

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 3 April 2013

**Public Authority:** **Whitchurch Town Council**  
**Address:** **Civic Centre**  
**High Street**  
**Whitchurch**  
**Shropshire**  
**SY13 1AX**

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the resignation of Whitchurch Town Council's (the "council") former town clerk. The council refused the request, withholding the information under the exemption for personal data.
2. The Commissioner's decision is that, in refusing the request, the council correctly relied upon the exemption for personal data.
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 1 August 2012, the complainant wrote to the council and requested information in the following terms:

*"I seek the following information about the departure from Whitchurch Town Council of former town clerk Peter Martin:*

*1 – Did Mr Martin receive any money from town council funds under the terms of his departure?*

*2 – If so, how much money did he receive?"*

5. The council responded on 29 August 2012. It refused the request citing the exemptions for personal data and information provided in confidence.
6. Following an internal review the council wrote to the complainant on 18 September 2012. It stated that it was maintaining its original decision to refuse the request.

### **Scope of the case**

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7. On 27 September 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied exemptions in refusing the request.
9. During the course of the Commissioner's investigation the council provided the complainant with the information specified in part 1 of the request. The Commissioner has, therefore, considered whether the council has correctly withheld the information requested in part 2 of the request.

### **Reasons for decision**

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#### **Personal Data – section 40(2)**

10. 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."*

11. 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"*

*Is the information 'personal data'?*

12. 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 accepts that information about an individual's financial settlement and the terms of their leaving an authority's employment is personal data as defined by the DPA.

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

13. In refusing to provide details of any payments made to the former clerk the council has argued that disclosure would contravene the first data protection principle.

14. 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".*

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

- The existence of a compromise agreement or equivalent between the individual and the council.
- The individual's reasonable expectation of what would happen to their personal data.
- The individual's senior position at the council.
- What damage or distress would the individual 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 or equivalent*

16. The council has confirmed that details of the former clerk's severance package are covered by the terms of a "COT3". A COT3 is a form used to record the terms of a settlement on an Employment Tribunal Claim (or potential claim) negotiated with the assistance of an ACAS Conciliation Officer.

17. The Commissioner believes that such 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 individual's departure and any payment(s) made to them are included in the COT3 agreement.
18. 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*

19. The council has argued that the former clerk would have had a reasonable expectation that the requested information would be kept confidential and not disclosed to a newspaper, with the inevitable widespread publication which would follow.
20. The council further submitted that, whilst being a council employee, the former clerk was not an elected member and would, therefore, have a higher expectation of privacy.
21. From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within the outgoing employee's reasonable expectations.
22. One of the terms of the COT3 confirms that the terms of the settlement would remain confidential and would not be disclosed to other parties. The council confirmed that it considers that disclosure of any information over and above the confirmation that a settlement was paid to the former town clerk is likely to lead to a breach of confidence action being pursued against the council.
23. The Commissioner recognises that people have an instinctive expectation that a public authority, in its role as a responsible data controller, will not disclose certain information. For example, he

considers that information relating to the termination of an individual's employment will attract a strong general expectation of privacy.

24. The Commissioner is satisfied that the data subject would have had a reasonable expectation that their personal information would be kept confidential and not passed on to third parties without their consent.

### *Seniority*

25. 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. The Commissioner also believes that a distinction can be drawn about the levels of information which junior staff should expect to have disclosed about them compare to what information senior staff should expect to have disclosed about them. This is because the more senior a member of staff the more likely it is that they will be responsible for making influential policy decisions and / or decisions relating to the expenditure of public funds.
26. The Commissioner's general approach is that public sector employees should expect some details about their salary to be placed in the public domain. However, it is reasonable to assume that they would not expect details of exact payments to be made publicly available.
27. Disclosure of exact payment details would clearly lead to a greater infringement into the privacy of individuals as it would reveal the specific details of their financial situation.
28. The Information Tribunal in *Rob Waugh v the Information Commissioner and Doncaster College* (EA/2008/0038)<sup>1</sup> 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."*
29. 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

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i282/Rob%20Waugh%20v%20IC%20&%20Doncaster%20College%20\(EA-2008-0038\)%20Decision%2029-12-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i282/Rob%20Waugh%20v%20IC%20&%20Doncaster%20College%20(EA-2008-0038)%20Decision%2029-12-08.pdf)

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."*

30. The Tribunal also 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. In relation to the current complaint, the Commissioner has not been provided with any evidence of these latter two activities.

31. A more recent Tribunal decision - *Trago Mills (South Devon) Limited v the Information Commissioner and Teignbridge Council (EA/2012/0028)*, found that, in the case of a comparable request, which asked for details of the severance package of a senior employee:

*"However, even taking those factors into account, in addition to those identified above, 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."*<sup>2</sup>

32. In view of the above, although the former clerk held a senior role at the public authority the Commissioner considers that their 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?*

33. The Commissioner has considered what the consequences of disclosure 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.

34. Disclosing details of a severance 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

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i822/20120822%20Decision%20EA20120028.pdf>

may be affected by disclosure even though the distress or damage caused may be difficult to clearly evidence.

35. The Commissioner has looked at some related factors. The fact that some information about the former clerk'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 severance package or COT3 agreement were never made public. It is important to note that the Commissioner is concerned with additional damage or intrusion that disclosure would cause.
36. The council stated that, having considered the ICO's guidance in relation to this matter, it was necessary to take into account the potential harm or distress that disclosure would cause.
37. The council has argued that disclosure of details of any payments made to the former clerk would have detrimental consequences. The council explained that public knowledge of this fact could have a damaging impact on the individual's future employment opportunities.
38. The Commissioner considers that there is a real risk that release of the information would cause damage and intrusion to the data subject.

#### *The Legitimate Interests of the Public*

39. In considering the legitimate interests of the public, the Commissioner notes there is a real public interest in knowing how much money has been spent by the public authority particularly where an employee's employment has been terminated.
40. 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.
41. 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."*
42. It can be argued in this case that there is a strong public interest in knowing the terms of the former clerk's severance package 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 ("By Mutual Agreement – Severance payments to council chief executives") states, 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'."*<sup>3</sup>

43. 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 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.
44. In addition, the Commissioner also believes that the unilateral breach of the confidentiality terms in the COT3 agreement would also be likely to be unlawful. This fact alone would also mean the exemption was applied correctly.

### *Conclusions*

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 would be likely to cause distress to the data subject. He is therefore satisfied that the council was correct to refuse disclosure under section 40(2).

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<sup>3</sup> "By Mutual Agreement – Severance payments to council chief executives" , available online here: <http://www.audit-commission.gov.uk/SiteCollectionDocuments/Downloads/20100315bymutualagreementrep.pdf>

## Right of appeal

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46. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

47. 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.
48. 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 .....**

**Andrew White**  
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