

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 September 2007

Public Authority: Vehicle & Operator Services Agency (an executive agency of the Department for Transport)

Address: Great Minster House
76 Marsham Street
London
SW1P 4DR

Summary

The complainant requested details of a Vehicle & Operator Services Agency ("VOSA") examiner's maintenance report and findings. VOSA refused this request under section 31 of the Freedom of Information Act 2000 (the "Act"). During the course of the investigation, VOSA also submitted that the information was exempt under section 32 of the Act. Having considered VOSA's submissions the Commissioner has decided that the exemptions cited by VOSA were not applicable. However he has decided that the information was exempt under section 40 of the Act because it constituted personal data of the subject of the report and the disclosure of the information would breach the Data Protection Act 1998 ("DPA"). In addition, he has decided that the public authority had breached section 17(1) of the Act as it failed to adequately explain in its refusal notice which part of section 31 it was relying on and why it applied.

The Commissioner's Role

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

2. The complainant wrote to VOSA on 20 October 2005 about the poor condition of a minibus he had hired from a local firm on 9 September 2005. The Commissioner notes that under the Act VOSA is not a public authority in its own right, but is actually an executive agency of the Department for Transport ("DfT") and therefore the public authority in this case is actually the DfT not VOSA.

However, for sake of clarity, this decision notice refers to VOSA as if it were the public authority.

3. VOSA replied to the complainant's letter on 15 November 2005 by stating that it had instructed a local examiner to visit the operator concerned in order to check the roadworthiness of the operator's vehicles and to ensure that there has been no deviation from the laid down standards and procedures. It continued that as a result of that visit a report had been sent to the regulator of the industry, the Traffic Commissioner.
4. The complainant subsequently made a freedom of information request to VOSA at its Roadside Enforcement Division address in Liverpool on 16 November 2005. This request was for a copy of the VOSA examiner's maintenance investigation report on this operator and the findings which were sent to the Traffic Commissioner.
5. A member of staff from the VOSA Information Access Department in Bristol responded to the request on 23 November 2005. In this response VOSA stated that it was unable to identify a company by the name and at the address provided by the complainant. The complainant had apparently had a brief telephone conversation with VOSA prior to VOSA's response of 23 November in which he had endeavoured to identify the name of the company which was the subject of his request. However VOSA did confirm that a maintenance investigation was carried out on a company of a similar name at another address and asked the complainant to confirm in writing that his request related to this operator.
6. The complainant replied to VOSA on 26 November 2005. He confirmed that the address on his receipt when hiring the vehicle was the one he had provided to VOSA. However he stated that in view of VOSA's findings he was now requesting details of the maintenance investigation carried out at the name and address provided by VOSA. The complainant confirmed that this request was also being made under the provisions of the Act. The Commissioner understands that all the information requested by the complainant is contained in one maintenance investigation report. This report includes the examiner's findings on the vehicles inspected, an assessment of the condition of the operating centre, the examiner's more detailed comments about his investigation and the operator's history in relation to compliance with his license. This report can then be used by the Traffic Commissioner, as in this case, in order for the Traffic Commissioner to decide on whether regulatory action is appropriate.
7. VOSA responded to the complainant's letter on 15 December 2005. It advised that it needed to extend the time limit for responding to the request for information by approximately three working days. It advised that this was necessary because "the information requested must be considered under one of the exemptions to which the public interest test applies" but did not specify which exemption it was applying. It advised this extra time was needed in order to make a determination as to the public interest. It explained that it hoped to send a response by 21 December 2005. This issue is considered further in the Commissioner's analysis section of this decision notice.

8. VOSA provided its reply on 19 December 2005. It explained that it had decided not to release the maintenance investigation report for the reasons set out in a document attached to its letter. The attached document cited the section 31 exemption (law enforcement) together with the factors for and against disclosure and gave VOSA's reasons why it considered the public interest favoured withholding the information. VOSA did not however clarify which purpose under section 31(2) it was relying on or explain how disclosing the information would or would be likely to prejudice the exercise by the Traffic Commissioner of its functions for the purpose which was as yet not specified by VOSA.
9. The complainant was dissatisfied with VOSA's response and requested an internal review of its decision by email on 20 December 2005. As no acknowledgement was received to this email the complainant resent it on 22 December 2005.
10. VOSA responded by email on 22 December confirming it would review its decision and advise him of the outcome by 10 January 2006.
11. VOSA actually provided the complainant with its internal review decision in a letter dated 23 December 2005. It upheld its original decision that the public interest favoured maintaining the exemption in this case. It explained that it considered that the release of the report would prejudice the Traffic Commissioner's role as a regulatory authority.

The Investigation

Scope of the case

12. On 30 December 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant explained that he did not believe that VOSA was correct to refuse his request on the basis of section 31. Therefore the Commissioner's investigation was initially only concerned with the validity of VOSA's application of the exemption relating to law enforcement provided by section 31(1)(g).
13. During the course of investigating the complaint the Commissioner noted that VOSA has also applied section 32 (court records) of the Act. The Commissioner has therefore also considered the validity of the application of this exemption by VOSA.
14. Although not cited by VOSA, the Commissioner has also considered whether the information was exempt at the time of the request by virtue of section 40(2) (personal data) of the Act.
15. Although the complainant did not raise the point, the Commissioner also considered whether VOSA has breached section 17(1) of the Act when issuing its refusal notice by failing to explain exactly which part of section 31 it was relying and not adequately explaining why it applied.

Chronology

16. The Commissioner initially wrote to VOSA on 7 February 2006 informing it of the complaint. In this letter the Commissioner explained that as yet it was not possible to allocate the complaint to a caseworker but the Commissioner requested that VOSA supply him with a copy of the requested information.
17. VOSA replied to this letter on 21 February 2006 enclosing a copy of the requested information. However VOSA also explained that it was the Traffic Commissioner's intention to take regulatory action against the operator and the operator would be called to a public inquiry. The date of the inquiry was provisionally set for April 2006. It continued that the maintenance investigation report should at that time become a matter of public record.
18. The Commissioner's investigation of the complaint commenced on 19 August 2006 when the Commissioner wrote to VOSA.
19. In light of VOSA's letter of 21 February 2006 the Commissioner asked whether the public inquiry had taken place in April 2006 as planned and whether or not it was therefore now possible for VOSA to voluntarily disclose the requested information. He also asked whether it had already been released into the public domain and if so where this information could be found.
20. The Commissioner received a telephone call from VOSA on 14 September 2006 to say that it would be unable to comply with the deadline outlined by the Commissioner in his letter dated 19 August. This was because it was trying to ascertain whether or not details of the maintenance report were referred to in the public inquiry hearing.
21. VOSA replied to the Commissioner's letter on 19 September 2006. It confirmed that a public inquiry did take place on 30 March 2006 and the outcome of the inquiry was that the number of vehicles that can be operated by the operator in question was reduced from 12 to 8. It confirmed that this outcome can be found on VOSA's website. The Commissioner has ascertained that this information can be accessed through the following link:
<http://www.vosa.gov.uk/vosacorp/publications/N&P%202457%20-%2021st%20April%202006.pdf> .
22. VOSA explained in its letter that the maintenance report was considered by the Traffic Commissioner for the North West Traffic Area at the statutory inquiry. As a result VOSA advised the Commissioner that it considered this document to be a court record and therefore it was exempt under section 32 of the Act. It did not however explain in this letter why it considers the information to be a court record for the purposes of the section 32 exemption.
23. VOSA also clarified that a transcript of the public inquiry was available to the public to purchase. However it explained that as the Traffic Commissioner has the discretion to hold some parts of the inquiry in camera the information within the maintenance report may not be available from the transcript. It could not confirm whether this was the case as no transcript of the inquiry was produced as neither

the Traffic Commissioner nor VOSA had a business need to have a transcript available to them in respect of this Public Inquiry. However it explained that the complainant could request a copy of the transcript for a fee.

24. The Commissioner wrote to VOSA again on 20 October 2006. He asked VOSA to confirm that it was in fact now citing section 32 and section 31 as grounds for withholding the information requested. The Commissioner also advised that he considered it appropriate in this case, as regulator of the Data Protection Act 1998 (DPA) to consider the application of section 40 even though this had not been cited by VOSA because the operator in this case was a sole trader and therefore the information could constitute this operator's personal data. The Commissioner asked VOSA to also address certain issues surrounding its application of section 32 and section 31 and to explain the functions and role of the Traffic Commissioner.
25. In relation to section 32 the Commissioner asked VOSA to clarify which part of this exemption it was relying on. He also asked it to explain how and why it was of the view that the information requested constituted a court record.
26. In relation to section 31 the Commissioner asked VOSA to clarify which purpose in section 31(2) it was referring to. He also asked VOSA to explain more clearly and specifically why the public interest in maintaining the exemption outweighed the public interest in disclosure in this case.
27. The Commissioner also referred to section 40 and sought VOSA's comments as to whether it had considered section 40 of the Act and whether therefore it felt that disclosure of the information sought would have breached the DPA at the time of the request.
28. VOSA replied on 9 November 2006 and attached documentation explaining the role and functions of VOSA and its relationship with the Traffic Commissioner.
29. VOSA confirmed in this letter that section 32 was being cited in addition to section 31. It confirmed that by the time VOSA had received the request for information from the complainant on 16 November 2005, the Traffic Commissioner had already commenced regulatory activity in respect of the operator. It argued that this was because action had already commenced as a result of a previous public inquiry that took place in November 2004. Following that inquiry the Traffic Commissioner imposed conditions regarding maintenance and also gave a requirement that VOSA should undertake a licence performance re-appraisal approximately 12 months later. VOSA explained that at the same time as it was to undertake a licence performance re-appraisal the complainant provided information (which implied a breach of conditions already imposed at the previous inquiry of November 2004) to the Traffic Commissioner. This prompted the Traffic Commissioner's office to remind VOSA of its existing requirement to conduct a maintenance investigation. It also allowed the Traffic Commissioner to consider whether it would be necessary to hold a further public inquiry. Therefore VOSA argued that from the very outset, even before the complainant's FOI request the Traffic Commissioner was considering whether a further inquiry should be held.

30. VOSA confirmed that the report which is the subject of this request was completed by it following the examiner's visit on 15 November 2005 and was sent to VOSA's compliance team on 23 November 2005. The consideration of regulatory action against the operator continued within VOSA until mid December 2005 as further checks had to be made in connection with other aspects of the requirements of the operator's licence. On 15 December 2005 VOSA's Information Access Team was notified of a decision to transfer papers from their Compliance team to the Traffic Commissioner for consideration of a regulatory action.
31. VOSA therefore confirmed that the report was being used in the judicial process and it was held by the Traffic Commissioner in its judicial capacity. The report can be taken into account by the Traffic Commissioner for up to 5 years thereafter. VOSA stated that although it held a copy of the maintenance report it did so only in its capacity of providing administrative support to the Traffic Commissioner's tribunal role. Its administrative support functions in this capacity include identifying operators against whom it may be appropriate to take disciplinary action. This is achieved by gathering and evaluating a range of data and conducting routine and targeted checks on operators to ensure compliance with road traffic legislation as well as the operator's own licensing requirements. This information is then used to support the Traffic Commissioners to make informed decisions. The Commissioner's interpretation of VOSA's statement above is that it is arguing that although it held a copy of the report it is only held because of its administrative role for the Traffic Commissioner and it is obliged to obtain such reports on behalf of the Traffic Commissioner to enable him/her to carry out his role in monitoring compliance with licence conditions and taking disciplinary action against the licensees.
32. In relation to section 31 VOSA advised that as the operator was already subject to the Traffic Commissioner's regulatory action at the time of the FOI request it considered that any action undertaken by it in respect of inquiries on this operator's licence would automatically be covered by section 31(1)(g) and 31(2)(c). It did not however explain how disclosure would or would be likely to prejudice the Traffic Commissioner's purpose of ascertaining whether circumstances would exist to justify regulatory action against the operator. Neither did it clarify or expand on the public interest arguments it had referred to in its refusal notice.
33. In relation to section 40 VOSA confirmed that section 40 was briefly considered but the final response to the complainant relied on section 31 alone. VOSA confirmed that the Information Access Team had reviewed the case and concluded that it should have applied section 40 in addition to section 31.
34. The Commissioner emailed VOSA on 23 January 2007 to ask for further clarification on a number of points in relation to the application of section 40 and what information is given to the operator when an inspection is carried out. The Commissioner also explained that he was of the view the information was not exempt under section 31 but he would consider any further comments VOSA wished to make. In particular the Commissioner was not persuaded that disclosure of the information would or would be likely to prejudice the ascertaining

of whether any circumstances exist which would justify regulatory action bearing in mind VOSA has statutory powers of inspection. The Commissioner referred to his decision in the case of FS50073296 in which he also took this view.

35. VOSA responded on 8 March 2007. In this letter it explained the process by which the examiner carries out their inspections. This process is explained at paragraphs 41- 43 below.
36. VOSA maintained that as the operator was already subject to the Traffic Commissioner's regulatory action at the time of the complainant's request its enquiries on the operator's licence would automatically be covered by section 31(1)(g) and section 31(2)(c). It did not however clarify any further as to how it considered disclosure of the information requested would, or would be likely to, prejudice the exercise of the Traffic Commissioner's ability to ascertain whether circumstances which would justify regulatory action would arise in pursuance of section 35 of the Goods Vehicles (Licensing of Operators) Act 1995. Section 35 of this Act sets out the power of the Traffic Commissioner to hold inquiries. Section 26(1)(c) of this Act sets out the period (5 years) in which the maintenance report can be taken into account by the Traffic Commissioner in respect of regulatory action.
37. In relation to section 40, VOSA apologised for giving the impression that it had applied section 40 and confirmed that it was not applying section 40 to the maintenance report. It confirmed again that section 40 was briefly considered but the decision was made not to apply this exemption as it considered that the information was not personal information as it related to the operator's business life. VOSA confirmed that it relied on section 31 alone as its sole intention was not to prejudice the regulatory action that had already commenced in 2004. VOSA did not explain how that prejudice would occur.
38. VOSA did state that although it would be unable to meet the complainant's request it would be prepared to provide him with a copy of the PG13F form with redactions if the complainant wanted a copy. This is a summary of the examiner's findings which is provided to the operator following his examination. It confirms whether the check is satisfactory or not and also provides a "status of report" level A or B. The complainant confirmed in his undated letter received by the Commissioner on 27 March 2007 that he would like a copy but remained dissatisfied with VOSA's refusal to provide him with a copy of the full report. VOSA was asked to provide the complainant with a copy of the PG13F form on 1 April 2007.

Analysis

39. The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this notice, however the relevant points are summarised below. The procedural matters are considered initially and then matters relating to the application of the exemptions.

40. VOSA explained that it is a regulatory and prosecuting authority which undertakes such activities as required by legislation on behalf of the Secretary of State. VOSA also provides an administrative function to the Traffic Commissioner in respect of processing operator licence applications and as support staff for the Traffic Commissioner's tribunal function.
41. VOSA's duties include the routine and targeted checks on operators to check compliance with the operator's licensing requirements. Checks can also be carried out whilst vehicles are in service. Inspections are usually carried out every 12 to 18 months although these can be carried out more frequently where there appear to be continuing problems against a particular operator. Once this inspection has been carried out the examiner will notify the operator verbally or in writing of any immediate action or infringements that need to be dealt with. The operator is advised that the process will include either a report to the Traffic Commissioner or a report for prosecution where the results are found to be unsatisfactory. The Commissioner understands that although only the one report is compiled it is the examiner's findings and comments that determine whether it is a matter that requires referral to the Traffic Commissioner or for prosecution by VOSA itself.
42. The Commissioner is advised by VOSA that these reports are compiled such that they satisfy the conditions laid down in section 9 of the Criminal Justice Act 1967 for written witness statements. The operator is not given a copy of the full report although they would be advised if it was passed to the Traffic Commissioner, but does receive the summary form PG13F. The form in question was marked status level B which advises the operator that the shortcomings notified will be reported to the Traffic Commissioner for consideration. However it explained that in this case the operator should have been aware that the report was being passed to the Traffic Commissioner because of the Traffic Commissioner's decision at the public inquiry held in November 2004.
43. VOSA explained that the operator only receives a copy of the full report if a public inquiry is required and arranged. A set of papers is prepared and sent to the operator prior to the public inquiry to allow for a fair hearing and also the preparation of any mitigation in respect of the case.
44. For non-compliant vehicles enforcement action can be taken in the following ways:
 - where a vehicle is found by an examiner to be unroadworthy a prohibition notice could be issued immediately prohibiting vehicles from immediate use or
 - a delayed prohibition (allowing up to 10 days use from the date of the prohibition) could be issued for less immediate risks, or
 - by prosecuting drivers and vehicle operators and reporting to the Traffic Commissioner for Operator Licensing action
45. Traffic Commissioners are appointed by the Secretary of State under section 4 (2) of the Public Passenger Vehicles Act 1981 (PPVA 1981), and statutorily independent of VOSA. Under the PPVA 1981 Traffic Commissioners are responsible for granting public service vehicle (PSV) operator licences. Traffic

Commissioners are responsible for monitoring compliance with licence conditions and under section 17 of the PPVA 1981 can take disciplinary action against a licence holder if he considers it appropriate. If the Traffic Commissioner finds the operator to no longer be of good repute, of other appropriate standing or professionally competent, he must revoke the licence. In other circumstances he may revoke, suspend for a period of time or vary any condition attached to the licence or add a condition.

Procedural matters

Section 17 - Refusal Notice

46. Section 17(1) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should state in its refusal notice which exemptions are applicable and explain why the exemption applies within the time for complying with section 1(1) of the Act.
47. When VOSA wrote to the complainant on 15 December 2005 it explained that it needed to extend the 20 working days for issuing a response because the information requested had to be considered under one of the exemptions to which a public interest test applies. It added that this extra time was needed to determine where the public interest lies. It did not however identify the exemption it was relying on. Although the Act does allow a public authority to extend the time to consider the public interest under section 10(3) in relation qualified exemptions it must still within the time for compliance with section 1 provide a notice under section 17(1) of the Act clearly specifying the exemption in question which VOSA did not do in this case.
48. The Commissioner also notes that when VOSA received the complainant's request it sought further information to identify and locate the information required. Section 1(3) of the Act states that where a public authority requires further information in order to identify and locate the information requested the 20 working days do not start to run until the day the authority receives the further information. In this case the Commissioner considers this date to be 27 November 2005.
49. VOSA issued its refusal notice on 19 December 2005. Therefore although VOSA did therefore issue its refusal notice within the time for compliance outlined in section 10 of the Act it did not clarify which part of section 31 it was relying on and why it applied to the information requested and therefore breached section 17(1) of the Act.

Section 32 – Court records

50. Section 32 applies to information that constitutes court records. It is an absolute exemption and therefore there is no public interest test to be applied under the Act. The full text of section 32 can be found in the Legal Annex attached to this Decision Notice.

51. The Act is explicit in its definition that the word “court” encompasses tribunals in section 32(4)(a). The requested information was provided to the Traffic Commissioner by VOSA in order for the Traffic Commissioner to determine whether to hold a public inquiry against the operator. In carrying out public inquiries, a Traffic Commissioner is classified as a tribunal for the purposes of the Tribunals and Inquiries Act 1971. This judicial function stems from the PPVA 1981 referred to at point 45 above. The Commissioner is therefore content that this element of the exemption under section 32 of the Act has been satisfied. In view of this he has gone on to consider whether the requested information is of the type that is covered by this section of the Act.
52. Section 32(1)(a) provides for a specific type of information which is covered by the exemption. The Commissioner is aware that this section has been further analysed by the Information Tribunal Appeal Number EA/2005/0002 Mitchell v Information Commissioner. He has therefore paid particular attention to the findings of that case in reaching his decision in the present case. Paragraph 33 of the Tribunal’s decision in Mitchell clearly sets out the specific kind of information to which an exemption under section 32 of the Act can apply. Having reviewed the requested information, the Commissioner is satisfied that the information contained in the documents is indeed covered by the list of example documents set out in Mitchell.
53. Section 32(1)(a) states that information held by a public authority is exempt information if it is held only by virtue of being contained in any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter. VOSA has confirmed that although it holds a copy of the maintenance report it does so only in its capacity to provide administrative support to the Traffic Commissioner’s tribunal role.
54. Guidance produced by the Commissioner (Awareness Guidance No 9) states that:
- “the phrase “only by virtue of” implies that if the public authority also holds the information elsewhere it may not rely upon the exemption. For instance, a public authority may have a set of financial records which are the subject of litigation. If those records are only held for the purposes of litigation are contained in court records, then they are exempt. However, if it also held the records for another business purpose then they would not be exempt.*
- It is also important to remember that the proceedings for which the document covered by the exemption is held must actually have commenced. The exemption cannot be stretched to cover proceedings which are merely contemplated although in such cases it may be possible to rely upon the exemption relating to legal professional privilege”*
55. The Commissioner’s view is that VOSA did not hold the information requested only by virtue of being contained in any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter. In his view, VOSA held the information for the purposes of their own

- functions, particularly as there were no relevant proceedings in train at the time of the request.
56. VOSA explained in its letter of 9 November 2006 that the Traffic Commissioner had already commenced regulatory activity in respect of the operator at the time the complainant made his request on 16 November 2005. It explained that this action commenced at a previous public inquiry that took place in November 2004. Following that inquiry the Traffic Commissioner imposed conditions regarding maintenance and also gave a requirement that VOSA should undertake a licence performance re-appraisal in approximately 12 months. However there was no suggestion that this regulatory activity would automatically result in proceedings being taken against the operator.
 57. At the same time as VOSA was to undertake a licence performance re-appraisal the complainant provided information (which implied a breach of the conditions already imposed at the previous inquiry of November 2004) to the Traffic Commissioner. VOSA explained that the complainant's information prompted the Traffic Commissioner's Office to remind VOSA of its existing requirement to conduct a maintenance investigation. It also allowed the Traffic Commissioner to consider whether it would be necessary to hold a further public inquiry. Therefore, it argued that from the very outset, even before the complainant made his FOI request, and before the maintenance report that was prepared following the investigation, the Traffic Commissioner was considering whether a further inquiry should be held.
 58. In its letter of 9 November 2006 VOSA explained that the report was completed by it following the examiner's visit to the operator on 15 November 2005. This report was then sent to its compliance team on 23 November 2005. The consideration of regulatory action continued within VOSA during late November to mid December 2005 as further checks had to be made in connection with other aspects of the requirements of the operator's licence. On 15 December 2005, the Information Access Team at VOSA was notified of a decision to transfer papers from VOSA's Compliance Team to the Traffic Commissioner for *consideration* of regulatory action. VOSA confirmed that as at 22 December 2005 the Traffic Commissioner had not seen the enforcement case and no decision had been made on the public inquiry.
 59. The Commissioner notes therefore that as at 22 December 2005 the Traffic Commissioner had not seen the enforcement case and no decision had been taken by her on a second public inquiry. The Commissioner therefore takes the view that at the time the complainant made his request it could not be said that the information held by VOSA was held only in accordance with section 32(1)(a). VOSA has also made clear in its letter of 9 November 2005 that the purpose in compiling the report was in order to comply with its requirement to conduct a maintenance investigation on the operator and it also allowed the Traffic Commissioner to consider whether it was necessary to hold a further public inquiry.
 60. Therefore at the time VOSA refused the request from the complainant no inquiry had been initiated by the Traffic Commissioner and therefore, VOSA cannot

argue that it would have been correct to refuse the request at that time on the basis that it was information held only by virtue of being contained in any document as described in section 32(1)(a).

61. In light of the above considerations the Commissioner has concluded that the exemption contained in section 32 of the Act was not engaged.

Section 31 – Law Enforcement

62. VOSA applied section 31(1)(g) in its refusal notice dated 19 December 2005. This is a qualified exemption which requires the application of the public interest test. The full text of section 31 is quoted in the legal annex attached to this Decision Notice.
63. The attachment provided with VOSA's refusal notice indicated that it was relying on section 31(1)(g) in order to withhold the information requested by the complainant. It argued that disclosure *may* prejudice regulatory action by the Traffic Commissioner.
64. Section 31(1)(g) states that information is exempt if its disclosure under the Act would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
65. However the Commissioner noted that neither VOSA's refusal notice nor internal review specified which purpose in subsection (2) it was relying on.
66. The Commissioner therefore asked VOSA to clarify this issue and in its letter of 9 November 2006 VOSA explained that it was relying on subsection (2)(c). Subsection (2)(c) is defined as "the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise". The full text of section 31 is provided in the Legal Annex attached to this Notice.
67. Section 31 requires a degree of likelihood of prejudice to the exercise by any public authority of its functions for the purpose referred to in subsection 2(c). The Commissioner's view on the interpretation of this phrase has been clarified by the Information Tribunal in the case of EA/2005/0026 and follows the judgment of Mr Justice Munby in R(on the application of Lord) v Secretary of State for the Home Office (2003). In that case the Court concluded that likely "connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there "may very well "be prejudice to those interests, even if the risk falls short of being more probable than not." In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.
68. The Commissioner therefore sought VOSA's views in his letter of 20 October 2006 on how disclosure of the information would or would be likely to prejudice the Traffic Commissioner's ability to ascertain whether circumstances which would justify regulatory action by the Traffic Commissioner in pursuance of his duties under the PPVA 1981 exist or may arise.

69. VOSA's response of 9 November 2006 (and indeed its further letter of 8 March 2007) did not answer the question raised in point 66. However it did provide background information about the role and duties of the Traffic Commissioner and VOSA. Having considered this information and in the course of conducting his own enquiries the Commissioner notes that under section 68 of the Road Traffic Act 1988 (RTA 1988) a vehicle examiner may at any time, on production if so required of his authority, inspect any vehicle to which section 68 applies and for that purpose detain the vehicle during such time as is required for the inspection, and may at any time which is reasonable having regard to the circumstances of the case enter any premises on which he has reason to believe that such a vehicle is kept. A person who intentionally obstructs an examiner in the exercise of his powers is guilty of an offence under the RTA 1998.
70. In view of the above powers and in the absence of any supportive evidence from VOSA, the Commissioner considers that it would be unlikely that disclosure of the information requested would or would be likely to prejudice the specific purpose described in section 31(2)(c) of the Act – that of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise because VOSA would still have a duty to inspect operator's vehicles and, if necessary, pursue formal regulatory action. Arguments raised by VOSA about disclosure prejudicing regulatory action by the Traffic Commissioner are not relevant as the exemption states that the prejudice has to specifically be to the ability to ascertain whether the circumstances justify regulatory action, not to prejudicing the regulatory action itself.
71. The Commissioner therefore does not find that there is a significant risk of prejudice to the specific purpose set out in section 31(2)(c) of the Act.
72. The Commissioner did also ask VOSA to provide its public interest arguments when replying to his letter of 9 November 2005. VOSA's response failed to address this issue. However as the Commissioner's decision is that section 31(2)(c) exemption is not engaged, the public interest arguments are not explored further in this Decision Notice.

Section 40 – Personal Data

73. The Commissioner has considered the application of section 40(2) although VOSA has said that it is not relying on this exemption in order to withhold the requested information.
74. The Commissioner considers 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 was entitled to do so in appropriate cases. In this case the Commissioner considers that as he is also the regulator and enforcer of the Data Protection Act 1998, it was appropriate to refer to the application of section 40 since he considered there was a section 40 issue relevant to this case.
75. Section 40 of the Act contains an exemption for personal information. It provides, among other things, that information is exempt if it is the personal data of a person other than the applicant (as is the case in this instance) and if disclosure

to any member of the public would breach one or more of the data protection principles. The text of the exemption contained at section 40(2) of the Act is contained within the attached legal annex.

76. The DPA defines personal data in section 1(1) as:

“data which relate to a living individual who can be identified-

- a) from those data, or
- b) from those data and other information which is in the possession of, or is likely to come in the possession of, or is likely to come in the possession of, the data controller,

and includes any expression of opinion about the individual and any indications about the intentions of the data controller or any other person in respect of the individual”

77. The Commissioner notes that the subject of the information requested operates as a sole trader. As such 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 may impact on his private life.

78. Having satisfied himself that the information is personal data the Commissioner then considered whether disclosure would breach any of the data protection principles. In this case, the Commissioner considers that the most relevant of the data protection principles is the first principle which provides that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- a) at least one of the conditions in Schedule 2 is met, and
- b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

79. The Commissioner considers the condition that is potentially relevant in this case is in paragraph 6(1) of Schedule 2:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or third parties to whom the data is disclosed, except where the processing is unwarranted in any particular case by reason of the prejudice to the rights and freedoms or legitimate interests of the data subject.”

80. In considering the application of section 40 to this case the Commissioner has paid particular attention to the decision of the Information Tribunal in *ICO v House of Commons EA/2006/0015* and *0016*.

81. In assessing fairness the Commissioner firstly considered whether any of the general factors listed in his guidance were relevant to this case. These factors include:

- Would the disclosure cause unnecessary or unjustified distress or damage to whom the information relates?
 - Would that person expect that his or her information might be disclosed to others?
 - Had that person been led to believe that his or her information would be kept secret?
 - Had that person expressly refused consent to the disclosure of the information?
82. The Commissioner notes that VOSA did not provide the operator with a copy of the examiner's report at the time of the inspection (in accordance with its policy) and therefore he would not be aware of the details of the examiner's report, any comments made or any suggested action which should be taken against him. It is also reasonable to assume that the operator in this case would have a legitimate expectation that the contents of the report would not be made public unless he is subject to a public inquiry. The Commissioner notes that the Traffic Commissioner can take regulatory action up to 5 years after the date of a maintenance inspection, if an operator's compliance history warrants it. At the time of the request the Traffic Commissioner had made no decision as to what disciplinary action should be taken against this operator. However VOSA explained that in view of his previous breaches the operator would have been aware of the Traffic Commissioner's previous comments that "any future breaches would lead to them having to show cause why regulatory action should not be taken against the licence". In view of the potential of facing a further public inquiry, the Commissioner concludes that the operator would have a reasonable expectation that information which is likely to be used in the consideration of regulatory action against him including a further possible public inquiry would not be disclosed to the public in general unless and until any public inquiry takes place.
83. The Commissioner notes that a crucial factor in this case is that the FOI request was made at a time when a public inquiry was anticipated by VOSA following its investigation but not yet known by the operator. The Commissioner therefore considers that disclosure of this report before a decision had been made by the Traffic Commissioner to conduct a further public inquiry and before the operator was aware of the full details of the case against him and had the opportunity away from public scrutiny to examine, prepare and defend his case before the Traffic Commissioner is in essence, inherently unfair.
84. The Commissioner accepts that there is a legitimate interest in the public being made aware of the safety of a public service vehicle at the earliest opportunity. However the protection of public safety is provided for by the powers of VOSA's vehicle examiners to issue prohibition orders immediately if an operator has breached his licensing conditions thereby ensuring that in appropriate cases vehicles are immediately taken off the road. In view of this the Commissioner considers that the legitimate interest of the operator in being able to prepare and consider the case against him away from public scrutiny is paramount.

85. Taking into account all of the above, the Commissioner is satisfied that in this case it would breach the first principle of the DPA to disclose the maintenance report on the basis that the release of this information at the time of the request would be unfair.

The Decision

86. The Commissioner's decision is that the information requested is exempt under section 40(2) of the Act because the reports constitute the personal data of the operator and disclosure would breach the first data protection principle.
87. However, the Commissioner has also decided that VOSA incorrectly applied section 31 and section 32 of the Act.
88. Furthermore, the Commissioner has decided that VOSA has breached section 17(1) of the Act by failing to specify clearly the exemption it was relying on and why it applied.

Steps Required

89. The Commissioner requires no steps to be taken.

Other matters

90. The Commissioner has concluded that the section 40 exemption was applicable to the information at the time the request was received.
91. However, the Commissioner has also taken the view that if a request for the reports were to be made now it would no longer be exempt under section 40 of the Act since the operator has now been the subject of a further public inquiry in March 2006. The report requested by the complainant was an integral part of the Traffic Commissioner's decision to decide to hold a further public inquiry. Full details of his compliance history were made known at this time and resulted in the operator being ordered to reduce the number of vehicles he operated. Although – as a result of his formal decision he is unable to include this as a legal requirement (a "step") within this notice, he very much hopes that VOSA will now disclose the report, subject to any necessary redaction of personal data.

Right of Appeal

92. 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@dca.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 17th day of September 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

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).”

Court Records

Section 32(1) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
 - (i) a court, or
 - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.”

Section 32(2) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
- (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.”

Section 32(3) provides that –

“The duty to confirm or deny 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 this section.”

Section 32(4) provides that –

“In this section-

- (a) "court" includes any tribunal or body exercising the judicial power of the State,
- (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,
- (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
- (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.

Section 40

- (1) 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.
- (2) 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.
- (3) 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.
- (4) 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).
- (5) 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).
- (6)** 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.
- (7)** 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.