Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2018

Public Authority: Sheffield City Council
Address: Town Hall
Sheffield
South Yorkshire
S1 2HH

Decision (including any steps ordered)

1. The complainant has requested information on a complete and up-to-date list of all business (non-residential) property rates data held by Sheffield City Council. The council applied Sections 21, 22, 31(1)(a), 31(1)(d) and 40 to withhold the information. The complainant made a complaint about the application section 31 to the Commissioner.

2. The Commissioner's decision is that the council was not correct to apply the exemptions in section 41 to the information. She has also decided that whilst the council was correct in that sections 31(1)(a) and 31(1)(d) were engaged, the public interest in the disclosure of the information outweighs that in the exemptions being maintained in this instance.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - To disclose the withheld information to the complainant.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 30 March 2017 the complainant made the following request for information under the FOIA for:

"In terms of the Freedom of Information Act of 2000, and subject to section 40(2) on excluding personal data, could you please provide me with a complete and up-to-date list of all business (non-residential) property rates data for your local authority, and including the following fields:

- Billing Authority Reference Code (linking the property to the VOA database reference)
- Firm's Trading Name (i.e. property occupant)
- Full Property Address (Number, Street, Postal Code, Town)
- Occupied / Vacant
- Date of Occupation / Vacancy
- Actual annual rates charged (in Pounds)

If you are unable to provide an absolute "Occupation / Vacancy" status, please provide the Exemptions and / or Reliefs that a particular property may be receiving.

We recognise that you ordinarily refuse to release these data in terms of Regulation 31(1)(a)[sic]. In November 2016, we appealed this class of refusal - specifically as it relates to this request - to the Information Commissioner's Office and they issued a Decision Notice (FS50628943 - https://ico.org.uk/media/action-weve-tak..., and FS50628978 - https://ico.org.uk/media/action-weve-tak... on 28 February 2017 finding that "it is not correct to withhold this information under Regulation 31(1)(a)[sic]", and that "the public interest in the information being disclosed outweighs that in the exemption being maintained".

Note that these Decision Notices supersede Voyias v Information Commissioner and London Borough of Camden Council (EA/2011/0007) and Decision Notice FS50538789 (related to Stoke on Trent Council).

Please provide this as machine-readable as either a CSV or Microsoft Excel file, capable of re-use, and under terms of the Open Government Licence.

I'm sure you get many requests for business rates and we intend to update this national series every three months. Could we request that - as more than 30% of local authorities already do - you update and release this dataset via a dedicated page on your local authority

website or on an open data service. You should find that this reduces the time and cost of this request process."

6. The council responded on 2 May 2017. It said that the information was exempt under sections 21 (information accessible by other means), section 22 (information intended for future publication), section 40(2) (third party personal data) and section 31(1)(a) and (d) (law enforcement).

7. The council did not carry out an internal review of its decision. This followed correspondence with the Commissioner where she expressed the view that as a similar decision had been made on an earlier request asking for the same information previously then the council had already considered the issue twice and reached the same conclusion. The Commissioner considered therefore that in asking the council to reconsider its position and respond to her questions it was effectively carrying out a review at that point, and so it was not disadvantaged in this respect.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He complained about the application of section 31 and 41 to the information. He did not make a complaint on the application of sections 21, 22 or 40(2) to the Commissioner.

9. The Commissioner has not therefore considered the application of the other exemptions which were applied in this decision notice.

Reasons for decision

10. 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…"

11. In order for a prejudice based exemption, such as section 31, to be engaged the Commissioner considers that three criteria must be met:

- 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;

- 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

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. 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.

The harm which would be caused

12. The council argues that a disclosure of the information would be likely to prejudice the prevention and detection of crime.

13. It says that disclosing information highlighting a private business premises as vacant puts the premises at a higher risk of potential criminal activity than those that are unidentified. An FOI disclosure would put information into the public domain which would otherwise not be available. This would put the properties at greater risk of theft, targets for criminal damage, potential squatting sites, arson and sites of interest to urban explorers which might include breaking and entry into those premises. Although squatting is not in itself a criminal offence in non-residential premises it is associated with a number of criminal activities which should be taken into account (such as the theft of electricity).

14. The council also provided a list of incidents or criminal offences which had occurred in the borough in empty properties where there had been a disclosure of the fact that they were empty. *"http://www.urbanghostsmedia.com/2016/02/abandoned-sheffield-steel-city-urbex/ is a website reporting "Steel City Urbex: 10 Abandoned Places in Sheffield" which highlights sites of interest. We also refer to*

the Sheffield Star article: http://www.thestar.co.uk/our-towns-and-cities/sheffield/hallam-tower-student-plunge-tragedy-owners-urge-urban-explorers-to-consider-safety-1-8469774 which details the death of an urban explorer and states "urban explorers had been trespassing there on an almost daily basis, despite the company's best efforts to secure the property".

15. It notes that the article highlights the measures put in place by the owners of the premises to secure the site including security personnel attending daily, at likely significant cost to the business involved. It said that it has considered the disclosure of empty property details on the businesses involved and the wider community at large.

16. Further to this it argued that although the evidence is difficult to provide in the circumstances, it is aware that squatting in commercial property in Sheffield continues to be an issue: *http://www.thestar.co.uk/news/feature-squatters-drug-dealing-and-counter-terrorism-policing-the-streets-of-sheffield-1-8598493).*

17. It said that it is also aware of large scale police operations in the past completed in an effort to thwart metal theft where empty properties can be significant targets: *http://www.thestar.co.uk/news/crime/metal-theft-raids-in-police-crack-down-across-south-yorkshire-1-5191254 and http://www.bbc.co.uk/news/uk-england-south-yorkshire-15333118).*

18. It further argues that the council also needed to take into account that Sheffield is affected by above average numbers of burglaries, and it considers that empty properties will be easier targets than occupied premises: (source: https://www.police.uk/south-yorkshire/KD1/performance/compare-your-area/burglary/#msg_comparison). It said that there has also been a rise in reports of criminal damage and arson over the recent years: https://www.police.uk/south-yorkshire/KD1/performance/compare-your-area/criminal-damage-arson/#msg_comparison).

19. Its arguments follow, and expand upon a number of previous tribunal cases related to empty domestic property lists, for instance, *Voyias v Information Commissioner and London Borough of Camden Council (EA/2011/0007)* ('Voyias') in which the First-tier tribunal found that a disclosure of lists of empty residential 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. The council argues that in these cases the Tribunal accepted that it was logical that the disclosure of such information provides an easy way to identify empty properties and

that there is as causal link between the disclosure of the information and the prevention of crime.

20. The Commissioner has also considered a similar case previously in a decision notice relating to *Stoke on Trent Council; Decision Notice Reference FS50538789*. In that case she accepted that details of empty commercial properties could be withheld under section 31(1)(a) and section 40(2) (personal data) as disclosing the information would be likely to facilitate crime on vacant non-residential properties.

The complainant's arguments

21. Since these decisions the complainant has collated and provided to the Commissioner statistical evidence which he considers demonstrates that a disclosure of unoccupied commercial premises does not increase the levels of crime.

    a. He said that 66% of local authorities either already make the information available, or made it available after the receipt of an FOI request. Whilst the Commissioner has not checked whether this figure is accurate she is aware that a large number of authorities have provided the data to the complainant in response to his request. The Commissioner understands that since the complainant has made this complaint the figure is much higher than 66% with the vast majority of local authorities now either proactively publishing this information or at the last making it available upon request.

    b. He has made FOI requests to a number of police forces regarding the levels of crime in unoccupied commercial premises. Out of 44 police services, only two are actually able to provide data on incidents in empty commercial properties. The two who have are Thames Valley Police and North Wales Police. The remaining police services do not specifically collect such data and have no way of knowing what the incident rates are. The complainant therefore argues that any other forces which provide arguments supporting the application of the exemption are essentially providing an opinion rather than specific evidence.

    c. In North Wales, there is an average of 1,780 crimes a year in occupied properties, and 26 crimes a year in unoccupied properties that largely have to do with theft, vandalism or arson (note that squatting in commercial property is not a crime and so unrecorded).

    d. There are about 45,000 commercial properties in North Wales and vacancies range from 15% to 25%.

e. The complainant therefore argues that the ratio of crimes in occupied vs empty commercial properties is almost 70:1, compared with an actual occupied vs empty ratio of 6:1 (i.e. an occupied commercial property is ten times more likely to experience an incident of crime than an unoccupied one).

f. He gave an example of how publication of the information he had requested has had no effect upon crime levels in specific areas

> *In 2015 Oxford had 4,038 commercial properties and suffered 2 cases of empty commercial property crime at a cost of £1,259. In comparison, they had 3,133 cases of crime committed in occupied business premises, at a cost of £507,956.*
>
> *By comparison, Reading, with 5,659 commercial properties suffered 2 empty commercial property crimes that caused no damage at all.*
>
> *Oxford refuses to publish under Section 31(1)(a) while Reading publishes regularly*.

g. He argues that the data provided are unequivocal. Incidents of crime in empty properties are exceedingly rare, and there is no variation in the incidence rate between local authorities who do publish, and those who do not publish data on empty properties.

22. The Commissioner issued 2 decision notices providing similar arguments to Sheffield Council on 28 February 2017. She issued a Decision Notice FS50628943 to Cornwall Council, (available from https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013577/fs50628943.pdf), and FS50628978, the Royal Borough of Kensington and Chelsea Council (RBKC) available at https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013576/fs50628978.pdf.

23. Both of these decision notices found that the application of section 31(1)(a) by both authorities was correct under the circumstances of the case, however the public interest in the information being disclosed outweighed that in the exemption being maintained. The Commissioner therefore required the disclosure of the information in those cases.

Arguments regarding harm

24. The following arguments support the exemption applying:

a. The disclosure of the information may facilitate or encourage criminal activity.

b. There is a clear public interest in protecting society from the impact of crime and avoiding damage to property.

c. The victims of crime can be both individuals and organisations.

d. The impact of crime is not confined to its immediate victims. A request for the addresses of empty properties provides the opportunity to consider the wider repercussions of crime in more detail, for example, fraud, criminal damage, illegal occupation, risk of the theft of electricity, unlawful practices, arson attacks etc. The list could be used to target properties. Buildings could be stripped of valuable materials and fixtures.

e. As well as the financial costs of crime, there are also social costs, criminal damage reduces the quality of life in the area; neighbours would live in fear of further crime being committed.

f. The information, if disclosed, could be used by squatters and could make properties more vulnerable to illegal activities or antisocial behaviour which is not in the interests of owners/residents nearby.

g. It is also appropriate to take into account the cost of removing those illegally occupying properties.

h. There are potential financial costs to local taxpayers arising from such crime.

i. Estate agents/letting agents advertise properties on websites, adverts etc but not all properties they advertise would indicate whether they are vacant.

j. The ICO previously supported Stoke-on-Trent City Council decision to use this exemption on the same data requested. https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042144/fs_50538789.pdf

k. In case law, in *Yiannis Voyias v Information Commissioner and the London Borough of Camden (EA/2001/0007 23 January 2013)* the First-tier Tribunal upheld the council's decision to withhold the addresses of empty residential properties under section 31(1)(a).

25. The Commissioner notes however that the Voyias decisions related primarily to residential properties rather than commercial premises. She considers that there is a significant difference between these two types of property insofar as whether individuals are able to identify whether the property is vacant or not without reference to the withheld information.

26. The council said that it shares many of the concerns that were raised by the councils in Voyias, Stoke on Trent, Cornwall and RBKC but in addition the Council also submits that there is a significant and serious risk that vacant commercial premises would be targeted for criminal activity if this information were to be disclosed.

The causal relationship

27. The council argues that as it has not disclosed this information previously it is difficult for it to provide any specific evidence that a disclosure would cause the effects it has argued. It said that in its understanding, there has been no specific research into the effects of disclosure of information from other Council's and the impact on empty commercial properties and associated crime which might have occurred.

28. Further to this the council said that it would find it difficult to demonstrate a clear link between the disclosure of the information and the prejudice which might occur. It said that this is because the council cannot categorically state that the disclosure of the information will cause any specific impact because it has not previously disclosed this information. It said even where this information has been disclosed previously, unless there has been a specific review to find any correlation between the publication of the empty property details and related crime it would not be able to provide the evidence requested by the Commissioner.

29. The Commissioner accepts that the position is difficult in such situations. The council cannot provide statistical evidence of causation in support of its position as it has not previously disclosed the information. She also notes the council's argument that unless a specific review had been carried out by an authority once it started publishing the information it would be difficult to provide any evidence beyond opinion or views to back up the arguments. It does not appear that any authority has, to date, carried out such a review to determine this, and so there is no specific evidence as regards the potential causation factor. Nevertheless the Commissioner accepts on the face of it that there is a potential for the disclosure of the information to have the effect envisaged by the council.

The likelihood of prejudice

30. The council argued that as it has not disclosed this information previously it can only argue that a disclosure of the information "would be likely" for the purposes of the application of section 31(1)(a). It argues that the council would lose control over the potential use of the information and it would be disclosed to the whole world, particularly as the request had been received through a public website.

31. It argues that the risk is more than hypothetical as is evidenced by the use of empty property details by squatters and urban explorers, and that these groups could use some of the information which had been requested to create targets or identify suitable targets for their activities.

32. The Commissioner notes the evidence supplied by witnesses in the Voyias case that a squatters association had used such lists previously and provided advice that this information was available from local authorities in some areas in order to identify potential domestic properties to target for squatting. For instance, the Advisory Service for Squatters (ASS) provides advice on squatting in commercial properties on it's website:

http://www.squatter.org.uk/for-new-squatters/squatting-made-less-simple/

33. Paragraph 26 of the judgement in the remitted First-tier Tribunal's decision in *Voyias* states that the Tribunal were "provided with sufficient evidence, in particular in material published by the ASS…to satisfy us that squatters do check available lists of empty properties and that the release of such a list by another council in response to a freedom of information request in the past had led to an increase in squatting". The finding of the Tribunal in this respect carries significant weight.

34. Further to this, the council points to the decision in *Voyias* as evidence that both the Tribunal and the Commissioner have previously accepted the likelihood that a disclosure of such information would lead to an increase in squatting and criminal activity in residential properties.

35. The ASS website did previously advise that lists of non-residential properties might be available on request from local authorities, and it provides legal and practical advice as to how to move in to non-residential premises without breaking the law. However as regards finding properties which are empty it now advises:

"FINDING A PLACE

There are thousands of empty properties, including many that are non-residential, some of which are more obvious than others. Normally you

will have to keep an eye on a place to make sure it is empty. It is best to research a place thoroughly before you squat it.

The local council's Planning Department has a register of all planning applications and decisions which you can see online. This will tell you who, if anyone, has made an application or got permission.

The Land Registry records ownership of most places. You can get the details for a particular place at landregistry.gov.uk. It costs £3 per place (with a credit or debit card). If there is both a freehold and leasehold owner registered, the leaseholder is the one with rights to the place and can evict you. Don't assume that if you can't find an owner, or if the owner is dead or bankrupt that you are automatically safe. Dead owners have executors and bankrupt companies have administrators.

Once you are inside you will find more useful information in the mail and any documents left around. Keep them all carefully."

36. Although squatting in non-residential premises is not in itself illegal, following the Upper Tribunal's judgement, squatting has specific crimes which are associated with it, such as criminal damage which therefore needs to be taken into account when considering the application of the exemption.

37. The council therefore argues that it is widely recognised that a number of crimes occur in vacant commercial properties and that if it were to disclose the requested information it would make it widely available and this would be likely to assist people in committing crimes. Therefore the prejudice which the council envisages would be likely to occur if the withheld information were disclosed, and this relates to the prevention of crime which section 31(1)(a) is designed to protect.

38. The Commissioner notes however that the *Voyias* decisions related primarily to residential properties rather than commercial premises. She considers that there is a significant difference between these two types of property insofar as whether individuals are able to identify whether the property is vacant or not without reference to the withheld information.

Conclusions

39. The Commissioner has therefore considered the three criteria he has outlined above as regards the application of section 31(1)(a)

- With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice which the Council envisages would be likely to occur if the withheld

information was disclosed, and this relates to the interests which the exemption contained at section 31(1)(a) is designed to protect.

- With regard to the second criterion, the Commissioner accepts that it is clearly 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. She 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.

- In relation to the third criterion, the Commissioner acknowledges that a number of other local authorities have disclosed similar information without any apparent impact on the prevention of crime. However the Commissioner is persuaded that identification of vacant non-residential premises falling within the scope of this request represents more than a hypothetical risk of harming the prevention of crime. Rather, disclosure of this information would present a real risk.

40. The Commissioner therefore considers that the exemption is engaged. She has therefore gone on to consider the public interest test required by section 2(2)(b) of the Act. The test is whether the public interest in the exemption being maintained outweighs the public interest in the information being disclosed.

The public interest in the exemption being maintained

41. The council argues that the main public interest rests in the prevention of crime. It argues that the public interest rests in protecting the public from the effects of crime, and argues that disclosing the information would be likely to increase the levels of crime in the area. It therefore considers that the public interest in withholding the information outweighs the public interest in the information being disclosed.

42. The council identified the following factors in favour of the exemption being maintained:

- There is a strong public interest in maintaining the exemption in avoiding likely prejudice to the prevention of crime. The crime in this case would be likely to include a diverse range from anti-social behaviour, squatting and criminal damage at empty properties.

- Tackling issues like these would involve significant public expense and it is in the public interest to protect property and to ensure that public resources are used efficiently.

- There is also a compelling public interest in avoiding personal distress to the direct victims of the crime and to those in the wider neighbourhood who may be affected.

- Once an area is subject to crime, it has an impact on the surrounding neighbourhood, reducing the value of neighbouring properties and the quality of life of the residents.

- A disclosure of the information could highlight "easy targets" for crime (theft and criminal damage) where offenders would be less likely to be detected.

- Prevent properties being re-occupied quickly, which can impact on housing and rehousing wait times together with costs to individual businesses.

- Health, safety and well-being of residents.

- A disclosure may cause additional costs to business/ property owners in civil action for removal of individuals squatting/ trespass; and associated costs in securing and monitoring premises which are unoccupied.

- Where criminal activity occurs it would likely cause significant costs or insurance implications in the rectification of damage or the replacement of stolen goods or building fabric.

- Future use of the requested data may not take into consideration the relevant organisations intentions on a site which may be for future investment or development at a later time whereby approaches from organisations seeking to purchase the premises would be irrelevant; thereby leading to unsolicited and unwanted approaches to the business.

- Disclosure could lead to attempts to access potentially dangerous properties at significant risk to the individuals involved.

43. The council has also argued that many owners may be leaving the properties empty for a purpose (e.g. such as a property investment), and may not wish unwarranted contact from individuals looking to rent or purchase the properties. Whilst this may be the case this is not a public interest factor relating to the prevention and detection of crime

and cannot be taken into account in support of this particular exemption being maintained.

The public interest in the information being disclosed

44. The council identified the following points in favour of the information being disclosed:

- Reduce the wasted costs to the owners and wasted opportunities to developers
- The housing or business needs of some individuals or corporations would be met
- The costs to the public authority of funding alternative or temporary accommodation would be reduced and the cost of council tax/ business rate discounts for empty properties would fall
- The crime associated with empty properties (criminal damage and theft and squatting) would be likely to fall
- The 'broken window syndrome' by which areas go into decline, affecting living standards and property prices, would be likely to be reduced
- The utilisation of investment into currently empty business premises can assist with the general regeneration of areas within the City and be part of the associated economic benefits
- Businesses who sell business rate advice may be able to utilise empty property details to target the services they provide in regard to the management of business rates

45. The Commissioner's view is that the central public interest in the information being disclosed relates to the benefits which would derive from a disclosure of the information as outlined by the council. This includes use of the information which the complainant has explained that he would use it for, but this consideration cannot take into account the private interests of the complainant.

46. The complainant runs an organisation which, working with other organisations, provides information to business users on empty business properties. Effectively he wishes to provide statistical data and advice on the viability of types of businesses in particular properties within particular areas. The complainant says that this is partly funded by a grant from the EU Open Data Incubator to develop this service.

47. As stated, the Commissioner is not able to take into account the private interests of the complainant in her decision. She is however is able to take into account the wider consequences of a disclosure of the information, and any usage of that data for the purposes outlined by the complainant, either by him or any other organisation able to offer similar services, and consider the public benefits to businesses and communities this would create. She also notes and accepts the council's arguments regarding the benefits of disclosure.

48. The complainant has previously argued that:

> *"I would ask that you consider that the public interest in economic development and improving opportunities for independent businesses and entrepreneurs far outweighs any concern that the release of data which can identify empty business properties may cause crime.*
>
> *Unemployment and economic deprivation are often key to reducing the potential for crime. Our intention is to support local economic development initiatives through the use of these data."*

49. Outside of the direct intentions of the complainant there is a public interest in this information being available. A list of vacant commercial premises within an area will be of use to companies looking to develop their businesses within a specific area. Clearly such information will be useful to business owners and higher rates of occupation by businesses in an area aid in the areas economic development (and redevelopment). Companies moving into an area are generally going to be beneficial to the economic health of that, and surrounding areas. It raises employment levels, reduces crime by making the opportunities for squatting, etc lower, lessens the possibility of crimes such as fly-tipping within vacant properties, and also heightens the sense of security for neighbouring properties and people visiting the area.

50. Some public authorities therefore provide advice to businesses which are hoping to set up within their area in the same way that the complainants service does. The council has not said whether it provides any similar form of service. The council itself recognises the public interest in the information being made available to business users in this manner but is concerned that disclosing the information will facilitate crime within its area.

51. The complainant has also pointed out research: '*British High Streets: from Crisis to Recovery? A Comprehensive Review of the Evidence*'[1] by Neil Wrigley and Dionysia Lambiri of the University of Southampton on behalf of the Economic & Social Research Council which argues that there is a lack of open data on town centre/high street structures which affects research into the area as well as local government's response to retail issues on high streets. The complainant argues that this request is a step towards making open data on this available. The research (at page 4) states:

> *"In part, these difficulties reflect the dominance of proprietary research on topics which have considerable commercial value, and its consequences in terms of a resulting lack of visibility of the true spectrum of available research and findings. But, more widely, it also reflects: the long slow demise of publically accessible open data'; the rise and importance of 'commercial data' on town centre/high street structures, and the constraints that having to fund use of commercial data imposes on research."*

Conclusions

52. In providing its reasons for the information being withheld the council said that it considered that the possible negative effects from disclosure would be significant to business owners, citizens in the area and other public bodies including the police, wider tax-payers in Sheffield and individuals attempting to access premises who then put themselves at risk.

53. It said that it had considered its obligations under the Section 17 of the Crime and Disorder Act 1998 which states that a Local Authority must "*do all that it reasonably can to prevent…. crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment)"*. It considered that this includes consideration about the potential negative effect in the disclosure of information in this manner. It concluded therefore that the public interest must lie in favour of the exemption being maintained in this case. The Commissioner notes this point, but also notes the simple fact that there is little evidence that a disclosure of the information would be likely to affect crime levels. The majority of authorities disclose the information, either as a matter of

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1 http://www.riben.org.uk/Cluster_publications_&_media/BRITISH%20HIGH%20STREETS_MARCH2015.pdf

course or upon request, including some London Boroughs. Where local councils have disclosed this information previously there appears to have been little concern that the disclosure has led to increased levels of crime within the area.

54. When considering the public interest arguments in support of an exemption applying, the Commissioner can take into account the, severity and likelihood of prejudice identified, and this in turn will affect the weight attached to the public interest arguments for the exemption being maintained. The complainant has outlined how the information withheld by the council can be established for many properties already from information already in the public domain.

55. The Commissioner notes that the *Voyias* decision highlighted by the council primarily related to domestic, rather than commercial properties. The Commissioner notes that there is a significant difference between unoccupied domestic properties and between non-residential properties. It is relatively easy to take steps to make a domestic property look occupied, whereas this cannot be said to be the case for the majority of non-residential properties. Commercial properties will be closed and potentially shuttered, industrial properties are likely to be locked and appear empty from the outside, and office buildings are likely to be empty of equipment and locked up during normal business hours. The Commissioner's decision notice in the cases of Cornwall and RBKC noted as part of the arguments that vacant commercial properties can often be evident from the nature of the premises – steel shutters on windows and doors, whitewashed windows or the absence of activity such as parked cars on the properties car park etc.

56. Further to this, the complainant has demonstrated that the information he has requested is often available from estate agents, the Land Registry, Companies House, the Valuation Office Agency and other sources. As an example, he researched and provided the Commissioner with details of 3 properties in a London borough where he had obtained all of the information he had requested through research over the internet using publically available sources. He argued t0hat it had taken him approximately 20 minutes of research to determine the entirety of the information he had requested from another authority for 3 properties. A large number of properties are advertised by estate agents, (although the Commissioner accepts that this will not include all properties), and although this is not a guarantee that they are vacant, potential criminals would be able to visit these to determine whether they are or not. The Commissioner notes however that estate agents will often state that commercial properties are 'available immediately', which is a strong indication that they may be vacant.

57. The Commissioner notes that although it would not always be possible to determine whether a property was vacant or not purely from an estate agents advertisement, put together with the other sources of information which the complainant has mentioned this information will already be available in a lot of cases, providing an individual is willing to carry out the necessary research.

58. The complainant does not argue that all vacant non-residential properties are identifiable from the internet alone. His argument is that a significant amount of vacant non-residential properties can be identified from the internet, and other means such as visiting properties to identify their occupancy. If a significant amount of properties can be identified, criminals intending on carrying out activities in non-residential properties will be able to identify targets with or without the lists. Withholding the information would not therefore prevent or reduce crime from occurring. For the vast majority of non-residential properties visiting a property will establish whether it is occupied or not.

59. Whilst the necessary information may not be available from the internet for the majority of properties, the Commissioner stands by her decision in the Cornwall and RBKC cases that the occupancy of commercial properties is more visible that domestic properties. If nothing else, it will generally be evident whether they are occupied or not by visiting to the property. Organised stripping gangs, those intent on organising raves, and potentially squatters are likely to visit a property prior to breaking in to establish whether they are vacant or not and to establish what security arrangements are in place before they take the further actions which may amount to, or lead to criminal activity.

60. In the case of *London Borough of Ealing v IC (Appeal No: EA/2016/0013),* at paragraph 13 the First-tier Tribunal considered whether details of occupancy by property owners could be considered confidential. It found that it could not be confidential as generally this would be evident:

> *"The only relevant confidential information relied on by the Council is the identity of the occupier and the start date and end dates of the account. Although this information may be supplied to the Council by ratepayers we do not think that it is confidential in the required sense because the identity of an occupier and the dates of its occupation of a property are likely to be matters of public knowledge in that the public are generally able to see who is occupying commercial premises and when. This is in contrast to the position with other forms of taxation (like income tax) where many of the details held by HMRC relevant to a taxpayer's liability will come entirely from the taxpayer and not be in the public domain. We therefore reject the Council's case on section 41."*

61. The appeal went to the Upper Tribunal and was remitted back to the First-tier Tribunal. It was subsequently decided through a consent order relating to other matters. The statement of the Tribunal quoted above was not however in question in these further appeals.

62. The Commissioner therefore notes the Tribunal's opinion that the occupation of commercial premises may generally in the public domain because people will be able to see who is occupying it. In the same way it is also evident whether a property is occupied or not as people can visit the property and see whether it is or not.

63. The Commissioner recognises that the council's argument is not that crime will not occur; it is that disclosing the lists would be likely to widen the list of potential properties which criminals and urban explorers are aware of and the number of potential targets of crime will therefore increase.

64. The Commissioner considers it important to consider that those intent on committing organised crime would find opportunities simply from visiting an area, looking on commercial estate agents websites, investigating an area of low occupancy and go ahead with their plans in any event. Withholding this information will not prevent this sort of crime from taking place. Criminals can already obtain this information for some properties as demonstrated by the complainant. They are likely to commit crime regardless of whether the list is published as empty commercial properties can be identified regardless of the publication of the lists by the council. The Commissioner considers that this significantly weakens the council's argument that disclosing the requested information would be likely to be prejudicial to its ability to prevent crime. That crime would be likely to occur in any event.

65. Whilst the lists may be used for purposes such as identifying potential targets the evidence from the complainant, and from the fact that so many authorities already provide or publish this information, is that the likelihood, severity, and or frequency of the prejudice caused by a disclosure of the lists must be fairly low to local authorities who do actively publish it. This does not detract from the fact that the Commissioner fully accepts the council's argument that crime occurs in empty non-residential properties and that they are a draw to squatters etc. The point is that this would be likely to occur anyway, and the disclosure of the lists could not facilitate this to the degree that the council fears as vacant properties can already be identified. This weakens the public interest in the information being withheld. The Commissioner does recognise however that different areas will have different levels of crime, and the likelihood of crimes, such as those highlighted by the council, may be different for each council dependent upon the demographics and geography of the area concerned.

66. Non-residential properties are generally going to be easier to identify as being empty than domestic properties. Residential properties may look occupied even though they are not. The Commissioner considers that it is much harder to disguise the fact that a commercial property is vacant. Those intent on crime are likely to do so anyway. In this sense a disclosure of the lists is not likely to increase levels of crime, and nor will it make such activities easier to carry out. Organised criminals are likely to visit properties prior to taking action to determine what security measures are in place, and will as a result also determine whether the buildings are occupied or not in any event. In short, they are likely to visit properties prior to taking action regardless of the lists being published or not. Opportunist crimes are not generally pre-planned, but based on the actions of the individuals at the time that they note the opportunity, or shortly after that point. They are not therefore likely to refer to lists prior to taking action.

67. As stated, there is a balance to be made between the prejudice identified by the council and the public benefits identified. On the one hand the council may recognise the benefits disclosing the information might bring, on the other it has strong concerns that disclosing the information will prejudice its ability to prevent the crimes it has mentioned taking place.

68. The Commissioner must make her decision based upon the evidence presented to her. The Commissioner notes that the opportunity to identify whether a property is vacant or not exists without reference to the requested information. This significantly weakens the council's argument that a disclosure of the information might be substantially prejudicial to its ability to prevent crime.

69. The Commissioner considers that the council's arguments are significantly weakened by the fact that withholding this information would not prevent these types of crimes from occurring, and would not prevent empty properties from being identified by those intent on either squatting or committing other crimes in the properties.

70. As stated above, the council's argument is not that withholding the information will prevent crimes altogether – it is that a disclosure of withheld information will widen the information available to potential criminals in order to plan their activities. This is the level of prejudice which needs to be balanced against the strong public interest benefits which a disclosure of the information would result in.

71. The Commissioner has considered the economic advantages such a disclosure might bring about, the fact that many prospective business owners may benefit form a disclosure of the information as compared to the issues which occur when large numbers of commercial properties lay

empty. When balancing this against the level of prejudice which she has identified to the prevention and detection of crime she has described above the Commissioner considers that the balance of the public interest rests in the disclosure of the information.

72. The Commissioner's decision is that the council was not correct to apply section 31(1)(a) in this instance.

Section 31(1)(d)

73. Section 31(1)(d) provides 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— the assessment or collection of any tax or duty or of any imposition of a similar nature.

74. The council argues that a disclosure of the information would be likely to prejudice its collection of national non domestic rates (business rates). It said that it is aware that there are a range of organisations that seek to provide advice and guidance to businesses on the management of their business rate accounts and this can on occasion lead to efforts to avoid tax. It is concerned that a disclosure of this information could be used in association with other publically available information in an effort to support businesses in the avoidance of tax.

75. It said that there has been a significant history of rates evasion schemes which have progressed in relation to business rate and relief schemes. These have subsequently been investigated and closed at significant public expense. It considers that these types of scheme are firmly against the public interest and efforts must be made to protect information which may assist in the avoidance of tax.

76. It provided evidence of such schemes by noting previous attempts to fraudulently influence empty property relief fraud or criminal efforts to reduce business rates liability. It provided evidence of this in links such as http://www.teiccaf.com/download-pepp-2016/ and the Protecting the English Public Purse 2017 report which cites the potential value of business rates fraud and a specific case study from Oxford City Council re: empty property fraud. It said that a 2012 Audit Commission version of this report also noted empty property fraud as an upcoming fraud area.

77. It asked the Commissioner to look at utilisation of charities fraud as reported at http://www.cfg.org.uk/Policy/~/media/Files/News/CFG%20Briefing%20-%20Charities%20and%20Business%20Rate%20Relief%20-%20April%202015%20-%20final.pdf and note that at point 5, pages 7

& 8 the report cites evidence of the use of empty property information under FOI to exacerbate fraud.

78. It said that it is also aware that a number of specific schemes used by businesses and targeted by firms to avoid council tax, which includes the MVL avoidance scheme vehicles, Makro avoidance and charity avoidance schemes such as Emergency Aid and Kenya Aid Programme. It said that these schemes use short term leases, allowing firms to either inappropriately obtain relief via charitable status lets or provide bogus short term lets to allow a refresh or empty property relief without appropriate occupation of the property.

79. It did not provide specific further arguments in respect of the above, and instead referred to its arguments regarding the application of section 31(1)(a) in this regard. It effectively equated the effect of tax avoidance schemes such as those it outlined with the increased likelihood of criminal activity as it has argued for the application of section 31(1)(a).

80. The Commissioner accepts that the arguments have force and for this reasons accepts the councils arguments that the exemption in section 31(1)(d) is applicable to the information.

The public interest test

81. The council simply referred to its arguments as to the application of section 31(1)(a) when considering the application of the public interest test to section 31(1)(d). Effectively therefore the Commissioner has considered this as a further factor in the public interest test which the Commissioner carried out in respect of the application of section 31(1)(a).

82. The likelihood, and severity and frequency of the harm needs to be taken into account in the balancing of the public interest when reaching a decision. In this case she has already established that vacant commercial properties are already visible and with effort, much of the information can already be obtained, or is already discernible from information in the public domain.

83. The additional factor is the severity of the losses potentially incurred to public money which can occur where business rates are avoided in this manner. Additionally the costs of taking legal action to obtain funds from those found to be flouting tax laws in this manner can be significant.

84. The Commissioner has previously considered the issue of charitable business rates avoidance schemes in her decision notice relating to West

Berkshire Council, case FS50681322, (available at https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014854/fs50681322.pdf. The arguments within this notice are equally applicable to the council's arguments in this situation.

85. In essence, the Commissioner does not accept that the likelihood, severity or frequency of these schemes is likely to rise with the disclosure of the information. The complainant has demonstrated that it is possible, with a degree of research to uncover information on a large number of properties. Effectively withholding the information would not prevent such crime occurring, and with the levels of money potentially available under business rates avoidance schemes those intent on doing so will be more likely to carry out the necessary research to carry out their activities regardless of whether the lists have been disclosed or not.

86. The Commissioner also notes that the beneficiaries of such schemes include the businesses who would otherwise be liable to pay the full business rates for the property. They are already aware that the property is empty as they are liable for the business rates for the business. Withholding the lists has no effect whatsoever on preventing such schemes where they are initiated by businesses who would be otherwise liable to pay the full business rates.

87. For these reasons the Commissioner has not been persuaded that the public interest in the maintenance of section 31(1)(d) outweighs that in the disclosure of the information in this instance.

Section 41(1)

88. The council also outlined an argument that it considered that the information provided to it for business rates purposes, including whether the properties were empty or not, is held in confidence. It argues that if it disclosed the information and subsequent criminal activity led to increased costs or damage etc then it could find itself subject to a case for an actionable breach of a duty of confidence.

89. The council only gave a very brief outline of this argument to the Commissioner however it said that it would be willing to expand upon this argument should the Commissioner find it necessary to consider this further. The Commissioner has not asked the council to do so as she is aware of the argument, it has previously been touched on by the First-tier Tribunal, and because, as demonstrated below, the arguments against the information being confidential have significant force.

90. Following the test for confidence provided in *Coco v Clark [1969] RPC 41*, the following criteria are required in order for a duty of confidence to arise:

    a) The information has the necessary quality of confidence;

    b) The information was imparted in circumstances importing an obligation of confidence; and

    c) There was an unauthorised use of the information to the detriment of the confider.

91. a) Quality of confidence – The complainant has limited the information he is asking for. He has not asked for all information on the business rates of individual properties. For the most part the information he has asked for is already available to the public via the VOA and through other sources such as the Land Registry. For the most part it is only the question of whether the property is empty which has been brought into question where exemptions have been applied under section 31 by other authorities. This suggests that section 41 could not be applied to all of the information which the council holds as the vast majority of councils disclose the majority of the requested information.

92. Additionally, as pointed out by the Tribunal in the *Ealing* case (noted in paragraph 60 above), as the occupation of a building is publically visible it cannot be said that a disclosure of this information has been limited by the owners. The information therefore does not have the necessary quality of confidence for a duty of confidence to arise. The Tribunal dismissed an argument that information of this sort was confidential on these grounds.

93. b) Obligation of confidence - The question for the Commissioner is whether a duty of confidence would be implied or specified when the information is provided to the council. The council would need to demonstrate that at the time that information was provided both parties would have had an expectation that the information they were providing would be held in confidence.

94. The Commissioner notes, and takes into account that there is a recognised, general expectation of confidence regarding an individual's tax affairs.

95. However as regards business rates, property owners could not generally expect a duty of confidence to be implied as a matter of course as this information would be available for the majority of properties (for the reasons outlined above). More generally the majority of the other information provided by the individuals would be already available to the

public through other sources. The VOA provides details on general property valuation from its website, and the Land Registry will provide details of ownership as regards the majority of properties. Companies House will provide details of the ownership of limited companies, together with details of the directors of those companies and a registered company address. The Charity Commission will provide details of charities including listing the registered address.

96. Whilst individuals may consider that specific figures surrounding the payment of their rates might be considered confidential, the council would need to demonstrate why they might consider issues such as their ownership of the property and whether the property is vacant or occupied would be understood to be confidential.

97. The Commissioner considers that it is not possible to justify the obligation of confidence on information which is already available by viewing the property itself or using other publically available sources of information. As the information is publically available or otherwise visible the Commissioner cannot therefore conclude that an implied duty of confidence could be said to be present when the information is provided to the council in the first instance.

98. For these reasons the Commissioner considers that the information cannot be subject to a duty of confidence. She has not therefore found it necessary to go on to consider the likely detriment to the confider of the information or whether there may be a public interest defence to the information being disclosed which might outweigh any duty of confidence which the council argues exists.

Right of appeal

99. 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

100. 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.

101. 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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