



APPENDIX C – CLOSED UNTIL APPEAL PERIOD PASSED

Freedom of Information Act 2000 (FOIA)

Substituted Decision Notice

Dated: 25 April 2017

Public Authority: Craven District Council

Address: 1 Belle Vue Square
Broughton Road
Skipton
North Yorkshire
BD23 1FJ

Decision (including any steps ordered)

1. The complainant has requested a report concerning the purchase of a property on the Granville Street Development, Skipton, by the Chief Executive of Craven District Council. The Council refused to disclose the information on the basis that section 40(2) of the Freedom of Information Act 2000 (the Act) applied. During the course of the Commissioner's investigation it disclosed part of the report however it retained its reliance upon the exemption for some sections of it.
2. The Commissioner's decision is that the Council has incorrectly applied section 40(2) to the information, other than in relation to the personal data of certain junior officers named in the report.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To redact the personal data of the two junior officers and the complainant;
 - Then to disclose the redacted report.
4. The public authority must take these steps within 35 calendar days of the date of the decision notice. Failure to comply may result in the Commissioner making written certification of the fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and Response

5. On 9 October 2015 the complainant wrote to the Council and requested information in the following terms:

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

6. The Council responded on 28 October 2015. It stated that the exemption in section 40(2) of the Act applied (personal data of a third party) to the information.

Scope of the Case

7. The complainant contacted the Commissioner on 5 January 2016 to complain about the way the request for information had been handled. She believes that the report should have been provided to her.
8. During the course of the Commissioner’s investigation the Council reconsidered its response to the request and disclosed part of the report to the Complainant, however it continued to withhold other sections under section 40(2).
9. The Commissioner considers that the complaint is that the Council has applied section 40(2) incorrectly.

Reasons for Decision

10. Section 40(2) of the act states that:

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

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

11. Section 40(3) provides that:

“The first condition is:

- (a) *in a case where the information falls within any of the 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 the Act would contravene:*
 - (i) *any of the data protection principles, of ...*

12. The Commissioner has considered the most relevant data protection principle, which in the case is the first data protection principle. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless:

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

13. In his approach to the application of the first data protection principle the Commissioner concentrates in the first instance on whether the disclosure of the information would be ‘fair’.

In considering fairness, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subject, and the potential consequences of disclosure and balanced the rights and freedoms of the data subject with the legitimate public interest in disclosing the information.

Relevant Background

14. The Commissioner notes that the Chief Executive's purchase was from a developer who was in the process of building housing in the area. There had been concerns expressed about non-compliance with planning conditions and causing a nuisance to residents for one particular development. The Complainant argues that the Council's planning enforcement officers were not successful in preventing these abuses and that they failed to take enforcement action against the developer despite, he argues, 'multiple and manifest evidence' of breaches. She says that local residents consider the Council's position over this to have been overly lenient. It was on this development that the Chief Executive subsequently chose to buy one of the properties.
15. On the basis of the information before the Commissioner, it appears to him that there is nothing to suggest that the Chief Executive himself was involved with 'negotiations' with the developer. However, it does seem 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. There is nothing that the Commissioner has seen to suggest that the Chief Executive attended meetings in a decision-making capacity.
16. The Complainant argues however that he failed to inform elected members of the Council of his purchase (by then completed) until three days after a heated and controversial emergency general meeting in March 2015 (from which the public were excluded wherein the Council agreed to the developer purchasing a second site to develop further housing). At the point he wrote to members informing them of his purchase and stating that he had distanced himself from the discussions over the new site. The email was subsequently leaked and the local newspaper published an article about it in April 2015; http://www.keighleynews.co.uk/news/12867194.Chief_executive_of_Craven_District_Council_gives_reassurance_over_home_purchase_decision/
17. The Complainant argues that it was not clear that the Chief Executive complied with the processes of declaring his interests in this regard, and that he had reportedly not withdrawn from other key committee meetings where the decision had been discussed.
18. The Council agreed to commission an independent review of the issues raised. This found that the Chief Executive had acted appropriately.

The Nature of the Information

19. The information in question is the report into the issues investigated by the independent consultant. The report was commissioned by the Council with the stated role of establishing the robustness and application of Craven District Council procedures. Effectively, however, it also considers the Chief Executive's actions in purchasing the property. For the absence of doubt, the finding of the report was that there was no wrongdoing on the part of the Chief Executive or the Council as regards the issue.

20. The withheld information is a report that relates to the actions of the Chief Executive together with evidence provided by other third parties. The third party evidence mostly relates to evidence provided on the actions of the Chief Executive leading up to his purchase of the property. In passing however it also mentions a member of the Chief Executive's family.
21. The withheld information therefore contains details of the actions of the Chief Executive and evidence provided by third parties on the actions of the Chief Executive.

The Expectations of the Individuals

22. The expectations of the individuals will (or should) be dependent upon a number of factors, including the seniority of the individuals, whether their role is public facing and the circumstances in which the information has been requested. Essentially, the more senior the person the more likely that person should have an expectation that details of their actions and decisions might need to be disclosed in order for the authority to be transparent and accountable for its actions. However, more junior employees will have less of an expectation that their actions will be disclosed in response to an FOI request. They are accountable to their direct managers and to their departments and the public authority as a whole. It is the public authority which is ultimately accountable for the actions its employees take on its behalf.
23. Additional to this consideration is whether the information relates to the private or public life of the individual. There would be a much greater expectation that information on an individual's public role might need to be disclosed than details of their private life.

The Chief Executive

24. Turning first to the personal data of the Chief Executive the Council argues that part of the reason for the report was partly to determine whether his actions were appropriate. It says that in this sense the report could be considered to be analogous to a fact finding enquiry that would be conducted as part of a formal disciplinary investigation. It said that in such cases the details of these enquiries would not be disclosed externally except, on occasion, during the course of formal action, for example to an Employment Tribunal. It therefore argues that the Chief Executive would have no expectation that the information might be disclosed to the public in response to a FOI request.
25. The Commissioner recognises that information relating to disciplinary investigations against individuals carry a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future prospects and general reputation.
26. In his guidance on personal data available at <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance>, the Commissioner states that the expectations of an individual will be influenced by the distinction between his or her public and private life and this means that it is more likely to be fair to release information that relates to the professional life of the individual. However, information relating to an internal investigation or disciplinary hearing will carry a strong general expectation of privacy. This was recognised by the Information Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038)* when it said at paragraph 40 that:

“...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters.”

27. The Commissioner accepts the Council’s argument has weight, and he also considers that in the majority of situations this would be a strong argument for the information to be withheld. He must however look at the circumstances of the particular case.
28. The Council also argues that the withheld information relates to the purchase of a house by the Chief Executive and his family. It says that the purchase was a private transaction between him and the developer. It says that the purchase had nothing to do with his public role as Chief Executive, and that it was a matter of public record how much he paid for the property. The Council accepts that the Chief Executive is a senior officer at the Council and that as such, he would have greater expectations that some of the information on his public role would be open to greater levels of scrutiny than less senior officers might expect. It argues however that the purchase of the property was a private transaction between the developer, himself, and his family and that the report (carried out by an independent person), clears his actions of any wrongdoing in his public role. The Council argues that any public interest is met by the outcome of the independent report being publicised; it argues that it is not necessary for the whole report to be disclosed in order to demonstrate that his actions were appropriate.
29. The Commissioner accepts the above arguments to an extent. However he also considers that the withheld information mainly relates to the actions of the Chief Executive in clarifying and clearing the purchase with relevant Council officers to ensure that no conflict of interests arose. It demonstrates him taking steps to ensure that his purchase would not lead to accusations of wrongdoing on his, or the Council’s behalf. The Commissioner considers that the majority of the withheld information relates to this aspect of the purchase, not the actual details of the purchase itself. The Commissioner therefore considers that this relates to the formal actions taken by the Chief Executive, in his public role, in ensuring that matters relating to his private life did not impact upon his position at the Council and the integrity of decisions taken by the Council as regards the developer.
30. As regards the private details of the Chief Executive's private actions, the Commissioner notes that details of the purchase are already in the public domain, and it would be relatively obvious that in purchasing the property his family would also be involved in that purchase. These are the central, private aspects of the issue which the report would disclose, but these facts are already in the public domain.
31. The Commissioner therefore considers that he would have far less expectation that his actions in the regard could be considered ‘private’ or withheld from disclosure given his seniority and his previous meetings with the developer.

Third Parties

32. The Council also argues that third party evidence submitted to the investigation is reported in the report, and that the third parties would also have had no expectation that the evidence they provided to the investigator would be subsequently disclosed in response to a FOI request. It argues that some of these individuals are not senior officers at the Council and that, together with the nature of the investigation, would have led them to believe that

the information they were providing to the investigation would not be disclosed if requested under the Act.

33. The Commissioner accepts the argument that not all of the individuals whose evidence is noted are senior officers within the council. In his view, from the organogram provided, it appears that all but two of the officers mentioned fell within a category which the Commissioner considered would be likely to have middle management responsibilities and for these purposes could therefore be viewed as senior officers. The Commissioner was of the view that the two junior officers would reasonably not have expected their personal data to be disclosed further to a request under the Act. As such, in relation to those two officers, he concluded that the exemption at section 40(2) did apply and the Council had been correct in withholding their information.
34. The Commissioner considers that the senior individuals would recognise that a disclosure of the information would indicate to the public whether the checks and measures within Council procedures are appropriate to deal with the issues which were raised by the purchase. The evidence was not submitted as part of a disciplinary process.
35. The issue was whether there were any concerns over the actions of the Chief Executive and whether the processes in place were suitable for the situation the Council found itself in. The Commissioner considers that in such scenarios the more senior contributors would be robust enough to provide truthful answers and would not be dissuaded from doing so purely on the basis that a record of the evidence they provided might subsequently be disclosed.

The Potential Consequences of Disclosure

Chief Executive

36. The Commissioner has considered the potential arguments surrounding a disclosure of the information as regards the Chief Executive.
37. A disclosure of the information could renew the public's interest in the matter, which may cause a degree of distress or embarrassment, however the report is clear in finding that his actions were appropriate and so no professional repercussions should occur as a result.
38. Insofar as the public may have any remaining doubts about the integrity of his actions, a disclosure would clarify the actions he took and help to assuage these. In this respect a disclosure would be fair to the Chief Executive.
39. A disclosure would however undermine his personal privacy (and that of his family) on a personal, private transaction with the developer to a limited degree. As outlined above the majority of the information as regards his private life regarding the purchase is however already known by the public.

Third Parties

40. The Council provided arguments detailing the consequences of the disclosure. It argues that if details of evidence provided to the investigation were disclosed this could undermine individual's expectations of privacy as regards the information they were providing to the consultant in her fact finding investigation.

41. The Council argues that disclosure could lead to them being less open with such enquiries in the future in the fear that their identities and personal information might be placed in the public domain. The Commissioner considers this a role of public employees in such circumstances however. Suggestions that improper conduct had occurred had been voiced, and the questions they were asked were to address these allegations, might clarify the situation and clear the Chief Executive from improper conduct.
42. Whilst in the majority of occasions such evidence would be considered to be in confidence in this case the issues were not following a clear allegation of wrongdoing but a fact finding mission. Given the findings of the report the Commissioner considers that a subsequent disclosure of their evidence would not be overly concerning to the individuals concerned. They had simply reported on conversations they had had with the Chief Executive on a matter which had subsequently proven to be legitimate. It would have been clear to them that in providing the evidence they were demonstrating that he had voiced his intentions and prior to the time that was reported, and that his actions were therefore appropriate.
43. The individuals were carrying out their public roles when providing the information to the consultant, and so there would be no particular loss of private information other than details of who they were and what they said.
44. The Commissioner considers that the senior local government officials would be robust and forthright enough to not be dissuaded from providing responses to inquiries of the type in the future, particularly as a disclosure would have no particular negative effects upon them or the Chief Executive in this instance. The Commissioner took the view however that two members of staff should have their personal data redacted on the basis that it would not be within their reasonable expectation that this would be disclosed in the report.

Conclusions

Chief Executive

45. The Commissioner considers that for the purposes of the first data protection principle a disclosure of the information would lie within the expectations of the Chief Executive (and members of his family). Effectively his role demands high standards as regards his personal integrity, and given his previous role in meetings with the developer it would be clear that greater transparency would be needed to alleviate any doubts in the electorate's minds that he had acted appropriately and not with conflicted interests.
46. The Commissioner also considers that the suggestion was that he had acted improperly, that this may have led to a serious conflict of interest and that the developer may have in some way benefited from this. This is a serious allegation which had reputational consequences for both the Chief Executive and the developer. The Commissioner believes that in the circumstances of the case, it would be fairer to both parties for information demonstrating that the suspicions were incorrect to be disclosed than for it to be withheld.

Third Parties

47. The Commissioner is satisfied that in the circumstances of the case, and bearing in mind the evidence provided by these individuals, other than in relation to the junior members of staff, a disclosure of the information would be fair. In effect their evidence is merely reports

of conversations they had had with the Chief Executive which demonstrates that his actions had been appropriate and clear from the outset.

48. In the case of the Chief Executive's family members there is a brief mention, however the information would be easily ascertainable or obvious from the outset. The Commissioner therefore considers that it would be fair under the circumstances for the information also to be disclosed.

Legitimate Interests of the Public v an Unwarranted Intrusion into the Rights of the Individuals

49. Schedule 2 of the Act provides a set of conditions relevant for the purposes of the first principle in the processing of personal data. Effectively even where a disclosure of the information would be considered within the expectations of the individuals under the first data protection principle one of these conditions must be met before any disclosure would be considered fair.

50. Paragraph 6(1) of Schedule 2 provides that:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or 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."

51. Effectively therefore, a disclosure must be necessary for the legitimate interests of the public when balanced against the legitimate interests of the Chief Executive and the third parties.

52. The Commissioner considered whether the Complainant might have been a lone voice in making a complaint and asking for a copy of the report. An argument would, on that basis, be that there is no real legitimate interest in the information being disclosed because the wider public did not appear to have been concerned about the issues. The Commissioner however notes the local newspaper stories and the fact that there was an investigation at all will obviously raise concerns within the community.

53. The Council further argued that as the findings of the independent report had been publicised it was not necessary to disclose the full report in order to satisfy the legitimate interests of the public in understanding that the Chief Executive had acted appropriately.

54. The Commissioner has considered the argument. Although there was a possibility that the investigation might have led to disciplinary procedures; it did not, and the report found no evidence that the Chief Executive had behaved improperly when purchasing the property. The report was a fact finding mission to determine in part, whether any disciplinary action should be taken, however, it was discovered that this was not required. The Commissioner therefore considers that this distinguishes the report from the normal disciplinary reports which he has referred to above.

55. The outcome of the independent report has been published however the details which demonstrate that the Chief Executive's actions were appropriate have been withheld. In the instance, given the issues with the development and the description of events outlined by the Complainant and reported in the media the public has a legitimate interest in understanding exactly what occurred.

56. A disclosure of the information would allow the public to satisfy themselves that the actions of the Chief Executive had not led to their calls for sanctions against the developer to be ignored, or the subsequent decision to allow the developer to purchase another site for development swayed in any way. Effectively a disclosure of the information would create greater trust in the actions of the Council over the issue. This is one of the central principles behind the introduction of the Act in the first instance.
57. The Chief Executive and the third parties will all have had some degree of expectation that the information obtained from them for the report would be withheld given the investigation's similarity to disciplinary proceedings. In the majority of similar situations this would have led to any disclosure being unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the individuals concerned. However, in this case this was not a clear disciplinary investigation. The investigation was stated to be as regards the procedures at the Council rather than directly into the actions of the Chief Executive.
58. The Commissioner also notes that the suggestion of improper behaviour also affects the developer and from this aspect has a legitimate interest in the information being disclosed in order to clear it from any suggestion of improper influence being exerted by the Chief Executive to make decisions in its favour.
59. The public therefore has a legitimate interest in being able to understand what actions the Chief Executive took, and when, in order to ensure that there was no conflict of interest. A disclosure of the information would simply clarify that these actions were appropriate, and would demonstrate why the report had found no suggestion of improper behaviour.
60. The effect of the disclosure on third parties, other than the two junior members of staff, whose comments are recorded in the report would be minimal, and any expectations they do have that the comments would not be disclosed needs to be balanced against the legitimate interests of the public in receiving the information. The Commissioner has highlighted above why, other than in relation to the two junior members of staff, he considers this to be of primary importance in this case.
61. The Commissioner is therefore satisfied that the legitimate interests of the general public outweighs any intrusion into the rights and legitimate interests of the Chief Executive or third parties, other than the two junior members of staff, in this case. He therefore considers that the council was not, other than to the limited extent set out above, correct in applying section 40(2) in this instance.

Judge Carter