Tribunals Service
Information Rights

IN THE FIRST-TIER TRIBUNAL **EA/2009/0097**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50205855
Dated: 9 November 2009

Appellant: PAUL MORRIS

Respondents: 1) THE INFORMATION COMMISSIONER
2) DEPARTMENT FOR TRANSPORT

On the papers

Date of hearing: 27 May 2010

Date of Decision: 7 June 2010

Before

Annabel Pilling (Judge)
Suzanne Cosgrave
and
Ivan Wilson

Representation:

For the Appellant:	Paul Morris
For the Respondent:	Michelle Voznick
For the Additional Party:	Rory Dunlop

Subject matter:

FOIA Whether information held s.1
FOIA Cost of compliance and appropriate limit s.12
FOIA Qualified exemptions – Legal professional privilege s.42
FOIA Public interest test s.2

Cases:

Urmenyi v Information Commissioner and London Borough of Sutton (EA/2006/0093)
Roberts v Information Commissioner (EA/2008/0050)
Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013)
Department for Education and Skills v IC and Evening Standard (EA/2006/0006)
Department for Business, Enterprise and Regulatory Reform v O'Brien and Information Commissioner [2009]EWHC 164 (QB)

Home Office and Ministry of Justice v Information Commissioner [2009] EWHC 1611 (Admin)
Department for Culture Media and Sport v Information Commissioner (EA/2008/0065)
Department of Trade and Industry v Information Commissioner (EA/2006/0007)
Mersey Tunnel Users Association v Information Commissioner and Halton Borough Council (EA/2009/0001)

DECISION OF THE FIRST -TIER TRIBUNAL

The Appeal is dismissed for the reasons set out in below, but the Tribunal substitutes the following Decision Notice to reflect this decision:

SUBSTITUTED DECISION NOTICE

Dated: 7 June 2010

Public Authority: **DRIVER AND VEHICLE LICENSING AGENCY, DEPARTMENT FOR TRANSPORT**
Longview Road
Swansea
SA6 7JL

Name of Complainant: **PAUL MORRIS**

The Substituted Decision

For the reasons set out in the Tribunal's Decision, the public authority dealt with the request for information in accordance with section 1(1) of the Freedom of Information Act 2000 as it answered satisfactorily the request for information by its confirmation that it holds no information on the legality of Regulation 27 of the Road Vehicles (Registration and Licensing) Regulations 2002 and/or its compatibility with the European Directive on Data Protection (Directive 95/46/EC).

Reasons for Decision

Introduction

1. This is an Appeal by Mr Paul Morris against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 9 November 2009. The Decision Notice relates to requests for information made by Mr Morris to the Driver and Vehicle Licensing Agency (DVLA) under the Freedom of Information Act 2000 (the 'FOIA'). The requests principally related to Mr Morris's concerns regarding Regulation 27[1] of the Road Vehicles (Registration and Licensing) Regulations 2002 ('Regulation 27'), which gives the DVLA power to disclose details of vehicles and vehicle keepers, to local authorities, Police and Customs officers and to other agencies, both public and private if "reasonable cause" is shown and which Mr Morris contends is not compatible with the European Directive on Data Protection(Directive 95/46/EC) (the 'European Directive').

Factual Background

2. The DVLA is an executive agency of the Department for Transport (the 'DfT'). The Vehicle Excise and Registration Act 1994 requires most vehicles used or kept on a

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[1] Regulation 27 (as amended) provides:

The Secretary of State may make any particulars contained in the register available for use-

(a) (i) by a local authority for any purpose connected with the investigation of an offence;
(ii) by a local authority in Scotland, for any purpose connected with the investigation of a decriminalised parking contravention; or
(iii) by a local authority in England and Wales, for any purpose connected with its activities as an enforcement authority within the meaning of Part 6 of the Traffic Management Act 2004;

(aa) by the Department of Regional Development for any purpose connected with-
(i) the investigation of a contravention to which Schedule 1 to the Traffic Management (Northern Ireland) Order 2005 (contraventions subject to penalty charges) applies; or
(ii) the exercise of the Department's powers under Article 18(1)(b) or 21(1)(b) of the Order (immobilisation or removal of vehicles);

(b) by a chief officer of police;
(c) by a member of the Police Service of Northern Ireland
(d) by an Officer of Customs and Excise ;
(da) on or after 30 April 2010 or the date of coming into force of section 144A of the 1988 Act (whichever is later), by the Motor Insurers' Bureau (being the company of that name incorporated on 14th June 1946 under the Companies Act 1929) for any purpose connected with the exercise of any functions of the Secretary of State relating to the enforcement of an offence under section 144A of the 1988 Act; or
(e) by any person who can show to the satisfaction of the Secretary of State that he has reasonable cause for wanting the particulars to be made available to him.

public road to be licensed and registered by the Secretary of State. This function is performed by the DVLA. Under FOIA, the DVLA is not a public authority as it is an executive agency of the DfT and therefore the relevant public authority is the DfT. For consistency with the Commissioner's Decision Notice, we refer to the DVLA rather than the DfT which conducted the appeal before us.

3. Although requests for information under FOIA are "motive blind", we have been told that at the heart of these requests for information and this appeal is Mr Morris's belief that Regulation 27 is not compatible with the European Directive.

4. The European Directive on Data Protection is given effect in the United Kingdom by the Data Protection Act 1998 (the 'DPA').

The request for information

5. We set out below parts of the correspondence between Mr Morris and the DVLA. We have not set out the contents of each piece of correspondence in full but simply outline the relevant parts of the requests and replies.

6. Mr Morris made a request under FOIA to the DVLA on 20 November 2007, requiring to be provided with:

   i) *"all the data concerning your discussions, meetings and negotiations with the Information Commissioner in regard to the operation of the Data Protection Act 1998 (and all subsequent Statutory Instruments) especially any material which relates to the legitimacy of 'Regulation 27';*

   ii) *a copy of the "full update" of the measures announced by Stephen Ladyman which was promised for Autumn of the year in which he made his announcement on the press release headed, "Release of Data from the UK Vehicles Register"*[2]*;*

[2] Items ii), iii) and iv) have been dealt with and form no part of this appeal.

iii) a copy of the three year "rolling audit checks";

iv) a copy of the complaint procedure by which a data subject can notify both the DVLA and the Information Commissioner if they believe they data has been used inappropriately;

v) all data including correspondence with anyone (including all your internal correspondence and communications) concerning the above. This would include correspondence with the Department for Transport.

The data should included notes, memoranda, letters, reports, e-mails, minutes of meetings be they hand-written, typed or recorded in any other form including audio tape, held on paper or electronically or computer or in any form whatsoever."

7. The DVLA responded on 13 December 2007 requiring some clarification of the request. Using the same numbering i) to v), it indicated that:

i) correspondence between the DVLA and the Information Commissioner is held in various locations on a number of files and much of that correspondence relates to individual cases. Many of these cases are concerning the application of the DPA and the application of Regulation 27 in relation to those specific circumstances. Based on the current question, the DVLA would not be able to provide the information as it would exceed the £600 limit to collate. If you are able to refine your request by giving details of a particular document(s), situation or timeframe, we might be in a better position to help.

(ii)-iv) not relevant)

v) Refers to reply to i) above. Again you will need to refine this request and be more specific in detailing the information you require.

8. Mr Morris wrote again on 22 December 2007:

    i) As I have now received much of the information I require in regard to the correspondence between DVLA and the Information Commissioner in relation to the operation of Regulation 27, I am happy that this item may be held in abeyance.

    (ii) – iv) not relevant)

    v) I require any correspondence between departments within DVLA and with the Department for Transport in regard to the legality and operation of Regulation 27. For the time being, this excludes any correspondence with the Information Commissioner.

9. The DVLA responded to this on 22 January 2008:

    i) This request is still too broad to allow the DVLA to provide the information you have requested. …the DVLA's interpretation of your request is that you require copies of all correspondence relating to whether Regulation 27 is legal and as to how the Regulation is interpreted and applied by the DVLA.

    The DVLA receives a large amount of correspondence in relation to Regulation 27. The majority of the correspondence requests details of the legal provisions under which the DVLA releases information from the vehicle records, in answer to which the DVLA provides details of Regulation 27. Some of the correspondence is in relation to individual circumstances, questioning why the DVLA considered 'reasonable cause' to apply in those circumstances.

    This correspondence is dealt with by more than one area of the DVLA, including the teams responsible for dealing with requests for information from the vehicle records, the Policy section, various areas dealing with complaints and various Local Offices. The correspondence is stored on many personal computers and in many filing systems throughout the

DVLA… with older files being held in a file registry on site or in an archive which is held off site.

Given the need to locate correspondence that relates to Regulation 27, to read and further break down that correspondence into those that refer to the legality and operation of the Regulation and then to redact personal information, we have estimated that the cost of compiling your request would exceed £600… Section 12 of the Act does not oblige the DVLA to comply with requests if they exceed the cost limit.

(ii)-iv) not relevant)

v) See answer to i) above.

10. Mr Morris wrote back on 1 February 2008:

i) Despite having indicated that he was content to leave this request in abeyance on 22 December 2007, Mr Morris states that "*I have not asked for all the correspondence relating to Regulation 27. My interest lies only in the data contained in correspondence with the Information Commissioner, the Department for Transport and the European Commissioner for Data Protection. In order to reduce the burden further, I would be happy to receive just the data contained in all types of communication (electronic or paper based) between DVLA departments on the subject of Regulation 27 and between DVLA and Department for Transport, plus anything between DVLA and the European Commissioner for Data Protection who is currently investigating the legality of Regulation 27 at my instigation.*"

(ii) – iv) not relevant)

v) "Are you able to supply any information at all within the budget? If not, I should be grateful if you would explain why not."

11. The DVLA responded on 29 February 2008:

i) *Although refined since your last request, I must advise that DVLA would still have the same number of files and computers to search in order to locate this correspondence. It is not the case that this correspondence will be limited to a very few data files or computers. ….. I should also advise that DVLA is not aware of any correspondence between itself and the European Commissioner for Data Protection in relation to Regulation 27.*

(ii) - iv) not relevant)

v) *(not specifically addressed separately)*

11. Mr Morris wrote again to the DVLA on 6 March 2008 referring to the letter from the DVLA of 29 February 2008;

"I am pleased to be able to refine my request ... by requiring a list of the computers by department which you believe may contain the data I am seeking. If you hold the view that there are too many to interrogate within the £600 limit, then you must have evidence to prove your assertion.
You will understand that I find it hard to believe that in an important matter such as the one I am investigating, that there have been hundreds of people, using hundreds of computers which are not linked in any way, who have been involved in corresponding with the Information Commissioner."

12. The DVLA had not suggested that "hundreds of people" had been in correspondence with the Commissioner. This part of Mr Morris's request had not been pursued as Mr Morris had already conceded on 22 December that he was no longer requiring correspondence between the DVLA and the Information Commissioner. This letter also covered a number of other issues and made other observations to the DVLA concerning Regulation 27 and matters of data protection.

13. The DVLA responded on 8 April 2008:

"We have identified four departments within DVLA who would be the primary holders of the data you require, involving a total of 2552 members of staff

who could potentially hold correspondence in relation to Regulation 27 on their PCs. In order to extrapolate the information from the network, a bespoke scan would have to be created and run. The estimate for doing this would exceed 6 days, far exceed the £600 limit and is therefore exempt under section 12 of FOIA.
It is not clear from your letter whether you are now requesting copies of correspondence between DVLA and the Information Commissioner's Office. If so, I must request that you refine your request so that it can be determined whether we are able to comply within the £600 limit.
The majority of the correspondence between DVLA and the DfT concerning Regulation 27 is likely to relate to the review of the release of information which took place in 2006. We estimate that to collate all of this information would take in excess of 3 ½ days and therefore section12 applies. However, if you could limit your request to a specific period of time or specific piece(s) of correspondence DVLA may be in a position to hep you.
Any other correspondence between DVLA and DfT concerning Regulation 27 is likely to be a request for legal advice or a response from DfT legal advisers. The DVLA confirmed that this information is held however it considered that it is exempt under section 42 of FOIA and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

14. Mr Morris replied on 15 April 2008 disputing that it would take 6 days to scan the computer network and observing that in the absence of evidence of that, this is "yet another excuse to cover up what you have been doing (or not doing)." He also indicated that:

"For the time being I am happy to accept the data I requested from just the computers and files in your Department starting with the information held by Paul Jeffreys. To clarify, I want any documents which have been created by you, to or from the DfT in relation to the legality of Regulation 27. For the time being, I will be satisfied with putting my request for copies of the correspondence with the Information Commissioner in abeyance. This narrows the request even further.

If you could provide me with a list of the correspondence between DVLA and the DfT, I will be in a position to tell you which I require. If it is helpful, I will, again for the time being, request that only those documents which relate to the legality of Regulation 27 need be selected and provided. I am not interested in any documents which tries to change the method in which Regulation 27 is operated...
The question of legal professional privilege does not apply because you will not be able to maintain it in legal proceedings. I want your legal arguments as to why you think that Regulation 27 is lawful and what the DfT thinks about this."

(The remainder of the letter sets out his reasons for concluding that Regulation 27 is not compatible with the Directive.)

15. The DVLA replied on 24 April 2008, clarifying that the reference to 2552 members of staff was to those who may hold any information relating to Regulation 27 not those involved in correspondence with the Information Commissioner. It advised Mr Morris that that the DVLA and DfT have never questioned the legality of Regulation 27 and therefore the DVLA does not hold any correspondence or other information in relation to its legality or compatibility with the European Data Protection Directive. It also confirms that correspondence between the DVLA and its legal advisers has been withheld under section 42 but clarifies that this relates to the *application and operation* of Regulation 27, either in general or in relation to individual cases. There is no correspondence between the DVLA and its legal advisers in relation to the *legality* of Regulation 27.

16. In the same letter, Mr Morris was asked to confirm whether he wished the DVLA to conduct an internal review of the application of section 42.

17. Mr Morris replied on 4 May 2008. He confirmed that he is not interested in any individual cases concerning the *application* of Regulation 27 or, in general terms, the application of Regulation 27 *or how it is interpreted* and repeats that he seeks

data relating to any material generated internally or externally by the DfT, DVLA or any other person or body concerning the *legality* of Regulation 27.

18. Mr Morris indicated that he disputes that the DVLA does not hold any correspondence relating to the legality or compatibility with the Directive and refers to it being raised in a meeting and an Opinion that was sought from Counsel:

    "Furthermore, I have documentary evidence that both DVLA and the Information Commissioner had serious doubts about the legality of Regulation 27. I want copies of these documents and any others which were generated as a result of or in connection with this issue."

19. Because Mr Morris had not indicated that he sought an internal review, this letter was treated as a request for an internal review by the DVLA. On 12 June 2008 the DVLA informed Mr Morris that the information that was withheld under section 42 had been correctly withheld. He was advised to complain to the Information Commissioner if he was not satisfied with the outcome of the internal review.

<u>The Complaint to the Information Commissioner</u>

20. On 25 June 2008 Mr Morris complained to the Commissioner:

    "I placed a request under FOIA with DVLA for the correspondence between DVLA and the Information Commissioner in regard to the application of Regulation 27 (and Regulation 15 that preceded it) and any related internal correspondence which sprung from this correspondence including legal opinion that the Regulation was compliant with the European Directive
    .
    In particular I would like copies of the legal opinion in regard to which type of data could be disclosed under Regulation 27 (assuming it was compatible with the Directive and therefore legal) especially the Opinion that disclosure for debt collection purposes was not lawful."

21. The Commissioner referred to these as Requests 1 and 2 in his Decision Notice and considers they can be “equated with questions 1 and 5 of the complainant’s initial request to the DVLA dated 20 November 2007.”

22. The Commissioner then investigated the substantive complaint, receiving additional arguments and/or material from Mr Morris and the DVLA.

23. The Commissioner issued a Decision Notice on 9 November 2009. He concluded that:

    i) The DVLA correctly applied section12(1) to Request 1 as to comply with the request would exceed the £600 cost limit; and

    ii) The DVLA was entitled to withhold information held relating to Request 2 on the basis that it fell within the exemption in section 42 of FOIA and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

<u>The Appeal to the Tribunal</u>

24. Mr Morris appealed to the Tribunal on 12 November 2009.

25. The Tribunal joined the DVLA as a Respondent.

26. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents.

27. In addition, the Tribunal was provided with a Closed bundle of documents. This bundle is identical to the Open bundle with some additional pages that have been withheld from Mr Morris. In order to preserve the confidentiality of this material we have not referred to its contents in this Decision.

28. Although we may not refer to every document in this Decision, we have considered all the material placed before us. We have considered in detail the written submissions from the parties although we do not begin to rehearse every argument in this Decision.

The Powers of the Tribunal

29. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

    (1) If on an appeal under section 57 the Tribunal considers-

    (a) that the notice against which the appeal is brought is not in accordance with the law, or

    (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

    the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

    On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

30. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

The Issues for the Tribunal

31. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in

writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

32. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)). Section 42 of FOIA is a qualified exemption.

33. The issues for the Tribunal to decide are:

    i) whether the Information Commissioner erred in considering the scope of the request for information;

    ii) whether the Information Commissioner was wrong to find that the DVLA was entitled to rely on section 12 of FOIA to refuse to comply with the requests for information made by Mr Morris;

    iii) whether the "disputed information" falls within the exemption in section 42 of FOIA, and, if so,

    iv) whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

34. If we conclude that the Commissioner erred in considering the scope of the request for information and that the DVLA dealt with the request in accordance with section 1(1) of FOIA, the other issues do not arise.

35. This Tribunal has no jurisdiction to consider whether Regulation 27 is or is not compatible with the European Directive. The DPA gives effect to the Directive.

<u>*Information Commissioner's interpretation of the scope of the request for information*</u>

36. Under section 50 of FOIA, a complainant may make an application for a decision by the Commissioner if dissatisfied with the way in which a public authority has handled its request for information. Section 50 provides as follows:

    "(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by a complainant to a public authority has been dealt with in accordance with the requirements of Part I."

37. We have set out in considerable detail in paragraphs 6 to 19 above the history of the request for information made by Mr Morris to the DVLA.

38. Mr Morris submits that although he indicated to the DVLA during this iterative process that he was content to leave certain matters in abeyance or that he narrowed or refined his request, in fact he still requires all the information requested. There appears, even now, real confusion on the part of Mr Morris as to what information he requested and the information he actually seeks.

39. The DVLA submits that the request for information was narrowed by Mr Morris and should be regarded as the request of 15 April 2008, that is for "*documents which have been created by you, to or from the DfT in relation to the legality of Regulation 27* ". We agree with this submission; the relevant request for information made by Mr Morris to the DVLA is the request as refined on 15 April 2008 and it is this request that the Commissioner should have considered in accordance with section 50 of FOIA. The previous requests had been answered or were no longer pursued by Mr Morris by that stage. In relation to this request, the DVLA submits that it holds no such information because it has never queried the legality of Regulation 27.

40. When Mr Morris complained to the Commissioner, he did not phrase his complaint in terms that the DVLA had failed to comply with that request. In fact, he presented an entirely new request to the Commissioner as if that were the request he had made to the DVLA.

41. The first part of the complaint to the Commissioner, referred to by the Commissioner as Request 1, suggested that Mr Morris had placed a request under FOIA with DVLA for the correspondence *between the DVLA and the Information*

Commissioner in regard to the application of Regulation 27 (and Regulation 15 that preceded it) and any related internal correspondence which sprung from this correspondence including legal opinion that the Regulation was compliant with the European Directive.

42. We are satisfied that on 15 April 2008 Mr Morris had been clear and unambiguous that he no longer requested copies of correspondence with the Commissioner but was limiting his request for information to documents which had been created by the DVLA, to or from the DfT in relation to the legality of Regulation 27. The answer to that request had been provided to him; the DVLA had never queried the legality of Regulation 27 and therefore no such information was held. In accordance with its duty under section 1(1) of FOIA, the DVLA informed Mr Morris of this in writing.

43. We do not consider that Request 1 can be equated with item i) of the initial request of 20 November 2007 as this was not the request as considered by the DVLA after the refinements outlined above and Mr Morris had been clear in his subsequent letters that he no longer pursued his request for correspondence with the Commissioner.

44. The second part of Mr Morris's complaint to the Commissioner, referred to by the Commissioner as Request 2, suggested that he had requested copies of the legal opinion in regard to which type of data could be disclosed under Regulation 27 (assuming it was compatible with the Directive and therefore legal) especially the Opinion that disclosure for debt collection purposes was not lawful.

45. We are not satisfied that this was information that was ever requested from the DVLA by Mr Morris. No reference to types of data or debt collection was ever made by Mr Morris in his numerous letters to the DVLA. Mr Morris was clear throughout that his request was not for information concerning the *"application of Regulation 27"*[3], as the complaint to the Commissioner suggests, but was confined to information concerning its legality and compatibility with the European Directive.

46. We find that the Commissioner was wrong to equate this with request v) of the initial request of 20 November 2007. Request v) was framed very widely and had been

[3] Mr Morris's letter to DVLA of 4 May 2008.

significantly narrowed by the time the DVLA gave its response under section 1(1) of FOIA. At no stage did Mr Morris request from the DVLA the information identified in this part of his complaint to the Commissioner.

47. For the reasons given above we are not satisfied that the Commissioner's decision related to a request made by Mr Morris to the DVLA and that therefore the Decision Notice is not in accordance with section 50 of FOIA.

48. We accept the evidence given in the statement of Catherine Bowden, Data Protection Officer at the DVLA, that written legal opinion and advice has been sought from Counsel regarding Regulation 27 but not in relation to the compatibility with the European Directive.

49. We are satisfied that the DVLA properly dealt with Mr Morris's request for information by informing him of this in writing on 24 April 2008.

Section 12 of FOIA

50. Section 12 did not arise in relation to the DVLA's response to the refined request for information of 15 April 2008 and should not, therefore, have been considered by the Commissioner. Section 12 was relied upon by the DVLA in relation to the broader requests made by Mr Morris before the final refinement of 15 April 2008. Although, in light of our decision regarding the scope of the request as considered by the Commissioner, this is not an issue that the Tribunal needs to decide, we make the following observations.

51. Section 12 of FOIA does not provide an exemption as such; its effect is to render inapplicable the general obligation to provide information contained in section 1(1).

52. Section 12(1) provides as follows:

> *Section 1 (1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*

53. The appropriate limit is set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations'). The appropriate

limit for DVLA is £600. By Regulation 4(4) cost is to be calculated as a rate of £25 per hour spent; this equates to a limit of 24 hours' work.

54. Mr Morris's submission that £25 per hour is an excessive amount to pay staff is irrelevant; the figure of £25 does not relate to the actual rate of pay for any member of staff undertaking the work, but is the figure set by the Regulations for a public authority to use in its calculations. Additionally, the relative costs incurred by the DVLA in relation to preparing this Appeal are irrelevant and, in any event, the DVLA was made a Respondent to the Appeal by the Tribunal's direction.

55. Regulation 4(3) sets out the factors that may be taken into account in arriving at a cost estimate:

> *In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in –*
>
> *(a) determining whether it holds the information,*
>
> *(b) locating the information, or a document which may contain the information,*
>
> *(c) retrieving the information, or a document which may contain the information,*
>
> *extracting the information from a document containing it.*

56. Differently constituted Panels of this Tribunal have given guidance in relation to the application of section 12. In *Urmenyi v Information Commissioner and London Borough of Sutton*[4], the Tribunal held:

> (1) that it was clear from the wording of section 12 that it was up to the public authority to estimate whether the appropriate limit would be exceeded in carrying out the activities described in Regulation 4;
>
> (2) the Commissioner and the Tribunal can enquire into the facts or assumptions underlying the estimate;

[4] (EA/2006/0093)

(3) the Commissioner and the Tribunal can enquire whether the estimate was made on facts or assumptions which should not have been taken into account.

57. As to what is a reasonable estimate, in *Roberts v Information Commissioner*[5] the Tribunal held:

(1) only an estimate is required;

(2) the costs estimate must be reasonable and only based on those activities described in Regulation 4(3);

(3) the determination of a reasonable estimate can only be considered on a case-by-case basis;

(4) any estimate should be sensible, realistic and supported by cogent evidence.

58. The DVLA relied on section 12 when responding to the initial request of 20 November 2007 and thereafter, asking Mr Morris to refine his request in such a way as to enable it to provide information within the cost limit, including, for example, by reference to a particular period of time. The way in which Mr Morris framed his requests for information concerning Regulation 27 was very broad; Regulation 27 is an issue raised frequently in the DVLA's correspondence.

59. In its letters to Mr Morris, the DVLA explained that as it does not file correspondence by issue, a bespoke scanning programme would be needed to extrapolate the information from computers used by 2552 staff in the 4 main departments identified as those which may hold the requested information relating to Regulation 27.

60. Mr Morris submits that the information could be held in a maximum of only 4 computers but those submissions create confusion as he refers to those people who would have had correspondence with the Commissioner regarding Regulation 27 when in fact that part of his request was not being pursued.

[5] (EA/2008/0050)

61. The Commissioner queried the application of section 12 and sought further explanation about the calculation of creating and running this bespoke scanning programme and questioned whether such a scan was required or whether the DVLA had considered any other methods to determine whether the information was held.

62. The DVLA provided a break-down of the estimate relating to the bespoke scanning programme (1 day of design work, 3 days of development work, 2 days of testing). It also explained that it had considered sending an email to all staff who may hold relevant information asking each to conduct an individual search. Estimating this at 2 minutes per person, this would still exceed the relevant cost limit.

63. Although the Commissioner was considering the application of section 12 in the context of what he referred to as Request 1, he was satisfied that the DVLA had provided sufficient evidence for its reliance on section 12.

64. The DVLA has provided the Tribunal with additional evidence concerning the possible location of the information relating to Regulation 27. Catherine Bowden, in her statement, explains that the calculation took account of the number of staff within the DVLA who may have raised an internal query as to the application of Regulation 27 in general or as part of a particular case. This would include staff employed within the relevant Policy area (currently 9 members of staff, plus predecessors over recent years), 98 staff employed within the Operational areas who consider requests under Regulation 27 and any number of the other 6781 staff employed within the Agency (in 2008) who may have dealt with a complaint or enquiry from a member of the public or other government department. Correspondence with the DfT would, more recently, have been with more senior officials or with lawyers. Miss Bowden states that there is no area of the DfT that has policy responsibility for the disclosure of information from DVLA records and therefore no specific area with the DfT that would hold correspondence. To locate any information that may have been held would require a search of all files/computers within the central department. At that time there were approximately 2500 computers which could have held the information sought.

65. In our opinion the DVLA reached a reasonable estimate as to whether the cost limit would be exceeded in carrying out the relevant activities in Regulation 4. It has

provided evidence of how the estimate was calculated and we see no basis to reject that evidence.

Does the "disputed information" fall within the exemption in section 42 of FOIA?

66. Section 42 did not arise in relation to the DVLA's response to the refined request for information of 15 April 2008 and should not, therefore, have been considered by the Commissioner. Section 42 was raised by the DVLA only once in its letter of 8 April 2008, pointing out that although the request could not be met within the cost limit, much of the information falling within the scope of the request *at that stage* would fall within that exemption.

67. The Commissioner considered the application of section 42 in relation to the request contained within the complaint to him rather than the request made to the DVLA. The request as made to the Commissioner is more specific than that made to the DVLA and as a result of the Commissioner's investigation, certain information, identified as the "disputed information" before us, was located.

68. Again, although, in light of our decision regarding the scope of the request as considered by the Commissioner, this is not an issue that the Tribunal needs to decide, we make the following observations.

69. Section 42 of FOIA provides as follows:

> *(1) 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.*

70. The Tribunal considers that the meaning and effect of section 42 FOIA is clear. The only question for the Tribunal can be whether, in respect of the information requested, under English law a claim to legal professional privilege could be maintained or whether under Scots law a claim to confidentiality of communications could be maintained in legal proceedings. If the answer is "yes", the information falls within the scope of section 42 of FOIA and the qualified exemption is engaged. This question may be more difficult when the privilege is sought to be extended to

material such as notes, memoranda and correspondence that relate to information sought by a legal adviser to enable the provision of legal advice.

71. In our opinion, a claim for legal professional privilege could be made in respect of the "disputed information" and section 42 of FOIA would be engaged. We do not consider that privilege has been waived on the evidence provided to us. However, section 42 is a qualified exemption and the information could only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Public Interest Test: General Principles

72. We agree with Mr Morris's submission that there is no absolute exemption from disclosure for information falling within the scope of legal professional privilege and we must therefore consider where the balance of the public interest lies in respect of the disputed information.

73. There is now a considerable body of case law from this Tribunal on the issue of legal professional privilege, both under the FOIA and the Environmental Information Regulations 2004. It is not necessary or helpful for us to set down in this Decision a detailed review of those cases. We consider that the following principles, drawn from relevant case law, are material, both generally and with particular reference to section 42 of FOIA, to the correct approach to the weighing of competing public interest factors. The principles established by these cases do not form a rigid code or comprehensive set of rules and no Panel is bound by decisions of differently constituted Panels of this Tribunal. These principles are to be regarded as guidelines of the matters that should properly be taken into account when considering the public interest test, but each case must be decided on its own facts.

    (i) The "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld *(Guardian Newspapers Limited and Brooke v Information Commissioner and the BBC (EA/2006/0011 and 0013) ('Brooke')* (at paragraph 82).

(ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information (see, for example, *Department for Education and Skills v IC and Evening Standard* EA/2006/0006 (*DfES*) at paragraphs 64-65).

(iii) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.

(iv) The mere fact that legal professional privilege applies to information is insufficient to justify non-disclosure. A public authority is only entitled to refuse to disclose such information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

(v) The approach for the Tribunal is to acknowledge and give effect to the significant weight to be afforded to the exemption in any event, ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least[6].

(vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. *"A factor which applies to very many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so."* (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin)).

[6] Per Wyn Williams J in *BERR v O'Brien and Information Commissioner* [2009]EWHC 164 (QB)

(vii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of freedom of information regimes and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture Media and Sport v Information Commissioner*[7]).

(viii) The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner*[8]).

(ix) Some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential (*Calland v Information Commissioner and FSA*[9]).

(x) The age of the legal advice contained in the information is relevant. The passage of time would, as a general principle, favour disclosure. Legal advice is, however, still "live" if it is still being implemented or relied upon as at the date of the request or may continue beyond that date to give rise to legal challenges by those unhappy with the course of action adopted.

74. In relation to the "disputed information" we would have concluded that the public interest in favour of maintaining the exemption considerably outweighed the public interest in favour of disclosure.

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[7] EA/2007/0090 (*'DCMS'*) at paragraph 28
[8] EA/2006/0007 at paragraph 50
[9] EA/2007/0136

75. We have also been asked to give an opinion as to additional material that has been located by the DVLA subsequent to the issuing of the Commissioner's Decision Notice. Unlike the position in, for example, *Mersey Tunnel Users Association v Information Commissioner and Halton Borough Council*[10] this is not information that falls within the scope of the request made to the public authority but which was not located until late in the appeal process. This additional material does not fall within the scope of the request for information as made to the DVLA on 15 April 2008 and which we have found was the request that should have been considered by the Commissioner. We do not intend to compound the error by giving an opinion as to whether this information would fall within the exemption in section 42 or as to where the public interest might lie. It would be artificial to do so, in particular, as we must consider the public interest as at the time of the request rather than the time of this appeal, and this was information was not subject of a request made to the DVLA at any stage.

Conclusion and remedy

76. For the reasons given above we are not satisfied that the Commissioner's decision related to a request made by Mr Morris to the DVLA and that therefore the Decision Notice is not in accordance with section 50 of FOIA.

77. We are satisfied that the DVLA dealt with the request from Mr Morris in accordance with section 1(1) of FOIA as it informed him in writing that it held no information concerning the legality of Regulation 27 or its compatibility with the European Directive.

78. We issue a Substituted Decision Notice.

79. Our decision is unanimous.

80. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of the date of this decision. Such an application must identify the error or errors of law in the decision and state the result

[10] (EA/2009/0001)

the party is seeking. Relevant forms and guidance for making an application can be found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed

Annabel Pilling Date 7 June 2010

Tribunal Judge

RULING ON AN APPLICATION FOR PERMISSION TO APPEAL

1. This is an application dated 16 June 2010 by Paul Morris for permission to appeal pursuant to Rule 42(1) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the 'Rules'). The application for permission to appeal relates to a decision of the First-tier Tribunal (Information Rights) (the 'Tribunal') dated 7 June 2010 which dismissed Mr Morris's appeal but substituted the Information Commissioner's Decision Notice dated 9 November 2009 (FS50205855) with the following Decision:

   For the reasons set out in the Tribunal's Decision, the public authority dealt with the request for information in accordance with section 1(1) of the Freedom of Information Act 2000 as it answered satisfactorily the request for information by its confirmation that it holds no information on the legality of Regulation 27 of the Road Vehicles (Registration and Licensing) Regulations 2002 and/or its compatibility with the European Directive on Data Protection (Directive 95/46/EC).

2. The right to appeal against a decision of the First-tier Tribunal is restricted to those cases where there is an alleged error or errors of law.

3. In the Tribunal's decision, the history of the request for information made by Mr Morris to the DVLA has been set out in considerable detail (paragraphs 6-19). We noted that there had been, and remained, real confusion on the part of Mr Morris as to what information he requested and the information he actually seeks. We accepted the submissions

of the DVLA that the request for information had been narrowed to a request for *"documents which have been created by you, or from the DfT in relation to the legality of Regulation 27."* The answer to that request had been provided; the DVLA had never queried the legality of Regulation 27 and therefore no such information was held.

4. Mr Morris states that the Tribunal did not consider the matters placed before it except for one matter which had been agreed by the parties prior to the hearing. He submits that he "sought information concerning the discussions between DVLA/DFT and the OIC concerning the application of 'Regulation 27'."

5. The Tribunal found that on 15 April 2008 Mr Morris had been clear and unambiguous that he no longer requested copies of correspondence with the Commissioner but was limiting his request as set out above. Mr Morris does not accept that finding of fact.

6. Under Rule 43 of the Rules I am required to consider, taking into account the overriding objective in Rule 2, whether to review the decision in accordance with Rule 44. In this case, I am not of the opinion that I should review the decision as I am not satisfied that there is any error of law in the decision of 7 June 2010.

7. I acknowledge that Mr Morris is unrepresented and not legally trained. While he does not accept our findings of fact, I am not satisfied that Mr Morris's appeal has identified an error of law in the Tribunal's Decision that has any reasonable prospect of success on appeal to the Upper Tribunal. The history of this request, and appeal, has shown a considerable degree of confusion on the part of Mr Morris.

8. Permission to appeal is therefore refused.

9. The Appellant has one month from the date this Ruling was sent to lodge an application for permission to appeal directly to the Upper Tribunal with:

   The Upper Tribunal Office (Administrative Appeals Chamber),
   5th Floor, Chichester Rents,
   81 Chancery Lane,
   London WC2A 1DD

   DX: 0012 London/Chancery Lane

Annabel Pilling
Judge
First-tier Tribunal (Information Rights)
10 July 2010