



IN THE FIRST-TIER TRIBUNAL

Case No. EA/2012/0073

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50413081

Dated: 5th March 2012

BETWEEN

EXETER CITY COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

MR NICOLA GUAGLIARDO

2nd Respondent

Heard at Field House on 13th September 2012

Representation: Exeter City Council: Mr Matthew Boyden

The Commissioner: Mr Robin Hopkins

Mr Guagliardo did not attend

Date of decision 24th September 2012

BEFORE:

Fiona Henderson (Judge)

Roger Creedon

And

Henry Fitzhugh

Subject matter: FOIA –s 40 data protection

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER**

Case No. EA/2012/0073

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below, the Tribunal upholds the Decision Notice and orders that the disputed information with the exception of any property which is used to house individuals requiring protection in a secret or confidential location and which is owned, leased or rented by the Council for this purpose, and contemporaneous with the information request be disclosed within 35 days of the date of this Decision.

Dated this 24th day of September 2012

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Background

1. On 31st August 2010 a request was made to have the complete list of all property, residential and business owned by or leased or rented to Exeter City Council (the Council). The Council refused the request in relation to residential property relying upon s 40(2) FOIA (personal data). This appeal is against the Information Commissioner's Decision FS50413081 dated 5th March 2012 ordering disclosure of the withheld information with the exception of:

“ any property which is used to house individuals requiring protection in a secret or confidential location and which is owned by the Council for this purpose”¹.

The appeal to the Tribunal

2. The Appellant has appealed this decision. The original grounds of appeal have been condensed and now constitute a challenge to the Commissioner's application of

¹ This caveat is not subject to appeal but see paragraph 21 below.

s40(2) FOIA and in particular a consideration of whether disclosure would breach the first data protection principle.

3. The information requester Mr Guagliardo of the Your Decision party was joined at his request to this appeal on 21st July 2012. However, despite directions enabling him to submit arguments both by way of a response and in a skeleton argument, he has chosen not to participate further in this appeal.
4. It was not in dispute that this information constituted personal data as the addresses could be linked to the electoral roll in order to determine the identity of the tenants.
5. The Commissioner concluded that disclosure would not breach the first data protection principle in that disclosure would be fair, lawful and would not breach condition 6(1) of schedule 2 of the DPA. It is not disputed that disclosure pursuant to the proper application of FOIA would not be unlawful.

Fairness

6. It was not disputed between the parties that the assessment of fairness required consideration both of the data subjects, but also those who may make use of this data. The Council argued that it was not and could never be within the reasonable expectations of a Council tenant to have the fact of their tenancy revealed to third parties and that they were prejudiced as a group when compared to private tenants.
7. The Council relied upon the responses to a survey it had carried out in July 2012 and sent to all Council tenants headed “Human Rights Issue” and entitled “Important issue concerning your right to privacy.” Asking the question : “Would you be happy for the Council to provide the address of your Council property to the general public”?
8. The Tribunal was not assisted to a great degree by this evidence because:
 - Less than 10% of those surveyed responded.
 - Those that responded were a self selecting sample,
 - The opinions of 90% of the affected population were not ascertained owing to the method of sampling,

- The presentation of the questionnaire was leading,
 - From the comments returned with the responses many Tenants did not appear to realise that the ownership of their property by the Council was already publicly available at the Land Registry, or that if the Council applied for planning (either when building the accommodation or altering it) the fact that the premises were owned by the Council would be available by way of public notice and on a data base searchable on the internet.
 - Additionally some respondents expressed concerns about telephone contact which was not material to the disputed information.
9. There was no clear evidence from the Council as to the extent to which Council properties are identifiable by appearance (e.g. a particular type of door furniture) but the Tribunal accepts that some properties will not be distinguishable in appearance from their neighbours and that not all properties are in identifiable estates. However, the Tribunal observes that who owns property is not a private matter. It has to be publicly recorded and available by way of Land Registry Records (although there is a fee for this information.)
10. There are many other ways that the ownership becomes public (e.g. local knowledge, press articles when properties are constructed, news articles and planning records). The Tribunal is satisfied that a tenant cannot therefore have a legitimate expectation that this information would not be disclosed, but does give some weight to the position as argued by the Commissioner that they might not expect that their information would be disclosed in this format.
11. The Council argues that disclosure as a group disadvantages Council Tenants in a way that private tenants would not be so disadvantaged. The Tribunal disagrees:
- There is nothing to prevent a major private landlord from publishing a list of its housing assets,
 - By omission from the list an individual is identified as a private tenant or homeowner.
 - Certain landlords impose identifiable features upon their properties such as name and contact details, or uniform presentation such that their properties are

known to the wider public. They may also be advertised for let as part of a particular estate of properties.

12. Additionally we are satisfied that there is a proper distinction to be drawn between those living in a Council owned asset and private accommodation, because the Council are accountable to the public for the way they manage those assets and execute housing policy whereas a private landlord has no such additional public responsibility and that this must impact upon the reasonableness of any expectation that the Council would not publish this information.

Breach of privacy and any undesirable consequences of disclosure

13. The Tribunal agrees with the Commissioner's finding that this information is of low inherent sensitivity. In reaching this conclusion we take into consideration the arguments in relation to information already in the public domain as set out above. The Council did not argue that there was any general unfairness or stigma to individuals in being identified as Council tenants relying instead upon the "vulnerability" of those allocated Council Housing in support of their contention that the disputed information was highly sensitive.
14. In support of this argument they relied upon the criteria for the allocation of housing as set out in the "Devon Home Choice Policy Document". This prioritizes the allocation of Council accommodation depending upon an assessment of housing need. There is an underlying financial threshold as allocation is considered to be for people who have insufficient resources to meet their housing needs and then the applicants are prioritized in relation to other social or physical factors which increases their housing need. The Council argues that disclosure of the disputed information would identify these tenants as vulnerable which would enable them to be targeted as such.
15. The Council challenges the Commissioner's analysis that "a list of properties does not automatically identify the tenants of those properties as vulnerable". The Council argues that there is a "near certain risk" to the Council's tenants as vulnerable parties and that it may result in unwanted contact from vendors of goods and services seeking to exploit their vulnerability with the risk of companies offering bogus or

inappropriate loans from unregulated companies charging excessively high rates of interests.

16. There is no evidence before the Tribunal to assist as to whether the publication of this list would significantly alter the approach of such vendors, whether the data subjects are already targeted or the level of distress that e.g. additional junk mail would cause. The Tribunal does accept that the presentation of the disputed information as a list would increase the ease of access to this information and would enable it to be used as a database. However, we do not give this factor great weight because we note that:

- the majority of the addresses are in clusters and susceptible to targeted approaches already by analysis of postcode,
- The edited electoral roll can be purchased by companies for marketing purposes,
- Additionally the Tribunal notes that such individuals and companies are understood to use many methods to target individuals including local knowledge and personal introduction.

17. We are not satisfied that the information is sufficiently specific to enable the tenants to be targeted in any meaningful sense. The Council argues that at the least the information designates the data subjects as economically vulnerable. However, the disputed information gives no indication as to why or when someone had been allocated housing and the Council conceded that the classification of tenants as being “vulnerable” on their own case only applied at the point of recent² allocation. The data subjects would also include:

- those who had inherited or been assigned their tenancy,
- those who had been allocated tenancies many years ago when the allocation priorities would have been different.
- those whose social circumstances had changed and who were no longer in financial need and whose additional prioritization factors may have resolved (e.g. children leaving home, improvement in health etc.)

² The Council were not able to clarify how long these criteria had been applied or what the historic situation was.

18. The Tribunal also observes that the reason someone had a high housing need e.g. because of overcrowding, does not mean that the “vulnerability” continues once they become a Council Tenant because at the point that they have been allocated appropriate housing the risks associated with overcrowding are resolved through the provision of adequate space.
19. Consequently the Commissioner argued and the Tribunal accepts that the only information (additional to the fact of the address) that can be discerned about any particular data subject by the disclosure of the disputed information was that “they or their predecessor may have been financially unable to meet their housing needs at some time”. The Tribunal takes into consideration that there are many private tenants who are in receipt of housing or other benefits in order to meet their housing needs and is satisfied that this is not the same as being “vulnerable”.
20. The Tribunal does accept that within the disputed information there will be data subjects who are properly classified as vulnerable, but considers that this covers a wide spectrum of circumstances (encompassing social, medical, age and child related issues) and that disclosure of the information will not enable individual groups to be specifically targeted.
21. The Commissioner did identify a class of specific vulnerability namely *any property which is used to house individuals requiring protection in a secret or confidential location and which is owned by the Council for this purpose*. The Tribunal is satisfied that this caveat should remain but to prevent anomalies should also include properties **leased or rented** by the Council for this purpose.

Public interest in the disclosure in the Information

22. It is not disputed *that private information relating to home life has a greater expectation of privacy than information relating to e.g. the work of public servants*. Since these data subjects are private individuals (rather than public servants) the Council argues that their rights should **prevail against** the rights of the third parties to whom they would be disclosed and that disclosure is therefore unwarranted. However, the Tribunal has already found that the information is publicly available albeit not as a

group list and has low sensitivity in determining that the disclosure would not be unwarranted.

23. The Council does not consider there to be any public interest in the identification as a group of all the addresses. They point to other cases where there has been a clearly defined political imperative for disclosure. Mr Guagliardo has not detailed the use to which he had intended to put the information although we note that he made the request on behalf of the Your Decision party. The Tribunal is satisfied that it must consider whether the processing is necessary for the purposes of legitimate interests pursued by all the parties to whom the data are disclosed, which in the case of FOIA is the general public.

24. The Commissioner relies upon the enhanced transparency in allowing the public to be aware of the Council's assets (i.e. its housing stock) which is important to democratic engagement between the public and the Council in the context of a very important issue, namely the supply of housing. By knowing how many properties the Council owns and where, the public would be enabled to scrutinise the distribution of Council properties between localities, analyse whether factors (such as levels of educational attainment) are correlated with the extent of Council owned housing in a given area. Knowing the individual addresses would enable the public to see how Council properties are maintained, their state of repair and assess whether areas are under or over provided for.

25. The Tribunal adds that such disclosure would also enable the public to review the type of housing stock owned and used by the Council and ascertain whether it could be used more efficiently to meet better the needs of those in housing need . Analysis of the extent to which private rentals are over or under used and whether this provides value for money would also be enabled by disclosure of this information.

26. The Tribunal has considered whether at the date of the request these legitimate interests could be met by any other means available to the public. The Council suggested at the hearing that since the request was made by a Political Party they could enter a data sharing agreement with the Council for provision of this material to enable mailing for Political purposes. The Tribunal observes that this offer was not made at

the time of the request and was not therefore available to the information requester at the relevant time. It also does not meet the transparency arguments since it would limit the use to which the information could be put and would not enable scrutiny by the public. Although a map showing the present general distribution of Council housing was compiled for the hearing, it was accepted that this information was not publicly available at the date of the information request. Neither was there any analysis of housing stock by e.g. age or size, publicly available which might have gone some way towards meeting these legitimate interests.

27. The Council argued that individuals or groups could approach local Councillors asking them to take up the matter on their behalf. The Tribunal observes that it may not be apparent that something is awry until an analysis has been done. Equally there is a public interest in increasing public confidence by demonstrating optimum use of housing stock and exemplary application of housing policy if that is the case.

28. Further the Council argues that these interests are met because anyone wishing to ascertain whether a property is Council owned may make a direct enquiry of the tenant or check with the Land Registry. The Tribunal observes that a direct enquiry would be more likely to be intrusive than the disclosure of the disputed information. Additionally this approach would not enable scrutiny of the big picture in terms of the Council's use of their stock and application of housing policy or other policies as they relate to areas of high or low Council housing. This approach would be likely to exclude individuals and voluntary groups from the ability to access this information for democratic purposes.

29. The Tribunal considered whether certain additional categories should be redacted. The Council conceded that beyond the Commissioner's caveat in relation to secret and confidential locations, it would not be possible to consider redaction on the basis of particular vulnerabilities. Additionally the Tribunal considered whether:

A) individual properties not part of a cluster and not obviously identifiable as Council properties should be redacted on the basis that they would be more exposed by their appearance on a list.

B) properties rented to the Council but not owned by them should be redacted as the Council's involvement would not be apparent from the land register or planning applications,

C) Properties rented by the Council to Housing Associations should be redacted because for the period of the lease the Council did not run them or allocate tenants.

30. The Tribunal is satisfied that in light of its findings about the low sensitivity of such information the methods by which this information came into the public domain in any event and in light of the weight given to the legitimate interests that would be furthered by disclosure, the balance remains in favour of disclosure.

Conclusion

31. For the reasons set out above, the Tribunal refuses the appeal and upholds the Commissioner's decision notice. The Council must disclose within 35 days the withheld information with the exception of

“ any property which is used to house individuals requiring protection in a secret or confidential location and which is owned, leased or rented by the Council for this purpose”.

32. The Tribunal notes that the information that was requested was the information as it existed around the date of the request. The information provided to the Commissioner was not complete and dated from the date of the Commissioner's investigation. The information in the Tribunal's closed bundle dated from June or August 2012. Whilst the Tribunal was content to use this closed material as an example of the type of information withheld, the information that should be disclosed pursuant to this decision should date from around the date of the original request.

Dated this 24th day of September 2012

Fiona Henderson

Judge