

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 June 2011

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
East Riding of Yorkshire
HU17 9BA

Summary

The complainant requested information relating to a particular council officer's remuneration package and early retirement. The Council disclosed some information but withheld other information using the exemptions under section 40(2) and 42(1) of the Freedom of Information Act 2000 ("the FOIA"). In relation to the latter exemption, the Council considered that the public interest did not favour disclosure. The Commissioner investigated and decided that some of the information had been correctly withheld using section 40(2) and section 42(1) however he considered that the Council should have disclosed two reports in their entirety along with the majority of another report and the majority of some notes written by the Chief Executive. He requires the Council to disclose this information within 35 days. The Commissioner found the Council in breach of section 1(1)(a), 1(1)(b), 10(1), 17(1) and 17(1)(a)(b) and (c) of the FOIA.

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 FOIA. This Notice sets out his decision.

Background

2. Employees of the Council may be members of the Local Government Pension Scheme. Each person's pension benefits will be unique to them depending on the contributions made over a period of time.

Regulations allow for an employer to use their discretion to allow employees who retire between the ages of 55 and 59 to access their pension and for an employer to augment a member's pension by a specified number of years. If a member retires early, there is an additional "strain" on the pension fund. The "strain" costs are the "strain" on the pension fund as a whole of allowing an employee to retire earlier than expected and be granted augmented service. To counter this, when an early retirement is proposed, an actuarial evaluation takes place to ascertain what contribution will be required by the employer in order to offset this additional strain on the fund.

3. Ms Lockwood was the Council's Director of Corporate Resources and she applied for early retirement. The early retirement policy that applied at the time of her retirement was publicly available. Applications for early retirement at Head of Service level and above are considered by the Cabinet of the Council. In this case, a report was prepared for a Cabinet meeting on 16 March 2010 setting out the "strain" cost of allowing the early retirement. The Cabinet resolved to approve the application. Cabinet decisions may be "called-in" by councillors. This has the effect of suspending implementation of a Cabinet decision until the submission of a report to the appropriate Overview and Scrutiny Committee. On 25 March 2010, the Corporate Issues Overview and Scrutiny Committee considered the application at a meeting and resolved to refer the matter back to the Cabinet with a recommendation that the decision should be reviewed. The Cabinet considered the application again on 13 April 2010 and it was resolved that the application should be granted.

The Request

4. On 30 April 2010, the complainant requested information from the Council in the following terms:

"My request for information concerns the recently announced remuneration packages which the East Riding of Yorkshire Council (ERYC) have allegedly agreed to pay Ms Susan Lockwood (or Mrs [reference to husband]) for taking early retirement.

I wish to be supplied in hard paper copy form, all recorded information, E-mails, Council meeting minutes, research & reports held by you in whatsoever files concerning the granting of this Council Officers retirement package.

Together with the reasons if any for early retirement

My understanding is that ERYC Cabinet have agreed to pay Susan Lockwood the sum of [figure] for taking early retirement.

I wish to be supplied also with details of the Officers current gross remuneration package which should include, salary, car allowances and the like."

5. The Council responded on 28 May 2010, explaining that it had received the request on 3 May 2010. It supplied details of the officer's remuneration package and provided a link to its website where council minutes could be accessed. In relation to the remaining information, the Council advised the complainant that it believed it was exempted from having to confirm or deny whether it holds the information in accordance with section 40 of the FOIA. The Council then went on to consider the request for reports in particular. It confirmed that it held this information but again stated that it was exempt under section 40 of the FOIA.
6. On 1 June 2010, the complainant requested an internal review of the Council's decision.
7. On 9 June 2010, the Council responded. It referred to the information it had provided and confirmed that it held other information in the form of reports to Cabinet and the Overview and Scrutiny Committee. It confirmed that this information was exempt under section 40(2). This response did not address the refusal to confirm or deny whether any other information was held.

The Investigation

Scope of the case

8. On 10 June 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner understood that the complainant wished him to consider whether the Council had correctly refused to provide him with the information he had requested. The complainant sent a letter to the Commissioner on 19 November 2010 which outlined more clearly the details of his complaint. He specifically complained that:
 - The Council had not provided him with all the information he asked for
 - Ms Lockwood's refusal to disclose the information was not in itself a sufficient reason for maintaining the exemption
 - The Council had not complied with his request for hardcopy information as it had provided a link to its website

9. During the course of the Commissioner's investigation, the Council provided hardcopies of the relevant minutes on its website. The Commissioner therefore considers that this informally resolved point 3 of the complaint above and it has not therefore been addressed in this Decision Notice.

Chronology

10. On 11 August 2010, the Commissioner sent a standard letter to the Council asking for copies of the withheld information.
11. The Council replied on 3 September 2010. Along with background information, the Council supplied two bundles of information labelled Appendix 2 and 3 which the Commissioner understood represented the withheld information. The Council said that Appendix 2 contained reports considered by the Cabinet on 16 March 2010 and 13 April 2010 and a report considered by the Corporate Issues Overview and Scrutiny Committee on 25 March 2010. Appendix 3 contained other information such as emails and letters relating to the individual application to retire. The Council provided further supporting arguments relating to the exemption under section 40(2) of the FOIA.
12. On 12 November 2010, the Commissioner wrote to the complainant to set out his understanding of the request and to ask for clarification regarding the precise details of the complaint.
13. On 19 November 2010, the complainant replied to the Commissioner and clarified the details of his complaint. He also provided background information.
14. On 24 November 2010, the Commissioner wrote to the Council. He asked the Council to consider providing the information on its website directly to the complainant in hard copy form as this was the preference that he had expressed in his original request. The Commissioner set out his understanding of what information had been withheld and he also asked for further supporting arguments. The Commissioner said that it appeared as if the Council had incorrectly stated that it was unable to confirm or deny whether all the information was held in its original refusal and he asked the Council to confirm that this was the case. The Commissioner also asked the Council to consider whether it could disclose redacted versions of the reports to the Cabinet and the Corporate Issues Overview and Scrutiny Committee.

15. On 13 January 2011, the Council responded to the Commissioner. It provided background information to the request and further supporting arguments. It confirmed that the reference to a refusal to confirm or deny whether information was held had been made in error. Regarding the information that the Commissioner had believed comprised the withheld information in this case, the Council indicated that some documents had been included as "background" although they did not fall within the scope of the request as they were created after the date of the request. The Council also stated that it was unwilling to consider disclosing a redacted version of the reports.
16. On 18 January 2011, the Commissioner wrote to the Council asking it to clarify, for the avoidance of any doubt, which documents fell within the scope of the request.
17. On 1 February 2011, the Council replied to the Commissioner and supplied a schedule itemising the information that it believed fell within the scope of the request. A significant amount of the information that was originally provided to the Commissioner was scoped out of the investigation at this stage as it post-dated the request. For clarity, the Commissioner can only consider information that was held at the time of the request.
18. On 10 February 2011, the Commissioner spoke to the Council during a telephone call and clarified that the Council had confirmed that the strain cost figure leaked to the media was correct.
19. On 14 February 2011, the Commissioner wrote to the Council again to check that no further information was held at the time of the request. In particular, the Commissioner asked whether there were any more minutes setting out in more detail how and why the decision was made as he noted that the minutes identified seemed fairly brief.
20. On 28 February 2011, the Council replied to the Commissioner and confirmed that while there were no further minutes, it had held at the time of the request some notes of a Cabinet discussion relating to the decision which were written by the Chief Executive. The Council said that these had no "official status". The Council did not indicate what its position was regarding the disclosure of this information under the FOIA.
21. The Commissioner wrote to the Council on 1 March 2011. He asked if the Council could confirm whether it accepted that the information fell within the scope of the request. He pointed out that the FOIA covers all recorded information held by a public authority and he asked the Council to confirm that no further information was held that fell within

- the scope of the request. He also asked the Council to confirm whether it was seeking to withhold the notes and if so, to provide rationale.
22. The Council replied to the Commissioner on 16 March 2011. It apologised that the notes had not been identified earlier and it confirmed that no further information falling within the scope of the request was held. It explained that it wished to withhold the notes in their entirety and its reasons for relying on section 40(2) were essentially the same as those already presented. The Council also indicated that it wished to rely on section 42(1) of the FOIA but it did not identify precisely what information it wished to apply this exemption to and it did not provide appropriate rationale, including its considerations in respect of the associated public interest test.
 23. On 21 March 2011, the Commissioner wrote to the Council again asking it to provide a clearer description of why it believed some information should be withheld under section 42(1).
 24. The Council replied to the Commissioner on 28 April 2011 and identified the information to which it had applied the section 42(1) exemption. It also provided some rationale for applying the exemption and finding that the public interest did not favour disclosure.
 25. On 4 May 2011, the Commissioner telephoned the Council. He pointed out that the Chief Executive's notes appeared to be incomplete and at one point appear to invite input from other people. The Council said that the notes were never completed and that no comments on the notes were received.

Analysis

Exemption

Section 42(1) – Legal professional privilege

26. Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
27. The principle of legal professional privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two categories of privilege: advice privilege (where no litigation is contemplated or pending) and litigation privilege (where litigation is underway or anticipated). In this case, the Council argued that a limited amount of

information on page 4 of the notes was covered by legal advice privilege.

Does the information attract legal professional privilege?

28. The Commissioner was prepared to accept that the information was covered by legal advice privilege. Having inspected the information, the Commissioner accepts that the notes record a verbal request for legal advice and a verbal response from a qualified solicitor. The Council also confirmed that the information had not been shared in circumstances where it would cease to be confidential. In the absence of evidence to the contrary, the Commissioner accepts this position.

Public interest arguments in favour of disclosing the requested information

29. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
30. In addition to the above general considerations, the Commissioner also accepts that there is a strong public interest in understanding how decisions are reached within public authorities that affect the expenditure of public funds. The Commissioner notes that disclosure of the information would provide more information about the Council's detailed considerations when arriving at the decision to approve the early retirement.

Public interest arguments in favour of maintaining the exemption

31. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to full informed, realistic and frank legal advice, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

32. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023) when it described legal professional

privilege as, “a fundamental condition on which the administration of justice as a whole rests”.

Balance of the public interest arguments

33. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to decisions that affect a considerable amount of public money. The Commissioner accepts that in this case, the disclosure of the privileged information would help the public to understand more about the Council’s detailed considerations in relation to this decision.
34. However, having regard to the particular information in question, it was not the Commissioner’s view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the Council’s right to consult with its lawyers in confidence. The Commissioner accepts that the disclosure of privileged information would more probably than not undermine the important common law principle of advice privilege and therefore undermine the course of justice in general. It is important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear or doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. In the Commissioner’s view, the content of the information itself would not add to the public understanding of this matter to the extent that it would justify its disclosure.
35. Further, having considered the nature of the information, the Commissioner can see no obvious signs of wrong-doing or evidence that the Council misrepresented the legal advice it received. The Commissioner also notes that the legal advice was sought at the Cabinet meeting of 13 April 2010 and is therefore still particularly recent.
36. Taking into account all the circumstances, the Commissioner did not consider that the public interest in disclosure of the privileged information was strong enough to equal or outweigh the strong rationale for upholding the exemption. For clarity, in view of this finding, the Commissioner did not find it necessary to consider whether this information was also exempt under section 40(2). His considerations below do not relate to this information.

Section 40(2) – Third party personal data

37. This exemption provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 2 of the Data Protection Act 1998 (“the DPA”).

Is the withheld information personal data?

38. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
39. The Commissioner considered the withheld information in this case. He notes that the Council has withheld reports which concern the Council’s considerations in relation to the former Director’s early retirement (appendix 2). The Commissioner was therefore prepared to accept that the minutes as a whole relate to the former Director and therefore represent her personal data. The Council also withheld a bundle of other information (appendix 3) containing information relating to the retirement of the former Director. Having considered this information, the Commissioner was satisfied that it all relates to the former Director and therefore represents her personal data. Finally, at a late stage in the Commissioner’s investigation, the Council identified that it held some notes relating to the discussions concerning the former Director’s early retirement. The Commissioner was satisfied that these notes comprise the personal data of the former Director.

Would disclosure breach the Data Protection Principles?

40. The Data Protection Principles are set out in Schedule 2 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner’s considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

41. The Council argued that disclosure of the withheld information would not be within the reasonable expectations of the former Director and that she had not consented to the disclosure. It explained that since 1998, 126 members of staff, at varying levels of seniority, had been granted early retirement and in all of those cases, the details of the early retirement arrangements have remained private. It stated that the former Director would therefore have expected her application to

be treated in the same way. This would have been confirmed by the Council's decision to classify the reports to the Cabinet and Corporate Issues Overview and Scrutiny Committee as exempt under section 12A of the Local Government Act 1972 ("the LGA") in accordance with standard procedures.

42. The Council recognised that in the case of senior public servants, their legitimate expectations of privacy may sometimes be qualified or carry less weight. It said that it understood that the rationale behind this is that the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions or decisions related to the expenditure of significant amounts of public funds. However, it said that the information did not relate to any policy decision taken by the former Director and that pension information is generally considered to be a private and confidential matter, even amongst senior people.
43. There are a few points that the Commissioner would like to make regarding the above arguments. Although a lack of consent is indicative of what the expectations of an individual were, the Commissioner will consider on a case by case basis whether it was *objectively reasonable* to expect that the information would not be disclosed to the public. A lack of consent in itself does not prevent the disclosure of personal data under the FOIA.
44. Further, it will not be sufficient to argue that an individual would not have expected disclosure of information purely because it has been classified as an exempt item under the LGA or because it has never previously been disclosed. Under the FOIA, the Commissioner will consider whether the disclosure of personal data will breach the Data Protection Principles in the DPA. If it would, the information will be exempt under section 40(2) of the FOIA. However, neither the LGA nor the fact that a public authority has never previously disclosed the information prevent the Commissioner from finding that information would not be exempt under the FOIA and that it should therefore be disclosed. For clarity, Part VA of the LGA, sections 100A to 100K, concern what information local government authorities must make available to the public and how. Schedule 12A of the LGA lists the information that is exempt from the requirements of Part VA, and not information that is exempt from disclosure under any other regime.
45. Amongst other circumstances, the seniority of the individual concerned will be relevant as senior individuals generally expect greater levels of transparency. The Commissioner does not accept the point put forward by the Council that because the information does not concern a policy decision by the former Director, her seniority is not relevant. The

former Director's decision to request early retirement resulted in a decision by the Council which involved public money. In the Commissioner's view, senior individuals should be more accountable for the decisions they make which have an impact on public funds, particularly where that decision is not part of the normal course of business. The Commissioner therefore considers that it is appropriate to have regard to the seniority of the former Director when considering whether disclosure of the information would have been within her reasonable expectations.

46. The Commissioner accepts that as a matter of general principle information relating to pensions and retirements will often carry a strong expectation of confidentiality. However, in making his decision about whether disclosure would have been within the reasonable expectations of the former Director, the Commissioner will have regard to the actual information in question as opposed to focusing purely on what type of information it is.
47. The Commissioner carefully considered the above arguments, the nature of the withheld information and the context of the request. His considerations have been separated out below into three categories, the first dealing with the withheld reports, the second dealing with the information from appendix 3 relating to the retirement and the third dealing with the Chief Executive's notes that were identified by the Council at a late stage in the Commissioner's investigation.

The withheld reports in Appendix 2

48. Regarding the Cabinet report dated 16 March 2010, the Commissioner noted that the majority of the first page of this report contained information that was already in the public domain by virtue of the publicly available minutes of the same date. As such, the Commissioner does not consider that disclosure of the same information within the Cabinet report would have been outside the reasonable expectations of the former Director. Regarding the remainder of the information in this document, the Commissioner noted that, with the exception of the strain cost figure, the information is quite general in nature and he does not consider that disclosure of information of this type should have been beyond the reasonable expectations of the former Director in view of her senior position and the fact that the decision to allow her early retirement involves public money.
49. As regards the strain costs figure, the Council explained to the Commissioner that this was already in the public domain by the time of the request because of a leak to the media. It explained that it had

also confirmed to the media that the figure was correct by the time of the request because it had wanted to correct misleading media statements that the figure had been paid as a lump sum to the former Director. The Commissioner's view is that because the Council had confirmed that the figure was correct by the date of the request, thereby officially putting this information into the public domain, it can not now be argued that disclosure at the time of the request would have been outside of the reasonable expectations of the former Director.

50. Regarding the report to the Corporate Issues Overview and Scrutiny Committee dated 25 March 2010, the Commissioner again noted that a significant amount of the information in this report had already been put into the public domain by virtue of the public minutes of the same date. He does not therefore accept that disclosure of the same information in the report would have been beyond the reasonable expectations of the former Director at the time of the request. As with the Cabinet report discussed above, the Commissioner was not persuaded that disclosure of any of the information that was not in the public domain would be outside the reasonable expectations of the former Director because of its general nature and in view of her senior position and the fact that the decision involved public money.
51. Regarding the Cabinet report dated 13 April 2010, the Commissioner again noted that a significant amount of the information in this report had already been put into the public domain by virtue of the public minutes of the same date. He does not therefore accept that disclosure of the same information in the report would have been beyond the reasonable expectations of the former Director at the time of the request. The remainder of the report is mainly concerned with drawing to the attention of the Cabinet the matters which are felt to be relevant to its decision-making. The Commissioner notes that a large proportion of this information is again quite general in nature. Some of it is alluded to in the public minutes as "background to the scheme, the financial and other benefits which it had secured since its introduction". Given the general nature of this information, the Commissioner was not persuaded that disclosure should have been outside the reasonable expectations of the former Director given her seniority and the fact that the decision involved public money.
52. The remaining information focuses more precisely on the application of the former Director although the Commissioner does not consider that it is particularly sensitive when compared with other withheld information such as a pension estimate and the reasons for seeking early retirement. The Commissioner carefully considered this information. In reaching the conclusion that the disclosure of the

majority of the information should have been within the reasonable expectations of the former Director, the Commissioner has attached significant weight to the seniority of the former Director and the amount of public money involved. He has also had regard to the current economic climate and the increased pressure on public authorities to make the best use of their resources. Against this background, the Commissioner considered that the former Director ought to have expected that it was likely that the Cabinet would be called upon to be as transparent as possible about the information it took into account when making the decision to allow the early retirement.

53. The Commissioner notes that the strain cost figure also appears in this report. For the reasons already given in paragraph 49, the Commissioner did not consider that disclosure of this figure would have been outside the reasonable expectations of the former Director by the time of the request.
54. The Commissioner was prepared to accept that there was a small amount of information within the report that the former Director could reasonably expect not to be disclosed to the public. This information is contained within paragraph 3.3 of the report. It is the date when the former Director met the qualifying criteria for taking early retirement and the date when she had completed the minimum years of pensionable local government service in order to allow an early retirement as well as the number of years and days of pensionable service attained. This Commissioner considered that although it ought to be within the reasonable expectations of the former Director that the Council would confirm she met the qualifying criteria, it would not be within her reasonable expectations for this very precise pension-related information to be disclosed as such details would in the Commissioner's view attract a legitimate expectation of confidentiality, particularly given the very limited public interest in the disclosure of such details.

The withheld information in appendix 3

55. The withheld information consists of emails, letters and print outs. The Commissioner carefully considered the nature of this information and formed the view that the former Director would not reasonably have expected this information to be disclosed. The information is largely of an administrative nature relating to the Council processing the request for early retirement and it includes information that is of a very personal and private nature, such as a pension estimate and the former Director's reasons for wishing to take early retirement.

56. Although the former Director was obviously in a senior role and the decision to take early retirement involved public money, the Commissioner's view was that while he considers that there should have been a reasonable expectation of disclosure in respect of the majority of information in reports that form part of the decision-making process, he considers that the former Director's reasonable expectations would have been very different in respect of the information in appendix 3 which is largely of an administrative nature and which include particularly personal details about the former Director's individual pension and retirement. The Commissioner considered that no public sector employee would have the reasonable expectation that information of this nature and containing this level of personal detail would be disclosed to the public.

The Chief Executive's notes

57. The withheld notes were written by the Council's Chief Executive and they concern the discussions that took place at the Cabinet Meeting held on 13 April 2010. The Commissioner carefully considered the notes and decided that the former Director could not reasonably have expected the majority of the information to be withheld given her senior position and the large amount of public money involved. Again, the Commissioner noted that much of the information was quite general in nature and some had already been put into the public domain through the publicly available minutes. The Commissioner considered that the disclosure of a limited amount of information would not have been within the reasonable expectations of the former Director. In particular, the Commissioner noted that the Chief Executive had made some comments within the notes that focused on the former Director's personal circumstances on the second and last page of the notes.

Consequences of disclosure

58. As already mentioned in this notice, the Council explained to the Commissioner that prior to the request, information had been leaked to the media. The Council stated that the strain cost reported in the media was referred to as a payment into the former Director's pension fund and as a "lump sum". A council spokesman was quoted in the media explaining that the figure was to be paid into the pension scheme and was not a lump sum payment to the former Director personally. It said that this did not however prevent further articles and internet comments reporting the payment as if it had been paid directly to the former Director. The Council said that the reporting focused on the former Director and revealed details of her private life. The Council said that the matter also became a political issue in the

run up to the General Election. The Council highlighted that there had been multiple highly offensive personal attacks on the former Director's character following her decision to take early retirement. It said that on one occasion the comments facility on a local newspaper website had to be suspended because of the defamatory nature of the comments being made. It was able to provide many examples of the comments that had been made.

59. The Council pointed to the above as evidence that disclosure of information relating to the decision is likely to reignite personal criticism of the former Director and that this could be distressing to her. It also argued that the disclosure would be distressing because it would be outside her reasonable expectations.
60. The Commissioner has already set out above that he does not consider that disclosure of the vast majority of the information in the reports would have been outside of the reasonable expectations of the former Director. However, he appreciates the point made by the Council that the former Director has already endured a large amount of very offensive comments and criticism. He can appreciate therefore that disclosure of any additional information relating to this matter may prompt further criticism which may be directed at the former Director as an individual. He appreciates that this may be distressing to her. In relation to the remaining information, as the Commissioner considers that disclosure would not have been within the reasonable expectations of the former Director, he considers that the disclosure would be distressing because it would represent an unwarranted invasion of her privacy.

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

61. The Commissioner has considered below the legitimate public interest in the disclosure and he has balanced this against the reasonable expectations of the former Director and the consequences of disclosure.
62. The Commissioner's view is that there was a legitimate public interest and value in allowing the public to see the entire reports in appendix 2 (with minor exceptions) and the Chief Executive's notes of the Cabinet meeting at which the decision was made (with some redactions) in order to be transparent about the level of detail that was presented to the decision-makers at each stage of the process, particularly in view of the former Director's seniority, the fact that the decision involved public money in a difficult economic climate and the Commissioner's

finding that disclosure should not have been outside her reasonable expectations.

63. The Commissioner carefully considered the potential that disclosing further information about this particular issue may prompt some further personal criticism of the former Director. However, it was the Commissioner's view that because of the fairly general nature of the majority of the information and the passage of time, he did not consider that this would be likely to inflame the situation significantly. The Commissioner considered that there was a greater possibility that disclosure of the Chief Executive's detailed notes may bring about further personal criticism of the former Director, however, the Commissioner noted that this meeting was a crucial one in the decision-making process and involved a substantial amount of detailed input from elected representatives. Given the importance of this input in determining how public money was spent and the fact that it involved the opinions of various elected representatives, the Commissioner considered that the public interest in disclosing this information outweighed the legitimate interest of the former Director in this particular case.
64. With regard to the information in appendix 3, as already described above, the Commissioner's view is that the disclosure of this information would not have been within the reasonable expectations of the former Director and as such it would have been distressing to her, particularly in relation to the more personal elements of this information such as her pension estimate and her letter setting out the reasons why she wished to take early retirement. It is in the public interest for public authorities to be transparent and accountable and there is therefore always some public interest in the disclosure of information held by a public authority. However, the Commissioner considers that when taken together, the lack of a reasonable expectation of disclosure and the distressing effects of that disclosure outweigh the legitimate public interest in disclosure. In the Commissioner's view, while there is a significant legitimate public interest in disclosure of the information relating to the decision-making process, the Commissioner did not consider that the legitimate interest in disclosure of the information in appendix 3 was particularly strong.

Would the disclosure be necessary?

65. For clarity, when a disclosure would be fair, the Commissioner must consider whether it would be necessary in accordance with Condition 6 in Schedule 2 of the DPA. The full wording of Condition 6 is as follows:

"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".

66. The Council explained to the Commissioner that it was of the view that it had been sufficiently transparent about the matter and that it was not necessary to disclose any more information. It highlighted that at the time of the request, the minutes of the Cabinet meeting on 16 March 2010 and 13 April 2010 were publicly available on its website, as were the minutes of the Corporate Issues Overview and Scrutiny Committee on 25 March 2010. It also explained that a document called A "Statement of Policy on the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2008" was in the public domain which set out the Council's policy on early retirement and augmentation. A report to Cabinet dated 2 March 2010 entitled "Monitoring Report – Early Retirements LGPA" was in the public domain which gave a statistical overview of early retirements granted in the period of April to December 2009 and the costs to the Council. The Council had also commented upon the strain costs figure which had been leaked in an attempt to correct inaccurate reporting.
67. As well as the above, the Council explained that at a meeting on 7 April 2010, a "cross-party" review panel was asked to review the early retirement scheme. The review panel examined in detail the reasons for having an early retirement scheme and the way in which such a scheme should operate. The panel met on eight occasions and produced a set of five recommendations which were accepted by the full Council. This document is now available on the Council's website although it had not been published at the time of the request.
68. The Commissioner accepts that the Council had taken, or intended to take, significant steps towards transparency by the date of the request in relation to this particular issue and the general issue of allowing employees to take early retirement. The Commissioner also notes that a significant amount of the withheld information had already been put into the public domain or was quite general in nature. However, the Commissioner remains of the view that there was a strong legitimate public interest in the disclosure of the majority of the information within the actual reports and notes which formed the decision-making process to allow the public to understand more about how this particular decision was made. In the Commissioner's view, this legitimate interest cannot be sufficiently met through alternative means.

Was the exemption under section 40(2) engaged?

69. For the reasons provided above, the Commissioner considered that section 40(2) had been correctly applied to the information in appendix 3. However, the Commissioner did not consider that section 40(2) had been correctly applied to any of the information in the Cabinet report dated 16 March 2010 or the report to the Corporate Issues and Overview and Scrutiny Committee dated 25 March 2010. He also considered that section 40(2) had not been correctly applied to the majority of the information in the report to Cabinet dated 13 April 2010 with the exception of the information described in paragraph 54. In relation to the Chief Executive's notes, the Commissioner considered that section 40(2) had not been correctly applied with the exception of some comments made on the second and last page of the notes.

Procedural Requirements

70. The Commissioner considers that the Council breached section 10(1) of the FOIA because when it responded to the request, it failed to confirm that it held information that was relevant to the request in accordance with its obligation under section 1(1)(a) other than the publicly available minutes and the reports. As it still had not done this by the time of its internal review, it breached section 1(1)(a).
71. As the Commissioner considered that the Council incorrectly applied the exemption under section 40(2) to withhold some information, he has found the Council in breach of section 1(1)(b) and 10(1) of the FOIA for its failure to provide the information within 20 working days of the request or by the date of its internal review.
72. The Commissioner also finds the Council in breach of section 17(1) and 17(1)(a)(b) and (c) for its failure to rely on the exemption under section 42(1) within 20 working days or by the date of its internal review.

The Decision

73. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the FOIA:
- It correctly withheld some information from the report to Cabinet dated 13 April 2010 and the Chief Executives notes of this meeting using the exemption under section 40(2) of the FOIA.

- It correctly withheld the information in appendix 3 using the exemption under section 40(2)
 - It correctly withheld some information from the Chief Executive's notes using the exemption under section 42(1) and correctly determined that the public interest favoured maintaining the exemption.
74. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:
- The Council breached section 10(1) of the FOIA because it failed to confirm that it held information relating to the request other than the publicly available minutes and the reports. As it did not correct this failing at the internal review stage, it also breached section 1(1)(a).
 - The Council incorrectly withheld the report to Cabinet dated 16 March 2010, the report to the Corporate Issues Overview and Scrutiny Committee dated 25 March 2010 and the majority of the report to Cabinet dated 13 April 2010 and the Chief Executive's notes on this meeting using section 40(2) of the FOIA. It therefore breached section 1(1)(b) and 10(1) of the FOIA.
 - The Council failed to rely on the exemption under section 42(1) within 20 working days or by the date of its internal review. It therefore breached section 17(1) and 17(1)(a)(b) and (c) of the FOIA.

Steps Required

75. The Commissioner requires the public authority to take the following steps to ensure compliance with the FOIA:
- Disclose to the complainant the report to Cabinet dated 16 March 2010 and the report to the Corporate Issues Overview and Scrutiny Committee dated 25 March 2010.
 - The Council should disclose to the complainant the report to Cabinet dated 13 April 2010 but it should redact the date when the former Director met the qualifying criteria which is mentioned in paragraph 3.3 of the report and the date and time period relating to local government pensionable service contained at the end of the last sentence in the same paragraph.

- The Council should also disclose the Chief Executive's notes with the exception of the following information:
 1. Information found on the second page, second paragraph, beginning of sentence on line 5 until end of that sentence on line 8.
 2. Information found on the second page, entire third paragraph
 3. Information found on the fourth page under the Councillor's name at point 3.
 4. Information found on the last page, fourth paragraph, end of the last sentence in the paragraph from "...and the".
76. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

77. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

78. 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 sent.

Dated the 15th day of June 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex – Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Effect of Exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Exemption

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