



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0176**

**Decided without a hearing  
On 17 January 2020**

**Before**

**JUDGE SOPHIE BUCKLEY**

**MALCOLM CLARKE**

**JEAN NELSON**

**Between**

**SURESH SINGH**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**and**

**THE LONDON BOROUGH OF HACKNEY**

Second Respondent

**DECISION**

1. For the reasons set out below the appeal is dismissed.

## REASONS

### **Introduction**

1. This is an appeal against the Commissioner's decision notice FS50786336 of 24 May 2019 which held that the London Borough of Hackney ('the Council') was entitled to rely on s 31(1)(a) of the Freedom of Information Act 2000 (FOIA) (prejudice to the prevention or detection of crime) to withhold the requested information.
2. We note from correspondence with the tribunal office that Mr Singh is disabled and has unspecified physical and mental health conditions. Mr Singh has been given additional time to submit written submissions. He has not done so and has not requested additional time. He has asked that the delay to the proceedings be minimised. It is therefore in the interests of justice to proceed today on the basis that it appears that Mr Singh does not wish to make any further submissions.

### **Request and Decision Notice**

3. Mr Singh made the request which is the subject of this appeal on 9 July 2018:

In light of the recent decision by Judge Fiona Henderson to order Camden Council make public its list of empty housing, and the previous decisions to make lists of long-term empty Lambeth and Bexley public, could you please send me a copy of the:

  - (a) Addresses of all long-term empty private and council owned homes that are within the Hackney Borough Council.
  - (b) Addresses of all long-term empty commercial properties within the Hackney Borough Council.
  - (c) The names of the owners of those properties referred to in (a) and (b).
4. The Council replied on 8 August 2018 confirming that it held information within the scope of the request but refusing to provide the information relying on s 31(1)(a) FOIA, save in relation to certain Council owned empty commercial properties which were listed on the Council's website.
5. The Council upheld its decision on internal review and informed Mr Singh by email dated 3 September 2018 .
6. Mr Singh complained to the Commissioner on 4 September 2018.
7. In correspondence with the Commissioner the Council also sought to rely on s 40(2) FOIA.

8. In a decision notice dated 24 May 2019 the Commissioner concluded that s 31(1)(a) was engaged. She accepted that the prejudice being claimed related to the interests which the exemptions was intended to protect; that it was not trivial or insignificant; that it was plausible to argue that there was a causal link between disclosure of the information and the prejudice; and that disclosure would be likely to prejudice the prevention of crime.
9. Weighing the factors in favour of the exemption being maintained against the public interest in disclosure, she concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

### **Grounds of Appeal**

10. The Grounds of Appeal replicate the request, stating:

In the light of the recent decision by Judge Fiona Henderson to order Camden Council to make public its list of empty housing, and the previous decisions to make lists of long-term empty properties in Lambeth and Bexley public.

In considering this request, I hope you will take into account Judge Henderson's statement on releasing the empty housing list in Lambeth:

"The Tribunal is satisfied that publication of this list would bring a proportion of the void properties back into use earlier than would otherwise be the case and that, consequently, this is a strong public interest in favour of disclosure."

### **The Commissioner's response**

11. The Commissioner's response states that the reliance on the 'recent' decision of Judge Fiona Henderson is misguided. The decision of Judge Fiona Henderson relied on by Mr Singh is the decision of the first tier tribunal in **Voyias v Information Commissioner & London Borough of Camden** EA/2011/0007 (2 September 2011) which was overturned on appeal by the Upper Tribunal in **London Borough of Camden v Information Commissioner & Voyias** [2012] UKUT 190 (AAC). On remittal a first-tier tribunal concluded that the information was lawfully withheld: **Voyias v Information Commissioner v London Borough of Camden** EA/2011/007 (remitted decision 22 January 2013) in which the tribunal stated that:

...the small weight that the public interest in disclosure bears does not come close to equalling the public interest in preventing the categories of crime we have identified in this decision.

12. There are no other grounds of appeal identified and the Commissioner relies on the reasoning in her Decision Notice and submits that it is in accordance with the Upper Tribunal's reasoning in **Voyias**.

## The Council's response

13. The request is based on a fundamental misconception of the application of s 31(1) to empty property information. The first-tier tribunal decision on which the appeal is based (Voyias) was overturned by the Upper Tribunal which held that the tribunal had erred in its application of the public interest test. On remittal a differently constituted first-tier tribunal held in clear terms that the public interest balance favoured maintaining the exemption.
14. Since the request in Voyias s 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has made it a criminal offence for a person to knowingly enter a building as a trespasser, living or intending to live in it.

### *Section 31(1) - Engagement of the exemption*

15. There can be no serious dispute that disclosure of lists of empty residential and commercial properties would, at the least, be likely to prejudice the prevention of crime in the Hackney area.

### *Public interest*

16. There is a strong public interest in the prevention of crime in the context of realistic direct and indirect impacts arising from common sense and the specific experience of the Council, including criminal damage; squatting; theft; anti-social behaviour; the costs to the public purse of eviction, law enforcement and property refurbishment; indirect costs; social and psychological detriment to neighbours and costs of securing empty properties.
17. The Council accepts that disclosure will serve the general interests of transparency and openness. The Council does not accept that it will serve the public interest to any material degree in causing empty properties to be brought back into use: Mr Singh does not explain how it would have this effect; the Council is taking proactive measures to bring residential properties back into use; and the degree to which any public debate is assisted is undermined by the vague and undefined use in the request of 'long-term'.

### *Section 40 - Engagement of the exemption*

18. Section 40(2) applies to a portion of part (a) of the request: names of owners of empty private homes. They will be generally identified natural persons. The Council anticipates that the vast majority of owners of commercial property (part (b)) will be legal and not natural persons.
19. There is no good reason that a data subject would reasonably expect that the Council would disclose a list of empty residential property and identity the

data subject as the owner. It would be manifestly unfair to do so and would be likely to cause the data subject distress and fear of harm to their property.

20. There is no identifiable lawful basis for disclosure. It is not necessary to produce a ready-made list linking property and owner, when an individual owner could be traced through the Land Registry.
21. In relation to addresses rather than names, the Council accepts that an owner could reasonably expect that they may be identified in relation to a property through the Land Registry, and that if it is in the public interest to publish under s 31, it is likely to be necessary and proportionate within Article 6(1)(f), and the Tribunal should instead have regard to the likely impact on individual data subject owners as part of the public interest balance under s 31(1) FOIA.

### **The Council's written submissions**

22. The Council's written submissions largely replicate its response, but it makes the following additional points.

#### *Section 31(1)(a)*

23. The engagement of s 31(1)(a) arises from the increased risk of property-related crimes. The Council accepts that there will be opportunistic crime in relation to empty properties of which criminals become aware in other ways. It is implausible to suggest that someone could be aware of all empty properties without a list. Non-opportunistic, planned and targeted crime is rendered significantly easier by the publication of a ready-made list of apparently vacant properties.

#### *Section 40*

24. The Commissioner has imposed a monetary penalty notice on the Royal Borough of Kensington & Chelsea for releasing in response to a FOIA request a list of empty properties in the vicinity of the Grenfell Tower which accidentally revealed the identities of the owners.
25. Finally, the tribunal took account of the Council's short supplementary written submissions made in the light of the first-tier tribunal decisions in **Sheffield City Council v Information Commissioner & Chait** (EA/2018/0055) and **Westminster City Council v Information Commissioner & Chait** (EA/2018/0033).

### **Legal framework**

#### *S 31 – law enforcement*

26. Section 31(1) FOIA provides a qualified exemption subject to the public interest test in respect of information relevant to specific areas of law enforcement. Section 31(1)(a) provides:

- (1) Information which is not exempt information by virtue of section 30 [*investigations and proceedings conducted by public authorities*] is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) the prevention and detection of crime,

27. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

#### *S 40 – personal Information*

28. The relevant parts of s 40 of FOIA (after the coming into force of the Data Protection Act 2018 'DPA' and the General Data Protection Regulation 'GDPR') provide:

- (2) Any information to which a request for information relates is also exempt information if-
- (a) it constitutes personal data which does not fall within subsection (1), and
- (b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act-

- (a) would contravene any of the data protection principles, or
- (b) would do so if the exemptions in section 24(1) of the [DPA] (manual unstructured data held by public authorities) were disregarded.

...

(7) ... "the data protection principles" means the principles set out in-

- (a) Article 5(1) of the GDPR, and
- (B) section 24(1) of the [DPA]...

(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of the information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second subparagraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

29. The effect of this provision is that personal data of an individual other than the requestor can only be disclosed if disclosure is compatible with the data protection principles. If disclosure would contravene the principles the information is exempt from disclosure. This is an absolute exemption not subject to the public interest test.

30. Personal data is defined in s3(2) DPA as:
- ... any information relating to an identified or identifiable living individual
31. The first data protection principle is the one of relevance in this appeal. This provides that:
- Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. (Article 5(1)(A) GDPR)
32. 'Lawfully' requires that one of the conditions in Article 6(1) GDPR is satisfied. The only potentially relevant condition is Article 6(1)(f) which provides that the disclosure is:
- necessary for the purposes of 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, particularly where the data subject is a child.
33. Therefore disclosure must be fair and transparent and one of the conditions in Article 6 met.
34. Fairness requires the consideration of fairness to the data subject, including his or her reasonable expectations, to the data user, the consequences of disclosure, the general interest in transparency and the purpose of the DPA.
35. The case law on what is now Article 6(1)(f) has established that it requires the following three questions to be answered:
1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
  2. Is the processing involved necessary for the purposes of those interests?
  3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?
36. Necessary reflects the European concept of proportionality: a measure would not be necessary if the legitimate aim could be achieved by something less.
37. The definition of "personal data" consists of two limbs:
- i) Whether the data in question "relate to" a living individual and
  - ii) Whether the individual is identifiable from those data.
38. The tribunal is assisted in identifying 'personal data' by the cases of Ittadieh v Cheyne Gardens Ltd [2017] EWCA Civ 121; Durant v FSA [2003] EWCA Civ 1746 and Edem v Information Commissioner [2014] EWCA Civ 92, from which the following principles are drawn.

39. In terms of 'identifiability', personal data covers, for example, the name of a person in conjunction with his telephone details or information about his working conditions or hobbies, as well as information that a person has been injured and is on half time, or his name and address.

40. In Durant, Auld LJ, giving the leading judgment said at [28]:

Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.

41. In Edem Moses LJ held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or obviously about the individual, approving the following statement in the Information Commissioner's Guidance:

It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him.

### **The Task of the Tribunal**

42. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

### **Issues**



43. The issues we have to determine are as follows:

*Section 31(1)(a)*

1. If the disputed information, or any part of it, were released, would it prejudice, or be likely to prejudice, the prevention of crime?
2. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it?

*Personal Data*

3. Is any of the disputed information personal data?
4. To the extent that any of the information in the scope of the Requests amounts to personal data, would the release of that information breach the First Data Protection Principle, i.e. would disclosure be fair, transparent and lawful?
5. When deciding if disclosure would be lawful the tribunal will ask itself:
  - (i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
  - (ii) Is the processing involved necessary for the purposes of those interests?
  - (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

**Evidence**

44. We have read an open bundle of documents, which we have taken account of where relevant.
45. We read statements on behalf of the Council from Steven Davison, Enforcement Team Leader for the Council, and Gurpaje Singh, Corporate Estate Manager for the Council.

**Discussion and conclusions**

*Section 31(1)(a): If the disputed information, or any part of it, were released, would it prejudice, or be likely to prejudice the prevention of crime and if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it?*

46. As the first tier tribunal in Hogan Oxford City Council and the Information Commissioner (EA/2005/0026, EA/2005/0030) observed at para 27, where the specified activity or interest which would be likely to be prejudiced is a public interest, like the prevention of crime, there is an obvious overlap between whether or not the section is engaged and any subsequent application of the

public interest test. We bear in mind that although the relevant factors may overlap, the questions that we have to answer are different.

47. The applicable interest in this case is the prevention of crime. It is important to note that s 31(1)(a) is engaged where there would be likely to be prejudice to the prevention of crime. It does not require the respondent to show that disclosure *will* lead to an increase in crime.
48. The nature of the prejudice being claimed by Hackney is to the prevention of property crimes and associated costs, namely: criminal damage; squatting; theft; anti-social behaviour; the costs to the public purse of eviction, law enforcement and property refurbishment; drug use; indirect costs; social and psychological detriment to neighbours and costs of securing empty properties.
49. When deciding if the section is engaged, we must decide if the Council has satisfied the evidential burden of showing that some causal relationship exists between the prejudice being claimed and the potential disclosure; if the prejudice is real, actual or substantial; and whether the chance of prejudice is more than a hypothetical or remote possibility i.e. is there a real and significant risk of prejudice?
50. Squatting in non-residential properties is not a crime, but is often associated with criminal offences such as criminal damage and anti-social behaviour offences. Squatting in residential properties is a crime. The witness statements produced by the Council show that squatting, and associated criminal offences are a current and significant problem in Hackney in both residential and non-residential properties. The statements show that the Council has experience of metal theft and illegal raves in empty properties. The statements show that all the above are associated with criminal damage.
51. Although these crimes do already occur without the publication of the list, we accept that publication of a ready-made list of empty properties will make such crimes easier to commit. There is no evidence that the publication of the list will, on the balance of probabilities, lead to an increase in such crimes, but that is not what the statute requires.
52. For the reasons set out above, we find that section 31(1)(a) is engaged. We find that there is a real and significant risk that property crimes would be made easier and therefore more likely to occur by the release of this list; and that the provision of a readymade list of empty properties makes it easier for criminals to identify targets for those crimes. We find that the release of the list would therefore be likely to prejudice the prevention of crime.
53. Turning to the public interest, we conclude that there is a substantial public interest in not making crime easier, and in the light of the evidence that these crimes are a current problem, taking into account our discussions and

conclusions set out above, and noting the direct and indirect realistic consequences associated with crimes of this nature (based on the Council's evidence and as a matter of common sense) such as the attendant social and financial costs, we find that there is a significant public interest in maintaining the exemption.

54. We accept that there is some public interest in disclosure. Revealing details of empty properties is likely to assist the public in holding the council to account in relation to its efforts to resolve housing shortages. Further the requested information would go some way to informing the public debate in this area.
55. However, we conclude that these interests do not require the level of detail requested and it is that detail which leads to the risks highlighted above. There are other means by which the public debate could be informed and the Council held to account: for example simply knowing the numbers of empty properties, perhaps broken down by area, would effectively serve the same public interests without the attendant impact in relation to the prevention of crime. Indeed, the Council could have and still could send Mr Singh those numbers, which would serve the purpose of contribution to the debate/holding the Council to account that we think lies behind the request.
56. Further we note that this issue is already on the Council's radar – there was fairly limited evidence before us on the steps that they are already taking, but it is clear that the Council is already making some attempts to deal with this issue.
57. Overall for the above reasons we conclude that the relatively limited public interest in disclosure is outweighed by the significant public interest in maintaining the exemption.

#### *S 40 – personal data*

58. Having concluded that the information can be withheld it is not necessary for us to go on to consider if any of it is exempt under s 40.

#### *Conclusion*

59. For the reasons set out above the appeal is dismissed. Our decision is unanimous.

Signed Sophie Buckley  
Judge of the First-tier Tribunal

Date: 4 February 2020

Promulgated: 5 February 2020

