

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 4 May 2010

**Public Authority:** Vehicle & Operator Services Agency  
**Address:** Corporate Office  
2<sup>nd</sup> Floor  
Berkeley  
Croydon Street  
Bristol  
BS5 0DA

### Summary

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The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Vehicle & Operator Services Agency ("VOSA") for details of any monitoring/visits over the past 12 months and any action taken in that time against a particular garage. VOSA refused to confirm or deny if the requested information was held under section 31(3) and section 43(3) of the Act. During the Commissioner's investigation, VOSA explained that it was prepared to confirm that the requested information was held. However VOSA stated that it was exempt from disclosure under section 31(1)(g) with subsections 2(a), (c) and (d) and section 43(2) of the Act. The Commissioner considers that section 40(2) is applicable in this case and that this exemption would prevent disclosure of the requested information. The Commissioner has not therefore gone on to consider the application of section 31(1)(g) with subsections 2(a), (c) and (d) or section 43(2) any further.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of

Information Act 2000 (the "Act"). This Notice sets out his decision.

## **The Request**

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2. The complainant made a request to VOSA on 17 November 2009 for details of any monitoring/visits over the past 12 months and any action taken in that time against a particular garage.
3. On 2 December 2009 VOSA responded to the request for information. It neither confirmed nor denied whether it held the information requested under sections 31(3) and 43(3). It explained why it could neither confirm nor deny whether it held the information requested with reference to the Act and set out the factors it had taken into account when carrying out the public interest test.
4. As the complainant was dissatisfied with the response he received, he asked VOSA to conduct an internal review of its decision.
5. On 5 January 2010 VOSA wrote to the complainant with the result of the internal review it had carried out. VOSA upheld its original decision.

## **The Investigation**

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### **Scope of the case**

6. On 6 January 2010 the complainant made a formal complaint to the Information Commissioner's Office as he was dissatisfied with the result of the internal review. As set out below, during the course of the Commissioner's investigation VOSA stated that it was prepared to confirm that the requested information is held, however it stated that the information was exempt from disclosure under section 31(1)(g) with subsections 2(a), (c) and (d) and section 43(2). The Commissioner will not therefore investigate whether VOSA should have confirmed or denied whether the information was held as it has now confirmed to the Commissioner that it is held and has no objection to the

complainant being informed. However upon viewing the withheld information and following further discussions with VOSA the Commissioner considers that section 40(2) is applicable in this case for the reasons outlined in the analysis below. The Commissioner has therefore considered whether section 40(2) would prevent disclosure of the withheld information in this case and has not considered VOSA's application of section 31(1)(g) with subsections 2(a), (c) and (d) or section 43(2) any further.

## **Chronology**

7. The Commissioner contacted VOSA on 21 January 2010 in order to discuss its handling of the complainant's request and to establish whether or not section 31(3) and section 43(3) had been correctly applied in this case.
8. VOSA responded to the Commissioner on 17 February 2010. VOSA explained that upon reconsidering the case it was now prepared to confirm to the complainant that the requested information was held, however it stated that the information was exempt from disclosure under section 31(1)(g) with subsections 2(a), (c) and (d) and section 43(2). It provided its submissions in support of the application of these exemptions and provided the Commissioner with a copy of the withheld information.
9. On 14 April 2010 the Commissioner contacted VOSA to clarify some further issues. On the same date VOSA confirmed to the Commissioner that the owner of the garage, which is the subject of this request, is a sole trader.

## **Analysis**

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### **Exemption**

#### **Section 40(2)**

10. Although VOSA has not relied upon this exemption to withhold the requested information, the Commissioner believes that it is appropriate in this case to consider whether section 40(2) is applicable.

11. The Commissioner recognises that he is under no positive duty to consider exemptions not cited by a public authority. However the Information Tribunal commented in *Bowbrick v Nottingham City Council EA2005/0006* that he is entitled to do so in appropriate cases. The Commissioner considers that as he also regulates application of the Data Protection Act 1998, it is appropriate in this case to consider whether section 40(2) is applicable.

12. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*"Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied."*

13. Section 40(3)(a)(i) of the Act states that:

*"The first condition is-*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),"*

14. The full text of section 40 can be found in the legal annex attached to this decision notice.

15. The Commissioner has first considered whether the requested information would constitute the personal data of a third party.

Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:

- a. from that data, or
  - b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
16. In this instance the requested information is details of any monitoring or visits over the past 12 months and any action taken in that time by VOSA against a particular garage. The particular garage which is the subject of this request is run by an individual as a sole trader. The Commissioner takes the view that information about the business activities of a sole trader constitutes personal data because those activities and the individual are inextricably linked and then may impact upon the individual's private life. The Commissioner considers that the request, which was for information about any monitoring or visits over the past 12 months and any action taken in that time by VOSA against a particular garage, inevitably relates to particular aspects of the business activities conducted by the garage. The Commissioner therefore considers that the requested information does constitute the personal data of the sole trader who runs the garage which is the subject of this request. The sole trader is therefore the data subject in this case.
17. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.
18. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following: -

### **Likely Expectation of the Data Subject**

19. The Commissioner does not consider that the data subject would have expected that the requested information would be disclosed into the public domain. This is because any information relating

to the regulatory monitoring of the data subject's business may impact upon the viability of that business if disclosed into the public domain.

20. Furthermore the Commissioner is aware that VOSA reserves the right to rely upon previous monitoring exercises for a five year period and this is notified to garages which have been the subject of monitoring. Therefore the information requested could have been relied upon by VOSA when conducting future monitoring exercises. The Commissioner does not therefore consider that the data subject in this case would have expected the requested information to be disclosed as it could have impacted upon the outcome of any future monitoring exercises conducted by VOSA.

### **The effect of disclosure on the Data Subject**

21. The Commissioner considers that disclosure of the requested information could cause damage or distress to the data subject.
22. The Commissioner's Awareness Guidance 1 covering Section 40 Personal Information, states that public authorities should take into account the potential harm or distress that may be caused by the disclosure. The Guidance states that, "For example, there may be particular distress caused by the release of private information about family life. Some disclosures could also risk the fraudulent use of the disclosed information (e.g. addresses, work locations or travel plans where there is a risk of harassment or other credible threat to the individual), which is unlikely to be warranted. However, the focus should be on harm or distress in a personal capacity. A risk of embarrassment or public criticism over administrative decisions, or the interests of the public authority itself rather than the individual concerned, should not be taken into account."
23. The above Guidance can be accessed at the following:  
  
[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/personal\\_information.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf)
24. The Commissioner considers that although the requested information relates to the business activities of the data subject as a sole trader, the disclosure of this type of information could impact on the data subject in a personal capacity. Furthermore

depending on the actual information held, disclosure could cause damage to the data subject. This is because disclosure could indicate concerns with the business and thereby have a negative impact on the sole trader's reputation which in turn could result in a reduction in trade. Therefore disclosure could affect his business and livelihood.

### **Legitimate Interests**

25. The Commissioner recognises that there is a general interest in accountability and transparency. He therefore accepts that disclosure of the requested information could go some way to meet the legitimate interests of the public in understanding how VOSA carries out its regulatory functions and when and where regulatory action is deemed necessary.
26. The Commissioner considers that the legitimate interests in disclosure in this case are outweighed by the likely expectations of the data subject and the likely effect of disclosure on the data subject. The Commissioner therefore considers that disclosure of the withheld information would be unfair and that the section 40(2) exemption is applicable in this case. Since the Commissioner considers disclosure of this information would be unfair he has not gone to consider whether a schedule 2 condition can be met.
27. As the Commissioner considers that section 40(2) is applicable in this case he has not gone on to consider VOSA's application of section 31(1)(g) with subsection 2(a), (c) and (d) or section 43(2) any further.

### **The Decision**

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28. The Commissioner's decision is that section 40(2) is applicable in this case.

### **Steps Required**

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29. The Commissioner requires no steps to be taken.

## Right of Appeal

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30. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 4<sup>th</sup> day of May 2010**

**Signed .....**

**David Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

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### Law enforcement.

**Section 31(1)** provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

**Section 31(2)** provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,

- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

**Section 31(3)** provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)."

### **Personal information.**

**Section 40(1)** provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

**Section 40(2)** provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and

- (b) either the first or the second condition below is satisfied."

**Section 40(3)** provides that –  
"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

**Section 40(4)** provides that –  
"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

**Section 40(5)** provides that –  
"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) he giving to a member of the public of the confirmation or denial that would have to be

- given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 40(6)** provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

**Section 40(7)** provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

### **Commercial interests.**

**Section 43(1)** provides that –

"Information is exempt information if it constitutes a trade secret."

**Section 43(2)** provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

**Section 43(3)** provides that –  
“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”