

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 January 2022

**Public Authority:** Driver and Vehicle Licensing Agency  
(Department for Transport)

**Address:** Longview Road  
Morrison  
Swansea  
SA6 7JL

#### **Decision (including any steps ordered)**

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1. The complainant has requested details of the registered keeper of a particular vehicle. The Driver and Vehicle Licensing Agency ("the DVLA") originally refused to confirm or deny that it held the requested information. It later confirmed that it did hold the information but relied on section 41 of the FOIA (actionable breach of confidence) to withhold it.
2. The Commissioner's decision is that the DVLA has correctly applied section 41(1) of the FOIA to withhold the information. However, as the DVLA failed to confirm, within 20 working days, that it held the requested information it breached section 10 of the FOIA.
3. The Commissioner does not require further steps to be taken.

#### **Nomenclature**

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4. The DVLA is not listed as a separate public authority in Schedule 1 of the FOIA because it is an Executive Agency of the Department for Transport. However, as it has its own FOI unit and as both the complainant and the Commissioner have corresponded with "the DVLA" during the course of the request and complaint, the Commissioner will refer to "the DVLA" for the purposes of this notice – although the public authority is, ultimately, the Department for Transport.

## Request and response

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5. On 11 February 2021, the complainant requested information of the following description:

*"Under the Freedom of Information Act 2000, I hereby request details of the registered keeper of vehicle [redacted] in January 2021 (this should be only 1 keeper, but if this is not the case please provide details of all keepers as well as the date when the keepership was changed). Please be advised as this vehicle is registered to a limited company, and personal data only applies to individuals, nothing in the UK GDPR prevents you from disclosing this information.*

*"I also have no grounds under regulation 27 of The Road Vehicles (Registration and Licensing) Regulations 2002 to request this information, hence section 21 of FOIA (Information accessible to applicant by other means) also does not apply."*

6. On 10 March 2021, the DVLA responded. It stated that it was relying on section 40(5B) of the FOIA to neither confirm nor deny holding any information within the scope of the request – however it also stated that any information it held had been provided in confidence and therefore it was entitled to rely on section 41(1) of the FOIA to withhold the information.
7. The complainant requested an internal review on the same day. The DVLA sent the outcome of its internal review on 28 May 2021. It upheld its original position.

## Scope of the case

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8. The complainant contacted the Commissioner on 23 April 2021 to complain about the way his request for information had been handled. He noted that there was considerable information about this vehicle (such as its tax and MOT status) already in the public domain and it was therefore irrational for the DVLA to neither confirm nor deny holding information within the scope of the request.
9. The Commissioner commenced his investigation on 1 October 2021 with a letter to the DVLA. He noted that it appeared unlikely that a neither confirm nor deny position would be sustainable and asked the DVLA to reconsider its position. The DVLA subsequently clarified to the Commissioner that it held the requested information but wished to rely on section 41(1) of the FOIA to withhold it.

10. The Commissioner considers that the scope of his investigation is to determine whether the DVLA was entitled to rely on section 41(1) of the FOIA to withhold the information.

## Reasons for decision

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### Section 41 – actionable breach of confidence

11. Section 41(1) of the FOIA states that:

*Information is exempt information if—*

- (a) *it was obtained by the public authority from any other person (including another public authority), and*
- (b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

12. The Commissioner's guidance states that, in order for this particular exemption to apply, four criteria must be met:

- the authority must have obtained the information from another person,
- its disclosure must constitute a breach of confidence,
- a legal person must be able to bring an action for the breach of confidence to court,
- that court action must be likely to succeed.

13. In respect of the first criteria, the DVLA will have obtained the information from a third party – the Registered Keeper of the vehicle. Even if that registered keeper is, as the complainant claims, a limited company, that would still mean that there would be a legal person entitled to bring a claim for breach of confidence – therefore the third criteria is satisfied.

14. Turning next to the second criteria, in determining whether a breach of confidence would occur, the Commissioner applies the three step test set out in 1968 by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:

- the information must have the necessary quality of confidence,

- it must have been imparted in circumstances importing an obligation of confidence, and
  - there must have been an unauthorised use of the information to the detriment of the confider.
15. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. The Commissioner does not consider that the information in question is trivial in nature as it relates to the ownership of a motor vehicle.
  16. As to whether the information was already in the public domain, given his interest in this particular vehicle, the Commissioner asked the complainant whether he was aware of the appearance of this vehicle and, in particular, whether it had any company livery on it (which might identify the vehicle as being operated by the company that owned it). The complainant refused to provide any further information about the vehicle (although he was under no obligation to provide it).
  17. In the absence of any contrary evidence (and it is unlikely that the DVLA would be aware of any livery), the Commissioner must assume that the vehicle in question has no markings which would enable the casual observer to link it with any individual or company that owned it. He must therefore assume that the information is not in the public domain.
  18. Next, the Commissioner turns to the question of whether the information was imparted in circumstances where there would be an obligation of confidence. This could be because a formal agreement was in place or because the situation was one where a duty of confidence was expected (such as between a doctor and patient).
  19. The complainant argued that the Registered Keeper would not have had an expectation of confidence when providing the information. He noted that registered keepers have a legal duty to register their vehicles with the DVLA under the Road Vehicles (Registration and Licensing) Regulations 2002 and that those regulations allow the Secretary of State for Transport (or the DVLA acting on the Secretary of State's behalf) to disclose such details to anyone who can show "reasonable cause" for wanting them.
  20. As the "reasonable cause" that must be shown is entirely at the Secretary of State's discretion, the complainant argued that:

*"DVLA therefore has an extremely wide and virtually unfettered discretion to disclose the information, and such a wide discretion is simply incompatible with the information being held in confidence.*

*"If DVLA decides to release information under regulation 27 because it judges that someone has shown reasonable cause, that cannot be a breach of confidence as it is a disclosure explicitly permitted by law. No person supplying information to DVLA could take it that this is information provided in confidence, given that the Secretary of State has an almost absolute discretion to disclose that information to anyone who asks for it."*

21. In contrast the DVLA noted that:

*"There is an explicit obligation of confidence between the confider and the DVLA. Specifically, on page 1 of the V5C (attached at Annex A), the DVLA states the following:*

*"DVLA handles your personal data in accordance with road vehicle law and data protection laws. The law allows us to release your data to the police and other enforcement bodies. We also provide data to other parties where the law allows it. For further information about how we process your data, your rights and who to contact, see our privacy notice at [gov.uk/dvla/privacy-policy](http://gov.uk/dvla/privacy-policy)"*

*"In addition, there is also an implied duty of confidence; namely that DVLA will not make public the information that has been provided to it."*

22. Having considered the submissions of both parties the Commissioner is satisfied that the information has been imparted in circumstances where a duty of confidence is implied.

23. The Commissioner accepts that the discretion of the Secretary of State to determine "reasonable cause" is wide, but "wide" is not the same as "unlimited."

24. In *Coco*, Judge Megarry went on to discuss what circumstances might constitute an implicit duty of confidence, noting that:

*"if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised, that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence."*

25. The Commissioner does not consider that a reasonable person, standing in the shoes of the DVLA, would take the view that information provided by the registered keepers of vehicles was free to be published.

26. A registered keeper should reasonably expect that the information they provide to the DVLA will be passed to the police if their vehicle is

involved in an accident or crime. They should also reasonably expect that their details may be passed to insurance companies or parking enforcement companies in certain circumstances – and this is reinforced by the wording of the V5C form. However, a registered keeper should not reasonably expect that their details will be placed into the public domain indefinitely – or that they will be provided to a person who has not shown reasonable cause for wanting the information.

27. The Commissioner therefore considers that the second condition of Judge Megarry's test is met.
28. Next, the Commissioner must consider the issue of detriment. As the owner of this vehicle is a company, it does not have automatic privacy rights which would be infringed by disclosure. Therefore in order to bring an action for a breach of confidence, it would need to show some other form of detriment.
29. The DVLA explained that establishing detriment was problematic as it did not know the use to which any particular vehicle might be put by the company that owned it. The DVLA had no need to acquire such information and, although the company name might provide a clue in some cases, this would not always be the case.
30. However, the DVLA outlined one hypothetical scenario in which information of the type being withheld here could potentially be used to the detriment of a company.
31. The DVLA explained that it publishes data showing whether particular vehicles are appropriately taxed or not. That data is not published in "real time" and there can be a delay of several days before the published information is updated to reflect the true status of a vehicle. If the registered keeper submits their paperwork at the last minute, that could result in the vehicle showing on the website, for a short time, as being untaxed when in fact this is not the case. The DVLA explained that companies that owned fleets of vehicles often did submit the paperwork close to the deadline – increasing the chance of this happening.
32. If a person had, purely by chance, identified a vehicle whose tax had been paid, but whose details had yet to be updated – and was then provided with details of the company that owned that vehicle, that person would be able to rely on the public data to (erroneously) claim that the company was operating untaxed vehicles. The company would struggle to win a libel action in such circumstances and might suffer reputational damage.
33. In addition, the DVLA explained that:

*"there are circumstances where a vehicle may be shown as untaxed such as when it is in the motor trade. Traders routinely allow their vehicles to be driven on the public road, e.g., for test drives while the vehicle tax they pay covers the use of trade licences which are not attributed to any specific vehicle. This provides flexibility for the dealership while ensuring that there is no loss of tax revenue to the exchequer.*

*"In some cases, dealerships are not as diligent as they should be in displaying trade plates and even though the vehicle is in trade, it would have the appearance of a vehicle in normal, everyday use. In such cases, while the tax is paid, a check on the vehicle enquiry service would show the vehicle as untaxed. Therefore, information from the vehicle enquiry service, taken as a 'snapshot' at a point in time, may have shown that the vehicle was not taxed. As explained, this information may not have been correct, due to the time delay. Therefore if we were to release the name of the company, it could then be publicly associated with an alleged failure to tax its vehicles."*

34. Whilst the Commissioner accepts that such a scenario is unlikely to be common, it does remain a possibility – especially where an individual had a grudge against a particular company or a driver of a particular vehicle. That individual might be motivated to use the name of the registered keeper, in combination with the publicly available information to make mischief for the company owning a particular vehicle.
35. In addition, the Commissioner notes that, where an individual believes (rightly or wrongly) that they have been wronged by the driver of a vehicle, but have been unsuccessful in pursuing that driver, they may, if provided with the name of the company that owns the vehicle, choose to pursue the company instead – even though the company may have had no control over the actions of the driver.
36. The Commissioner is not suggesting that the complainant is such an individual. However, disclosure under the FOIA is disclosure to the world at large. Once the DVLA discloses the information, it has no power to prevent its further dissemination. The information will be available to all – including those who might wish to use it for malign purposes.
37. The Commissioner is therefore satisfied that the necessary conditions exist for a breach of confidence to be made out.
38. The final criteria for section 41 to apply is that a breach of confidence must be an actionable breach. As Lord Falconer (the promoter of the FOIA as it was passing through Parliament) said during the debate on the FOIA

*"...the word "actionable" does not mean arguable...It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure'. That is not the position. The word used in the Bill is 'actionable' which means that one can take action and win."*

39. The Commissioner therefore considers that it is not sufficient to merely claim that a breach of confidence might be brought. Any action must be likely to succeed.
40. To determine whether an action would be likely to succeed, the Commissioner must assess whether the public authority might be able to put forward a public interest defence.
41. This is not the same as the sort of public interest test that would be applied to a qualified exemption. There must be clear and compelling public interest reasons that would override the duty of confidence.
42. The complainant has not put forward any compelling public interest argument to explain why, confidentiality notwithstanding, the information should be disclosed. The Commissioner notes that the complainant, in his request, admitted that he did not have "reasonable cause" to want the information.
43. Whilst there would be a public interest in ensuring that all vehicles are appropriately taxed, the Commissioner does not consider that disclosure of the name of the registered keeper to the world at large is a proportionate response. The DVLA is already able to identify untaxed vehicles and any individual with particular concerns would be able to flag this directly with the DVLA. The Commissioner does not therefore see any pressing need for disclosure that would override the duty of confidence.
44. As the DVLA does not appear to have a viable public interest defence in the event of an action for breach of confidence, it follows that such an action would be likely to succeed. The Commissioner is therefore satisfied that the DVLA is entitled to rely on section 41 to withhold the information in question.

### **Procedural matters**

45. Section 1(1) of the FOIA places two duties upon a public authority in receipt of an information request. Section 1(1)(a) requires the public authority to confirm whether or not it holds any information within the scope of that request. Section 1(1)(b) requires the public authority to communicate any non-exempt information to the requestor.



46. Section 10 of the FOIA requires a public authority to discharge both its duties under section 1(1) within 20 working days.
47. Even where a public authority wishes to withhold information (ie. it has a valid reason for not discharging its section 1(1)(b) duty) it is still required by section 1(1)(a) to confirm whether or not it holds any relevant information – unless it can demonstrate that it is entitled to neither confirm nor deny holding information.
48. The DVLA's initial refusal notice explicitly stated that it was neither confirming nor denying that it held the information – but also applied an exemption to withhold information.
49. Given that section 40(5B) of the FOIA could not have applied to the request in question, the Commissioner considers that the DVLA was obliged to confirm that it held information – even if it wished to withhold that information. As the DVLA failed to confirm that it held information within 20 working days, it breached section 10 of the FOIA.

## Right of appeal

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50. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**