

FOIA and EIR Foundation Training Module 6: Applying the public interest test



The public interest test

FOIA section 2(2)(b):

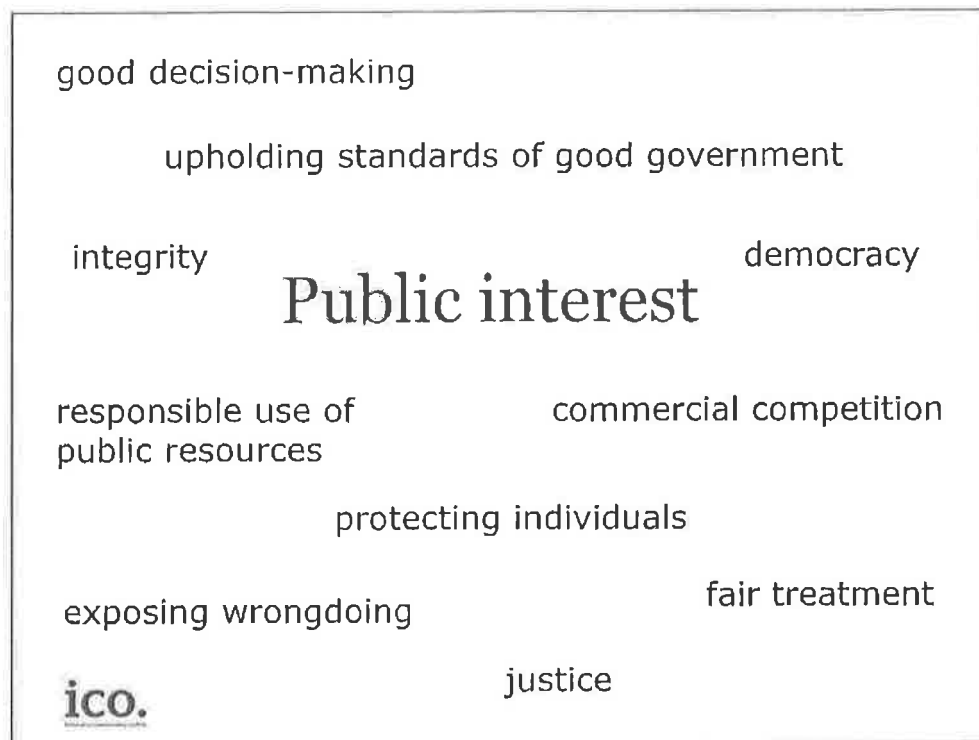
"...in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Assumption in favour of disclosure:

- disclosure is "default" if factors equal
- inherent value in transparency



We will look at the PIT under the EIR at the end of this session.



No official definition of public interest.

On the whiteboard: get them to contribute / discuss what is and is not “public interest” – not just in relation to disclosures but generally

Then [click] to show these examples [if printing handouts don't print this with everything showing]

Public interest

Is NOT:

- what the media happens to be interested in this week
- public curiosity or gossip
- individual / private interests

although these may be relevant to identifying the public interest

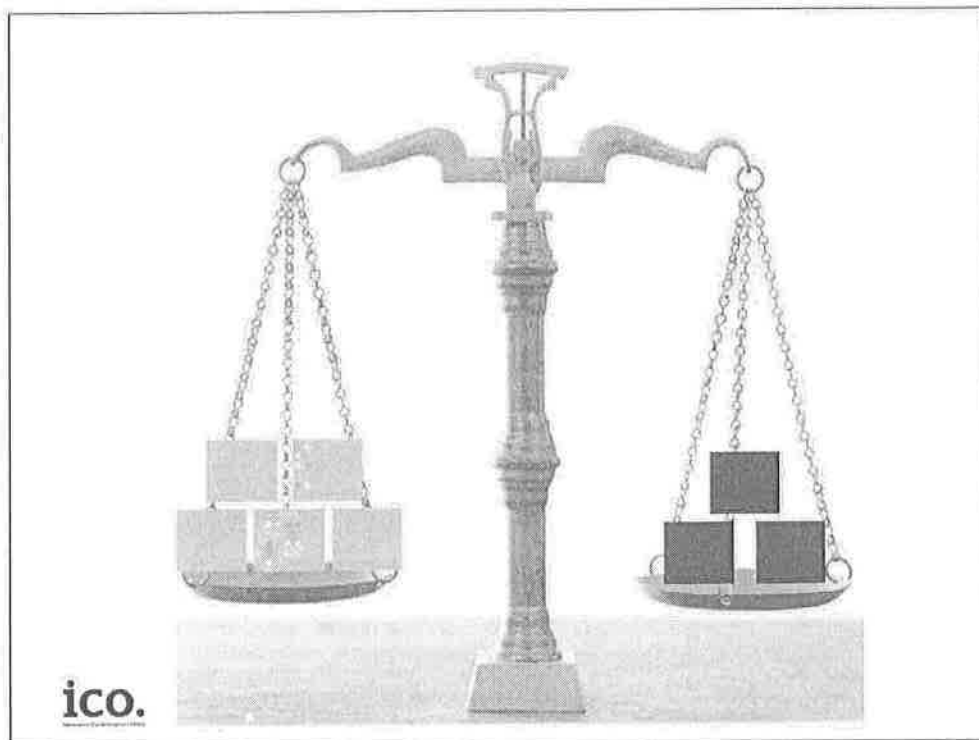
The public interest is the public good or what is in the public's best interests

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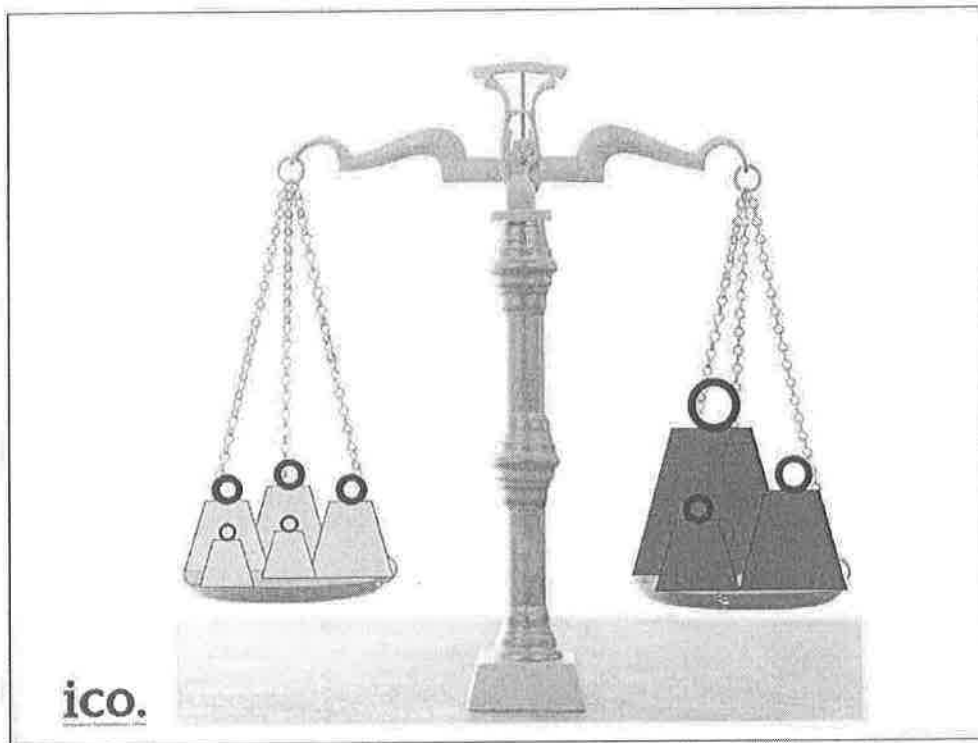
Media coverage may help you to identify public interest – the “free press”, lively public debate, and public involvement in politics are in the public interest – but the media may also be interested in celebrities, misinformation, scandal and whipping up public fear, so they are not always reliable arbiters of public interest.

All prejudice-based exemptions have an element of public interest – any individual or private interest must be *linked back* to that public interest. E.g. it is in the public interest to protect commercial interests so that the UK can be a competitive and prosperous economy; it is not necessarily in the public interest for this particular company or individual to be more financially successful than another (that is their private interest)



Start by identifying factors then determine how much weight to give to them.

Expert evidence of effects relevant but
Commissioner and IT must reach own conclusions
Public authority should step back and focus on
public interest not just its own interest (DWP
EA/2006/0040)



So here you see there may be fewer factors on one side but with more weight.

Public interest in the exemption

"not all public considerations ... should be taken into account. What has to be concentrated upon is the particular public interest necessarily inherent in the exemption or exemptions".

Bellamy v IC and Secretary of State for Trade and Industry (EA/2005/0023)

Prejudice-based exemptions (FOIA)

If engaged, will always be some public interest in the exemption

- “carry over” finding on likelihood of prejudice from the prejudice test (this includes frequency of prejudice occurring)
- also consider severity of prejudice

Remember limited to prejudice to specific interests:

- s.43 commercial not “financial”
- s.31(1)(g) prejudice to investigatory functions, not any functions of public authority



Recap on the prejudice test.

If prejudice-based has been engaged -> will be some weight. “Carry over” findings on likelihood plus consider overall impact.

s.36: if you’ve accepted the QP’s opinion (i.e. it is “reasonable”) then have to accept their findings as to likelihood, but come to our own conclusions on severity etc.

Class-based exemptions (FOIA)

- No automatic public interest
- Consider specifics, not blanket policy

"We do not accept that the inclusion of information within such a class ... reflects the inevitability of damage to the public interest ...

"The weighing exercise begins with both pans empty and therefore level."

(DfES v IC, EA/2006/0006)

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If class based, will not have considered harm / consequences when engaging exemption. Must therefore consider this at PIT stage. May find there is no harm from disclosure – classes can be broad and there may not necessarily be any public interest in withholding information just because it falls into an exempt class.

The quote relates to a case about s.35 but the principle applies to any class based exemption (except s.42 which will be raised later) – it would be useful to give a (hypothetical) example of something anodyne which might fall within a class based exemption.

Class-based exemptions (FOIA)

Identify the relevance of the exemption, for example:

35 government policy

Process of policy making, "safe space" and "free and frank discussion"

42 legal professional privilege

so people are not disadvantaged or inhibited from seeking and receiving honest legal advice

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For prejudice based exemptions, what is 'inherent' is clear – it's the interest in avoiding the harmful consequences.

For class based have to consider what the purpose of the exemption is – what are you trying to protect?

Class-based exemptions an exception to the rule: s.42 FOIA

“Inbuilt” public interest in the principle of LPP

- strong public interest in protecting the confidence enshrined in LPP

But not the same weight in all cases:

- Live / current advice → greater weight
- Advice relating to public administration deserves less protection than re. criminal or protection of children

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An exception to this rule: some exemptions have “inbuilt weight”. S.42 the *principle* of LPP is v important and *any* disclosure of privileged information would by its nature tend to undermine that principle. However it is not an absolute exemption so sufficiently strong PI factors in a certain case could outweigh it.

What should not be considered

- The class or status of the information
- Public interest related to “this type of information”
- The fact that the public may misunderstand the information
- How the media may present it e.g. harmful, misleading, distracting attention away from what the debate “should” be
- Identity of requester or purpose of request

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“class” or “status” e.g. the seniority of individuals involved or the type of information rather than the actual content
Public misunderstanding.

Example: identifying public interest in exemption (FS50182402)

DCMS report recommending **not** to bid for Olympics

- would re-open controversy when already contractually committed to Olympics
- "safe space" for live issues e.g. infrastructure
- divert attention from ongoing policy decisions
- damage relationship with sports bodies

We did **not** accept that it would undermine relationship between ministers and civil servants

- senior civil servant – should remain robust and not fear accountability

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Usually the importance of maintaining the exemption less once the policy decision (in this case, to bid for the Olympics) has been taken.

However, in this case it was still a live and ongoing issue. Also information included a frank assessment of issues including the budget and financing of the Olympics, the legacy in relation to regeneration and economic development and the burden on the transport infrastructure. Disclosure could divert energy from the ongoing policy decisions onto rehashing a past decision.

The information also included comments about UK sports bodies; the DCMS described these as "frank advice about sporting bodies and officials drafted in a forthright tone".

Although documents reveal serious concern that info should not be made public, rejected arguments that disclosing civil servant's advice which would undermine government position would impact on the future relationship between politicians and civil servants. Tribunal has found that civil servants can be expected to remain robust in their advice, though they should be protected from being made wrongly accountable for the decisions of ministers (especially more junior civil servants)

Public interest in disclosure

PI in disclosure relates to info not exemption – same regardless of which exemption claimed.

Accountability, transparency and decision making:

- understanding the way decisions are made
- proper conduct of public authorities
- accounting for how public funds are spent
- informing public debate

Some will be more specific, e.g.:

- competition / getting best value



warning public of risks

So now identifying the things to put on the other side. This is the bit people struggle with – yes it's about accountability and transparency but this does *not* mean you can just cite “accountability and transparency” in favour of disclosure in every DN. Still have to consider the specific information: what does this information reveal and why does the public need to know? E.g. is there a decision to be accountable *for*? Could a public debate be generated? Also other issues will arise in specific cases.

[steve's notes]

Improve public confidence in the processes of government

Conduct – investigations, h + S

Enhance quality of decision making

Weighing the public interest



Consider the specific information and circumstances, for example:

- How many people affected?
- How much money involved?
- Is it a matter of legitimate debate?
- Are there valid concerns and criticisms?
- Severity of any prejudice / consequences

What does this information reveal? Would it be of value to the public? Would it be harmful?

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Having identified the relevant interests, consider how much weight they have in these circumstances. Again, specific information – would transparency be particularly valuable in this case?

Weighing the public interest



Age of the information:

- generally gets less sensitive over time...
- ...but not always, e.g. re-opened case.
- Key stages, e.g. policy decision announced.

Information already in public domain:

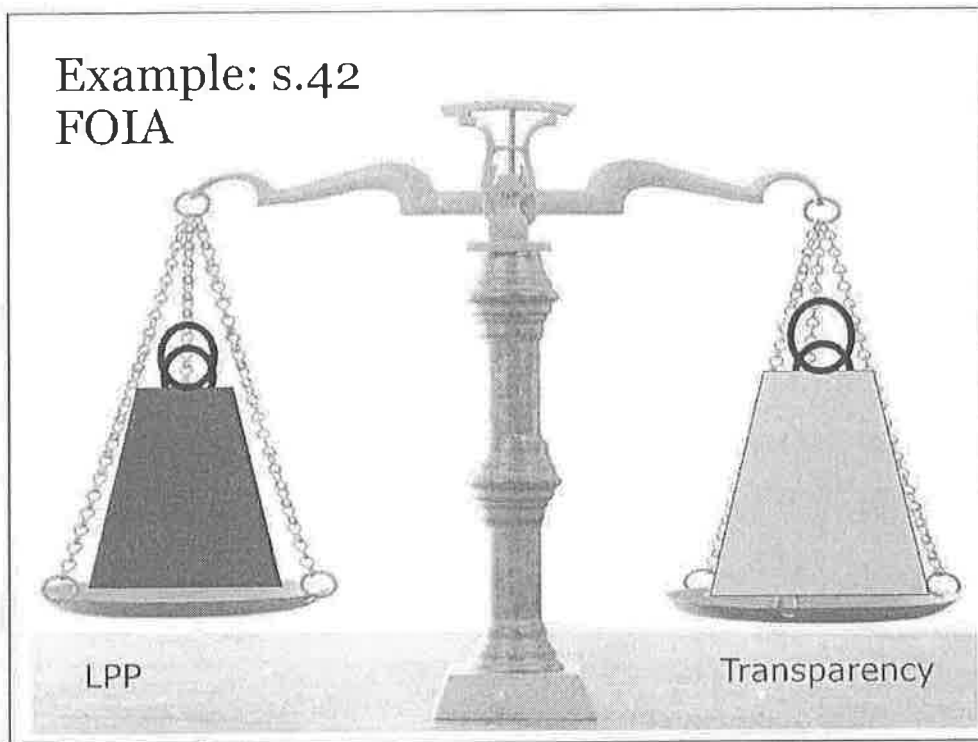
- May lessen harm of further disclosure
- Will this information add anything?
- Always some value in "full picture" even if just proving that nothing further of interest recorded
e.g. FCO v ICO (EA/2007/0047) (Iraq dossier draft)

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Again we're looking here at *weight* not at factors - the age of the information is not in itself a reason to disclose, but it may affect the balance of the factors. Time and info in public domain can both cut both ways.

Iraq case: just because the Hutton enquiry had put a lot of info into the public domain didn't mean that the disclosure of further material was not of value. The government claimed this particular draft had not been taken further and was thus irrelevant; the Tribunal found this was for the public to judge.

Example: s.42
FOIA



With section 42 we start with an inherent public interest in preserving LPP. In other words this already has some weight. Transparency is always a factor on the other side but the weight of it is determined by context.

The weight given to LPP increases if it is (a) recent (b) live and (c) necessary to protect individuals. [click]

The weight given to transparency is determined by (a) the number of people affected (b) the money involved and (c) any lack of transparency on the part of the PA. Also consider the content of the information – the issue may be important but would this information actually be of use?

May of course also be other factors or weightings.

Absolute exemptions and public interest considerations: FOIA

Section 40(2) personal data

- Fairness is a "balancing exercise"
- Legitimate public interests are relevant

Section 41 confidentiality

- Public interest defence to breach of confidence

In both these cases, the presumption is reversed
i.e. default is non-disclosure.

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[not going to go into this so much because will have been covered in s.40 session, also because not focusing on sch condition so much now]

[Steve's notes]

The processing 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.

Case study: empty homes

(Camden EA/2011/0007)

Requests for the addresses of empty properties.

Council claimed section 31: would be likely to prejudice the prevention or detection of crime



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Remitted Tribunal decision. (Original Tribunal decision overturned at Upper Tribunal which provided guidance on correct approach to PIT and then remitted it back to First Tier Tribunal.)

Pulls modules 5 & 6 together

First look at prejudice test

- Step 1 - Relevant interest
- Step 2 - Nature of prejudice - causal link
- real actual and of substance
- Step 3 - Likelihood of Prejudice

Empty homes: prejudice test

- Evidence of increased crime in and around empty properties
- Criminal gangs stripping properties
- Organised Squatters v Disorganised Squatters
- Would or would be likely to cause harm which is real, actual and of substance.

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Prejudice test - Step 1 – Prevention of crime associated with empty homes = an interest relevant to s31

First – look at whether exemption is engaged

Steps 2 & 3

Main forms of crime associated with empty properties (i) arson/vandalism

(ii)

crime associated with squatting

(iii)

house stripping

Causal link

(i) **No** causal link between disclosure and opportunistic crime such as arson & vandalism.

But...

(ii) Organised gangs – strippers could take advantage of lists. This was traditionally associated with building sites but possible change in behaviour.

Squatters and crime – squatting **not** a crime at time of request (is now)

(iii) Organised squatters – solving their housing need

Evidence – websites etc that organised squatters would use lists – also previous release of a similar list by another council had increased squatting in that area.

Main crime associated with organised squatters = entering & securing properties – theft of electricity.

Disorganised squatters – suffer from drug & mental health problems.

Most of the serious crime in empty properties is associated with disorganised squatting.

Appellant argued that dis-organised squatters wouldn't be capable of making use of list – too disorganised

But...

Tribunal didn't accept this argument – (i) degrees of

'organised' squatters – not all would be so responsible or considerate & (ii) probably some cross over between organised/disorganised squatters – i.e some people with drug and mental health problems could still be capable of using the list.

Step 3

Tribunal found disclosure **WOULD** prejudice prevention of crime. This is carried over when looking at the public interest test.

Empty homes: prejudice test

List would be of use to:

Criminal gangs of strippers

Some disorganised squatters

plus

Organised squatters

Would prejudice prevention of crime

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Simple summary of the basis on which section 31(1)(a) was engaged.

Not shown in handouts

Public interest test

Guidance from Upper Tribunal – LB of
Camden v IC & Yiannis Voyias
(GIA/2986/2011)

“... take account of any consequence that
can be anticipated as realistic possibility.”

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Brief recap of history.

Original appeal against our DN succeeded with original FTT finding that public interest favoured disclosure.

This was appealed to UT which found the FTT had erred in law by failing to taking account of all the circumstances of the case when considering the public interest as required under section.

UT concerned that by failing to take account of some of the consequences that would result from disclosure the FTT had taken narrow a view of the crimes that would result, particularly those associated with squatting, and the impact of those crimes.

The UT therefore remitted the case back to the FTT with the guidance/instructions quoted.

So now we consider whether we accept that the consequences presented by the council can be:

(i) anticipated as being a realistic possibility

exemption is trying to prevent

(ii) relate to the crimes with the

Empty homes: public interest in maintaining the exemption I

- (i) Level of Increase in crime
- (ii) Costs of repairs and securing properties
- (iii) Cost of evicting squatters
- (iv) Impact on those directly affected

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This and the next slide are the main ones on the public interest arguments and they will take longest to discuss.

This slide deals with fairly direct impacts and uncontroversial ones.

(note in these slides we're considering the impact of both house stripping and the crime associated with squatters but emphasis obviously more on squatters)

Level of increase in crime

Before looking at the direct and indirect consequences of the crimes that would be facilitated by the disclosure it is important to have some idea of how much crime would increase as a result of disclosure, but this likely to be quite rough.

Costs of repairs and securing properties

Obvious – direct impact - the disclosure would increase how vulnerable the properties listed were to crime.

Cost of evicting squatters

Tribunal only took account of the cost of evictions which were required to prevent on going, high level criminal, damage, i.e they costs had to relate to crimes that the exemption was trying to prevent not evictions that were motivated simply by desire to regain possession.

Impact on those directly affected

Again this directly relates to the crime in question.

Those directly affected includes not just the owners but perhaps tenants who are temporarily absent (abroad, in hospital).

Affect includes distress where those affected are individuals. But be careful not to double count.

Empty homes: public interest in maintaining the exemption II

- (i) Impact on community
- (ii) Impact on council
- (iii) Impact on police

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Some of the impacts covered on this slide are less direct or are more uncontroversial.

Impact on community

Not such a direct impact.

Crime generates a fear of crime. This can be seen as a consequence of that crime and therefore it's appropriate to take account of the impact of that 'fear of crime'.

Fear of crime real even if the fear was not always rational.

Engaging the exemption = accepts that disclosure would lead to squatting and associated crime + increased house stripping. Therefore those living near empty properties would fear such crimes taking place and if those properties were actually occupied by squatters this fear would be heightened.

The **Upper Tribunal** also suggested lowering of property values + increase in insurance premiums. But these arguments were not presented by the Council and therefore the FTT.

Impact on council

Impact on Council in terms of costs of repairs, increased security and evictions already considered under earlier headings.

Therefore not very clear what issues the Tribunal considered here. er this heading. Officers time lost dealing with the impact of squatters Ok if not covered impervious heading.

Council's arguments re how disclosure would hinder its social and housing policies:

- Squatting was effectively queue jumping
- Squatting hinders the process of returning properties to housing stock
- Damage to relations with private sector landlords/owners

1st bullet – difficult to relate back to crime rather than non criminal occupation by squatters.

2nd bullet - there is a link between crime and the alleged impact – ie criminal damage & house stripping will delay getting houses back on the market.

3rd bullet - relations could be damaged by private sector landlords'/owners' concerns about risk of criminal damage and house stripping. So a link can be made. But it's certainly not an immediate impact that we would naturally think of as being the result of an increased vulnerability to crime.

These 3 points are flagged Amber on the IT summary.

Impact on police

This is a more direct impact.

Additional crime = additional workload for police – takes away resources from policing other crimes.

Empty homes: public interest in disclosure.

- Squatting in empty homes is in the public interest
- Holding Council to account for its measures to bring empty homes back into use.

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These are the arguments **presented by the appellant** .

Squatting is itself in the public interest.

Organised squatters cause limited criminal damage and has the advantage of directly bring properties back into use and

Prevents their occupation by disorganised squatters who cause all the problems.

This was accepted by the original FTT.

But this time **Tribunal rejected the argument** (note - this makes sense since it had found that even organised squatters caused some damage entering a property and that there was some crossover between the two groups and that some disorganised squatters would also use the list see slide 21)

Holding the Council to account

Accountability is in the public interest

But – do you need this actual information – full addresses

Council was happy to give out numbers of empty properties in each ward,

Appellant argued there was a value in being to actually go up to the empty homes and see what was going on – again this had been accepted by the previous Tribunal but was reject by the Tribunal this time round.

This FTT was satisfied that the information already provided was sufficient to hold the Council to account, therefore it afforded very weight to this factor.

Balance of the Public interest

Disclosure would cause substantial increase in crime

+

Direct and indirect consequences of that crime

v

Minimal public interest in increased accountability

Withhold the information

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Simply summarises the outcome of the public interest test.

Disclosure would cause substantial increase in crime and therefore weight given to the public interest in preventing such crime and the consequences (direct and indirect), balance against the minimal public interest in increased accountability/providing the full picture.

Not shown in handouts.

The public interest test under the EIR

- Must apply public interest test to all exceptions in the EIR, in contrast to FOIA where it does not apply to all exemptions.
- Under the EIR the public interest for all relevant exceptions may now be aggregated – following European Court decision: Ofcom v ICO [EA/2006/078]

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The PIT works differently under the EIR from under FOIA.

All EIR exceptions are subject to the PIT.

Normally we would apply the PIT to each exemption separately – including subsections, except if largely overlapping. (Note: where there is overlap between exemptions/ exceptions you don't count the same factors twice).

There is no need or benefit for authorities to identify every exemption which might apply.

However for EIR exceptions we now have to aggregate the public interest...

ICO position is that this is not the case for FOIA.

Aggregation of public interest (EIR) : Ofcom v ICO EA/2006/0078

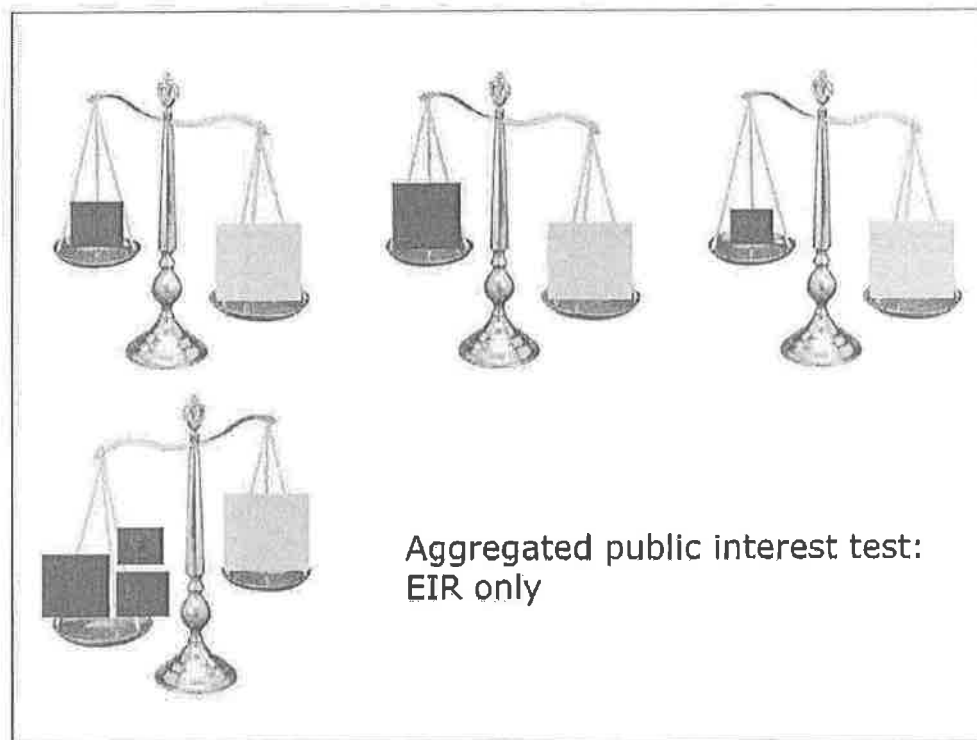
- Multiple exceptions engaged; PI in each one insufficient to withhold info -> disclose
- Ofcom suggested "aggregated public interest test"
- Tribunal and High Court accepted our approach but Court of Appeal allowed Ofcom approach
- ICO appealed to Supreme Court.
Supreme Court asked for European Court of Justice opinion; ECJ ruled in favour of aggregation.
- ICO view is that this does not apply to FOIA.



See ICO guidance "How exceptions and the PIT work in the EIR" – extract:

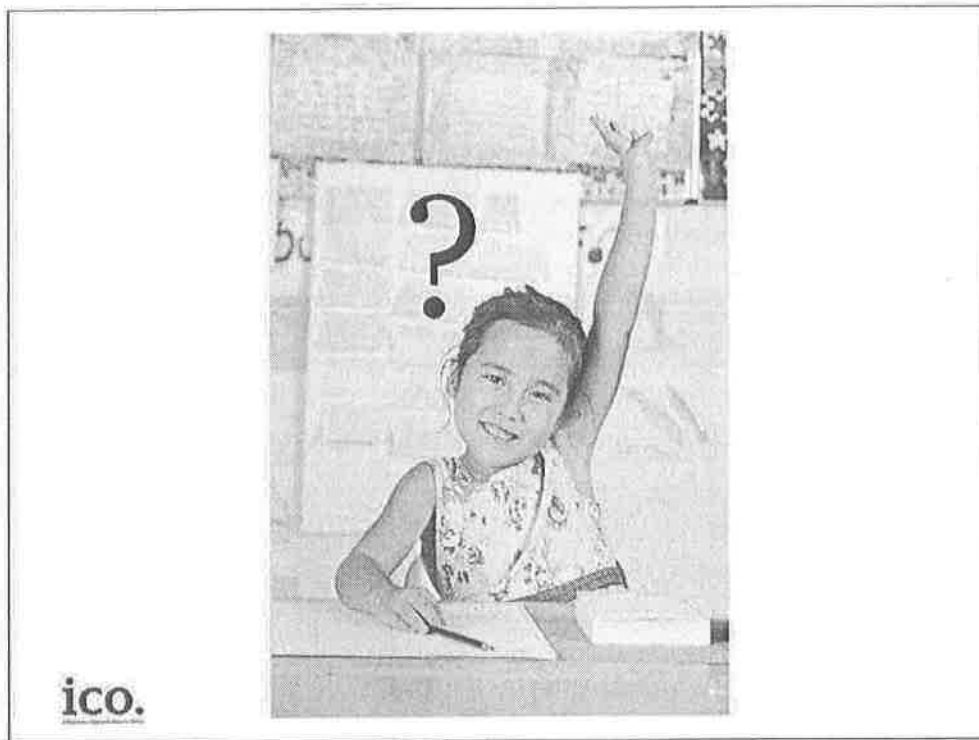
Aggregation of public interest factors

67. Where more than one exception is engaged, a further step may be required in carrying out the public interest test. If more than one exception is engaged in relation to the same piece of information, and the balance of the public interest test for each of them is in favour of disclosure, the authority may then weigh the public interest in disclosure against the aggregated weight of the public interest arguments for maintaining all the exceptions.



****For FOIA we are sticking to our current line ****

The disadvantage of aggregation is that an authority is then incentivised to identify every possible exemption which might apply even when only one is needed, and that increases the burden on us investigating.



Any questions?

For more information, see our
guidance page on www.ico.org.uk
and the FOI Policy knowledge base
on ICON

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FOI Foundation Module 6: Applying the public interest test

Learning and Development

Please ask delegates to bring with them a copy of FOIA and the EIR – their own, borrowed or printed off from legislation.gov.uk.

Trainer's Checklist

The handout pack for each attendee should contain one copy each of the following documents which are all on Meridio 1.17.04.03:

- Objectives and schedule
- Slides handout. When printing, select the "handouts" option, 3 per side of A4.

They will also need one copy each of:

- The feedback form – provided by L&D, either at the session or subsequently by email.

L&D will also provide a **signing-in sheet**.

The trainer will need:

- Slides – print out a copy with the speaker notes on using the "Notes pages" option. These are also the slides to show on the screen and are different from the handout version.
- Case study public interest test **v2** – this tells you how to run this case study.

NB There is a labelled course folder with master copies in cupboard PD2 in Policy Delivery, First floor West Wing (behind the desks of Lisa Atkinson and Viv Adams).

FOI Module 6: Applying the public interest test

Objectives

This session follows on from Module 5: How the exemptions and exceptions work, which you should already have attended before attending this module. It explains how to apply the public interest test for qualified exemptions and for EIR exceptions.

By the end of this session, you should be able to:

- describe the concept of the public interest
- explain the public interest test in FOIA
- begin to identify valid and invalid arguments in favour of maintaining specific exemptions and exceptions (this session will not cover every exemption or exception in detail)
- identify general and specific arguments in favour of disclosing information
- discuss how you might assign weight to different public interest arguments
- explain how the PIT works under the EIR, including aggregation

Schedule for today

The public interest test

Identifying the public interest in maintaining the exemption

Identifying the public interest in disclosure

Weighing the public interest

Case study: should you disclose information which would be likely to prejudice the prevention of crime?

The public interest test under the EIR, including aggregation.

This session is planned to last approximately 2¼ hours. There is no scheduled coffee break.

Resources

The following cases will be referred to in today's session:

Bellamy v IC (EA/2005/0023)

Mersey Tunnel Users Association v IC (EA/2007/0052)

Foreign and Commonwealth Office v IC (EA/2007/0047)

Ofcom v IC (EA/2006/0078)

England & London Borough of Bexley v IC (EA/2006/0060 & 66)

Voyias v IC & London Borough of Camden (EA/2011/0007)

OGC v IC & Another [2008] EWHC 737 (Admin) (11 April 2008)

You can also follow up today's points on the **Policy Knowledge Base**.

FOI Module 6: applying the public interest test

Objectives and schedule

4.2.11 updated 16.1.13

It's quite difficult to work out a case study on public interest, since inevitably it's very specific to the circumstances of the case and the specialist background which may not be easy to explain briefly.

I suggest:

- ask them to come up with arguments in favour of the exemption
- then run past them the arguments made by the council – ask which ones are valid
- do the same for the arguments in favour of disclosure
- then have a debate about how they would weight the two sides
- then reveal the 'balance' section

Arguments put forward by the council for maintaining the exemption

The prejudice test has already found that it "would cause significant harm in the form of criminal activity"

Crime is likely to cause distress to owners, especially where these are individuals rather than businesses or organisations

Crime is also likely to have a knock-on impact on neighbours

The best way to reduce crime is to bring the houses back into use and this will be harder if they are damaged by crime

It would be unfair to the owners and a breach of trust – not accepted by the Tribunal as it is not relevant to s.31

The local authority has other powers it can use to bring these properties back into use – not accepted by the Tribunal likewise

Arguments put forward by the requester for disclosing the information

The local authority has a duty to reduce the numbers of long-term empty properties and should be held accountable for failure to do so

Lack of housing in London is a major social issue and the existence of empty properties is a subject of public debate

Disclosure would bring more attention to the subject and put pressure on local authorities to improve their handling of the problem

Publication might help potential buyers / developers get in touch with owners – one witness had set up a website which had helped to pair up owners of empty properties with buyers.

Squatting is not illegal and is preferable to street homelessness

Publication might put pressure on owners of empty properties to sell them – the Tribunal said that this “may be at the expense of owners being frightened into disposing of property” by the risk of crime, and that “this seems a rather unattractive prospect”

Balance of the public interest

The public interest in favour of disclosure has limited weight because:

- the addresses are not necessary to hold the authority accountable for a failure to meet its targets
- there are a wide range of reasons why it may have proved difficult to bring a property into use, many of which would not be solved by publication – e.g. the property is in a poor state of repair and the owner can't afford to fix it
- the impact on private individuals should be given particular weight
- the knock-on effect on neighbours can't be justified as being fair

In actual fact the Tribunal in this case said that they should disclose the addresses of those empty properties owned by companies or authorities – who would be less distressed and should perhaps take more responsibility and have more resources for doing up and selling the property. Only those belonging to private individuals were withheld. However a later very similar case determined that the knock on impact on neighbours was such that neither should be released (this was based on actual evidence subsequent to other disclosures).

Module 6 Case Study Briefing – Empty Homes

This case study was updated 08 February 2013.

The case study concerns a request for a list of empty homes in the London Borough of Camden, their full addresses. The actual request was for a list of voids where no individual has a material interest in the property. 'Void' just means the property is empty for council tax purposes. The reference to no individuals having a material interest was an attempt to confine the request to only those properties owned by organisations eg private landlords, housing associations and the council. But we are ignoring this issue for the sake of the case study.

The council withheld the information under section 31(1)(a) – prevention of crime, arguing that the list would encourage house stripping (the removal of any valuable materials, fixtures or fittings), encourage arson attacks and vandalism and most importantly facilitate squatting. At the time of the request squatting itself was not a criminal offence, so squatting was only a relevant consideration if it could be established that there was crime associated with squatting.

The council based most of its arguments on those presented in an earlier case about similar information (LB Bexley v IC and England EA/2006/0060/0066). It argued that squatting involved criminal damage entering and then securing the property, theft of electricity and was associated with drug use and prostitution and had a serious impact on those who found themselves the neighbours of squatters.

The ICO's DN found that the information ought to be withheld. This was appealed by the applicant. The First Tier Tribunal found that the information should be disclosed. This was on the basis that the list would be used primarily by 'organised' squatters, characterised as people who simply squatted to solve their housing need and apart from the initial low level criminal damage caused by entering the property, they behaved like responsible citizens. This was in contrast to 'disorganised' squatters who suffered from mental health problems or drink and drug addictions. These people were very dysfunctional and would be un-capable of using a list of empty homes to find squats.

The FTT also dismissed the possibility of arson attacks/vandalism on the basis that these were opportunistic crimes and wouldn't be affected by the disclosure of any list. It also dismissed the threat from house strippers, finding that this was mainly associated with building sites. The FTT found that the exemption was engaged but only based on an increase of low level crime (likelihood of prejudice was the lower 'would be likely' threshold).

Under the public interest test it found that there was actually a public interest in empty homes being occupied by organised squatters, it fulfilled a social need ie to house the homeless and so directly brought these empty homes into use. These organised squatters would also occupy properties that could otherwise be taken over by disorganised squatters. Publication of the list would also help hold the council to account regarding the effectiveness of its policies for returning empty homes to the housing market, commenting that there was a value in people being able to walk up to an empty property and seeing what was actually being done.

This decision was widely condemned being called a squatters charter by some senior politicians. The council appealed to the upper tribunal which found that the original FTT had erred in law by failing to take account of all the circumstances of the case when considering the public interest under s2 of the Act. Essentially it was saying that the original tribunal had taken too limited a view of the crimes that would occur if the list was published and the impact of those crimes. The UT therefore remitted the case back to a differently constituted FTT to be reheard. In doing so it provided some guidance to the FTT as to how it should approach the public interest test, explaining that it should "take account of any consequences that can be anticipated as a realistic possibility" (see slide 22).

This case study concerns the decision of the second FTT. Second time around the FTT found that the information ought to be withheld. This was on the basis that the publication of the list would facilitate house stripping because although currently this was mainly associated with building sites, publication of the list could change the behaviour of criminals and make empty homes on the list attractive targets. It also found that the organised squatters were not such a well defined group which would always behave as responsibly and considerately as accepted by the original FTT. Furthermore some of the disorganised squatters would also use the list. This increased the level of crime associated with the squatting facilitated by publication of the list. This meant that the exemption was engaged much more strongly than originally. It was engaged on the basis that this higher level of crime **would** happen as opposed to 'would be likely' as was the case first time around. This all meant that greater weight was carried forward to consideration of the public interest test.

Furthermore when looking at the impact of these crimes the FTT also took account of the fear of crime that would result. This was based on guidance from the UT which had explained that if the fear was real this was a relevant factor even if that fear wasn't always rational. So the public interest in maintaining the exemption expanded further.

On the pro disclosure side the Tribunal was unconvinced by the public interest in allowing squatting which everyone accepted involved some criminal damage, and was similarly dismissive of the value in being able to walk up to a void and see what was happening. Although there was a public interest in holding the public authority to account this was satisfied by the publication of the number of empty properties in each ward, there was no value in publishing the actual addresses of those properties.

It can be seen from the history of the case that it is possible to reach different conclusions both on the extent to which an exemption is engaged and the balance of the pi test. Although the case study focusses on the second FTT decisions rather being a compare and contrast between the second and the first, it is useful to have this background as it can be fed into discussion of the validity of the arguments that were presented and the weight that it's appropriate to give different factors under the public interest test.

Slide 19

Introductory slides

Pulls modules 5 & 6 together.

The aim is to consider the range of public interest arguments that can be relevant to an exemption – i.e what public interest factors are inherent in an exemption, and in consider the validity and weight that should be attributed of the factors presented in this particular case.

Explain were looking at a decision that's been remitted back to the FTT. That the original Tribunal decision was overturned at Upper Tribunal and that the UT provided guidance on correct approach to PIT and then remitted it back to First Tier Tribunal.)

First look at prejudice test as dealt with in Module 5

- Step 1 - Relevant interest
- Step 2 - Nature of prejudice - causal link
- real actual and of substance
- Step 3 - Likelihood of Prejudice

Slide 20

Prejudice test - Step 1 – Is the interest that its claimed will be prejudiced relevant to s31? Yes it is the council is concerned with prevention various types of crime associated with empty homes.

First – look at whether exemption is engaged

Steps 2 & 3

Main forms of crime associated with empty properties

- (i) arson/vandalism
- (ii) house stripping
- (iii) crime associated with squatting

Is there a causal link between an increase in these crimes and the publication of the list? You can ask the delegates.

No causal link between disclosure of list and opportunistic crime such as **arson & vandalism**.

But a causal link with (ii) & (iii)

Organised gangs – **house strippers** could take advantage of lists. This crime traditionally associated mainly with building sites but possible change in behaviour particular where a whole block of flats are shown as being empty on the list. (it's assumed that this could have been the case, perhaps where a whole block were being refurbished).

Squatters and crime – squatting **not** a crime at time of request (is now)

Organised squatters are simply solving their housing need. There was evidence from existence of websites etc that organised squatters could use lists and also a previous release of a similar list by another council had increased squatting in that area.

Main crime associated with organised squatters is criminal damage caused by entering & securing properties and the theft of electricity.

Disorganised squatters who suffer from drug & mental health problems are associated with the most serious crimes eg drug use, prostitution. Appellant argued that dis-organised squatters wouldn't be capable of making use of list because they're too disorganised

But...the Tribunal didn't accept this argument. It found that (i) there were degrees of 'organised' squatters, not all would be so responsible or considerate & (ii) probably some cross over between organised/disorganised squatters i.e. some people with drug and mental health problems could still be capable of using the list.

Step 3

The Tribunal found that disclosure **WOULD** prejudice prevention of crime. This is carried over when looking at the public interest test.

Slide 21

This is simply a summary of the basis on which s31 was engaged.

Slide 22

This slide provides an opportunity to present a brief recap of history of the cas;

Original appeal against our DN succeeded with FTT finding that public interest favoured disclosure. This was appealed to UT which found the FTT had made of error of law by failing to taking account of **all** the circumstances of the case when considering the public interest as required under section 2. UT was concerned that by failing to take account of some of the consequences that would result from disclosure, the FTT had taken too narrow a view of the crimes that would result from disclosing the list, particularly those associated with squatting and the impact of those crimes. The UT therefore remitted the case back to the FTT with the guidance/instructions quoted.

So now we consider whether we accept that the consequences presented by the council can be:

- (i) anticipated as being a realistic possibility and
- (ii) relate to the crimes with the exemption is trying to prevent

Slide 23

This and the next slide are the main ones on the public interest arguments and they will take longest to discuss.

This first slide deals with fairly **direct and uncontroversial impacts**.

(note – for the purpose of these slides we’re considering the impact of both house stripping and the crimes associated with squatters although the emphasis of some of the points is very obviously more about squatters)

Level of increase in crime

Before looking at the direct and indirect consequences of the crimes that would be facilitated by the disclosure it is important to have some idea of how much crime would increase as a result of disclosure. In most cases this is only going to be v rough the best we can hope for is to gain some sense of would crime go up a little, a lot or somewhere in between. It’s very rare that we’ll be able to form some precise idea about the increase, but we need to have some feel for how much the increase would be when considering the other factors

Costs of repairs and securing properties

This is an obvious and direct impact; the disclosure would result in more properties being squatted with the resultant increase in criminal damage that would need repairing. To avoid the properties being broken into those properties on the list would need additional security measures. All this represents a cost of crime.

Cost of evicting squatters

The Tribunal only took account of cost of evictions which were required to prevent on going, high level criminal, damage, i.e they costs had to relate to crimes that the exemption was trying to prevent. This is because squatting itself was not a crime and the Tribunal was keen not to be seen to be associating costs to consequences that were not in themselves criminal offences. Therefore it was only where evictions were pursued to prevent criminal damage over and above the limited damage caused when squatters access a property. The thinking is that where the only crime is low level damage caused by breaking a window etc, the real motivation is not to prevent crime but to gain possession of the property again. Again you can only get a rough idea of these costs, it's more a case of saying there's a cost involved evicting squatters but we can't take account of all the costs so we'll reduce the weight we attach to this factor a bit.

The actual Tribunal decision also mentions that on occasion rather than resorting to legal action a landlord may simply pay the squatters to leave.

Impact on those directly affected

Again this directly relates to the crime in question.

Those directly affected includes not just the owners but perhaps tenants who are temporarily absent (abroad, in hospital). Affects include distress where those affected are individuals not organisations/public authorities. (When you look at the actual request it refers to voids where no individual has a material interest but regardless who the council's records had down as being eligible or previously eligible for the council tax it could not be ruled out that individuals would not have some connection with the property.)

You have to be careful though that you don't do any double counting under this heading, eg if you've already taken account of the cost of evictions/repairs etc, you can't also take account of them under this heading.

Slide 24

Some of the impacts covered on this slide are **less direct** or are more **uncontroversial**.

Impact on community

This is not such a direct impact.

Where a crime is committed it will often also generate a fear of crime. This can be seen as a consequence of that crime and therefore it's appropriate to take account of the impact of that 'fear of crime'. The Upper Tribunal commented that such an impact was real even if the fear was not always rational. That is person's perception of the risk of becoming a victim of crime may be greater than really exists, but people will act according to their perception of the risk, so the impact will be real.

By engaging the exemption we have accepted that disclosure of the list is likely to lead to squatting and the crime associated with squatting together with an increased risk of house stripping. Therefore those living near empty properties would fear such crimes taking place and if those properties were actually occupied by squatters this fear would be heightened.

The Upper Tribunal had suggested that the lowering of property values as a result of the crime associated with squatting could be included as factor, as could a general increase in insurance premiums if crime rose in an area due to squatters. However these arguments were not presented by the Council and therefore the FTT was not able to consider them at the rehearing.

Impact on council

The FTT had already considered the impact on the Council in terms of costs of repairs, increased security and evictions under previous headings so it's not very clear what issues the Tribunal considered under this heading. The Council referred to the time its officers lost dealing with the impact of squatters and the associated crime. If this not already considered as a cost under previous headings then it's appropriate to take account of here.

But the Council also explained how disclosure would hinder its social and housing policies:

- Squatting was effectively queue jumping (the house being squatted in could've been allocated to someone in greater need)
- Squatting hinders the process of returning properties to housing stock (you can't refurbish a house if it's occupied)
- If council was seen to have encouraged squatting by disclosing the list it would damage relations with private sector landlords/owners and make it harder for the Council to work such partners and get these properties back onto the market.

You can argue that the first two bullets above don't relate to crime but rather the occupation of properties by squatters which in itself was not a criminal activity. This must be true in respect of the first bullet. However regarding the second bullet there is a link between crime and the alleged impact – ie criminal damage caused by squatting or house stripping will have an impact on the time taken to get houses back on the market. Regarding the third bullet point, relations could be damaged because disclosing the list would make properties more vulnerable to criminal damage caused by squatters and house stripping. So a link can be made but it's certainly not an immediate impact that we would naturally think of as being the result of an increased vulnerability to crime.

These 3 bullet points are flagged Amber on the IT summary.

Impact on police

This is a more direct impact. Essentially there is a public interest in avoiding the increased workload generated for the police by the disclosure ie the additional work in dealing with the increased crime levels.

Slide 25

This slide shows arguments **presented** by the appellant, not necessarily accepted by the FTT.

Squatting is itself in the public interest.

The argument is that squatting by organised squatters only causes very limited criminal damage and has the advantage of directly bringing properties back into use and at the same time preventing their occupation by disorganised squatters who cause all the problems. Although this may seem a rather flimsy argument, it was accepted by the original FTT when the case was heard first time round. However on this occasion the **Tribunal rejected the argument** (note - this makes sense since it had found that even organised squatters caused some damage entering a property and that there was some crossover between the two groups ie that some disorganised squatters would also use the list see slide 21)

Holding the Council to account

Accountability is in the public interest, but the question is whether you need the actual information being requested to achieve the appropriate level of accountability. The information requested was the full addresses of all the empty properties (owned by organisations rather than individuals – but ignore this detail for sake of the exercise). The Council was happy to give out numbers of empty properties in each ward, but the Appellant argued that there was a value in being to actually go up to the empty homes and see what was going on. Again this had been

accepted by the previous Tribunal but was rejected by the Tribunal this time round. Tribunal was satisfied that the information already provided was sufficient to hold the Council to account and that the full addresses were not necessary, therefore it afforded very little weight to this factor.

Slide 26

This simply summarises the outcome of the public interest test. Disclosure would cause a substantial increase in crime and therefore weight given to the public interest in preventing such crime and the consequences (direct and indirect), balanced against the minimal public interest in increased accountability.

Content	Objectives (what the learners should be able to do by the end)	Estimated maximum times
Start:		
What is the public interest test?		
FOIA What is public interest?	Distinguish between the “public interest in disclosure” and “what the public are interested in knowing”.	minutes
How is the balancing exercise carried out?	Approach the public interest test methodically, distinguishing between the arguments and the weight given to them	
Identifying the public interest in the exemption		
FOIA	<u>Not</u> take into account all public interest arguments against disclosure Take findings on prejudice into account appropriately Begin to identify which arguments are appropriate to which exemptions	minutes
s.42	Be aware of the need to protect the <u>principle</u> of LPP and how this differs from other class-based exemptions	
Weighing this against the public interest in disclosure		
FOIA	Begin to identify specific arguments in favour of disclosure Remember to factor in the timing of the request and the age of the information	minutes
s.42 s.40 / s.41	[inherent weight] Be aware that “absolute” exemptions may still involve consideration of public interest, and be able to distinguish this from the PIT.	
Case study		
	Identify which arguments on each side are legitimate or not	

FOIA s.31 "Empty Homes" example	legitimate; debate the weight on each side.	minutes
EIR		
PIT under the EIR	How the PIT under the EIR differs from FOIA. Aggregation.	