



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Information Commissioner Decision FS50527543**

Appeal Reference: EA/2014/0123

**Heard at Belfast
On 18 February 2019
Promulgation date 8th March 2019**

Before

JUDGE HUGHES

TRIBUNAL MEMBERS

HENRY FTZHUGH & ANDREW WHETNALL

Between

JOHN CIESLIK

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

THE DRIVER AND VEHICLE STANDARDS AGENCY

Second Respondent

THE DEPARTMENT FOR TRANSPORT

Third Respondent

PORSCHE CARS GREAT BRITAIN LIMITED

DECISION AND REASONS

1. The Appellant is the owner of a Porsche car and is concerned at an aspect of the performance of the car which he bought in 2011. He had correspondence with Porsche Cars Great Britain Limited (the Fourth Respondent - Porsche) and raised his concerns with VOSA (now called the Driver and Vehicle Standards Agency (DVSA – the Second Respondent)) which is an executive agency of the Department for Transport (the Third Respondent). He became aware that DVSA had carried out an investigation and on 6 November 2013 he made an information request to the agency: -

“... I am fully aware that VOSA tested a Porsche Cayman not in response to my concerns but in response to a safety issue raised by [name redacted], and because of the involvement of ministers and VCA.

Please supply all the information you have regarding the VOSA test of the Porsche Cayman throttle malfunction with particular reference to:

- *The vehicle transmission*
- *The vehicle exhaust system*
- *The vehicle model (Cayman S or Cayman R)*
- *The date and duration of the test*
- *The vehicle VIN number*
- *The location of the test*
- *The gears used in the test*
- *The vehicle speed when the test was performed*

And all other test data and correspondence with the members of the public who requested the test, government ministers, VCA, other government departments and Porsche cars Great Britain limited. You may redact names where appropriate”

2. Following correspondence DVSA maintained its position that the information was protected from disclosure by ss44(1)(a) of FOIA. S44 provides:

“44 Prohibitions on disclosure.

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment,

(b) is incompatible with any EU obligation, or

(c) would constitute or be punishable as a contempt of court.”

3. The Appellant complained to the First Respondent ("the IC") on 12 January 2014 setting out his concerns: -

"I requested to VOSA in 2011 they investigate a vehicle defect in new Porsche Cayman vehicles sold in the UK. VOSA dismissed my defect report. As part of a subsequent and separate litigation against Porsche Cars Great Britain Ltd (PCGB) I was surprised to learn under disclosure rules that VOSA did indeed test a Cayman vehicle to investigate the vehicle defect symptoms that I had reported to them. I believe they have tested the wrong car and have simply requested to VOSA the details of the vehicle test. VOSA have refused to disclose the specific vehicle tested."

4. During the course of the investigation the Appellant explored the possibility of a partial disclosure and DVSA approached Porsche to see whether it would consent to the disclosure of such information as it held, but no resolution was achieved.
5. In her decision notice the IC explored the statutory prohibition relied upon which is contained in the Enterprise Act 2002: -

"Restrictions on disclosure

237 General restriction

(1) This section applies to specified information which relates to –

(a) the affairs of an individual;

(b) any business of an undertaking.

(2) Such information must not be disclosed –

(a) during the lifetime of the individual, or

(b) while the undertaking continues in existence, unless the disclosure is permitted under this Part.

(3) But subsection (2) does not prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene –

(a) that subsection;

(b) any other enactment or rule of law prohibiting or restricting the disclosure of the information.

(4) Nothing in this Part authorises a disclosure of information which contravenes the Data Protection Act 1998 (c. 29).

(5) Nothing in this Part affects the Competition Appeal Tribunal.

(6) This Part (except section 244) does not affect any power or duty to disclose information which exists apart from this Part.

238 Information

(1) Information is specified information if it comes to a public authority in connection with the exercise of any function it has under or by virtue of –

(a) Part 1, 3, 4, 6, 7 or 8;

(b) an enactment specified in Schedule 14;

(c) such subordinate legislation as the Secretary of State may by order specify for the purposes of this subsection.

.....

6. The IC concluded that the DVSA, which is responsible for vehicle safety, has functions under the General Product Safety Regulations 2005 these Regulations are one of the pieces of subordinate legislation which have been specified by an order made by the Secretary of State under s238(1).
7. The IC having identified the statutory function and the legislative provision preventing disclosure concluded that DVSA was correct to withhold the data.
8. The Appellant appealed to the First-tier Tribunal which concluded that the request for information fell to be considered under the Environmental Information Regulations rather than FOIA and ordered disclosure. This conclusion was reversed by the Upper Tribunal which remitted it to the First-tier Tribunal for re-determination within the regime for disclosure of information contained in FOIA.
9. In a document of 9th July 2018, the Appellant set out six revised grounds of appeal. These may be summarised as: -
 - The information did not come to DVSA but was generated by it
 - The test was undertaken not for the purpose of DVSA's functions under GPSR but "with type approval in mind"
 - S240 Enterprise Act "*This Part does not prohibit the disclosure of information held by a public authority to another person if the disclosure is required for the purpose of a EU obligation.*" applied.
 - Disclosure was required by the disclosure gateway provisions of s240-243 Enterprise Act.
 - The Enterprise Act was concerned with competition policy and a purposive approach should be adopted to the interpretation of the Act in this case to prevent the anti-competitive behaviour of cheating emissions targets which the Appellant considered underlay the car performance issue.
 - The information was disclosable under s241 Enterprise Act for the purpose of exercising its functions.
10. These grounds were resisted by the IC and Porsche who submitted detailed grounds for doing so; the Second and Third Respondents agreed with Porsche.
11. In the hearing the Appellant summarised the history of his concerns and the responses of Porsche and DVSA to them; he then largely focussed on the first two grounds of appeal.
12. The primary ground of appeal was based on a strict interpretation of the words of the statute - "*Information is specified information if it comes to a public authority*". The Appellant argues that the information did not come to DVSA from Porsche,

rather the DVSA created the information, *“The fact that Porsche provided a vehicle for testing is not in itself information, nor can there be anything confidential about a vehicle which was on general sale at the time...”*

13. In resisting this ground, the IC argued *“s238(1) of the Enterprise Act 2002 encompasses information that the DVSA generates using information or material provided to it in connection with the exercise of its functions under GPSR. The requested information was not generated by the DVSA in isolation from material provided to it by Porsche – rather, it is based on and/or reveals that material”*.

14. Porsche contended that: -

“...on its proper construction section 238(1)(c) is not intended to draw any distinction between (i) information that is created by a public authority, and (ii) information that is provided to the public authority by a third party. If the information comes to be held by the public authority in connection with the exercise of a function falling within s238(1) of EA 2002, then it falls within the statutory prohibition in section 237(2). Hence it is immaterial whether the disputed information in this case was provided by Porsche GB, or generated by DVSA or the Department.

Alternatively, even if Mr Cieslik’s construction is correct, Porsche GB does not accept that the disputed information (or the whole of that information) was created by the Department and/or DVSA. The FTT would need to consider the actual content of that information in order to determine this issue.”

Consideration

15. The tribunal was greatly helped by the clarity with which both parties set out their positions and advanced them orally. While there is authority on the interpretation of s44(1) FOIA, we were not taken to any authority on the interpretation of s238(1) – a case referred to was first-tier.

16. The disputed information relates to the business of Porsche and Porsche continues to exist as a business entity. The issue for the tribunal is what, in this context, is the meaning of “comes to”. The DVSA is tasked with functions with respect to vehicle safety and has expertise in that area. In order to function effectively in that regulatory capacity, it needs information about products, this information will usually come from those putting the products onto the market, such businesses as Porsche. These businesses will have expended considerable ingenuity and resources in developing their products which will embody intellectual property rights which a manufacturer is entitled to protect. In order to ensure that the regulator that it has the information it needs to function the Enterprise Act protects such a supply of information. Similarly, a regulator may receive tip-offs from whistle blowers where there is a clear public interest in protecting the identity of the whistle blower and (to ensure that protection) some of the detail of the information which has come to it from that source. Where a complaint is received from a consumer that individual has rights of

confidentiality. There are clear and substantial public interest grounds for restricting the onward transmission of information which the regulator has received.

17. Although the Appellant contended that there can be nothing confidential about a vehicle on general sale, a moment's reflection demonstrates that this is an over-simplification, many aspects of a vehicle will embody intellectual property rights/trade secrets of various sorts which a manufacturer is entitled to protect, whether it be aspects of the formulation of the paint, the precise composition of the steel or the programming of the many microprocessors which control functioning. While a purchaser will have acquired a vehicle, which relies on the use of these technologies the purchaser does not acquire right of access to the technology itself. A purchaser is however in the position to assess the performance of the technology by his own assessment, whether assessing fuel efficiency or acceleration or a myriad of other attributes of the product without infringing any right of the manufacturer (indeed a rival might through detailed examination and analysis be able to penetrate the manufacturer's trade secrets, although whether the rival would then be in a position to exploit that knowledge is a different matter). The need to protect third parties and the confidentiality of their information as received by the regulator is distinct from the need to protect the regulator's own information.
18. Although in its submission Porsche argues that *"If the information comes to be held by the public authority in connection with the exercise of a function falling within s238(1) of EA 2002, then it falls within the statutory prohibition in section 237(2)"* the tribunal considers that this is an unnecessary elaboration of the statutory wording, the provision is explicitly *"comes to"* not *"comes to be held"* the statute directs attention to the actual source of information in connection with its functions, not the purpose for which the public body may use the information. There is analytically a distinction which must be respected.
19. In this case there is information which has come to DVSA from a variety of sources, initially Mr Cieslik and others who have raised concerns about the functioning of their cars with Porsche, DVSA and on public websites. DVSA has had contact with Porsche, which is aware of those concerns and which facilitates DVSA in investigating them. However, while the *"hypothesis"* has come to DVSA from other parties (whether Mr Cieslik or Porsche or more generally from the public domain), the investigation - ie the observations which DVSA staff make and record on a standard form, the inferences and conclusions which those staff draw from those observations, do not come to the regulator but are generated by it. Such *"self-generated"* information falls outside the statutory prohibition on disclosure.
20. The request for information is in 2 parts, the first part is for specific information about a vehicle on which a test was carried out and the circumstances in which the test was performed. The second part is for background information about

the issue – information supplied to DVSA by others. That information clearly falls the prohibition on disclosure; it has come to DVSA; much of the withheld material the tribunal has seen falls within that category. However, the tribunal is satisfied therefore that the material within the scope of the request set out in paragraph 2 above to the extent that it is derived from the visual inspection and evaluation of DVSA staff should be disclosed.

21. A consideration of the closed material identifies one document, the Vehicle/Component Examination Record Sheet, which contains such of the information requested which has been recorded and should, subject to redaction, be disclosed. The Appellant has made clear that he is not seeking any personal data (the disclosure of which is restricted by s237(4)) and the names of all persons should be redacted, in addition the first paragraph under the heading Details of Examination is information supplied by an employee of Porsche and should also be redacted. The appeal is allowed in part.
22. The subsidiary grounds of appeal, grounds 2-6; may be dealt with more briefly. The second ground, that the test was carried out with type approval rather than safety in mind is unsubstantiated speculation on the Appellant's part. What he sought from the request was the "VOSA safety evaluation of the throttle malfunction". The document he is seeking in the closed material is focussed on the safety issue. There is no basis for thinking that DVSA was doing anything other than consider vehicle safety – its function under GPSR. This ground is without merit.
23. In the remaining grounds the Appellant largely seeks to rely on the disclosure provisions contained in the permitted disclosure provisions of the Enterprise Act. S239 allows disclosure with the consent of the party to whom the information relates (this was sought and refused at an early stage), s240 permits disclosure if it is required for the purpose of an EU obligation, however the appellant was unable to demonstrate why disclosure was so required, s241 permits a public authority to disclose information for the purpose of facilitating the exercise of its functions, again the Appellant was unable to specify a function and explain why disclosure would facilitate such a exercise. In relying on the "considerations relevant to disclosure" contained in s244, the Appellant pre-supposed a desire on the part of DVSA to disclose the information, since it did not seek to disclose the information s244 was not of assistance. The suggestion that a "purposive approach" to the interpretation of the Enterprise Act would require the disclosure of the information seemed to the tribunal to be expanding the interpretation of the Act beyond the bounds of what was possible.
24. For the reasons stated the tribunal allows the appeal in part and directs that the information identified in paragraph 21 be disclosed within 35 days.

Judge of the First-tier Tribunal
Date: 7 March 2019