

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 June 2021

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

Address: The Axis Building
112 Upper Parliament Street
Nottingham
NG1 6LP

Decision (including any steps ordered)

1. The complainant requested the text of the top ten most and least correctly answered questions on both the car and motorcycle theory tests for a three year period. The Driver and Vehicle Standards Agency ("the DVSA") withheld the information, relying on section 36(2)(c) of the FOIA (otherwise prejudice the conduct of public affairs) to do so.
2. The Commissioner's decision is that section 36(2)(c) of the FOIA is engaged in respect of this information and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require any further steps.

Nomenclature and Background

4. The DVSA 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 DVSA" during the course of the request and complaint, the Commissioner will refer to "the DVSA" for the purposes of this notice – although the public authority is, ultimately, the Department for Transport.

Request and response

5. On 25 July 2019, the complainant wrote to the DVSA and requested information in the following terms:

"Please provide the following information relating to DVSA's Theory Test for cars and motorcycles:

[1] The ten best performing questions, including the total number of times each of those questions were presented, the number of times each answer was given and the percentage pass rate for each of the last three years.

[2] The ten worst performing questions, including the total number of times each of those questions were presented, the number of times each answer was given and the percentage pass rate for each of the last three years."

6. On 19 August 2019, the DVSA responded. It withheld the requested information and relied on section 36 of the FOIA (effective conduct of public affairs) to do so.
7. The complainant requested an internal review on 17 January 2020. The DVSA sent the outcome of its internal review on 28 February 2020. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 18 August 2020 to complain about the way his request for information had been handled.
9. The DVSA provided its formal submission on 9 April 2021 and maintained its stance that section 36 would apply. However, after some discussion with the Commissioner, the DVSA agreed that it could disclose a "pseudonymised" version of the statistics – with the actual wording of each question replaced by the category of questions from which it was drawn. The Commissioner asked the complainant whether he would be prepared to accept this version of the data – whilst noting that she was minded to agree that section 36 would apply to the original information sought.
10. The complainant did not accept the Commissioner's offer and exercised his right to seek a decision notice. However, the DVSA disclosed the pseudonymised statistics anyway.

11. Having considered the Qualified Person's opinion that the DVSA originally supplied ("the First Opinion"), the Commissioner noted that it had been provided more than a month before the request had been submitted and bore only partial relevance to the actual information being withheld because it covered a wide variety of information that the DVSA wished to withhold in the event that it received future requests. This is discussed further in "Other Matters."
12. The Commissioner considered whether to issue a decision notice finding that the exemption was not engaged, but decided against doing so. Where the First Opinion did relate to the actual withheld information, the arguments made were relevant and these were further developed in the submission itself. Had the Commissioner found that the exemption was not engaged, the DVSA would have been entitled to appeal and obtain a fresh opinion from the Qualified Person on which to base its appeal. She therefore decided that it would be proportionate in the circumstances to give the DVSA an opportunity to obtain a fresh opinion ("the Second Opinion") upon which her investigation would be based.
13. The Commissioner considers that the scope of her investigation is to determine whether the DVSA was entitled to rely on section 36(2)(c) of the FOIA to withhold the requested information.

Reasons for decision

Section 36 – Prejudice to the Effective Conduct of Public Affairs

14. Section 36(2) of the FOIA states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (a) *would, or would be likely to, prejudice—*
 - (i) *the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
 - (ii) *the work of the Executive Committee of the Northern Ireland Assembly, or*
 - (iii) *the work of the Cabinet of the Welsh Assembly Government.*
 - (b) *would, or would be likely to, inhibit—*
 - (i) *the free and frank provision of advice, or*

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

15. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure herself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.
16. All references to the Qualified Person's Opinion for the remainder of this notice refer to the Second Opinion – unless otherwise specified.

Who was the Qualified Person – and have they given an opinion?

17. The DVSA furnished the Commissioner with a submission that had been provided to Baroness Vere of Norbiton, Parliamentary Under Secretary of State for Transport, setting out why section 36(2)(c) of the FOIA was engaged, along with an email from her private office confirming that she agreed with the content of that submission.
18. The Commissioner is satisfied that Baroness Vere is entitled to act as the DVSA's qualified person and that, in approving the submission that had been placed before her, she provided an Opinion on 15 June 2021.

Is the Qualified Person's opinion reasonable?

19. Section 36 places the Qualified Person's opinion at the centre of exemption. The Commissioner's approach – supported by case law – is that the threshold to establish that an opinion is reasonable should be a low one. It is not for the Commissioner to substitute her own opinion for that of the Qualified Person. For an opinion to be reasonable, it need not be the most reasonable opinion available. It need only be within the range of opinions a reasonable person might hold.
20. The Commissioner considers that an opinion is likely to be unreasonable if it fails to explain why the exemption applies to the particular withheld information; if the explanations do not relate to the limb(s) of the exemption that have been cited or if it seeks to claim that prejudice may be caused by disclosure of information that is already in the public domain.

21. Specifically in relation to section 36(2)(c), the Commissioner considers that an opinion will only be reasonable if it identifies some form of prejudice that would not be covered by any other limb of the exemption. This approach was upheld by the First Tier Tribunal in *Evans v Information Commissioner* EA/2006/0064:

"if the same arguments are to be advanced [as for the other parts of the exemption], then the prejudice feared is not 'otherwise'. Some prejudice other than that to the free and frank expression of advice (or views, as far as section 36(2) (b) (ii) is concerned) has to be shown for section 36(2) (c) to be engaged." [emphasis added]

22. The submission approved by the Qualified Person set out a number of arguments demonstrating why prejudice might arise from disclosure:

- *"the impact of disclosure would be that the theory test questions would not be a reliable indication of road safety competency if details of these and the correct answer were made publicly available. Candidates would learn the questions and answers by rote rather than learning and understanding all the underlying aspects of each topic area required to become a safe and responsible driver.*
- *"disclosure would have an adverse effect on the wider general public as it would compromise the integrity of the theory test. This could lead to unprepared drivers and riders taking to the road without the relevant knowledge to be a safe and responsible driver/rider. We would therefore struggle to meet the government's objective of improving road safety and reducing those killed and seriously injured on Great Britain's roads*
- *"we take sufficient steps to ensure candidates are aware of the format of the theory test questions as we publish practice questions. All the information on which the test is based on is in the public domain.*
- *"disclosure of the top 10 worst questions and the number of times they were asked could lead to candidates purely focussing on these questions alone and not the broader topic area they fit in and the wider theory test material. This could affect knowledge and application of safe driving and riding.*
- *"disclosure of the top 10 best performing questions and the number of times they were asked could lead to challenge from candidates who know or believe that they were not asked these questions at the test and therefore felt hard done by. This could damage*

confidence in the theory test.

- *"On each candidate's theory test result sheet, they are advised the topic areas in which they got questions wrong and therefore can focus their efforts on particular areas of the theory test to improve their overall driving or riding knowledge and ultimately application of those when riding or driving."*
- *"Previously DVSA released the entire question bank to the public. This was withdrawn following on from research that candidates were learning the questions and answers rather than the rules of the road."*

23. The Qualified Person did not specify whether she considered that disclosure "would" cause prejudice or only "would be likely to" cause prejudice. The Commissioner has therefore assumed that the DVSA wishes to apply the lower bar of "would be likely to".
24. Whilst the Commissioner considers that some of the arguments made appear speculative, the Qualified Person's central argument – that there is a reasonable possibility that the integrity of the theory test would be undermined if candidates simply focused on learning the answer to every active question, rather than developing a through knowledge of the highway code – is an opinion that a reasonable person might hold.
25. The Commissioner is therefore satisfied that section 36(2)(c) of the FOIA is engaged in respect of this request.

The public interest test

26. Even where section 36 is engaged, the information still cannot be withheld unless the balance of the public interest favours disclosure.
27. Because the Commissioner has found that the lower bar of "would be likely to" cause prejudice is engaged, this carries less weight in the public interest test than if prejudice "would" be caused by disclosure (ie. the chance of prejudice occurring is more probable than not). Nevertheless, there will always be some inherent public interest in preventing any identified prejudice from occurring.
28. The Commissioner considers that there will always be a broad public interest in public authorities being transparent about the way that they are operating and spending public funds.
29. More particularly in this case, the complainant has speculated that some of the questions are ones which are "unanswerable" and that, in contracting the questions out to a private company, the DVSA is attempting to suppress the number of successful theory test passes.

30. The Commissioner also recognises that there might be a public interest in disclosure if the information demonstrated that one particular area of knowledge was responsible for most of the incorrect answers – as this might demonstrate that the published training materials failed to prepare candidates adequately.
31. However, the Commissioner also notes that there is a strong public interest in ensuring that only those individuals with an acceptable knowledge of the Highway Code are permitted to drive. Protecting the integrity of the theory test is a key component in ensuring that drivers have that acceptable level of knowledge. The Qualified Person has stated that having the actual questions in the public domain would lead to some drivers learning to answer the questions by rote, rather than developing knowledge of the Code – the Commissioner considers that that is a reasonable opinion and therefore there is a strong public interest in preventing it from occurring.
32. Having had regard to the pseudonymised information the DVSA has disclosed, the Commissioner is not persuaded that there is a strong public interest in disclosure of the actual question texts themselves. Whilst there is, as one might expect, a significant difference between the top and bottom most correctly-answered questions, the discrepancy does not suggest a question with no possible correct answer. In addition, there is no obvious pattern to the questions appearing in either list which would give the Commissioner cause to be concerned about the quality of preparation materials available.
33. The Commissioner therefore considers that disclosure of the exact questions themselves would add little to the quality of public debate whilst simultaneously undermining the overall integrity of the test. She is therefore satisfied that the balance of the public interest in this case favours maintaining the exemption.

Other matters

Obtaining the opinion of the Qualified Person

34. The DVSA explained to the Commissioner that it seeks an “annual certificate” from one of the Department for Transport ministers stating that the DVSA is entitled to rely on section 36(2)(c) of the FOIA to withhold certain categories of information. These include the text of questions on the theory tests as well as route maps taken for the practical tests, clips used on hazard perception tests or scoring algorithms used.

35. The reason for doing so is, it would appear to avoid the DVSA having to ask ministers repeatedly to authorise section 36(2)(c) for the same information.
36. The Commissioner accepts that ministers are busy people, however the DVSA has also indicated that the number of requests that fall within these categories is not excessive. The Commissioner would also note that the requirement for ministers to act as a Qualified Person for the purposes of the FOIA, where appropriate, is a statutory requirement.
37. The Commissioner accepts that the DVSA has strong arguments to demonstrate that the integrity of its tests could be undermined by disclosure of this information. She also accepts that many of the same arguments will be relevant, regardless of the timing of the request. However, she is much less likely to consider as reasonable an opinion which is wholly generic and poorly-related to the content of the information that is actually being withheld. In addition, she is much less likely to accept an opinion as being reasonable when the opinion significantly pre-dates the request and fails to take account of the factors in place at the time the request is responded to.
38. The Commissioner's guidance on this exemption states that:

*"We recognise that public authorities will tend to develop a general approach to, or policy on, releasing certain types of information, but this must not limit the qualified person's discretion. An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request. The qualified person should consider the facts in each case, weigh the relevant factors and ignore irrelevant factors in order to reach their opinion."*¹
39. The First Opinion, because it had been obtained in advance, failed to take account of the fact that the requestor had only asked for a small subset of the test questions – affecting the severity and likelihood of prejudice.
40. During the course of this investigation, the DVSA indicated that it recognised the Commissioner's concerns and would be reviewing its procedures for applying section 36. The Commissioner accepts that this is a proportionate way forward.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

Right of appeal

41. 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@justice.gov.uk

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

42. 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.
43. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF