

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2017

Public Authority: Driver & Vehicle Licensing Agency
Address: Longview Road
Morrison
Swansea, SA6 7JL

Decision (including any steps ordered)

1. The complainant has requested information on the supply of keeper data where byelaws apply. The Driver & Vehicle Licensing Agency (DVLA) identified information within the scope of the request but withheld this on the basis that information was legally professionally privileged and therefore exempt under section 42 of the FOIA.
2. The Commissioner's decision, after considering the public interest test, is that the DVLA has correctly applied this exemption and the public interest favours withholding the requested information.

Request and response

3. On 27 August 2016 the complainant made the following FOIA request:

'1. Information that purports to entitle the DVLA since July 2005 to provide keeper data to private parking companies operating on railway land where the enforcement regime is otherwise than in furtherance of section 24 of the 2005 Byelaws.

2. Information that purports to entitle the DVLA to deem the car parking enforcement provisions of the 2005 Railway Byelaws can be lawfully disregarded or supplanted by any alternative procedure.

3. Information that purports to enable the DVLA to deem keeper data requests to be founded on a reasonable cause where the purpose of the request is in conflict with the provisions of these Byelaws OR IS IN

CONFLICT WITH ANY OTHER BYELAWS that regulate land which is not relevant land for the purposes of POFA.

4. Information which indicates that the DVLA can fly in the face of its Minister's express requirements and his prohibition of keeper data release.

5. With regard to the FOIR5322 Annex.pdf, please provide a copy of the first page without the perverse redactions that itemise the five "main points", none of which can be subject to privilege and is, in any event, of overwhelming public interest.'

4. On 26 September 2016 the DVLA responded that it did not hold any information in scope of requests 1-4 and withheld information held in scope of request 5 citing section 42, legal professional privilege. DVLA also provided some explanation outside of FOIA.
5. On 30 September 2016 the complainant requested an internal review on request 5: 'to provide the requested un-redacted document. I find the redactions unnecessary and perverse and that they will not constitute statements of legal advice for which you assert exemption.'
6. After the intervention of the Information Commissioner, the DVLA provided the outcome of its internal review on 31 January 2017. It upheld the decision to withhold the legal advice under section 42.

Scope of the case

7. The complainant wrote to the Commissioner on 7 March 2017 to complain about the decision of the DVLA to withhold information within the scope of her request 5. In particular she did '*not believe that is correct because the redacted content comprises the "five main points" that are discussed in the remainder of the document. It now stands for you to have sight of this document and determine what if any of these five main points justifiably remains redactable. Without sight of the document myself I cannot decide whether or not exemption is justified and, if it is, the extent to which it is justifiable.*'
8. The Commissioner has viewed the Annex provided in response to the previous FOI request (FOIR5322) mentioned in request 5. The Annex is not a single cohesive document but a sequence of emails in November 2015 raising the issue of Railway Byelaws and parking and making arrangements for a telephone conference call. The 'first page' is an email dated 8 December 2015 summarising the main points of the telephone conference call.

9. The redactions on this first page are the withheld information in request 5 to which the DVLA has cited section 42.
10. The Commissioner considers the scope of her investigation to be the decision by the DVLA to withhold the information in request 5 under section 42 of the FOIA.

Reasons for decision

11. Section 42(1) of the FOIA states 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.”

12. The Commissioner has first assessed whether the withheld information is subject to legal professional privilege. Legal professional privilege was defined by the Information Tribunal¹ as *“ a set of rules or principles which are designed to protect the confidentiality 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.”*
13. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
14. In its submissions to the Commissioner, DVLA stated that
 - While the email subject to the redactions is a hard copy record of a telephone conference, DVLA maintains that the redacted information is subject to legal advice privilege. DVLA is an executive agency of the Department for Transport (DfT).

¹ *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)*

- The information contains advice that was provided by a Departmental lawyer present during the call. It is mentioned that he provided “legal input” and that is considered to attract legal advice privilege. The email was copied to DVLA’s Legal Advisor who was not present during the call.
 - The email has not been shared outside of the DfT and therefore DVLA maintains that the privilege attached to the document has not been lost.
15. The Commissioner has reviewed the withheld information and is satisfied that it is subject to legal advice privilege. This is because the withheld information consists of legal opinions and advice provided to DVLA by a professional legal adviser on the issue of railway byelaws and parking.
16. As such the Commissioner finds that the requested information is subject to legal advice privilege and also notes that DVLA considers this issue to still be ‘live’ and would use this advice to guide its thinking in future issues around this subject. The Commissioner consequently finds that the legal professional privilege exemption is engaged.
17. This exemption is a qualified exemption. This means that where the exemption is engaged a public interest test must be carried out to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

18. DVLA advised the complainant and the Commissioner that the public interest arguments in favour of the information being disclosed revolve around creating greater transparency in the workings of DVLA:
- That there is accountability for the advice provided to Government Departments.
 - That there is proper scrutiny of government actions.
 - To demonstrate that DVLA seeks specialist advice to ensure that registered keeper information is released only when lawful.
19. The complainant has stated that there are
- irregularities and inconsistencies related to DVLA's provisions of vehicle keepers' personal data in relation to railway premises subject to byelaws

- ...the public interest in ending current irregularities in this matter, which requires maximisation of relevant information on this subject is equally substantial but is justifiable.

Public interest arguments in favour of maintaining the exemption

20. There is a strong element of public interest inbuilt in this exemption, the central public interest arguments in favour of maintaining the exemption are those inherent in the concept of legal professional privilege. There is clearly a very strong and well recognised public interest in allowing clients to seek full and frank advice from their legal advisers in confidence.
21. A disclosure of that advice would potentially undermine the client's position in any legal dispute which arose, and the possibility of this occurring may in fact prevent the clients being able to seek full and frank advice in the first instance. This would lead to a more guarded approach to seeking advice and the provision of advice itself. This could lessen the effectiveness of the advice process and potentially undermine the client's legal position or ability to make fully informed and robust legal decisions.
22. DVLA advised the complainant and the Commissioner that the legal advice it received relates to an issue which is still relevant and live:
 - Effective legal advice requires absolute candour between client and lawyer. This candour is less likely where there is knowledge that the correspondence is likely to be disclosed.
 - The advice forms part of on-going interpretation of the legislation. Therefore it cannot be considered to have served its purpose.
 - It is strongly in the public interest that an organisation such as DVLA is able to maintain the confidentiality of legal advice. Safeguarding this is a fundamental principle of law. There is a strong inherent and inbuilt public interest in protecting privileged information which must be taken into account when balancing the public interest test

Balance of the public interest arguments

23. The Commissioner accepts that there is a public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. However, as DVLA considers the information to still be relevant and would be relied upon in any future considerations of this issue, the Commissioner considers the privilege attached to the information has not been waived and is still relevant now.

24. The Commissioner's view is that there are stronger public interest arguments in favour of maintaining the exemption. She considers the DVLA's argument that it should be able to obtain free and frank legal advice so that it is fully informed of all relevant legal issues before decisions are made to be a strong argument. Disclosure could lead to DVLA being unable to obtain frank legal advice in the future with confidence that the advice is given without consideration of disclosure. The Commissioner is also mindful of the Tribunal's comments in the *Bellamy* case that *"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest."*
25. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in maintaining the exemption and withholding the information which is subject to legal professional privilege in this case. The Commissioner places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis in this case. She therefore concludes that the DVLA correctly withheld the requested information under the exemption at section 42.

Other matters

26. The code of practice produced under section 45 of the FOIA recognises that there are no statutory time limits on how long an internal review should take to complete. Nevertheless it provides that any deadlines set by the public authority should be reasonable.
27. The Commissioner considers that generally an internal review should take no longer than twenty working to complete. In exceptional circumstances it may be necessary to extend that to forty working days. (<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>)
28. In this case the complainant requested an internal review on 30 September 2016 and DVLA provided the outcome of its internal review on 31 January 2017.
29. The Commissioner does not consider this to be satisfactory and would expect DVLA to deal with reviews within the suggested deadlines in the future.

Right of appeal

30. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

31. 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.
32. 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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