

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2017

Public Authority: Hertsmere Borough Council
Address: Civic Offices
Elstree Way
Borehamwood
Hertfordshire
WD6 1WA

Decision (including any steps ordered)

1. The complainant has requested information on empty houses within the council area. Amongst other information he requested the addresses of the properties and how long they have been empty. The council has applied section 31(1)(a) to the information.
2. During the course of the investigation the council disclosed much of the information to the complainant however it withheld the addresses of the properties.
3. The Commissioner's decision is that the council was correct to apply section 31(1)(a) to the addresses of the properties and the public interest rests in the exception being maintained. The Commissioner has also decided that section 40(2) was applicable to withhold the information. The Commissioner has however decided that the council did not comply with the requirements of section 10(1) in that it did not respond to the complainant's first request within 20 working days.
4. The Commissioner does not require the council to take any steps.

Request and response

5. On 5 February 2016, the complainant wrote to the council and requested information in the following terms:

"I require the following information under the Freedom of Information Act:

1. *Number of empty properties in Hertsmere – dates 31.12.15, 31/3/15, 31.3.14, 31.3.13*
 2. *Length of time that they have been empty – over 6 months, year, five years, ten years*
 3. *The addresses of the properties that have been empty for the longest time*
 4. *How long have each of the properties at 3 been empty*
 5. *The number of properties where any legal action has been taken to address them under the Empty Homes for last 6 months, year, five years and ten years in terms of Compulsory Purchase Orders, enforced sales Procedures, Empty Property Management Orders + a note of action taken by the Empty Homes Office."*
6. The council responded on 22 April 2016. It provided information in respect of points 1, 2 and 5 but withheld information on points 3 and 4 on the basis that disclosing it places the security of the identified properties at risk. The complainant however could not view the table which the council had provided to him by email for parts 1 and 2 of his request and so he subsequently asked the council to provide it to him in hard copy.
7. Following an internal review the council wrote to the complainant on 24 May 2016. It upheld its initial decision and said that section 31(1)(a) applied (prejudice to the prevention and detection of crime) had been applied. It also said that it had posted hard copies of the information in response to parts 1 & 2 of his request again.
8. On 21 February 2016 the complainant made a further request for:
1. *The number of actions that Hertsmere Borough Council has taken under the New Homes Bonus scheme in the last a) 6 months, b) year c) two years d) three years e) four years f) five years g) ten years h) fifteen years and i) twenty years*
 2. *The number of empty properties successfully brought back into use using the New Homes Bonus scheme for a), b), c), d), e), f, g), h) and in i) above*
 3. *The number of occasions that the local authority has used powers under Section 79 to 81 of the Environmental Protection Act 1990 in*

- the last a) 6 months b) year c) two years d) three years e) four years f) five years g) ten years h) fifteen years i) twenty years and k) twenty six years (since 1990)*
4. *The number of cases where the council has been successful in taking steps to investigate cases of statutory nuisance made by residents for a), b), c), d), e), f), g), h) and in i) in 3) above*
9. The complainant said that he did not receive a response to this request.

Scope of the case

10. The complainant contacted the Commissioner on 4 April 2016 to complain about the way his request for information had been handled. Although the majority of his complaint related to matters which the Commissioner is not able to consider, his initial complaint was that the council had failed to respond to his requests.
11. During the course of the Commissioner's investigation much of the requested information was disclosed. The council allowed the Commissioner to provide the complainant with electronic copies of the information, which included its response to parts 1, 2 4 and 5 of the request of 5 February 2016, and the council's response to the request of 21 February 2016. In respect of this latter response the council admitted that it had not initially responded to this request, however it said that the complainant had repeated the request on 9 April 2016 to which it did respond on 9 May 2016.
12. The remaining points from the complaint is therefore that the council has incorrectly applied section 31(1)(a) to withhold the addresses requested in part 3 of the request, and that it failed to provide the information to him within the statutory time limit of 20 working days set in section 10(1) of the Act.

Reasons for decision

Section 31(1)(a)

13. Section 31(1)(a) of FOIA states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime..."

14. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner considers that three criteria must be met:
15. Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
16. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
17. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
18. The council argues that a disclosure of the addresses of empty properties in response to part 3 of the request of 5 February 2016 would place the properties at a higher risk of burglary and vandalism.
19. Its arguments follow a number of previous tribunal cases related to empty residential property lists; *Voyias v Information Commissioner and London Borough of Camden Council (EA/2011/0007)* wherein the First-tier tribunal found that a disclosure of lists of empty properties would be likely to increase the likelihood of crime. The Tribunal concluded that the exemption in section 31(1)(a) applied and that the public interest rested in the exemption being maintained.
20. The council argues that it was a "'matter of 'common sense judgement'" that the publication of the addresses of empty residential properties in the Borough would place them at a significantly higher risk of burglary or vandalism. It therefore concluded that a disclosure of the requested information would be likely to prejudice the prevention or detection of crime.
21. The council confirmed to the Commissioner that it agreed that the arguments in *Voyias* in favour of withholding the information had been in its mind when making this decision.
22. The Commissioner considers that the area of the country where the houses are situated is a relevant issue as the *Voyias* case related to empty properties in a London Borough. London is noted as being a draw

to the squatting community. However he has also concluded that this does not prevent the likelihood that disclosing a list of empty properties would indicate potential targets for criminal activity

23. The Commissioner does not need to rehearse the full arguments which the tribunal reasoned in the judgement in the *Voyias* case. In summary, though, the tribunal considered that there was adequate evidence to demonstrate that lists of empty properties were being used by squatters to identify empty properties for the purposes of squatting in the London Borough of Camden, and that the presence of squatters has certain crimes associated with it (such as criminal damage and electricity theft). At the time of the decision squatting in residential properties was not itself a crime, however it has subsequently become one under Section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The Commissioner's position

24. With regard to the first criterion of the three limb test described in paragraphs 15-17 above, the Commissioner accepts that the potential prejudice which the Council considers would be likely to occur if the information were to be disclosed clearly relates to the interests which the exemption contained at section 31(1)(a) is designed to protect.
25. With regard to the second criterion, the Commissioner accepts that it is logical to argue that the disclosure of a list of empty properties would provide those intent on committing crimes associated with such properties an easy way to identify them. He therefore accepts that there is some causal relationship between disclosure of the withheld information and the prevention of crime. Moreover, the Commissioner is satisfied that the resultant prejudice which the Council believes would occur is one that can be correctly categorised as one that would be real and of substance.
26. In relation to the third criterion, the Commissioner follows the views expressed in the *Voyias* case that a disclosure of the information would be likely to prejudice the prevention and detection of crime. Based upon the evidence in the *Voyias* decision it appears that squatters were using such lists as a means to identify empty properties and as such the Commissioner concludes that it would be likely that the prejudice identified would occur if the addresses of the properties were to be disclosed by the council. Disclosures under the FOI Act are considered to be to the whole world. If the information were to be disclosed details of empty private properties within the area would be disclosed and could be used by individuals with criminal intent.
27. The Commissioner therefore considers that the exemption in section 31(1)(a) is engaged for the addresses of the properties.

Public interest test

28. Section 31 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
29. The Council argued that it was clearly in the public interest to maintain the exemption because it was not in the public interest to disclose information that would aid individuals to commit crimes.

Public interest in disclosure of the information

30. Disclosure of the requested addresses could potentially assist in returning the properties to use if interested parties were able to use the list to easily identify empty houses within the borough. Clearly if it could be established which houses were empty, and why that was the case then the potential for that building becoming used might increase if the owner were to receive offers.
31. There is also a public interest in disclosing the addresses as it would provide some insight, albeit relatively limited, into the management of empty properties by the Council. It would be in the public interest if disclosure of the withheld addresses could assist in returning such properties to use or if, as the complainant is potentially seeking to prove, it demonstrates that the council has failed to take action to try to improve the housing situation in the area by seeking to bring empty homes back into use. The complainant points out that there have been government initiatives to urge councils to act upon empty properties within their areas, such as the New Homes Bonus; (see for instance <http://researchbriefings.files.parliament.uk/documents/SN05724/SN05724.pdf>).

Balance of the public interest

32. A major point behind the request was to question the actions taken by the council in seeking to move empty properties back into use. The disclosure of the information other than the addresses will allow interested parties to scrutinise the actions of the council in this respect without the need for the addresses themselves to be disclosed.
33. The result of disclosing addresses of empty properties is that these are then specified for any interested individual to identify. As stated, the Tribunal has in the past clearly accepted the risks of such disclosures.
34. The Commissioner is of the view that the positive public interest in the disclosure of the information is outweighed by the public interest in ensuring that criminals are not aided in identifying empty properties in the area.

35. He has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the addresses of the empty properties.

Section 40(2)

36. Although this was not an issue raised by the council in defence of its position at internal review the Commissioner has considered the likelihood that a disclosure of some of the information in question would potentially disclose personal data under conditions failing to comply with the requirements of the Data Protection Act 1998 (the DPA), and in particular any of the data protection principles.
37. For its part the council did not respond directly to this in its notice or review, but instead sought to rely upon the application of section 31. In her role as regulator of the DPA however the Commissioner must also ensure that her decisions do not result in personal data being disclosed in breach of the data protection principles purely on the grounds that a public authority has failed to address or recognise where that may be the case. She has therefore considered whether any data protection issues would be raised by a disclosure of the information in this case.
38. Section 40 states in the relevant part:

“(2) any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within sub-section (1), and

(b) either the first or second condition below is satisfied

(3) the first condition is –

(a) in a case where the information falls within paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

i. any of the data protection principles, or ...”

Is the information personal data?

39. Personal data is defined in the Data Protection Act 1998 as data which relates to a living individual who can be identified from that data, or

from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

40. The Commissioner considers that following the Tribunal's decision in the case of England & L B of Bexley v Information Commissioner (EA/2006/0060 & 0066) ('Bexley') the disclosure of addresses alone (i.e. without the associated details of the owner of a property) can amount to personal data:

"It is the Tribunal's conclusion that the addresses are personal data in the hands of the Council because the addresses are held with ownership details from the Council Tax register. The address alone, in our view, also amounts to personal data because of the likelihood of identification of the owner (or the individual who inherits from a deceased owner), as we have concluded above. In our view this information amounts to personal data because it says various things about the owner. It says that they are the owner of property and therefore potentially have a substantial asset. It also raises issues and questions about why the owner has left the property empty and it seems to us that that very question in itself is capable of being personal data. The key point is that it says something about somebody's private life and is biographically significant. It is not as Mr Choudhury suggests the address that is the focus or the property, that analysis is based upon the question being asked, and not upon what meaning or meanings the data may have in the context of someone's private life. Does the fact that Mr X owns a property potentially worth several tens of thousands of pounds say something about Mr X? In our view it does, and the owner is the focus of that information."

41. The Tribunal's decision was that the addresses of empty properties not owned by individuals should be released together with the names of those owners. It decided however that the information on individuals should be withheld.
42. Following this lead, the Commissioner considers that disclosing the addresses of properties will therefore be personal data even without the corresponding identification of the individuals.

Would disclosure breach any of the data protection principles?

43. The relevant data protection principle in this case is the first data protection principle. This states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

44. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the data subject

45. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
46. The council holds the information as it has collected it for the purposes of calculating the home owners' liability for tax. The owners of the properties will have submitted that information for the purposes of allowing the council to identify their tax liability for the property. They would have no expectation that their information might then be disclosed to the public in response to an FOI request. The Commissioner considers that the owners would have a reasonable expectation that the information would only be used by the council for the purposes of tax collection.

Consequences of disclosure

47. The Commissioner has outlined above how the Tribunals have previously accepted that a disclosure of lists of empty properties can be used by those wishing to squat, and that this would be likely to increase the chances that crime will occur to those properties. The Commissioner also accepts that disclosing the fact that a property is empty may well increase the chance that other forms of crime, such as burglary may occur to the property as the council has suggested.
48. At the least, therefore, the likelihood of crime occurring to individual properties will rise through the disclosure of the fact that the property is unoccupied and the disclosure will therefore raise the concerns of the individual owners.
49. There is also a general loss of privacy for the individuals. As the Tribunal in the *Bexley* case found, disclosing the addresses together with the fact that the properties are empty provides information about the owner, for instance that they own a substantial asset which is not currently in use.

Balancing the rights and freedoms of the data subject with the legitimate interest in disclosure

The legitimate interest of the public

50. The complainant's reason for asking for the information is to highlight or seek evidence on his view that the council has failed in its duty to seek to get empty properties back in use again. This was part of a government policy
51. The Commissioner cannot take into account the specific reasons why the complainant wishes the information as FOI requests are intended to be 'applicant blind'. However, as regards the legitimate interests of the receiver of the information, the receiver would be the public as a whole. She can therefore take into account the general public benefits which will occur through a disclosure of the information, such as those highlighted by the complainant as his intentions with this information. It would allow the public to ascertain the steps taken by the council to move empty properties back into use.

Unwarranted intrusion into the rights of the data subjects

52. If disclosed, the information would put into the public domain that the individuals' own premises which are currently vacant. The Commissioner has highlighted above that in the *Voyias* case the Tribunal considered in the case of residential properties that this might lead to the increased potential for criminal activity affecting and/or damaging the properties of the individuals. Additionally, there is a risk of unwanted contact from parties wishing to market their property sale or management services. Although this is in the public interest generally (as it would put properties back into use), the individual may not wish to be contacted by such parties in the first instance.
53. The Commissioner considers that it should not be the case that information provided for one reason to an authority purely in order to allow the authority to calculate their tax liabilities is subsequently disclosed to the outside world, and as a result of that disclosure the risk of detriment being caused to the individual raises. Given the Tribunal's findings in the *Voyias* case this cannot be overlooked.
54. Additionally a disclosure would provide some information about the current standing of the individual – that they own or rent a substantial asset which is currently not being used. This is a general loss of privacy which they would not otherwise expect to occur.
55. The Commissioner considers that the potential detriment to individuals and the actual detriment though the loss of privacy provides a strong

weight in favour of the information being withheld in this case. The individuals would have no expectation that the information regarding their ownership of a property which is empty would be disclosed by the council in response to an FOI request.

56. In conclusion, when weighing up the competing factors the Commissioner has decided that the legitimate interests of the public in having access to the information is unwarranted when balanced against the prejudice to the legitimate interests of the individuals.
57. For this reason the Commissioner considers that a disclosure of the information would not comply with the first data protection principle. The Commissioner has therefore applied section 40(2) in this instance.

Section 10(1)

58. Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

59. The Commissioner notes that the complainant made his request for information on 5 February 2016. The council did not however respond to that request until 22 April 2016. Further to this, full information in respect of parts 1, 2 and 4 of the request was not provided until the Commissioner provided it to the complainant with the council's permission in December 2016.
60. Further to this the council did not respond to the complainant's request of 21 February 2016 until 9 May 2016.
61. These responses fall outside of the period of 20 working days required by section 10(1) the Act.
62. The Commissioner therefore considers that the council did not comply with section 10(1) when responding to the complainant.

Right of appeal

63. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

64. 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.

65. 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

**Gerrard Tracey
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