

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2013

Public Authority: East Herts Council
Address: The Causeway
Bishop's Stortford
Hertfordshire
CM23 2EN

Decision (including any steps ordered)

1. The complainant has requested an internal Council report containing details of the financial settlement reached between the Council and the former Chief Executive following her departure from the Council. The Council provided the complainant with a heavily redacted copy of the report but withheld the majority of the information (including the financial details) under section 40(2).
2. The Commissioner's decision is that East Herts Council (the Council) has correctly applied section 40(2) to the information requested.

Request and response

3. On 9 February 2012, the complainant wrote to Council and requested information in the following terms:

'I've also previously asked [name redacted] if it would be possible to see the Part II report on [name redacted] that went to the human resources committee with any confidential information redacted? He said he would see what he could do. This may mean you provide a document with large amounts of text blanked out but it would be better than nothing as I'm sure not every word breaks the confidentiality agreement or belongs in Part II and it would demonstrate your stated wish to be transparent as feasibly possible'.

4. The Council responded on 8 March 2012. It stated that the requested information was exempt from disclosure by virtue of legal professional privilege. Although the Council incorrectly cited section 43 (prejudice to commercial interests) it was clear from the response that the Council was actually applying the section 42 (legal professional privilege) exemption.
5. Following an internal review the Council wrote to the complainant on 3 April 2012. The Council provided the complainant with a heavily redacted copy of the report. The review upheld the application of section 42 to the remaining information and advised that it was also exempt from disclosure under section 40(2).

Scope of the case

6. The complainant contacted the Commissioner on 18 May 2012 to complain about the way his request for information had been handled. In discussions with the Commissioner the complainant explained that the information he was seeking from the report was not information pertaining to the personal health circumstances of the former Chief Executive, but information concerning her flexible retirement agreement (which had previously been reported in the local press). Essentially, the complainant wanted to know how much the Council had paid the former Chief Executive as a result of the agreement and how much she had paid back, if anything, as a result of her leaving the Council earlier than anticipated.
7. Mindful of his data protection responsibilities the Commissioner has first considered the Council's use of section 40(2) to withhold the requested information. The Commissioner had sight of the un-redacted report requested by the complainant.
8. The scope of the Commissioner's investigation has therefore been to determine whether the Council were correct to withhold the information in the report that related to the flexible retirement agreement in the context of the former Chief Executive's subsequent departure from the Council.

Reasons for decision

9. Section 40(2) of FOIA 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 second condition below is satisfied'.*

10. 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 –*
- (b) *any of the data protection principles'.*

Is the information 'personal data'?

11. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the Data Protection Act 1998 (DPA). In this instance, the Commissioner agrees that information about an individual's financial settlement and the terms of their leaving a public authority's employment is personal data as defined by the DPA.

Does the disclosure of the information contravene any data protection principles?

12. The Council has contended that disclosure of the former Chief Executive's severance details would contravene the first data protection principle.

13. The first data protection principle states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) *at least one of the conditions in Schedule 2 is met, and*
- (b) *in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met'.*

14. In deciding whether disclosure of personal data would be unfair in this case the Commissioner has taken into account the following factors:

- The existence of a compromise agreement between the former Chief Executive and the Council.

- The former Chief Executive's reasonable expectation of what would happen to their personal data.
- The former Chief Executive's prior senior position at the Council.
- What damage of distress would the former Chief Executive suffer if the information was disclosed?
- The legitimate interests of the public in knowing the amounts of public money being spent by the Council.

The existence of a compromise agreement

15. The Commissioner has had sight of the confidential Human Resources report requested by the complainant and the compromise agreement to which the report relates. The report was presented to the Council's Human Resources Committee and contains information concerning the terms of the compromise agreement, including the financial details sought by the complainant. To all intents and purposes therefore, the report (the actual information requested) is indistinguishable from the compromise agreement to which it relates.
16. As the Commissioner has previously stated (see FS50419393) he considers 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 so 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 into such agreements. In this instance, details of the reasons for the former Chief Executive's departure and any payment(s) made to them are included in the compromise agreement.
17. The Commissioner also believes that the right to access official information and the right to reach an equitable compromise 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 a 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 employees' reasonable expectations of privacy.

Reasonable Expectations

18. In 2010 the former Chief Executive entered into a flexible retirement arrangement with the Council. The details of this arrangement were put in the public domain and the pension strain costs (the difference between the estimated cost to the pension fund of early payment of the pension and the estimated saving to the fund by the reduction in pension benefits) were £92,643, or £33,325 per year over 3 years. The flexible retirement arrangement was reported in the local press and reference was made to a report to the Council Human Resources of 1 March 2010 in which it was stated that:

'A key argument put forward in support of approval of the application is that this will secure the retention in post of the incumbent. 'A' is prepared to enter into an agreement to underwrite their commitment to remain with the Council. The agreement would provide for 'A' to pay a monetary amount to the Council in the event they, by their choice, do not remain with the Council until the salary saved has offset the strain costs'.

Importantly, the proposed form of agreement was set out in a confidential part of the report agenda.

19. On 20 January 2012 the Council publicly announced that the former Chief Executive would be leaving the Council. In responses to press enquiries in late 2011 and January 2012 the Council had confirmed that the former Chief Executive was on sickness leave. The Council's announcement read as follows:

'The Council wishes to thank [name redacted] for the significant contribution she has made as Chief Executive. [name redacted] was dedicated to improving the quality of services provided to the residents of East Herts. [name redacted] successfully implemented a number of important initiatives which have greatly benefited local people. Despite the difficult economic climate, she ensured that the Council has been able to achieve significant cost savings and at the same time improve services to customers'.

20. In *Rob Waugh v the Information Commissioner and Doncaster College (EA/2008/0038)*, the Information Tribunal, when considering a case similar to the present case and 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'*. In the Waugh case, as here, 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 found that this gave rise to *'a reasonable expectation that no further information would be released'*.

21. The Tribunal held that, even in the public sector, there is an expectation that information subject to compromise agreements should be accorded privacy, particularly where there is no evidence of wrongdoing or criminal activity. It is clear, from submissions provided to the Commissioner by the Council and from information already publicly disseminated by the Council, that the Chief Executive's departure was prompted by health reasons rather than conduct or performance issues.
22. The Tribunal's findings in the Waugh case were recently reaffirmed in *Trago Mills (South Devon) Limited v The Information Commissioner and Teignbridge District Council (EA/2012/0028)*. In *Trago Mills* the Tribunal upheld the Commissioner's decision in FS50419393 that disclosure of the details of a severance agreement would be unfair and thus contravene the first data protection principle. The Tribunal stated that:

'Even without an express confidentiality provision, an individual would have a reasonable expectation that the terms on which his employment came to an end would be treated as confidential. The question we have to consider is, not whether X's severance package was a private transaction (it clearly was), but whether the factors in favour of disclosure should lead us to conclude that, on balance, disclosure would not have represented an unwarranted interference with that right'.
23. From the evidence provided the Commissioner has no reason to believe that disclosure of the information requested was within the former Chief Executive's reasonable expectations. Whilst it would be reasonable to have expected some press interest in the Chief Executive's departure, given the previous interest that her flexible retirement arrangement had attracted, the exact details of that arrangement had not been made public. Moreover, the compromise agreement includes a confidentiality clause, which is binding on the individual and the Council.
24. The Commissioner recognises that people have a natural expectation that a public authority, as a responsible data controller, will not disclose certain personal information. He considers that such information includes information relating to the cessation of an individual's employment, which will attract a strong general expectation of privacy.
25. The Commissioner is satisfied that the former Chief Executive would have had a reasonable expectation that her personal information would be kept confidential and not disclosed to third parties without her consent.

Seniority

26. The Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the FOIA. He believes that a distinction can be drawn about the levels of information which junior staff should expect to have disclosed about them compared to what information senior staff should expect to have disclosed about them. This is because the greater the seniority of a member of staff, the greater the likelihood that they will have responsibility for influencing or making policy decisions and/or decisions which involve the expenditure of public funds.
27. As the most senior member of a council, a Chief Executive should expect to have some of his/her personal information disclosed under the FOIA. The Council has pointed out that *'a great deal of information about the role and that individual in post was and remains publicly available'*. The Commissioner accepts this. In addition to the various press releases relating to the former Chief Executive's flexible retirement agreement and subsequent departure from the Council, the Council has published her salary and benefits in its Statement of Accounts 2011/12. The Statement records that the former Chief Executive was paid £50,000 as 'Compensation for Loss of Office'. The figure of £47,742 is listed as Pension contributions, with it being noted that, *'This includes £33k in respect of pension strain costs arising from the exercise of flexible retirement giving rise to future salary savings'*.
28. In publishing the figures that it has about the former Chief Executive for her time in post, the Commissioner considers that the Council has accorded due and significant importance to the need for transparency and accountability. This is consistent with the Commissioner's general approach that public sector employees should expect some details about their salary to be placed in the public domain.
29. However, the Commissioner does not consider it reasonable that public sector employees, even one as senior as the Chief Executive of a council, should expect the exact details of the termination of their employment to be made publicly available. Disclosure of the information requested by the complainant would clearly lead to a greater infringement into the privacy of the former Chief Executive as it would reveal the specific details of her financial situation.
30. In light of the above factors, even taking into account the very senior role held by the former Chief Executive, the Commissioner considers that her expectations of privacy are objectively reasonable and outweigh the arguments for disclosure based on an employee's professional life.

What damage or distress would the individual suffer if the information was disclosed?

31. The Commissioner has considered what the consequences of disclosure might be and has then looked at other related factors.
32. As the Commissioner noted in FS50419393, disclosing details of a severance agreement could well pose a risk to the data subject's chances of employment elsewhere. Sight of such information by prospective employers could place the data subject at a disadvantage as they may be perceived (rightly or wrongly) as being more problematic or costly than other applicants. Another real risk exists in the present case, that of disclosure causing damage or distress to the health of the data subject. From previous announcements and press releases made by the Council, it is clear that the ill health of the former Chief Executive played a significant part in her departure. As that departure was comparatively recent (January 2012) and in light of submissions received by the Council, the Commissioner considers that there is a real risk that disclosure of the information might exacerbate the former Chief Executive's health situation and have a detrimental effect upon her well-being.
33. In terms of related factors, the Commissioner recognises that some information pertaining to the former Chief Executive's departure has been - and may still remain - in the public domain and could be argued to lend weight to the case for further disclosure of information. However the details and terms of the compromise agreement (and the Part II report proposing it) were not made public and were not intended to be placed in the public domain. The Commissioner is concerned with additional damage or intrusion that disclosure would cause. In this case, he considers that there is a real risk that release of the requested information would cause damage and intrusion to the data subject.

The Legitimate Interests of the Public

34. Although the section 40(2) exemption is absolute and therefore not subject to the public interest test, the Commissioner will still consider legitimate interests in favour of disclosure as part of his consideration of fairness.
35. In his request for an internal review of the Council's decision to withhold the requested information the complainant contended that, *'the release of this information would further the understanding of and participation in the public debate of an issue that has received a considerable amount of publicity'*. In submissions to the Commissioner, the Council has questioned the amount of publicity generated by the former Chief Executive's departure and the motivations for the same. Several

websites and online search results were provided to the Commissioner by the Council which, in its opinion, indicated that the issue, *'if it exists at all, is extremely limited in scope and largely appears to be driven by political or personal aims, as well as promoting a culture of envy against those who are well paid and in senior positions'*. The Council stated that it was not in *'the long term public interest'* to support such a culture.

36. The Commissioner is concerned that the attitude demonstrated by the Council in the above regard indicates insufficient recognition and appreciation of the public interests in legitimate transparency and accountability of public funds and the decisions taken by public authorities, given that the data subject concerned is senior and therefore influential and significant to both.
37. However, the Commissioner does find the suggestion surprising, given that in other regards the Council has demonstrated a due and commendable awareness and level of transparency, most notably in its Statement of Accounts detailed in paragraph 24.
38. In an era and climate of considerable public sector cuts and associated redundancies it would be unreasonable and unrealistic for the Council not to expect some degree of legitimate public interest in whether the manner of the former Chief Executive's departure mirrored what had been intended by the previously negotiated flexible retirement agreement, i.e. what impact her early departure had upon the agreement to repay the pension strain costs as detailed in paragraph 18.
39. Whilst the Commissioner accepts that the public interest in this particular case is largely limited to the immediate locality and local press, the issues it concerns are common to the wider public interest in due transparency and accountability of council decisions and spending in financially straitened times. In his request for internal review the complainant contended that *'disclosure of the information was justified in the circumstances because of the public interest in knowing whether senior officials are being awarded large pay-offs'*. The Commissioner would not characterise the public interest in the pension strain costs situation in such language but he does take the view that the interest is a legitimate one, and not insignificant or trivial, since it involves the Council's managing of public funds and the transparency and accountability attached to the same.
40. In considering the legitimate interests of the public, the Commissioner notes that there is a real public interest in knowing how much money has been spent by the Council, particularly where the most senior member of the organisation's employment has come to an end.

41. Despite the data subject's reasonable expectations or any damage or distress that might be 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, such as in the case of MPs expenses.
42. However, whilst the Commissioner would agree with the complainant's statement that *'it is important that taxpayers have as much information as possible so that they can understand the decisions made by their council'*, it is implicit in this contention that such a principle can be limited by the particular facts of any specific case.
43. Although there is a strong public interest in knowing the terms of the former Chief Executive's compromise agreement and how much public money was spent, the disclosure of such information might deter parties from entering into such agreements in future. The Audit Commission, in its report, 'By Mutual Agreement – Severance payments to council chief executives', highlighted the public interest benefits of severance payments as follows:

'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'.¹

Therefore the objective is the efficiency of the Council's service. This can encompass a wide range of circumstances and it should be noted that the departure of the former Chief Executive in the present case did not arise due to either a dysfunctional relationship or a drawn-out legal dispute.

44. As both the Commissioner and the Tribunal have made clear in the Trago Mills case previously cited, the legitimate interests of the public in knowing the finer financial details of settlements of this nature must be weighed against the individual's right to privacy.
45. The Tribunal made clear that such decisions should be made on the expectations of privacy held by *'the reasonably balanced and resilient*

¹ 'By Mutual Agreement – Severance payments to council chief executives', available online here: <http://www.audit-commission.gov.uk/SiteCollectionDocuments/Downloads/20100315bymutualagreementrep.pdf>

individual' holding the position that X held (Service Lead for Planning) with the Council. Even taking into account the fact that X was no longer employed by Teignbridge District Council, so no working relationship would be jeopardised by disclosure, the Tribunal concluded (in paragraph 66) that:

'We do not find that the Council's duty to be transparent and accountable about the expenditure of public money outweighs the requirement to respect the former employee's reasonable expectation of privacy. Accordingly, we conclude that disclosure would have breached the data protection principles'.

46. In the present case, as noted, the compromise agreement (proposed by the confidential Part II report) was expressly subject to confidentiality terms, which would have added to the former Chief Executive's reasonable expectation that the terms of the compromise agreement would not be disclosed. In this respect the Commissioner cannot agree with the complainant's contention that, *'there is no reason why the third party should have expected such information not to be disclosed to others bearing in mind her very senior position'.*
47. In this case the Commissioner considers that the public interest in knowing what costs were involved in the former Chief Executive's departure from the Council has, to some degree, been met by the publication of the financial data in the Council's Statement of Accounts, most notably the £50,000 figure cited as 'Compensation for Loss of Office'.

Conclusion

48. In the circumstances of this case, which do not involve any allegation or suggestion of misconduct or wrong-doing on the part of the former Chief Executive (factors which might have increased the legitimate public interest in disclosure), the Commissioner finds that disclosure of the Part II report containing details of the Compromise Agreement would contravene the first data protection principle. Whilst the Commissioner has been mindful of the data subject having held a very senior position within the Council, he considers that she had a reasonable expectation of privacy in relation to the details of her departure. The Commissioner is satisfied that to release the requested information would be unfair and would be likely to cause harm or distress to the data subject. He is therefore satisfied that the Council was correct to refuse disclosure of the information requested under section 40(2).

Other Matters

49. As the Commissioner has found that the Council were correct to withhold the requested information under section 40(2), he has not gone on to consider the application of section 42.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF