IN THE FIRST-TIER TRIBUNAL **Case No. EA/2009/0119 and EA/2009/0102**

GENERAL REGULATORY CHAMBER [INFORMATION RIGHTS]

ON APPEAL:

Information Commissioner's Decision Notices: FS50178905 and FS50179473 Dated (respectively): 4 November 2009 and 18 November 2009.

Appellant: DUNCAN CARINS

Respondent: THE INFORMATION COMMISSIONER

Additional Party: THE DRIVER and VEHICLE LICENSING AGENCY, an EXECUTIVE AGENCY of THE DEPARTMENT OF TRANSPORT]

On the papers

Date of decision: 2 September 2010

Before

CHRIS RYAN
(Judge)

and

JACQUELINE BLAKE
IVAN WILSON

Subject matter: Whether information held s.1
Public interest test s.2
Vexatious or repeated requests s.14
Cost of compliance and appropriate limit s.12
Duty to advise and assist s.16
Law enforcement s.31

Cases: ***R (on the application of Lord) v Secretary of State for the Home Office*** **[2003] EWHC 2073 (Admin),**
Brown v Information Commissioner **EA/2006/0088**
Roberts v Information Commissioner **EA/2008/0050**

IN THE FIRST-TIER TRIBUNAL

Case No. EA/2009/0119 and EA/2009/0102

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notices are substituted by notices in identical form save that, for the reasons set out in this Decision,:

1. In the case of FS50178905, DVLA is directed to disclose the material set out in the Confidential Schedule to this Decision; and
2. In the case of FS50179473, DVLA is found to have been in breach of FOIA section 16 in the manner in which it responded to the Appellant's request, although it is not required to take any steps to remedy the breach.

REASONS FOR DECISION

Introduction

1. These combined appeals arise from a number of requests for information made by the Appellant to the Driver and Vehicle Licensing Agency ("DVLA") an Executive Agency of the Department for Transport. The Appellant's complaint to the Information Commissioner about the way in which DVLA handled his requests led to the two Decision Notices identified in the heading to this decision.

2. The parties consented to the appeals being determined, without a hearing, on the basis of documents and written submissions they provided to us. The documents included a closed bundle containing some of the materials which DVLA refused to disclose, which was not made available to the Appellant, for obvious reasons.

3. At the time when the appeals were launched this Tribunal was constituted as the Information Tribunal. However, by virtue of the

Transfer of Tribunal Functions Order 2010, it is now constituted as a First-tier Tribunal.

Background information.

4. The Vehicle Excise and Registration Act 1994 ("VERA") imposes on those who keep a vehicle on the public road an obligation to pay vehicle excise duty. If a vehicle is kept off the road then no payment falls due, provided a Statutory Off Road Notification ("SORN") is completed and submitted to DVLA. This must be done each year. When DVLA becomes aware that a registered vehicle keeper has neither paid duty on it, nor made a SORN declaration that it is off the road, it writes to him or her claiming the duty but offering to settle the matter by payment of a Late Licensing Penalty ("LLP"). It follows that failure to complete and file a SORN declaration on time may lead to a penalty even though, had the declaration been made, the vehicle would not have attracted any payment of duty. The scheme is described as the "Continuous Registration" scheme.

5. DVLA has procedures in place for dealing with cases where the recipient of an LLP puts forward reasons for mitigating the penalty. There is obviously no limit to the number of possible mitigating factors and the decision on whether a particular circumstance will be accepted as justifying a waiver of the penalty will ultimately be a matter of discretion for the Minister, or those to whom the power is delegated. However DVLA has identified a number of common occurrences that are raised by recipients of an LLP and has determined the broad approach that its staff should adopt to each one. This includes guidance on whether the mitigation should be accepted at face value or should only be accepted if supported by evidence.

6. In the course of this Appeal, and in communications between the parties prior to its commencement, the possible justifications for waiving a LLP have variously been identified as "mitigating circumstances", "exceptional circumstances", "compassionate reasons" or by the use of similar phrases. Each one may be capable of including different types of mitigating factors, depending on the circumstances in which it is used. For the purposes of this Appeal, however, it seems to us that the materials which DVLA has refused to disclose to the Appellant would fall comfortably within any of them. We reach that conclusion having reviewed the materials in question, which were made available to us in the closed bundle referred to above.

7. Having dealt with those preliminaries we now turn to consider each of the Appeals before us.

First Request for Information (Appeal 0102)

8. This was made by the Appellant on 30 March 2007 and was in two parts. The first part asked "What in general terms constitute 'exceptional circumstances'?" and the second requested a "copy of your enforcement concordat/policy". We will deal with each in turn.

"What in general constitutes 'exceptional circumstances'"

9. In correspondence the Appellant made it clear that the request was intended to apply to the exceptional circumstances that the DVLA would consider justified an individual being excused a penalty, even though he or she had failed to complete and return a SORN form in time. The request was refused and the Appellant complained to the Information Commissioner.

10. In the course of the Information Commissioner's investigation of that complaint DVLA provided the Appellant with a document summarising the exceptional circumstances which are taken into account, provided supporting evidence is produced. However, it continued to resist disclosure about those circumstances where no evidence is required. Its basis for originally refusing the request for that category of information, (and for maintaining its opposition to disclosure during the Information Commissioner's investigation and during this Appeal), was FOIA section 31(1)(d). The relevant part reads:

> *"Information … is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*
> *…*
> *(d) the assessment or collection of any tax or duty or of any imposition of a similar nature…"*

11. The exemption is a qualified exemption with the result that, if it is found to apply to particular information, disclosure may be refused only if the public interest in maintaining the exemption outweighs the public interest in disclosure.

12. The Appellant argued that the exemption was not engaged, first, because the subject matter did not fall within subsection (1)(d) and, second, because the relevant prejudice was not "likely" to result from disclosure. He also argued that, even if the exemption was engaged, the Information Commissioner should have concluded that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

13. Engagement of the exemption raises the question of whether a SORN penalty is a tax, a duty or an imposition of a similar nature. DVLA argued, and in his Decision Notice the Information Commissioner agreed, that the exemption applied to a penalty for failing to complete an annual SORN declaration. The Appellant argued that this was not

so because, although Vehicle Excise Duty ("VED") was a tax, the SORN penalty was not. He drew attention to a number of differences in the way that VED is accounted for and managed and contrasted these with the treatment of SORN penalty payments. These included the fact that VED is paid into the Vehicle Excise Duty account, operated by DVLA, whereas SORN penalty payments are treated as a civil debt owed to the Crown and, upon being paid, are credited to the Consolidated Fund operated by the Treasury. The Information Commissioner conceded that a SORN payment is a fine or penalty, as opposed to a "tax". However, he argued that it is not the precise characterisation of the payment that is determinative, but the effect of disclosing to the public the list of matters that might persuade the DVLA to waive the obligation to pay it. He said that the effect of disclosure would be to facilitate the activities of those who wished to avoid their obligation to pay VED, because the same exceptional circumstances apply to both non-payment of VED and failure to make a SORN declaration.

14. VED itself clearly falls within sub-section (d). It is, as its name clearly indicates, a "duty". A system that imposes a penalty for failure to pay it also falls comfortably within the term. Arguably, its meaning would have to be stretched to apply to a case where the penalty becomes payable, not because the vehicle owner has kept his or her vehicle on the road without paying the duty, but because he or she failed to complete a declaration confirming that it was off the road. However, in our view, it is quite capable of extending to a financial sanction imposed on those who fail to comply with a process for collecting information to determine whether or not the duty in question has fallen due. Even if it were thought that this stretched the term too far, the exemption applies also to "any imposition of a similar nature to" the duty, and we have no hesitation in concluding that the penalty falls within the meaning of that phrase.

15. The Appellant's second argument on engagement was that the Decision Notice did not deal adequately with the question of whether the prejudice identified in section 31(1)(d) would arise, or would be likely to arise, if the withheld information were to be disclosed. The Information Commissioner's conclusion on the point in his Decision Notice was that public awareness of information on the particular exceptional circumstances which had been withheld *"would be likely to reduce the deterrent effect of the LLPs and in doing so, reduce the incentive of the individual to either license their vehicle or declare SORN, which in turn would be likely to prejudice the collection of VED."* He reached that conclusion having first considered the level of risk which the word "likely" connotes, basing himself on *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), in which it was held that "*likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests…even if the risk falls short of being more probable than not".* The Appellant's written submissions

to us included an annex, extending to 15 pages of closely printed text, analysing the word "likely". However, neither that document nor the arguments set out in other materials submitted to us by the Appellant persuaded us that the Information Commissioner's analysis of the law, or his conclusion on the facts of this particular case, was in error. We are satisfied that disclosure of the mitigating or exceptional circumstances that do not require supporting evidence would be likely to prejudice the assessment or collection of the monies claimed under an LLP. Less directly, but still sufficiently connected to be taken into account for this purpose, it would be likely to prejudice the collection of VED.

16. Having therefore decided that the exemption is engaged we next have to consider whether, in the language of FOIA section 2(2)(b), *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".*

17. The Grounds of Appeal set out the essence of the Appellant's criticism of the conclusion in the Decision Notice in favour of maintaining the exemption. This was that the Information Commissioner had *"not provided sufficient and justifiable reasons as to why he believes that it is in the public interest for the DVLA to maintain the exemption".* When the Appellant then expanded on that summary he appeared to become drawn into a separate argument on the impact on the public interest balance of the perceived absence of an enforcement policy as well as a number of arguments that did not seem to us to have relevance to the issue at stake. These included a number of allegations about the degree of evasion which appears to occur and DVLA's inability, in the Appellant's view, to prevent or reduce it.

18. In the Decision Notice the Information Commissioner considered the public interest arguments in favour of disclosure, which were that it was desirable that the public could see that the decision-making process in this area was operated in a reasonable, fair and consistent manner. He also acknowledged that transparency and accountability were in general terms desirable. He set against those factors the public interest in the government being able to collect the correct amount of VED and in therefore not providing those who wished to evade their liability with information that would make it easier for them to do so. He also considered the interests of the general body of tax payers who may ultimately have to pay more to cover any shortfall in VED collection caused by evasion.

19. We believe that the Information Commissioner took account of the correct factors for and against maintaining the exemption and that he gave appropriate weight to each of them. We do not believe that his conclusion, that the public interest in favour of maintaining the exemption did outweigh the public interest in disclosure, can be faulted. We therefore conclude that he was correct to conclude that DVLA had

been justified in refusing to disclose the information withheld in its response to this part of the First Request.

"a copy of your enforcement concordat/policy".

20. It is accepted by all parties that this was intended to refer to the policy in respect of the Continuous Registration scheme.

21. In his Decision Notice the Information Commissioner accepted, on the balance of probabilities, that DVLA did not hold an enforcement policy document at the time when the request was made and that it had accordingly acted in accordance with FOIA section 1 when it rejected the request on that basis. Paragraph 12 of the Decision Notice recorded that the Information Commissioner had relied on a statement from DVLA that *"…there are no policy or guidance documents available".*

22. At paragraph 26 of the Decision Notice the Information Commissioner expanded on the explanation that had been provided by DVLA as follows:

> *"The DVLA has explained to the Commissioner that when the [scheme described in paragraphs 4 – 6 above] was first established it was decided that the primary enforcement channel would be via the civil court. It was not therefore considered necessary to have a separate enforcement policy document. The DVLA has also confirmed that it does not hold anything which could be used as a substitute for this document. It has further explained that its 'Operating Instructions' contains internal procedural instructions as opposed to policy considerations"*

23. The Grounds of Appeal included a very extensive recital of communications on this topic between DVLA, on the one hand, and either the Appellant or the Information Commissioner, on the other. It was accompanied by a careful analysis of the language used as the basis for the Appellant's conclusion that the DVLA had misunderstood his request and/or misrepresented certain facts. It was difficult for us to extract from the detail the essence of the Appellant's complaint. However, in his subsequent written response to the Information Commissioner's Reply he said:

> *"It should (sic) stated at the outset that it is fairly clear that the DVLA do not have (and still do not have) an enforcement policy and therefore the conclusion reached by the IC about its existence is not at issue"*

A little later in that document he acknowledged that the fact that the DVLA did not have an enforcement policy was a matter that had already been resolved. Elsewhere in his submissions he relied upon

the perceived absence of a policy to support other arguments including, as we have mentioned, his argument on the public interest balance to be applied to the first part of his request. In the Appellant's final written submission to us, very shortly before we met to determine the appeal, he appeared to have demoted the point to one of a number of points which he wished us to deal with because he *"would like to ensure that the Decision Notice … as finally produced is a fair and accurate account".*

24. We have had the advantage, which the Appellant did not have, of studying the withheld material in full. This included certain guidance materials for staff variously described within DVLA as "enforcement instructions" or "operating instructions". It seemed to us, when we first met to determine the appeal, that the instructions did contain material that it would be appropriate to characterise as a statement of policy, alongside a great deal more material on the detailed implementation of the Continuous Registration scheme. We raised this thought with DVLA and the Information Commissioner and invited them to comment. DVLA responded that, when read in context, the statement recorded in paragraph 12 of the Decision Notice was a correct response to the request.

25. It is a truism that FOIA applies to information and not documents. And although the terms of the request may have suggested that the Appellant was seeking a copy of a particular policy document, we do not believe that this absolved DVLA from considering what information it held about its policy in this area, even if recorded with other information falling outside the scope of the request. We think that it was, in any event, wrong when it stated to the Information Commissioner that its operating instructions did not contain policy considerations. We think that they did and that the Information Commissioner was wrong to conclude that the information requested was not held. We have set out in a Confidential Schedule to this Decision the extracts from the Operating Instructions which, in our view, constitute information about the Continuous Registration enforcement policy, which should be disclosed. We should make it clear that this is not the entirety of policy information, but only those parts of it that we believe can be disclosed without causing, or being likely to cause, prejudice to the interests protected under FOIA section 31(1)(d). The Schedule should remain confidential until the period for appealing this decision has expired without an appeal being launched or, in the event that an appeal is launched, until the relevant appeal tribunal has ordered otherwise.

Second Request for Information (Appeal 0119)

26. On 15 June 2007 the Appellant submitted a request for information on the same general subject matter as the First Request. It was in 21 parts but the only ones that are still in issue are the following:

a. “Over the last 2 years, how many level 3 complaints have been dealt with in the DVLA.” (Original question 4)

b. "Numbers of `appeals' (corporate complaints,) received in the last two years plus details of the appellant success rate and at what stage in the process”. (Original question 6)

c. "Can you advise on the following ; from the monies collected from the LLP scheme over the last two years, how much is spent on:

a) road safely schemes and please specify which scheme these were and the amount actually contributed from the LLP monies;

b) crime reducing initiatives and please specify which initiatives these were and the amount actually contributed from the LLP monies." (Original question 13)

d. "Can you advise me what constitutes compassionate ground " (Original question 14)

e. "Can you supply me a copy of your policy/guidance on this area as to what falls into this category?" (Original question 15)

f. “Can you advise me under which section of the legislation allows for compassionate reasons to be excluded from payment.” (Original question 16)

g. “If the category compassionate reasons includes, amongst other things, all the cases of exceptional circumstances, then can you advise me how many exceptional circumstances cases there have been in the last two years?” (Original question 19)

h. “Can you break down the compassionate reasons into other broad areas and supply the figures for these areas over the last two years?" (Original question 20)

We will deal with each in turn, to the extent that arguments presented to us address them specifically. Having done so we will then consider a number of other arguments that are more general in nature.

Arguments specific to particular requests.

27. “Over the last 2 years, how many level 3 complaints have been dealt with in the DVLA.”

a. Although the Information Commissioner indicated in his submissions on the Appeal that no issue arose in respect of this request the Grounds of Appeal raised two issues in respect of it, which we should consider.

b. The first issue raised stemmed from a complaint that the Information Commissioner had taken too long on part of his investigation. The Appellant speculated that part of the information covered by this request, (records of level 3

complaints before January 2006), may have been in existence when he first made his request, but may have been deleted by the time the relevant part of the investigation had been completed. He did not suggest that there had been any deliberate act of destruction to thwart his request, just that routine data culling may have had that result. However, there was no evidence that this is what had happened and the Information Commissioner stated that his investigation led him to conclude that DVLA did not in fact start to record the relevant information until January 2006.

c. Even if the passage of time had caused data to become unrecoverable, we were not persuaded that the Information Commissioner was culpable or that, even if he were, this would be capable of giving rise to a ground of appeal. But the arguments are irrelevant because we find, on the facts, that DVLA never did hold the information on complaints submitted prior to January 2006.

d. The second issue arises from the Appellant's complaint that DVLA breached FOIA section 16, in that it failed to give him the advice and assistance to which he was entitled and which may have enabled him to overcome DVLA's refusal to disclose the information in question on the ground that the cost of doing so would have exceeded the limit imposed by FOIA section 12. As this argument applied to other requests also it is dealt with below with the other grounds of appeal having general effect.

28. "Numbers of `appeals' (corporate complaints,) received in the last two years plus details of the appellant success rate and at what stage in the process".

a. The request was refused by DVLA because, it said, FOIA section 12 permitted it to do so if the cost of complying would have exceeded a specified limit. It argued that it did.

b. The relevant part of section 12 reads:

> *1) 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.*
>
> *…*
>
> *(3) … "'the appropriate limit" means such amount as may be prescribed…*
>
> *…*
>
> *(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.*

c. The regulations in question are the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the fees regulations'). They provide that the limit applicable in

this case is £600 (regulation 3(2)), calculated at £25 per hour (regulation 4(4)) taking into account only staff time spent on identifying, locating, retrieving and extracting relevant information (regulation 4(3)). They also provide (regulation 5) that more than one request received from the same person on the same or similar subject matter may be taken together in calculating whether the limit would be exceeded.

d. The Information Commissioner accepted DVLA's statement that this was information that it did not routinely capture and that it would have to be searched for manually through its records of 1,419,899 LLPs in 2005 and 1,274,143 in 2006. It estimated the time that would be involved which, on our calculations, would have resulted in an estimated cost in excess of £50,000. On that basis the Information Commissioner decided that DVLA had been entitled to refuse the request for information under section 12.

e. The Appellant criticised the manner in which DVLA had produced costs figures for the Information Commissioner, the time that was taken on the issue during the investigation and the Information Commissioner's perceived failure to verify the figures presented to him. However, he ultimately did not put forward any material or arguments that seriously challenged the evidence summarised in sub-paragraph d. above. He presented no case to suggest that the Decision Notice contained any factual or legal error in this respect. He suggested that we should take into account another decision of this Tribunal concerning a cost estimate. However, that was a case decided on its particular facts and costings and provided no assistance in the circumstances of this case.

f. We see no error in the estimate on which the Information Commissioner relied or any reason to question his conclusion that the number of records was correct and the reason for requiring manual investigation was convincing. Accordingly we conclude that no case was made out to the effect that the Information Commissioner was wrong to conclude that the DVLA had been entitled to refuse this request under section 12.

29. "Can you advise on the following ; from the monies collected from the LLP scheme over the last two years, how much is spent on:

a) road safely schemes and please specify which scheme these were and the amount actually contributed from the LLP monies;
b) crime reducing initiatives and please specify which initiatives these were and the amount actually contributed from the LLP monies."

a. The Information Commissioner decided that, on a balance of probabilities, DVLA did not hold information at the relevant time which fell within the scope of this request. The Appellant did not make any direct challenge to that finding. However, he did raise

a number of general criticisms about the actions of both DVLA and the Information Commissioner, which we consider later in this Decision.

30. "Can you advise me what constitutes compassionate ground "

    a. DVLA relied on FOIA section 14 in rejecting this request. It did not specify any particular sub-section of that provision but the Information Commissioner decided that it had intended to rely on section 14(2). That provides:

        "Where a public authority has previously complied with a request, for information which was made by any person, it is not obliged to comply with a subsequent, identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request"

    b. In his Decision Notice the Information Commissioner decided that the request in respect of "compassionate grounds" was substantially similar to earlier requests by the Appellant in respect of "exceptional circumstances" and that DVLA had therefore been entitled to refuse disclosure under section 14(2). However, in his Reply to the Grounds of Appeal he said that he now accepted that he should instead have found that DVLA did not hold the information requested. He added that he reached that conclusion having considered parts of the withheld material which the Appellant had not seen. In a subsequent Written Submission the Appellant appeared to accept both the change of approach and the conclusion reached. However, we have already decided that some information on the broad policy that DVLA applies should be disclosed. It is, in our view, information that serves just as well to provide broad guidance on the circumstances it considers justify waiving a LLP. Accordingly, it would have fallen within this request and, had we not already ordered it to be disclosed under paragraph 25 above, we would have done so under this request. In those circumstances we see no point in considering whether or not the Information Commissioner was correct to categorise it originally as falling within FOIA section 14, even though DVLA did not formally abandon its argument that the exemption continued to apply.

31. "Can you supply me a copy of your policy/guidance on this area as to what falls into this category?"

    a. It is clear that "this category" refers to the "compassionate reasons" mentioned in question 14.

    b. The Information Commissioner decided that the request had already been answered by DVLA in its response to what he considered were substantially similar previous requests for a copy of its enforcement policy. The Appellant criticised the

conclusion in his Grounds of Appeal. We found some of his arguments difficult to follow. They seemed, in general, simply to repeat some of the arguments in the first appeal about the apparent absence of an enforcement policy (although we found some policy information, which we have directed should be disclosed). In his final written submission the Appellant simply asserted that the request should not have been caught by section 14 but did not expand on his reason for saying so. In our view the Appellant did not put forward any material or arguments to convince us that the Information Commissioner's decision on the point was not entirely correct.

32. "Can you advise me under which section of the legislation allows for compassionate reasons to be excluded from payment."

    a. As before the Information Commissioner has accepted in his Reply that his Decision Notice was wrong in concluding that the request was sufficiently similar to earlier requests in respect of DVLA's enforcement policy as to justify refusal under section 14. In this case he says that DVLA had still been entitled to refuse the request because the obligation of a public authority under FOIA is limited to information which it holds in recorded form (section 1(1) read with the definition of "information" in section 84) and it was unlikely, on a balance of probabilities, that it held the answer to such a general question in the form of recorded information. DVLA did not deal with the question at all in its Reply, filed subsequently, and the Appellant, in his Final Written Submissions, limited himself to expressing surprise that DVLA was, in his perception, unable to provide information as to the statutory basis for excusing individuals from a fine in particular circumstances.

    b. We do not believe that FOIA entitles members of the public to force a public authority to research the legal basis for activities it undertakes. There are no doubt many circumstances where they may be required to identify the legal basis for their actions and it may be sensible for them to gather the relevant material into a single document and to make it readily available to members of the public in order to ward off challenges to their authority. But it does not follow that a FOIA request may force them to create such a document. If it does not exist (and, in answer to a question from the panel, DVLA has confirmed that it did not hold such a document at the time of the Request in this case) it might be said that information on the legal basis for the activity in question is still held by them, in that they possess copies of the Statutes and legal texts from which it may be extracted. However, we believe that materials of that type do not fall within the meaning of information that is held in recorded form for the purposes of FOIA, and that the law would impose too great a burden on public authorities if it did.

c. Accordingly we reject this part of the Appeal as the request was for information that fell outside the scope of FOIA section 1(1).

33. "If the category compassionate reasons includes, amongst other things, all the cases of exceptional circumstances, then can you advise me how many exceptional circumstances cases there have been in the last two years?"

a. We have explained in paragraph 28 above how we reached our conclusion that the DVLA had been entitled to refuse request 6 under section 12. The same reasoning applies to this request. The two requests were decided together in the Decision Notice because they each involve examination of the same records. However, the Information Commissioner argued that responding to each of the requests would have exceeded the appropriate limit. We believe that is correct and that, although DVLA would have been entitled to combine several of the requests for the purpose of its costs estimate, the final outcome would have been the same – the section 12 cost limit would have been exceeded.

b. We conclude that the DVLA was entitled to refuse this request under section 12.

34. "Can you break down the compassionate reasons into other broad areas and supply the figures for these areas over the last two years?"

a. The Information Commissioner accepted evidence provided to him by DVLA to the effect that, during the two years in question, there had been a total of 44,254 cases, which would require manual interrogation in order to respond to the request. He also accepted DVLA's estimate of the time that would be required for that task, an estimate that would have produced a costs figure in excess of £9,000. On that basis he concluded that DVLA's application of section 12 had been correct.

b. We set out in paragraphs 28 and 33 above our comments on the criticisms raised by the Appellant on the process of estimating costs. He raised no additional arguments in respect of this request and we conclude, on this request also, that no case was made out to the effect that Information Commissioner was wrong to conclude that the DVLA had been entitled to refuse this request under section 12.

Arguments having general effect.

35. The Grounds of Appeal included criticism of certain parts of the Decision Notice and the investigation that preceded it. They appeared to us to have been included by way of example of what the Appellant considered was inadequate treatment of his complaint. However we were unable to detect in the Grounds of Appeal any connection

between the criticisms and a relevant part of the Information Commissioner's conclusions. Our task, under FOIA section 58 is, not to conduct a review of the Information Commissioner's performance of his duties, but to decide whether or not the Decision Notice that results is in accordance with the law. We found no sustainable basis for challenging it in this part of the Appellant's case.

36. The Appellant complained that the Information Commissioner had not given adequate consideration to FOIA section 16 (duty of a public authority to provide advice and assistance to those making information requests). He argued that the Information Commissioner should have found that, had DVLA complied with its obligation in this respect before refusing some of his requests under section 12, it might have been possible to limit their scope so as to avoid exceeding the costs limit. In his Reply the Information Commissioner conceded that his Decision Notice should have included a finding that DVLA had been in breach of section 16 and we reflect that concession in the Substituted Decision Notice we have issued. However, the Appellant went further and argued that the section 16 breach had denied him access to the information requested under his request number 4. His argument seemed to be that this was because, if he had been properly advised, he could have limited his requests to just request 4. And as, responding to just that request would not have caused the cost limit to be exceeded, DVLA would have been obliged to release the information.

37. The Appellant did not go so far as to say that the punishment for DVLA's breach of section 16 should be an order for disclosure, but he seemed to come close to doing so when quoting from the decision of a differently constituted panel of this Tribunal in *Brown v Information Commissioner* EA/2006/0088. In that case the Tribunal expressed the view that a section 12 cost estimate might be found not to have been made on a reasonable basis (and therefore not to provide a sustainable ground for resisting disclosure) if no advice had first been given that might have enabled the scope of the request to be limited. In the later case of *Roberts v Information Commissioner* EA/2008/0050 another panel (which included one member of the one that had determined the *Brown* appeal), decided that the language of FOIA did not permit one to forge a link between the two sections. We think that, while it is obviously very desirable that discussion does take place with a view to refining a request, so that complying with it does not cause the cost limit to be exceeded, there is no basis for saying that a failure by the public authority to comply with section 16 should have any effect on its right to rely on section 12. Accordingly we conclude that DVLA was entitled to rely on its cost estimate in respect of request 4 in refusing to comply with it.

38. The Appellant complained that the Information Commissioner failed to involve him during his investigation. There may be cases where a failure to debate with the original requester issues arising during the

investigation may result in an error arising in the Decision Notice. In those circumstances this Tribunal will have jurisdiction to consider whether it should be upheld, varied or overturned. But no jurisdiction exists entitling us to regulate or review the way in which an investigation is conducted. We may review the outcome of the investigation (in the form of the Decision Notice issued at the end of it) not the process by which it is conducted. For the same reason the general criticism of the Information Commissioner for delay during the investigation does not give rise to a sustainable ground of appeal.

39. The Appellant argued that it had not been appropriate for the Information Commissioner to have drawn conclusions based on an earlier Decision Notice before the period for appealing the earlier Decision Notice had expired. This, again, is an issue of process over which we have no jurisdiction. If relying on a particular document, whether an earlier Decision Notice or other document, leads the Information Commissioner to make an error in his Decision Notice, we have jurisdiction to review it. But the basis of our jurisdiction is the presence of the error, not the reliance on the document that may have led the Information Commissioner to make it.

Conclusion

40. For the reasons we have given we reject the Appeal on all points save for the small amount of material which is identified in the Confidential Schedule to this decision, which we find was held by DVLA at the time of the Request and should have been disclosed. A substituted decision notice is issued with this Decision to record that conclusion, as well as the fact that, as now conceded by the Information Commissioner, DVLA was in breach of FOIA section 16 in the way in which it responded to the Second Request.

41. 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 receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed on the original:

Chris Ryan
Judge

2 September 2010