



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50855160**

Appeal Reference: EA/2020/0157

Considered on the papers

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

KATE GRIMLEY-EVANS & NAOMI MATTHEWS

Between

ANDREW MACLEAN

Appellant

and

INFORMATION COMMISSIONER

First Respondent

DECISION

The appeal is allowed. The DVLA/DfT should disclose the information within the scope of this request within 35 days. The information be redacted to remove names and personal e-mail addresses of civil servants below the level of the senior civil service.

REASONS

1. Mr Maclean is concerned at the slow progress in sharing data between DWP and DfT to enable applicants seeking to tax their vehicles who are entitled to a reduced rate of tax (due to receipt of personal independence payment "PIP") to do so through a single simple online process. On 25 March 2019 he wrote to

the DVLA (Driver, Vehicle and Licensing Agency - an executive agency of the Department for Transport responsible for performing some of DfT's administrative functions) seeking information:-

"Following your response to my FOI request of November 2017, can you please tell me what progress has been made with the following reply from you. "The DVLA is working closely with DWP on how data can be shared securely and appropriately between the two departments to help facilitate an online and Post Office service for customers entitled to the reduced rate of vehicle tax."

Please provide copies of any communications that DVLA has had with DWP regarding this matter since November 2017, or failing this, an explanation as to why nothing has been done."

2. DVLA sent a holding reply on 18 April, a further holding reply on 18 May and a substantive reply on 22 July 2019. This stated:-

The DVLA can confirm that it holds information in scope of your request.

However, and as indicated in the extension letters, the DVLA considers some of the information held to be exempt from disclosure because it is information that relates to the formulation of government policy. The DVLA relies on s35(1)(a) of the FOIA. As you will already be aware, the DVLA is required to consider the public interest as to whether or not to disclose information and further details as to why it favours withholding information can be found in the attached Annex.

That said, the DVLA can disclose some information that it holds in scope of your request. However, that information has already been disclosed to you by the Department for Work and Pensions (DWP) when you made an almost identical request to them on 25 March. A copy of your request and their response can be found here:

https://www.whatdotheyknow.com/request/vehicle_tax_50_discount_for_peop_2#incoming-1350028

In their response to you, the DWP disclosed amongst other things three sets of emails between them and the DVLA. The DVLA can confirm that it holds an identical copy of the email thread they provided called '12151 redacted email 2'. Having carried out a search for information, the DVLA can confirm that it no longer holds information contained in the other two email threads disclosed by the DWP.

The DWP also stated in their response to you dated 17 April 2019 that the DVLA had approached them in June 2018 with a proposal for data sharing. The DWP also advised you that they had asked the DVLA to complete a formal commission template in November 2018 to enable work to commence and that they were awaiting the return of the completed template. The DVLA can confirm, outside the provisions of the FOIA, that at the time of your request it was in the process of completing the template and returned a completed template to the DWP on 1 April 2019.

The DVLA is not required to disclose a copy of the completed template in response to this request because it was not held at the time of your request. A public authority is only required to disclose information that it holds in scope of a request at the time the request is made. Should you make a subsequent request for the completed template, then it is likely that it too would be withheld from disclosure under s35(1)(a) of the FOIA.

3. The exemption relied upon provides (so far as is relevant):-

35 Formulation of government policy, etc.

(1) Information held by a government department or by the Welsh Assembly Government 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 for the provision of such advice, or
- (d) the operation of any Ministerial private office.

4. The response set out the reason s35(1) justified not disclosing the information:-

It would not be in the public interest to disclose information that relates to the ongoing formulation and/or development of process. Disclosure at this stage would be likely to inhibit debates, discussion and the exploration of the full range of options available. The DVLA needs the safe space to consider options without undue influence from outside and be able to have open discussions without the threat of those discussions being disclosed.

5. In the internal review of 4 October 2019 the DfT maintained that position.

6. There are substantial matters of concern in this response. Firstly the substantive reply was due within a quarter of the time that the response took. To suggest that it is acceptable for such a period of time to be required to refuse a request for what, from a consideration of the withheld material is a very small amount of information on the basis of a single exemption is a serious failure on the part of the Department for Transport. The second issue of concern is; irrespective of the applicability of the exemption claimed, the DfT has misstated the law to a citizen seeking information from it. S1 FOIA provides (so far as is relevant:-

1 General right of access to information held by public authorities.

(1) 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.*

....

(4) The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or*

(b) which is to be communicated under subsection (1)(b), is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

7. The effect of s1(4) is that since the partially completed form was in existence and therefore "held" at the time the request was made on 25 March, was completed and sent to DWP on 1 April (the holding replies started on 18 April and the substantive refusal was made on 22 July, the completion of the form on 1 April being an amendment or deletion that would have been made regardless of the receipt of the request is also within scope of the request.

8. Mr Maclean complained to the information Commissioner who on 7 April 2020 upheld the position of DfT. She noted an explanation given by DfT:-

DVLA said that, as explained above, those entitled to a 50% reduction in VED cannot apply for this reduction online. The DVLA is working with the DWP to allow this, which will affect a large number of individuals. Therefore, the DVLA considers the information relates to the improvement and adjustment of an existing policy for the benefit of many.

9. In his appeal Mr Maclean challenged the idea that the processes were the early stage of policy formation:-

Para 12 States the Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister.

My application was not made in the early stages of policy discussion, in fact the first request for information to DVLA was in November 2017.

Two years and 4 months would fall well outside of what any reasonable person could expect to call "early stages"

The Commissioner did not give due weight to the time scales involved in this formulation of policy.

Para 16 The Commissioner, once again, refers to the "current policy" being under review. No timescale has been shown for the length of time that this review has taken, the Commissioner should have taken more heed of the length of time involved in this alleged review.

Paras 19-21 The DVLA in its public interest arguments in favour of maintaining the exemption, relies heavily on the "early nature" of discussions and would inhibit the free exchange of ideas. The Commissioner erred in interpreting the length of time this matter has been active as being "early stages"

10. In her response to the appeal the Commissioner argued that:-

The only question to be considered when asking whether section 35(1)(a) was engaged was whether the information related to the formulation or development of government policy (as distinct from, for example, the implementation of that policy). It was obvious from the face of the request that it did. Matters such as the stage that the policy formulation was up to, or the number of people potentially affected by the policy, are matters which are only relevant to the public interest and are addressed under that heading below.

24. Insofar as it is suggested that the formulation of the policy was not an early stage, it can be accepted that the policy review appeared to have been on foot for about 16 months by the time the Appellant made the Request. This fact alone is of little significance. Some policies may take days or weeks to develop, others may take years. There is no one objective standard or rule of thumb. The relevant question for the purposes of assessing the public interest is not how long it should take to develop the policy but rather the stage that the policy development was in fact up to and what effect disclosure might have at that particular stage. The Commissioner was entitled to accept the DVLA's position about this at face value.

Consideration

11. In freedom of information "policy" has an increasingly protean meaning; too often it is a simple pretext for an unconsidered refusal without proper justification. However a consideration of s35(1) demonstrates the focus of the exemption - of the four limbs two relate directly to Ministers- their communications and their private offices, and another relates to the Law Officers of the Crown, all these relate closely to the persons of members of the government. The first exemption within s35(1) is the "*formulation or development of government policy*". The Commissioner in her guidance recognises that there can be a difficulty in interpretation noting that:- "*with the classic policy formulation process of turning a White Paper into actual legislation, the formulation of policy can be ongoing right up to the Bill receiving Royal Assent.*" It has been suggested that "*a review of the practical efficacy of a policy already in place may be characterised as representing information relating to the development of that policy*"
12. However proper analysis of the concept points to the distinction between policy formulation and its implementation. It seems to the tribunal that the meaning of "*policy*" in this case has stretched far beyond its elastic limit, it had deformed beyond recognition and shattered. Defining a decision-making process as "*policy*" does not make it so. The policy in this area is clearly established it is the recognition that individuals in receipt of certain benefits should pay a reduced level of vehicle excise duty. That has been established for years and is not controversial. Another relevant policy is *digital by default*, which has also been established for a long time. The policy owner in this case is DWP which determines that those in receipt of benefits should pay less. The implementation is with an executive agency - bodies which are there to act under the direction of Ministers but separated from departments so that

Ministerial departments, where policy resides, are not overwhelmed with operational and implementation issues. This is not to denigrate the importance of effective implementation; merely to observe that the point of executive departments such as DVLA is to enable competent people to get on with delivering services without the day-to-day involvement (one might say interference) of Ministers. It is the antithesis of policy formulation.

13. The extent that the policy is a long-established and settled policy is further exemplified by the relationships – DVLA is an executive agency of DfT, DWP owns the policy and is simply seeking better implementation.
14. This is an established policy, Civil Servants are serious minded individuals getting on with attempting to deliver public benefits. It does not stand up to scrutiny to suggest that such people, trying to define the operational parameters of the data transfer between two IT systems to continue the provision of a simple, secure and accurate delivery of reduced cost to persons in receipt of PIP would be likely to be influenced by the exposure of their work to public knowledge, however that is the proposition which DVLA and the Commissioner have put before the tribunal.
15. The exemption is not engaged, no safe space is needed.
16. The appeal is allowed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 9 June 2021

Promulgated: 10 June 2021