



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

Appeal Reference: EA/2021/0132

Heard via the CVP platform on 1 March 2022.

Before

Judge Stephen Cragg Q.C.

Tribunal Members
Ms Suzanne Cosgrave
Ms Marion Saunders

Between

David Beavan

Appellant

And

The Information Commissioner

Respondent

And

East Suffolk Council

Second Respondent

The Appellant was represented by Mr Chessher

The Information Commissioner was not represented

East Suffolk Council was represented by Mr Hopkins

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. The Appellant joined remotely and the Commissioner was not represented. The public authority was a party to proceedings. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 110 pages, some additional papers, a closed bundle, and a skeleton argument and an additional skeleton argument from the Appellant.

INTRODUCTION

4. On 13 May 2020 the Appellant (who is a local councillor) wrote to East Suffolk Council (the Council) and requested information in the following terms:-

I would like to formally submit a freedom of information request to find out the identities of the self catering holiday lets that we have granted £10,000 each in the ip18 post code.

5. For context, the Government introduced a range of measures including financial benefits to support businesses including holidays lets affected by the Covid-19 pandemic. These include the grants that form the basis of this request. The Council responded on 9 June 2020, refusing to provide the requested information, citing sections 31(1)(a) (prevention or detection of crime), and 38 (health and safety) of the Freedom of Information Act 2000 (FOIA) as the grounds for doing so.

6. The Appellant requested an internal review and the Council responded on 17 July 2020. It removed its reliance on section 38 FOIA but continued to apply section 31(1)(a) FOIA to the withheld information. The Appellant contacted the Commissioner on 22 July 2020 to complain about the way his request for information had been handled. The Appellant had concerns about the eligibility of those applying for grants and considered it in the public interest to know if any were being fraudulent.

THE STATUTORY FRAMEWORK

7. Section 31(1)(a) FOIA provides in relevant part that:

(1) 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

8. In summary, for a prejudice based exemption, such as section 31(1)(a) FOIA, to be engaged there must be likelihood that disclosure would cause prejudice to the interest that the exemption is designed to protect, which in this case is the prevention or detection of crime.

9. Although only a first-tier tribunal case, the usual approach to a prejudice-based exemption is set out in *Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006), at paragraphs 28-34. This is also reflected in the Commissioner’s guidance on the issue.¹ The *Hogan* approach involves the following steps:

- Identify the “applicable interests” within the relevant exemption
- Identify the “nature of the prejudice”. This means:
 - o Show that the prejudice claimed is “real, actual or of substance”;
 - o Show that there is a “causal link” between the disclosure and the prejudice claimed.
- Decide on the “likelihood of the occurrence of prejudice”.

10. At step 1, the authority must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect – in this case the prevention and detection of crime.

¹ https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

11. At step 2, in relation to the nature of the prejudice, there are two parts. As the *Hogan* Tribunal explained, this step involves two parts. Firstly, the prejudice envisaged must be real, actual or of substance, rather than trivial or insignificant. Secondly, there must be a “causal link” between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would or would be likely to lead to the prejudice. Establishing the causal link means that the prejudice claimed is at least possible, that is, there are circumstances in which it could arise.
12. At step 3, in establishing whether prejudice would or would be likely to occur, it is necessary to consider:-
 - the range of circumstances in which prejudice could occur (for example, whether it would affect certain types of people or situations);
 - how frequently the opportunity for the prejudice arises (ie how likely it is for these circumstances to arise); and,
 - how certain it is that the prejudice results in those circumstances.
13. The first limb of the exemption relates to ‘would’ and the second to ‘would be likely’. ‘Would’ therefore means ‘more probable than not’; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so. ‘Would be likely’ refers to a lower level of probability than ‘would’, but one which is still significant, as explained by Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin) who said:

“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.” (paragraph 100)
14. Section 31 FOIA is subject to the public interest test. This means that even if the exemption is engaged, consideration must be given as to whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

THE DECISION NOTICE

15. The Commissioner issued a decision notice dated 19 May 2021. The Commissioner set out the Council's position, as follows:-

11...the withheld information detailing the individual lets that have been awarded grants is currently subject to active local and national anti-fraud investigations. Daily and weekly work is taking place with the National Anti-Fraud Network, Credit Industry Fraud Avoidance Systems, the National Crime Agency and others.

16. The Commissioner decided that on the basis of this, the first step of the prejudice- test under s31(1)(a) FOIA is met (see above). Given that the investigations were currently active the Commissioner was satisfied that the prejudice claimed (for the purposes of step 2) is both real and of substance. She noted there had been 'wide press coverage of the same'. The Commissioner continued as follows:-

12. The Council has explained to both the complainant and the Commissioner that providing details of which businesses have received grants will put those businesses under scrutiny and enable motivated individuals to investigate whether these grant claims are genuine. This is in fact a declared intention of the complainant himself, and whilst the FOIA is motive and applicant blind, it is likely that the information would be used by individuals to investigate potential fraudulent activity and this would compromise official investigations.

13. The Council goes on to say that the information could also be used by individuals to identify eligible businesses that have not applied for the grant, and then make fraudulent claims on their behalf. This is a real possibility as this has happened elsewhere nationally and has come to light when the genuine eligible business has subsequently applied itself.

14. The Council also notes that there is a risk that knowledge of fraudulent claims, or assumed fraudulent claims, may expose businesses to physical damage or individuals to malicious behaviours. Whilst the Council reports that this has not yet happened locally, it believes that the risk of it happening through disclosure of the information is real.

17. The Commissioner accepted that there was a causal link between disclosure of the withheld information and the harm envisaged. In relation to step 3, she concluded that:-

15. ...the compromise caused to the current official investigations and the possibility of fraudulent claims being made would be more likely than not to occur, and the exposure of businesses and individuals to crime/malicious intent is a real possibility.

Consequently, disclosure of the withheld information would prejudice both the prevention and detection of crime and therefore section 31(1)(a) is engaged.

18. In relation to the application of the public interest test the Commissioner concluded that the public interest in protecting the ability of the Council and its partner agencies to prevent and detect crime outweighed the public interest in transparency, ‘and thus she concludes that the public interest in the maintenance of the exemption outweighs the public interest in favour of disclosure’ (paragraph 18).

THE APPEAL AND RESPONSE

19. The Appellant’s appeal is dated 19 May 2021. In summary, the Appellant made the following points:-

- (a) Publicity prevents and enhances the prevention of crime, especially in relation to fraudulent applications, as does public disdain.
- (b) As the Small Business Covid Grants Scheme closed in September 2020 it is unlikely that their ongoing investigations in East Suffolk and if investigations have concluded the information can and should be disclosed.
- (c) Transparency is an important point in favour of disclosure.

20. In her Response, the Commissioner relies on the decision notice as setting out her findings and the reasons for those findings. The Commissioner comments about the Appellant’s reliance on the passage of time and argues that it is well-established that ‘the Commissioner, and, on any appeal, any tribunal or court, have to assess the correctness of the public authority’s refusal to disclose as at the date of that refusal’ R (*Evans*) v *Attorney General* [2015] UKSC 21 at [73] added); confirmed in *APPGER v IC and FCO* [2015] UKUT 377 (AAC) and in *Maurizj v IC and CPS* [2019] UKUT 262 (AAC). The request was submitted on 13 May 2020 and responded to on 9 June 2020, with the internal review following on 17 July 2020. At the date of request and review the grant period was still open for new applications and did not close until September 2020.

21. The Council added, in submissions that,

In any event, the investigations into possible fraud continued after September 2020. The premature public disclosure of details about those investigations – specifically, details of those who made such grant claims in the Council’s area – would disrupt those investigations. Fraud investigations need to be undertaken by the responsible authorities without premature publicity and associated public commentary and/or unauthorised parallel investigations that would compromise the fairness and efficiency of official investigations.

22. The Council also added this:-

Further or alternatively, even if the withheld information is not exempt by virtue of the concerns about likely prejudice to fraud investigations as outlined above, it is exempt under section 40(2) FOIA. The Council has not relied on this exemption in this case to date, but it does so now, as it is entitled to do.

(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...

The withheld information is the personal data of those who claimed Covid relief grants for their self-catering holiday properties.

23. The Council has submitted a witness statement dated 20 August 2021 from Siobhan Martin who is the Council’s Head of Internal Audit and Data Protection Officer. Ms Martin confirms that from the date of the request to the date of the review (13 May 2020 – 17 July 2020), investigations at both a national and local level were in progress in relation to possible fraudulent claims, relating both to pre- and post-grant cases.

24. Ms Martin says that the Council was and remains concerned that disclosure of the withheld information would have entailed a very significant and weighty chance of real, actual or substantial prejudice to those investigations, and that the information would likely be used by fraudsters making claims on behalf of businesses that might be eligible for a grant but which had not made a claim.

25. Ms Martin confirms that investigations continued after September 2020 and are continuing. She says that the premature public disclosure of details about those investigations – specifically, details of those who made such grant claims in the Council’s

area – would disrupt those Fraud investigations. This is because these investigations need to be undertaken without premature publicity, associated public commentary and/or ‘unauthorised parallel investigations which would compromise the fairness and efficiency of official investigations.’ There is concern that some members of the public (not the Appellant may become involved in vigilante activities.

26. Ms Martin argues that publicity would not be in the public interest to the extent that it related to those investigated who turned out to be innocent and could also endanger the possibility of a fair trial. At some point in the future, she says that the Council aims to publish some grant award information.

THE HEARING

27. At the hearing the Appellant was represented by Mr Chessher, and the Commissioner was not represented. The Council was represented by Mr Hopkins.

28. The Appellant produced a skeleton argument for the hearing. The relevant part of this in relation to the applicability of the exemption in s31(1)(a) FOIA reads as follows:-

...no case is advanced as to why or how investigations might be prejudiced by disclosure.

Mrs Martin says at paragraph 10.4 of her witness statement... that *‘the premature public disclosure of details about those investigations – specifically, details of those who made such grant claims in the Council’s area – would disrupt those Fraud investigations ...’*

It appears that [the Council] has assumed that a request for identification of recipients of grants is in some way to be equated with a request for details of investigations. That is self-evidently not the case.

Mrs Martin goes on to suggest at paragraph 10.5 of her witness statement that disclosure of the information requested might prejudice any future prosecution and trial. The inference can only be that the request seeks information as to investigations. But it does not. It is inconceivable that the disclosure would prejudice any future criminal proceedings.

29. If the exemption is made out, the Appellant expresses his argument as to the public interest as follows:-

- the grant funding of small businesses disrupted by Covid-19 should be a matter of public record. Publication of the identity of recipients of grants serves to protect the integrity of the funding schemes;
- Government grants to business in general are not provided on condition of confidentiality and there is no reason why Covid grants should be treated any differently. Grant funding should be transparent;
- The holiday let sector in IP18 (the coastal town of Southwold and its immediate surroundings) forms a major part of the local economy. There is a legitimate and significant local public interest in knowing that small businesses in this area were properly supported during the pandemic by Government grant funding.
- [The Council's] case on the public interest test turns on the mistaken assumption that the request seeks information about investigations. It does not. [The Council] has advanced no reasons as to why the disclosure actually sought would be contrary to the public interest.

30. At the hearing Ms Martin gave evidence and was asked questions by the advocates and the Tribunal. Ms Martin explained the administration of grants was by the Council in conjunction with the DBEIS. She was aware of specific fraudulent claims for grants, either by homeowners who did not qualify, or by those impersonating homeowners who had not themselves applied. She explained that there was a preponderance of second homes in the relevant area, which led to some local animosity, which she had seen expressed in local newspapers. There had been a fear by the Council at the time the request was made that there could be interference with criminal investigations if the list of those who had received grants was disclosed.

31. There was reference made to an email in the bundle sent by the Appellant to the Council on 17 July 2020 around the time of the review by the Council, in which the Appellant had asked 'Would you give me the list in confidence so that I could inform your fraud department of any applicants that do not let their properties and are not a business? The names would not be released unless you failed to act and I then succeeded in another FOI to release the name?'

32. It was suggested that this indicated that the Appellant might carry out his own investigations into fraudulent applicants for grants.

33. As Ms Martin also told us there have been further, similar, grants available and the information requested would have been of assistance in fraudulent applications in the grant round in 2020 and later.
34. In submissions, Mr Hopkins emphasised the evidence that there had been fraudulent applications by homeowners and by impersonators, and that this showed a real, actual or substantial risk that disclosure of the list of grant applicants would lead to interference with investigations and especially to further fraudulent impersonation once it was known which properties were subject to a grant application and which were not. On this basis the exemption in section 31(1)(a) FOIA was engaged. There was a weighty public interest in preventing the prejudice envisaged by s31(1)(a) FOIA, which was not outweighed by the obvious public interest in transparency. How well the Council was performing its functions could be explained in aggregated statistics or a description of the methods used by the Council, rather than by disclosure of the list of names of those who had applied for the grants.
35. Mr Chessner emphasised the benefits of disclosure and argued that fraudsters could already make applications for grants on holiday properties without the list. If someone applied for a grant where such a grant had already been awarded that application would be rejected. In relation to the public interest, in addition to the points made above, the Appellant noted that excessive secrecy could stir up animosity in the local community.
36. Both the Council and the Appellant made submissions about the applicability of s40 FOIA (disclosure of private information). It was noted that the Council had only introduced reliance on this ground after the Commissioner's decision notice. The Appellant objected to the Council being permitted to rely on s40(2) FOIA, but the Tribunal reminded itself of the passage in *IC v Malnick and ACOBA* [2018] UKUT 72 (AAC) at para 102:-

...there is no limitation on the issues which the FTT can address on appeal, and the focus of its task is the duty of the public authority. This means that the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away.

37. In our view this passage applies even where the public authority has referred to an exemption at an early stage of the process, but not pursued the point before the Commissioner. In the end, as explained below, it was not necessary for the Tribunal to consider the exemption in s40 FOIA in this case.

DISCUSSION

38. We accept the principle that the freedom of information regime should not undermine the investigation, prosecution or prevention of crime, or the bringing of criminal proceedings by public bodies, and that is of course what the exemption in s31(1)(a) FOIA is there to protect.

39. We accept Ms Martin's evidence that there had been examples of fraud which had been uncovered, and this evidence was not challenged in the hearing. Indeed it is the Appellant's case that there are people both claiming business rate relief and the Covid-19 grant who do not operate their homes in the area as a business. There were issues about who had registered for the business rate relief, and whether they were actually running a business at all. To apply for a variety of Covid business grants a person/business had to be registered for business rates.

40. We accept Ms Martin's evidence that she is aware of cases of fraudsters who have sought to claim a grant in relation to a property they do not own. Again, this was not challenged.

41. We accept Ms Martin's evidence that rate relief information and other information had been removed from publicly available websites as this was being used by fraudsters to wrongly claim on properties they do not own. We agree with Ms Martin's view that disclosure of the full list of properties where a Covid-19 grant had been claimed at the time the request was made was likely to lead to interference in ongoing investigations and an increase in fraudulent applications for available grants.

42. We are of the view that the email sent to the Council by the Appellant on 17 July 2020 is an example of possible interference with the investigations process. Although the Appellant is clearly driven by altruistic motives, it is obvious that he wishes to use the information sought to identify properties where he thinks there is fraud, and states that he will take further action if the Council does not act. We also reject the submission

made by Mr Chessher that disclosure will not lead to an increase in fraudulent applications. In our view it is much more likely that a fraudster would make an application if it could be seen that no application had been made in relation to a particular property.

43. Applying the *Hogan* tests, we find that the Council clearly envisages that the prejudice envisaged would be to the prevention and detection of crime. From the evidence of Ms Martin that fraudulent claims have occurred, the prejudice envisaged is real, actual or of substance, and not trivial or insignificant. Again, applying the evidence of Ms Martin, there is a causal link between the disclosure and the prejudice claimed, as the disclosure will lead to an increased chance of fraudulent applications. In relation to step 3, and with the benefit of the evidence of Ms Martin, we agree with the Commissioner that the prejudice caused to current official investigations and the possibility of fraudulent claims being made would have been more likely than not to occur if the information had been disclosed at the time of the request.

44. Applying the public interest test, we accept that there is a weighty public interest in preventing the prejudice envisaged by s31(1)(a) FOIA, which outweighs the obvious public interest in transparency.

45. Although we recognise that the lack of disclosure by the Council could lead to some ill-will towards the Council, we accept that there are other ways by which an assessment of the Council's performance could be assessed, for example in aggregated statistics or a description of the methods used by the Council, rather than by disclosure of the list of names of those who had applied for the grants. In our view, the argument expressed in the Appellant's grounds of appeal that publicity would in fact enhance the prevention and detection of crime has some force, but is outweighed by the potential damage done to ongoing investigations (into those who may be guilty or innocent).

46. In relation to the reliance on s40(2) FOIA, we note that in *Malnick* at paragraph 109 the Upper Tribunal said:-

109. We summarise the effect of our analysis on the role of the FTT where a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies.

47. It seems to us that this passage must also apply where the second exemption has not actually been referred to by the Commissioner, and therefore we need not consider s40(2) FOIA, because we have agreed with the Commissioner in relation to the application of s31(1)(a) FOIA.

48. For all these reasons the appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 4 March 2022

Promulgation Date: 7 March 2022