



IN THE MATTER OF AN APPEAL
TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2016/0177

BETWEEN:-

CRAVEN DISTRICT COUNCIL
Appellant

-And-

INFORMATION COMMISSIONER
First Respondent

-And-

Jane Houlton
Second Respondent

Decision

1. This is an appeal brought by Craven District Council (the Council) under section 57 of the Freedom of Information Act 2000 (FOIA). The appeal is against a decision notice of 16 June 2016 issued by the Information Commissioner (the Commissioner) which relates to a request for information made to the Council by the Second Respondent for a particular report (the Report) issued by the Council. The Commissioner ordered the Report to be disclosed in full. The Council has appealed that decision.
2. The Tribunal's decision is to uphold the appeal in part and orders that the Council disclose the requested Report without redactions other than those set out in paragraph 17 below. Closed Appendix A contains part of this decision which should remain closed until the period for appeal has passed. The Tribunal attaches a substituted decision at Closed Appendix C which should also remain closed until the period for appeal has passed.

Background

3. On 9 October 2015 the Second Respondent wrote to the Council and requested a copy of the following information:

"[the] Report concerning the purchase of a property on the Granville Street Development, Skipton, by the Chief Executive, Craven District Council."

4. The Council responded on 28 October 2015. It refused to provide the requested information, relying on section 40(2) FOIA.
5. The Second Respondent contacted the Commissioner on 5 January 2016 to complain about the Council's handling of her request. At an early stage in the Commissioner's investigation, the Council released a redacted version of the Report to the Second Respondent. The Council maintained that section 40(2) FOIA applied to the remaining information which it continued to withhold.
6. The Commissioner considered the application of section 40(2) FOIA to the information which had been withheld and decided that it should be disclosed.
7. The Appellant's grounds of appeal were in essence:
 - a) that the personal data of certain Council officers should not be disclosed; and
 - b) in any event, given mistakes in the Decision Notice which indicate a bias on the part of the Commissioner, the whole report did not need to be disclosed under FOIA.

Redaction of individuals' personal data

8. The Council relied upon section 40(2) of FOIA in arguing that the names of Council officers should not be disclosed. This provides for an absolute exemption from disclosure where to do so would be a breach of the Data Protection Principles, in this case, the first Data Protection Principle ("DPP1"). One facet of DPP1 is that processing must be "lawful" i.e. it must not contravene any statutory or common law provisions. Another facet of DPP1 is "fairness", which itself incorporates two requirements:
 - (1) Processing must not undermine data subjects' reasonable expectations about what would happen to their personal data and it must not cause them damage or distress, unless there is a sufficiently weighty justification for doing so.
 - (2) There is also a transparency requirement: data controllers must ensure that they have been sufficiently transparent with data subjects about how their personal data may be used, so that data subjects can take informed decisions about whether or not they are content for their data to be processed in those ways.
9. The final facet of DPP1 is that processing must satisfy a condition from Schedule 2 and, if necessary, from Schedule 3 to the Data Protection Act. The latter does not arise in this context, as the relevant personal data is not "sensitive personal data" within the meaning of section 2 of that Act.

Personal data of Council officers named in the report

10. The Council sent the Tribunal a copy of the Council's organisation chart together with other information about individuals mentioned in the Report. The Council stated that it had been in touch with the author of the Report who confirmed that she did not give any indication to individuals who were interviewed as part of the fact-finding process that their personal data would be disclosed at all, and in particular as a consequence of a Freedom of Information request. Further it was stated that the Council had identified that a number of exchanges between individuals in relation to the matter in 2015 when the Review was conducted, were marked 'Private and Confidential'. It was submitted that the interviewees named in the Report would have reasonably believed that the information that they were providing was made in confidence. The Council has further spoken to each of the individuals named (apart from two persons no longer connected with the Council), and a number of officers have

indicated that they would not be content for their personal data to be included if the withheld information is eventually disclosed.

11. In particular the Council identified two members of staff by name and job title whom it was argued were junior in rank and would therefore have a greater expectation of privacy.
12. The Commissioner argued that the individuals named in the Report were mostly of a senior position such that, in his view, there would be a reasonable expectation on their part that their names would be disclosed further to any publication of the Report. Their particular roles in the matter arose from their professional and not their private life. The particular content of the Report it was said would not be likely to lead to any negative impact for those individuals, mostly being facts as to what was told to whom.
13. The Commissioner argued that these points should be balanced against a strong legitimate public interest in the public knowing the identity of those to whom the Report's author spoke (not least so the public could be assured that the review sought contributions from relevant people). There was moreover it was said a strong legitimate interest in transparency and accountability in the case and that it would be difficult to provide the salient information in a less intrusive manner.
14. The Tribunal took the view that the names of the Councillors and senior members of staff should not be redacted on the basis that those individuals would have had a reasonable expectation that their personal data as it related to their professional roles would be subject to public scrutiny, be it via FOIA disclosure or the Council's own decision to publish the Report. Whilst the Report's author may not have specified that the disclosure might be made, nor had the individuals had concrete promises of confidentiality. The Council had not moreover provided any evidence of any such implicit guarantee other than the fact that the Report was entitled "Private and Confidential". Councillors and senior members of staff would, in the Tribunal's view and further to matters of common knowledge, be used to the fact that much of the Council's documentation, albeit nominally entitled confidential, would nevertheless be subject to FOIA disclosure and that their professional and elected roles would also be a matter of public knowledge.
15. The Tribunal took a different view with regard to the two junior members of staff in relation to whom the Tribunal took the view that the exemption at section 40(2) did apply.

Closed Appendices and redactions

16. The Tribunal's reasoning with regard to the personal data of the two junior members of staff to be redacted is set out in Closed Appendix B. The Tribunal also sets out there the basis for the redaction of the personal data of a further individual named in the Report.
17. The Tribunal ordered that the following information be redacted from the Report before disclosure:
 - a) page 2, paragraph 3, name after "complaint by"
 - b) page 3, paragraph 1, name after "complaint by"
 - c) page 4, paragraph 3):
 - a. the name in the title; and
 - b. the same name in the three places in which it appears in the body of the paragraph; and
 - c. the whole of the second sentence of the paragraph (which is in square brackets)
 - d) page 12 paragraph c), line 7, redact after "told" to the first "and".

- e) page 13 redact the last two sentences
- f) page 14, paragraph i), third sentence redact the first four words.
- g) page 15, paragraph n), name after "complaint from".
- h) page 17, paragraph u), redact from after "April" to "forwarded".
- i) page 20, paragraph i) redact after "complaint by" to "I" in the first sentence and then the same name from the next sentence.

Bias

- 18. In its grounds of appeal the Council sets out a number of instances within the Decision Notice which it asserts are incorrect. The Council goes on to say that as a result of some of these inaccuracies, the Commissioner's decision-making was biased. The Commissioner argued that the Decision Notice presents overall a balanced account of the relevant circumstances. From an early stage the Commissioner did accept however that there are a few statements within the Decision Notice which may be misleading when read in isolation but that these points did not affect the Commissioner's findings or the overall outcome of the decision.
- 19. The Commissioner was at pains to point out that the Decision Notice was clear, reading the Decision Notice as a whole, and that the Report had concluded that neither the Council nor the Chief Executive had acted inappropriately.
- 20. The Commissioner informed the Tribunal that he remained of the view that the overall decision that he reached in his Decision Notice, that the Report should be disclosed, is correct. However, during the course of the proceedings and in responses to directions issued by the Tribunal and in light of the Council's submissions and evidence he had revised his view with regard to the following points in the Decision Notice.

'Negotiations'

- 21. The Council argued that the Chief Executive had not acted in a negotiating role and that the Decision Notice had misled in this regard in various places.
- 22. The Commissioner told the Tribunal that he had no reason to dispute the Appellant's statement that its Chief Executive did not act as a lead negotiator and that that role does not exist within the Council. The Commissioner had set out in his Response that he understood that the Chief Executive had had dealings or contact with the developers for several years; given his role, which is the most senior one within the Council, the Commissioner understood the Chief Executive had been present at meetings with the developers and at meetings about the various developments. Given all the information which the Commissioner has, it appears to him that there is nothing to suggest that the Chief Executive himself was involved with 'negotiations' with the developer. The Tribunal accepted this view and made an appropriate amendment to the substituted Decision Notice.
- 23. According to press reports, the sale of the 'Horse Close' site alone appears to have been worth around £3.5m to the Council; a significant sum. Further, it appears that there may have been a perception within the local community that the Chief Executive might be involved in matters.
- 24. However, the Tribunal also accepted the Commissioner's submission that the evidence supported that the Chief Executive had attended meetings about the developments after he had paid a deposit for the property in question in September 2014, and before he had

alerted councillors to the purchase. That said, there was nothing to suggest that the Chief Executive attended meetings in a decision-making capacity.

25. The most senior official in the Council was purchasing a property which had been built on land sold by the Council around the time that local residents had called for enforcement action against the developer regarding non-compliance with planning conditions on the Granville Street site, and when the Council was considering selling another of its sites to the same developer.
26. Accordingly, in the Tribunal's view, whilst the Chief Executive was not involved in 'negotiations' with the developer, there remained a legitimate public interest in clarifying what had happened.
27. The Appellant also set out further concerns with regard to paragraph 16 of the original Decision Notice. The Appellant explained that there was an inaccuracy because the Chief Executive had distanced himself some time previously, and this was clear from the email referenced in paragraph 17 of the substitute Decision Notice. The Commissioner told the Tribunal that he agrees that the wording in the relevant paragraph in the original Decision Notice may mislead and it does not accurately reflect the content of the email. The Commissioner noted, and the Tribunal concurred, that the Chief Executive said in his email that he 'had distanced' himself from any decisions on the Horse Close site.
28. The Tribunal accepted however that this did not alter the lawfulness of the Commissioner's overall decision.

'Loan voices'(sic)

29. The Appellant expressed concerns about an argument that had been included in the Decision Notice as being put forward by the Council at paragraph 52 of the original Decision Notice. The Commissioner had interpreted the Council's statement to be that there was little public interest in the matter. The Appellant argues that that interpretation was wrong, and asserts that the argument was incorrectly and unfairly attributed to the Council. The Commissioner accepts that the argument was not put forward by the Council as set out in the original Decision Notice. Again, whilst the Tribunal put right the mistake in the substituted Decision Notice, it agreed with the Commissioner that this did not make any difference to the overall decision.
30. The Council argued that the above mistakes in the Decision Notice amounted to an indication of bias on the part of the Commissioner. For this reason, the above matters did need to be considered and were more than the Tribunal considering simple drafting of the Decision Notice.
31. The Tribunal has already concluded that each mistake above was not operative in its view in terms of the overall decision i.e. even with the suggested changes by the Commissioner in his findings, the Tribunal accepted this did not upset the overall conclusion that the Report be disclosed (subject to the points above on personal data). It was further of the view that even looked at cumulatively, these mistakes did not come anywhere near sufficient to amount to actual or the appearance of bias in the Commissioner's decision-making. They were of a minor nature set against the public interest in clarifying the role of the Chief Executive in the development. Set against the clear indication from the Report and

the Decision Notice that the Chief Executive had not done anything wrong, there was, in the Tribunal's view, nothing to substantiate bias on the part of the Commissioner.

Conclusion

32. The Tribunal concluded that other than in relation to the specified redactions of the personal data of particular individuals (in relation to which the exemption at section 40(2) FOIA applied), the Commissioner had been correct in ordering disclosure of the Report.
33. The Commissioner had withdrawn the original Decision Notice from its website at an early stage in light of the Council's representations. It also took steps to request that a third party take that version down from its website. The Commissioner had written to the Chief Executive to admit the mistakes but had nevertheless maintained the position that it would not issue a revised Decision Notice. The Tribunal noted that the Commissioner may not have been able to do so in law without the matter being considered on appeal. Given that the Tribunal has decided that the appeal be allowed in part in order that the personal data of the two staff members not be disclosed, it has taken the opportunity to rectify the mistakes in the Decision Notice.
34. The Tribunal has provided the substitute Decision Notice attached to this decision.
35. The Council is ordered to make disclosure of the Report with the specified redactions within 35 days of the decision.
36. The decision of the Tribunal is unanimous.

Judge Carter

25 April 2017