

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 April 2021

**Public Authority:** Knowsley Council  
**Address:** Archway Road  
Huyton  
Knowsley  
Merseyside  
L36 9YU

#### **Decision (including any steps ordered)**

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1. The complainant requested information from Knowsley Council ("the Council") relating to Non-Domestic Rates Liability Orders. The Council stated that any such disclosure regarding the Liability Orders granted by the Court is a matter for Merseyside Magistrates' Courts, it considered the request to be exempt information and cited section 21 (information reasonably accessible by other means) of the FOIA. The Council subsequently provided the complainant with some information relating to the request but withheld the names of the ratepayers (part 1 of the request) and also applied sections 41 (information provided in confidence) and 40(2) (personal data) to this information.
2. The Commissioner's decision is that the Council was not entitled to rely on sections 21 and 41 of the FOIA to refuse the request. However, the Commissioner considered that part 1 of the request (ratepayer name where it constitutes a personal name) was correctly withheld under section 40(2) of the FOIA.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the information which does not attract section 40(2) of the FOIA.

4. The Council 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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

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5. On 29 November 2019 the complainant wrote to the Council and requested information in the following terms:

*"I wish to obtain from the Council information relating to liability orders which have been granted in respect of unpaid Business Rates. For each liability order made since January 1 2019, please provide the following:-*

- *The ratepayer for which the liability order was granted.*
  - *The address in the rating list for which the liability order was granted.*
  - *The amount of the outstanding liability which the order was granted for.*
  - *The date on which the liability order was granted."*
6. On 23 December 2019 the Council responded. It stated that any such disclosure regarding the Liability Orders granted by the Court is a matter for Merseyside Magistrates' Courts. Therefore, the Council considered the request to be exempt information and cited section 21 (information reasonably accessible by other means) of the FOIA.
  7. On 6 January 2020 the complainant asked the Council for an internal review.
  8. On 3 February 2020 the Council provided its internal review response. It confirmed that the Council holds information regarding Liability Orders made by the Magistrates' Court, as the Council requires such information to enforce the terms of those Orders (*"which is a statutory function of the Council"*). However, the Council maintained its original position to refuse to comply with the request.

## Background to the case

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9. The Commissioner notes from the correspondence provided to her by the complainant, that he had attended a court hearing on 29 November 2019 for the non-CPS prosecutions. The Court had made a Liability Order for nine businesses on the application of the Council in respect of non-payment of non-domestic rates. On that day, the complainant asked the Court for "*the names of those businesses in respect of whom the [Liability] orders were made?*"
10. The Court responded and informed the complainant that he would need to contact the Council for this information, as the Court does not hold the information on its system.
11. Following the complainant's request for information to the Council on the same day - 29 November 2019, and his subsequent internal review request, the Council responded and maintained its position to rely on section 21 of the FOIA. The Council confirmed to the complainant that it holds information regarding Liability Orders made by the Magistrates' Court as the Council requires such information to enforce the terms of those Orders ("*which is a statutory function of the Council*"). The Council said that it does not release this information publicly, and believes that the Magistrates' Court remains the most appropriate body to provide the information which the complainant is seeking.
12. The complainant disagreed with the Council's conclusions and referred the Council to the response he received from the Magistrates' Court stating that it does not hold the information on its system. The complainant argued that as the Council holds the information and the Court does not, he therefore believes that it is the Council to be the most appropriate body to ask for the information he is seeking.
13. On 14 February 2020 following correspondence between the complainant and the Council, and also between the Council and the Court, the Court said that it would arrange for the register to be brought up from its archives, and that the information requested would be supplied to the complainant. The Court also asked the complainant to confirm if he required "*the names of the nine businesses who had a Liability Order against them on 29 November 2019 in relation to non-domestic council tax?*" The complainant confirmed that this was correct [albeit in relation to "*non-domestic rates*"] and he asked the Court if it was possible to have a list of *all* the Knowsley businesses that had such orders made against them in 2019. He said to the Court that if it was not possible to obtain a list of all the businesses, then he would accept the orders from just 29 November 2019.

14. On 20 February 2020, the Court provided the complainant with the names of the nine businesses that had a Liability Order against them on the date in question.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 3 February 2020 to complain about the way his request for information had been handled.
16. Following the Commissioner's intervention and during the course of the investigation, the Council contacted the Magistrates' Court to ascertain the Court's reasons for not supplying the information directly to the complainant. The Magistrates' Court replied and provided the complainant with some information relating to his request, this was one month's worth of information from the court register. The Court stated that it does not have a copy of the Liability Order but that it does have a court register. It explained that it was unable to provide him with the full year of information (which he had requested from the Council) due to the way in which the documents were stored.
17. Also, during the course of the investigation, the Council provided the complainant with some of the information requested. This contained details of the Liability Orders – the sum amount and the dates (parts 3 and 4 of the request). The Council, following a review of the matter, considered that some parts of the information held to be exempt under sections 41 and 40(2) of the FOIA. It confirmed that this exemption was specific to *"the ratepayer company name and the company address in the rating list for which the Liability Order was granted."*
18. The complainant was asked to state which part of his request he considered to be outstanding, and he confirmed to the Commissioner that he is seeking the names of the ratepayers for which the liability order was granted (part 1 of the request).
19. With regard to part 2 of his request - the addresses of the ratepayers, the complainant decided to withdraw this part of his request.
20. The following analysis therefore focuses on whether the Council was entitled to rely on sections 21, 41 and 40(2) of the FOIA to refuse information to part 1 of the request – the names of the ratepayers regarding the Liability Orders.

## Reasons for decision

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### Section 21 – information accessible to the applicant by other means

21. Section 21 of the FOIA states that:

*(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*

*(2) For the purposes of subsection (1)—*

*(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and*

*(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.*

22. Section 21 is an absolute exemption, which means there is no requirement to carry out a public interest test if the requested information is exempt.

23. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor can access elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes. Finally, it protects the statutory right of public authorities to charge for certain information which they are bound by law to collect.

24. In the Commissioner's guidance for section 21<sup>1</sup> of the FOIA, the Commissioner explains that subsection (1) describes the fundamental principle underlying this exemption. That is, in order to be exempt, the requested information must be reasonably accessible 'to the applicant'. Unlike consideration of most other exemptions in the FOIA, this allows the public authority to take the individual circumstances of the applicant into account.
25. In effect, a distinction is being made between information that is reasonably accessible to the particular applicant and the information that is available to the general public. In order for section 21 to apply, there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA.
26. Information is only reasonably accessible to the applicant if the public authority:
- knows that the applicant has already found the information; or
  - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 of the FOIA in this context, the key point is that the authority must be able to provide directions to the information.
27. Additionally, paragraph 23 of the Commissioner's guidance, following the case of *The London Borough of Bexley and Colin P England v Information Commissioner (EA/2006/0060 & 0066, 10 May 2007)*<sup>2</sup>, states that for section 21 to apply, it is necessary to consider whether all of the information is reasonably accessible to the complainant. At paragraph 113 of the decision the Tribunal stated:

*"The reasons are that in section 21 the word "reasonably" qualifies the "accessible" and in the majority's view, "reasonably accessible" applies to the mechanism that any applicant has available to him or her to obtain the information. We do not interpret the section as stating that a public authority has no obligation to provide information where a reasonable amount of that information is available elsewhere."*

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

<sup>2</sup> <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i146/ENgland.pdf>

## **The Council's position**

28. The Council refused to disclose the names of the ratepayers for which Liability Orders were granted by the Magistrates' Court and explained its reasons. It stated to the Commissioner that the Magistrates' Courts are part of the Judicial Office which is a central Government body and is covered by the FOIA. It said that FOI requests submitted to the Judicial Office are managed by the Ministry of Justice, and that the Judicial Office respond to FOI requests which is established from the Courts and Tribunals Judiciary website. The Council said that it had explained these details to the complainant in its letter to him of 5 February 2021.
29. The Council noted to the Commissioner the complainant's correspondence of 19 January 2021 in which he refers the Council to Rule 5.8(4) of the Criminal Procedure Rules, governing requests for information regarding historic cases. The complainant emphasised that under this rule, *"Court staff can only supply information about cases which are ongoing or where the verdict was not more than six months ago and that, in respect of cases which are older than six months, disclosure is at the discretion of the Court."*
30. The complainant also noted to the Council that the information he requested was older than six months, and at the time of the original request made in November 2019, much of the information was already over six months old. The Council stated that as the complainant is now requesting only the names of the ratepayers for which Liability Orders were granted by the Magistrates' Court, it doubts that these rules were applicable in respect of the "outcome" of a case rather than the supporting case file. The Council said that it would expect the Court to hold records of "outcomes" of cases for longer than a six-month period and for a period which would allow the Court to consider any appeal from an Order made. However, the Council stated that *"any retention of records policy is a matter for the Court itself."*
31. The Council informed the Commissioner that the complainant had previously asked for information from Liverpool Magistrates' Courts and that he was supplied with it. This, it said, was following the Council's intervention to Liverpool Magistrates' Court on the complainant's behalf, as he had been refused a request by a Liverpool Magistrates' officer. However, due to the Council's intervention, *"another Liverpool Magistrates' Court officer took a different view and supplied information to the complainant (albeit in respect of one hearing date only)."*



32. The Council stated to the complainant that as the information requested is reasonably accessible to him from Merseyside Magistrates' Court, it is considered to be exempt information under section 21 of the FOIA. The Council said that *"it fully accepts that legal proceedings are conducted in public – including disclosure of the identities of the parties involved where that is appropriate – and therefore that anyone attending such proceedings is entitled (again where appropriate) to publish the outcomes as a matter of record."*
33. The Council said it considers that there is no overriding public interest in disclosing this information. It explained that ratepayers, or associated parties have provided details of ratepayers for a statutory function and expect that it will be used for the purposes for which it was collected, treated confidentially and not to be released into the public domain without the prior consent of the ratepayer.
34. The Council's position is that the complainant could obtain the requested information directly by attending each hearing at which Liability Orders are being heard, or by requesting information from the Liverpool Magistrates' Court under the FOIA process. The Council said it believes that the Magistrates' Court remains the most appropriate body to provide the information which the complainant is seeking. For these reasons, the Council said, it refused under section 21 of the FOIA to release the information.

### **The complainant's position**

35. The complainant argued the Council's reliance on section 21 to refuse the names of companies that were issued Liability Orders for Non-Domestic rates. He reiterated that the Council had stated the information is available from the Magistrates' Court, and that the Court informed him that it does not hold it, although the Council confirmed that the Court does hold the information.
36. The complainant is of the view that Magistrates' Courts are not subject to the FOIA and therefore do not hold the information he has requested. He maintained that *"...if the Judicial Office did hold the information and it could be attained through the FOIA, each public authority could claim a similar exemption on the basis that the information could be obtained from the other with the effect that the information would never be released."*



37. The complainant argued that the exemption does not apply as he believes the information requested is not "reasonably accessible". He said the Court had indicated that it is unable to provide the information and suggested that it is not reasonably accessible. The complainant said that if the Court refuses to provide the information, then "*it is not accessible at all.*" The complainant repeated that the Court stated that it cannot provide the information, and it appears to be under no obligation to.

### **The Commissioner's position**

38. The Commissioner has considered the names of those businesses in respect of whom the Liability Orders were made, and notes that this information is not reasonably accessible from the Magistrates' Court. Nor via any other mechanism by which the applicant could reasonably obtain access outside of the FOIA.
39. In order to rely upon section 21 of the FOIA a public authority must be able to show that the information is easily accessible to the requester, and be able to provide directions to where that information is available. The Commissioner notes in this case that the Court informed the complainant that the information requested is not available. She is also aware that the Council has not provided any arguments which demonstrates that the information is available with the Court, it has only argued that the Court should hold this information. Therefore, the Commissioner has determined that the Council has not demonstrated the application of the exemption in this instance.
40. The Council was therefore not entitled to rely on section 21 of the FOIA in respect of the information requested.

### **Section 41 – Information provided in confidence**

41. Section 41(1) of the FOIA states that information is exempt from disclosure if –
- (a) it was obtained by the public authority from any other person (including another public authority), and,*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*
42. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information must constitute an actionable breach of confidence.

43. In her guidance<sup>3</sup> on section 41 the Commissioner acknowledges:  
“[Section 41] *is designed to give those who provide confidential information to public authorities, a degree of assurance that their confidences will continue to be respected, should the information fall with the scope of an FOIA request.*”

*Was the information obtained from another person?*

44. The withheld information in this case, consists of the names of the ratepayers for which Liability Orders were granted by the Magistrates' Court. The information was obtained by the Council from individuals and non-individuals - such as companies.

45. The Commissioner is satisfied that the Council obtained this information from another person.

*Would disclosure constitute an actionable breach of confidence?*

46. In considering whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. This judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

47. Further case law has argued that where the information is of a personal nature, it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

*Does the information have the necessary quality of confidence?*

48. For the information to have the necessary quality of confidence, it must not be trivial and not otherwise available to the public. Information which is of a trivial nature or already available to the public, cannot be regarded as having the necessary quality of confidence. This reflects the position taken in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415* where the Judge stated;

*"...there can be no breach of confidence in revealing something to others which is already common knowledge."*

49. In this case, the Commissioner has reviewed the withheld information. She notes that the information consists of the names of the ratepayers for which Liability Orders were granted by the Magistrates' Court.
50. The Commissioner is satisfied that the information withheld is more than trivial as it contains the details of ratepayers that the courts have decided were liable to pay outstanding business rates.
51. Information will be in the public domain if it is realistically accessible to the general public at the time of the request. If the information has entered the public domain at any time, even if the material is no longer in the public domain at the time of the request, it is considered that confidentiality will be permanently lost.
52. The Commissioner is aware that the Council believes the information is already available in the public domain, as the Council maintained that the Magistrates' Court is the appropriate body to provide the complainant with the information he is seeking. The Council had cited section 21 and stated that any such disclosure regarding the Liability Orders is a matter for the courts, therefore the Council considered the request to be exempt information because it is accessible by other means. Paragraphs 32 and 34 of this notice highlights this argument.
53. The Commissioner has viewed the initial correspondence in which the complainant had tried to obtain information from the Court, along with the information which the Court subsequently provided to him. It is clear that the Court was unable to supply information for each Liability Order made since 1 January 2019, however, the Court was able to supply the complainant with some information which he had asked for. This consisted of a court list of nine liable parties - one months worth of the information. The complainant then submitted an information request to the Council asking for information for the whole year - 2019.
54. The information which the complainant obtained from the Court has been aired in open court and therefore this information does not attract the necessary quality of confidence.

*Was the information imparted in circumstances importing an obligation of confidence?*

55. The Council stated that an important duty of confidentiality is owed to taxpayers, and that this is recognised in English law. This is known as "taxpayer confidentiality" and the Council said that it is there to protect taxpayers' affairs against disclosure to the public. The Council is of the view that disclosure of the information requested, would be that individual business ratepayers could issue legal proceedings against the Council. It said that no consent had been obtained from the individual ratepayers, and neither is disclosure required by law.
56. The Council argued that where individuals are sole traders, disclosure about their business may reveal information about their financial well-being which could be misinterpreted and adversely affect their business.
57. The Commissioner has considered the Council's position and the nature of the requested information. She is satisfied that the individuals concerned would expect that the information would remain confidential and would not be disclosed to the general public as part of an FOIA request. The Commissioner is therefore satisfied that the information being withheld was imparted in circumstances which give rise to a duty of confidence.

*Would disclosure be an unauthorised use of the information to the detriment of the confider?*

58. The Council explained that ratepayers provide information (names and addresses) to the Council in confidence and that they have an expectation which is supported in law, that this confidence will be maintained. The Council considers that ratepayers and taxpayers may be discouraged from sharing such information with the Council, if there were not a degree of certainty that such confidences would be respected.
59. The Commissioner has established the information provided to the Council by the ratepayers, constitutes information of a confidential nature. Disclosure may impact on both parties and cause distress if they were to become the focus of any proposed action. It is not necessary for there to be any detriment to the confider, however, the Commissioner is satisfied that disclosure would have a detrimental impact on the confider in this case.
60. The Commissioner has determined that the criteria at section 41(1) of the FOIA are met, and the withheld information was provided in confidence.

*The common law duty of confidence and the public interest*

61. While section 41(1) of the FOIA is an absolute exemption, and therefore not subject to the public interest test at section 2 of the FOIA, the common law duty of confidence contains an inherent public interest test. This test assumes that the information should be withheld, unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence. Whether any public interest is sufficient to outweigh the duty of confidence, will depend on the circumstances of the case.
62. The complainant argued that the information (names of ratepayers) cannot be considered as confidential, he said that the fact it has been aired in open court demonstrates that it is not confidential. The complainant considers that *"the information has lost any quality of confidence that it may previously have had by virtue of the fact that these details were aired in open court when the Council applied for the liability orders."*
63. The complainant was asked to provide the Commissioner with a copy of the information which he received from the Magistrates' Court in February 2020, following his attendance of the court hearing in November 2019. The information was a list of 9 records of orders that were made, and was approximately one month's-worth of the information requested. This included the name of the liable party, their correspondence address, the address of the premises, and the amount they are liable for. The complainant stated to the Commissioner that *"all of this information forms the official record of the court and, while it may not have been spoken out loud, is deemed to have been aired in open court (otherwise the court wouldn't have been able to send me even these details."*
64. The complainant believes that there is a public interest in disclosing the information. He said *"the businesses in question have acted unlawfully in failing to pay their business rates on time, forcing the Council to take them to court to recover the money and using up Council time and resources. Holding these businesses to account is in the public interest and could act as a deterrent to others. Indeed, it would be perverse if a business could default on its obligations to the public purse, be taken to court and then assert that all this was confidential."*
65. The complainant disagrees with the Council's assessment that publishing the names of parties involved in court cases is not in the public interest, given the principle of open justice. He referred the Commissioner to a link to an article within the Knowsley News website, the details show that the Council had published the identity of other parties involved in prosecutions it had brought.

66. The complainant also argued that many local authorities publish this information on their websites, along with the rateable value of the property, the value of any relief provided, and in some cases, the actual amount of business rates the ratepayer is liable for. He provided the Commissioner with some links to certain councils as evidence of published information on their websites. The complainant said that as far as he is aware, none of these local authorities had been taken to court as a result of publication of this information, and he believes it to be highly unlikely that the Council would be in this instance.
67. The complainant strongly disputes the confidentiality of the ratepayer's name, he said this information "*is not so ironclad as to prevent disclosure as a matter of routine and not just in cases where there is a suggestion of serious wrongdoing.*" However, the complainant said he acknowledged that in cases of sole traders, councils have chosen to redact names and addresses.
68. The complainant referred the Council to a link to Coventry City Council's website, where this specific information relating to Liability Orders had been previously published. He said that "*this example shows that the arguments relating to taxpayer confidentiality are not necessarily overwhelming ones.*"
69. The Council responded to the complainant's argument that Coventry City Council had provided similar information to that which he is seeking from the Council. It said that the link which the complainant supplied related to the financial year 2014/15 and that it is not evidence of a recent approach. The Council stated that it is possible that Coventry City Council has since changed its policy on publishing this information. It went on to say that it is unaware of any other locally neighbouring local authorities which are publishing or supplying this type of information.
70. The complainant is of the view that the public interest in disclosing the information is significant. He said that these Liability Orders show that there has been wrongdoing on the part of the businesses that had failed to comply with their legal obligations and to pay their taxes on time.
71. The complainant added that the "*limited*" information which the Council disclosed, revealed that some of the sums owed are considerable. Therefore, the complainant believes that there is a clear public interest in identifying businesses that have "*shirked their responsibilities to the public, something which could also act as a deterrent to similar conduct in the future.*"

72. The complainant also argued that there is a public interest in upholding the principle of open justice, *"which requires, among other things, that parties to legal proceedings be publicly identified (with a few limited exceptions where this would undermine the administration of justice)."*
73. The complainant is of the view that if his request was simply for the sole trader's names and addresses, then they may have a reasonable expectation of confidentiality. However, as he previously argued, the complainant said that this cannot be the case where the sole trader's details have been aired in open court. He stated that the sole trader's may suffer adverse consequences by having these details published, but the complainant believes that this is a consequence of having failed to pay their business rates on time and forcing the Council to take them to court.
74. The Commissioner considers that there is always some public interest in a public authority conducting its business in a transparent manner. In this case, the Commissioner acknowledges that there is some public interest in information regarding Liability Orders and to whom they were granted to. However, she is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant.
75. Whether any public interest is sufficient to outweigh the duty of confidence, will depend on the circumstances of the case. For example, there would be greater public interest in disclosure in a case where there is evidence of any wrongdoing, or efforts to cover up the reason for a course of action.
76. The Commissioner is aware that the complainant has concerns over these Liability Orders. Specifically, in respect of unpaid business rates i.e. ratepayer's failing to pay their business rates promptly, resulting in the Council having to take them to court to recover the money, which the complainant views as an unnecessary use of the Council's time and resources.
77. The Council said that it considered the public interest in transparency on how the Council administers the collection of business rates and council tax. However, it believes that this interest is reduced in the absence of any allegations of serious misconduct, wrongdoing, or risks to the public. The Council explained that the ratepayers provide information which includes names and addresses to the Council in confidence. It said that it must maintain trust and preserve the free flow of information, where it is necessary for the Council to perform its statutory functions relating to the administration of business rates and council tax.



78. The Council also said that such functions are undertaken for the benefit of the public. It considered that *"it would be unnecessarily excessive to override the duty of the taxpayer confidentiality in order to disclose such information."*
79. The Commissioner has therefore considered whether the public interest factors in favour of disclosure are sufficient to outweigh the assumption that information provided in confidence should not be disclosed.

### **The Commissioner's decision**

80. The Commissioner is mindful that some information has been aired in open court. The information is that the Court made a Liability Order for nine businesses on the application of the Council in respect of non-payment of non-domestic rates. The names of nine businesses of whom the Liability Orders were made had been aired in open court. The Commissioner notes that in the complainant's initial request to the Court, he confirmed that he was seeking the names of these nine businesses who had a Liability Order against them on 29 November 2019 relating to non-domestic rates. The complainant asked the Court if it was possible to have a list of *all* the Knowsley businesses that had such orders made against them in 2019. He said to the Court that if it was not possible to obtain a list of all the businesses, then he would accept the orders from just 29 November 2019.
81. The information has lost any quality of confidence that it may previously have had because the details were aired in open court when the Council applied for the Liability Orders. Information that is already in the public domain will not possess the necessary quality of confidence. Therefore, the information cannot be considered as confidential.
82. The Commissioner's guidance on section 41 includes a paragraph which states the position taken by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 where he stated;  
  
*"...there can be no breach of confidence in revealing something to others which is already common knowledge."*
83. Information will be in the public domain if it is realistically accessible to the general public at the time of the request.
84. The Commissioner notes that the complainant had received from Liverpool Magistrates' Court and from the Council, some of the information relating to his request.

85. In weighing the above against the public interest in keeping the information confidential, the Commissioner has concluded that there is an overriding public interest defence for a breach of confidence, and that the Council was not entitled to rely on section 41 in respect of the withheld information.

### **Section 40 – Personal information**

86. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

87. In this case the relevant condition is contained in section 40(3A)(a)<sup>4</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (“the DP principles”), as set out in Article 5 of the UK General Data Protection Regulation (“GDPR”).

88. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (“DPA”). If it is not personal data then section 40 of the FOIA cannot apply.

89. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

90. Section 3(2) of the DPA defines personal data as:

*“any information relating to an identified or identifiable living individual”.*

91. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

92. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

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<sup>4</sup> As amended by Schedule 19 Paragraph 58(3) DPA

93. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
94. The withheld information in this case consists of the name of the ratepayer for which the Liability Order was granted. Individuals are identifiable from the information.
95. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
96. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
97. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

98. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

99. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
100. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

*Lawful processing: Article 6(1)(f) of the GDPR*

101. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

102. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>5</sup>.*

103. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii. **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

104. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>5</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

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

*Legitimate interests*

105. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
106. The complainant stated to the Commissioner that because the names and the details have been aired in open court, the ratepayers do not have a reasonable expectation of confidentiality. He therefore disputes the Council's reliance on section 40(2) of the FOIA and considers that the information should be disclosed.
107. The Council argued that the exemption is specific to the ratepayer name where it constitutes a personal name (as opposed to a company name) in the Rating List for which the Liability Order was granted. The Council considers disclosure of such information would breach principle (a) of Article 5(1) of the UK GDPR are not met. Also, the Council considers that it would not be fair to the ratepayers to disclose this information as the individuals have a reasonable expectation that such personal information would not be disclosed. The Council is of the view that the individuals would suffer consequences if such information were disclosed. Where individuals are sole traders, any disclosure about their businesses may reveal information about their financial well-being which could be misinterpreted and adversely affect their businesses. Therefore, the Council maintains its position that the information requested is exempt under section 40(2) of the FOIA by virtue of section 40(3A)(a).
108. The Council explained to the Commissioner that it does however consider that the amount of outstanding liability for which the Liability Order was granted, and the date on which it was granted, when not disclosed alongside the name to which it relates, does not engage an exemption. The Council reiterated that it had already provided the complainant with this information – sum amount and date. In accordance with his request, the information covered the period from 1 January 2019 to 29 November 2019 (date of request).

109. The Commissioner accepts that there is a legitimate interest in the transparency of information relating to Liability Orders. She finds that there is no legitimate interest in identifying the name for which the Liability Order was granted.

*Is disclosure necessary?*

110. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

111. The Commissioner understands that the complainant is seeking the information as he believes that the Liability Orders reveal that there has been wrongdoing relating to unpaid business rates. She also notes that the complainant considers that it is in the public interest for the information to be disclosed. However, the Commissioner does not consider that disclosure of this information (names of ratepayers) is necessary. The Council has provided some of the information requested to meet the legitimate interests identified while protecting the personal data of the ratepayers. The Commissioner is satisfied in this case that there are less intrusive means of achieving the legitimate aims identified, and that these aims have been met in the Council disclosing a spreadsheet consisting of information relating to the request, but without the name of the ratepayer.

112. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it therefore does not meet the requirements of principle (a).

### **The Commissioner's conclusion**

113. The Commissioner's decision is that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a) of the FOIA.

## Right of appeal

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114. 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@justice.gov.uk](mailto:grc@justice.gov.uk).

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

115. 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.

116. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**