

Ministry of Transport not unreasonable to take car keys off driver failing breath test

Legislation	Ombudsmen Act 1975, Transport Act 1983
Agency	Ministry of Transport
Ombudsman	Nadja Tollemache
Case number(s)	W27450
Date	1992

Treatment by traffic officers of suspected drunken driver and passenger—adequacy of the law relating to passengers wishing to drive—adequacy of administrative procedures for handling suspected drunken drivers

The Ombudsman received a complaint from the parents of a young woman who had been detained at a Ministry of Transport checkpoint. The complainants' daughter returned a positive breath screening test and was required to surrender the car keys and accompany the officers for an evidential breath test, blood sample, or both.

When the complainants' daughter was stopped, she had a passenger (a relative) in the car. When the driver of the vehicle was told she needed to accompany the officers, the passenger requested the car keys so she could continue her journey. She was asked by a traffic officer if she had also been drinking. The passenger stated she had consumed one beer. She was refused the keys. The passenger then asked to be administered a breath screening test. The traffic officer also refused to conduct a breath screening test. There is no requirement in the Transport Act obliging the Ministry to test in this situation. There is no provision in the Act to cover the testing of a passenger.

The Ombudsman's investigation revealed the traffic officer refused to give the passenger the keys because she had admitted drinking alcohol and she exhibited signs associated with alcohol consumption. Because of the signs displayed, the traffic officer felt it inadvisable to allow her to drive the car.

The traffic officer relied on section 63 of the *Transport Act 1983* which relates to an officer preventing or prohibiting a person from driving. However, section 63 related specifically to people who are 'for the time being in charge of a motor vehicle'. The passenger, it was established, was at no time in charge of the vehicle. It follows therefore that the traffic officer had no legal authority to rely on section 63 to prevent her from driving. For the traffic officer to have been able to exercise that authority, the passenger would have needed to have been 'in charge'. Yet, for her to have been so, would have required the traffic officer giving her the keys to the vehicle. If the traffic officer had given her the keys and then relied upon the powers in section 63 it could well have created a legal farce, with the officer placing the person 'in charge of the motor vehicle' so that he could demand she hand over the keys under threat of arrest. Any traffic officer in such a situation faces a moral dilemma as well as the potential threat of entrapment.

In light of the legal issues this investigation raised, the Ministry of Transport acknowledged the need to review section 63 of its principal Act to see if similar situations could be avoided. The Ministry told the Ombudsman that the passenger having been refused the keys to the car was asked by the traffic officers at the checkpoint if she wished a taxi to be called. The passenger disputed the offer was made. In the absence of independent evidence, the Ombudsman made no finding in this regard. The passenger made her way home independently.

In respect of the driver of the car, she was taken by a traffic officer from the checkpoint to a Ministry office for further testing. She returned an evidential breath test just under the legal limit. Given the driver's initial difficulty in stopping the car, her inability to park where requested, and her obvious alcohol consumption, she was issued with a 12-hour probation notice. The traffic officers unsuccessfully assisted the driver in trying to locate the telephone number of the destination she wished to go. The driver's entire family were attending a 21st at a community hall. No phone number could be found for it. Consequently, none of her family could be contacted to collect her. As she was prohibited from driving, she had little option but to take a taxi to the destination.

The complainants were most concerned that the two women were left to find their own way home at night. They believed there should be some obligation on the Ministry of Transport to return a driver to a vehicle when a negative breath test is returned. It would not have been appropriate in this case as the prohibition notice had been issued. The complainants believed the *Transport Act* needed amendment to ensure people are provided with a safe means of returning to their homes or continuing where they wish to go.

The complainants were provided with a copy of the Traffic Officer's Manual as it relates to suspected drunken drivers. Specific mention is made of ensuring women at night are given reasonable assistance to get to where they want to go. As a last resort provision is available for taxi chits to be given to such drivers at the Ministry's expense. No direct mention is made in the Manual of passengers of such drivers. However, the Ombudsman believed the Ministry officers take reasonable steps to consider the plight of such passengers and have regard to their safety.

The complaint was not sustained because the Ombudsman found the Ministry's actions in respect of the driver and the passenger were not unreasonable.

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