



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2016/0013

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50597448
Dated: 17 December 2015**

Appellant: London Borough of Ealing

Respondent: The Information Commissioner

On the papers

**Before
HH Judge Shanks
and
Henry Fitzhugh and Suzanne Cosgrave**

Date of decision: 06 June 2016

Date Decision Promulgated: 06 June 2016

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 31(1)(a) (Law enforcement)

Section 40(2) (Personal information)

Section 41 (Information provided in confidence)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal considers that the Decision Notice dated 8 December 2015 was not in accordance with the law and issues the following substituted Decision Notice.

SUBSTITUTED DECISION NOTICE

Public authority: **LB Ealing**

Complainant: **Sharon Krajnc**

The Substituted Decision

For the reasons set out below:

- (1) the requested information was covered by the exemption in section 31(1)(a) of FOIA but the public interest in maintaining that exemption was outweighed by the public interest in disclosure and the Public Authority could not therefore rely on it;
- (2) the requested information was not exempt by virtue of section 41 of FOIA;
- (3) the requested information in relation to occupiers who were individuals constitutes personal data and its disclosure may contravene the data protection principles so that it may be exempt by virtue of section 40(2) of FOIA but the Public Authority did not consider the issue.

Action Required

The Public Authority must by 8 July 2016:

- (a) disclose to the Complainant the requested information in relation to occupiers who were not individuals;

- (b) in relation to occupiers who were individuals (whether sole traders or partners) consider the effect of section 40(2) FOIA in the light of any representations made by the Complainant and either disclose the requested information and/or serve an appropriate notice under section 17 FOIA accordingly.

HH Judge Shanks

06 June 2016

REASONS FOR DECISION

Background

1. On 3 July 2015 Sharon Krajnc made a request for information under FOIA from LB Ealing in these terms:

I request a breakdown of credit balances accrued since your earliest records for the amounts owing to all ratepayers within your billing area. Please include the following information:

- a) Occupier (where possible)**
- b) Full hereditament address**
- c) Rateable value**
- d) Property description**
- e) Billing Authority Reference Number**
- f) Start Date of Account**
- g) End Date of Account**
- h) Value of unclaimed Credit Balance**
- i) Period within which Credit Raised**

I fully understand that where the occupier is a sole trader, you are prevented from supplying us with the occupier name under the Data Protection Act. I would therefore reiterate that I am not asking for the occupier name in the case of sole traders and only requesting information relating to (b) to (i) above.

2. The Council refused to supply this information in reliance on section 31(1)(a) of FOIA which exempts information "... if its disclosure would, or would be likely to, prejudice the prevention ... of crime" on the basis that its disclosure could increase the risk of fraudulent claims for reimbursement of rates and that the public interest was served by protecting against fraud. Mrs Krajnc complained to the Information Commissioner who in a Decision Notice dated 17 December 2015 upheld her complaint on the basis that section 31(1)(a) was not engaged and ordered that the information should be disclosed. During the investigation the Council also sought to rely on section 41 (information provided in confidence) but the Commissioner decided that they had failed to make out a case on that section.

3. The Council appeal against the Commissioner's Decision Notice. The issues for this Tribunal are (a) whether section 31(1)(a) applied to the information sought (b) whether the public interest in maintaining the exemption provided by that section outweighed the public interest in disclosure of the information and (c) whether section 41(1) applied to the information. We have also considered the effect of section 40(2) of FOIA (Personal information) which was raised by the parties although not considered by the Commissioner in his Decision Notice. In addition to the material before the Commissioner, the Decision Notice itself and the representations of the parties in the course of the appeal, we have been provided with a statement from Jane Pearson who is the Council's NNDR (national non-domestic rates) and Insolvency Manager.

Ms Pearson's statement

4. Ms Pearson says that the Council have 10,000 "live non-domestic hereditaments" from which they raise about £150 million a year in rates. The turnover on accounts is 30% (which we take to mean 30% of properties per year change hands) and there are about 60,000 live accounts. Over the last three years her team have authorised over 1,000 refunds a year amounting to about £5 million per year. Refunds are made on written application; some checks are made to see that claims are genuine; but

“corporate response times” require that refunds are made within ten working days to ensure that ratepayers receive refunds due in a timely manner.

5. Ms Pearson draws attention to the general problem of fraud against local government and to the fact that information published under transparency drives has been used by criminals to help them to commit such frauds. She says that the Council has direct experience of a fraud where a member of the Council’s own staff obtained unclaimed rate refunds based on his internal access to information like that requested in this case.
6. Ms Pearson accepts that other local authorities have disclosed or published information like that requested in this case, although most London Boroughs do not provide such information. She says, however, that most of the authorities making such disclosure have smaller NNDR databases and expresses the view that “business rate retention” introduced in 2013 (whereby authorities are directly dependent on the rates they raise) may change attitudes. She points out that other local authorities have turned down similar requests for information under section 31 or 41 and points to advice given by the Metropolitan Police to Westminster City Council that the application of section 31 would be “sensible”.

Does section 31(1)(a) apply?

7. The Commissioner was unconvinced that disclosure of the requested information would, or would be likely to, prejudice the prevention of crime. In particular he was not satisfied that the Council’s verification procedures would be incapable of preventing a fraudulent claim and considered that the Council had failed to provide evidence of a clear link between disclosure of the information and the occurrence of fraudulent claims.
8. It is well established by the jurisprudence that the expression “likely to prejudice” should be interpreted as requiring a chance of prejudice being suffered which is more than a hypothetical or remote possibility and which involves a real and significant risk. In our view the Commissioner has adopted too stringent an approach in

considering the applicability of section 31(1)(a). We are satisfied that releasing information about refunds due to rate-payers (including the identity of the rate-payer, the amount due, details of the property and details of the account) will make it easier for fraudsters to make false claims for rate rebates with some chance of success and therefore more likely that they will attempt to do so. That, in our view, clearly constitutes a real and substantial risk of prejudicing the prevention of crime. We therefore disagree with the Commissioner in relation to the application of section 31(1)(a) in this case and consider that it is necessary to consider the public interest balance.

The public interest in relation to section 31(1)(a)

- 9.** There is an obvious public interest in the disclosure of any information available about local authority rate accounts, in that the public will be able to get more idea how local authorities are managing their finances, and we accept the evidence from the Commissioner and Mrs Krajnc that many Councils in England and Wales voluntarily publish information like that requested in this case. We can also see that publishing specific details of who is owed rate refunds by the Council would make it more likely that they will claim what is due to them, which is clearly in the public interest.
- 10.** On the other hand, we have already found that there is likely prejudice in relation to fraudulent claims resulting from the publication of such information. However, we consider that it would be fairly easy for the Council to mitigate that prejudice substantially by tightening up the verification process for claims, in particular by requiring those claiming rate refunds to produce documents to verify that they were in occupation of the relevant property, such as original utility bills.
- 11.** Balancing these considerations we are of the view that the public interest in maintaining the exemption does not outweigh that in disclosure of the information and that the Council were not therefore entitled to rely on section 31(1)(a) in order to refuse to disclose the information sought.

Section 41

12. Section 41 makes information exempt if:

- (a) **it was obtained by the public authority from any other person ... and**
- (b) **the disclosure of the information to the public (otherwise than under [FOIA]) by the public authority holding it would constitute a breach of confidence actionable by that or another person.**

In order for the section to apply the information in question must be supplied to the public authority rather than generated by the authority and it must have the necessary quality of confidentiality to give rise to a potential claim for breach of confidence.

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

Section 40(2)

14. Mrs Krajnc appears to accept that the names of sole traders (who are individuals) are personal data and therefore not disclosable. In fact it is clear that all the details she requests (save perhaps for (b), (c) and (d) which have no interest in themselves) will *relate to* living individuals (whether sole traders or partners) who were in occupation of the relevant property and that such individuals will be identifiable from the remaining information even if the name is not disclosed: they therefore constitute the "personal data" of those individuals and come within section 40(2)(a) of FOIA.

15. In those circumstances unless the occupier was a corporate body the details sought cannot be disclosed if their disclosure to a member of the public otherwise than under FOIA would involve a contravention of any of the data protection principles (see section 40(2)(b) and (3)). Such a contravention is clearly a possibility in this case but the point has not been properly addressed by the Council or the Commissioner or raised with Mrs Krajnc.

Conclusion

16. Given our conclusions on sections 31 and 41, we consider that in so far as the request relates to corporate bodies the Council should supply the information requested.

17. However, in so far as it relates to individuals, the section 40 point needs considering properly. It seems to us that the best course would be for the Council to consider the request in relation to individuals again in the light of any representations from Mrs Krajnc and make a decision whether to disclose and, if not, to serve a suitable section 17 notice. We will allow them four weeks to do so.

18. This decision is unanimous.

HH Judge Shanks

06 June 2016