



BY EMAIL ONLY to:  
request-463957-  
dd46e5e2@whatdotheyknow.com

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67c St Helier Avenue  
Morden SM4 6HY  
DX 161030 Morden 3

Direct Line: 020 8545 4567  
Fax: 020 8545 3244  
My Ref: L/CW/651/137  
Your Ref:

Date: 14<sup>th</sup> June 2018

Dear L Jones

**FOI Request Information concerning business rate accounts in the London Borough of Merton – Review of Decision - F10174**

I have been requested by the London Borough of Merton to carry out a review of the decision of 9 March 2018 not to disclose the information you requested in your email of 10 February 2018 in respect of the above.

You requested the following information:

*Freedom of Information request - Use of Empty Rates Relief for Commercial and Industrial Properties*

*Dear Merton Borough Council,*

*I would like to request responses to the following questions:*

- 1) For how many commercial properties within the London Borough of Merton have there been multiple applications for empty rates relief in the past three years with a time lapse of no less than approximately four and a half months between applications?*
- 2) For how many industrial properties within the London Borough of Merton have there been multiple applications for empty rates relief in the past three years with a time lapse of no less than approximately seven and a half months between applications?*

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Paul Evans

Assistant Director of Corporate Governance London Borough of Merton

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- 3) What are the addresses of the properties covered by your answers to questions (1) and (2) above?
- 4) Who are the proprietors of the properties covered by your answers to questions (1) and (2) above?
- 5) For each proprietor covered by your response to question (4), what is their interest in the property (for example, freehold or leasehold)?
- 6) For each proprietor covered by your response to question (4), are they a Real Estate Investment Trust (REIT)?
- 7) If the applicants for empty rates relief for the properties covered by your answers to questions (1) and (2) above are not the proprietors of those properties, who are the applicants?
- 8) For each of the properties mentioned in your answers to the questions above, on what date did the London Borough of Merton receive the most recent application for empty rates relief, and was such relief granted?

Alternatively, if you already operate a publication scheme for any of the information requested above, please can you let me know where and how I can access this scheme in order to obtain that information? Of course, for any information requested above that is not part of a publication scheme, I would still like to receive that information from you by way of this Freedom of Information request. I understand that certain landowners are exploiting a loophole in the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 to avoid paying business rates for long periods of time while keeping their properties empty. An empty commercial or industrial property will be exempt from paying business rates for a certain period of time. After three months (for a commercial property) or six months (for an industrial property) of being empty, the landowner must start paying business rates again. I am aware that certain landowners will enter into a lease of at least six weeks at the end of this three or six month period with the sole intention of using this lease to avoid paying business rates for a further three or six months once the lease expires. This is done to get around regulation 5 of the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008, according to which a lease of less than six weeks would not achieve this goal. It is worth noting that, despite the six week lease, the property is likely to remain continuously empty by any reasonable definition of the word, as High Court case-law has found that simply installing Bluetooth apparatus into a premises is enough for that property to be "occupied". I trust there will be no issues regarding the 'personal data' exemption to disclosing information. I understand that 'personal data' is limited to data about identifiable living individuals and does not extend to information about companies or organisations. To the extent that the vast majority of answers you can provide to my questions above will relate to companies and organisations, I expect you will be able to disclose those answers without breaching your obligations under the Data Protection Act. However, if you take the view that some of the requested information does constitute 'personal data', I trust you will be able to find a way of processing it fairly and lawfully such that you are able to fulfil your duties under the Data Protection Principles. I implore you to find a way of doing so, especially given the public interest in disclosing this information, given its importance to the public discussion on issues such as tax avoidance, homelessness and property speculation. Such importance was recently recognised by Judge Fiona Henderson, who noted in the context of a freedom of information case brought against Camden London Borough Council that "the public interest lies in putting empty properties back into use" and who thereby ordered the disclosure of certain information that would facilitate this. It is

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*suggested that the information requested herein would also facilitate this, by contributing to the public discussion on properties that remain empty and hopefully driving forward public policy proposals that would bring such properties back into use.*

The response you received on 9 March 2018 was:

*Unfortunately we can not provide this information because it would exceed the time limit for requests, which is 18 hours (as stated in the Freedom of Information (Fees and Appropriate Limit) Regulations 2004). This is because in order to locate the information a manual search would need to be conducted of 5,400 records.*

*Therefore, the information requested is exempt under Section 12 of the Act, which is that the cost of compliance exceeds the appropriate limit.*

*Please consider refining your request so that it can be answered within the time limit. You could do this by reducing the timescale for your request or limiting the number of queries.*

*If you have any queries or concerns about this please contact me.*

*If you are dissatisfied with the handling of your request please contact the Head of Information Governance at Merton Council, Civic Centre, Morden, SM4 5DX or e-mail [foi@merton.gov.uk](mailto:foi@merton.gov.uk)*

*If you remain dissatisfied with the handling of your request or complaint, you have a right to appeal to the Information Commissioner at:*

*The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.  
Telephone: 0303 123 1113 Website: [www.ico.org.uk](http://www.ico.org.uk)*

*There is no charge for making an appeal.*

On 7 April 2018 you wrote to the Council requesting a review:

*Please pass this on to the person who conducts Freedom of Information reviews.*

*Thank you for your letter dated 9 March 2018 (Your Response), in which you responded to my correspondence dated 10 February 2018 (My Correspondence).*

*Your Response*

*I understand that you are refusing to answer the Freedom of Information (FOI) requests within My Correspondence on the grounds that the cost for doing so would exceed the appropriate time limit of 18 hours.*

*You assert that you would have to do a manual search through 5,400 records.*

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*In asserting this, you rely on section 12 of the Freedom of Information Act 2000 (FOIA) and the 'appropriate limit' set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.*

#### *Internal Review*

*Please may I request an internal review of this decision?*

*I believe the decision contained within Your Response is incorrect, and I will outline my reasons for believing this below.*

#### *(1) The Cost of Accessing Storage*

*In your response, you state only that you would have to conduct a manual search of your records. However, you do not make clear what system is used to store your records. For example, you do not specify if they are stored in an off-site or an in-house storage system.*

*Please confirm how they are stored, and in particular whether it is off-site or in-house storage.*

*Please also confirm whether and how the cost of accessing this storage system was included in your calculation of the overall cost of responding to my FOI requests.*

#### *(2) Your Failure to Provide Cogent Evidence*

*I understand you are under a duty to be "reasonable" in your response to FOI requests, and in particular when estimating the time it will take to comply with such requests.*

*I refer you to the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2006/0004, 30 October 2007), which defined "reasonable" as meaning "sensible, realistic and supported by cogent evidence".*

*I point you to paragraph 37 of the relevant guidance from the Information Commissioner's Office, available at [https://urldefense.proofpoint.com/v2/url?u=https-3A\\_ico.org.uk\\_media\\_for-2Dorganisations\\_documents\\_1199\\_costs-5Fof-5Fcompliance-5Fexceeds-5Fappropriate-5Flimit.pdf&d=DwlFaQ&c=HmJinpA0me9MkKQ19xEDwK7irBsCvGfF6AWwfmMZqono&r=xfU6XFq5QgZuCbd3kKljdmhR2sL82Cy75xn1KUnzDs&m=dUQkcXOo2UNxf8w2K-HOFnEyg5NqNC8x\\_LbSw3s5eyk&s=OS\\_0DFqhQiMEEJqsSW-XTwE4SZeyzeCwUH7T2YpPEpA&e=](https://urldefense.proofpoint.com/v2/url?u=https-3A_ico.org.uk_media_for-2Dorganisations_documents_1199_costs-5Fof-5Fcompliance-5Fexceeds-5Fappropriate-5Flimit.pdf&d=DwlFaQ&c=HmJinpA0me9MkKQ19xEDwK7irBsCvGfF6AWwfmMZqono&r=xfU6XFq5QgZuCbd3kKljdmhR2sL82Cy75xn1KUnzDs&m=dUQkcXOo2UNxf8w2K-HOFnEyg5NqNC8x_LbSw3s5eyk&s=OS_0DFqhQiMEEJqsSW-XTwE4SZeyzeCwUH7T2YpPEpA&e=) (The Guidance), which highlights the following information you might have provided as 'cogent evidence':*

- whether you have carried out any preliminary searches for the requested information;*
- whether you have based your estimate on a random representative sampling exercise;*
- which departments or members of staff have been contacted;*

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**Paul Evans**

Assistant Director of Corporate Governance London Borough of Merton

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- the search terms used when querying electronic records;
- why you need to search any accounts to which you refer; and:
- how long it would take to determine whether the requested information is held or to locate, retrieve and extract it.

*None of this information was provided in Your Response. Because Your Response fails to provide such 'cogent evidence', it is not reasonable.*

### *(3) Your Failure to Act Reasonably in light of Other Authorities' Responses to Identical Requests*

*I refer once more to your duty to be "reasonable" when responding to FOI requests, and in particular to be "sensible and realistic".*

*The FOI requests I sent to you have also been sent to other local authorities.*

*The London Boroughs of Bexley, Kingston-upon-Thames, Lambeth, Sutton and Wandsworth have each responded to my FOI requests with correspondence and excel spreadsheets providing answers to the eight questions I also asked of you.*

*If the London Boroughs of Bexley, Kingston-upon-Thames, Lambeth, Sutton and Wandsworth are able to provide such responses, it is not reasonable, sensible or realistic to suggest that the London Borough of Merton cannot do the same.*

### *(4) Treatment of My Correspondence as One FOI Request*

*I refer you to the case of Ian Fitzsimmons v ICO & Department for Culture, Media and Sport (EA/2007/0124. 17 June 2008), which established that multiple requests within a single item of correspondence should be treated as separate requests for the purpose of section 12.*

*Because My Correspondence contained eight separate questions, it should not be treated as one FOI request, but rather as multiple separate FOI requests within one document.*

*A separate costs estimate should therefore be made for each separate FOI request, rather than one aggregate estimate for the cost of responding to them all.*

*This could be achieved by calculating an aggregate costs estimate for responding to all eight FOI requests within My Correspondence, and dividing that overall figure by eight.*

*When costs are calculated in this manner, the cost of responding to each FOI request separately should fall comfortably below the appropriate limit.*

### *(5) Your Failure to Offer Advice and Assistance*

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Assistant Director of Corporate Governance London Borough of Merton

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*I understand that, where a public authority invokes section 12 FOIA in its refusal to disclose answers to an FOI request, that public authority is under a duty to provide advice and assistance to help the requestor refine their request so that it can be dealt with under the appropriate limit.*

*I further understand that, even where a public authority does not invoke section 12, it remains under a general duty to provide advice and assistance pursuant to section 16 FOIA.*

*Such advice and assistance may include advice as to what proportion of the requested information could fall within the appropriate limit, and advice as to how an FOI request might be re-formulated so as not to exceed the appropriate limit.*

*Your Response fails to offer any such advice and assistance.*

### *Concluding Remarks*

*On the basis of the above, I re-iterate my request for an internal review.*

*I believe that, following the internal review, you should decide to provide answers to the FOI requests within My Correspondence, on the grounds that:*

*- you have failed to provide cogent evidence to support your refusal to answer my FOI requests;*

*- it is neither reasonable, nor sensible, nor realistic that the London Borough of Merton should fail to provide responses to my FOI requests where the London Boroughs of Bexley, Kingston-upon-Thames, Lambeth, Sutton and Wandsworth have been able to do so; and:*

*- you should treat My Correspondence as eight separate requests within one piece of correspondence, which should bring individual costs estimates down to an acceptable level.*

*Should you disagree with the points raised above, I look forward to receiving your reasons for such disagreement.*

*If relevant, I also look forward to receiving your advice and assistance regarding what proportion of the FOI requests within My Correspondence you will be able to answer within the appropriate limit, and/or regarding how I might re-formulate my FOI requests so as to stay within the appropriate limit.*

### *Review*

The information was refused under section 12. The Council does not require a standard report for this information and I am therefore satisfied that it would not be required to adapt its system to be able to provide it under FOI. However as part of the reviews process the Local Authority has reconsidered whether it would be able provide the

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information requested within the appropriate limit and it has now successfully been able to extract the information requested and provide answers to questions 1, 2, 5, 6, 7 and a partial response to question 8 within the appropriate limit. The answers to the questions are as follows:

1) For how many commercial properties within the London Borough of Merton have there been multiple applications for empty rates relief in the past three years with a time lapse of no less than approximately four and a half months between applications? - 5

2) For how many industrial properties within the London Borough of Merton have there been multiple applications for empty rates relief in the past three years with a time lapse of no less than approximately seven and a half months between applications? – 3

3) What are the addresses of the properties covered by your answers to questions (1) and (2) above?

(1) Section 41 exemption engaged please see below

(2) Section 41 exemption engaged please see below.

4) Who are the proprietors of the properties covered by your answers to questions (1) and (2) above?

(1) Section 41 exemption engaged please see below

(2) Section 41 exemption engaged please see below

5) For each proprietor covered by your response to question (4), what is their interest in the property (for example, freehold or leasehold)?

Not known

6) For each proprietor covered by your response to question (4), are they a Real Estate Investment Trust (REIT)?

Not known

7) If the applicants for empty rates relief for the properties covered by your answers to questions (1) and (2) above are not the proprietors of those properties, who are the applicants?

N/A

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Assistant Director of Corporate Governance London Borough of Merton

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8) For each of the properties mentioned in your answers to the questions above, on what date did the London Borough of Merton receive the most recent application for empty rates relief, and was such relief granted?

Property addresses withheld as section 41 exemption is engaged, dates are as follows:

(1)  
30.6.17  
1.11.15  
1.11.15  
31.10.15  
26.12.16

(2)  
23.3.17  
25.11.17  
13.1.18

The London Borough of Merton has not provided a response to questions 3 and 4 and has provided a partial response to question 8 withholding names and addresses.

Having considered ICO Guidance and Tribunal/ICO decisions I am of the view that the exemption provided by section 41 apply here.

Section 41 concerns information provided in confidence.

The section 41 exemption applies where information is provided in confidence. It states that 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

I am satisfied that the common law principle of tax payer confidentiality applies here.

Clearly information would have been supplied by or on behalf of the business to the local authority as a rating authority.

I have considered the Information Tribunal decision in The Higher Education Funding Council for England & Guardian News and Media Ltd. If the information was to be disclosed and a breach of confidence claim brought the local authority would not be able to make out the defence that disclosure was justified in order to serve the public interest. I feel that it is more than just arguable that a claim would be successful. In my view it would be successful.

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I am satisfied that the three point test in *Coco v Clark* is met – the information has the necessary quality of confidence, it was imparted in circumstances importing an obligation of confidence, and disclosure would be an unauthorised use of the information and to the detriment of the confider. I have also noted that the duty of confidence is not absolute and the courts recognise three circumstances under which confidential information may be disclosed – where the person to whom the duty of confidentiality is owed consents to the disclosure, where the disclosure is required by law, where there is an overriding public interest in disclosure. No consent has been obtained from individual business rate payers and I feel that it would be impractical to do so. The disclosure is not required by law and I am not satisfied there is an overriding public interest in disclosure in the absence of any allegations of wrongdoing or risk to the public on the part of the local authority. Ratepayers provide information to the local authority in confidence and there is an expectation that this confidence will be maintained. Taxpayer confidentiality is a long established principle of common law. I note in the HEFCE case that the Information Tribunal also referred to rights which may now exist under Article 8 of the European Convention on Human Rights

If you are dissatisfied with my decision then you may take the matter to the information Commissioner's Office at :

Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

Fax: 01625 524510

<https://ico.org.uk>

Please quote our reference given at the head of this letter in all correspondence

Yours sincerely

Claire Williams  
for Assistant Director Corporate Governance

E-mail: [claire.williams@merton.gov.uk](mailto:claire.williams@merton.gov.uk)

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Assistant Director of Corporate Governance London Borough of Merton

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