

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2013

Public Authority: Vehicle Operator Services Agency
Address: Second Floor
Berkeley House
Croydon Street
Bristol
BS5 0DA

Decision (including any steps ordered)

1. The complainant has requested a copy of the Vehicle Operator Services Agency (VOSA) accidents and defects database. VOSA has relied on several exemptions to withhold the information: the information is personal data (section 40), the information was provided in confidence (section 41), the information is subject to a statutory bar (section 44) and the information is intended for future publication (section 22).
2. The Commissioner's decision is that the information held on the database is prohibited from disclosure by virtue of the Enterprise Act 2002. As such the section 44(1)(a) exemption of the FOIA is engaged and VOSA has correctly withheld the requested information.

Request and response

3. On 9 January 2013, the complainant wrote to VOSA and requested information in the following terms:

"Please provide a copy of the VOSA Accidents and defects database. I understand the project involves police using Vehicle Operator Services Agency (VOSA) examiners to inspect vehicles involved in accidents where it is alleged or suspected that a defect may have been a causal factor. As referred to in the DfT Information Asset Register, the link is attached http://data.gov.uk/dataset/dft_information_asset_register. Please export the data as a csv or an excel spreadsheet."

4. On the same day the complainant wrote again to VOSA which referenced a response she had received to another information request. In this response the complainant was directed to a link to information on the Department for Transport's (DfT) website under the Road Safety section¹. The complainant was unsure whether the information published at this link was the information she requested so queried this with VOSA.
5. VOSA responded on 16 January 2013. It stated that the database published by the DfT contains information completed by all UK police forces on accidents, a small proportion of which would also be included on the database held by VOSA. As such VOSA considered any information also included on the DfT database to be exempt from disclosure under section 21 of the FOIA (information accessible by other means).
6. VOSA explained that any information it held would relate to a small number of incidents as VOSA only becomes involved in an incident if it involves a Heavy Goods Vehicle (HGV) or Public Service Vehicle (PSV), there is a fatality, or the police request an examination by VOSA. VOSA informed the complainant it did hold a database in relation to reported defects on vehicles but considered it was exempt from disclosure on the basis of section 44 of the FOIA – prohibitions on disclosure. VOSA explained it considered the Enterprise Act 2002 (EA2002) prohibited disclosure of the requested information.
7. Following an internal review VOSA wrote to the complainant on 16 February 2013. It upheld its reliance on section 21 and 44 and also explained that it considered that Defect Reports received by members of the public about alleged defects on their vehicles would be exempt under section 40(2) and information provided by manufacturers concerning their investigations into an alleged defect is exempt under section 43(2). VOSA also considered section 22 to be applicable and explained that it already publishes vehicle recall data and has agreed that non-code of practice on safety defects actions will be published every 6 months from July 2013 so any information in this category on the database is exempt on the basis of section 22.

¹ <http://data.gov.uk/dataset/road-accidents-safety-data>

Scope of the case

8. The complainant contacted the Commissioner on 5 March 2013 to complain about the way her request for information had been handled. In doing so the complainant accepted that some information may be published in July 2013 but that the request was for access to the full database. The complainant did not accept that all the information in the database would be 'specified information' for the purposes of section 44 of the FOIA.
9. The Commissioner considers the scope of his investigation to be to determine whether VOSA has correctly applied sections 21, 22, 40(2), 43(2) and 44(1)(a) to withhold the information on the accidents and defects database.

Reasons for decision

10. Section 44(1)(a) of FOIA states that information is exempt if its disclosure is prohibited by or under enactment.
11. VOSA states that it is prohibited under Part 9 section 237 of the EA2002 from disclosure of "specified information" as defined in section 238 of the EA2002. The Information Tribunal has previously been asked to consider the use of section 237 as a statutory prohibition on disclosure and has concluded it can be used in this way².
12. However, in order for the prohibition to be applicable the Commissioner must first consider if the information would be "specified information". Section 238 of the EA2002 defines specified information as information that:

"comes to a public authority in connection with exercise of any function it has under or by virtue of –

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

(b) an enactment specified in Schedule 14;

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

² *Dey v ICO and OFT (EA/2006/0057)*

The Tribunal has also previously established that if information is received by a public authority in connection with the performance of any of its functions under the EA2002 it will constitute "specified information". In this case the information that is being withheld can be categorised as information on safety recalls, non-code actions and safety defect investigations.

13. This information would have been received by the OFT but the Commissioner questioned VOSA further on whether the information was received in the exercise of a function under the EA2002.
14. VOSA explained that the General Product Safety Regulations 2005 (GPSR2005)³ implement the EU directive on product safety – the General Product Safety Directive 2001/95/EC. The GPSR2005 is made under the powers in section 2(2) of the European Communities Act 1972. For this reason VOSA argues that the information on the database is "specified information" as it is information provided to VOSA in the exercise of a function in an order specified by the Secretary of State.
15. The Commissioner accepts that the Secretary of State is designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to general product safety. It is also accepted that the Secretary of State in exercise of these powers made the GPSR2005. VOSA has also confirmed that the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information)(Amendment and Specification) Order 2003⁴ specifies the GPSR as an order to which section 238 of the EA2002 applies.
16. For this reason the Commissioner acknowledges that the GPSR2005 would fall within category (c) of section 238(1) of the EA2002 as it is subordinate legislation specified by the Secretary of State.
17. The Commissioner has next considered whether the information on the database is information which has come to VOSA in the exercise of any function within the GPSR2005. Under the GPSR2005 producers shall not place a product on the market unless it is safe and the distributor shall monitor the safety of a product placed on the market. Distributors are also required to cooperate with the enforcement authority to avoid risks. As the authority responsible for vehicle safety, VOSA is considered an enforcement authority for the purposes of the GPSR2005.

³ <http://www.legislation.gov.uk/ukxi/2005/1803/made>

⁴ <http://www.legislation.gov.uk/ukxi/2003/1400/contents/made>

18. On this basis, information passed to VOSA by a producer or manufacturer for the purposes of an investigation into a potential safety defect would have come to VOSA in connection with the functions it has by virtue of the GPSR2005.
19. Whilst the Commissioner has accepted that the information on safety recalls, non-code actions and safety defect investigations would be "specified information" he has also considered section 237(2) of the EA2002. This sets out that such information cannot be disclosed during the lifetime of the individual or while the undertaking continues in existence. The undertaking refers to the business of an undertaking and would, in this case, mean the producers. The Commissioner has received no evidence to suggest that the undertaking is no longer in existence so is content that section 237(2) is applicable.
20. Sections 239-243 of the EA2002 provide certain 'gateways' for disclosure of specified information. These gateways do not compel VOSA to disclose information but do allow it to disclose information for the purposes set out in these sections. In the *Dey* case the Information Tribunal commented on the gateways and stated that "*it gives a power to disclose, not a duty*". The Commissioner therefore accepts that VOSA has discretion as to whether to use the gateways to disclose specified information.
21. In this case VOSA has stated it does not consider any of the gateways to be applicable. VOSA has stated that in certain circumstances it may seek consent for disclosure (although it is not obliged under the EA2002 to do so) but given the size of the database in question it would be impractical to seek and obtain consent for all of the data. VOSA also highlighted that some of the information within the database would be published i.e. the non-code actions but at the time of the request was not routinely published. However, most of the information on the database was not information that VOSA had published or intended to publish, particularly papers on investigations into alleged safety defects. VOSA did not consider it was practical to obtain consent (and was not obliged to do so) and did not accept that any of the other 'gateways' were applicable; the Commissioner therefore accepts that there was no obligation on VOSA to disclose the specified information.
22. The Commissioner's decision is that VOSA has correctly applied section 44(1)(a) to withhold all the requested information in this case and he has therefore not gone on to consider the application of the other exemptions.

Right of appeal

23. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

24. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
25. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Pamela Clements
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Information Commissioner's Office
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