First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0033

Heard at the Sheffield Magistrates Court
On 7-10 October 2019
Representation:
Appellant: Mr Lockley (Counsel)
First Respondent: Ms Kelsey (Counsel)
Second Respondent: In person

Before

JUDGE SOPHIE BUCKLEY
DAVE SIVERS
PAUL TAYLOR

Between

WESTMINSTER CITY COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

GAVIN CHAIT

Second Respondent

DECISION

1. For the reasons set out below the tribunal allows the appeal against decision notice FS50681283 and issues the following substitute decision notice.

SUBSTITUTE DECISION NOTICE

Public Authority: Westminster City Council
Complainant: Gavin Chait

The Substitute Decision

1. For the reasons set out below the Public Authority was entitled to refuse the Complainant's requests for information made on 30 March 2017 on the grounds that the requested information was exempt from disclosure under s 31(1)(a), s 41, s 14, and, in relation to any of the disputed information relating to sole traders or partnerships, under s 40(2) FOIA.

Action Required

2. No action is required.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50681283 of 25 January 2018 which held that Westminster City Council ('Westminster') was not entitled to rely on s 31(1)(a) (prejudice to the prevention or detection of crime) of the Freedom of Information Act 2000 (FOIA). The Commissioner held that s 31(1)(a) was engaged but that the public interest in disclosure outweighed the public interest in maintaining the exemption.

2. This appeal was heard along with the appeal number EA/2018/0055, an appeal by Sheffield City Council ('Sheffield') arising out of an identical request by Mr Chait. The tribunal has issued separate decisions but much of the content is the same.

3. Where reference is made to 'the council' or 'the councils' this should be read as referring to both Westminster and Sheffield.

Factual background to the appeal

4. Mr Chait is an economic development researcher at an open data research, training and consulting company, Whythawk. The company is, inter alia, studying the diversity of economic development opportunities across England and Wales, mapping the revenue potential of active commercial property for all business types.

5. Councils bill and collect national non-domestic rates (NNDR) from all occupiers of non-residential premises. Rates due from empty properties are

collected from the person entitled to possession. There are a variety of exemptions and reliefs available. The level of NNDR administered by Westminster is higher than any other local authority. In 2017/2018 the overall value of NNDR handled by Westminster was £2.2 billion, which amounts to 8% of the NNDR collected nationally.

6. The Council administers NNDR refunds, which arise, for example, when a business moves or because of a reduction in the rateable value of a property. Westminster issues about 9000 refunds a year totalling approximately £165 million, with individual refunds often in excess of £1 million.

7. The request is for information related to NNDR charged to businesses in the Council's area.

8. The Valuation Office Agency ('VOA') is an executive agency of HMRC. In relation to NNDR, one of its functions is to compile and maintain lists detailing the rateable value ('RV') of each non-domestic rateable property (also known as a hereditament) in England and Wales. Rateable properties can be occupied or vacant, but have to be appropriate for occupation. The rateable value forms the basis for NNDR bills issued by local billing authorities. As part of the valuation process, each rateable property is assigned a category code, which might, for example, identify it as a warehouse.

9. The VOA is subject to statutory provisions which cover the confidentiality of information held by the VOA, when it is lawful to disclose that information and the legal sanctions for wrongful disclosure. The VOA is not permitted to disclose information except in certain limited circumstances, including, for the purposes of its functions, where there is a legislative gateway or with customer consent.

10. Within those constraints the VOA publishes certain information on its website including the billing authority reference code and the full property address.

Request and Decision Notice

11. Mr Chait made the request which is the subject of this appeal on 30 March 2017:

> In terms of the Freedom of Information Act of 2000, and subject to section 40(2) on excluding personal data, could you please provide me with a complete and up-to-date list of all business (non-residential) property rates data for your local authority, and including the following fields:
>
> - Billing Authority Reference Code (linking the property to the VOA database reference)
> - Firm's Trading Name (i.e. property occupant)
> - Full Property Address (Number, Street, Postal Code, Town)
> - Occupied/Vacant

- Date of occupation/Vacancy
- Actual annual rates charged (in pounds)

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

12. Mr Chait had requested the same information on 14 March 2016. Westminster refused the 2016 request relying on s 31(1)(a). Mr Chait requested an internal review on 26 April 2016 and Westminster upheld its decision on 25 May 2016.

13. Westminster replied to the 2017 request on 21 April 2017, confirming that it held information within the scope of the request but refusing to provide the information relying on s 31(1)(a) FOIA. No internal review was requested or carried out.

14. Mr Chait complained to the Commissioner on 8 May 2017.

15. In a decision notice dated 25 January 2018 the Commissioner concluded that s 31(1)(a) was engaged. Westminster argued that disclosure of the information would directly provide an opportunity for fraudulent NNDR refunds. The Commissioner accepted that Mr Chait had shown that information was already publicly available in relation to many properties but concluded that a larger list of properties would be available if the information were disclosed. The Commissioner determined that this was a prejudice likely to affect the prevention of crime. Weighing the factors in favour of the exemption being maintained against the public interest in disclosure, she concluded that the balance of public interest rests in the disclosure of the information.

Grounds of Appeal

16. In summary the grounds are that the Commissioner was wrong to conclude that the public interest favoured disclosure (Ground 1) and that Westminster wishes to rely on additional exemptions: s 21 (information in the public domain) (Ground 2); s40(2) (third-party personal data) in relation to any sole traders or partners (Ground 3); s 14 (vexatious request) on the basis that Westminster estimates that deciding which exemptions apply would take at least 123 hours (Ground 4).

17. In particular, in relation to ground 1, the appellant submits that the Commissioner:
    17.1. Failed to give due weight to the increased risk of fraud to Westminster which she accepted would be the result of disclosure;
    17.2. Gave undue weight to the fact that other local authorities have disclosed similar information and/or failed to give due weight to the unique circumstances of Westminster;
    17.3. Failed to give any weight at all to the distinct prejudice that would arise from disclosing the locations of empty properties.

18. Westminster acknowledges in its grounds of appeal that some of the information is already in the public domain and states that it is in the process of providing Billing Authority reference codes and full property addresses to the Mr Chait.

The Commissioner's response

19. The Commissioner's response states:

Ground 1 (public interest balance)

20. Westminster has not explained why other Councils have been able to release this data without cause of concern. It seems unlikely that the fact that the amount of public money at risk was lower would lead authorities to release the data. There is insufficient evidence of a risk of crime in empty properties.

Ground 2 (s 21)

21. Westminster has not indicated where the information can be obtained. It is unclear if Westminster asserts that all the information is reasonably accessible.

Ground 3 (s 40(2))

22. This is misconceived. The request was made subject to s 40(2).

Ground 4 (s 14)

23. In principle the cost of complying may make a request vexatious, but Westminster need to provide further explanation of time and cost.

Mr Chait's response

Section 31 is not engaged

24. Evidence shows that disclosure of ratepayer and vacancy data does not prejudice the prevention of crime. There is no evidence that vacant property crime occurs at a rate substantially higher then expected in Westminster. North Wales Police have provided data on incidents in empty commercial premises which shows that a vacant property is less likely to experience crime.

25. Data provided by Thames Valley police (a) shows that crime in vacant properties is so low as to not be a meaningful risk and (b) does not demonstrate a causal link between the publishing of data by authorities and crime in empty commercial properties.

26. More than 65% of authorities publish periodic updates on commercial vacancy data to their open data websites and 93% overall provide vacancy data.

27. The cost of collating, cleaning and cost-referencing empty property data provided by local authorities to provide a statistical database is disproportionately large compared to the potential gains from empty property crime such as metal theft.

28. Authorities rely on hyperbole – for example Liverpool Council claimed that disclosure leads to 'use, possibly by overseas companies, to dump waste'. The data can not be used in that way. It does not include anything about a property's size, access, buildings, parking areas or unbuilt space. Properties rated by the VOA are required to be ready for immediate commercial occupation and use and therefore unlikely to be the sites used for illegal dumping.

29. There is no evidence in support of Westminster's claims that empty properties lead to a risk of terrorism.

30. It is already possible in less than an hour to gather the requested data related to a specific commercial property, which could be used for fraudulent purposes. A sufficiently motivated individual would not be prevented by the lack of data published by Westminster.

31. The requested data are not part of Westminster's fraud risk assessment. There is no request for the ratepayer customer number, the credit value due to each ratepayer or any information on revaluation of the property. In order to process a rebate an appointed agent would need information not covered by the request. City of London refund to the person who made the payment and make refunds without application. Their incidence of fraud is nil. The evidence of the Detective Chief Inspector carries little weight.

32. Squatting and fraud are low frequency events.

33. Data released by public authorities on empty properties can be and is used to assist authorities in identifying companies fraudulently claiming tax relief.

34. The empty buildings likely to be of interest to urban explorers are unlikely to be on the master ratings list, because those buildings are ready for occupation by a tenant. The VOA database already provides plenty of information which would be of greater use to potential urban explorers. There is a mass of existing public data already offering almost unlimited ability to identity explorable places. Ratepayer data would not offer anything new.

<u>The public interest favours disclosure</u>

35. Data is needed to inform action to be taken to tackle empty commercial properties. The government recognises the value of commercial vacancy data.

36. The data produced by Whythawk can be or it used to support economic development, access to housing, assessment of energy use, the investigation of money laundering and fraud and to inform the setting of business rates.

Summary

37. Westminster have not shown a causal relationship between disclosure and any prejudice. Mr Chait's evidence shows that:
    37.1. Vacant properties are at a lower risk of crime than occupied properties, ratepayer publication is used in the investigation of fraud, and that vacant properties have no relevance to terrorism.
    37.2. Any prejudice is not real and is insubstantial.
    37.3. There is no clear or causal link between disclosure and criminal activity.
    37.4. Those wishing to commit rates-related fraud against specific ratepayers can do so with data in the public domain.
    37.5. Westminster does not use the requested data in its fraud prevention systems and a significant risk is caused by their systems of themselves.

Further written submissions

38. The tribunal took account of all further written submissions provided by the parties, but they will not be summarised here.

The scope of the appeal

39. Westminster are no longer relying on s 21 and have disclosed the property codes and the addresses. Four parts of the request are still in issue: the name of the business, whether occupied or vacant, the date of occupation or vacancy and the actual rates charged, and if unable to provide an absolute occupied or vacant status the exemptions or reliefs that a particular property may be receiving.

40. At the hearing all parties proceeded on the basis that all other parts of the requests were within the scope of this appeal and we also proceed on this basis.

41. During the hearing Westminster were permitted to rely on s 12 and s 41 as additional exemptions.

Legal framework

S 31 – law enforcement

42. S 31 FOIA provides a qualified exemption subject to the public interest test in respect of information relevant to specific areas of law enforcement:

S 31 - law enforcement

(1) Information which is not exempt information by virtue of section 30 [*investigations and proceedings conducted by public authorities*] is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
(a) the prevention and detection of crime,
(b) the apprehension or prosecution of offenders,
(c) the administration of justice,
(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
(e) The operation of the immigration controls,
(f) The maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
(g) The exercise by any public authority of its functions for any of the purposes specified in subsection (2),
(h) Any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
(i) Any inquiry held under the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.
…

43. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

S 41 – information provided in confidence

44. S 41 provides, so far as relevant:

S 41 – Information provided in confidence
(1) Information is exempt information if –
(a) it was obtained by the public authority from any other person (including another public authority), and
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

45. Sections 31(a) and (d) and s 41 are qualified exemptions and therefore if either section is engaged, the tribunal must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing whether the information.

S 40 – personal Information

46. The relevant parts of s 40 of FOIA provide:

> (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 subsection (1), and
> (b) either the first or the second condition below is satisfied.
> (3) The first condition is-
> (a) in a case where the information falls within any of paragraphs (a)-(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 principles...
>
> …
> (5) The duty to confirm or deny—
> …
> (b) does not arise in relation to other information if or to the extent that either
> (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 191)(a) would (apart from this Act) contravene any of the data protection principles...

47. Personal data is defined in s1(1) Data Protection Act 1998 ('DPA') (this request predates the introduction of the General Data Protection Regulation "GDPR") as:

> 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.

48. The first data protection principle is the one of relevance in this appeal. This provides that:

> 1. 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..." (See para.1 Sch 1 DPA).

49. The only potentially relevant condition in Schedule 2 DPA is section 6(1) which provides that the disclosure 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.' (See para. s 6 Sch. 2 DPA)

50. The case law on section 6(1) has established that it requires the following three questions to be answered:

1. Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

51. The definition of "personal data" consists of two limbs:
i) Whether the data in question "relate to" a living individual and
ii) Whether the individual is identifiable from those data.

52. The tribunal is assisted in identifying 'personal data' by the cases of Ittadieh v Cheyne Gardens Ltd [2017] EWCA Civ 121; Durant v FSA [2003] EWCA Civ 1746 and Edem v Information Commissioner [2014] EWCA Civ 92, from which the following principles are drawn.

53. In terms of 'identifiability', personal data covers, for example, the name of a person in conjunction with his telephone details or information about his working conditions or hobbies, as well as information that a person has been injured and is on half time, or his name and address.

54. In Durant, Auld LJ, giving the leading judgment said at [28]:

> Mere mention of the data subject in a 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 that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a 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 have 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.

55. In Edem Moses LJ held that it was not necessary to apply the notions of biographical significance where the information was plainly concerned with or

obviously about the individual, approving the following statement in the Information Commissioner's Guidance:

> It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him.

S 12 – cost of compliance

56. Under s 12(1) a public authority is not obliged to comply with a request for information where:

> the authority estimates that the costs of complying with the request would exceed the appropriate limit.

57. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is, in this case, £450.

58. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in–
(a) determining whether it holds the information,
(b) locating it, or a document which may contain the information,
(c) retrieving it, or a document which may contain the information, and
(d) extracting it from a document containing it. (See regulation 3).

59. The Regulations specify that where costs are attributable to the time which persons are expected to spend on the above activities the costs are to be estimated at a rate of £25 per person per hour.

60. The estimate must be sensible, realistic and supported by cogent evidence (McInnery v IC and Department for Education [2015] UKUT 0047 (AAT) para 39-41).

61. A public authority cannot comply with FOIA by providing such information as it can find before section 12 applies (Reuben Kirkham v Information Commissioner [2018] UKUT 126 (AAC) ('Reuben Kirkham')).

S 14 - vexatious request

62. Guidance on applying s 14 is given in the decisions of the Upper Tribunal and the Court of Appeal in Dransfield ([2012] UKUT 440 (AAC) and [2015] EWCA

Civ 454). The tribunal has adapted the following summary of the principles in Dransfield from the judgment of the Upper Tribunal in CP v Information Commissioner [2016] UKUT 427 (AAC):

63. The Upper Tribunal held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA (para 10). That formulation was approved by the Court of Appeal subject to the qualification that this was an aim which could only be realised if 'the high standard set by vexatiousness is satisfied' (para 72 of the CA judgment).

64. The test under section 14 is whether the request is vexatious not whether the requester is vexatious (para 19). The term 'vexatious' in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA (para 24). As a starting point, a request which is annoying or irritating to the recipient may be vexatious but that is not a rule. Annoying or irritating requests are not necessarily vexatious given that one of the main purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account (para 25). The IC's guidance that the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request (para 26).

65. Four broad issues or themes were identified by the Upper Tribunal as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to staff). These considerations are not exhaustive and are not intended to create a formulaic check-list.

66. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.

67. As to burden, the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether the request is properly to be described as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor [para 29]. Thus, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious. A requester who consistently submits multiple FOIA requests or associated correspondence within days of

each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request [para 32].

68. Ultimately the question was whether a request was a manifestly unjustified, inappropriate or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests [paras 43 and 45].

69. In the Court of Appeal in Dransfield Arden LJ gave some additional guidance in paragraph 68: 'In my judgment the Upper Tribunal was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available...'

70. Nothing in the above paragraph is inconsistent with the Upper Tribunal's decision which similarly emphasised (a) the need to ensure a holistic approach was taken and (b) that the value of the request was an important but not the only factor.

71. The lack of a reasonable foundation to a request was only the starting point to an analysis which must consider all the relevant circumstances. Public interest cannot act as a 'trump card'. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious.

72. In relation to whether or not a request could be vexatious because of the cost of compliance the Court of Appeal stated:

> 85. As the UT held, there is no warrant for reading section 14 FOIA as subject to some express or implied qualification that a request cannot be vexatious in part because of , or solely because of, the costs of complying with the current request.
>
> 86. In addition I would agree with the UT's observation that, if the authority can easily show that the limits in section 12 would be exceeded, it would be less complicated for it to rely on that section, rather than section 14.

73. In Home Office v Information Commissioner and Cruelty Free International [2019] UKUT 299 (AAC) the Upper Tribunal stated:

> The issue is always whether the resources required to provide the information, and therefore the requests to the authority, were such as to render the request vexatious. And that will depend on the context. It would, for example, take a much higher burden to render vexatious a request pursuing allegations of ministerial corruption than a request asking for the number of paperclips used in the minister's private office.

74. In the same case the Upper Tribunal stated, at para 21, that although there are other provisions, such as s 12, that allow burden to be addressed, those other provisions do not deal with every eventuality.

The Task of the Tribunal

75. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

76. The issues we have to determine were agreed by the parties as follows:

Section 31(1)(a)

1. If the disputed information, or any part of it, were released, would it prejudice, or be likely to prejudice, the prevention of crime?

2. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it?

Section 41

5. Is any of the disputed information confidential within the meaning of s.41(1) FOIA?

6. For any information which is confidential, would disclosure be in the public interest such that it would not amount to an actionable breach of confidence?

Personal Data

7. is any of the disputed information personal data, insofar as it relates to
a. Sole traders; and/or

b. Partnerships.

8. If so, should the Requests be construed as either:

a. Excluding any personal data, or alternatively

b. Including personal data, subject to the application of the exemption at s.40(2) FOIA?

9. To the extent that any of the information in the scope of the Requests amounts to personal data, would the release of that information breach the First Data Protection Principle, in that its release would be unfair to the data subject?

Section 12/14 (Westminster only)

10. Would the costs of disaggregating personal data from non-personal data fall within the costs that may be included within an estimate of the cost of responding to the Request, for the purposes of s.12, as defined by reg. 4(3) of the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004?

11. If so:

a. has Westminster produced a reasonable estimate of those costs; and

b. on that estimate, do the costs exceed the appropriate limit?

Evidence and submissions

77. We have read an open and a closed bundle of documents, which we have taken account of where relevant.

78. We read statements from and heard oral evidence from Mr Hinkley, Assistant City Treasurer – Revenues and Benefits on behalf of Westminster, and, on behalf of Sheffield, from Mr Harrow, Solicitor with responsibility for NNDR advice and recovery at Sheffield, Mr Foster, Capita team leader in the NNDR

team dealing with collection of business rates on behalf of Sheffield, and Mr Exley, Group Manager in Structural and Public Safety for Sheffield.

79. All witnesses were cross-examined by the Commissioner and Mr Chait. Mr Chait did not give oral evidence but confirmed that any evidence contained in his submissions or in the bundle was true to the best of his knowledge and belief. Mr Chait was not cross-examined by the Councils or the Commissioner on the basis that this would not be taken as accepting the truth of all Mr Chait's evidence.

80. All parties submitted skeleton arguments or equivalent and made oral submissions, including a very short closed submission by Westminster, a gist of which was given to the excluded parties. The tribunal took account of the content of all submissions where relevant.

Discussion and conclusions

Section 31(1)(a): If the disputed information, or any part of it, were released, would it prejudice, or be likely to prejudice the prevention of crime and if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it?

81. As the first-tier tribunal in Hogan Oxford City Council and the Information Commissioner (EA/2005/0026, EA/2005/0030) observed at para 27, where the specified activity or interest which would be likely to be prejudiced is a public interest, like the prevention of crime, there is an obvious overlap between whether or not the section is engaged and any subsequent application of the public interest test. Thus, in this appeal there is significant overlap in the evidence and submissions on the first two issues. We have therefore combined our consideration of the evidence and submissions of the first two issues, but we bear in mind that although the relevant factors may overlap, the questions that we have to answer are different.

82. The applicable interest in this case is the prevention of crime. It is important to note that s 31(1)(a) is engaged where there would be likely to be prejudice to the prevention of crime. It does not require the respondent to show that disclosure *will* lead to an increase in crime.

83. The nature of the prejudice being claimed by Westminster is to the prevention of three different types of crime: (i) fraud (ii) terrorism and (iii) a broad spectrum of crimes broadly falling under the heading of property crime.

84. When deciding if the section is engaged, we must decide if the Council has satisfied the evidential burden of showing that some causal relationship exists between the prejudice being claimed and the potential disclosure; if the prejudice is real, actual or substantial; and whether the chance of prejudice is

more than a hypothetical or remote possibility i.e. is there a real and significant risk of prejudice?

Provision of 'out of date' data

85. Mr Chait submitted that much of the risk of crime could be avoided while still satisfying the public interest in the use of the data by researchers by the provision of 'out of date' data, with a time lag so it was no longer live. This is not what was requested and therefore not something we can take into account.

The relevance of the statistics on squatting, crime, fraud etc

86. We accept the Council's submissions that the statistics produced by Mr Chait do not assist us in resolving the issues before us. For example, the fraud statistics appear to show a general increase in the number of business frauds, but it is impossible to draw any relevant inferences from this. The statistics on squatting relate only to residential property and therefore are not helpful.

87. The other crime statistics are relied on by Mr Chait to demonstrate that the release of equivalent data by other public authorities has not led to an increase in crime, which would be expected if the Council's fears are justified. We do not accept that we can draw any such inference from the statistics or indeed any inferences which assist us in resolving the issues before us.

88. Mr Chait provided details of information recorded by two police authorities on crime in vacant properties. Only Thames Valley Police and North Wales Police record this information. It is a snapshot rather than a 'before and after disclosure' comparison and is therefore of limited use. Thames Valley Police provides some data for Oxford and Reading, one of which discloses the information and one which does not, but this does not take account of many other potential differences between Oxford and Reading and we do not accept that we are able to infer anything about whether disclosure has or has not made a difference.

89. Taken at their highest, the statistics show that in the Thames Valley and North Wales police authorities, crime is much more likely to occur in occupied properties than in unoccupied properties. That is unsurprising and does not assist us in resolving the issues in this appeal.

90. Mr Chait also produced a graph showing crime rates more generally over the period during which there was a dramatic increase in the number of authorities publishing the requested information. He submitted that this showed that there had not been the increase in crime which would be expected if the Councils were right.

91. The graph shows the change in recorded rates of four particular types of crime between July 2013 and March 2019: shoplifting, criminal damage and arson, robbery and burglary. Shoplifting is included as a comparator. Robbery is not likely to occur in vacant properties by definition. The statistics on burglary relate to 'business and community' which is undefined but is not limited to vacant properties. Criminal damage and arson are the most relevant crimes, but the statistics are not limited to vacant properties.

92. It is unclear to us whether any increase in crime caused by the release of the information in other authorities would show on this graph, particularly if Mr Chait is right that crime is much more likely to occur in occupied than unoccupied properties. We note that the chart shows a slight increase in criminal damage and arson post-publication by most authorities, but we do not think this is significant given that the statistics are not limited to vacant properties and given the potentially unlimited and unknown other variables which could have caused the rise.

93. Overall, we do not find these statistics helpful in determining the issues before us: the question that we have to answer is not whether the Councils have shown that the release of information would lead to an increase in crime, but whether release would be likely to prejudice the prevention of crime.

The relevance of disclosure by most other public authorities

94. Both Mr Chait and the Commissioner ask us to place weight on the fact that the majority of local authorities publish the information requested. Save for the issue of the statistical evidence or lack of it as to the effect of this publication dealt with above, what is the relevance of this factor to the issues we have to determine?

95. The Commissioner submits that we should infer that either the authorities or the Commissioner considered either that disclosure would not prejudice the prevention of crime or that the negative consequences of disclosure were outweighed by the public interest in disclosure. She submits that it is not reasonable to infer that the authorities simply failed to consider whether or not disclosure would prejudice the prevention of crime.

96. We accept that it is reasonable to infer that most authorities would have considered the issue, even if some might not have done. We accept that it is reasonable to infer that the Commissioner or most of the other local authorities concluded, on the basis of facts and reasoning that we are not aware of, that there was either no prejudice or that any negative consequences were outweighed by the public interest in disclosure.

97. How does this assist us in determining the issues before us? The Commissioner urges us to treat this as 'highly suggestive' of there not being significant

prejudice arising from disclosure. We do not accept that the conclusions of other local authorities made on the basis of facts and reasoning unknown to us are of any assistance in deciding whether or not prejudice would be likely to arise from disclosure by Sheffield or Westminster.

98. For similar reasons, we place little weight on the factual conclusions of other first tier tribunals that have considered similar issues: we do not have the same evidence before us.

Information already in the public domain: property crimes and fraud.

99. Mr Chait makes two separate points under this heading. First, that a decision has been made to publish details on, for example, the planning portal which carries the same if not greater risk of misuse and second that any criminal wishing to locate a vacant property for the purposes of crime has access to plethora of other sources of information already in the public domain.

100. In relation to the publication of similar information on the planning portal, we do not accept that this is relevant to the issues we have to determine. Parliament has decided, for understandable reasons, that certain information should be made public in an arena where decisions will have a likely impact on neighbours and/or the wider community. We assume that some assessment of risks and benefits was undertaken before such a decision was made, but it does not assist us in determining the issue before us.

101. We note that the VOA database, which does publish certain information, does not contain the more specific ratepayer data which is covered by the request. Again, we assume that some assessment of risks and benefits was undertaken, but it does not assist us in determining the issue before us.

102. Finally, we note that businesses in the BID ('Business Improvement District') in the centre of Sheffield produce a list of vacant commercial properties. Here again, we presume that the owners of the properties undertook some assessment of risks and benefits before taking the decision to make these details public, but it does not help us in determining this appeal.

103. In terms of the submission that any criminal wishing to locate a vacant property/use rates data for the purposes of crime can already do so, Mr Chait produced evidence that showed that much of the requested information could be obtained by a wrongdoer in relation to a particular hereditament in approximately 10-25 minutes. We accept that evidence. We note however that not all the information was discoverable: for example, Mr Chait had to estimate the date of vacancy. We accept that an educated guess as to the properties potentially due a refund could be made with the information published on the VOA, which would give a potential fraudster a starting point, but not as much as a confirmed figure issued by the Council.

104. In relation to property crimes we accept that the planning portal, Google Street View and other sources already allow criminals to identify targets, and that the list is not likely to contribute to opportunistic crimes, but we accept the submission by Sheffield that the provision of a readymade list makes it easier to commit crime and therefore prejudices the prevention of crime: it enables criminals to avoid the significant effort of researching and compiling the information in relation to each potential target.

105. It would take a significant period of time to assemble a list equivalent to that requested: for a list of 40,000 hereditaments Mr Chait estimates that it would take 515 days of continuous work and this list would still not contain all the requested detail.

106. We accept that disclosure of this information is not likely to prejudice the prevention of opportunistic property crime. Further we accept that it is possible to identify many vacant properties from outside and others are generally known to be vacant. However, we accept that it is much easier to use a ready-made list than comb through the planning portal, or use Google Street View to assess the whole of Sheffield or Westminster or scan marketing websites. Although a potential criminal can piece something similar together with enough time, effort and motivation, that does not answer the point that the criminal's life is made easier through the provision of a ready-made list.

The claimed prejudice: fraud

107. Westminster argued that there is a significant risk of serious prejudice to the prevention of crime in two ways: first, with the disputed information a malefactor could bypass the security systems and convince Westminster that they were the ratepayer given that they use the requested data as part of their security checks; second, by analysing the data a malefactor could work out which properties were due a refund – giving a readymade way of prioritising a fraud target.

108. The level of NNDR administered by Westminster is higher than any other local authority. In 2017/2018 the overall value of NNDR handled by Westminster was £2.2 billion, which amounts to 8% of the NNDR collected nationally.

109. Westminster administers NNDR refunds, which arise, for example, when a business moves or because of a reduction in the rateable value of a property. It issues about 9000 refunds a year totalling approximately £165 million, with individual refunds often in excess of £1 million.

110. The system Westminster has adopted to limit fraudulent claims for NNDR refunds is to verify the identity of anyone seeking a refund by asking a series of questions in a telephone call. We accept Mr Hinkley's evidence that the

disputed data would allow a person to answer some of the security questions in the current pool. Different questions are asked each time, and so this would allow someone to bypass the systems sometimes, but not always.

111. It is true that Westminster could remove these particular questions from the pool, but we accept that reducing the size of the pool of questions makes a system less secure. Further we accept that adding new questions is not straightforward given the limited datasets that Westminster collects: they do not for example have access to identifiers like national insurance numbers or dates of birth. Creating a new security system, or collecting further information would incur costs and cause inconvenience.

The relevance of the fact that the Council could alter its security systems

112. The Commissioner and the Councils submitted that for the purposes of considering whether or not the section is engaged we have to take the Council as we find them and disregard the fact that the prejudice to the prevention of crime could be avoided by taking some of the steps outlined above. Mr Chait disagreed, submitting that the fact that the systems could be changed, avoiding an increased risk of fraud, meant that the section was not engaged.

113. Mr Lockley drew an analogy with the s 12 authorities where an authority's systems must be taken as they are: it is not for the tribunal to judge the adequacy of Westminster's systems: the question is, given that Westminster has the system they have, would the prejudice arise?

114. The Commissioner submitted that the potential for altering the system became relevant at the stage of considering the public interest.

115. In our view the starting point in relation to whether or not s 31 is engaged is that we should look at the circumstances as they existed at the relevant time and ask ourselves whether or not there is a significant risk of prejudice to the prevention of fraud given the Council's security systems at that time. We do not think that it is an answer to say that there would be no risk if they adopted a different system.

116. When looking at the balance of public interest we accept that the ease with which the risks of prejudice to the prevention of fraud could be mitigated are relevant to the weight to be attached to this risk. If the risk of fraud could be easily and quickly mitigated at no cost to the authority, this risk might attract relatively little weight in the balance. If it could only be mitigated at significant cost and effort, it would attract more weight. In this case we accept that it is not straightforward to simply create new questions, and that creating an entirely different security system would entail significant time and expense.

The claimed prejudice: terrorism

117. Westminster, along with City of London, is the prime target for terrorist activity in the United Kingdom. Westminster rely on an email from DCI Boon (Head of Serious Acquisitive Crime Investigation for Westminster Police), received by Westminster on 8 September 2010 which states in relation to terrorism that:

> I have been asked to look at into the harm likely to be caused by releasing specific details of the vacant properties owned by Westminster Council.
> …
> From the police perspective there is a real risk of crime should this detail be released…
> Most importantly Westminster is also a unique borough, a centre of world attention and, unfortunately, sometimes hate. Releasing this information would potentially provide terrorists with vulnerable key locations from which to conduct or focus their activities. If a terrorist atrocity is being planned, Westminster as a centre of government, tourism, culture and commerce is an extremely likely target.

118. The Commissioner submitted that Mr Hinkley was not entitled to simply do what the police advise him to do: this is not what is required by FOIA. The authority can seek advice but cannot replace its own assessment under FOIA with that of a police officer. That is undoubtably right, but we are not here to review the public authority's decision-making process.

119. In an ideal world, we would hear oral evidence from a police officer in relation to this specific request. Failing that, we would have a recent signed witness statement dealing with the specifics of this request. In reality, the police have limited resources and other priorities. Mr Hinkley gave evidence that he had requested updated advice, but had received no reply.

120. Whatever the practical difficulties of obtaining 'better' evidence, we would have placed more weight on the evidence of DCI Boon if the email had been written in 2017, or if we had been provided with a signed witness statement, or if DCI Boon had attended the tribunal to give evidence and been subject to cross-examination, or if we had the precise details of the request he had been asked to consider, or if the evidence had related to this request in particular.

121. However, aside from a broad assertion from Miss Kelsey that things might have changed since 2010, there was no suggestion that things had changed in relation to terrorism since 2010 in any relevantly significant way, for example in the way terrorists operate or in terms of any reduced risk in Westminster. Mr Hinkley, although not an expert in terrorism, gave evidence that the severity of risk in Westminster had not reduced since 2010.

122. Mr Hinkley was '99% certain' that DCI Boon was considering a similar request. Although we do not have the precise details of the terms of the request that DCI Boon was considering, we find that 'specific details of the vacant

properties owned by Westminster Council' is sufficiently similar that we can infer that DCI Boon would have given the same opinion in relation to the request in this appeal.

123. Therefore, although we place reduced weight on this evidence for the reasons outlined above, we do place weight on the opinion of a senior police officer in this borough, and we accept that the release of details of vacant properties would potentially provide terrorists with vulnerable key locations from which to conduct or focus their activities. We do not think it is appropriate to infer that the risk arising from empty properties is not significant simply because it is not mentioned in the various documents produced by Mr Chait: just because it is not mentioned does not mean that it is not a risk. Even in Westminster, terrorism is a low probability event, but carries with it a risk of serious harm. We find that this makes it a real and significant risk such that it engages 31(1)(a). Given the limitations in the evidence we find that, despite the risk of serious harm, it carries only a moderate amount of weight in the public interest balance.

The claimed prejudice: property crimes

124. Under this heading we consider all the other crimes or issues associated with criminal behaviour in empty properties relied on by the Councils.

125. Squatting in non-residential properties is not a crime, but is often associated with criminal offences such as criminal damage and anti-social behaviour offences.

126. Westminster relied on evidence in the form of a letter dated 13 April 2011 to the Chief Executive of Wandsworth Borough Council from Chief Superintendent Dave Musker from the Metropolitan Police. The Chief Superintendent gives his opinion that the release of information on vacant properties in Wandsworth would or would be likely to prejudice the prevention of crime. He states:

> …properties left empty can become prone to being at the centre of crime and disorder issues, namely crack houses, meeting places for young people and anti-social behaviour by those squatting. There is also a growing trend of vacant commercial premises being used by those squatting… Disclosure of a list of this nature would make it considerably easier for organisers of these events to identify new locations to hold them.

127. This letter from 2011 is supplemented by another email provided by Wandsworth which is dated 16 June 2017 and is to Merton Council from Peter Laverick, also from the Metropolitan Police, in which he fully endorses the 2011 letter and states:

> I have spoken to three Neighbourhood Inspectors on the borough. They have brought to my attention several unoccupied non-residential premises in Wandsworth which

have been linked to crime and disorder…One address in particular has been used for unlicensed social events and the consumption of alcohol and has been frequented by a number of individuals with criminal convictions. This has caused considerable concern to local residents.

My fear is that if we were to disclose the number and location of unoccupied non-residential premises in the borough, this would lead to further incidents of crime and disorder – including illegal squatters, anti-social behaviour, drug consumption and unlicensed social events - and prejudice our efforts to prevent and investigate crime.

128. Westminster also relied on an email from DCI Boon (Head of Serious Acquisitive Crime Investigation for Westminster Police) , received by Westminster on 8 September 2010 which states that:

I have been asked to look at into the harm likely to be caused by releasing specific details of the vacant properties owned by Westminster Council.
…
From the police perspective there is a real risk of crime should this detail be released….speaking from my specific area of expertise, which is burglary, there is a risk these premises could be targeted. Even though vacant, fixtures, fittings and raw materials can be stolen form them. Theft of lead, copper and other materials have all occurred in Westminster recently for example. I have conducted quick checks on our databases and in the last two months alone there were 6 burglaries of vacant premises…. Other offences such as Arson and Fraud have also been recorded in relation to vacant premises on Westminster…There is a likelihood that social networking sites could share this information to arrange unlawful raves. In addition, from my policing experience in general. I have seen vacant properties used as crack houses. Therefore, I believe your concern around anti-social behaviour and drugs to be valid.

129. As set out above in relation to terrorism, we were urged to place little weight on the police evidence by the Commissioner and Mr Chait. We refer back to our observations above in relation to DCI Boon's evidence, and add that Ms Kelsey is correct to submit that DCI Boon's evidence would have carried more weight if he had contacted other authorities which did disclose this information and asked them if they had seen any increase in crime in empty commercial properties. However, we do place weight on this evidence, again for the reasons set out above.

130. In relation to the other police evidence, we repeat our points about 'better evidence' and note also that these emails do not relate to Westminster and that one dates from 2011.

131. Despite these limitations, we do place weight on the opinion of Commander David Musker, endorsed more recently by Peter Laverick from the Metropolitan Police. If the situation had changed in any relevant or significant way since 2011, we assume that Mr Laverick would not have 'fully endorsed' Commander Musker's email. Those emails show that, in the opinion of the

Metropolitan Police, based on examples of crime related to empty properties, the release of a list of unoccupied non-residential premises would lead to further incidents of crime and disorder in Wandsworth. Wandsworth is not a dissimilar borough to Westminster and we infer that similar risks would exist in Westminster, particularly in the light of the similar concerns expressed by DCI Boon.

132. Mr Chait made the point that Wandsworth now release this data. We do not know why this decision was made by Wandsworth, and we do not think that this makes any difference to the weight we place on the police evidence. We deal with the relevance of the decisions of other public authorities elsewhere in this decision.

133. We were referred to the evidence heard by the first-tier tribunal in Voyias and the conclusions that the tribunal reached on the basis of that evidence. That evidence was not before us and we do not place any weight on the factual findings of that tribunal.

134. Overall, we accept, on the basis of the evidence of police opinion, that the release of the requested information is likely to make the commission of these crimes easier and therefore that s 31(1)(a) is engaged. Because of the fact that many of these crimes will be opportunistic, and because of the limitations of the evidence discussed above, we place less weight on this prejudice in the public interest balance than in relation to the other crimes relied on by Westminster.

Conclusions

135. For the reasons set out above, we find that section 31(1)(a) is engaged. We find that there is a real and significant risk that fraud would be made easier by the release of this list; that the release of details of vacant properties would potentially provide terrorists with vulnerable key locations from which to conduct or focus their activities; and that the provision of a readymade list of empty properties makes it easier for criminals to identify targets for the crimes grouped under the heading 'property crimes' above. We find that the release of the list would therefore be likely to prejudice the prevention of crime.

136. Turning to the public interest, taking into account our discussions and conclusions set out above, we find that there is a very significant public interest in maintaining the exemption. In relation to terrorism although this is, by its nature, a low probability event, the potential consequences of an act of terrorism are extremely serious. In DCI Boon's opinion, terrorists might be able to exploit the information in Westminster. We therefore give this prejudice moderate but still significant weight in the balance.

137. In relation to fraud, we accept that the release of this information would make it much easier for a fraudster to pose as a ratepayer and bypass the Council's security systems, and that changing those systems would entail significant time and expense. Further that it would facilitate a fraudster posing as the Council to obtain confidential information from a ratepayer. There is evidence that rates fraud is a real and current problem. The consequences to the Council of a loss of a significant sum of public money are serious. We therefore give this prejudice very significant weight in the balance.

138. In terms of the remaining group of property crimes, including squatting, we place some limited additional weight on this prejudice for the reasons set out above.

139. Taking all these matters together, including in particular the prejudice to the prevention of rates fraud and terrorism, we find that there is a very significant public interest in maintaining the exemption.

The public interest in release of the information

140. Mr Chait argues that there is a lack of public data in this area, and that it is needed for the purposes of research. He argues that there is strong public interest in proper research relating to current concerns about empty commercial properties, particularly on the high street, claims that business failures are due to business rates, and the impact or potential impact of steps to tackle this including potentially discounting business rates. Without this disclosure Mr Chait argues that there is no data available to interrogate these claims or evaluate interventions. He highlights a number of specific issues which we deal with below.

Use by charity tax commission

141. Mr Chait referred us to a report by the Charity Tax Commission (CTC) dated July 2019 entitled 'Reforming charity taxation, towards a stronger civil society' which makes a number of recommendations intended to make charitable tax reliefs, including business rates relief, more effective in achieving their ends. The report states that there are areas where it cannot propose immediate solutions because of a lack of adequate data and robust research that would allow the CTC to understand the consequences of various possible changes (p 8). One of its main recommendations is headed 'improved data and openness'. This section describes a need for better government data because knowing how tax reliefs are distributed is important for understanding how far they influence public and charity behaviour and deliver their intended objectives. The report states that 'it is currently difficult to determine with any degree of accuracy where most charitable tax reliefs are targeted or the public benefit they support. The related recommendation is mainly focussed on the publication of government statistics but the CTC does also recommend that

'Local authorities should also publish their business rates registers as open data in a standardised format' (p 10).

142. At p 31 of the report, the CTC states that 'the data for business rates relief are less comprehensive owing to a lack of publicly available and accessible information.' The CTC then uses data made available by 18 local authorities to examine the characteristics of a sample of charities that have received mandatory business rates relief and make observations on the distribution of business rates relief. The CTC states at p 43 'Our research into the distribution of business rates relief was similarly disadvantaged by the lack of available and consistent machine-readable data… This meant that we only had a relatively small sample of data to analyse…' recommending at p 44 that 'local authorities should publish their business rates registers as open data, to a standardised format, using charity and company numbers collected during the application process' and noting later that 'to be truly useful open data need to be both machine-readable and consistent in format' and at p 639 'Our own research into the distribution of business rates relief across the charitable sector is limited by the lack of open, machine-readable data for analysis'.

143. The fact that the CTC complains of a lack of sufficient useable data in July 2019, despite the number of local authorities now publishing information in response to Mr Chait's request, suggests that the public interest in the availability of data usable by organisations such as the CTC will not be served by another ad hoc release of data in a potentially inconsistent format. As the chart on p 4 of Mr Chait's skeleton argument shows, at the time the review was commissioned, over 200 local authorities self-published the requested information along with over 100 publishing in response to his requests. Despite this the CTC were only able to use data from 18 local authorities. What the CTC identified as lacking was the publishing of business rates registers by all local authorities in a standardised machine-readable format. That is not what Mr Chait has requested, nor what he is achieving by his many individual freedom of information requests and it will not be achieved by the release of the data in this appeal.

144. We do accept that the CTC report shows that some use can be made of non-standardised data on business rates released by individual authorities on an ad hoc basis (see the use of the data made available by the 18 local authorities) and therefore that the release of this information by these two Councils might add something to similar research in the future. However, the evidence of Mr Harrow and Mr Hinkley was that this information could be made available directly to the CTC on request subject to appropriate safeguards, such as an information sharing agreement, providing an alternative route to achieve the same aim. The availability of this option significantly dulls the public interest in ordering release to the public at large.

Use of the information by researchers

145. It is accepted by the Councils that researchers, including Mr Chait, can use this data to contribute usefully to the general debate in this area and therefore there is some public interest in its release. The usefulness of data released by an individual council in response to an FOI request is reduced for the same reasons set out in relation to the CTC above, i.e. ad hoc release by different Councils of different information in different formats has its limitations.

146. It is clear from, for example, the report on 'meanwhile use' by Centre for London (Meanwhile, in London: Making use of London's empty spaces), that researchers can use data produced by Mr Chait using the requested data from other authorities to undertake research which could facilitate economic development and Mr Chait gave further examples of researchers who were looking to undertake research using his data in diverse areas such as energy use.

147. However, it is clear that this research can be and is being undertaken without the data from Sheffield or Westminster. Although there is some evidence that researchers complain of a lack of data in this area, it is open to researchers to approach either council to enter into licensed research agreements to obtain the same data, and therefore there are other routes to satisfy this interest without releasing the data to the world at large with associated risk of misuse.

Use of information by businesses looking for opportunities

148. We accept that a list of vacant commercial properties could be used by businesses looking for development opportunities. However, there are already sources of information which can be used to identify these opportunities: in addition to those vacant properties which are being actively marketed, there is a list of vacant commercial properties on the BID list and information is available from the Council itself including, in Sheffield, from the town centre management scheme or planning officers.

Use of information by local authorities

149. Mr Chait referred us to a summary of responses to a Business Rates Avoidance consultation published by the Department for Communities and Local Government in July 2015. In response to question 8 ('Do you have any views on what steps could be taken to help authorities come together to tackle attempted business rates avoidance?') the DCLG records that:

> The majority of respondents suggested that a centralised information sharing portal where local authorities could share experiences and solutions would be helpful and provide more consistency to the way they tackle avoidance…Some identified the need for two-way data and information sharing between local

authorities, the VOA and other public bodies to help strengthen attempts to tackle avoidance.

150. Mr Chait put to Mr Hinkley that this document specifically stated that data sharing would be helpful, but as Mr Hinkley stated in evidence, it is referring to data sharing between authorities and not with the public.

151. The data requested could be used by other local authorities in their attempts to reduce avoidance schemes: Mr Harrow's witness statement sets out the use he makes of data released by other authorities and Mr Hinkley accepted that a national database would be of use in identifying potential business rates fraud. However, Mr Hinkley and Mr Harrow both gave evidence that steps were being taken to set up a shared data portal where this information could be shared between local authorities without release to the the public. Whilst this had not been set up at the time the request was made, we accept that the fact that the process is in motion reduces the public interest in the release of the information on this ground: a more appropriate channel is in the process of being created. This is in accordance with the views of local authorities expressed in the DCLG consultation set out above.

Conclusions on the public interest in disclosure

152. We accept that there is some public interest in disclosure, but we conclude that this interest is limited for the reasons detailed above, principally that these matters can and do take place without the data, and that where this data is helpful this public interest can be satisfied by obtaining it or equivalent information through other channels without the risks attendant on publication to the world. We conclude that this limited public interest in disclosure is outweighed by the very significant public interest in maintaining the exemption.

Section 41
Is any of the disputed information confidential within the meaning of s.41(1) FOIA?

153. We accept Mr Knight's submissions that there is a general common law principle of tax payer confidentiality: see R (Ingenious Media Holdings plc and another) v Revenue and Customs Commissioners [2016] UKSC 54 ('Ingenious Media') at para 17: 'where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from who it was received or to who it relates not to use it for other purposes.'

154. We do not think that the very short consideration of a similar issue by the first-tier tribunal in London Borough of Ealing v Information Commissioner EA/2016/0013 assists us in determining whether or not the disputed information in this appeal is confidential.

155. We accept that the statutory bar on disclosure that applies to the VOA assists us in determining whether or not the disputed information is of the type that is protected by the law of confidence. Sections 63A and 63B of the Local Government and Finance Act 1988 ('LGFA') allow disclosure of revenue and customs information in certain circumstances in the business rates arena. Any further disclosure is not allowed under s 63A. This reflects s 18 of the Commissioners for Revenue and Customs Act 2005, which was held by the Supreme Court in Ingenious Media to stem from the general common law principle referred to above. It does not apply directly to the Local Authority, but we accept Mr Knight's submission that it not only explains why the VOA publishes what it does, but also strongly suggests, by analogy, that the disputed information is covered by s 41.

156. We were provided in the hearing with a copy of Sheffield's small business rates relief application form. It transpired after the hearing that we had been provided with a different version to that in use at the relevant time, and we were provided with the 2017 version after the hearing. Both forms include statements under the relevant data protection legislation in force at the time about how personal data will be used and who it will be shared with. This is of limited assistance in determining whether or not the disputed data (which is not always personal data) has the necessary quality of confidence, however we find that there is nothing in these statements that is inconsistent with the information being confidential. We accept that information provided to a local authority for the purposes of calculating rates or reliefs is information that a reasonable person would regard as confidential.

157. We accept that it is relevant to consider whether the disputed information is already in the public domain, but given the difficulty of finding most of the disputed information we do not accept that it is generally accessible such that it cannot be regarded as confidential.

158. For these reasons we accept that the disputed information carries the necessary obligation of confidence.

For any information which is confidential, would disclosure be in the public interest such that it would not amount to an actionable breach of confidence?

159. Even if information is confidential, s 41 only applies where disclosure would be an actionable breach of confidence. We must therefore apply something akin to the public interest test and ask if there is some public interest in disclosure which outweighs the interest in the protection of confidence.

160. For the reasons set out in our consideration of the public interest balance in relation to s31(1)(a) above we have concluded that there is only a limited

public interest in disclosure of this information, and consequently we conclude that there is insufficient public interest in disclosure to outweigh the importance of the general common law principle of taxpayer confidentiality.

161. We find that s 41 applies to the whole request. We accept Mr Knight's submission that dataset 2 should not be looked at in isolation but in the context of the whole request: the tax payer's identity is used in conjunction with the rest of the information to calculate the level of taxation and therefore we accept that the whole of the disputed information is exempt under s 41.

S 40 – personal data

Is any of the disputed information personal data, insofar as it relates to Sole traders and/or partnerships?

162. Applying the usual tests, we conclude that any of the disputed information that relates to sole traders and/or partnerships is personal data. Mr Chait argues that trading names and addresses are not personal data. We disagree: the information relates to a living individual and the individual is identifiable from those data. The information links to an identifiable individual and reveals something meaningful about their life, even though it is their professional life. Taken together all the information has an individual as its focus where it concerns a sole trader or partnership.

163. Mr Chait argues that he has only asked for trading names, but we accept Mr Knight's submission that as the request asks for the property occupier, this would identify the individual ratepayer where this was a sole trader or partnership.

Should the requests be construed as excluding any personal data, or including personal data subject to the application of the exemption at s 40(2)?

164. Mr Chait did not express a clear view as to which of these meanings he intended: he knows that there is 'supposed to be a s 40 redaction' and he just cut and pasted a template for the wording.

165. Looked at objectively, we think that the request is unambiguous. The phrase 'subject to s 40(2) on excluding personal data' must mean that only data excluded in accordance with 40(2) should be excluded. It is difficult to see how it could be objectively construed as excluding all personal data, given the express reference to s 40(2). We construe the request as including personal data, subject to the application of the exemption at s 40(2).

To the extent that any of the information in the scope of the Requests amounts to personal data, would the release of that information breach the First Data Protection Principle, in that its release would be unfair to the data subject?

166. Mr Chait argues that trading names and addresses of sole traders and partnerships are already published in a number of places, including on the Companies House website, on the VOA, in the phone book, on SatNavs, on commercial drivers' licences and on the outside of company premises.

167. It is true that the information requested in these sections of the request, taken alone, is available in the public domain from a number of sources. However, in our view it is artificial to consider each element of the request separately. This is not a request for a list of the names and addresses of businesses within the local authority. The request is, in terms, for a 'list of all business (non-residential) property rates data'. The fields which follow are simply a list of fields that should be included. The specified rates data is only useful if it is provided with the name and address of the company and the names and addresses are only useful when provided with the specified rates data.

168. The rates data is only personal information because it is provided in conjunction with the identifying information of name and/or address. We must therefore look at whether or not release of the requested list as a whole, rather than of each individual item on the list, would be unfair.

169. We accept that Mr Chait is pursuing a legitimate interest, but we do not accept that disclosure is necessary to pursue that interest for the reasons set out in considering the public interest in disclosure under s 31(1)(a) above.

170. Unless the Councils expressly stated that they would publish personal data held for the purposes of the assessment and collection of business rates, we find that there would be a legitimate expectation that personal information held by the Council for these purposes would be used only for those purposes and not generally published. In reaching this conclusion we take account of the general principle of taxpayer confidentiality discussed above.

171. We find that release of this data would expose the individuals in question to the risks identified when considering s 31 above. It would increase the risk of crime in relation to that individual's property if it was empty, and would increase the risk of business rates fraud against that individual.

172. We infer that knowledge of this increased risk would lead to distress for the individuals. The fact that some individuals might choose to place details of their empty business properties on the BID list, or on a estate agents marketing website does not alter this conclusion. In those circumstances they took the decision to publish voluntarily with the knowledge of the risks and benefits to their business and could take appropriate precautions. The fact that they are not caused distress by publishing in these circumstances does not mean that they would not be distressed by the Local Authority, without their consent, releasing their personal data which includes details of their empty properties (where relevant) with attendant risks to security and rates data which would

assist a fraudster to bypass security checks, in circumstances where they were obliged to provide the data to the Local Authority for the express purposes of assessing business rates or reliefs.

173. Taking account all the above, we conclude that although Mr Chait is pursuing a legitimate interest, the release of the data is not necessary for the purposes of those interests and, in any event, the processing is unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Section 12/14 (Westminster only)

174. Having concluded that personal data falls within the scope of the request, the costs of disaggregating personal data from non-personal data do not fall within the costs that may be included within an estimate of the cost of responding to the request. We therefore consider whether or not the request is vexatious by reason of those costs. We were provided with a closed bundle and Westminster made a short closed submission in relation to this issue.

175. The gist of the closed session that was provided to Mr Chait and Sheffield is as follows: The Tribunal looked at the closed material, which is a sample of 50 rows from the NNDR database. Mr Lockley explained and the Tribunal satisfied itself that what was shown in the final column was the precise date that the property was occupied from/ vacant. Mr Lockley illustrated the estimate that 160 entries could be reviewed per hour at 2.25 seconds per entry by reference to particular examples, including some instances where he demonstrated by reference to the closed material that it would take a bit more thought to establish if the ratepayer was or was not a sole trader. This gives a total of 23 hours.

176. Mr Hinkley gave evidence to explain the time it would take to redact information which was exempt under s 40(2). There are 37,000 properties on the Council's NNDR database. Prior to 2013 the entries were not automatically divided into corporate ratepayers and sole traders/partnerships. In 2013 the system was changed, and in relation to any ratepayers registered since 2013 the user who entered the data indicates if the ratepayer was a separate legal entity such as a limited company. When the system was changed Westminster used a piece of software to identify whether pre-existing entries related to limited or non-limited companies.

177. The Council has manually reviewed a sample of 250 pre-2013 entries marked as being a limited company and 250 pre-2013 entries marked as containing personal information to determine the accuracy of the classification of the entries. The review showed that 2% of the 250 marked as limited companies were incorrect and 3% of those marked as containing personal data were incorrect.

178. The Council submits that it would need to carry out a manual check of all pre-2013 entries to avoid unlawfully disclosing any personal data. The Council further submits that it would have to manually check all post-2013 entries too, to identify any manual entry errors. The Council have not carried out a sample review to identify the error rate post-2013 but Mr Hinkley asserts that there will inevitably be some errors because the indication is done manually. Mr Lockley submits that this assertion is supported by the closed evidence which shows that it is not always immediately obvious from the name of the ratepayer whether or not they are a limited company or a sole trader. We note also Mr Hinkley's evidence that the indicator that was introduced was not one that they used, because it is not a distinction that they need for normal purposes.

179. We accept that it is reasonable for the Council to manually check all its records given its evidence as to the likelihood of errors in classification in both pre-2013 and post-2013 records because of the risks entailed in unlawfully releasing personal data. If the Council's position was based purely on the possibility of human error due to manual input, we would not have accepted that this justified a manual check of all records. However, the closed evidence showing the potential for confusion and Mr Hinkley's evidence of the lack of importance of this indicator to the Council both support a conclusion that there is an increased potential for error. This, combined with the presence of a significant number of pre-2013 entries (we do not have a precise number but the 'sample' was of 500 such entries), leads us to conclude that in these specific circumstances a full manual check is justified. We accept that the estimate of 2.25 seconds per record is a reasonable average, given that some entries will take significantly longer than this.

180. Although we are considering the matter under s 14, we accept by analogy that any flaws in the way the local authority holds the information are irrelevant (see Reuben Kirkham v Information Commissioner [2018] UKUT 126 (AAC). We do not accept the Commissioner's submission that the failure of Westminster to 'cleanse' its data or establish a better system amounts to 'deliberately distributing the information in a way which would always allow it to rely on s 12' (see para 19 of Reuben Kirkham v Information Commissioner [2018] UKUT 126 (AAC). There is no evidence, and it was not put to Mr Hinkley, that these decisions were deliberately taken with s 12 in mind.

181. This is a case where the burden cannot be addressed by s 12 and therefore it is appropriate for it to be considered under s 14 The fact that it would take in excess of 18 hours (the limit under s 12) to carry out the necessary work does not necessarily make a request vexatious under s 14. We need to consider, in context, whether the resources required to provide the information are such as to render the request vexatious.

182. We accept that the request is not likely to cause any harassment or distress to staff and that Mr Chait has no improper motive in pursuing the request. However, balancing the significant resource implications for the public authority against the limited public interest in the release of the information, we conclude that this is a vexatious request.

Conclusion

183. For the reasons set out above the appeal is allowed. Our decision is unanimous.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 2 December 2019

Promulgation: 4 December 2019