

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2024

Public Authority: Erewash Borough Council
Address: Ilkeston Town Hall
Wharncliffe Road
Ilkeston DE7 5RP

Decision (including any steps ordered)

1. The complainant requested information about non-domestic business rates. Erewash Borough Council (the "council") refused the request, citing the exemption for information provided in confidence (section 41).
2. The Commissioner's decision is that is that the council was correct to apply section 41(1) to withhold the information from disclosure.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 25 August 2023, the complainant wrote to Erewash Borough Council (the "council") and requested the following information:

"Please can i have a copy of the latest CSV file containing companies that are liable for non-domestic business rates in your borough along with their corresponding unique reference numbers/property addresses."
5. The council responded on 31 August 2023. It confirmed it was refusing the request, citing the exemption for information provided in confidence (section 41).
6. Following an internal review the council wrote to the complainant on 9 October 2023. It confirmed that it was maintaining its position in relation to section 41.

Scope of the case

7. On 14 November 2023 the Commissioner confirmed receipt of the complainant's complaint about the way their request for information had been handled.
8. The Commissioner considers that the scope of this decision notice is to determine whether the council correctly withheld the requested information.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41(1) of the FOIA states:

"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."
10. In considering the application of section 41 in this case, the Commissioner has also referred to his conclusions in another decision notice (ICO reference: IC-264793-Q3L7) which relates to an identical request. The Commissioner considers that the circumstances in this case

are the same and that, therefore, the analysis and conclusions reached in this previous notice are transposable here. The reasoning below reflects this.

Was the information obtained from another person?

11. The Commissioner understands that the council receives all its business rates information from two sources: the Valuation Office Agency ("VOA", an executive agency sponsored by His Majesty's Revenue and Customs) for information relating to the property and its value, and the ratepayer themselves for anything else. He understands that in some instances the ratepayer may appoint an agent to provide information on the ratepayer's behalf or the property landlord may provide some limited information, e.g. to confirm tenant names or lease dates. These are also third parties.
12. The Commissioner accepts that, in order to identify a business's tax liability and bill them accordingly, the council relies on the ratepayer to advise on the name of the business, the dates it took occupation of the premises, any circumstances that might entitle the business to financial reliefs, and anything else that contributes to the effective creation and management of bills. The VOA is responsible for providing specific property information necessary for billing as set out in the Local Government Finance Act 1988 and provides ongoing weekly updates of any amendments to the property rating list.
13. In view of the above, the Commissioner is, therefore, satisfied that the information was provided to the council by another person.

Would disclosure constitute an actionable breach of confidence?

14. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider

Does the information have the necessary obligation, and the necessary quality of confidence?

15. Under the common law there are specific relationships where information confided by one party to another is considered to be confidential. For instance, it is generally considered that employers owe a duty of confidentiality to their employees as regards some information which they obtain, doctors are considered to owe a duty of confidence to information provided by their patients regarding their health issues, and lawyers are considered to hold their clients information under a duty of confidence.
16. In the tribunal decision on appeal EA/2018/00551 the First-tier (Information Rights) Tribunal considered whether information provided to authorities in respect of business rates could be confidential for the purposes of section 41. At paragraph 128 the Tribunal found that:

“128. 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.’”¹
17. The case in question before the Tribunal was a request for information relating to business rates for businesses. The Tribunal therefore specifically raised the principle of taxpayer confidentiality as regards business rates.
18. The Tribunal therefore considered that the general public would expect information which it has to provide to an authority in the furtherance of a public duty is information which is provided in confidence.
19. Extrapolating this to the current case, information on the payment of rates, and how much an organisation has paid to the council in rates, is therefore considered to be information with the necessary obligation of confidence. The parties concerned would consider that the information is

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2566/Sheffield%20Council%20EA.2018.0055%20\(03.12.19\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2566/Sheffield%20Council%20EA.2018.0055%20(03.12.19).pdf)

being passed to them in a situation which gives rise to the common law principle of taxpayer confidentiality.

20. At paragraph 131 the tribunal went on to say:

"131. 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.

132. 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.

133. For these reasons we accept that the disputed information carries the necessary obligation of confidence."²

21. The Commissioner therefore notes that the Tribunal considers that information provided to public authorities for the purposes of calculating rates or reliefs is information which the general public would expect to be information provided in confidence. He also notes that the Tribunal also considered that the information has the necessary quality of confidence. The information is not trivial and is not otherwise in the public domain.

22. Having applied the same reasoning to the current case, the Commissioner is satisfied that information on the rates paid by an individual has both the necessary obligation, and the necessary quality of confidence. The Commissioner considers that the case for this is particularly strong as regards details of payments made by an organisation to cover their tax liabilities.

23. In relation to the general public availability of the information, the Commissioner notes that the request seeks the legal name of the business in association with a property it occupies (within the council district). The requested information relating to properties is publicly available from the VOA but the requestor is seeking this to be combined with the ratepayer name for each property.

² Ibid.

24. The Commissioner notes that the Tribunal considered the question of accessibility and reached the following conclusions:

"132. 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."³

25. The Commissioner accepts that some of the requested information for some of the businesses may be in the public domain, but not all of the information for all of the businesses. Further, what is available is sufficiently difficult to locate and use as a single, reliable, electronic dataset that it cannot be considered generally accessible in terms of this legal test. The Commissioner considers that the council is the only holder of both the ratepayer name linked to the property they occupy, and this information is not and should not be generally accessible within the public domain.

Would disclosure be an unauthorised use of the information to the detriment of the confider?

26. The Commissioner recognises that if an undisclosed release of the requested information occurred, the information that becomes publicly available could be utilised by third parties for those third parties' purposes. A primary concern for the council is that this information could increase the risk of harm from fraud by third party fraudsters, both directly to the business and also in the business's dealings with the council. It is the case that fraud causes financial loss, reduction of competitive advantage psychological harm to those who have been its victims, reputational harm and erosion of trust in the business. The impact of fraud to a small business can result in long term harm and even insolvency.
27. Having considered the council's arguments, the Commissioner also considers that information released via unauthorised disclosure may also be used for legal but unsolicited purposes. Businesses who seek to keep their name in connection with a property confidential but lose control due to unauthorised disclosure would be able to bring a claim for their costs in spending any additional time by employees in responding to the loss of control.

³ Ibid.

28. For example, if additional contact from marketeers or attempts for "passing off" the company name are made. The Commissioner appreciates why the council may anticipate that the information, if released, would be detrimental to the businesses concerned since it would identify information that is specific to the commercial interests of the business, namely their property liabilities and associated costs.
29. Since businesses whose information is released would be able to demonstrate that there is a risk of damage, the Commissioner has concluded that releasing the information requested would be an actionable breach of confidence.
30. In addition to the specific risk of damage, the Commissioner considers that disclosure of the information would undermine the general expectation of confidence which the companies might otherwise expect to be in place. This would not only affect the companies in question; it would affect the degree of confidence and trust of all companies who pay business rate that their information will be retained in confidence.
31. The Commissioner is therefore satisfied that if the information were to be disclosed it would be in breach of a duty of confidentiality which the council owes to companies liable to pay business rates to it.
32. Although section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test under section 2 of the Act, a disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality.
33. The test is whether the public interest in the disclosure of the information outweighs that in the protection of the duty of confidence in this instance. In considering this, the Commissioner has referred to arguments put forward by the council and the complainant and has summarised these below.

Is there a public interest defence for disclosure?

34. Releasing information would demonstrate to the public at large that the council has identified appropriate ratepayers for each property, has charged each ratepayer correctly, and has taken action to collect unpaid liabilities and administer the business rates account properly.
35. Releasing information may benefit some individuals, groups or organisations who have a personal or commercial interest as it may enable them to focus marketing or commercial products to businesses.

36. Some information may already be in the public domain if released by the businesses themselves, e.g. via websites or other promotional tools. However, businesses can retain control their own information and its dissemination if promoting themselves: disclosure would remove this control from the hands of the business itself.
37. The Commissioner has considered whether disclosure would serve the public interest in transparency around business rate reliefs and appeals. The Commissioner recognises that the public interest linked to this area is in demonstrating that the council has acted correctly in its statutory functions. These are important to the businesses that they relate to since they ensure the charge billed to the business is correct. However, the Commissioner understands that an annual bill is sent to the business occupying each property so the information does not need to be in the public domain to achieve this aim.
38. The Tribunal in EA/2018/0055 considered the public interest in the disclosure of information relating to business rates information. In paragraph 135 it concluded:

“...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.”⁴
39. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the common law principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly.
40. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against the wider public interest in preserving the principle of confidentiality, and the impact that a disclosure of the information would have on the interests of the confider. It needs to take into consideration the wider public confidence that information relating to tax payments can be confided in local authorities without it being subsequently disclosed without good cause.

⁴ Ibid.

41. As the decisions taken by courts have shown, significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
42. The Commissioner is therefore satisfied that the public interest in the disclosure of the information is weak as compared to the public interest in protecting the principle of tax-payer confidentiality in this case.
43. The Commissioner has, therefore, decided that the council was correct to apply section 41 to withhold the information.

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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

Christopher Williams
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