

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 October 2019

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant has requested from Sheffield City Council, information relating to a limited company's rateable occupation of a particular property. Sheffield City Council refused the request, citing the exemption at section 31 (law enforcement) of the FOIA.
2. The Commissioner's decision is that Sheffield City Council was entitled to rely on section 31(1)(c) of the FOIA to refuse to disclose the requested information. No steps are required.

Background

3. The request relates to the calculation of business rates. Sheffield City Council ("the Council") has explained to the Commissioner that business rates are a tax on businesses which helps fund local government expenditure. Business rates are set by central government, which sets the multiplier (a pence in the pound value) which is then applied to a property's rateable value (an estimate of the open market rental value a property could achieve on a specified date). Business rates are, after rent, the second largest outgoing for commercial tenants. However, there are reliefs and exemptions that may sometimes be claimed, pertaining to rateable value, charitable use and empty properties.
4. Business rates are normally chargeable on the person entitled to possession of commercial premises. If the premises are let, the tenant is

entitled to possession and is therefore rateable as occupier. Once the lease ends, the landlord becomes responsible for paying business rates, until it finds a new tenant.

5. Any industrial property that has been continuously occupied for a period of at least six weeks is eligible to receive "empty rates relief" for six months when it next becomes unoccupied. This relief is awarded to the property rather than to the ratepayer, and will only be awarded once, regardless of whether there is a subsequent change in ratepayer.
6. The complainant represents the landlord of the property to which the request relates. The property was let to a tenant, but the lease was forfeited due to non-payment of rent, and the landlord took the property back from the tenant.
7. The landlord is in dispute with the Council about the landlord's business rate liability in relation to the property. The landlord believes that, on taking the property back, it was due empty rates relief in respect of it. The Council claims that the relief is not due to the landlord because the property was unoccupied in the period immediately prior to it being taken back from the tenant, and it therefore does not meet the criteria for empty rates relief set out in paragraph 5, above.
8. The Council has calculated the landlord's business rate liability on the basis that the relief is not due and legal proceedings are currently underway to recover monies owed.

Request and response

9. On 18 February 2019, in the course of an exchange of correspondence with the Council regarding his client's business rate liability for the property in question, the complainant requested information in the following terms:

"I note your comments regarding Sheffield Council's requirements to satisfy themselves that rateable occupation occurred prior to empty relief being awarded and that this assessment has been 'regularly inspected'.

To allow me to understand how this decision has been arrived at I would be grateful if you could confirm the following:

1. Do Sheffield Council's records currently show [previous tenant's name] to be in Rateable Occupation of the above premises at any point from 23rd February 2017 to 08th August 2018? If so, for what period(s)?

2. *If not, have Sheffield Council's records ever shown [previous tenant's name] as having been in Rateable Occupation of the above premises at any point from 23rd February 2017 to 08th August 2018? If so, what precipitated Sheffield Council's decision to amend their records?*
3. *For what period was the last "empty property exemption" awarded?*
4. *Please can you provide details of these inspections? Please could this include, times and dates of the inspections along with copies of the inspection reports/notes/photos and the subsequent dialog on whether [previous tenant's name] were in Rateable Occupation."*
10. The Council responded on 18 March 2019. It confirmed that it held information falling within the scope of the request, but said that the information was exempt from disclosure under section 31 (law enforcement) of the FOIA. It said:
- "To help explain, we have general concerns about the release of certain business rates information in that it may give rise to opportunities for criminal and fraudulent activity; this decision has been challenged and we are to go to the First Tier Tribunal later this year. Unfortunately, the information you requested falls in the scope of this refusal. We are not suggesting your intention is untoward, but in your case it is likely the information will be disclosed in the event there is a dispute around the payment of business rates and [sic] case goes to legal proceedings, whereby the legal proceedings will result in the mutual exchange of information."*
11. The complainant expressed dissatisfaction with the outcome on 21 March 2019, saying that he could not see a link between his request and the case that was being considered by the Tribunal, and that refusing to disclose the information went against the public interest. The Council treated this as a request for an internal review and it responded on 29 March 2019, upholding its application of section 31 on the grounds that the matter was the subject of legal proceedings. It reiterated that, for the purposes of those proceedings, the information would be shared with the landlord at a later date, via the rules governing judicial disclosure.

Scope of the case

12. The complainant contacted the Commissioner on 9 April 2019 to complain about the way his request for information had been handled. He disagreed with the Council's decision to apply section 31 of the FOIA to refuse the request. He explained that he required the information

now, in order to determine whether a costly court case could be avoided, rather than waiting for disclosure via the judicial process.

13. During the course of the Commissioner's investigation, the Council notified her that it was relying on section 31(1)(d) of the FOIA to withhold the requested information. This section applies where disclosure would, or would be likely to, prejudice the assessment or collection of any tax or duty or of any imposition of a similar nature. As the request relates to the collection of business rates by the Council, the Commissioner can understand why the Council might consider this section pertinent.
14. However, it was clear from the arguments that the Council supplied to the Commissioner that its main concern is that disclosure would undermine litigation which the Council is bringing against the landlord, to recover unpaid business rates. As such, the Council's arguments lend themselves more directly to the application of section 31(1)(c) (the administration of justice) of the FOIA.
15. It is not for the Commissioner to provide a public authority with arguments in support of withholding information. However, where her experience suggests that the arguments that have been provided to her are more appropriate to an exemption other than the one that has been cited, she is entitled to intervene (and she considers it in the public interest to do so) to apply the correct exemption herself, to prevent the disclosure of information which she considers would otherwise be exempt.
16. The analysis below therefore considers whether the Council was entitled by section 31(1)(c) of the FOIA to refuse to disclose the requested information.

Relevance of the Tribunal hearing

17. In its refusal notice, the Council said its decision to apply section 31 of the FOIA was influenced by a forthcoming appeal to the First-tier Tribunal in respect of a similar case¹. In the decision notice in that case², the Commissioner determined that section 31(1)(d) of the FOIA was engaged, but that the public interest in disclosing the information was stronger than the public interest in maintaining the exemption.

¹ EA/2018/0055

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258231/fs50681336.pdf>

18. In that case, the request asked for all business (non-residential) property rates data held by the Council. The prejudice envisaged was that business rate payers might use the data to minimise their business rate liability, resulting in an overall reduction in the business rates payable to the Council.
19. The request under consideration in this decision notice differs because it concerns information about a single property, during a particular time frame, made by an agent known to be acting for the landlord of the property and with that landlord currently the subject of court action by the Council, regarding the rateable liability to which the request relates. The Council argued in the other decision notice that the prejudice related to the likely general increase in rate payers manipulating the system to reduce their rateable liability, whereas in this case, the Council argues that the information could be used to undermine specific litigation that it is involved in.
20. The Commissioner does not consider the two requests, or the arguments relied on by the Council, to be directly comparable and, consequently, she does not consider it necessary to refrain from making a decision in this case, pending the Tribunal's decision in the case referred to by the Council.

Reasons for decision

Section 31 – law enforcement

21. Section 31(1)(c) of the FOIA states:

"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-

...

(c) the administration of justice".

22. The Commissioner's guidance on section 31³ notes that "*the administration of justice*" is a broad term. Amongst other interests, the

³ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

exemption will protect information if its disclosure would undermine particular legal proceedings.

23. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does disclosure of the information have to prejudice the administration of justice, but also that the information may only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
24. In order to be engaged, the following criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, the administration of justice);
 - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie that disclosure either '*would be likely*' to result in prejudice or that disclosure '*would*' result in prejudice.
25. The Council explained to the Commissioner that it is pursuing the landlord for unpaid business rates, and that the matter is the subject of court action, with the Council seeking full payment of the amount it has calculated as being owed by the landlord. It says that the requested information is information that the Council has used in the course of determining whether or not empty rates relief was due, and that its disclosure would be likely to undermine the court proceedings.
26. It said that the complainant's request effectively sought some limited form of pre-action disclosure from the Council, in relation to the forthcoming proceedings. It said that the burden of proof in these proceedings is upon the landlord to prove that the tenant was in occupation continuously for the required period prior to the claimed period of empty property relief. As such, the Council believed its position would be prejudiced if it was required to "reveal its hand" first, by responding to the request under the FOIA. It observed that once a party has stated their position in pleadings it is very difficult for them to resile from that position.
27. While the Council has told the complainant that it does not suggest that the intention behind the request is untoward, it nevertheless argued that

knowing key information, such as the dates of occupation recorded by the Council, would, *hypothetically*, enable the landlord to draw up documentation retrospectively, to rebut the Council's position.

28. The Council referred the Commissioner to the government's published concerns that business rates avoidance imposes an unfair burden on the wider public and prevents money from reaching the crucial public services that need it⁴. It said that the Local Government Association estimated in 2015 that £230m per annum is lost to business rates avoidance nationally⁵. It said that avoidance schemes incentivise legal action because the gains to be made from successfully avoiding business rates are sufficiently high.
29. The Commissioner has considered the applicability of the exemption at section 31(1)(c) of the FOIA in this case. While she is aware that litigation between the Council and the landlord is currently underway, she is required to consider the situation as it was at the time the request was received.
30. The Council has acknowledged that court action was not underway at the time the request was received, but said that it was anticipated at that point, and that it was fundamental to its decision to refuse the request under section 31 of the FOIA. The Commissioner has seen correspondence from the complainant to the Council, dated 6 March 2019, referring to a prior conversation and asking to know the possible date of a summons. She is satisfied that this supports the Council's claim that litigation was being anticipated by the Council, at the time the request was received.
31. With regard to the first criterion of the three limb prejudice test described above, the Council has explained that its ability to conduct its case in court may be harmed if it is required to disclose the withheld information under the FOIA. The Commissioner accepts that the potential prejudice outlined relates to the applicable interests within the exemption (ie the administration of justice).
32. With regard to harm being caused by disclosure, having reviewed the withheld information, the Commissioner is satisfied that its disclosure could have a detrimental effect on the administration of justice, and specifically the proceedings that are underway between the Council and

⁴ Business Rates Avoidance Discussion Paper, December 2014, Department for Communities and Local Government

⁵ Business Rates Avoidance: Summary of responses, July 2015, Department for Communities and Local Government

the landlord with regard to the landlord's business rate liability. The request concerns information which the Council has used to determine that the landlord is not entitled to business rate relief and, if disclosed prematurely, it could be used to undermine the Council's ability to conduct its case. The Commissioner is satisfied that the prejudice envisaged is "*real, actual or of substance*".

33. As regards the third criterion, the likelihood of prejudice arising, the Council was concerned about the likely impact of disclosure on its ability to conduct its case in court, efficiently and fairly. Having considered the evidence it supplied, and in light of the fact that the withheld information pertained directly to evidence that would be presented in court, the Commissioner is satisfied that the Council has demonstrated that prejudice to its case "*would be likely*" to occur.
34. The Commissioner is therefore satisfied that the exemption at section 31(1)(c) of the FOIA is engaged.

Public interest test

35. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 31(1)(c) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

36. The complainant has argued that disclosing the information to him at this stage would enable him to ascertain for himself whether his client's business rate liability had been calculated correctly by the Council. He says that if he could be satisfied that the Council had assessed his client's liability correctly, he would advise his client to pay the charge, and a costly and time consuming court case would be avoided.
37. The complainant also argued that there was a public interest in someone facing legal action knowing the precise details of the case against them, in order that they may defend their position effectively and robustly. He argues that if the Council is satisfied that the charge has been correctly calculated it should disclose its evidence, to avoid escalating the matter to court.
38. The Council commented only that, "... *the "default setting" in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act provides a relevant exemption*".

Public interest arguments in favour of maintaining the exemption

39. The Council argued that its policy of non-disclosure is an effective means of corroborating the claims it is asked to consider when

determining business rate liability. It argued that the current legal process is the proper mechanism for the Council's claim and the landlord's defence, in which it makes its case for empty rates relief. The Council will put its records before the Court, which will decide on the veracity of the two parties' arguments. The Council said that a fair legal hearing in which both parties can cross-examine each other and satisfy the Court accordingly, places the public interest in favour of maintaining the exemption.

Balance of the public interest

40. The complainant has argued that if the Council's calculation is correct, it has nothing to worry about by disclosing the information. The Council's position is that disclosure of the information would be likely to interfere with its ability to successfully conduct its case in court.
41. The Commissioner has no reason to believe that the landlord is not acting in good faith in contesting its business rate liability. However, she recognises that there appears to be the opportunity for someone who is *not* acting in good faith, to manipulate the information they present to the Court, if they know, in advance, detailed information about the Council's case.
42. The Commissioner acknowledges the complainant's point about the importance of knowing the details of the proceedings one faces. However, the Commissioner understands that the withheld information will be disclosed to the landlord prior to the court hearing, under judicial disclosure rules. This will mean that the landlord will, at that time, have access to the Council's case, and the arguments against it. At the same time, the landlord will have submitted details of its own case to the Court, to be shared with the Council. This formal and regulated process of disclosure helps ensure the integrity of the evidence presented to the Court by both sides, and it is key to avoiding the situations described in paragraph 41.
43. Where the withheld information is relevant to ongoing legal proceedings, there is a clear public interest in ensuring that the administration of justice is dealt with according to the judicial process. The Commissioner considers that no party should be placed at an advantage over the other by virtue of the provisions of the FOIA, particularly where the judicial process makes specific provision for the disclosure of documentation to the relevant parties in a legal dispute.
44. In the circumstances of this case there is a real possibility that the jurisdiction of the Court would be undermined should disclosure of the requested information be made under the provisions of the FOIA.

45. In reaching a view on where the public interest lies in this case, the Commissioner accepts there is a legitimate public interest in informing the public about the way in which the Council has calculated a particular ratepayer's business rates liability. Balanced against this is the need to allow the Council (and the landlord) to prepare its legal case, without premature disclosure of that information through the FOIA, to the world at large. The Commissioner also recognises that there is a very strong public interest in ensuring that the Court is able to administer justice without this being undermined by the premature publication of the evidence to be considered.

46. This has led the Commissioner to decide that whilst weight must be given to the general principles of accountability and transparency, greater weight must be afforded to the potential negative impact on the jurisdiction of the Court which disclosure is likely to bring about. Therefore, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that the Council was entitled to rely on section 31(1)(c) of the FOIA to refuse to disclose the requested information.

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Samantha Bracegirdle
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