

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 11 July 2017

Public Authority: Vehicle Certification Agency
Address: 1 The Eastgate Office Centre
Eastgate Road
Bristol
BS5 6XX

Decision (including any steps ordered)

1. The complainant has requested information relating to the attributes of a number of catalytic converters. The Vehicle Certification Agency (VCA) refused to provide the information, citing the exceptions provided by regulation 12(5)(d) – confidentiality of proceedings and 12(5)(f) – voluntary supply of information. During the Commissioner’s investigation the VCA also introduced the exception provided by regulation 12(5)(b) – course of justice.
2. The Commissioner’s decision is that none of the exceptions claimed are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information that has been withheld under the exceptions provided by regulation 12(5)(b), (d) and (f).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 July 2016 the complainant requested information of the following description:

"Please can you confirm if each part number was covered by the approval certificate, and do each of the observed attributes (Monolith material, Shape of Monolith and Monolith frontal dimension) for each part conform to the approval certificate specifications, that was in force at the time the part was manufactured?"

Approval on Part	Part no	Manufactured Date	Monolith Material	Shape of Monolith	Monolith frontal dimensions
E11 103R 003028	311411	12/07/2013	Ceramic	Oval	3.15" x 4.75"
E11 103R 003302	321428	13/01/2015	Ceramic	Round	3.66" x 3.66"
E11 103R 003302	321429	29/12/2014	Ceramic	Round	3.66" x 3.66"
E11 103R 003302	321430	30/12/2014	Ceramic	Round	3.66" x 3.66"
E11 103R 003302	321533	30/12/2014	Ceramic	Round	3.66" x 3.66"
E11 103R 003306	321872	22/12/2014	Ceramic	Round	4.66" x 4.66"
E11 103R 003313	321643	31/12/2014	Ceramic	Oval	3.15" x 4.75"
E11 103R 003313	321683	13/01/2015	Ceramic	Oval	3.15" x 4.75"
E11 103R 003315	311485	12/01/2015	Ceramic	Round	3.66" x 3.66"
E11 103R 003315	311685	30/12/2014	Ceramic	Round	4.66" x 4.66"
E11 103R 003350	321668	30/12/2014	Ceramic	Round	4.66" x 4.66"
E11 103R 003357	321456	09/06/2013	Ceramic	Round	4" x 4"

E11 103R 003357	321456	21/10/2014	Ceramic	Round	4.66" x 4.66"
E11 103R 003359	321516	31/12/2014	Ceramic	Oval	3.15" x 4.75"
E11 103R 003361	321177	13/01/2015	Ceramic	Round	4.66" x 4.66"
E11 103R 003362	321305	13/02/2015	Ceramic	Round	3.66" x 3.66"
E11 103R 003375	311644	29/03/2013	Ceramic	Round	3.66" x 3.66"
E11 103R 007273	321569	22/07/2014	Ceramic	Round	3.66" x 3.66"

This request is asking for confirmation of physically observed attributes ..."

6. On 6 September 2016 the VCA responded. It refused to provide the requested information citing Regulation 12(5)(f) – voluntary supply of information as the basis for doing so.
7. The complainant requested an internal review on 26 October 2016. The VCA sent him the outcome of the internal review on 5 December 2016. The VCA revised its position. In addition to regulation 12(5)(f) the VCA now also applied regulation 12(5)(d) - adverse affect to the confidentiality of proceedings, to withhold the information.
8. During the course of the Commissioner's investigation the VCA introduced the exception provided by regulation 12(5)(b) – course of justice.

Background

9. Before any product with an internal combustion engine, or any component for such an engine can be sold in the European Union (EU) it has to be approved by an appropriate approval authority, this is known as 'Type Approval'. There are a number of such approval authorities operated by different countries within the EU. The VCA is the UK's.
10. The request relates to catalytic convertors which are available on the open market.

11. The VCA approved these products and so holds the Type Approval documentation for each of the products listed in the complainant's table. Therefore by providing the relevant information from that documentation the complainant could confirm for himself whether the details held by the VCA correspond with the details he has observed through the physical inspection of products he has obtained.
12. The VCA has explained that it would not be prepared to simply confirm whether the complainant's table is accurate, for example by putting a cross or a tick against each entry. Although this may seem the easiest way of answering the request it would in effect be the creation of new information which was not held at the time the request was received. A public authority is not required to create new information in response to a request. Therefore when considering the request and the application of the exceptions the VCA has looked at the impact of disclosing the information it could extract from the relevant Type Approval documentation.

Scope of the case

13. The complainant contacted the Commissioner on 20 December 2016 to complain about the way his request for information had been handled.
14. The Commissioner considers the matter to be decided is whether any of the exceptions cited provide grounds for withholding the information and, if so, whether the public interest in maintaining the exception or exceptions outweighs the public interest in disclosure.

Reasons for decision

Regulation 12(5)(b) – course of justice

15. Regulation 12(5)(b) of the EIR states that a public authority can refuse a request if disclosing the information would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
16. The exception can only be engaged on the basis that the alleged adverse affect 'would' occur. This is a high threshold. It is not sufficient that disclosure may or could have some level of adverse effect, but

rather that disclosure 'would' have an adverse affect. In the ICO's opinion this means that that the likelihood of an adverse affect must be more substantial than remote.

17. The Commissioner understands that the Driver and Vehicle Standards Agency (DVSA) is conducting an investigation into the manufacture of the products listed in the complainant's table. The DVSA is concerned that disclosing the requested information would prejudice its investigation, or rather it would compromise the case when it came to court.
18. The VCA argues that one of the means by which the investigation and any subsequent court case may be prejudiced is that disclosure of the requested information may lead to its scrutiny by the public and possibly the media. This publicity, the VCA says, may make people less willing to participate in a trial as witnesses.
19. The Commissioner recognises that any witness to a trial may have concerns over the potential public and media attention that the trial may attract. However a great number of trials are conducted fairly and successfully which have high public profiles; higher probably than one relating to the subject matter of this request may attract. The Commissioner does not therefore accept that the generation of any public awareness of the issues raised by this request or the possibility of media interest is likely to deter potential witnesses.
20. The VCA has also argued that if the requested information was disclosed before the investigation was completed it may influence witnesses and so their testimony.
21. The Commissioner understands that this is based on a concern that the request appears to be made on the premise that the parts in question do not conform to the relevant Type Approval . This has not been proved, but is the central to the ongoing investigation. If the details observed by the complainant and set down in his table differed from those contained in the Type Approval documentation, and the two sets of information were compared, it could create a negative impression. As a disclosure under the EIR is considered a disclosure to world at large, this, it is argued, could influence witnesses and undermine their credibility.
22. The Commissioner recognises that the public are likely to draw their own, potentially incorrect, conclusions if the withheld information did suggest some products bearing the relevant Type Approval numbers did not match the approval documentation. The complainant has argued that these conclusions may not be those anticipated by the VCA, or the DVSA. He suggests that members of the public may simply think that the complainant himself made mistakes when compiling the table and

that it is impossible to pre-judge what conclusions they may draw. The Commissioner accepts that it is impossible to say with one hundred percent certainty how the public may react. Nevertheless application of any exception requires a public authority and the Commissioner to contemplate what the most likely response to a disclosure would be. The Commissioner agrees with the VCA that it is more likely than not that the public would draw the conclusion that errors had been found in the Type Approved products.

23. The final question is whether these perceptions would have the effect claimed by the VCA and DVSA i.e. that it would influence the evidence of witnesses and undermine their reliability.
24. The Commissioner has produced a short confidential annex to this notice which deals with specific arguments raised by the VCA as to how the disclosure of the requested information may influence the evidence that the DVSA would be able to bring to court. This confidential annexe will be made available solely to the VCA. The Commissioner is only able to provide the following limited explanation of her reasoning within the open version of this notice.
25. It is not clear to the Commissioner how the substance of any evidence which DVSA would seek to obtain as part of its investigation could be influenced by witnesses having already concluded that there were errors in some of the Type Approved products.
26. The Commissioner is not satisfied that the VCA has demonstrated that the likelihood of disclosing the information having an adverse affect on the course of justice is more substantial than remote.

Regulation 12(5)(d) – confidentiality of proceedings

27. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that, or any other public authority, where such confidentiality is provided by law.
28. The engagement of the exception involves a three stage test:
 - What are the proceedings in question?
 - Is the confidentiality of those proceedings provided by law?
 - Would disclosing the information adversely affect that confidentiality?
29. The VCA has identified the relevant proceedings to be the consideration and granting of Type Approval, as described in paragraph 9 above. A manufacturer applying for Type Approval would be credit checked, would

need to declare information about the product and provide details around the place of manufacture and the addresses of the production plants. It is then for the VCA to assess whether the product conforms to the relevant standards and if so to grant Type Approval. The Commissioner accepts that this is a formal process and can be considered to be a form of 'proceeding' for the purpose of regulation 12(5)(d).

30. The VCA has explained that the concept of confidentiality runs throughout the approval process. The Type Approval process was established under the European Whole Vehicle Framework Directive 2007/46/EC. The VCA has directed the Commissioner to the following provisions within the Directive which refer to the need for confidentiality in the approval process:

- Article 38(1) (2nd paragraph) says that "The vehicle manufacturer may impose a binding agreement on the manufacturers of components or separate technical units to protect the confidentiality of any information that is not in the public domain, including what is related to intellectual property rights"
- Paragraph 2 of Appendix 2 to ANNEX V – "Auditors (from technical services – i.e. 3rd parties who assess vehicles) shall show trust and integrity. They shall respect confidentiality and discretion."
- Delegated Reg (EU) No 44/2014 – (amending 2007/46/EC) Appendix 1 to ANNEX XVI (which relates to virtual testing), paragraph 3 (3rd paragraph), says that "when working with manufacturers in providing access and support to the technical service does not remove any obligation regarding "respect of confidentiality" (when working with manufacturers).

31. The VCA also drew the Commissioner's attention to a declaration provided to manufacturers when beginning the approval process:

"Confidentiality

All information provided to VCA by the customer relating to an approval or other work will be regarded as secret processes, designs and information of a technical nature, which necessitate a high degree of confidentiality. Both the customer and VCA acknowledge that disclosure of that information may prejudice the commercial interests of the customer and of VCA, such that both the customer and VCA are obliged to maintain that confidentiality."

32. The Commissioner accepts that where confidential information is supplied to the VCA by a manufacturer as part of the approval process there are provisions that allow the information to be protected. It is

clearly important that a manufacturer's intellectual property rights are protected, particularly where, for example, the information being supplied relates to new products.

33. However the Commissioner does not accept that any duty of confidentiality provided by this legislation, or under common law would extend to information about the product which can easily be gleaned from a simple inspection of the product by a mechanic fitting that part, or indeed a member of the public. As discussed earlier, the information which the VCA has identified as being captured by the request is that contained in the Type Approval documentation that relates to the attributes specified in the complainant's table, i.e. the type of material (metal or ceramic) which the component is made from, the shape of the component (round or oval) and the dimensions of the front of that component. The VCA has referred to this information as relating to design specifications. Whilst strictly speaking this may be true, the Commissioner can see no grounds for such obvious and easily observed attributes being considered confidential, or how the disclosure of such information would adversely affect the confidentiality of other more sensitive information. By marketing these products the manufacturer has in effect placed the information into the public domain.
34. In light of the above the Commissioner finds that regulation 12(5)(d) is not engaged.

Regulation 12(5)(f) – interests of the person who provided the information

35. Regulation 12(5)(f) provides that a public authority may refuse to disclose information where its disclosure would adversely affect the interests of the person who provided that information where that person:
- was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - did not supply it in circumstances such that that or any other public authority is entitled to disclose it; and
 - has not consented to its disclosure.
36. Although the exception refers to the interests of a 'person' the term is accepted as meaning any legal entity such as any manufacture of the parts to which the request relates. The exception can only be applied where the manufacturer was not under any legal obligation to provide the requested information to the VCA (or any other public authority). The VCA has argued that no one is under any statutory requirement to provide information of any kind to the VCA. It accepts that in order to obtain Type Approval a manufacturer would have been obliged to

present some information (including technical specifications) for the purposes of the approval process. However it argues that this is different from the manufacturer being under any obligation to do so as manufacturers are under no compulsion to market their products in the EU and so under no obligation to apply for Type Approval.

37. The Commissioner does not accept this argument. In line with her published guidance on regulation 12(5)(f) the Commissioner finds that where a company is applying for some form of permission, such as Type Approval, the provision of any information required to obtain that permission cannot be regarded as being made on a voluntary basis. Despite the fact that the decision to market its products in the EU is a voluntary one, once that decision has been taken, it is obliged by law to supply certain information to one of the European approval authorities.
38. Therefore the Commissioner finds that the exception is not engaged.

Right of appeal

39. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

40. 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.
41. 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

**Pamela Clements
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