



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS)**

**EA/2010/0095**

**BETWEEN:**

**T W GIBSON**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**CRAVEN DISTRICT COUNCIL**

**Additional Party**

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**DECISION OF THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS)**

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Paper hearing by: Claire Taylor, Tribunal Judge  
Roger Creedon, Tribunal Member  
Nigel Watson, Tribunal Member

On: 11 October 2010  
Date of decision: 22 February 2011

**Subject**

**Freedom of Information Act 2000: s.40(2)**

**Representation:**

Dr T Gibson  
Clare Nicholson for the Information Commissioner  
Gillian Cooper for the Additional Party

**Cases:**

*Corporate Officer of the House of Commons v ICO and Norman Baker MP (EA/2006/0015 & 0016) ("Baker")*  
*House of Commons v ICO and Leapman, Brooke, Thomas (EA/2007/0060) ("Leapman")*  
*Thomas Wilson v ICO (EA/2009/0082) ("Wilson")*  
*Waugh v ICO and Doncaster College (EA/2008/0038) ("Waugh")*

## **DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out in the Tribunal's determination and the confidential schedule, the Tribunal allows the appeal in part and substitutes the following decision notice in place of the Commissioner's entire Decision Notice Ref. FS50267298 of 20 April 2010:

### **SUBSTITUTED DECISION NOTICE**

**Public authority:** Craven District Council  
**Address:** Council Offices, Granville Street, Skipton, North Yorkshire, BD23 1PS  
**Complainant:** Dr T W Gibson

**Steps Required:** Within 28 days of the date of this substituted decision notice Craven District Council are ordered to disclose clauses 3, 5, 7 and 16 of the requested information in exactly the same form as in the agreement.

**Rights to Appeal:** Under section 11 of the Tribunals, Courts and Enforcement Act 2007 and the new rules of procedure an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk).

Signed

Judge Taylor  
22 February 2010

**REASONS FOR DECISION**

**Introduction**

1. The Appellant seeks an agreement from Craven District Council ('Craven') that it entered into with its erstwhile Chief Executive Officer ('ex-CEO'), covering the terms of her departure.
2. The dispute before the Tribunal concerns whether the requested information is exempt by virtue of s40(2) Freedom of Information Act 2000 ('FOIA').

**The Request for Information**

3. On 30 June 2009, the Appellant wrote to the Council stating:
  - a. *"I believe you are in possession of an agreement between the Council and Mrs Gill Dixon entered into at the time she left employment of the Council as Chief Executive Officer. I believe also that such an agreement would contain the terms upon which she left her employment. Can you please confirm these two beliefs? If you hold such document (or documents), I hereby request that you provide me with a copy under the Freedom of Information Act..."*
4. On 1 July 2009, Craven confirmed it held the requested information ("the Compromise Agreement"), but that

*"in relation to an earlier similar FOI request... the Council's decision was that the information was exempt from disclosure under s.40(2) Freedom of Information Act 2000... the Information Commissioner ... subsequently ruled that it would be unfair to the former employee to release the information..."*
5. Curiously, the council did not state that they considered the Appellant's specific request was exempt under section 40(2); or why disclosure would be unfair (and the statutory relevance of "unfairness"); or make any reference at all to a contravention of the data protection principles. However, it implied that it considered the requested information exempt through relating the outcome of events for what they described as a similar FOI request.
6. On 11 July 2009, the Appellant requested the council review its decision. He asserted that it had not considered section 40(2)(b) properly, because it did not consider the legitimate interests of the public in the requested information. He claimed, without substantiating it, that there were suggestions that the relevant departure payments exceeded contractual entitlements and that the public had an interest in knowing whether this was so. He suggested there could not be harm caused to the individual if the payments did not exceed the contractual entitlements, but if they did, such harm was "warranted" as any excess may be "unlawful". He stated that: *"so much seems to have gone on,...within the work of the Council about which the Councillors freely admit a lack of knowledge,..."*
7. On 21 August 2009, the review concluded that s.40(2) FOIA applied. It acknowledged a legitimate interest in *"disclosure about information which would inform the public as to*

*whether the council and its senior officers have conducted itself lawfully*". It concluded that: *"Having considered the terms of the agreement and the basis upon which it was entered into it is my conclusion that disclosure would cause unwarranted prejudice to the rights, freedoms or legitimate interests of the former employee."* However, it provided no detailed reasons for this nor how it had assessed and balanced the legitimate interests.

### **The Complaint to the Information Commissioner**

8. The Appellant complained to the Commissioner on 30 September 2009.
9. On 20 April 2010, the Commissioner's Decision Notice concluded that Craven had dealt with the request in accordance with the FOIA. Relevant factors for deciding this included:
  - a. The requested information was personal data of the ex-CEO, such that disclosure must not breach the data protection principles, including that the data must be *"processed fairly and lawfully"*.
  - b. In determining what is fair, the following was to be brought into the balance, including the possible consequences of disclosure for the ex-CEO and her reasonable expectations as to the use of her data:

#### The Terms of the Compromise Agreement

- i. The terms of the requested Compromise Agreement, and the role of compromise agreements more generally in avoiding time, expense and stress of an Employment Tribunal, allowing the parties to conclude a relationship and make a fresh start. That the Employment Rights Act 1996 established the opportunity for parties to reach a compromise agreement.
- ii. There was a strong public interest in knowing the terms of the Compromise Agreement and how much public money was spent. However, disclosing such details may deter parties in the future from entering into such agreements. Citing the Audit Commission's report, severance payments can also be in the public 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>1</sup>

#### Consequences of disclosure

- iii. Although difficult to prove, further disclosures beyond what was already in the public domain might pose a risk to the CEO's chance of promotion or employment; affect her emotional wellbeing and be intrusive.
- iv. Unlike with a local news story, a disclosure under the FOIA could become part of a permanent and easily searchable/accessible source which may increase the unfairness of disclosure.

#### Reasonable expectations

- v. Of particular weight, the CEO would have an expectation of privacy which would be objectively reasonable. However, expectations should be modified by the existence of the FOIA's presumption in favour of disclosure of information.

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<sup>1</sup> [http://www.auditcommission.gov.uk/localgov/nationalstudies/bymutualagreement/Pages/default\\_copy.aspx](http://www.auditcommission.gov.uk/localgov/nationalstudies/bymutualagreement/Pages/default_copy.aspx).

### Private versus Public Life

- vi. A person's public actions and work duties will be subject to greater scrutiny than aspects of their private lives. But details of "HR information" - such as pension contributions and tax codes - that might arise from the public life and be found within a compromise agreement, should remain private.

### Seniority of the CEO

- vii. The Commissioner's guidance on s.40 FOIA states that generally the more senior the role within the public authority the greater the weight in favour of disclosure will be.

### Balancing the individual's rights and the legitimate interests

- viii. The Commissioner weighed the individual's rights to privacy against the strong public interest in disclosure which was itself tempered by the public interest in ensuring that parties were not deterred from entering into compromise agreements in the future.

## **The Appeal to the Tribunal**

10. Dr Gibson appealed to the Tribunal by notice dated 14 May 2010. The Tribunal joined Craven as a party. The parties agreed to have the matter determined by consideration of their documents without an oral hearing, and the panel met to consider the appeal.
11. The Tribunal has had the benefit of witness statements and submissions from the parties, (including some given in confidence); and bundles of documents and authorities submitted by the parties. The panel submitted further questions for all the parties on 3 October 2010. Consequently, the parties all gave further submissions. The Additional Party was requested to, if possible, provide evidence that the ex-CEO objected to disclosure, and a statement as to why disclosure might prejudice her legitimate interests. Accordingly, the ex-CEO submitted an open and confidential witness statement after the hearing.
12. We have considered all of this material, even if not specifically referred to below.

## **The Appellant's Grounds of Appeal**

13. The Appellant confirmed at the case management hearing that his grounds for disputing the Commissioner's decision were:
  - (1) Legitimate Interest Test: Wrongly Assessed:
    - a. That the Commissioner had wrongly concluded that the requested information should not be disclosed having reached the wrong decision in weighing the legitimate interests of the public against that of the outgoing CEO under condition 6 of Schedule 2 of the Data Protection Act 1998 (DPA). This was either by not taking all relevant factors into account, or wrongly doing so, or by giving too much weight to some. In so doing, the Commissioner either exercised its discretion wrongly or made an error in law; and/or
  - (2) Personal Data: Certain Information May not be Personal Data.
    - b. That at least part of the information within the Compromise Agreement was not personal data, and therefore should be disclosed. (The Appellant acknowledged that the requested information would seem to be personal data. However, since he had not seen the requested information, he was seeking for the Tribunal to consider whether the disputed information or any part of it was not personal data such that it may be disclosed in redacted form.)

## **Evidence: Appellant**

14. In support of his grounds, the Appellant submitted amongst other things:

- a. The Audit Commission's Local Government Report: "*By Mutual Agreement: Severance Payments to Council Chief Executives*" March 2010. This included:
  - i. "*Councils can suffer reputational damage from making severance payments... weak performance management arrangements mean that where there are genuine performance concerns councils often lack evidence to mount a case for dismissal... Councils ... have a duty to consider fully the financial implications of any severance package, including any pension costs the Authority might have to cover. Non-monetary considerations, such as damage to the authority's reputation or the difficulty of recruiting a replacement, should be taken into account.*"

The panel notes that whilst no parties made submissions on the matter, this report was published in March 2010 and so was not in existence at the time of the request and internal review by Craven. However, in the absence of argument to the contrary, we have considered the paragraphs above to still be relevant as providing a background to this appeal. It indicates the circumstances that applied around the time of the request which we expect that the public authority would or ought to have known about. In any event, whilst it provides background it did not determine any part of this decision.

- b. Audit Commission's Audit 2008/9: "*Use of Resources*" of December 2009 2008/09 for Craven, including:
  - i. "*We have assessed the Council's arrangements for 2008/09 as level 1, performing poorly...We reported significant failings to secure value for money in the use of resources last year...*"
  - ii. Level 1 was identified as meaning: "*Does not meet minimum requirements*".
  - iii. Score for Managing Finance (financial planning, understanding costs and performance, reporting financial performance): Level 1.
  - iv. "*The initial budget agreed for 2008/09 was not prepared in enough detail to make meaningful links with the service planning process...Treasury management was not effective for most of 2008/09... There has been a lack of clarity about the use of reserves.. The Council's financial standing was seriously undermined by major overspending against 2007/08 budgets...The Council only had a very limited understanding of costs through the early part of 2008/09...*"
  - v. "*Following the revelation of the scale of the Council's financial crisis there was a period of significant tension and mistrust, but the change in political administration and a number of changes in senior management, including the appointment of a new Chief Executive, has enabled positive working relationships to be re-established.*" ("*Item 63*").

Again, the panel notes that whilst no parties made submissions on the matter, this report was published after the Council considered the request and review. However, in the absence of argument to the contrary, we consider it to be of relevance because it pertains to circumstances before or at the time of the request or review.

- c. Audit Commission's "*Annual Audit and Inspection Letter*" for Craven: Audit 2007/08, March 2009, including:
  - i. "*The District Auditor took the unusual step of using his powers... to make a public statutory recommendation in December 2008, for the Council to ensure that there is an adequately resources, experienced and skilled*

*Finance Department in place as soon as possible in order to deliver the functions required of it.”*

- ii. *“...The predicted budget underspend for 2007/08 did not materialise and instead the outturn was nearly £800,000 overspend. Further unexpected costs were identified during the current financial year, and as a result savings in the order of £2.5million need to be achieved over the next two years.*
  - iii. *“Your appointed auditor... has been unable to issue his audit report for the 2007/08 financial year because of the Council’s failure to produce financial statements and supporting working papers of sufficient quality...”*
  - iv. Overall assessment for the council’s arrangements for the use of resources: 1 out of 4: *“The Council failed to provide accounts that were materially correct... there was a failure to set a sufficiently detailed and robust Medium Term Financial Strategy... The Council failed to monitor the treasury management position during 2007/08...”*
- d. Press Articles: (we did find the articles submitted to be clearly identified by source):
- i. *“Now it’s a catastrophe”*

*“... now we discover the shortfall over the next two years is not “just” a million. It is two and a half times that... It takes errors of an astronomical nature to get the budget so wrong and the repercussions are horrendous. People will lose their jobs...Services will be decimated...Top officials have gone (and severance payments to some have added to the burden)...“*
  - ii. *“Why £2.5m had to be saved and how the mess got worse”, 20 February 2009:*

*“...Councillors - many of whom had said they had difficulty understanding the detail of local authority finances – have been left in no doubt about the gravity of the situation... But as it turned out councillors had not been given the correct information. Last April, the director of finance... left the council, followed in June by chief executive... A month later, the council’s economic problems came to light...”*
  - iii. *“Council seeks a new chief executive as ... resigns”, Craven Herald & Pioneer 20 June 2008:*

*“Last month, an external investigator was brought in after a complaint against an unnamed senior official... The investigation concluded there was no suggestion of any misconduct. The independent investigator interviewed a number of officers and members, including the chief executive...”*
- Various emails were also submitted, which the panel either did not consider particularly relevant or contained hearsay and potentially personal data.
- e. In response to the panel’s question, asking for elaboration on his statement: *“the fact that some information is in the public domain should make it even more essential to publish the full story to quell rumour”:*
- i. *“Over a period of time, there were Editorials, articles, and letters in the local paper - The Craven Herald - on the subject of the troubles at Craven District Council and the sudden departure of the CEO, Mrs Gill Dixon. (See para. 14(d) above.) The Financial disasters e.g. the sale of Council land at well below value, the £2,000,000 loan taken out for no apparent purpose, obviously received much publicity as did the adverse 'Annual Audit and*

*Inspection Letter 2007/2008'. See para. 14(c) above.) I was never aware of any publicity for the harsh comments under Item 63 of the 'Use of Resources Audit 2008/2009' (See para. 14(b)(v)). Although this report was available to the public, the information was not easy to find. To the best of my knowledge the public were never given concrete reasons for Mrs Dixon's precipitate departure, any information on her severance pay, or indeed told of the use of a Compromise Agreement. Needless to say there were many wild rumours."*

**Evidence: Additional Party**

15. The testimony of Gillian Cooper, Craven's Head of Legal Services and Monitoring Officer included:
- a. *"The relevant statutory provisions which relate to the termination of employment are contained in sections 111 and 112 of the Local Government Act 1972<sup>2</sup>, the Employment Rights Act 1996, JNC National Salary Framework and Conditions of Service for Local Authority Chief Executives and the Local Government Pension Scheme Regulations 2007.*
  - b. *Following management concerns raised by two Directors within the Authority, on the 23rd March 2008... The Council met on the 8th April 2008 and a Panel of members was established... The Panel decided to appoint an external investigator to examine the issues in depth and report on the findings... The JNC Conditions of Service recognised that mutual termination of the contract of employment may be considered at any stage... During this process discussions continued with all parties concerned. It is recognised that mutual termination of the employment contract can be considered at any time and that sometimes this will be a suitable alternative for all concerned.*
  - c. *Where financial settlements are considered it is necessary that the arrangements come within the local authority's powers for termination namely, sections 111 and 112 of the Local Government Act 1972, the JNC National Salary Framework and Conditions of Service for Local Authority Chief Executives and the relevant Pension Regulations, these being at the time the Local Government Pension Regulations 2007. The Council authorised only those payments except for one, which arose from contractual requirements, and statutory pension entitlements.*
  - d. *The legality of the decision taken has been considered by the District Auditor as evidenced by paragraph 16 in his Report headed "Financial Statement and Annual Governance" [copy of that report attached – see para. 16(a) below]... Furthermore, the issue was considered by the District Auditor and his response to the resident who objected to the closure of accounts 2008/09 [see para. 16(b) below]...*
  - e. *When the Council received the Appellant's request for information, I contacted the former Chief Executive to establish whether she consented to a disclosure of the terms of the Compromise Agreement. She did not. Her concerns related to her reputation and to maintaining the privacy of her family.*

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<sup>2</sup> s.111 Local Government Act: "... a local authority shall have power to do any thing ... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions".

s.112: "**Appointment of staff:** (1) Without prejudice to section 111 above but subject to the provisions of this Act, a local authority shall appoint such officers as they think necessary....(2) An officer appointed under subsection (1) above shall hold office on such reasonable terms and conditions, including conditions as to remuneration, as the authority appointing him think fit.



- f. ...The Third Party has a duty as local authority, both to the public, and to its employees. The legislation recognises the authority's role as an employer to protect the rights of its employees.
- g. Detailed evidence on the background to this case has been submitted in support of the Additional Party's contention that the legal and financial basis for entering into the financial settlement and the Compromise Agreement was sound. Indeed the District Auditor has confirmed this.
- h. The Additional Party was in a position where there was a breakdown in its management arrangements. This had a detrimental impact on its governance arrangements and on its reputation.
- i. There is clear evidence that employment proceedings were in contemplation by the former Chief Executive and the use of compromise agreements in this situation is recognised.
- j. In reaching a settlement the need for costly legal proceedings which could prove damaging to the Additional Party in terms of time and reputation is recognised and there was a clear need at that time to stabilise the Additional Party's governance and management arrangements. It is submitted that this was recognised by the Auditors in their Use of Resources Audit which is referred to by the Appellant in the Good Governance Section paragraph 63 of the Council's 2008/09 (folder (f) Audit) dated December 2009.
- k. In addition it is submitted that the evidence demonstrates the impact on the former Chief Executive personally, reputationally and financially. Her position was and remains that she needed to protect herself and her family in order to secure her future career and there is no suggestion that this position has changed. Indeed the evidence indicates that she expects the Additional Party to adhere to the terms of the Compromise Agreement generally and in particular in relation to the need for references for future employment. Failing to adhere to the terms of the Compromise Agreement could potentially lead to litigation....
- l. ... There was a breakdown in the management and governance arrangements of the Additional Party however, the legal and financial basis for the settlement and Compromise Agreement was sound. The Compromise Agreement legitimately afforded the opportunity to the Additional Party to move forward to a more positive situation..."

16. There were many attachments to the statement. These included:

- a. Report on Financial Statement and Annual Governance Statement, undated:

" ...

X The audit opinion was delayed by an objection to the accounts relating to the compromise agreement with the former Chief Executive. The agreement meant details had not been disclosed and led to speculation about the amount of the settlement involved. My response to the objector indicated that the settlement was in accordance with the Council's powers. Also, the total amount paid to the former Chief Executive in 2008/09 was below the £50,000 disclosure limit and did not need to be disclosed separately in the financial statements.

X

" ..."

- b. District Auditor's Report to a resident who had objected to the closure of the 2008/09 accounts:

" ...

I should firstly confirm my role as external auditor. My responsibilities are defined by the Audit Commission Act 1998 and the Code of Audit Practice. I am concerned with the financial transactions of the Council in the year of audit, including assessing whether the Council has made proper arrangements to secure corporate governance and economy, efficiency and effectiveness in the use of its resources. I also give an opinion on whether the accounts 'present fairly', that is have they been drawn up in accordance with the proper legal and accounting frameworks and are they properly supported by the underlying information. I do not have a general power to review action taken by the Council and would in general only become involved in individual cases if there is evidence of illegality relating to the Council's accounts.

#### **Legal powers for terminating employment**

The power to terminate Mrs Dixon's employment arose from section 112 of the Local Government Act 1972 but account was also taken of section 111 LGA 1972, JNC National Salary Framework and Conditions of Service for Local Authority Chief Executives and the Local Government Pension Scheme Regulations 2007.

The Council authorised only those payments, except for one, which arose from contractual requirements and statutory pension entitlements. The Council's policy does not permit any enhancement to the basic release of pension benefits and no discretion or enhancement was exercised in this case.

The only exception was one payment for £5000 to a training company. This was agreed to honour a training and development commitment which had been previously agreed with Mrs Dixon. The amount involved is not excessive and I conclude that the action taken as part of reaching agreement with Mrs Dixon was not unreasonable.

I am satisfied that the Council properly considered the legal powers applicable to this situation in deciding the action it wished to take. Those powers were exercised reasonably and there are no matters on which I would need to take any action.

#### **Accounting for the termination payments**

I have examined the accounting entries relating to the costs incurred in the year and the effect on the pensions liability. Before giving my opinion on the Council's accounts, I am required to be satisfied that the accounts present fairly the financial position of the Council at 31 March 2009 and its income and expenditure for the year then ended. Following review of the transactions concerned, I am satisfied that they are fairly stated and that they are in accordance with the Code of Practice on Local Authority Accounting.

17. The written testimony of Ms Gill Dixon included the following:

I was Chief Executive at Craven District Council until 30<sup>th</sup> June 2008. I terminated my employment having entered into a compromise agreement with the Council. This agreement includes a confidentiality clause which both Craven and myself have formally agreed. Without the protection offered by this clause I would not have entered into the agreement, and therefore confirm to you that I do not wish for any aspect of the compromise agreement to be disclosed.

It was important to me at that time to protect my reputation, my career prospects and the impact on my family. This has not changed over time and I still wish to protect my reputation and future personal and professional life.

I regard the terms of the compromise agreement as legally binding on both parties.

18. In response to questions from the panel:

- a. The Chief Executive holds the statutory post of Head of Paid Service, and is the most senior officer reporting to the Leader of the council.
- b. Regarding the panel's question about the new requirement for authorities to publish in their statements of accounts the individual financial details of any severance payments to all senior officers earning over £50,000, Craven clarified that this requirement only took effect for the 2009/2010 accounts. The severance

payment made to the ex-CEO was dealt with in 2008/2009 prior to these requirements and so no details were published.

- c. The ex-CEO officially left her post on 30th June 2008.
- d. Regarding the panel's question: "*The Appellant asserts in his submissions that 'the financial ills were so grave that the public is entitled to a full explanation about how they came about and what steps the Councillors were taking for dealing with them.'* Does the Council have a response to this, and what was published in this regards?": The Additional Party did not provide a response.
- e. Further documents:

"

#### **Council Press Statement**

##### **Council rejects secrecy charge**

**This Council refutes totally the charge of "secrecy" made by the Craven Herald in relation to an internal investigation into management issues.**

##### **The facts are as follows:**

- On 8<sup>th</sup> April, Council established an Investigatory Panel, in line with national guidance to all Local Authorities. The Panel was asked to consider some internal management issues which had been raised.
- On 15<sup>th</sup> April the Panel agreed to commission an independent investigator to undertake a preliminary investigation and advise the Panel on the best way forward in relation to the issues raised. Again, this is in accordance with national guidance for local government. The Council has confirmed this to the Craven Herald.
- On the 21<sup>st</sup> April, the Council responded fully to a query from the Craven Herald regarding the Use of Resources and financial reporting score. This story was published on the 25<sup>th</sup> April. quoting Derek Jackson.

- The Council is correctly following procedures in relation to this and all staffing matters. It is quite correct that the details on internal management issues are not made public whilst an investigation is underway. This is not secrecy. It is the correct procedure to follow until the investigation is concluded.

In summary, the Council has never "responded with silence". There are some details which it is incorrect to share with a newspaper and the Council has been quite open that this is the case. The Council has not tried to hide fact of the investigation. It has simply said that this is not the time to give details, as the editorial admits.

The Council has been pleased to work closely with the Herald over the years, through all the ups and down, because it believes in being open and transparent with the residents of Craven. However this does not extend to flouting local and national guidance to respond to malicious gossip and scaremongering. We regret that the Craven Herald has stooped so low as to deliberately skew the facts of recent events to make a sensational headline.

"

- f. Letter from leader of council to the Councillors, dated 13 June 2008:

" ...

Attached is a copy of the press release relating to the decision by Gill Dixon, the Council's Chief Executive, who has mutually agreed to terminate her contract of employment with Craven District Council. Gill is no longer Chief Executive for operational purposes.

The mutual termination of Gill's contract of employment has been in line with the decision of the Policy Committee on 4<sup>th</sup> June. It has involved the Council entering into agreement with Gill and the terms of that agreement include a confidentiality clause. The clause has relevance for both Members and employees of this Council, as well as for Gill herself.

From our point of view, the effect of the confidentiality clause covers all Members of the Council and those employees, who have had any involvement in the process leading to the mutual termination of Gill's contract. The Head of Legal Services has given the following advice, which refers to the implications for both the Council and Members, or employees concerned, of breaching this clause:

*"It is really important that Members respect the confidentiality of information and knowledge that they have come across or know about in connection with any aspect of the management issues raised with them in March or since, or the subsequent initial investigation.*

*Effectively, I am asking you not to make publish or issue any public statements that may be considered detrimental or derogatory to Gill Dixon's employment with the Council or that relate to the mutual termination of her employment. In addition, it is important that the same principles are applied to current and former directors, or any other employees in connection with these issues."*

..."

### **Legal Submissions and Analysis**

19. The submissions of all parties are considered below to the extent they apply to the issues before the Tribunal. We note that Craven did not provide non-confidential submissions, stating that it concurred with the Commissioner's arguments.

### **The Task of the Tribunal**

20. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

### **The Questions for the Tribunal**

21. The matters before the Tribunal concern whether the requested information is exempt by virtue of s40(2) FOIA. In particular:
- a. Is all the requested information personal data?
  - b. What is the proper approach to considering the first Data Protection Principle?
  - c. Would processing be fair?
  - d. If so, would processing be lawful?
  - e. If so, does condition 6(1) of Schedule 2 DPA apply?

### **The Legislation**

22. Section 1 FOIA sets out a right of access to recorded information held by public authorities. It is subject to various exemptions.

23. Craven relies on the exemption in s.40(2) FOIA to resist disclosure. The part of that section relevant to the present appeal provides:

*“(2) Any information to which a request for information relates is ... **exempt information if-** (a) it constitutes **personal data** ..., and (b) ... the first ... condition below is satisfied.*

*(3) The first condition is- (a) in a case where the information falls within... 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 ...***

*(7) ...“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule .....* (Emphasis added.)

24. Personal Data is defined in s.1 DPA as:

*“... **data which relate to a living individual who can be identified**— (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;”* (Emphasis added.)

25. It is agreed between the parties that, if the information is personal data, the only data protection principle (DPP) at risk of being contravened is the first principle set out in DPA Schedule 1, namely:

*“1. 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...”*  
- Part I, of Sch.1 of DPA The Principles. Emphasis added.

26. We are to interpret ‘fair’ in accordance with principles including:

*“1 (1)... regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed....”*

- Part II, of Sch.1 of DPA Interpretation of the Principles

27. The only Schedule 2 condition that has been referred to by the parties and that seems relevant is set out in paragraph 6(1), which we shall refer to as the “legitimate interest test”. It provides that:

*“6. -(1) The processing **is necessary for the purposes of legitimate interests** pursued 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.**”*

-Sch.2 of DPA (Emphasis added.)

28. In this context, the type of ‘processing’ we are concerned with is disclosure to the Appellant as a member of the public. The ‘third party’ is the public. The ‘data subject’ is the outgoing CEO.

## **A. Is all the requested information personal data?**

29. The Commissioner argues that all the information in the Compromise Agreement comprises personal data about the CEO. Whilst certain might be more obviously 'personal', the agreement in its entirety records the contract terms agreed with the ex-CEO and so disclosure of those terms would reveal something about the ex-CEO.

### The Law

30. The definition of **data** includes information “(c) recorded as part of a relevant filing system” as well as more generally recorded information held by public authorities. (s.1,DPA).
31. What makes data **personal** is where it relates to a living individual who can be identified from the data available. (s.1(1) DPA.) Whether it “relates to” the person identified depends on context and whether the information is sufficiently personal and focused on him/her.<sup>3</sup>

### Our Findings

32. It is clear to us that the requested information is data, and personal data, in its entirety. The Appellant has requested disclosure of an agreement entered into by a named individual, such that even if the Compromise Agreement were to be provided with the name blanked out, the ex-CEO would be identified. We consider all terms within a compromise agreement to have considerable personal connotations for the employee concerned, and for her to be the main focus of the agreement.

## **B. What is the proper approach to considering the first Data Protection Principle?**

### Submissions

33. The Commissioner has argued that a disclosure under FOIA must be (1) fair, (2) lawful and (3) meet at least one of the conditions in Schedule 2 of the DPA. If any one of these criteria is 'missing', then disclosure does not comply with the first DPP<sup>4</sup> such that disclosure is not required because the s.40(2) exemption applies.<sup>5</sup> As the Commissioner concluded that disclosure of any part of the requested information would be 'unfair', he decided that it was not necessary to consider whether processing would be lawful or a condition in Schedule 2 DPA could be satisfied.
34. The Appellant argued that the Commissioner was wrong never to have considered the legitimate interest in disclosing the information. However, he did not elaborate on why, with reference to the provisions, the Commissioner would be required to take this approach.

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<sup>3</sup> See *Durant v Financial Services Authority* [2003] EWCA Civ 1746 para.s 26-31

<sup>4</sup> See para. 25 above.

<sup>5</sup> The exemption argued to apply under s.40(2) FOIA is “absolute”, as opposed to “qualified”. Information subject to a qualified exemption is only exempt from disclosure if the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Information subject to an absolute exemption is exempt without considering this public interest test.

## Our Findings

35. The Appellant may be arguing, that if one of the Schedule 2 conditions is met then the processing cannot be considered unfair or unlawful, such that the Commissioner should have considered the conditions as well as the general categories of fairness and lawfulness before deciding whether the information was exempt. However, our reading of the first DPP and the conditions is that the words “*and, in particular*”, indicate that the processing can only be fair and lawful if at least one of the conditions is met. It is not that if one of the conditions is met then the processing cannot be considered unfair or unlawful. Therefore, the Commissioner’s approach seems to have been valid. (However, we note that the Commissioner’s guidance on s.40 FOIA, recommends considering whether disclosure satisfies one of the specific conditions first, before moving on to the general consideration of fairness and lawfulness, and states that for practical purposes, disclosure will generally be fair if a Schedule 2 condition 6 has been satisfied. This is because a general consideration of fairness will involve balancing very similar issues to those set out above. We prefer this more comprehensive approach because the conditions are specific examples of what are to be considered fair or lawful.)
36. Alternatively, the Appellant may have been arguing that the Commissioner did not consider the legitimate interests of disclosure properly when considering the general category of fairness, such that it was wrongly concluded that disclosure would be unfair. In both the Decision Notice and submissions in this appeal, the Commissioner did indicate that “balancing of the rights of the individual with the legitimate interests in disclosure” was a factor when considering “fairness” generally. We have taken this broader interpretation of the Appellant’s grounds of appeal because he was not legally represented, these provisions are legally complex and the other parties appear to have done the same. Therefore, we proceed to consider whether the requested disclosure would be unfair.

### **C. Would processing be fair?**

#### Submissions

37. We summarise below what we consider the parties’ most pertinent arguments. For ease of reference, we make comments about individual arguments in brackets immediately after them.
38. In considering fairness, the Commissioner’s submissions repeated much of what had been stated in the Decision Notice (as summarized in paragraph 9 above). Other matters included:
- a. Consequences of Disclosure: unjustified harm or distress
    - i. It was a reasonable assumption that disclosure might well impact on the CEO’s prospects of promotion or employment and unreasonable to suggest otherwise.
  - b. Reasonable Expectations: Confidentiality:
    - Consent and expectation:
      - i. The CEO does not consent to disclosure.
      - ii. She did not expect that the terms of the Compromise Agreement would come into the public domain, because the terms were not in the public domain at the time of the request.

Confidentiality:

- iii. The CEO's expectations would have been affected by the confidentiality provision in the agreement. However, in response to a panel question, that a public authority should not try to 'contract out' of its obligations under FOIA:

*" A public authority should not try to 'contract out' of its obligations under FOIA. The Commissioner encourages public authorities to consider carefully the nature of confidentiality clauses when entering into contracts, although he makes clear that there can be no absolute guarantee of confidentiality, regardless of the wording of a confidentiality clause. The Commissioner also points to the Section 45 Code of Practice which records one of its aims as being to 'promote consideration by public authorities of the implications for Freedom of Information before agreeing to confidentiality provisions in contracts' (see Part V of that Code). It is to be noted that that Code appears to focus on the commercial contract aspect."*

- iv. The Compromise Agreement differs from a commercial contract entered into by a public authority with another party. It also differs from a standard employment contract. Disclosure of the terms of such a contract (which would be between all or the majority of members of staff within a public authority) would differ vastly from those in the agreement (which relates only to the ex-CEO).
- v. The primary relevance of the confidentiality clause in this case is to the 'fairness' limb of the first data protection principle. In other words, it is relevant to what the ex-CEO might reasonably have expected to happen to the information in the Compromise Agreement.
- vi. In the *Wilson* decision the Tribunal accepted that generally, a confidentiality agreement would give rise to a reasonable expectation that no further information would be released.

Timing:

- vii. Given that the CEO's departure was one year before the request, consideration should be given to the fairness of further publicity when the individual may have 'moved on'.

c. Private versus Public Life

- i. Information on 'personnel matters' attracts a very strong expectation of privacy.

d. Data Subject's rights and freedoms balanced against the legitimate interests in disclosure

- i. There is a strong but not overriding interest public interest in knowing the terms of the Compromise Agreement and how much money was spent.
- ii. There is a strong public interest in preserving such agreements as vehicles for ending the employer/employee relationship.
- iii. The legitimate interests of the public in accessing the requested information is not sufficient to outweigh the CEO's right to privacy, particularly given the substantial detriment that would result from disclosure, which would involve a significant invasion of her privacy.



- iv. This is particularly so given that the District Auditor's report provides information about the legal powers for the ex-CEO's termination of employment and accounts for the termination payments made to her. (See *para.16 above*). There is no indication from these letters that there was anything untoward.

39. The Appellant made various arguments to support his appeal without always clearly identifying which parts of the first DPP the arguments might fit within. We have sought to apply his arguments where they most sensibly fit. They include:

a. Terms of Compromise agreement

- i. The Commissioner makes a general case for such agreements, but does not state why such an agreement is appropriate in this case. When considering the context of the evidence provided, a secret compromise agreement is less justifiable. It is not appropriate for covering up circumstances that seriously affect the ratepayers of Craven. (We have been given no compelling evidence that the authority were orchestrating a so-called cover up. Craven presented evidence, which we accept, that it was within the council's power to enter into the agreement and that it followed the appropriate procedures. Further, the agreement was approved by internal audit. It is not our task in this case (nor was it the Commissioner's) to consider the appropriateness of a compromise agreement. Our task is to consider whether the agreement should be disclosed.)

b. Consequences of Disclosure: unjustified harm or distress

- i. The Commissioner's supposition that disclosure may pose a risk to the ex-CEO's chances of promotion or employment is unsubstantiated and seems to have been drawn from air. It is difficult to imagine that a person employed as the head and public face of a large council could have her emotional wellbeing affected by the release of details of her severance pay. In the light of the compliments given to her, it does not seem possible that anything in the agreement can affect the future prospects of the subject or affect her wellbeing. Either that, or the public is being deliberately misled.
- ii. The fact that some information is in the public domain should make it even more essential to publish the full story to quell rumour.

c. Reasonable Expectations

Context:

- i. The Commissioner did not take into account the background to the subject's departure, which is relevant in considering what would be the CEO's reasonable expectations. It must have made her aware that the public had a right to know the circumstances of her departure and that the District Auditor would comment on her period in office. It was unreasonable for her to expect that she should be granted privacy in circumstances such as:
  - 1. The Audit Commission's audit, including item 63 (*see para.14(b)(v)*), and the other evidence submitted elaborates on the way the council's finances fell into chaos during ex-CEO's period as Chief Executive. The council, financed by the public, had been led to the

edge of bankruptcy, had found it difficult to perform because of tensions and had found it necessary to change senior management including the Chief Executive. Given the mistrust described, it is difficult to imagine a situation of more legitimate public interest.

2. The effects of the stringent measures the council has had to take because of its disastrous financial position at the end of the ex-CEO's her time in office.

Confidentiality:

- ii. Much is made of the secrecy clause to which both parties agreed saying that the subject could automatically expect non-disclosure. The Commissioner argues as though non-disclosure was automatically ensured by the secrecy clause, and the Complainant submits that he is wrong. The Commissioner's guidance on s.40 FOIA warns authorities:

*"it is not possible to avoid your duties under the FOIA by not telling individuals that their data may be disclosed, or by stating that data will not be disclosed, and then arguing that disclosure would be unwarranted and unfair."*<sup>6</sup>

The subject might have thought that a secrecy clause made disclosure impossible, but that conclusion is not automatic and can be overruled where circumstances allow.

- iii. The *Baker* case makes clear that the test is not what the subject actually expected, but what the subject could *reasonably* expect. The case states that the FOIA modifies the expectations that individuals can reasonably expect secrecy, "*especially where the information relates to the performance of public duties or the expenditure of public money*". (We note that the Appellant is quoting from what the Commissioner's arguments in that case rather than the Tribunal's actual decision.)

Seniority of CEO:

- iv. As a senior employee of the Council, the ex-CEO should reasonably have expected that the agreement would or may be disclosed to the public under FOIA. The Commissioner's guidance states:

*"The more senior a person is, the less likely it is that disclosing information about their public duties will be unwarranted or unfair. Information about a senior official's public life should generally be disclosed unless it would put them at risk, or unless it also reveals details of the private lives of other people (eg the official's family)."*<sup>7</sup>.

To overcome this guidance, the Commissioner must be convinced that there are circumstances present which make disclosure particularly harmful, and he has been unable to do this, merely stating that disclosure "might well" harm her. He also admits that evidence of this is difficult to produce. Absent of good reason to the contrary, the guidelines should be followed. Otherwise it is difficult to understand why it is put to the public.

- v. The compliments paid to the subject publicly must indicate that any disclosure cannot be unreasonable on the grounds of unfairness. If these compliments are unfounded it would appear that the Council is deliberately misleading the public.

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<sup>6</sup> Information Commissioner's Office: Awareness Guidance 1: "The exemption for personal information" Nov08, p.8 [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance%20\\_1\\_%20personal\\_information\\_v2.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance%20_1_%20personal_information_v2.pdf)

<sup>7</sup> *ibid.*

d. Private versus Public Life:

- i. It is not argued, or expected, that disclosure will relate to the subject's private or family life. It cannot be accepted that details relating to pension *contributions*, tax codes etc. relate to a person's private life such that the whole agreement is exempt from disclosure. They quite clearly relate to her public duties under the heading of "senior pay in the public sector" referred to in the Audit Commission's report. (We found the Appellant's argument difficult to follow. We do not see how details on a person's tax code can be said to pertain to public duties.)

e. Data Subject's rights and freedoms balanced against the legitimate interests in disclosure

- i. The public is entitled to know when its governance has been destabilised and what steps are being taken to restore stability. This entitlement must take priority over the interests of a person whose conduct was thought (both by the Council and the District Auditor) to have led to such instability.
- ii. (Further arguments are set out below in relation to the legitimate interest test.)

### The Law

40. In construing the first DPP, the Tribunal notes and applies the comments by Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 (referring to the equivalent exemption in the Freedom of Information (Scotland) Act 2002 ('FOISA')):

*"In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes the provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data..."* (Para. 7)

41. When determining what is fair, we are to have regard to how the information was obtained and whether the person from whom it was obtained is deceived or misled as to the purpose for its processing. (See *para.26 above*.) We therefore accept that the reasonable expectations of the ex-CEO and possible consequences of disclosure for her are relevant factors to consider.

### Our Findings

42. In short, the requested agreement falls within a category of what might be termed "personnel matters" and as such, there is a strong expectation of privacy. Therefore, for most of the terms of the agreement, we consider it a reasonable expectation that the information would not be disclosed and that to do so would be unfair. However, we would not regard it as reasonable for the ex-CEO (or the council) to expect that certain information relating to the use of public funds, to be hidden from public gaze by virtue of a confidentiality clause agreed between them. This is because of the context described below and the fact that the ex-CEO was the most senior officer of the council.
43. The following factors are pertinent to our findings:

a. Privacy:

- i. There is no presumption in favour of releasing personal data.

- ii. A person in public office should expect their public actions and work duties to be subject to greater scrutiny than their private lives. However, we accept that there is a category of data - information that might belong in a personnel file within the human resources department of a public authority, such as pension contributions and tax codes - that comes into existence whilst acting in one's professional capacity, which is nevertheless inherently private and would attract a very strong expectation of privacy and protection from the public gaze. (We note that disclosure under the FOIA is considered disclosure to the world at large and so might be considered particularly intrusive). A compromise agreement entered into with employers is private in nature and would fit within this category.
- b. Seniority: A senior person in public office should expect their public actions to be subject to greater scrutiny than a more junior official. In this case, the ex-CEO was the most senior officer in the council, reporting to the leader of the council.
  - c. Context: To consider whether expectations are "reasonable", they must be seen within their context. We note:
    - i. The ex-CEO left office with the council finances in disarray. Auditors described the period prior to her leaving, as a financial crisis. The 2007/08 audit describes the finance department as having been inadequate and failing to meet certain minimum requirements. Instead of the budgeted underspend, there was a £800,000 overspend and a need to save £2.5M. We would anticipate the measures needed to curtail the budget would impact on the authority's ability to deliver services; staff; taxpayers and residents. The local press described the situation as a catastrophe and were keen to find out what was going on and who to blame.
    - ii. At the time of the request, it was known that compromise agreements were being used in the public sector. There was (and still is) public interest in the remuneration levels of top council officials and increasing openness in this area. There was an interest in knowing whether public authorities were "rewarding failure" through early contract termination payments. (We do not imply that Craven did reward failure or that the ex-CEO had in any way failed. There was clearly a breakdown in relationships and an interest in finding out whether this was happening there.).
    - iii. Within the context described here, we do not find the argument about timing (*in para. 38(b)(vii) above*) compelling.
  - d. The Information: ie the terms of the agreement:
    - i. Confidentiality: CEO's Expectations: Curiously, it was only after the panel's further questions, that the Additional Party submitted a witness statement from the ex-CEO. In this she stated that without the protection of the confidentiality clause within the agreement, she would not have entered into the agreement. However, the ex-CEO had received independent legal advice in entering into the agreement, and so presumably would have been aware of FOIA. Even if she were not, as the Commissioner's guidance on s.40 FOIA points out: "*...in the absence of other factors disclosure will not be automatically unwarranted or unfair just because the person was not aware of the possibility of disclosure.*"<sup>8</sup>
    - ii. The Commissioner's guidance also warns authorities that: "*it is not possible to avoid your duties under the FOIA by not telling individuals that*

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<sup>8</sup> Ibid.

*their data may be disclosed, or by stating that data will not be disclosed, and then arguing that disclosure would be unwarranted and unfair.”<sup>9</sup>*

- iii. The section 45 Code of Practice which the Commissioner referred to (see *paragraph 38(b)(iii) above*) also warns that the public authority and contractor should be aware of the limits placed by the FOIA on the enforceability of confidentiality clauses. We accept that the code is focused predominantly on contracts with third party contractors. However, we consider that the principle remains - although where the data falls within the personnel category, it may very well fall within the absolute exemption within the FOIA.
  - iv. We were referred to paragraph 24 of the *Wilson* decision, where the Tribunal states that the existence of a confidentiality agreement would give rise to a reasonable expectation that no further information would be released. However, that statement was made as a general observation; this Tribunal is not bound by the decision; and in any event, the facts differ. We do agree that generally, we would not anticipate that information contained within a compromise agreement would be disclosed.
  - v. The Commissioner also considered the value of compromise agreements more generally. This does not appear relevant to whether disclosure would be unfair to the data subject. Arguably, it is relevant in considering the legitimate interests of the public, discussed below.
- e. Consequences of Disclosure for the Data Subject: Brief assertions were made that the consequences of disclosure would be deleterious to the subject's emotional wellbeing and/or career. However, they were unsubstantiated and not justified to any satisfactory level. Compromise agreements are commonly used and we would not see why disclosure of, say, their common terms would cause damage. We accept that disclosure of the information might cause a level of mischief but not to a significant degree.
  - f. The Commissioner considered as a further factor, the data subject's rights and freedoms when balanced against the legitimate interests in disclosure. Given the same arguments will apply in relation to the legitimate interest test, we deal with those points below, instead.

## **D. Would processing be lawful?**

### Submissions

44. In closed submissions, the Additional Party and Commissioner argued that disclosure would be unlawful. They based this on the confidentiality clause within the agreement. After the hearing that the Additional Party served an open witness statement that openly referred to the existence of the confidentiality clause within the agreement. In view of this late statement, we see no justification for the arguments being kept confidential, and we deal with them below. We have not sought the Appellant's submissions in reply to the arguments. In view of the lack of analysis presented, we consider this unnecessary.
45. The Additional Party argued that since the Compromise Agreement contains a valid confidentiality clause, disclosure of the personal data contained in the agreement would be unlawful. However, when asked whether redaction was possible, it agreed that it would be.
46. The Commissioner also argued that disclosure would be unlawful because it would breach the terms of the confidentiality clause, as it appeared to remain valid and legally binding on the two parties to the Agreement. (This was despite its statement in para.38(b)(v)).

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<sup>9</sup> Ibid.

## Our Findings

47. We do not find the arguments that processing would be unlawful at all persuasive. Whilst the first DPP requires that information be processed “lawfully”, this is not defined in the Act. However, it seems to mean that information may not be processed when the law does not allow it, as opposed to when two parties have entered into a voluntary agreement not to disclose the information.
48. Perhaps the parties were seeking to argue that disclosure would be a breach of confidence. However, they did not enunciate this - nor why such quality of confidence would be inherent rather than simply agreed; nor why such arguments were not more properly put within the absolute exemption in s.41 FOIA.<sup>10</sup>

## **E. Does Condition 6(1) of Schedule 2 DPA<sup>11</sup> apply?**

### The Law

49. We adopt the reasoning in *Baker*, that condition 6 of Schedule 2 is satisfied if the legitimate interests of the public outweigh those of the ex-CEO in protecting her personal data:

*“...Paragraph 6 requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this context are members of the public (section 40 (3)(a)); and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs. However because the processing must be ‘necessary’ for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should the personal data be disclosed.”* (Para 90).

50. In connection with necessity, we are assisted by the reasoning in *Leapman*:

*“...Interference with private life can only be justified where it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued... the Court identified the essential questions as whether there was an interference with private life, whether the interference was justified by a legitimate aim, and whether the interference was necessary to achieve the legitimate aim pursued, i.e., whether a pressing social need was involved and the measure employed was proportionate to the aim (paragraphs 73-94)... (A) whether the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the MPs (and, so far as affected, their families or other individuals), (B) if we are satisfied that the aims cannot be achieved by means that involve less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the MPs (or anyone else)....”* (Para.s 59-60 – Emphasis added).

### Our findings

51. The main legitimate interests of the requester or members of the public raised in this appeal can be summarized as follows:

#### Transparency and Public Funds:

- a. The parties acknowledge a strong interest in the public knowing the terms of the Compromise Agreement and how much public money was spent. The Appellant

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<sup>10</sup> We note that we have already discussed above whether the presence of the confidentiality clause might have meant that processing would be unfair.

<sup>11</sup> Para. 27 above sets out this provision.

considers that transparency is important to the democratic process to ensure the public are able to exercise a properly informed vote, and that the public have a right to know how its money is being expended - particularly at a time of financial failings. (We consider this interest to be particularly strong to the extent it concerns knowing whether senior officials are being awarded large pay-offs.)

- b. In assessing the weight of this, we considered the Commissioner's arguments that there is a countervailing strong public interest in preserving the use of such agreements as vehicles for ending employer/employee relationships. The Audit Commission's report was cited to illustrate the interest in maintaining the confidentiality of compromise agreements because they may serve to reduce the size and number of severance payments; ease quick departures where there are dysfunctional relationships and therefore increase efficiencies. (We presume this is partly based on a calculation that settling a dispute with an outgoing employee is generally more economical than allowing the dispute to progress through the court. However, the report also states that not all such settlements are justified, with some competent chief executives losing their jobs needlessly, and less effective individuals being paid-off rather than dismissed. The commission called for, amongst other things, all deals to be more transparent, scrutinised by remuneration committees, and details published shortly after they are agreed. We do accept that there is a public benefit to compromise agreements that serve to draw a line on dysfunctional relationships and bring clarity as to the costs of doing so. However, we do not accept that if the outgoing employee were to know that financial details of their severance agreement were to be made public, they would instead always opt to continue with their dispute in court instead. Whilst it is possible that for some confidentiality is the predominant benefit, there are other advantages. The employees may prefer the speed, lesser stress and certainty of result achieved through the out of court settlement.)
  - c. The Appellant expressed a concern that the public should be able to be assured that severance agreements were not used to cover up defects in public administration. (We accept that there is a strong public interest in knowing whether the authority was justified in reaching a settlement or whether instead an agreement has been entered into to bury issues or reward failure. This is particularly when its competency in financial management has been brought into question. However, we would anticipate that disclosure of most of the terms of a standard settlement agreement would not enlighten the reader as to whether the settlement was justified. Assurance from the district auditor in the terms repeated above might be of greater assistance. (See *paragraph 16* above).
52. The main prejudices to the rights, freedoms or legitimate interests of the ex-CEO raised in this appeal can be summarized as follows:
- a. Privacy: the Compromise Agreement is private in nature and generally an employee ought to be able to expect it to be treated confidentially.
  - b. Consequences to the data subject of disclosure: As discussed above, we did not find any compelling evidence that the disclosure would cause harm, although it is possible that it could cause mischief that we are unable to predict.
53. Having considered all these interests and taking into account the particular circumstances that led to the settlement, we find that the legitimate interests of members of the public outweigh the prejudice to the rights, freedoms or legitimate interests of the ex-CEO only to the extent that the information concerns the use of public funds - either through Craven being exposed or potentially exposed to make payments to her. We note that some information relating to the financial details of the settlement is in the public domain. (See para 16b). The Appellant has argued that the public interests can only be satisfied by a

disclosure of all the terms of the Compromise Agreement, and not merely the amount of compensation paid. He argued that: “*only full disclosure can address the serious inadequacies of matters surrounding the departure from office of the data subject at a time when the finances of Craven DC had been decimated under her period of accountability.*” However, he did not fully explain why, and we disagree.

54. It is clear that although the requested disclosure pertains to information that came into existence as a result of public office, it is information belonging to the personnel files. Therefore if it were to be disclosed, this would interfere with the ex-CEO’s privacy. In accordance with paragraph 50 above, any such interference must be justified by a legitimate aim or pressing social need. In this case, the strongest need would be to know the how much of public funds were expended for senior staff in the context of a council whose financial affairs had caused great public concern. There are also needs to know that agreements are not used to bury failings of councils or poor management; and that the settlement was justified. However, as discussed above, we do not consider that disclosure would serve that need, and certainly not more so than the less intrusive method of an assurance from the district auditor. We are satisfied that disclosure of the financial details of the settlement would not have an excessive or disproportionate adverse effect on the legitimate interests of the ex-CEO.
55. Whilst not a factor informing our decision, we note we were told that within local government, there is a now a requirement for authorities to publish in their statement of accounts the individual financial details of any severance payments to all senior officers earning over £50,000. Those earning over £150,000 are to be identified by name, with all others by post title.
56. The parties made reference to the decisions in *Waugh* and *Wilson*. In both cases the requests were not for comparable information. Further, in the former the severance sum had already been disclosed. In the latter, the employee does not appear to have been of a similar level of seniority. In any event, we are not be obliged to follow those decisions.

### **Conclusion and remedy**

57. For the reasons set out above, we find that Craven must provide the information identified in the substituted decision notice.
58. Our decision is unanimous.

Signed:

Judge Taylor

22 February 2011