First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50787725

Appeal Reference: EA/2019/0083

Heard at Field House
On 5 August 2019

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

DAVE SIVERS & ANDREW WHETNALL

Between

AUTOMOTIVE SOFTWARE SOLUTION LIMITED

Appellant

and

INFORMATION COMMISSIONER

First Respondent

Appearances: -

Appellant: Gordon Hudson (Director)
First Respondent: Ben Mitchell (11 Kings Bench Walk)

Case
Breyer v Bundesrepublik Deutschland C582/14

DECISION AND REASONS

1. The Town Police Clauses Act 1847 sections 37-68 provides the statutory basis for the regulation of Hackney Carriages (taxis). S42 requires Councils to keep records of such licences: -

   "42 Licences to be registered.
   Every licence shall be made out by the clerk of the commissioners, and duly entered in a book to be provided by him for that purpose, and in such book, shall be contained columns or places for entries to be made of every offence committed by any proprietor or drive or person attending such carriage; and any person may at any reasonable time inspect such book without fee or reward."

2. Part 2 of the Local Government (Miscellaneous Provisions) Act 1976 makes provision for Hackney Carriages and Private Hire Vehicles by s45-80. S48 requires the Council to satisfy itself that the vehicle is suitable and the provisions relating to the keeping of a public register are contained in s51(3): -

   (3) It shall be the duty of a council by which licences are granted in pursuance of this section to enter, in a register maintained by the council for the purpose, the following particulars of each such licence, namely –
   (a)the name of the person to whom it is granted;
   (b)the date on which and the period for which it is granted; and
   (c)if the licence has a serial number, that number, and to keep the register available at its principal offices for inspection by members of the public during office hours free of charge.

3. While neither of these provisions explicitly requires the publication of VRMs, the effective of the requirements of the licencing system to ensure that a vehicle displaying its licence number is taxed insured and roadworthy means that issuing a licence to the operator links a specific VRM to a licence.

4. Information with respect to vehicles used for private hire or taxis is kept by the hundreds of councils who are responsible for the licensing of such vehicles in their area. Mr Hudson (a director of the Appellant) told the tribunal that he had been involved in the motor trade for many years. The use of a vehicle for private hire was likely to significantly reduce its resale value. He saw a commercial opportunity in collecting the information identifying which vehicles had been used for private hire and supplying that registration information to other companies buying and selling used vehicles. Given the workings of the UK vehicle market he needed to collect information covering a very large proportion of private hire trade which meant approaching all the licensing authorities to collect information. He had been successful with a number of local authorities, others published the information on websites, however his requests had been refused by some.

5. On 10 September 2018 the Appellant in these proceedings sought information from Tandridge District Council: -

   "I would like to make a request under the freedom of information act 2000 for the following information:
   Motor Vehicles registered for public hire i.e. Taxi or Chauffeur hire relating to the period January 1st 2012 to the current date.
   Specifically, I would like to know: (If any of these elements are not available, please supply the ones that are)
   Vehicle registration
   Manufacturer (Make)
   Model
   Date at which they were first licensed
   Date at which the license ceased
   Would you also please advise of any additional information that may be available that pertains to this request assuming it does not breach the Data Protection Act.
   If possible, I would like the data supplied in spreadsheet format."

6. The Council supplied some information on 17 September. This was the make and model of all vehicles then registered with the Council as Hackney carriages, since the Council did not hold past records it was unable to provide details of previous licences. The response continued: -

   "I also regret that I am unable to supply the registration number of these vehicles. Guidance published by the Information Commissioner's Office on their website lists car registration numbers among the type of personal data that could allow an individual to be indirectly identified. This information is therefore being withheld under sections 40(2) and 40(3A) of FOIA, which provides that information is exempt from disclosure if disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles laid down in the GDPR and the Data Protection Act 2018."

7. The Appellant queried this on 17 September and on 20 September the Council replied, treating the communication of 17 September as a request for an internal review. The internal review acknowledged that while the VRN cannot directly identify an individual it was a type of information which allowed an individual to be indirectly identified. *"This is because it is possible to obtain the name and address of the registered keeper of any given vehicle from the DVLA."* The Council continued to withhold the VRMs.

8. The Appellant complained to the Information Commissioner (the IC) who investigated and on 8 March issued her decision notice. She analysed whether or not the requested data was personal data (decision notice paragraphs 15-23) concluding (22): -

"The VRM will therefore relate to an identifiable individual and relate to the relevant vehicle keeper's private life and falls within the definition of "personal data" for the purposes of the DPA."

9. She went on to consider that a VRM, where the vehicle was owned by a living person, was personal data. She then considered whether the processing proposed (i.e. disclosure to the Appellant) would be compliant with the General Data Protection Regulation. In considering whether the disclosure was necessary to meet what she acknowledged was the Appellant's legitimate interest she concluded: -

   "50. The Commissioner is therefore satisfied that the public has a legitimate interest in being able to access such information. In order to provide an easily accessible, internet based checking facility it would be necessary for the information requested to be disclosed so that companies such as the complainant's have access to all of the relevant information which they require to produce the database."

10. In weighing the legitimate interest in disclosure against the data subjects' interests, rights and freedoms she noted that the disclosure of the information was to the whole world; far wider than needed for the statutory purpose of making a register available for inspection, wider than was notified to holders of PHV licences. A disclosure of the information would be an infringement of the right to a private life, particularly where the current owner of the car had not used it as a taxi or a PHV. She also noted the concern of other Councils that disclosure would facilitate the commission of crimes through vehicle cloning. She concluded that the legitimate interests of the requestor did not outweigh the rights and interests of the individuals and concluded that the Council was entitled to withhold the information.

11. In challenging the decision, the Appellant argued that the VRM did not enable any third party to identify the registered keeper of a vehicle. That information was held by DVLA. The DVLA only permitted access to this information in exceptional circumstances (e.g. to local authorities for parking violations and to the police in the course of criminal investigations) the effect of this was that any application for disclosure by DVLA "will receive a high degree of scrutiny and ultimately …a compelling argument that personal data … will not be made available to any third party".

12. The IC in her response relied on her decision notice. She argued that individual pieces of information can constitute personal data if they identify an individual when held alongside other information which might be information which could be obtained from another source. The VRM was in that respect similar to a passport number. The disclosure of the information would also increase the risk of vehicle cloning. She submitted: - *"Currently there is only piecemeal access to sufficient information… someone intending to do so would have to match the relevant vehicle to one that happens to be present on a second-hand vehicle website or one that they happen to pass on the street. Disclosing this*

information, however, would make it far easier to clone a vehicle because it would allow someone to gather all the required information into a single resource…. The potential for a single instance of cloning is enough to engage the exception, though the level of risk is relevant to the public interest balance."

13. The Appellant further argued that the argument with respect to cloning lacked substance. The information requested related to VRM, make, model and licence period. *"In cloning a vehicle, the criminal would be looking to identify a vehicle that is similar to the vehicle that they wish to clone in all respects including, make model derivative and colour. This information is widely accessible through classified used vehicles sales sites such as Autotrader…The decision noted this is a low risk and contextually this is not a material risk."* The Appellant also argued that the disclosure of prior use was of value.

14. In his oral presentation Mr Hudson demonstrated his considerable knowledge of the motor trade. He had approached the DVLA seeking the driver's name and address for a specific car stating, *"we require the driver's name and address in order to supply this to potential interested parties such as an auction or for vehicle history enquiries"* and the DVLA had refused (bundle pages 125-127). He emphasised that given the approach to disclosure by the DVLA the VRM did not amount to personal data. His business was to provide a commercial information service to those involved in the wholesale trade in used vehicles. The information his company provided was limited. Vehicles were cloned to hide their use, to help dispose of stolen vehicles and to avoid parking and speeding fines. For the purposes of cloning vehicles websites were more useful since in one place it was possible to list a large number of cars of the same make and model, obtain the registration number and see the colour of the car. His business would sell information to the trade, in theory a member of the public could ask about the previous use of a car and get the same information. He did not think that trading standards officers would be able to get information about prior use of a vehicle if an individual complained to them about a purchase of a used car.

Consideration

15. The three issues before the tribunal were; -

- was the information in its context personal data (s40(2)
- would disclosure prejudice the prevention or detection of crime (s31)
- if the answer to either was in the affirmative, how the relevant balancing exercise should be struck.

16. The first issue for the tribunal with respect to personal data is whether, in the context of the information as to the make and model of the car and its use for private hire, the requested information is personal data.

17. In *Breyer v Bundesrepublik Deutschland*, the European Court of Justice in considering whether dynamic IP addresses were personal data within the then Data Protection Directive 95/46 reasoned that they were: -

45 However, it must be determined whether the possibility to combine a dynamic IP address with the additional data held by the internet service provider constitutes a means likely reasonably to be used to identify the data subject.

46 Thus, as the Advocate General stated essentially in point 68 of his Opinion, that would not be the case if the identification of the data subject was prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant.

47 Although the referring court states in its order for reference that German law does not allow the internet service provider to transmit directly to the online media services provider the additional data necessary for the identification of the data subject, it seems however, subject to verifications to be made in that regard by the referring court that, in particular, in the event of cyber attacks legal channels exist so that the online media services provider is able to contact the competent authority, so that the latter can take the steps necessary to obtain that information from the internet service provider and to bring criminal proceedings.

48 Thus, it appears that the online media services provider has the means which may likely reasonably be used in order to identify the data subject, with the assistance of other persons, namely the competent authority and the internet service provider, on the basis of the IP addresses stored.

49 Having regard to all the foregoing considerations, the answer to the first question is that Article 2(a) of Directive 95/46 must be interpreted as meaning that a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of that provision, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person.

18. In applying this logic to the current case, the issue to determine is whether the identification of an individual from the VRM would be practically impossible and the likelihood of it occurring insignificant. The IC argued that the DVLA holds the information and has the power to disclose it for reasonable cause. The Appellant's response to this, that it had attempted to obtain driver information for the explicit reason which matches its commercial intent, does not fully answer the IC's point. It would be open to DVLA to disclose the information for reasonable cause and if so the likelihood of identification is not insignificant. Furthermore, the IC gave the example of where a neighbour could by observation link a neighbour to the ownership of a car which was currently or had previously been used for hire. In addition, an individual who

placed a car for sale on a website would be identifiable by anyone using this data as the owner of a vehicle which was or had been a taxi.

19. It is therefore clear that the VRM is personal data and as such falls within the protection from disclosure of s40(2).

20. In considering whether although this is personal data its disclosure would not be in breach of data protection principles it is necessary to consider Article 5 which provides at 1(a): -

    "Personal data shall be:
    processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');"

21. Article 6 sets out grounds which may be relied on to process data lawfully. It provides (so far as is relevant to the proposed disclosure): -

    "1 Processing shall be lawful only if and to the extent that at least one of the following applies:
    …..
    (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, …"

22. The balance of public interest in respect of s40(2) FOIA raises some conflicting principles concerning the disclosure of the VRMs of vehicles that are or have been licenced for use as public hire vehicles. On the one hand, in favour of disclosure, there is a fair-trading issue. Mr Hudson told us that in his extensive experience of the market it was almost unknown for dealers to volunteer the information that a vehicle for sale had previously been used as a taxi. It seems to be common ground that a period of such use, if known to the purchaser, will generally reduce the price of a vehicle. Making it easier for purchasers to establish the facts could be said to make the market operate more transparently and honestly. On the other hand, there are privacy considerations relating to the vehicle's current owner. If the national legal framework authorised or required the disclosure of the VRNs of licenced vehicles, the relevant obligation under s5(1)(a) of the GDPR could be satisfied because the requirement that fair processing of personal data must be lawful would be met, as well as the requirement of fairness and transparency. Both vendor and purchaser would know where they stood. Both would have a diminished expectation of privacy because the law provided for disclosure. Any residual expectation that the fact of licencing would be private would be suspended, subject to any provisions on commencement or limits to retrospection. A dominant public interest in fair disclosure and fair trading would be recognised. If access to VRNs within any defined limits was recognised, it would no longer be necessary to rely on the purchasers asking

the vendor, case by case, whether there had been a period of use as a PSV. The ICO relies on such transparency by request as "an alternative source of information . . . that does not involve disclosure to the whole world" and is therefore a factor which leads them to conclude that disclosure of VRNs on request is not reasonably necessary to outweigh what they describe as "a relatively strong interest" in the requested information being available. However, in the absence of more formal disclosure rules purchasers relying on assurances of the vendor would still face a problem of verification as to truthfulness, as would any court.

23. As the legislative framework for licencing is surprisingly antique, relying on modifications to an Act of 1847, it may be that with research on the extent of any problem of unfair concealment of previous use and consultation of various interests, including the licensing authorities, the automobile trade, organisations representing the interests of motorists and the public, a legislative change could be devised which did not conflict with the requirements of the GDPR.

24. However, this is not a question within our remit or powers to examine or recommend.

25. The question we have to determine is whether the Information Commissioner's Decision Notice is lawful in respect of the requirements of s40(2) as the law stands. We conclude that it is. "

26. While the Appellant has a legitimate interest in the disclosure of the information, his intention is to augment a considerable database used primarily, as we understand it on a subscription basis, by the automobile trade. Disclosure under FOIA would be disclosure to the world, so others would be free to set up competing data bases using the same information. An individual setting out to establish whether a vehicle he or she was considering or had purchased had been used as a taxi would have to approach some 280 licensing authorities to be sure of establishing the facts. A comprehensive public data base would provide a more convenient solution. It is not clear that is what the Appellant would intend to provide, and no obligation could be placed on him to do so. The Commissioner's position is that taking account of the purchaser's ability to make direct inquiries of the vendor, it is not reasonably necessary to the Appellant's interest to disclose the disputed information. The private interests of the existing owner outweigh, on the IC's view, any more general interest in disclosure. We follow this line of reasoning with some reluctance, because of the limitations on relying on the vendor's knowledge and, as the case may be, honesty. For as long as licencing law does not require the disclosure of VRNs, there may be some difficulty in demonstrating that disclosure is lawful, although it would certainly contribute to fairness and transparency vis a vis the purchaser of vehicles once used as PSVs. In these circumstances the tests laid down by the Upper Tribunal and superior courts

as to disclosure of personal data under s40 FOIA apply, and we accept that protection of personal data, albeit narrowly, has the edge over the Appellant's private interests and intentions. So far as a public interest in greater transparency is concerned, if there is a public interest relating to fair trading specific statutory change requiring publication of VRNs by licencing authorities would satisfy the requirement that processing should be lawful in GDPR Article 5(1)(a) and leave less to rest on the balancing considerations under Article 6. However, this is not a solution for the Tribunal to evaluate, investigate or recommend. The tribunal is not satisfied that disclosure is necessary, furthermore even if it were necessary the tribunal is satisfied that such a hypothetical necessity would not outweigh the interests of the data subjects, the vendors of the vehicles, who if individuals would either be drivers of PHVs or owners of a car which had been a PHV. The tribunal is therefore satisfied that disclosure is not permitted because the balance of interests engaged by this exemption weighs in favour of non-disclosure.

27. S31 FOIA exempts information from disclosure where: -

"…. disclosure under this Act would, or would be likely to, prejudice –
(a)the prevention or detection of crime..."

28. In support of this claim the IC relied on information provided by another council which had resisted a request for information relating to the vehicle registration numbers (VRN) of PHR vehicles from the Appellant (bundle pages 77-81). This council had considered its duty under the Crime and Disorder Act 1998: -

"Duty to consider crime and disorder implications.
(1) Without prejudice to any other obligation imposed on it, it shall be the duty of each authority to which this section applies to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent,
(a)crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment); and…"

29. In the light of this duty it had considered the s31 exemption and its application to the information. The council set out how and why cloning is carried out and how in the view of that council disclosure of this information would engage the s31 exemption: -

"it was immediately apparent that the set of vehicle data requested in this case would, if fully released – be more likely than not to prove useful for unlawful/criminal purposes.
Specifically, the release of the full dataset requested in this case would have the effect of creating a ready-made resource that would be of use to those engaged (or thinking of becoming engaged in VRN and/or vehicle cloning. – namely a set of data linking valid VRNs to specific makes and models of vehicle. This would allow someone wanting to

"blur the identity" of a (say) Skoda Octavia to search FOI published data for the appropriate vehicle and be presented with a range of VRN's that actually do belong to Skoda Octavias…
We do contend that the publication of the requested VRN data set would provide a means to make such crimes easier to commit (i.e. vehicle and/or number plate cloning) more "effectively". As such, release of requested VRN data would, or would be likely to prejudice the prevention or detection of those particular crimes [section 3191) (a) therefore applies]"

30. While there is some force in this analysis the tribunal also recognises that there are alternative sources, such as used car websites where similar information is available and which may include colour photographs of cars which would increase the resemblance between the original car and its clone. However, for a range of criminal endeavours it is clear that make, model and registration number is more than sufficient to be effective and the provision of a structured list would facilitate the finding of an existing registration number suitable for cloning. The tribunal is therefore satisfied that such disclosure as is requested would be likely to prejudice the prevention of crime by facilitating its commission.

31. In considering where the balance lies the tribunal attaches significant weight to the prevention of crime. While there is some value in the disclosure to enable individuals to have more information relevant to the value of a car, such information could be obtained by other means, such as questioning the vendor or gathering visual information such as an abnormally high mileage which could indicate use as a PHV. The tribunal is satisfied that non-disclosure is justified by s31.

32. The tribunal is therefore satisfied that the IC's decision is correct in law and the appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal
Date: 1 October 2019