated that this investigation was in response to a different case from the complainant's, which had been closed by that point.
13. Having reviewed its original response, the DVSA maintained its position that the information the complainant had requested was exempt from disclosure under section 44(1)(a) of the FOIA.
14. During the Commissioner's investigation, the complainant stated he would be satisfied with a partial disclosure, namely a response to the question:

"When DVSA test drove a Porsche Cayman to evaluate the throttle malfunction, did they test drive a manual transmission car fitted with a standard exhaust? Yes or No?"
15. The DVSA did not confirm to the Commissioner whether it held this specific information. It did confirm however that it had contacted Porsche to seek permission to release the information that it held falling within the scope of the request; Porsche refused this permission.

Scope of the request

16. The complainant contacted the Commissioner on 12 January 2014 to complain about the way their request for information had been handled.
17. The Commissioner focussed his investigation on whether the DVSA has correctly applied the exemption under section 44(1)(a) of the FOIA.

Reasons for decision

18. Section 44(1)(a) of the FOIA says that information is exempt if its disclosure is prohibited by, or under, any enactment.
19. The enactment the DVSA has cited is the Enterprise Act 2002 ('EA2002'). EA2002 prohibits the release of information on vehicle defects in certain circumstances. Section 237 of the Act makes it an offence to disclose "specified information" which relates to the affairs of

an individual, or business of an undertaking, during the lifetime of the individual or while the undertaking continues to exist. Section 238 clarifies that information is specified information if it comes to a public authority in connection with the exercise of its functions.

20. The Information Tribunal has previously been asked to consider the use of section 237 as a statutory prohibition on disclosure and it has concluded it can be used in this way¹. The Commissioner has therefore gone on to consider whether the requested information in this case is "specified information" and whether the undertaking, that is, the business entity, continues to exist.

Is the information 'specified information'?

21. The Commissioner considers that the requested information, while not of any technical nature, is 'specified information' as defined under EA2002, section 238 (1) (c). This is because it has come to the DVSA in connection with the exercise of a function it has under, or by virtue of, "*such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.*"
22. As the enforcement authority responsible for vehicle safety, where it is investigating a potential safety defect, the function the DVSA is exercising is product safety, under the General Product Safety Regulations 2005 (GPSR2005).
23. The Commissioner recognises that GPSR2005 is subordinate legislation specified by the Secretary of State. These Regulations implement the EU directive on product safety – the General Product Safety Directive 2001/95/EC, and so fall within category (c) of section 238 (1) of the EA2002.

Does the undertaking continue to exist?

¹ [Dey v ICO and OFT \(EA/2006/0057\)](#)

24. The 'undertaking' refers to the business entity - in this case, the manufacturer Porsche. The Commissioner has received no evidence to suggest this manufacturer is no longer in existence and consequently is satisfied that section 237(2) applies.
25. Sections 239 to 243 of the EA2002 provide for certain gateways for the disclosure of information. These gateways do not compel the DVSA to disclose information, but do allow it to do so for the purposes set out in these sections, or in accordance with the requirements they stipulate. Section 239 provides for disclosure where consent has been obtained; as stated in paragraph 15 above, the Commissioner notes that consent had been sought by the DVSA from Porsche but that it had been refused.
26. The Commissioner therefore considers that the DVSA has correctly applied the exemption under section 44 of the FOIA to the requested information, by virtue of the EA2002.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

28. 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.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Anne Jones
Assistant Commissioner (Wales)
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