



**IN THE INFORMATION TRIBUNAL
THE FREEDOM OF INFORMATION ACT 2000 (FOIA)**

Heard at Harp House, London on 1st, 2nd and 5th March 2007
Decision Promulgated 10th May 2007

BEFORE INFORMATION TRIBUNAL

**DEPUTY CHAIRMAN Peter Marquand
and LAY MEMBERS Jacqueline Blake and Paul Taylor**

BETWEEN:

MR COLIN P ENGLAND

First Appellant

And

LONDON BOROUGH OF BEXLEY

Second Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the First Appellant: In Person

For the Second Appellant: Mr Andrew Maughan, solicitor, London Borough of Bexley

For the Respondent: Mr Akhlaq Choudhury, counsel

DECISION

The Tribunal has decided to substitute the following Decision Notice in place of the Decision Notice dated 25.07.2006 and allows parts of both appeals. The action that is required in the light of the decision that has been reached is set out in the substituted Decision Notice below.

Substituted Decision Notice

The Tribunal allows the appeals and substitutes the following decision notice in place of the decision notice dated 25.07.2006:

FREEDOM OF INFORMATION ACT 2000 (SECTIONS 50 and 58)

Information Tribunal Appeals Numbers: EA/2006/0060 and EA 2006/0066

SUBSTITUTED DECISION NOTICE

Dated 9th May 2007

Public authority: London Borough of Bexley

Address of Public Authority: Civic Offices
The Broadway,
Bexleyheath
Kent DA6 7LB

Name of Complainant: Mr Colin England

The Substituted Decision:

For the reasons set out in the Tribunal's determination, the substituted decision is that the London Borough of Bexley did not deal with the complainant's request in accordance with the requirements of Part I of the Freedom of Information Act 2000 in that the London Borough of Bexley failed to disclose to the complainant the following information:

- (a) addresses of "long term empty" and "uninhabitable empty properties" that are not owned by individuals; and
- (b) the names of the owners of those properties referred to in (a).

"Individuals" means natural persons, or the beneficiaries of deceased individuals, if they are also natural persons.

Action Required:

The London Borough of Bexley shall provide a copy of the said information to the Complainant within 28 days from today.

Dated 9th May 2007

Signed
Peter Marquand
Deputy Chairman, Information Tribunal

REASONS FOR DECISION

The request for information

1. By email dated the 05.02.2005, Mr England made a request for information from the London Borough of Bexley ("the Council") in the following terms:

(a) *"I wish to have a copy of the working document showing the vacant, empty or abandoned residential properties which have come to the Council's notice and the reasons for such attention and the actions being taken or already taken by the Council."*

2. Mr John Grosvenor, Freedom of Information Project Support, replied on behalf of the Council by email dated 11.02.2005 in the following terms:

"... statistics about empty residential properties, obtained from the Council tax database,

No. of short term empty properties (i.e. less than 6 months) 630

No. of long term empty properties (i.e. longer than 6 months) 936

No. of uninhabitable/under repair properties 77

No. of empty properties – special circumstances

(owner in nursing home/property repossessed/owner died ... etc) 480

No. of second homes (i.e. only used occasionally) 36"

3. Mr England replied to this information by email dated 12.02.2005 stating:

"... what I wanted was the addresses of the properties concerned, perhaps it would help if I asked for the addresses of the properties listed in your email under reply [the email dated 11.02.2005 referred to above] as "long term empty" and "uninhabitable empty properties". If you could give me a note of any information you have as to why the property is empty or other information as to ownership etc. that would be most helpful."

4. By letter dated 05.04.2005, Mr Grosvenor replied refusing the request for information on the basis of the exemption in section 31(1)(a) of the Freedom of Information Act (FOIA) stating that this exemption applied *"... because releasing information about empty properties and particularly their addresses would prejudice the prevention of crime"*, the letter also stated that the public interest in withholding the information outweighed the public interest in disclosure.

5. By email dated 06.04.2005 Mr England asked the Council to review its decision challenging the basis upon which the Council relied on the exemption relating to the prevention of crime. On 11.04.2005 the Council replied confirming its earlier decision.

The appeal to the Information Commissioner

6. On 18.04.2005 Mr England made an application to the Information Commissioner and the Information Commissioner issued a Decision Notice dated 25.07.2006 finding that the Council had not complied with its obligations under section 1(1) of FOIA, in particular that:
 - (a) That the exemption in section 31(1)(a) of FOIA was not applicable; and
 - (b) Information about the ownership of empty residential properties was accessible to Mr England by other means and in particular, through the Land Registry and so the exemption in section 21 of FOIA was engaged.

7. The Commissioner ordered the Council, within 35 days, to disclose a list of addresses of long term empty and uninhabitable empty properties in the borough to Mr England.

The appeal to the Tribunal

8. The Council appealed the decision of the Information Commissioner by a Notice of Appeal dated 18.08.2006. The Grounds of Appeal can be summarised as follows:
 - (a) The evidence provided by the Council did support the Council's position that disclosure of a list of empty properties would be likely to prejudice the prevention of crime and that the Information Commissioner had incorrectly required the Council to produce "hard evidence" in that regard.
 - (b) The public interest analysis in relation to that exemption would, on balance, have led to a conclusion against disclosure.
 - (c) The exemption from disclosure in section 44 of FOIA was claimed for the first time. The Council claimed that the provisions of the Local Government Finance Act 1992 acted as a statutory bar to disclosure (however, this ground was not pursued before the Tribunal but is included here for completeness).
 - (d) For the first time the Council claimed that the disclosure of the addresses alone would be in breach of the Data Protection Act principles and therefore be exempt from disclosure under section 40 of FOIA.

9. Mr England also appealed the Information Commissioner's Decision Notice by Notice of Appeal dated 23.08.2006. Mr England's Ground for Appeal can be summarised as:
 - (a) The information about empty properties was not available to him from HM Land Registry because it would not enable him to obtain the details of unregistered land.

10. Mr England's appeal was technically out of time but the Tribunal gave him permission to proceed and the two appeals were consolidated. Following exchange of witness statements an oral hearing took place at which Mr England acted in person, Mr Maughan, Head of Legal appeared for the Council and Mr Akhlaq Choudhury, Counsel, appeared for the Information Commissioner.

11. At the hearing, the Tribunal heard evidence from Miss Nicole Duncan of the Information Commissioner's office who dealt with Mr England's case and carried out the investigation resulting in the Decision Notice of 25.07.2006. Mr David Ireland, the Chief Executive of the Empty Homes Agency, Dr Rebecca Tunstall, a lecturer in housing at the London School of Economics, Mr John Grosvenor, the person at the Council responsible for handling Freedom of Information Act requests, Mr Kevin Murphy, the Head of Public Protection (Residential and Environment) at the Council and Chief Inspector Christopher Hafford, of the Metropolitan Police. The Tribunal also had the agreed witness statements of Marie Kelly-Stone, Head of Legal Services and Freedom of Information Officer of Dartford Borough Council (Mr England had made a similar request to this authority and received information as a result) and Mr Sahib Sehrawat, District Land Registrar of the Land Registry in Croydon. In addition, the Tribunal was provided with a bundle of documents.

Issues to be decided by the Tribunal

12. The issues raised before the Tribunal were as follows:
 - (a) Given the nature of the information held by the Council, is section 31(1)(a) engaged? This was a matter only raised by Mr Choudhury in his closing submissions.
 - (b) If section 31(1)(a) is engaged, would disclosure of a list of empty and uninhabitable properties ("the List"), be likely to prejudice the prevention or detection of crime?
 - (c) If the answer to (b) above is "yes", in all the circumstances of the case, does the public interest in maintaining the exemption (i.e. section 31(1)(a)) outweigh the public interest in disclosing the information?
 - (d) Are the Council entitled to rely upon the exemption in section 40 FOIA, relating to the disclosure of personal data, given that the first time that it was claimed, was in the Council's Notice of Appeal.
 - (e) If the answer to (d) above is "yes", do the addresses of the empty properties meet the definition of "personal data" within the Data Protection Act 1998?

- (f) If the answer to (e) above is “yes”, would disclosure of that information to a member of the public contravene any of the Data Protection Act principles?
- (g) Was the Information Commissioner correct to state that the details of ownership of the empty properties were reasonably accessible to Mr England by virtue of the existence of HM Land Registry?

13. The Tribunal’s remit is governed by section 58 FOIA and this is set out below:

“58.— Determination of appeals.

- (1) If on an appeal under section 57 the Tribunal considers—
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

14. The starting point for the Tribunal is the Decision Notice of the Information Commissioner but the Tribunal also receives and hears evidence, which it is not limited to the material that was before the Information Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence) may make different findings of fact from the Information Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute the Tribunal must consider whether FOIA has been correctly applied. In cases such as this one involving the public interest test in section 2(2)(b) a mixed question of law and fact is involved. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

Summary background

15. It is helpful at this stage to give a brief background of the facts behind this appeal. The policy of the Government is to bring empty properties back into use and local authorities, such as the Council, are required to collect information about their performance in returning vacant dwellings to occupation (Best Value Performance Indicators: 2005/2006 published February 2005 by the office of the Deputy Prime

Minister). In the ministerial foreword to “*Empty Property: Unlocking the Potential a Case for Action*” published by the office of the Deputy Prime Minister in 2003 it states:

“We recognise that each empty property is a wasted resource from the point of view of the owner, a wasted opportunity from the point of view of a developer and a wasted asset from the point of view of local authorities charged with bringing forward sufficient land and housing to meet projected housing needs”.

The Council has an empty property strategy and Council Tax records are used as the primary source of information in identifying empty properties. Mr Ireland, the Chief Executive of the Empty Homes Agency, gave helpful background information stating that as at January 2007 there are just over 680,000 empty homes in England and that there has been a slow downward trend in this number from a peak of around 850,000 in the early 1990's. However, Mr Ireland pointed out that there had “*been an increase in the number of households in England, meaning the demand and need for housing is greater than ever.*”

16. It is against this background that Mr England made his request for information as set out in paragraph 3 above. The Council confirmed that it does hold addresses for properties that are “long term empty” and “uninhabitable empty properties” (both of these by definition mean the properties have been empty for longer than 6 months) and also the names of the owners of those properties and that this information has been compiled from the Council Tax register.

Is Section 31(1)(a) engaged?

17. Section 31(1)(a) of FOIA is as follows:

“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...”

18. Mr Choudhury's argument was that section 31(1)(a) was not engaged at all. This is because the exemption is concerned with disclosures that would prejudice the prevention of crime and cover any information which might harm or hinder the steps taken by a public authority to prevent crime. In other words, it is only engaged when the information has been generated as a result of steps being taken to prevent crime. For example, the security arrangements regarding a public authority's payroll information (to prevent identity fraud). It is not specifically concerned with information that is not collated for the purposes of preventing crime. Mr Choudhury's submission was that information from the Council Tax register as to empty properties has no crime

prevention purpose, as such, and the Council have not adduced any evidence that it uses this information for any purpose other than to try and bring such properties back into use as part of its empty homes strategy.

19. In support of his argument Mr Choudhury relied upon:

(1) The Information Commissioner's Awareness Guidance No. 17 at page 3, which states: *"Information held for any of the stand-alone activities is exempt if its release would prejudice (would be likely to prejudice) that activity. The stand-alone activities are as follows:*

Preventing or detecting crime. This includes not only the procedures followed by the Police, Customs and Excise and other investigatory bodies, but also the crime prevention measures taken by public authorities in general. For example, information about the physical security of buildings, or the security of IT systems would be covered."

(2) The Tribunal's previous decisions in relation to section 31(1)(a) in Hogan v. Oxford County Council EA/2005/0026 & 0030 dated 17.10.2006 and Hemsley v Information Commissioner EA/2005/0026 dated 10.04.2006 are all related to information obtained for the purpose of crime prevention.

(3) Coppel on Information Rights at paragraph 20-014 when addressing section 31(1)(a) states:

"The basic distinction between sections 30 and 31 is that: the former is concerned with information held by the public authority for the purpose of a specific investigation or criminal proceedings conducted by it, and with investigative material that relates to the obtaining of information from confidential sources;

the latter is concerned with information, which although not held by the public authority for the purpose of a specific investigation or criminal proceedings conducted by it (nor relating to the obtaining of information from confidential sources), nevertheless would, if disclosed, prejudice or be likely to prejudice the enforcement of the law.

The latter is, therefore, more concerned with adverse revelations of methodology ..."

20. Mr Choudhury invited the Tribunal to depart from the comments made in paragraph 69 of the Hogan Judgment. In that case, the appellant was seeking the vehicle identification numbers (VIN) for a local authority's vehicles and the Tribunal was

considering section 31(1)(a). In relation to the Tribunal's finding on the public interest issue, the Tribunal stated:

"It has been a very difficult case to undertake the balancing exercise required by the public interest test, hence the need to call expert witnesses. However, we find on balance that the disclosure of VIN's by Oxford in this particular case would contribute to the sum of criminal knowledge to a greater extent than that already existing from currently available sources."

21. Mr Choudhury submitted that the issue of "*the sum of criminal knowledge*" was not a correct basis upon which to proceed. Mr Choudhury argued that where the information had been collated for other reasons, then other exemptions would be available to block disclosure. For example, where the information related to residential property, then the exemption in section 40 for personal data would be applicable. Any commercial interest would be protected by the exemption in section 43.
22. Mr Maughan rejected Mr Choudhury's interpretation of section 31(1)(a) and argued that the position was straightforward. He submitted that any information that could be used to commit a crime was caught by section 31(1)(a) and it did not matter that it had not been collected for the purposes of crime prevention. He submitted that the points raised by Mr Choudhury above were not relevant to this case as what was being discussed was the security of buildings, that VIN's were not uniquely a crime prevention measure and that the exemption was engaged where the disclosure of any information would, or would be likely, to lead to prejudice in the prevention of crime.
23. The Tribunal does not accept Mr Choudhury's submissions. Section 30 of FOIA clearly ties the information to investigations, which the public authority has a duty to conduct, which includes criminal offences and it states: "*30(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –*
(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained -
(i) whether a person should be charged with an offence, or
(ii) whether a person charged with an offence is guilty of it, ..."
24. It is not necessary to go into the full detail of that section but the important word is "purposes". Section 31(1)(a) on the other hand, does not contain any such express link to the purpose for which information has been obtained, or to the function of any public authority.

25. The Tribunal does not think it can gain any assistance from the previous Tribunal decisions in relation to section 31(1)(a). They did concern information that had been obtained for the purposes of prevention of crime but it may be purely a matter of chance that it is only such cases that have come before the Tribunal to-date. Similarly, the Information Commissioner's Awareness Guidance and Coppel on Information Rights only deal with section 31 in the context of information that has been collected for the purpose of crime prevention. There is nothing explicit in any of these references to section 31(1)(a) not applying to information obtained otherwise than for specific crime prevention purposes. They do not assist in determining whether section 31(1)(a) applies to information obtained for other purposes, which, coincidentally, if released, would, or would be, likely to prejudice the prevention or detection of crime.
26. Indeed, it would seem odd if the exemption were as restricted as Mr Choudhury submits. Whilst it is possible that a public authority might be able to claim other exemptions for information obtained for purposes other than the direct prevention of crime, it seems entirely feasible that information may also be available that would not attract any other exemptions but would, if disclosed, prejudice the prevention or detection of crime. For example, a public authority may keep an inventory of certain items, such as computer equipment, including details of its location. Such a list would not have a crime prevention purpose; it may be to assist the IT department. But it seems to the Tribunal that the disclosure of such a list to an applicant with criminal intent may well be very useful to him or her for those criminal purposes. Mr Choudhury was unable to point to any other exemption within FOIA that might prevent the disclosure of such a list.
27. Accordingly, the Tribunal is satisfied that section 31(1)(a) is applicable to information, even if the purpose of the collation of the information was not the prevention of crime per se.

Would the disclosure of the List prejudice, or be likely to prejudice, the prevention of crime?

28. The Council accepted that the issue for the Tribunal to determine was whether the disclosure of the list would be likely to prejudice the prevention of crime. Furthermore, it was agreed that the question of detection of crime (as opposed to prevention) was not relevant.

29. In order for the section 31(1)(a) exemption to be engaged the burden is on the Council to prove that disclosure would be likely to prejudice the prevention of crime. Differently constituted Tribunals have considered what is meant by “would be likely to prejudice”. For example, in *Hogan*, the Tribunal stated there were a number of steps:
- (a) First, the applicable interest has to be identified. In this case, the prevention of crime.
 - (b) Second, the nature of the prejudice must be considered. The burden is on the decision maker to show a causal relationship between the disclosure (if it took place) and the prejudice, which must be “real, actual or of substance”. The disclosure is to the public as a whole and may not be made subject to any conditions on subsequent use. The Tribunal may take into account the intended use or motive of the applicant in looking at the issue of prejudice.
 - (c) Third, the question of “likelihood” needs to be considered. The chance of the prejudice must be more than a hypothetical or remote possibility. Referring to Mumby J in R (on the application of Lord) v. Secretary of State for the Home Department [2003] EWHC 2003 (Admin), there are two possible limbs on which a prejudice based exemption might apply. First, that the occurrence of prejudice to the specified interest is more probable than not, and secondly that there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.
30. Ms Duncan gave evidence to the Tribunal on her investigations, which lead up to the Decision Notice. In her letter to the Council dated 02.09.2005, referring to section 31(1)(a) and seeking clarification from the Council, she stated that there should be a significant risk of prejudice and in a later letter dated 17.01.2006 she quoted from the Information Commissioner’s then guidance: *“Although prejudice need not be substantial, the Commissioner expects that it be more than trivial. Strictly, the degree of prejudice is not specified, so any level of prejudice might be argued. However, public authorities should bear in mind that the less significant the prejudice is shown to be, the higher the chance of the public interest falling in favour of disclosure.”* Ms Duncan also referred to disclosures from other councils and whether that might assist and asked for further evidence of prejudice. In oral evidence Ms Duncan confirmed that she contacted Marie Kelly-Stone, Head of Legal Services and Freedom of Information Officer of Dartford Borough Council who told her she was not aware of any effect of the disclosure (made as a result of a request from Mr England: see also paragraphs 58, 59 & 60) and she relied partly on that information in coming to her conclusion. Ms Duncan had been referred by the Council to the evidence obtained

from a Chief Inspector Gary Fryer, referred to in a letter from the Council to her dated 21.09.2005 but in oral evidence she acknowledged that she had not seen all of the evidence from the police until provided with the trial bundle, but she was not sure if she had had that evidence at the time she would have made a different decision. In her statement, Ms Duncan concluded that she *“...was not satisfied that the evidence provided by the Council was sufficiently compelling to support the view that disclosure of the list would or would be likely to prejudice the prevention of crime...”* In oral evidence Ms Duncan accepted that the List could *“potentially”* give squatters a *“head start”* and that the List made *“properties more likely to be burgled and the owners may take increased measures to protect their property.”* Ms Duncan accepted that she had not applied the test for likely to prejudice, as explained in Hogan (the decision in that case post-dates the Decision Notice in this case).

31. The issue the parties asked the Tribunal to decide was whether the evidence enabled the Tribunal to conclude that the release of such a list would be likely to prejudice the prevention of crime. All parties agreed that empty properties attracted criminal activity. It became clear that there were three broad issues for the Tribunal to consider. First, opportunistic crime, secondly, planned criminal activity and thirdly, squatting. It is agreed by all the parties and noted by the Tribunal that squatting itself is not a criminal activity but we shall go on to consider any association between squatting and criminal activity below.

32. The documents before the Tribunal included a letter from Detective Superintendent Vincent Kearney, dated 09.08.2006, which had been obtained by the Council for the purposes of the appeal. DS Kearney’s letter included the following:

“I would like to start by stating that the MPS [Metropolitan Police Service] supports your view that empty properties are the subject of squatting, break-ins and vandalism. In addition a vast number of empty houses are used as “crack houses”. There is supportive evidence that violent crime increases in the areas of these properties and Police and Council work together to close these premises.”

33. A draft document from the Insurers Property Crime Research Group entitled *“Guidance for the Protection of Empty Buildings”* produced by the Council, states that: *“Each year in the UK there are around 9,000 fires, to which the Fire Brigade are called, in empty buildings. The Fire Protection Association estimates that malicious fires, theft and wanton damage in empty premises (including dwellings) causes losses in excess of £100 million each year.”* A letter from Mr Graham Heale, Underwriting Director, Property and Engineering

of Royal & SunAlliance, obtained by the Council for the purposes of this appeal, confirms that unoccupied buildings are viewed as *“...an unfavourable feature for any insured building.”*

34. Mr Ireland in his evidence, referred to something known as “broken window syndrome” and the spiral of decline where maintenance is not carried out on an empty property. He stated:

“One unresolved problem is evidence to some petty criminals that nobody cares and acts as a green light to further vandalism and petty crime. Commonly this manifests itself in fly tipping, break-ins, graffiti and occasional arsonThis sort of petty crime causes fear, despair and reduction in confidence in the area in which the properties are situated.”

35. Mr Ireland, in oral evidence, referred to empty properties as *“honey pots for crime”*.

36. Mr Ireland’s opinion was that activities like arson took place because of a visible deterioration in the state of empty properties. He did not believe that it was likely that individuals would use the List for the purposes of criminal activity. Mr Ireland explained to the Tribunal that he was basing his comments on his large experience of individual cases, having been involved in the issue of empty homes for 10 years.

37. Dr Tunstall gave similar evidence and her statement included:

“Much crime and anti-social activity potentially associated with empty properties, such as vandalism, graffiti, dumping, is believed to be carried out in a largely opportunistic way and often by young people and others who do not travel far from their homes to the site of crime.”

38. Chief Inspector Hafford, in oral evidence, also agreed that once properties were damaged by people locally, they were likely to be damaged again. When properties are seen as boarded-up, individuals are likely to go through the boards and access the buildings and at some point a fire is lit. The first offence is usually opportunistic and then there is the spread of knowledge that there is no resident owner and therefore individuals are less likely to get caught by the Police and this attracts further crime. Mr Hafford agreed with Mr Choudhury that the individuals who commit opportunistic crimes will not read lists of properties.

39. In relation to more organised criminal activity, Mr Ireland, in his evidence, referring to empty properties and criminal activity stated:

“Occasionally, it [criminal activity] may be more persistent and planned, such as where empty properties are used by drug dealers, but in my experience this type of use generally follows petty crime, and is a symptom of abandonment. These types of criminals seek the privacy and anonymity that abandoned homes provide.”

40. Later on in his statement Mr Ireland said:

“Arguably, it [the disclosure of the List] may affect the levels of planned or organised crime, such as use of the property for illegal activities such as drug dealing. However, it seems to me to be improbable that criminals would work from a list.”

41. Dr Tunstall, in her statement referred to an article written by Morris *“Policing Problem Housing Estates”* (Police research paper 74, (1996)) and *“Empty Public Sector Dwellings in Scotland in 1992 (1994), Tunstall and Coulter “25 Years on 20 Estates: Turning the Tide?” (2006)* as showing that empty properties may be vulnerable to organised *“stripping”*. The Tribunal was not taken to the actual text of those papers but what Dr Tunstall meant by stripping was the theft of fixtures and fittings such as central heating, copper pipes and cables etc. Dr Tunstall's view was that this was an exception from what she described as *“largely opportunistic”* crime, which we have set out above. The basis for Dr Tunstall's conclusion was the research that had been carried out in areas of the North East where large numbers of properties were vacant, often in the same location. Dr Tunstall's evidence on the impact of the release of the List was that the effect could potentially vary very widely. Where an area had a high crime rate then the release would probably not “add” to an extreme situation. If there is a lower crime rate and lower levels of empty properties then one might see a greater proportionate effect, but still a low level increase in crime. Dr Tunstall also stated that how the information was released, would have an effect. How up-to-date the list was would have an impact and also the physical state of the property, as seen from the outside. Dr Tunstall said that in some circumstances, not much additional information might be provided by a list but in some it might and it depended on the crime potential in an area. In summary, she believed that there was a multifactorial basis for any criminal activity in relation to empty properties.

42. Mr Hafford said that he had not heard of the term *“strippers”* but agreed that once a property was vacant, that there were organised criminals who would remove lead, copper, skirting boards, kitchen units and strip a property *“to the bare bones”*. Mr Hafford said that gangs working in this way were known to him and he had seen it in

Southwark and in his view, such criminals looked for opportunities and that it was an organised activity.

43. DS Kearney's letter, to which we have referred above, also included the following text:

"Dealing with the increase risk to the Capital from Terrorists. Accommodation is required by these groups who wish to cause maximum damage to the Capital. The accommodation can be used either as a safe house for storing items for Terrorist Activity. If details of these empty premises are passed on to other people, this increases the vulnerability of London to attack."

44. As stated above, squatting itself is not a crime. The Council provided documentary evidence from a website www.squatter.org.uk dated 12.05.2004 entitled "Note for New Squatters". This included the following text:

"There are thousands of empty properties, some of which are more obvious than others. The most obvious are the ones with steel doors, which can be hard to get through, but boards, or general abandoned look are a good sign. Look around and ask around. Local squatters groups and ASS (Advisory Service for Squatters) have lists of empty properties, but rely on everyone to keep them up-to-date. Make sure the place is actually empty before doing anything.

If you are looking at a house, it is best to squat one that has been empty for at least two or three months i.e. a little run bit down. You will probably be able to live there longer."

45. Further on in the document it states:

"If the Police arrive, don't open the door, speak to them through the letterbox. Explain that you are not a burglar; you are living there because you have nowhere else to live. Do not say that you broke in. You can say you were walking past and the door was open."

46. Further on:

“An estate agent’s sign will probably mean it is privately owned. A Local Authority Planning Department keeps records of all planning applications for each address in its borough. These records are for public scrutiny and usually arranged in alphabetical order by street or block names. Each application will have the applicant’s name i.e. the owner or property agent.”

Another website www.56a.org.uk includes the following information: *“Empties List; we have a list of empty buildings in London that we reckon should be recycled by people needing housing or space to be social in. We need you to help us keep it up-to-date. Send us your empty addresses – buildings which could be used! Tell us important info like ... how long empty, state of building, security measures, size, state of, local knowledge etc. Ta!”*

47. For the avoidance of doubt, each of the websites that we have quoted does make it clear that breaking in or damaging property is a criminal offence.

48. In oral evidence Mr Ireland stated that squatting was not his area of expertise but a lot was heard about empty properties being used for squatting. Anecdotally, he said he did not believe there had been a significant increase in squatting. In his statement he expressed his view that squatting is not a widespread problem but confirmed there are organisations and networks *“around looking for properties to squat in.”* In oral evidence in response to questioning from Mr Maughan he said that he thought it was the minority of squatters who will commit crime. Dr Tunstall also gave evidence about squatters setting up their own “estate agencies” and collating and advertising details of properties known to be long-term empty, especially those with utility supplies in place.

49. Mr Hafford, in two statements, referred to his previous experiences in Southwark and that unoccupied premises often result in unauthorised occupants taking up residency. He stated:

“Their occupancy resulted in an increase in crime, in particular, robbery, burglary and criminal damage. In addition there was an increase in anti-social behaviour relating to prostitution and drug dealing. This caused the Police and the community some considerable concern and required an increase in resources to address the issues.”

50. Mr Hafford cited two examples. First, the Woodene Estate in Peckham and secondly, the Rolls Road Estate in Bermondsey. In those estates the existing tenants had been relocated and Mr Hafford stated:

“A significant number were occupied by unauthorised occupants. Almost immediately there was a rise in the number of complaints from members of the community in relation to open drug dealing, prostitution, vandalism and criminal damage, which was increasing both their fear of crime and was also increasing the number of reported crimes. ... There was unlawful extraction of electricity, which increased the risk to the occupants on (sic) the buildings.”

51. In relation to the Rolls Road Estate, the availability of unoccupied properties had been advertised on websites, including ones abroad.

52. In oral evidence Mr Hafford said:

“There was a clear link between squatting, antisocial behaviour and crime.”

53. The witnesses gave evidence on their views as to the impact of the disclosure of a list in relation to organised criminal activity and squatting. In his statement Mr Ireland said that he did not believe the disclosure of a list would cause *“any significant increase in crime in the area.”* In the main, the part of Mr Ireland’s statement that dealt with the question of disclosure of the List focussed on the benefits that this would bring (see our further comments below on the public interest factors).

54. In oral evidence Mr Ireland stated that he did not know if the disclosure of the list would cause an increase in crime. However, he did not think it was likely that people would take a list and use it but he did not know if it was likely to result in increased organised crime but accepted that it *“might have some effect”*. However, on this issue we think that Mr Ireland was confusing two points: First, whether the disclosure of the list would be likely to prejudice the prevention of crime and secondly, the separate point of whether or not the disclosure of the list would have a beneficial effect. Mr Ireland’s overall position, we think, can be summarised as that the disclosure of the list would, overall, be a beneficial result.

55. Dr Tunstall, in her evidence, referred to the publication of the list as being one factor amongst many that might be at play but stated: *“so one potential effect is a rise in squatting or theft from empty homes, and/or additional cost to owners insuring and securing their properties.”* Dr Tunstall also stated: *“this effect would be more marked if there was a higher level of threat to homes, and/or if the release of information was well publicised, perhaps including public discussion of potential extra risk ...”*. Dr Tunstall referred to the fact that the publication of the list would require a change in behaviour on the part of the property owners because of the wider accessibility of the knowledge,

and again, stated: *“any potential costs of organised criminals or squatters targeting particular Local Authority areas might be reduced if the release of this information became widespread across the country”*. We have already referred to Dr Tunstall’s views of the different impact, depending upon the level of crime and empty properties in any particular area and how, in her view, that might depend on the *“crime potential”* in an area. Dr Tunstall stated in oral evidence, when being questioned by Mr Maughan about organised gangs stripping properties that she *“did not think this [the provision of the List] would provide significant additional information”*. Again, in response to questioning by Mr Maughan, Dr Tunstall said that she thought the disclosure of a list was *“unlikely to have a very dramatic effect on crime in any area”* but she did not know that as a fact and described it as *“possible, but very unlikely”*. Dr Tunstall thought that squatters were *“capable of making their own list”* and would not need to use the list provided by the Local Authority. Nor did she believe that the release of a list would encourage people to become squatters for the first time. In response to questioning from the Tribunal, Dr Tunstall said: *“yes the list should be published but I do not know in what format. If the media made much out of a “squatters’ charter” it might have a negative impact.”* Dr Tunstall accepted that her concern was that it might result in an increase in crime but she thought that there would not be a problem if a list *“was released in a controlled way”*.

56. Again, the Tribunal’s view is that Dr Tunstall was mixing up the same separate issues that we have referred to above in relation to Mr Ireland. Her desire to see the list made available was colouring her view on whether or not disclosure of the list would be likely to prejudice the prevention of crime. Dr Tunstall seemed surprised and concerned at the prospect that any list that the Council might release would become available to the world at large, as indeed it would in the event that the Tribunal were to order disclosure. This consequence was accepted by all the parties as a possibility.
57. Mr Hafford gave a view that the disclosure of the list would be likely to prejudice the prevention of crime, essentially based upon his experience, as we have already described in his evidence above. As to squatting, his evidence was that in relation to the two incidences described above, publication of the location of the empty dwellings resulted in them being occupied and *“in my view, one of the key factors [in the examples of Woodene and Rolls Road] was the fact that there was clear knowledge that the properties were unoccupied and that fact was widely disseminated. There would not be, in those who wish to occupy, any doubt that they would find the properties empty”*. However, in response to questioning from Mr Choudhury, Mr Hafford did accept that the two examples he had given were unusual but he said they were not unique. He said: *“a list might attract squatters to those premises”* and he

pointed out that people and their approaches to criminal offending were changing all the time and that people were very resourceful.

58. Before we set out our conclusions on this issue, there is one further matter of evidence that was put before us that we need to address. Mr England had made a request to Dartford Borough Council and, following the advice of counsel, Mr Philip Coppel, it had disclosed to Mr England a list of long-term empty properties. Dr Tunstall, in her statement, said that the best sources of information would be authorities where such empty property details have already been released but in oral evidence she stated that she did not know whether the information that had been released by Dartford to Mr England had been actually placed into the wider public domain. Mr Ireland also, in his statement, said he was aware of other Local Authorities that had released the addresses of empty properties, including Kensington and Chelsea, Nottingham and Carmarthenshire. However, he was not able to assist on whether there had been any negative or positive effect from the disclosure. However, he stated: “... *I can say I have not, to date, heard of any report that there has been any increase in crime related to empty homes in those areas.*” However, in response to questioning from the Tribunal he stated he would not have expected to have been specifically informed in any formal sense.

59. The Tribunal also had the benefit of an agreed witness statement from Marie Kelly Stone, who had been responsible for dealing with Mr England’s request. At paragraph 5 of her statement it said:

“In relation to the issue as to whether release of the information may result in crimes being committed against those properties [i.e. those identified on the list] I am not aware that there has been any negative effect associated with the release of this information. In particular, I have had no contact from the local Police, MPs or Counsellors, to indicate that there has been an increase in crime to the empty or abandoned properties listed in the schedules that I have provided.”

60. The Tribunal has not found the evidence presented to it on what has happened in other Local Authority areas helpful in determining this issue. The evidence does not go far enough to be useful. First, it seems that it is probably too early to know whether there has been an impact and secondly, we do not think it is sufficient to be satisfied that the Police or other agencies would contact a particular Local Authority on a voluntary basis to inform them of any possible impact of the release of a list. At this stage of the disclosures it is not enough to say “*I have not heard anything*”.

61. Mr Choudhury's submissions were that the Council had not shown the existence of a causal relationship between disclosure and the prejudice test. The prejudice is not real, actual or of substance and he submitted that there was no evidence that crime would increase to any significant extent. Mr Maughan submitted that we only had to go so far as concluding that the disclosure "*may very well*" prejudice the prevention of crime and that considerations of the benefits of any disclosure were properly dealt with as part of the public interest test and the Information Commissioner had overlaid the statutory test with phrases such as "*significant risk of prejudice.*" Mr England, in relation to this aspect submitted that there was no evidence of a causal link between release of the list and prejudice to the prevention of crime.
62. The Tribunal has decided that the Information Commissioner's Decision Notice was wrong. However, the Tribunal wants to point out that Ms Duncan did not have available to her the extent of the evidence that the Tribunal has had the advantage of reviewing. Nevertheless, we are also of the view that Ms Duncan applied too high a test on the question of "*would be likely to prejudice.*" In evidence, Ms Duncan said she did not apply the test in the way that it is set out in Hogan and that is understandable as at this time the judgment had not been released. In evidence and in correspondence we think that some confusion arose over the use of the word "*significant*" and that this was used to refer to the strength of the evidence of prejudice and to "*likelihood*". In our view, "*significant*" is used in the sense of a "*threshold*" i.e. it is "*of significance*" as opposed to being "*insignificant*", when no regard should be taken of it. The magnitude of the effect is referred to by the word "*substantial*" and something may be significant, but not very substantial. In addition, Ms Duncan did not give enough weight to the evidence from the police and required the Council to do the impossible, namely provide her with evidence of the causal link between the disclosure of the List and the prevention of crime. That is a speculative task, and as all parties have accepted there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely. Furthermore, Ms Duncan relied upon what had happened in Dartford (or rather what she believed had not happened) following the disclosure of similar information. We have already set out our reasons why we do not think that this circumstance can properly be relied on.
63. The Tribunal is satisfied that on the evidence available that disclosure of the List would be likely to have a significant negative impact on the prevention of crime. We find on the evidence that empty properties are associated with criminal activity from organised local gangs and the evidence was clear that whilst squatting itself is not an offence, it is associated with criminal activity. Our finding is that the disclosure of the list would be of use to squatters and would, on a balance of probability, lead to significant harm in the form of criminal activity. We also find that it is likely that organised gangs will use the

information for criminal purposes. We certainly view the level of prejudice as real, actual and of substance.

The public interest test in section 2(2)(b)

64. Section 31 is an exemption that, even if engaged, requires a public authority to apply the public interest test set out in section 2(2)(b) of FOIA. Section 2(2) states that the duty to disclose under section 1(1)(b) FOIA does not apply:

“...if or to the extent that:

- (a) ...
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

65. In answering this question, the Tribunal has born in mind previous decisions of this Tribunal, namely the decisions of Hogan referred to above, Department of Work and Pensions v. The Information Commissioner EA/2006/0040 dated 05.03.07, Guardian News and Brooke v. The Information Commissioner EA/2006/0011 & 0013 dated 08.01.2007. The section requires all the circumstances of the case to be taken into account and that information can only be not disclosed if the public interest in maintaining the exemption outweighs the public interest in disclosure. As those other Tribunal cases have stated, this means:

- (a) The default setting in the Act is in favour of disclosure. Information held by public authorities must be disclosed on request, unless the Act permits it to be withheld.
- (b) If the public interest in favour of maintaining the exemption is equally balanced against the public interest in disclosure, then the exemption will not exclude the duty to disclose.
- (c) There is no express provision that requires a Public Authority to apply a presumption in favour of disclosure when considering exemptions to the general duty to disclose, which is in contrast to the Environmental Information Regulations 2004.
- (d) There is an assumption built into FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest and the strength of competing interests must be assessed on a case-by-case basis and not least because section 2(2)(b) requires the balance to be considered “in all the circumstances of the case”.

- (e) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time.
 - (f) In considering public interest factors in favour of maintaining the exemption, they relate to the particular interest which the exemption is protecting. In this case the prevention of crime.
 - (g) The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process.
66. Some of the evidence that goes toward the public interest in favour of maintaining the exemption has already been outlined above on the basis of the Tribunal's conclusion that disclosure would prejudice the prevention of crime. In addition, the Tribunal had available the "*Guidance Note on Empty Dwelling Management Orders*" dated July 2006, produced by the Department for Communities and Local Government and the foreword to that document emphasises the need to ensure that property owners know "*that their rights and interests are respected and that Local Authorities are intent on helping to find the best way forward for them*". In the same document it states: "*Local Authorities should always attempt to secure the occupation of empty dwellings with the consent and co-operation of the owner and only resort to the exercise of their formal enforcement powers, including the use of EDMOs (Empty Dwelling Management Orders) where occupation cannot be achieved through voluntary means.*" The document also discusses incentives to ensure the co-operation of owners and the compulsory powers to be used within that context. Mr Murphy gave evidence as to how the Council sought the co-operation of owners of empty properties, including writing to the owner setting out advice and assistance that could be given and the problems with leaving the property empty. Mr Murphy also referred to a survey that had been undertaken on behalf of the Council and a process of long-term negotiation that he and others under his supervision at the Council undertook with the owners of 10 of the properties out of one thousand addresses on the List. This is a process that he referred to as being over five to six years and he was of the view that if the List was released, those owners would view their trust as having been betrayed. Mr Murphy's opinion was that disclosure of a list would not increase the number of empty properties brought back into use.
67. Mr Ireland, in response to questioning from Mr Maughan, gave evidence about the impact of crime on home owners from his own experience. Mr Ireland explained that he had seen a lot of people very affected and gave an example of a woman who lived next to an empty property who had to call the emergency services 200 times in one

year and how that had ruined her life. He knew of another couple who felt unable to leave their house because it was regularly broken into following break-ins to an empty house nearby. He agreed with Mr Maughan that it was likely that any form of crime was very unpleasant for the victim and often causes a financial loss but has an impact on a lot of people. Mr Hafford agreed and in his statement says:

“I have been a police officer for 20 years and have dealt with many victims of a huge range of crime types. Although it is difficult to generalise about the effects of crime on individuals I have always found that victims of assault and burglary are very severely traumatised and affected by the experience and in some cases it can be life changing. Again, whilst difficult to generalise, I would, in terms of affect, say that it is not unfair to categorise burglary and assault together. Lower level crime and antisocial behaviour, which can change an environment of an area on a daily basis, also have (sic) a significant and adverse effect on the local population.”

68. Dr Tunstall, in her statement, described the effect of empty properties on an area as *“signalling to residents or visitors, lack of demand or lack of care for the property or buildings in the area more widely”*. She also stated that the more properties were empty and the longer that they were empty for, the bigger the effects were likely to be.
69. Dr Tunstall stated her view that better information *“about empty properties”* has the potential for beneficial effects too, for owners, for the economy and for society overall. More information might aid national or local lobby groups to pressurise owners into bringing buildings back into use, and to pressurise Local Authorities and other organisations to provide help to do this. Dr Tunstall in her statement, commented that potential threats to properties as a result of disclosure, might encourage the owners to find more uses for them and in oral evidence said the publication of a list would change the environment in which owners made their decisions on leaving a property, although Dr Tunstall made it clear she was not discussing frightening people into taking action.
70. Dr Tunstall was also of the view that the availability of this information would help academic and policy orientated research and analysis with beneficial effects for society. Dr Tunstall gave her view that the publication of the list might help owners define potential building users who had not been able to reach them before. Dr Tunstall referred to the Choice Based Letting scheme, which Mr Ireland referred to, and how this had opened demand and *“appears to be associated with lower overall empty property rates”*. In oral evidence Dr Tunstall stated that the List might produce *“more emphasis on empty property as a social problem and a real social asset in housing.”*

71. Mr Ireland's opinion can be summarised from his statement as follows:

"The most direct and effective way of reducing the economic and social problems caused by empty properties and, in particular, reducing the incidences of criminal activity associated with empty properties is to bring those properties back into use."

72. His evidence was that only a minority of Local Authorities were making a significant impact upon the number of empty properties in their areas. Mr Ireland referred to existing databases of vacant land and property, such as:

- (a) National Land Use database, which records all main privately owned potential development land.
- (b) Register of surplus public land maintained by English Partnerships.
- (c) Various buildings at risk registers compiled by Heritage Organisations for the Local Authorities.

73. Whilst Mr Ireland set these out, he was not able to say whether the publication enhanced the subsequent use and development of that land, but that must be the implication behind the publication of such details.

74. However, Mr Ireland referred to a website he had helped to set up, www.enpro.co.uk in 2004. This website brings together developers and prospective home owners and those owners of empty properties. The website does not specifically identify the owner but allows an owner to contact a prospective purchaser, who has registered an interest. It has only involved 100 properties to date but 25% of cases where empty property owners have been in contact with prospective purchasers have resulted in a subsequent sale or let of the property. Mr Ireland was able to say that this was similar to the English Heritage Buildings at Risk Register. It can help a property owner who thinks that there is no market for his or her property to realise that there is in fact a market. Mr Ireland's view was that if the List was available, it would be likely to increase substantially the number of sales of empty properties.

75. Mr Ireland also pointed out the importance of re-using empty properties where the supply of housing is low and he referred particularly to London and the South East of England. As stated in paragraph 15 above, Mr Ireland pointed out that there had *"been an increase in the number of households in England, meaning the demand and need for housing is greater than ever."* Whilst he did not maintain that it would solve the problem, disclosure of the List would certainly be of benefit in his view.

76. Mr Ireland also was of the view that disclosure of the List would assist in verifying that Local Authorities were making appropriate use of their powers under the Housing Act 2004. This Act provides the Emergency Dwelling Management Order, which is a compulsory power to aid the re-occupation of empty houses. In the evidence before us there is only one case in the country of such an order being made. Mr Ireland also advanced a positive case for squatting on the basis that it was better to have homeless people housed than wasting an empty property. Dr Tunstall gave evidence that *“overall, Local Authority performances have improved over time through improved awareness of the issue of empty homes, as potential public benefit, and of the tools available to bring homes back into use. However, levels of activity and performance do appear to vary between Local Authorities.”*
77. Mr England forcefully argued that disclosure of the list would enable individuals to hold Local Authorities to account for any failures of theirs in seeking to get empty properties back into use. He clearly articulated the benefit and general public importance of the re-use of properties. Mr Maughan, on behalf of the Council, argued that there was a strong public interest here in favour of maintaining the exemption because of the impact of crime on property and owners and the impact on the area in which the property is located. Mr Choudhury agreed with those as matters of principle but his argument was that the evidence was not sufficient to support the contentions made by the Council. Mr Choudhury also did not accept that the point made by Mr Maughan about disclosure with the owners’ consent was related to the public interest in prevention of crime, nor that the Council’s other powers in relation to action on empty buildings were a substantive consideration. The Council had also raised arguments that the disclosure without consent of the owner would be a betrayal of trust but Mr Choudhury rejected that argument on the basis that this only related to a small number of properties in question. As to the factors in favour of disclosure, the parties all agreed that there was a strong public interest in empty properties being re-used. However, Mr Choudhury submitted that disclosure would have other beneficial effects such as:
- (a) Other agencies becoming aware of the availability of empty properties and taking steps for re-use.
 - (b) The publicity would spur owners on to further action.
 - (c) Local Authorities could be held to account for any poor performance.
 - (d) Local residents can take action in respect of properties within their own locality.
 - (e) There is an inherent value in the publicity itself, given that it will further inform debate on this issue.
78. The Tribunal’s conclusions on this aspect are as follows. Looking first at the public interest factors in favour of maintaining the exemption, our view is that there is an

inherent strong public interest in avoiding likely prejudice to the prevention of crime. It also seems to us that the stronger the evidence is that disclosure would be likely to prejudice the prevention of crime, the stronger the public interest is in maintaining the exemption. In this case therefore, that public interest is substantial given our conclusions above. We are also of the view that it is important to consider those other factors that are inherent to the public interest in the prevention of crime, which was something accepted by Mr Choudhury. Those factors include avoiding personal distress to the victims of crime and to those in the wider neighbourhood who may be affected by crime and also the inherent public interest in avoiding damage to property and a public interest in the efficient use of police resources. A lot of the evidence went to the impact on individuals (by which we mean natural persons as opposed to “legal persons” such as corporate bodies or public authorities) of crime and the impact on a neighbourhood of crime. The fact that once an area is subject to crime, in particular damage and arson, it has an impact on the surrounding neighbourhood, reducing the value of those neighbouring properties. To this extent we agree with Mr Murphy that the disclosure might be seen as a “*betrayal of trust*” but we do not consider that “*betrayal of trust*” is a free standing public interest that is open to us to apply as a feature in favour of maintaining the exemption. Also on the particular facts, it was not clear whether the ten owners referred to by Mr Murphy fell within the group of long-term uninhabitable properties.

79. Of course, in relation to properties that are not owned by individuals but rather by the public sector (which for these purposes we take to include housing associations and the like), whilst the issues concerning damage to property are relevant and the impact on the area, the impact on the individuals as owners, is not a factor that will be in play. This in our view has the effect of lessening the public interest in maintaining the exemption as that inherent factor is absent.
80. Turning to those public interests factors in favour of disclosure, there is clearly a very strong public interest in reducing the number of empty properties. From the evidence before us, in particular the evidence of Mr Ireland, it does seem possible that disclosure of this list would result in a proportion of the properties coming back into use. However, as was indicated in the evidence, that may be at the expense of owners being “*frightened*” into disposal of their property and this seems rather an unattractive prospect to us. Again, this would have more impact on individuals as opposed organisations such as public authorities or corporate developers who were owners of property.
81. Publication will also give the public in the local area an opportunity to review and challenge their Local Authority on its activities. However, the Council is subject to audit

and there is a system for measuring this activity. The Government has set up a process which emphasises co-operation with owners and has within its system, some measurement of Local Authority performance.

82. There may also be an inherent value in publicising the information to further the debate. However, we do not view that as a particularly strong factor in this case as there clearly is an active public debate on the matter already and the identification of the exact addresses does not seem to us to be a matter that would further such a general point.
83. It seems relevant here to note that we were shown a variety of reasons why a property may be empty. In *“Empty Property: Unlocking the Potential, a Case for Action”*, referred to above, those are stated to include:
- (a) *“The owner may not be aware of the properties existence*
 - (b) *The owner may not fully appreciate the business case of bringing an empty property back to use*
 - (c) *The property may have been acquired solely for speculative investment purposes and the owner is not concerned that the property is empty”*
84. We were also referred to properties that may be empty because of a death of the occupant and it being inherited by another family member. Mr Ireland referred to a MORI poll, which, in addition to the above matters, referred to poorly maintained rented properties declining below a lettable quality and that often this occurred because landlords were unable to raise finance or organise refurbishment. It seems to us that the rather blunt instrument of disclosure of a list would fail to take into account the varying different circumstances of the owners of the empty properties. This in itself, we think, needs to be taken into account as part of the weight the Tribunal puts on the public interest in disclosing the list.
85. We accept Mr Choudhury’s submissions that factors such as the consent of individual property owners is not relevant as such, because it is not related to the public interest in the prevention of crime. We also agree that the availability of other powers to the Council is not relevant as a public interest factor.
86. The exercise of considering the competing public interests depends not upon the length of the list of the different sorts of public interests on one side or the other but upon how important each of the factors is. Our conclusion on the public interest test is that, insofar as the properties are owned by individuals, the public interest in maintaining the exemption does outweigh the public interest in disclosure. The impact of crime on individuals as an inherent part of the public interest in this circumstance is a significant

factor and leads to the exemption outweighing the public interest in disclosure in our view. However, for those properties that are owned by those other than individuals, including public authorities, our conclusion is that it does not, and the public interest is in favour of disclosure. This is because the impact of crime on an individual is not present and this inherent aspect of the public interest in preventing crime is therefore absent and changes the analysis of the balance.

Are the Council entitled to rely upon the exemption in section 40 FOIA?

87. As stated above, the Council first explicitly relied on section 40 of FOIA in the Notice of Appeal. Insofar as it is relevant section 40 states:

“(2) any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within sub-section (1), and

(b) either the first or second condition below is satisfied

(3) the first condition is –

(a) in a case where the information falls within paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

i. any of the Data Protection Act principles, or ...”

88. Section 40(1) is not relevant as this relates to an individual seeking their own personal data (i.e. a subject access request which is properly dealt with under section 7 DPA) and the remainder of the section is not relevant. It is an absolute exemption, in other words it does not require the subsequent application of the public interest test in section 2(2)(b) FOIA.

89. The Information Commissioner did not contest the Council relying on section 40. However, Mr England objected to the Council relying on this exemption at the appeal stage. His submissions were that the Council had made a decision based upon the prevention of crime exemption referred to above in section 31(1)(a) and that they should not be permitted to change “*half way through the race*”. He thought it was commonsense and it seemed to be wrong to him as a layman. Mr Maughan’s submissions were that the hearing before the Tribunal was a fresh one under section 58 of FOIA and the hearing was not restricted to a quashing of the Information

Commissioner's decision. The Tribunal is able to consider afresh any question of law and fact.

90. It is clear from the evidence that the issue of the disclosure of the addresses and ownership details of the owners of empty properties was potentially personal data as in the response to correspondence from Nicole Duncan, dated 03.02.2006, Mr Grosvenor stated: *"The key point from the Council's perspective is that the information that has come to us has come in many different forms and very often we would suggest from individuals who would not, under any circumstances, expect us to release that information."* In an internal email dated 21.02.2005 from the Council the possible exemptions were referred to as *"personal information or prejudicial to law enforcement"*. Mr Grosvenor, in a letter of 03.02.2005 referred to *"confidentiality to individuals in the borough who pass information about their property to us in good faith"*. However, the Council did not choose to rely on the section 40 exemption until serving the Notice of Appeal.
91. On previous occasions the Tribunal has permitted Appellants to rely on exemptions that were not relied on before the Information Commissioner and *Bowbrick v The Information Commissioner* EA 2005/0006 dated 28.09.2006 at paragraph 51 refers to exceptional cases and in particular in relation to section 40 of FOIA. The Tribunal's conclusion in relation to this issue is that the Council is allowed to rely on section 40. The reasons for this is that there is nothing in FOIA that would prevent the Council from doing so and there is nothing in the Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005 No 14), as amended, that would prevent the Tribunal from allowing a party to amend its Notice of Appeal in that regard. Furthermore, it seems to us that in relation to section 40 it would be inconsistent with the Tribunal's own obligations to act in a manner that is compatible with individuals' human rights under the Human Rights Act 1998 for it to, on a technicality, require a disclosure that would have an impact upon individuals' private lives which would otherwise be protected by the provisions of the Data Protection Act 1998.

Are the addresses and/or names of the owners of the empty properties "personal data"?

92. Section 1 of the Data Protection Act (DPA) defines personal data as follows:

"Personal data" means data which relate to a living individual who can be identified –

- (a) from those data, or*
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the Data Controller,*

and includes any expression of opinion about the individual and any indication of the intentions of the Data Controller or any other person in respect of the individual.”

93. There was no dispute between the parties about whether the information requested met the definition of “data”; the question was whether or not it was “personal”. The case of Durant [2003] EWCA Civ 1746 considered the meaning of personal data, in particular with regard to an application by an individual for their own data (a subject access request under section 7 DPA). Auld L J giving the judgment to the Court at paragraph 28 stated:

“It followed from what I said that not all information retrieved from a computer search against an individual’s name or unique identifier is personal data within the Act. Mere mention of the data subject in the document held by a Data Controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me there are two notions that may be of assistance. The First is whether the information is biographical in a significance sense, that is, going beyond the recording of the putative data subject’s involvement in the matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or has had an interest, for example, as in this case, an investigation into some other person’s or body’s conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity. A recent example is that considered by the European Court in Criminal Proceedings against Lindquist case C-101/01 (6th November 2003), in which the Court held, at paragraph 27 that “personal data” covered the name of a person or identification of him by some other means, for instance by giving his telephone number or information regarding his working conditions or hobbies.”

94. The Tribunal had the following evidence on this issue. The website www.squatter.org.uk referred to above, indicates how squatters can seek to identify the owner of a property. Mr Ireland in his witness statement stated: “Once you have the addresses of properties it is generally possible to get access to the owner by other means, such as using the national Land Register, talking to neighbours, or even asking

the Local Authority to pass on a letter to the owner for you." In oral evidence Mr Ireland confirmed that there were a number of ways to find out the ownership details and that there were some websites that were available for people to find out the ownership of homes although he was not sure how they were set up. In the light of this evidence, the Tribunal finds that knowing the address of a property makes it likely that the identity of the owner will be found.

95. Mr Choudhury's position on behalf of the Information Commissioner was that the information sought was not personal data. He submitted that what constitutes personal data within Durant had not been made out as the focus of the information was the property and not the individual owner. Even if Mr England were able, through the use of that information and information from other sources, to connect an individual to a particular empty property, this would not affect the privacy of that individual in the sense referred to in Durant. Mr Choudhury submitted that the fact that the owner was not resident suggested there was little likelihood of privacy rights being infringed and the fact that individuals took steps to secure their property and make it look like those properties were still occupied, went to the protection of property and was not an indication of their desire to protect his/her privacy. Mr Choudhury did not accept that empty properties were often a person's home, as the Council claimed, as the properties that were under consideration were by definition empty for longer than six months and it was reasonable to infer that the property owners did not reside in them.
96. Mr Maughan, for the Council, submitted that the addresses could be easily combined with the names of the owners by virtue of the information held by the Land Registry or from other sources. The key submission was that the factors in Durant were made out because release of the information would show that an individual owned the property and that the property was empty. Mr Maughan submitted that the information is "private" and that the evidence for this comes from the number of people who try to avoid giving the impression to the casual observer that their property is empty.
97. Mr Maughan also made reference to a previous decision of the Information Commissioner FS500 82890 involving Mid Devon District Council. In this case, a request was made, initially for the names and addresses of council tenants and subsequently for the addresses only. The Information Commissioner concluded that names and addresses, and some of the addresses alone, would be personal data as the inference would be drawn that those individuals were Council tenants and in particular that the applicant would be able to deduce the identity of the owners, even if addresses alone were released.

98. It is the Tribunal's conclusion that the addresses are personal data in the hands of the Council because the addresses are held with ownership details from the Council Tax register. The address alone, in our view, also amounts to personal data because of the likelihood of identification of the owner (or the individual who inherits from a deceased owner), as we have concluded above. In our view this information amounts to personal data because it says various things about the owner. It says that they are the owner of property and therefore potentially have a substantial asset. It also raises issues and questions about why the owner has left the property empty and it seems to us that that very question in itself is capable of being personal data. The key point is that it says something about somebody's private life and is biographically significant. It is not as Mr Choudhury suggests the address that is the focus or the property, that analysis is based upon the question being asked, and not upon what meaning or meanings the data may have in the context of someone's private life. Does the fact that Mr X owns a property potentially worth several tens of thousands of pounds say something about Mr X? In our view it does, and the owner is the focus of that information.

Would disclosure of the list contravene any of the DPA principles?

99. Schedule 1, part 1 of the Data Protection Act includes the Data Protection Act principles. It was agreed that the relevant principle here is No. 1 which states:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*

Schedule 3 is not relevant, as it was agreed that the information in question was not “sensitive” personal data with in the meaning in the DPA.

100. Part of 2 of Schedule 1 includes matters to be taken into account in interpretation of the principles. The relevant parts are:

“The First principle

1(1) *In determining for the purposes of the first principle whether the personal data are processed fairly, regard is had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*

(2) *Subject to paragraph 2, for the purposes of the first principle, data are to be treated as obtained fairly if they consist of information obtained from a person who:*

- (a) *is authorised by or under any enactment to supply it, or*
- (b) *is required to supply it by or under any enactment or by any convention or other instrument imposing an international obligation on the United Kingdom.*

2(1) *Subject to paragraph 3, for the purposes of the first principle, personal data are not to be treated as processed fairly unless –*

- (a) *in the case of data obtained from the data subject, the Data Controller ensures, so far as is practicable, that the data subject, has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and*
- (b) *in another other case, the Data Controller ensures so far as is practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).*

(2) *In sub-paragraph (1)(b) “the relevant time” means –*

- (a) *the time when the Data Controller first processes the data, or*
- (b) *in the case where at that time disclosure to a third party within a reasonable period is envisaged –*
 - i *if the data are in fact disclosed to such a person within that period, the time and the data are first disclosed,*

- ii *if within that period the Data Controller becomes, or ought to become, aware that the data are likely to be disclosed to such a person within that period, the time when the Data Controller does become, or ought to become, so aware, or*
- iii *in any other case, the end of that period.*

(3) *The information referred to in sub-paragraph (1) is as follows: namely –*

- a. *the identity of the Data Controller,*
- b. *if he has nominated a representative for the purposes of this Act, the identity of that representative*
- c. *the purpose of purposes to which the data are intended to be processed, and*
- d. *any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.”*

The remainder is not relevant.

101. It was also agreed that there was only one potentially relevant condition in Schedule 2, namely number 6 which is as follows:

“The processing is necessary for the purposes of legitimate interests pursued by the Data Controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

102. The definition of “*processing*” in the DPA is a broad one and is as follows:

““processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- (a) *organisation, adaptation or alteration of the information or data,*
- (b) *retrieval, consultation or use of the information or data,*
- (c) *disclosure of the information or data by transmission, dissemination or otherwise making available, or*
- (d) *alignment, combination, blocking, erasure or destruction of the information or data;”*

In our view it includes storage of the personal data, the process of preparing the list of addresses to be disclosed and the subsequent disclosure.

103. The name of the owner, the fact that the property is empty and the address of the property is obtained from the information provided by the owners in their Council Tax returns, as referred to in the evidence of Mr Murphy above. Mr Murphy also said that some owners do not record that a property is empty, even though in fact it is. The Council will not know that the property is empty unless this is included on the Council Tax return or has been otherwise identified as such.
104. Mr Choudhury's submissions were that there was no active deception of the owners in disclosing the information but he accepted that they will not be told that the information they are providing would be disclosed in the way suggested. There was no evidence to suggest however, that it would not be used for any other purpose and he did not view the disclosure as unlawful in a Wednesbury sense (which is a reference to Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All E.R. 680) which is a public law standard for reviewing the decision of a public authority. Mr Choudhury agreed that individuals' private lives were protected by Article 8 of the European Convention on Human Rights (the right to privacy) and that section 40 was playing a role to protect an individual's privacy. In his submission the same reason for justifying processing under the DPA would justify any infringement of Article 8. Mr Maughan submitted that processing would be unwarranted and would prejudice legitimate interests, including keeping those of the owner of keeping his/her property safe from criminal attack.
105. Before considering the conditions in Schedule 2, the Tribunal considers it is important to consider the first part of Schedule 1 part 1, in other words the requirement to process information fairly and lawfully. To satisfy the first principle, it is not enough to satisfy the conditions in schedules 2 and 3, there must be an initial consideration of whether any processing of personal data is lawful (i.e. otherwise than under the DPA, for example, would the law of confidence be breached?) and in addition, even where it is lawful, whether it is fair.
106. The parties have not raised any issues on the lawfulness of processing this information. However, the Tribunal has already referred to the Government publications on re-use of empty properties and the importance that has been placed in those public documents on obtaining the co-operation of the property owner and dealing with certain issues sensitively. It seems to us that disclosure of information without informing the owners at the time they provided the information of the potential disclosures would be contrary to that Government guidance. People's expectations of how they are going to

be dealt with would not be met. We were not told what information individuals received about the uses to which their Council Tax data would be put, but in our view it would not be fair to disclose the information in the absence of having informed the owners that that might take place as an owner might choose not to provide the information as to whether or not they are residing in the property if they knew that was going to occur. As Mr Murphy said, it seems some owners do just that already. Furthermore, it does not seem fair to use information obtained for one statutory purpose for another purpose unless people have been so informed in accordance with Part 2 Schedule 1 paragraph 2(3). On the basis of these two points, alone or in combination we conclude that the processing of this personal data would not be fair.

107. However, even if we are wrong in that, our view is that condition 6 in Schedule 2 is not made out in any case. In the *Corporate Officer of the House of Commons v Information Commissioner EA/2006/0015 and 0016* dated 16.01.2007 at paragraph 90 the Tribunal concluded in relation to this part of the DPA that it: “...finds that the application of Paragraph 6 of the DPA involves a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this context are members of the public (section 40 (3)(a)); and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs . However because the processing must be ‘necessary’ for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should the personal data be disclosed.”
108. We are not bound by this decision but it illustrates the Tribunal’s approach and we have followed the same approach. We conclude that the processing in this case is likely to have a significant impact upon the individual property owners. We have already referred to this elsewhere in this judgment in relation to the potential impact of crime. It is here that we believe that the consequences for individuals of the disclosure of information, possible effects of crime, loss of value of their property need to be taken into account. It is our view that for this reason the processing would be unwarranted because of the prejudice to individuals, both in terms of the impact upon them emotionally, financially and in respect of potential damage to property. This is not, in our view, outweighed by the legitimate interests of Mr England or any other members of the public to whom this information might be disclosed.

Are the details of ownership of empty properties reasonably accessible to Mr England?

109. We have already decided that the Council does not have to disclose the addresses of empty properties within the Borough where they are owned by individuals. However, we do still need to decide the question of whether or not the details of ownership of those, other than individuals needs to be provided or whether, as the Information Commissioner claims, that information is reasonably accessible to Mr England via the Land Registry. No party raised before the Tribunal that the exemption had first been claimed, not by the Council, but by the Information Commissioner in the Decision Notice. The issue that this raises, of whether it is open to the Information Commissioner to claim an exemption on behalf of a public authority, will have to be decided on another occasion, but we are sceptical that it properly can be. Nevertheless we have proceeded on the basis that the Council adopts the Information Commissioner's position.

110. Section 21 of 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 sub-section (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...”

The remainder of this section is not relevant. Section 21 is an absolute exemption and therefore does not require the application of the public interest test set out in section 2(2)(b).

111. In evidence Ms Duncan said that she considered Mr England could obtain the details of empty properties from Land Registry databases. In response to questions from the Tribunal Ms Duncan said that she had visited the Land Registry's website and gathered

that details of ownership of land would be available on the site. However, at the time, she had not appreciated that the Land Registry did not cover all land, but only that which was registered under the relevant Acts. However, she said that the issue was whether the information was reasonably available and it was not necessary for all of the information to be available to the applicant for the exemption in section 21 to be applied. The evidence of the agreed witness statement of Mr Sehwat is that within Bexley, 69.95% of land is registered.

112. Mr England's submissions were that 30% of land was not registered and that in his experience it was likely that the proportion of unregistered land would be higher in those properties that were empty. This was particularly the case in relation to land that was owned by public authorities. Mr England would have to make an application to Land Registry in relation to those addresses that were disclosed to him and then, if the Land Registry could not provide all the details because the land was unregistered, he would have to go back to the Council to make a further request for the details. Mr Choudhury's submissions were that what Mr England had requested was a class of information and not specific information about the ownership of any particular property. He submitted that the Council was not obliged to undertake an analysis of every property in order to determine whether or not it was registered but that in the light of the fact that 70% of properties were registered, the information would be reasonably accessible to Mr England: "reasonable" applies to the extent of the availability of the information.
113. The Tribunal has not been able to reach unanimous decision on this point. One lay member is of the view that the information is reasonably accessible to Mr England. The majority, however, are of the opinion that it is not reasonably accessible. 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. If that were the case, public authorities would be able to provide incomplete information to applicants and it is likely that there would be arguments over what percentage of available information is considered to be reasonable. It also runs the risk of attempts to avoid the impact of the legislation by making non-contentious information in a particular class available and then seeking to claim section 21 in order to avoid disclosing contentious information, by arguing that a substantial amount of material is already available to the applicant.
114. Mr Taylor, giving his opinion and reasons (as the minority view) believes that until the question is actually asked of the Land Registry as to whether the properties in question

are registered, it cannot be determined whether all of them are and that the required information is in fact available. Mr Taylor's view is that the onus is on Mr England to follow this course of action in order to determine which properties are registered and which are not; once he has established this, then he can go back to the Council and they cannot then use section 21 as a reason for non-disclosure (should it be established that some of the properties are not registered).

115. Mr Taylor accepts that this puts a large amount of effort before Mr England, however if it were otherwise, in his view, the Tribunal would effectively be circumventing other statutory access rights to information.
116. The determination of any question before the Tribunal shall be according to the opinion of the majority of the members hearing the appeal (section 61(2) FOIA applying Schedule 6 paragraph 5 of the DPA). Accordingly, Mr England succeeds on this aspect of the appeal to the extent that the owners of the long term empty properties are not individuals.

Peter Marquand
Deputy Chairman

Date 10 May 2007