

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 February 2011

Public Authority: Land and Property Services (an executive agency of the Department of Finance and Personnel NI)
Address: Colby House
Stranmillis Court
Belfast
BT9 5BJ

Summary

The complainant requested a list of all vacant properties throughout Northern Ireland. The public authority initially stated that it did not hold the requested information, however subsequently it confirmed that a list could be compiled from the rating database. The public authority refused to provide such a list citing section 31(1)(a), section 40(2) of the Act. The Commissioner decided that the exemption under section 31(1)(a) was not engaged but that some of the requested information was correctly withheld under section 40(2) of the Act. Given the circumstances of the case the Commissioner used his discretion and has not ordered disclosure of the information not exempt under section 40(2). It would have been completely disproportionate for the public authority to identify the relevant information and therefore comply with a step to disclose. Therefore the Commissioner requires no further steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

Background

2. The complainant in this case had made a previous request for a list of all empty residential and commercial properties in the Down district from his local council but had been advised that this information was not held. Instead the complainant was directed to make his request to Land and Property Services NI (LPSNI) as the Council considered it would be more likely to hold this information.
3. The Commissioner notes that under the Act LPSNI is not a public authority itself, but is actually an executive agency of the Department of Finance and Personnel for Northern Ireland (DFPNI). Therefore, the public authority in this case is actually DFPNI, not the LPSNI. However, for the sake of clarity, this Decision Notice refers to the LPSNI as if it were the public authority. LPSNI was established on 1 April 2007, initially from the merger of the former Rate Collection Agency and the Valuation and Lands Agency. This was followed by the addition of Land Registers of Northern Ireland and Ordnance Survey of Northern Ireland on 1 April 2008.
4. Amongst its responsibilities LPSNI values all domestic and non-domestic properties in Northern Ireland, maintains valuation lists, inspects vacant properties and provides a general valuation, estate management and property information service to government departments and the public sector in Northern Ireland.

The Request

5. On 6 April 2009 the complainant requested the following information from LPSNI:

"A list of all vacant properties throughout Northern Ireland."
6. On 8 April 2009 LPSNI responded to the complainant, advising that whilst an exercise to determine all vacant property in conjunction with all borough councils in Northern Ireland was under way, this was not yet complete. In view of this LPSNI stated that it did not hold the requested information at that point in time and advised the complainant to re-apply for the information at a later date.
7. On 11 May 2009 the complainant again contacted LPSNI asking if the exercise to compile a list of vacant properties was complete and if not, when it was likely to be completed. On 21 May 2009 LPSNI responded to the complainant stating that as the property list was continuously

updated there was therefore no specific date on which it would be 'considered complete and suitable for disclosure to the public'.

8. On 4 June 2009 the complainant appealed this decision and requested an internal review.
9. On 19 June 2009 LPSNI provided its internal review response which upheld the original decision that a definitive list of vacant properties was not held due to the continuous updating of the list. However the reviewer also confirmed that it was reasonable to regard the information as held in so far as a report could be created from the rating database that represented a snapshot of vacant properties at a given point in time. In view of this the reviewer had gone on to consider disclosure and concluded that the information was exempt under sections 31(1)(a) and s40(2) in conjunction with s40(3)(a) of the Act.
10. LPSNI argued that disclosure of the information would not only prejudice crime prevention but also contravene the first principle of the Data Protection Act 1998 (the DPA).

The Investigation

Scope of the case

11. On 27 June 2009 the complainant contacted the Commissioner to complain about the way his request had been handled.
12. The complainant specifically asked the Commissioner to consider the refusal of his request on the grounds that the information would be of use to the criminal element in society. The complainant contended that this was at best a weak argument as those intent on criminal activity were 'already well aware of any empty properties in their own areas and need no further help from government bodies.'
13. In his complaint to the Commissioner the complainant did not dispute that any list created would change on a daily basis and never actually be complete. He accepted this and stated that he would have been content to have received the list current on the date of his request.
14. Therefore the Commissioner's investigation has focused on the property list as at the date of the request and the Commissioner's decision relates to the application of exemptions to that information.

The Commissioner has also considered the handling of the request by LPSNI.

Chronology

15. On 18 May 2010 the Commissioner wrote to LPSNI regarding the way in which it had handled the complainant's request. The Commissioner asked for a copy of the withheld information together with LPSNI's representations regarding the application of section 31 and section 40 of the Act.
16. On 21 May 2010 LPSNI contacted the Commissioner explaining that a copy of the information requested had already been forwarded to the Commissioner several months previously. Since there was no record of this information having been received by the Commissioner, LPSNI was asked to provide another copy of the information. However in subsequent discussions with LPSNI the Commissioner ascertained that whilst the report was voluminous it essentially comprised a list of properties replicated under several key headings.
17. In view of this the Commissioner felt it was appropriate to request an electronic sample of the vacant property list. This was provided by LPSNI on 25 May 2010.
18. On 25 May 2010 the Commissioner contacted LPSNI to confirm receipt of the information and queried why additional representations regarding the application of exemptions to the information had not also been provided as requested. The Commissioner clarified that in the absence of any further submissions from LPSNI that he would make a decision on the basis of the arguments provided in the internal review response.
19. As the Commissioner did not receive a response to this correspondence he again wrote to LPSNI on 5 July, 7 July and 26 July 2010, seeking additional clarification regarding the sample of the list that had been provided in order to ensure that it was truly representative of the withheld information.
20. LPSNI responded to the Commissioner on 2 August 2010 confirming that the sample of information provided to the Commissioner on 25 May 2010 was 'a snapshot' of the list that was available at the time of the request. However LPSNI did not provide any further representations in respect of the exemptions cited to withhold the requested information.

21. Following further discussions with the Commissioner, LPSNI provided a final submission on 25 October 2010. LPSNI provided clarification of the database which held the requested information. LPSNI confirmed that, with regard to non-domestic properties the database did not distinguish between properties owned by individuals and properties owned by companies. Therefore LPSNI advised that, if it were to comply with the request, it would need to check each database entry against other information held in order to determine whether or not the property was owned by an individual. As there were 62,000 records, LPSNI considered that this task would be difficult if not impossible.

Analysis

Exemptions claimed

Section 31 – law enforcement

22. Section 31(1)(a) of the Act applies to information if its disclosure would, or would be likely to prejudice the prevention or detection of crime. Likely to prejudice means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. Would prejudice places a much stronger evidential burden on the public authority and must be at least more probable than not.
23. LPSNI argued the requested information was exempt as its disclosure:

"could prejudice the prevention of crime in that such a list would be of use to various criminal elements in identifying empty properties which could be used by them for a variety of illegal purposes".
24. The complainant argued that the criminal element in society is already aware of any empty properties in their own areas and therefore the LPSNI argument was weak at best.
25. The Commissioner notes that in this instance LPSNI has not specified the level of prejudice but rather has stated that prejudice could occur. In view of this the Commissioner has drawn upon the principle established by the Information Tribunal in *McIntyre v The Information Commissioner and the Ministry of Defence EA/2007/0068*. In this case the Tribunal was of the view that in the absence of a designation as to the level of prejudice, the lower threshold of prejudice test should be used. The Commissioner has therefore gone on to consider if this lower threshold has been met.

26. The Commissioner accepts that empty properties may be the target of crime. It is also plausible that information about empty properties could lead to further crime in or around empty properties. But he cannot just accept a basic assertion that disclosure of a list of empty properties would be likely lead to more crime being committed or to more of it going undetected. The causal link between disclosure and the likely prejudice must be properly established by the public authority. Unsupported speculation or opinion will not be taken as evidence of the nature or likelihood of prejudice, neither can it be expected that public authorities must prove that something definitely will happen if the information in question is disclosed. Whilst there will always be some extrapolation from the evidence available, the public authority must be able to provide some evidence (not just unsupported opinion) to extrapolate from.
27. There are also relevant counter arguments. It is also possible to conclude that the availability of a list of empty properties could be used for the purposes of local regeneration and to facilitate the reoccupation of empty properties could, in fact, help to reduce local crime levels. The Commissioner is also aware that this list of empty properties reflects a snap shot in time, and as such the list is likely to change over time. This would reduce any value it may have had to those wishing to commit crime.
28. Furthermore, it is accepted practice that letting agencies and estate agents make public the addresses of vacant properties on their books. The Commissioner is unaware of any evidence to suggest that this practice has facilitated crime or prejudiced its prevention.
29. In the Commissioner's opinion the evidence provided by LPSNI is not sufficiently compelling to support its view that disclosure of a list of empty properties would be likely to prejudice the prevention of crime. Although the public authority made reference to issues such as the possibility of damage to properties, efficient use of police resources and the avoidance of distress to those who might be victims of crime, it has not shown how, in practice, the availability of the list would influence these factors. In particular, LPSNI has not established that there is a causal link between the release of information identifying empty properties and prejudice to the purposes of law enforcement, in particular the prevention of crime.
30. In view of the poor quality of arguments put forward by the LPSNI the Commissioner cannot come to the conclusion in this instance that disclosure of the list of the addresses of empty properties would be likely to prejudice the prevention or detection of crime. This is in contrast to the convincing arguments put forward by public authorities

in relation to similar requests such as London Borough of Tower Hamlets (FS50259951). He cannot therefore determine that section 31(1)(a) is engaged in respect of disclosure of the requested information. As geographical circumstances can differ, it is important that each case is considered in the particular circumstances and the evidence from other Decision Notices cannot simply be read into this case.

31. The Commissioner has also distinguished this case from the case of *England v London Borough of Bexley EA/2006/060 & 0066*, where the Tribunal ruled that, in light of the convincing arguments provided, section 31(1)(a) was engaged.
32. As the Commissioner has concluded that the exemption at section 31(1)(a) of the Act is not engaged, he has not undertaken a consideration of the public interest test.

Section 40(2) – personal data

33. Section 40(2) of the Act provides an exemption from disclosure where the information in question is the personal data of any third party (the full wording of which is included in the legal annex). In order for a public authority to rely on section 40(2) it would have to be satisfied that:
 - the requested information was the personal data of a data subject; and
 - disclosure of that information would contravene a data protection principle as set out in Schedule 1 to the DPA.
34. LPSNI contended that the list contained addresses of both domestic and non-domestic properties and some of the properties on the list were owned by individuals, as distinct from corporate bodies, and were personal data of the owners that was provided for a specific purpose, namely the payment of rates. LPSNI therefore contended that the list of properties contained personal data.
35. Accordingly LPSNI argued that the information was exempt under section 40(2) in conjunction with section 40(3)(a)(i) of the Act as disclosure would breach the first data protection principle under the DPA.
36. LPSNI also argued that disclosure of the information would not constitute fair processing unless each individual owner was informed that their personal information would be disclosed.

Is the requested information personal data?

37. Personal data is defined in section 1 of DPA 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, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"

38. When considering whether the information in the vacant property list is personal data, the Commissioner has referred to his own published guidance entitled "Determining what is personal data"¹. This sets out two questions which, if answered in the affirmative, will decide whether information constitutes personal data:

- (i) Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?
- (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?

39. The Commissioner has reviewed the sample taken from the list of vacant properties created from the rating database and notes that the list contains the addresses of both domestic and non-domestic properties but not the names of the owners. The names of the owners are contained in the main database.

40. The Commissioner considers that the address information listed as empty properties, either by itself or in conjunction with other publicly available information, would identify a living individual. In addition, this data would relate to the individuals in a significant sense insofar as it says something about the owners of the properties both in terms of their financial assets and possibly even raises issues as to why they have left their properties vacant. As both questions can therefore be satisfied, the Commissioner considers the information to constitute personal data.

41. In coming to his decision the Commissioner is assisted by the line established by the Tribunal decision in the case of *England v London Borough of Bexley EA/2006/060 & 0066*, where the Tribunal ruled that

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

the addresses of long term empty and uninhabitable empty properties owned by individuals constituted personal data.

Would disclosure contravene a data protection principle?

42. LPSNI has argued that the release of the requested information would breach the first data protection principle. This principle states:

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

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

43. All the relevant requirements of the first data protection principle must be satisfied to ensure compliance with the DPA. If even one requirement cannot be met, disclosure will not be in accordance with the first data protection principle and therefore the DPA.

44. The Commissioner’s considerations here focus on the general issue of whether disclosure of the requested information would be fair.

Fairness

45. In establishing whether disclosure would be fair, the Commissioner has looked to balance the consequences of any release of personal data and the reasonable expectations of the data subjects with general principles of accountability and transparency.

46. The Commissioner has considered the competing interests of transparency and privacy by bearing in mind the following factors:

- the consequences of disclosure
- the data subjects’ reasonable expectations of what would happen to their personal data
- the balance between the rights and freedoms of the data subjects and the legitimate interests of the public.

47. In this instance the list of vacant properties has been created by LPSNI running a report from the rating database. Details of the addresses of the properties and the fact that the properties are empty are provided by the owners for the specific purpose of rates payments.

48. LPSNI argued that as the property owners are not informed that this information will be used for any other purpose that disclosure would constitute unfair processing.

49. The Commissioner accepts that disclosure of the information would be an intrusion into the lives of the data subjects, potentially revealing information related to their financial interests and could also lead to unwanted contact from third parties. Disclosure could therefore cause distress.
50. Furthermore there is no indication that the property owners had a reasonable expectation that this information would be disclosed.
51. The Commissioner has again looked to the *England* case referred to earlier, and notes that the Tribunal considered it unfair to disclose information concerning the addresses of vacant properties without the owners having been informed that such a disclosure might take place.
52. In addition the Commissioner has considered the legitimate interest of the public in reducing the number of vacant properties that exist and how disclosure of the list might be useful in this regard. The Commissioner acknowledges that there is a significant public interest in the information being disclosed and the disclosure could stimulate local debate about bringing empty properties back into use, and in some cases lead to significant initiatives. But considering the significant intrusion the Commissioner does not agree that this legitimate interest can justify disclosure. Disclosure would be unfair and would breach the first data protection principle.
53. In view of the above the Commissioner finds that the exemption at section 40(2) is engaged in relation to information in the database that related to properties owned by individuals.

The Decision

54. The public authority incorrectly applied section 31(1)(a) to the requested information and incorrectly applied section 40(2) to the non individually owned properties.
55. In failing to disclose the non personal information the public authority breached section 1(1)(b) and section 10 of the Act.

Steps Required

56. Although LPSNI incorrectly applied both exemptions to some of the information the Commissioner has not ordered it to disclose the non individually owned properties, in compliance with section 1 of the Act.
57. LPSNI has supplied the Commissioner with convincing evidence about the volume of records and the difficulty of verifying whether the non domestic properties were owned by individuals. If the Commissioner ordered disclosure of the non-individually owned properties, LPSNI would be obliged to assess 62,000 records and make a judgement as to whether they were owned by an individual or a company, by looking at the name of the owner. This process would also contain a risk that personally owned non domestic properties would be disclosed.
58. The Commissioner considers that he has discretion not to order a step to remedy non compliance with section 1. The Commissioner considers that he should not order a step that is manifestly unreasonable in terms of the administrative burden compliance would create. He also draws upon the fact the Tribunal can consider how the Commissioner has exercised his discretion. The relevant provision in the Act on discretion is listed in section 58, related to appeals of the Commissioner's decisions to the Information Tribunal. This is something the Commissioner will only do in exceptional circumstances. In this case he notes the high number of records and that the issue is related to the personal data exemption, an exemption that the public authority is, in effect, bound to consider by the DPA.
59. He has made some non binding observations below in the 'other matters' section about how the complainant could be assisted by LPSNI.
60. The Commissioner requires no steps to be taken.

Other matters

61. The Commissioner recommends that dialogue continue between the requester and LPSNI to investigate whether the requester could make a new request which is narrower or more focused, that would enable address information about empty properties to be disclosed.

Right of Appeal

62. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk
Website: www.informationtribunal.gov.uk

If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 7th day of February 2011

Signed

Steve Wood
Head of Policy Delivery

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Section 31 (law enforcement)

Section 31 provides that information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (1) (a) the prevention or detection of crime

Section 40(2) (personal information)

Section 40(2) provides that –

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.

Section 40(3) provides that –

The first condition is –

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

The Data Protection Act 1998

Interpretative provisions

Section 1(1) provides –

In this Act, unless the context otherwise requires...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Schedule 1

The data protection principles

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

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.