

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 April 2010

Public Authority: Craven District Council
Address: Council Offices
Granville Street
Skipton
North Yorkshire
BD23 1PS

Summary

The complainant requested information from Craven District Council relating to a compromise agreement between the Council and the outgoing Chief Executive Officer. The Council withheld this information on the grounds that section 40(2) of the Freedom of Information Act applied in that the information requested constituted the Chief Executive's personal data and to release it would breach the Data Protection Act. The Commissioner has investigated and is satisfied that the information is personal data and that disclosure would contravene the first data protection principle and therefore section 40(2) is engaged. He requires no remedial steps to be taken by the public authority.

The Commissioner's Role

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

Background

2. The request for information was born out of the complainant's concern over the misuse of public money by awarding large payouts to senior

management in local government. Recently the Audit Commission published a report on this matter. To read the report please follow the link below:

http://www.auditcommission.gov.uk/localgov/nationalstudies/bymutualagreement/Pages/default_copy.aspx .

3. During the course of the investigation, the Commissioner viewed both the Audit Commission's report and Craven District Council's own "Use of Resources, Audit 2008/09" report. The complainant highlighted these reports as evidence of the public interest in favour of disclosing the requested information.
4. The Commissioner has taken the Audit Commission's findings into account and notes the background to the report:

"Senior pay in the public sector has been a focus of media attention and public concern. This has included severance payments – compensation received by employees for early termination of their contracts. High-profile cases of council chief executives receiving large pay-offs have raised questions about whether taxpayers' interests are being protected."

The Request

5. On 30 June 2009 the complainant requested the following information from Craven District Council:

"I believe you are in possession of an agreement between the Council, and [named employee] entered into at the time [they] left employment of the Council as Chief Executive Officer. I believe also that such an agreement would contain the terms upon which [they] left [their] employment. Can you please confirm these two beliefs? If you hold such document (or documents), I hereby request that you provide me with a copy under the Freedom of Information Act."

6. The public authority provided a response on 01 July 2009 in which it confirmed the information was held. The Council refused to disclose the requested information citing the exemption contained in section 40(2) of the Act concerning personal data.
7. The complainant requested an internal review of the Council's decision to withhold the information on 11 July 2009.

8. On 21 August 2009 the Council wrote to the complainant with the details of the internal review. The Council upheld its original decision not to disclose the information under section 40(2) of the Act and expanded on its initial refusal notice by setting out a further eight points detailing why it was entitled to withhold the information.
9. The Council offered further responses to the complainant regarding its decision on 10 September and 25 September 2009. The responses restated its position regarding the refusal and enclosed copies of previous Decision Notices in favour of withholding personal data issued by the Commissioner in similar cases.

The Investigation

Scope of the case

10. On 24 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to investigate the arguments contained within the public authority's refusal of his request.

Chronology

11. The Commissioner commenced his investigation by writing to the public authority on 12 October 2009. He asked the Council to provide its arguments for withholding the information along with a copy of the withheld information.
12. On 15 October 2009 the Council responded to the Commissioner providing the following documents:
 - A copy of the compromise agreement
 - A copy of the exempt minute of the Policy Committee recording the decision taken at the meeting on 04 June 2008
 - A copy of the letter sent to the complainant explaining the reasoning as to why the information was considered to be exempt from disclosure.

Analysis

Exemptions

13. The full text of the relevant provisions of the Act referred to in this section is contained within the Legal Annex.
14. In considering whether the exemptions are valid, the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public.

Exemption: Section 40(2)

15. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied.
16. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would directly contravene any of the principles of the Data Protection Act 1998 (the DPA).

Is the information "personal data"?

17. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as:

"...data which relate to a living individual who can be identified

- a. from those data, or*
- b. from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

18. The Commissioner has viewed the information that was requested and is satisfied that the information relates to an identifiable living individual, in this case the outgoing Chief Executive. The Commissioner accepts that information about an individual's financial settlement and

contract with their employer is the individual's personal data as defined by the DPA.

19. Having concluded that the information falls within the definition of "personal data" the Commissioner has gone on to consider if disclosure of the information would breach the requirements of the first data protection principle. The first data protection principle states:

"Personal data shall be processed fairly and lawfully..."

The term "processing" has a wide definition and includes disclosure of the information under the Act to a third party.

20. In deciding what is fair the Commissioner considers the possible consequences of any disclosure on the data subject along with the data subject's reasonable expectations of how the data controller will treat/use their personal data. He balances this with the more general freedom of information principles such as accountability and transparency as well as any legitimate interests which arise on the specific circumstances of the case.
21. The Commissioner has taken the following factors into account:
- The terms of the compromise agreement between employer and employee
 - The consequences of disclosure
 - The Chief Executive's reasonable expectation of what would happen to their personal data
 - Balancing private and public life
 - The Chief Executive's position as a senior employee of the Council
 - Balancing the rights and freedoms of the data subject with legitimate interests in disclosure

Compromise agreement

22. The Commissioner believes that compromise agreements play an important role in employer/employee relationships. They avoid the time, expense and stress of litigation in an Employment Tribunal when an employer/employee relationship comes to an end. Such agreements provide the opportunity to conclude the relationship in private and allow both parties to make a fresh start if they choose. The Employment Rights Act 1996 established the opportunity for parties to reach a compromise agreement and has built safeguards into the process to ensure employees receive independent and accountable legal advice before entering in to such agreements. Indications of the

Council's intentions towards the Chief Executive's employment, details of the departure and any payment(s) made are included in the compromise agreement.

23. The Commissioner also believes that the right to access official information and the right to reach an equitable compromise in private when an employer/employee relationship comes to an end are not mutually exclusive. However, where a compromise agreement has been reached between a Council and a senior employee of that Council, a balance has to be struck between the public authority's duty to be transparent and accountable about how and why it decided to spend public money in a particular way, and its duty to respect its employee's reasonable expectations of privacy.

Consequences of disclosure

24. In looking at the consequences of disclosure the Commissioner has considered what those consequences might be and has then looked at other related factors. In this case the consequences of disclosure are less obvious or tangible than in some cases however it may still be unfair to disclose the information.
25. Disclosing details of a compromise agreement might well pose a risk to the data subject's chances of promotion or employment. The Commissioner has also taken into account that the data subject's emotional wellbeing may be affected by disclosure even though the distress or damage caused may be difficult to clearly evidence.
26. The Commissioner has looked at some related factors. The fact that some information about the Chief Executive's departure may have been and may still remain in the public domain could be argued to give weight to the further disclosure of information. However the details and terms of the compromise agreement were never made public. It is important to note that the Commissioner is concerned with additional damage or intrusion that disclosure would cause.
27. The extent to which disclosure can be said to remain in the public domain is also likely to affect the Commissioner's decision on fairness. For example a local news story may only stay in the public's consciousness for a short period whereas if the information is disclosed under the Act then disclosure is without restriction and there must be an assumption that the information could become part of a permanent and easily searchable/accessible source which may increase the unfairness of disclosure.

28. The Commissioner confirms there would be the risk of additional damage and intrusion caused by the release of the information in response to this request. The information would be disclosed a substantial number of months after the initial announcement was made about the departure of the outgoing Chief Executive Officer.

Reasonable expectations

29. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example privacy. It is accepted that every individual has the right to some degree of privacy and this right is so important that it is enshrined in Article 8 of the European Convention on Human Rights.
30. However, expectations are also shaped by a society where transparency and the Freedom of Information Act's presumption in favour of disclosure of information form part of its culture. This was recognised by the Tribunal in the case of *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016) where it was said that:

"...The existence of the FOIA [Freedom of Information Act] in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money." (para. 43)

31. The Commissioner has found no evidence in this case that the Chief Executive's expectations of privacy cannot be said to be objectively reasonable. There is no evidence to suggest that the Chief Executive expected or agreed that details of the compromise agreement would be disclosed. There is also no evidence that either party involved believed details of the compromise agreement were due to be or may be published at a future date. For these reasons the Commissioner holds that the Chief Executive's expectations of privacy are reasonable and weigh significantly on this case.

Private v Public Life

32. The Tribunal in *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* also commented on the distinction between a data subject's private and public life and commented that:

"...where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public

actions will be subject to greater scrutiny than would be the case in respect of their private lives..." (para. 78) and further that "...the interests of data subjects namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives" (para. 79).

33. Therefore, if an applicant requested information relating to the public/professional life of the data subject rather than their private life then it is more likely that it will be fair to disclose this type of information. However even if the information does relate to an individual's professional life, this does not mean that it will automatically be disclosed. For example there may be little expectation of privacy with regard to the data subject's work duties but there may still be an expectation that personnel details will not be disclosed.
34. In this case the Commissioner has considered whether information relating to a compromise agreement which might be deemed "HR information" (as for example details of pension contributions, tax codes, etc are) should remain private, even though such information arguably relates to an employee's professional life as well as to their personal life. The Commissioner believes that with regard to an employee's professional life it would be more likely to be deemed unfair to release details of an "HR" nature.

Seniority

35. The Information Commissioner's Office has produced Awareness Guidance on section 40 of the Act, which makes it clear that public authorities should take into account the seniority of employees when personal information about its staff is requested under the Act. The Commissioner takes the line that generally the more senior the role within the public authority the greater the weight in favour of disclosure will be.
36. The Commissioner's guidance "The Exemption for Personal Information" (version 3 11 November 2008) on the application of section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules it states that:

"Whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances) information about an individual's private life will deserve more protection than information about them

acting in an official work capacity. You should consider the seniority of their position, and whether they have a public-facing role. The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (e.g. the official's family)."

37. The Information Tribunal in *Rob Waugh v the Information Commissioner and Doncaster College* (EA/2008/0038) considered similar conditions relevant to those in this case. The Tribunal, in considering the concept of fairness under the first data protection principle, held that it was;

"...necessary to consider in terms of fairness what would be [the data subject's] reasonable expectations about the use and subsequent release of the material."

38. Similar to the current case, in EA/2008/0038, the settlement agreement between the public authority and data subject included a confidentiality agreement which limited the information that would be made available to the public about the termination of his employment. The Tribunal upheld this, giving rise to;

"...a reasonable expectation that no further information would be released."

39. The Commissioner confirms that in this case although the Chief Executive held one of the most senior roles at the public authority the expectations of privacy of the Chief Executive are objectively reasonable and outweigh the arguments for disclosure based on an employee's professional life.

40. The Commissioner has considered the nature of the requested information itself. The compromise agreement details personal, financial, contractual information. From the evidence provided in this case, the Commissioner has no reason to believe that disclosure of the information is within the outgoing Chief Executive's reasonable expectations. Disclosure would bring about the risk of additional damage and intrusion for the Chief Executive. As stated earlier in this notice, disclosure is not necessarily an automatic response to requests for information about senior officials. The compromise agreement includes a confidentiality clause (paragraph 15), which is binding on both parties adding further weight to the Chief Executive's reasonable expectations and the ultimate unfairness of disclosure.

Balancing the rights and freedoms of the data subject with legitimate interests

41. Although the exemption contained in section 40(2) if found to be engaged is absolute and therefore not subject to the public interest test, the Commissioner will still consider legitimate interests in favour of disclosure when conducting an investigation.

42. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure. This has been evident in cases for example involving MPs expenses (such as EA/2006/0015 & 0016) where on appeal the High Court stated:

"The expenditure of public money through the payment of MPs salaries and allowances is a matter of direct and reasonable interest to taxpayers."

43. It can be argued in this case that there is a strong public interest in knowing the terms of the compromise agreement and therefore how much public money was spent. However disclosing such details may deter parties in the future from entering into such agreements. As the Audit Commission's report stated, severance payments can also be in the public's interest:

"Reducing the number and size of severance payments may appear to be in the best interests of taxpayers, but quick, agreed departures can save public money. Dysfunctional relationships, or drawn-out legal disputes at the top of organisations, can have substantial negative effects on services. So, councils are permitted to agree payments on contract terminations as being in the 'efficiency of the service'."

44. The Commissioner believes that the legitimate interests of the public in knowing how much money is spent on settlements of this kind must be weighed against the individual's right to privacy. In the Decision in *Rob Waugh v the Information Commissioner and Doncaster College* (EA/2008/0038), the Tribunal concluded that the legitimate interests of the public in accessing the requested information were not sufficient to outweigh the data subject's right to privacy, particularly given the substantial detriment that would result from disclosure.

45. In the circumstances of this case the Commissioner finds that disclosure would contravene the first data protection principle. The Commissioner considers that the data subject had a reasonable expectation of privacy in particular in relation to details of their

departure from the Council's employment and to release the requested information would be unfair and be likely to cause distress to the data subject. He is therefore satisfied that the public authority were correct to refuse disclosure under section 40(2).

The Decision

46. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

47. The Commissioner requires no steps to be taken.

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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

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

Dated the 20th day of April 2010

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

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

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.