

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 29 October 2009

**Public Authority:** South Kesteven District Council  
**Address:** Council Offices  
St. Peter's Hill  
Grantham  
Lincolnshire  
NG31 6PZ

### Summary

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The complainant requested information from South Kesteven District Council (the Council) relating to the termination of contract of the Chief Executive. The Council withheld this information on the grounds that section 40(2) of the Act applied; in that the information requested constituted the Chief Executive's personal data and to release it would be unfair to him. The Commissioner is satisfied that the Council was correct to apply the exemption in this case; he does not therefore require the Council to take any further steps in respect of this request.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 15 April 2009 the complainant submitted a request to South Kesteven District Council (the Council), his request was as follows:

*"Please could you provide me with the following:*

*Contractual costs and amounts relating to the recent termination of the employment of the CEO.*

*Level of payments made to the outgoing chief executive in relation to the termination of his contract and how these will be paid.*

*Pension arrangements and the payment arrangements made to the outgoing chief executive.*

*Legal, administrative and associated costs borne by SKDC because of the resignation of the Chief Executive”*

3. The Council provided a response on 12 May 2009 (within 20 working days) in which it refused points one, two and three on the basis of the exemptions contained at sections 40(2) and 41. The Council answered point four.
4. The complainant requested an internal review of the public authority's decision on 22 May 2009.
5. On 19 June 2009 the public authority wrote to the complainant with the result of the internal review it had carried out. The Council upheld their decision to refuse disclosure of points one, two and three by virtue of the exemptions contained in sections 40(2) and 41.

## **The Investigation**

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### **Scope of the case**

6. On 27 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points with regard to the first three requests referred to above:
  - The Council's application of S40(2)
  - The Council's application of S41
  - The openness, transparency and accountability in the use of public finances
  - The public interest in this particular case
7. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

### **Chronology**

8. The Commissioner wrote to the public authority on 2 July 2009 advising them that the case was being taken forward. He asked them to provide their arguments for withholding the information, along with a copy of the withheld information.
9. On 24 July 2009 the public authority responded to the Commissioner, providing their arguments for non-disclosure along with a copy of the withheld information.

## Analysis

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### Exemptions

10. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.
11. In considering whether the exemptions are valid, the Commissioner has taken into account that the Act is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public.

### Exemption: Section 40(2)

12. Section 40(2) provides an exemption for information which is the personal data of a third party. Section 40(2) is contingent on two conditions and the Council has informed the Commissioner that it is withholding the recorded information under section 40(2) by virtue of section 40(3)(a)(i) of the Act. This condition requires firstly for the information to be personal information under the DPA and secondly that the disclosure of it would contravene a data protection principle.

Is the information 'personal data'?

13. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information 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 intention of the data controller or any other person in respect of the individual.'*

14. The Commissioner has viewed the information that was requested and is satisfied that the information relates to an identifiable living individual, in this case the outgoing Chief Executive. The Commissioner accepts that information about an individual's financial settlement and contract with their employer is the individual's personal data as defined by the DPA.

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

15. Having concluded that the information falls within the definition of 'personal data', the Commissioner must then consider whether disclosure of the information

breaches any of the eight data protection principles as set out in schedule 1 of the DPA.

16. In this case the public authority has informed the Commissioner that it is the first data protection principle that it believes would be contravened by releasing the withheld information.
17. The first data protection principle requires that the processing of personal data should be fair and lawful and that at least one of the conditions in Schedule 2 of the DPA must be met. The term 'processing' has a wide definition and includes disclosure of the information under the Act to a third party.
18. In considering whether disclosure of this information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
  - The existence of a compromise agreement between the parties;
  - The Chief Executive's reasonable expectation of what would happen to his personal data
  - The Chief Executive's position as a senior employee of the Council.

### **Compromise agreement**

19. The Commissioner believes that compromise agreements play an important role in employer/employee relationships. They avoid the time, expense and stress of litigation in an Employment Tribunal when an employer/employee relationship comes to an end. Such agreements provide the opportunity to conclude the relationship in private and allow both parties to make a fresh start if they so choose. The Employment Rights Act 1996 established the opportunity for parties to reach a compromise agreement and has built safeguards into the process to ensure employees receive independent and accountable legal advice before entering into such agreements. Details of the reasons for the Chief Executive's departure and any payment(s) made to him are included in the compromise agreement.
20. 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**

21. From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within the outgoing Chief Executive's

reasonable expectations. The compromise agreement includes a confidentiality clause, which is binding on both the parties.

### Seniority

22. The Information Commissioner's Office has produced Awareness Guidance on section 40 of the Act, which makes it clear that public authorities should take into account the seniority of employees when personal information about their staff is requested under the Act. However, the Commissioner also considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information relates to an employee's professional life, and not their personal life.

23. The Commissioner's guidance "The Exemption for Personal Information" (version 3 11 November 2008) on the application of section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules it states that:

*"Whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances). Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity. You should also consider the seniority of their position, and whether they have a public-facing role. 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 (e.g. the official's family)."*

24. Furthermore, the Information Tribunal in *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038)* considered similar conditions and the considerations are relevant 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".*

25. The Tribunal also held that;

*"there is a recognised expectation that the internal disciplinary matters of an individual will be private".*

26. As in the current case, in *EA/2008/0038*, the settlement agreement between the public authority and the data subject included a confidentiality agreement which limited the information that would be made available to the public about the termination of his employment. The Tribunal held that that this gave rise to;

“a reasonable expectation that no further information would be released”.

27. Following the decision in the House of Commons v Information Commissioner and Norman Baker (EA/2006/0015 and 0016), 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.
28. The Commissioner concludes that the information requested in the present case is sufficiently similar to that in EA/2008/0038, and other similar decisions taken by the Commissioner, to justify the same conclusion being reached here.
29. As the Commissioner believes that it would be unfair to the data subject to disclose the requested information, he is satisfied that the information was correctly withheld by the Council under section 40(2). He has not gone on to consider whether the Council correctly applied section 41 of the Act, which provides an exemption for information which was provided to public authorities in confidence.

## **The Decision**

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30. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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31. The Commissioner requires no steps to be taken.

## Right of Appeal

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32. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 29<sup>th</sup> day of October 2009**

**Signed .....**

**David Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Personal information

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 40(4)** provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

**Section 40(5)** provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-



- (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 40(6)** provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

**Section 40(7)** provides that –

In this section-

"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 and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

## Data Protection Act 1998

### Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- “data” means information which—

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- “data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- “data subject” means an individual who is the subject of personal data;
- “personal data” means 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;

- “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
  - (a) organisation, adaptation or alteration of the information or data,
  - (b) retrieval, consultation or use of the information or data,
  - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
  - (d) alignment, combination, blocking, erasure or destruction of the information or data;

- “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.