

## Annex B

our ref: IA/00930/11

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### Sent By Email

Redacted Section 40 (2), Information Commissioner's Office

21 February 2008

Dear Redacted Section 40 (2),

### **Request For Advice – Recording Of Driving Tests**

Following your recent discussion with Redacted Section 40 (2), at the Department for Transport, we would like to seek advice from the Information Commissioner's Office as follows.

#### **1. Purposes**

- 1.1 To ask the Information Commissioner's Office (ICO) to give an opinion on whether CCTV filming of practical driving tests in vehicles owned by Approved Driving Instructors (ADIs), or vehicles owned by any other individuals in which practical driving tests take place, constitutes a processing operation on personal data and therefore falls within the scope of the Data Protection Act 1998 (the Act).
- 1.2 To ask the ICO to consider arguments made by the Driving Standards Agency (DSA) in relation to a specific scenario and give an opinion on whether the DSA's understanding of the Act is correct in terms of that scenario.
- 1.3 To ask the ICO to consider and provide a response to one other, more general, question relating to the issue of the recording of driving tests.
- 1.4 To use the ICO's advice to inform guidance to be issued to DSA-employed Driving Examiners (DEs) about their legal rights as data subjects (if indeed this is what they are in the context of the scenario) when they are informed, or become aware, that a driving test they are about to conduct may be filmed.

#### **2. Timescale**

- 2.1 It would be helpful if a response could be provided within four weeks to enable DSA to respond to correspondence relating to the specific scenario outlined in this request, and begin to address any policy issues arising. If this is not possible, could you please identify when we are likely to receive such a response?

- 2.2 Alternatively, we would welcome a further meeting to discuss the issues in this submission considering the time that has passed since previous discussions.

### **3. Background**

- 3.1 DSA is an Executive Agency of the Department for Transport (DfT). The notified data controller for personal data processed by DSA, and other departments falling under DfT's remit, is DfT. DSA, however, holds delegated responsibility for the processing of the personal data it holds and, as such, carries out its processing as if it were the data controller.
- 3.2 DSA has statutory responsibility for the delivery of the driving test in England, Scotland and Wales and directly employs both administrators and DEs in order to achieve this. DSA also holds and has statutory responsibility for the Register of ADIs, assessing whether each instructor is 'fit and proper' and therefore suitable to remain on the Register. This responsibility also includes assessing whether Potential Driving Instructors (PDIs) are suitable to have their name entered onto the Register.
- 3.3 In considering this request for advice one important distinction must be made. DEs are directly employed staff of the DSA. ADIs are not directly employed by DSA. They are either employed by nationally recognised driving schools (such as, for example, the British School of Motoring) or are self-employed.

### **4. Previous Advice Given By ICO In Relation To 'Purpose' Issue**

- 4.1 From the records we hold, it appears that advice was sought from the ICO in 2003 on an aspect of this issue. There is no copy of written advice held; however, there is a report of a meeting held on 13 February 2003 between DSA and ICO on the subject of the purpose of filming.
- 4.2 The report states that 'advice given by Redacted Section 40 (2), (ICO) highlighted the importance of Section 36 of the Data Protection Act that deals with the use of data for domestic purposes. This exemption from the Act means that if it were stated that the purpose of the filming is for non-commercial reasons this would exempt the action from the requirements of the Act. An example of this might be an instructor or candidate who claimed that the film would be a souvenir of their test. There is no onus on the individual to prove that this is the intended purpose of the tape, [therefore a Fair Processing Notice is not required]. If this film was then not used in line with this stated purpose the Information Commissioner would pursue the data controller i.e. the ADI to investigate any breaches of the Act.
- 4.3 'At the same time, the ICO advised that provided the camera does not record an image or voice of the examiner, i.e. only the candidate or the outside of the vehicle is shown on the tape, filming the test would not infringe an examiner's rights under the Act.'

### **5. Current Scenario**

- 5.1 The lettered paragraphs in this section should be read in conjunction with the corresponding lettered paragraphs in the 'DSA Reasoning' section.

- (a) An ADI has installed CCTV equipment in their vehicle. This has been used to record footage of practical driving tests taking place inside the vehicle. Present in the vehicle during practical driving tests are DSA-employed DEs and test candidates. **Please see ‘DSA Reasoning’ paragraph (a) in relation to ‘data.’**
- (b) Correspondence received from the ADI has led DSA to understand that the CCTV system installed in the vehicle records images and sound of both the DE and test candidate. **Please see ‘DSA Reasoning’ paragraph (b) in relation to ‘personal data,’ ‘data controller’ and ‘data subjects.’**
- (c) The ADI has informed DSA that the CCTV equipment has been installed for ‘security purposes only.’ This implies that there is no other purpose for the recording such as, for example, retrospectively using footage as a means to attempt to demonstrate that a DE has not conducted a test correctly. **Please see ‘DSA Reasoning’ paragraph (c) in relation to Section 36 Domestic purposes exemption.**
- (d) The ADI, however, contradicts this in his correspondence by suggesting that they have sought to use the footage obtained from the recording for purposes other than the personal security of the vehicle. This appears to include the retrospective viewing and analysis of footage in order to determine, in their opinion, whether a DE has conducted a test correctly. DSA’s experience of this ADI has shown that the data collected has been processed to inform DSA, or attempt to influence DSA decisions, about a specific individual’s test result and has been used in the past to support claims of incorrect test markings. The ADI has also been quoted in the national press as saying: ‘Video recording is only resisted by those who have something to hide’ in a story relating to an instructor hiding CCTV equipment in his car to ‘catch out examiners.’

In their correspondence the ADI indicates that he displays a notice on the car informing the DE and the test candidate of the presence of the CCTV equipment but also refers to having ‘covertly filmed’ tests in the past. **Please see ‘DSA Reasoning’ paragraph (d) in relation to ‘additional purpose of processing.’**

## 6. DSA Reasoning

6.1 DSA’s analysis of the above points is as follows.

- (a) Data. The recording of footage on a CCTV system falls within the definition of ‘data’ under Section 1(1)(a) of the Act in that the footage is information which ‘is being processed by means of equipment operating automatically in response to instructions given for that purpose,’ i.e. the information is being processed by automated means and is therefore ‘data.’
- (b) Personal data. The CCTV footage thus being ‘data,’ it is also ‘personal data’ as defined by Section 1(1)(a) of the Act in that the images and sound recorded of the DE and test candidate are data which ‘*relate to (see below) a living individual who can be identified (see below) from those data or from those data and other information which is in the possession of, or is likely to come into the possession of (see below), the data controller (see below).*’

Data Controller. If the CCTV footage is ‘personal data’ then the ADI becomes the ‘data controller’ under Section 1(1)(a) of the Act in that he ‘determines the purposes for which and the manner in which ... personal data are, or are to be, processed.’

Data Subjects. The 'data subjects' in this scenario are both the DE and the test candidate in that they are the individuals who are 'the subject of personal data' as defined in Section 1(1)(a) of the Act.

*'Relate to'* - we argue that the footage does 'relate to' the DE, in particular if it is used for the purpose of calling into question the manner in which he/she has conducted a test. In drawing this conclusion we are mindful of your August 2007 'Data Protection Technical Guidance – Determining what is personal data' (pages 7-8) in which you state that 'data which identifies an individual, even without a name associated with it, may be personal data where it is processed to *learn or record something about that individual, or where the processing of that information has an impact upon that individual* (my italics).' In the context of a DE, we consider that the use of data to call into question the conduct of a driving test would be for the purpose of 'learning and recording something' about the DE and may also 'have an impact' on them in terms of a complaint being raised to DSA meriting possible subsequent investigation or disciplinary action, etc.

*'Who can be identified'* - while there is a small chance that the ADI may not be able to 'identify' the DE by their image or voice being recorded on the footage alone, without their name also being recorded, it has been proven in this scenario that the ADI is able to associate the footage with other information possessed to enable DEs to be named and identification to take place. This is borne out by references in the ADI's correspondence to DEs as they are specifically named and specific complaints have been raised against them.

*Focus of the data* - the ADI has argued that neither the DE nor the test candidate are the 'focus' of the data and that therefore no personal data is being recorded at all. We do not follow this line of argument. We are of the opinion that both the DE's and candidate's personal data are being recorded and that both parties are very clearly a focus. What is being recorded is a driving test. Both the DE and the candidate are entirely integral to that process.

Again we are mindful of your August 2007 guidance (page 13) which states that 'it is not always necessary to consider 'focus' to determine whether data is personal data. In many cases data may be personal data because it is 'obviously about' an individual, or because it is clearly 'linked to' an individual because it is about the individual's activities.'

Even where the footage is not used for the purpose of calling into question the conduct of a test we believe that it is still 'linked to' a DE in any case and, in particular, in circumstances when the footage is used to question their integrity it becomes 'obviously about' them.

- (c) Section 36 Domestic purposes exemption. The ADI has stated that the purpose is security only and that they are exempt from notification to the ICO as a data controller. While they do not cite the legal basis on which they make this statement we believe that they may be relying on the Domestic Purposes exemption (Section 36 of the Act). This states that 'personal data processed by an individual only for the purposes of that individual's personal, family or household affairs ... are exempt from the data protection principles and the provisions of Parts II and III.'

We note that the ADI has nonetheless told us they display a CCTV notice (which, if they were applying Section 36 to the letter, they would not need to display given that they are exempt from the principles including the fair processing provisions outlined under Part II). We note, however, that they would be exempt from

notification to your office under Part III if this exemption was applicable in these circumstances.

- (d) Additional purpose of processing. As stated above, however, correspondence received from the ADI has led DSA to the conclusion that, even if the initial purpose were to record footage for security purposes only (processing for which Section 36 may apply), that a new or additional purpose is being created by the ADI in situations where the footage is retrospectively viewed and analysed in order to determine, in the ADI's opinion, whether a DE has conducted a test correctly.

With regard to this additional purpose our opinion is that Section 36 does not apply to the processing and that as a consequence it falls within the scope of the Act. Accordingly, all the Principles would apply to the ADI in relation to this purpose of processing, including the duty to display a fair processing notice declaring this purpose under Principle 1. Parts II and III of the Act in relation to this form of processing would also apply, including a duty to notify your office of his being a data controller.

The ADI's correspondence, in our view, has demonstrated a consistent pattern of use of CCTV footage for this purpose. This in turn has led us to consider whether we can reasonably construe that, irrespective of the ADI's claim to only be filming for security purposes, there is in fact an additional purpose of filming to assess the integrity of the delivery of the practical test *in every circumstance where filming takes place*. We consider that the ADI has demonstrated that *any* footage recorded in the vehicle may be used for this additional purpose at any time chosen and as such this is a purpose they should declare and notify accordingly.

## 7. Specific Questions Arising From Scenario

7.1 We would be grateful if responses to the following questions can be provided.

7.2 Can the ICO please provide an opinion on DSA's reasoning outlined above giving specific clarification on:

(a) whether the information recorded by the CCTV system is 'data' under the terms of the Act?

(b) if it is 'data,' whether it is also the 'personal data' of the DE and the test candidate as 'data subjects' and if the ADI is therefore 'data controller'?

(c) whether the Section 36 exemption is not applicable to processing conducted for the purpose of assessing a DE's conduct of a test, and if so, whether the ADI therefore needs to notify the ICO of this processing and display a notice on the vehicle instructing data subjects that this is a processing purpose?

7.3 In relation to the individual ADI in this scenario, can the ICO also advise on whether, based on the ADI's pattern of behaviour:

(a) DSA can reasonably construe in every case where filming is taking place that there is an additional purpose for filming relating to the competence of DEs conducting driving tests?

(b) If so, can DEs (or indeed the test candidate) choose not to proceed with the test on that basis?

(c) Where the ADI (as is likely) denies to the DE that there is such an additional purpose to the recording, can the assumption of the additional processing still be made?

(d) Is any lawful basis provided under the Act to enable DSA to make such an assumption?

7.4 Where it is believed that CCTV processing is taking place in vehicles in breach of the Act is there any action DSA can reasonably take to respond to this other than notifying the ICO of such instances and/or asking the ICO to make an assessment of the processing taking place under Section 42 of the Act? In such circumstances could DSA as an organisation make representation to ICO on behalf of an individual DE?

## **8. General Question Arising From Scenario**

8.1 Can the ICO please provide an opinion on whether DSA has any lawful basis under the Act to adopt a policy refusing to permit the conduct of driving tests in vehicles equipped with CCTV in circumstances where there is cause to believe that a potential breach of the Act is likely to occur?

Thank you in advance for your consideration of this submission. I look forward to hearing from you.

Yours sincerely

Redacted Section 40 (2), DSA Knowledge and Information Management Team

cc. Redacted Section 40 (2),, Departmental Data Protection Officer, DfT  
Sarah Maddock, Head of DSA Chief Executive's Office  
Redacted Section 40 (2),, Head of DSA Knowledge and Information Management Team