



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2010/0165

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50286813

Dated: 7th September 2010

Appellant: Mr John Pycroft

Respondent: Information Commissioner

2nd Respondent: Stroud District Council

Heard on the papers at: Fox Court

Date: 8th February 2011

Date of decision: 11TH February 2011

BEFORE:

Fiona Henderson (Judge)

Gareth Jones

and

Dave Sivers

Subject matter:

FOIA

Absolute exemptions

- Personal data s.40

Cases:

House of Commons v IC and Leapman, Brooke and Thomas EA/2007/0060

Ince v IC EA/2010/0089

FS50150198 Lancaster City Council

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER**

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DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal refuses the appeal and upholds the decision notice dated 7th September 2010.

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Introduction

1. By the end of the 2008/9 financial year, Stroud District Council (SDC) had identified an £873,000 overspend in its Housing Revenue Account. KPMG were asked to investigate and published a report in August 2009. The report identified a combination of failings both individual and systematic which led to the shortfall. Amongst its findings, the report stated that the former Strategic Director (of Housing) “*did not ensure that staff had taken ownership of managing the budgets.*” The Strategic Director retired in March 2009 but the terms of his retirement were agreed in October 2008.

The request for information

2. The Appellant wrote to the Council on 5th October 2009 in relation to the HRA overspend. Within this letter he made the following request for information:
 - (1) *When did the Director of Housing take early retirement?*
 - (2) *[(a)] What package was he offered, [(b)] by whom?*
3. SDC answered part 1 of the request by letter dated 15th October 2009. In relation to request (2) they replied:

“The Director’s retirement had been dealt with by the Chief Executive (as line manager) and the Head of Human Resources in accordance with the Council’s policy and the provisions of the Gloucestershire Local Government Pension Fund administered by the County Council”.
4. SDC did not indicate that it was withholding any information relating to the information request or the exemption relied upon. However, after further correspondence between the parties in their letter of 20th November 2009 SDC stated:

“the Council does not disclose information relating to the individual officers’ retirement as this information constitutes personal data and is therefore exempt from disclosure under section 40 “personal data” of the Freedom of Information Act 2000”.

5. In his letter of 23rd November 2010 the Appellant indicated that he was dissatisfied with this response and SDC conducted an internal review which (as indicated in their letter of 17th December 2009) upheld the refusal under s. 40 FOIA.

The complaint to the Information Commissioner

6. On 18th December 2009 the Appellant complained to the Commissioner in relation to item 2(a) of his request. *“..I find it difficult to accept that anyone working in the public sector can be rewarded for doing his job badly: that the costs of his reward are not in the public domain. The extra costs involved – in providing anyone early retirement (with enhanced years of service added) are a burden on the taxpayer/council taxpayer that have not been earned. It does not seem fair (or sensible) for the general public to know details of the Head of HBOS pension, yet those relating to the Director of Housing at Stroud DC are not”.*
7. The Commissioner investigated the complaint and issued a Decision Notice dated 7th September 2010. The Decision Notice found that:
 - disclosure of the disputed information would not be fair for the purposes of the first data protection principle, and that the s40(2) FOIA exemption was engaged.
 - However, the Council were found to have breached various procedural provisions pursuant to s17 FOIA which are not the subject of this appeal.

The appeal to the Tribunal

8. The Appellant appealed to the Tribunal by notice dated 30th September 2010. His grounds of appeal argue that the Commissioner reached the wrong

conclusion about the disclosure of the part 2(a) information, as disclosure would be “fair” and would not otherwise breach any of the data protection principles.

9. In particular the Appellant argues that:

- The retirement package rewarded poor performance by the Strategic Director and this was not given sufficient weight by the Commissioner.
- the Commissioner did not give sufficient weight to the fact that the arrangement of the early retirement was overseen by the Chief Executive and not by members of SDC.
- Internal and external auditors could not be expected to scrutinize the early retirement package properly as criticism might lead to loss of employment or consulting opportunity,
- There is no practical system in place to regulate early retirement packages offered to officials at SDC.

The withheld information

10. The disputed information comprises the details of the retirement package offered to the Strategic Director. From the correspondence it is clear that discussions took place in October 2008 and the offer was made in a letter from David Hagg (Chief Executive) dated 20th October 2008 and accepted by letter dated 22nd October 2008. The Tribunal has viewed the withheld disputed material and has provided a short separate closed annex to this decision where it has been necessary to refer to the content of the withheld material.

Evidence

11. The Tribunal rehearses the evidence relevant to the background of the case but deals with the specifics within the analysis set out below.

12. The Council’s Monitoring Officer stated that the Constitution of SDC was originally approved by the Council in 2001 and has been revised (usually

annually) ever since. Only the full Council can authorise changes although the Council Standards Committee recommends appropriate constitutional changes to the full Council. Paragraph 22.1 of the Constitution gives delegated powers to its Chief Executive to deal with staffing matters, this includes the settlement of employees' retirement terms, including those of the Strategic Director. The retirement terms for any employee are not therefore subject to approval by the Council itself or by any Council Member.

13. In agreeing the retirement terms of the Strategic Director, the Chief Executive consulted with the then Head of Human Resources and Ms Sandra Cowley the Head of Finance from September 2008.

Legal submissions and analysis

14. Section 40 FOIA provides that:

... (2) Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data [of which the data requestor is not the data subject], and

(b) either the first or the second condition below is satisfied.

(3) 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,...

15. The withheld information directly relates to the financial affairs of a clearly identified individual (namely the former Strategic Director). Whilst it is not suggested that this would constitute sensitive personal data, there is no dispute that it does constitute personal data, and the Tribunal therefore goes on to consider whether the disclosure of the information to a member of the public would contravene any of the data protection principles.

16. The first data protection principle as set out in Schedule 1 of the DPA, applies to personal data:

*1. Personal data shall be processed¹ **fairly and lawfully** ²and, in particular, shall not be processed unless—*

(a) at least one of the conditions in Schedule 2 is met, ...³

Fair and lawful

17. In his Decision Notice the Commissioner balanced the reasonable expectation of the data subject with general principles of accountability and transparency. The Tribunal is satisfied that this is the right approach and adopts the same issue headings as identified by the Commissioner. Whilst section 40 FOIA is an absolute exemption and there is no public interest test under the Act, the application of the data protection principles does involve striking a balance between competing interests.⁴

The consequences of disclosure:

18. In his Decision Notice the Commissioner found that this was not a case where the Strategic Director was likely to be subject to harassment or threats if the information is disclosed, and this finding is not challenged by the parties. However, the Commissioner argues that disclosure would be intrusive and therefore would cause some distress on a balance of probability.

19. The Tribunal observes that people are reluctant to share their financial information for a variety of reasons, they may feel that they would become targets for salespeople and fundraisers, people are reluctant to enable comparisons to be made (whether favourable or unfavourable) with friends and neighbours. Additionally the Tribunal considers that pension information has certain characteristics:

- It usually relates to the sum of past service and not performance⁵;

¹ There is no dispute that disclosure of this information under FOIA constitutes processing for the purposes of the DPA.

² Emphasis added by the Tribunal

³ See paragraph 27 et seq below

⁴ *The Corporate Office of the House of Commons v IC and Norman Baker MP EA/2006/0015 and 16*

⁵ See para 33 below

- It is not “one time” information in that it does not provide a snapshot of a person’s economic situation, because it can usually be updated. Disclosure of a retirement package today would (if e.g. index linked) enable that person’s income to be calculated for the rest of their life, long after they had ceased to be accountable to the public.

Data subject’s reasonable expectations of what would happen to their personal data.

20. The way in which the first principle should be interpreted is provided in Part II of Schedule 1:

“(1) In determining for the purposes of the first principle whether personal data are processed fairly, 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.”

21. Because it is financial information there would be a level of sensitivity attached. Although in this case there is no specific confidentiality clause, the Tribunal is satisfied that there would be an assumed right to privacy between an employee and an employer in respect of a retirement package. It is not disputed that the more senior the employee, the greater chance that they will be responsible for making influential policy decisions or those that directly affect the expenditure of significant amounts of public funds. Therefore, in broad terms, the Tribunal accepts that it becomes less likely that exposure of a senior employee’s actions to a higher level of public scrutiny would be unwarranted or unfair.⁶

22. On the specific question of retirement details, Mr Pycroft relies upon the retirement details of Fred Goodwin when he retired from HBOS, however, the Tribunal considers that each case should be considered on its own facts. And in that case Mr Goodwin’s seniority, the national importance of the banking crisis and the sums of money involved were all relevant factors which are not replicated here.

⁶ Ince v IC EA/2010/0089

23. The Commissioner has relied upon his decision notice *FS50150198* involving *Lancaster City Council* where he found that release of information relating to the former town Clerk's pension arrangements would have a disproportionate adverse effect upon his legitimate privacy interests. The Tribunal is not bound by this decision, but considers that factually it is a more helpful equivalent than the example of Mr Goodwin. Mr Pycroft seeks to distinguish this case because the Town Clerk's retirement package was approved by the Council. For the reasons set out at paragraph 39 below the Tribunal is satisfied that whilst a different process was adopted by SDC there were appropriate checks and controls and the process was not inadequate.

24. Additionally the Tribunal is satisfied that the more the information relates to the employee's official functions and responsibilities where through their decisions or actions they may be accountable to the public they serve, the greater the expectation that it will be disclosed.⁷

25. In this case the disputed information goes beyond information directly concerning the individual's public role or decision making process and relates to personal finances. Although it is related to the individual's employment (in the sense that it is payment for service), it is not information so directly connected with their public role that its disclosure would automatically be fair.

The balance between the rights and freedoms of the data subject and the legitimate interests of the public.

26. Whilst the Commissioner has included this balance in his assessment of whether disclosure would be fair and lawful, this is also the Schedule 2 condition identified as being applicable on the facts of this case. The Tribunal therefore considers them together here.

27. The first data protection principle requires one of the conditions in Schedule 2 DPA to be met before disclosure can be made. Condition 6 provides;

⁷ *Ince*

(1)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.

28. In his Decision Notice the Commissioner did not believe that the public interest generated through the HRA overspend would necessarily translate itself into a legitimate public interest in the retirement of the former Strategic Director because the pensions terms would not allow the public to better understand how the overspend was allowed to occur. SDC point out that the overspend was considered at open meetings on 16th July and 23rd September 2009 respectively.

29. However, Mr Pycroft advances the following as additional third party legitimate interests:

- Disclosure would ensure accountability which is currently absent in his opinion because the Constitution affords the Chief Executive a great degree of discretion to approve and set the terms of a colleague's retirement.

30. The Tribunal notes that Mr Hagg did not make the decision unilaterally, he consulted with 2 senior colleagues. The Tribunal observes from their job titles that they would have been in an appropriate position to assess the affordability of this retirement and to examine the business case for releasing him.

31. Mr Pycroft further argues that there is a link between the Strategic Director's retirement and his performance in his role, in that:

- the Director of Housing's actions were in breach of his contract, job description and duty to the residents/council taxpayers.
- He has been rewarded for this neglect of duty with an enhancement⁸ to his retirement pension,

⁸ This is Mr Pycroft's assertion and in repeating his argument here, the Tribunal does not comment as to its accuracy or otherwise.

- In taking early retirement he has avoided accountability for his actions whilst in post.

32. It is not accepted by SDC that the Strategic Director's actions were in breach of any contract or duty. Additionally the Tribunal takes into consideration:

- Mr Spencer's evidence that the retirement was on an amicable basis, there was no contentious issue giving rise to litigation in an Employment Tribunal or elsewhere.
- KPMG investigated the matter and compiled a report, it did not conclude that the Strategic Director was personally and exclusively responsible for the overspend, although its conclusions included:
 - It appeared that the Strategic Director did not ensure that staff had taken ownership of managing the budgets.
 - The Housing service experienced staff turnover at senior level during 2008/9, which was poorly managed, leading to a lack of leadership over financial management arrangements.
 - The service had poor financial management processes, including incomplete budget monitoring and infrequent budget reporting.

33. It is accepted by SDC that, had they agreed the terms in the knowledge of the problems with the HRA, then this would have been a factor to take into consideration when balancing the competing interests. However, they deny that there is a causal link between the overspend and the retirement. Their evidence is that the terms were agreed in October 2008 which was before the problems with the overspend came to light. The Tribunal infers that it is their case that the retirement terms were to reflect the sum of service not performance.

34. Mr Pycroft does not accept that the Council were not aware of the overspend in October 2008 because of:

- The role of the Council's s151 Officer (Ms Cowley) who pursuant to s.151 of the Local Government Act 1972 has responsibility for the proper administration of SDC's financial affairs.

- A significant element of financial control occurs half way through the financial year (around October) when expenditure to date is closely measured against the budget, this enables an outline to be formulated for the following year's requirements.

35. The Tribunal is not persuaded by Mr Pycroft's arguments on this point and is satisfied that the over-spend was not apparent to SDC in October 2008 even though with better financial processes they should have been aware. Consequently the Tribunal is satisfied that there was no causal nexus between the Chief Executive agreeing to the retirement and the HRA overspend because:

- KPMG concluded that: *“the service had poor financial management processes, including unsophisticated budgeting, incomplete budget monitoring and infrequent budget reporting and did not meet the same standards that were operating in the rest of the Council”*.
 - Ms Cowley's evidence is that in October 2008 there was no indication of any budgetary issues on the HRA account. These became apparent several months later.
 - The KPMG investigation reported that the Council were not aware of the over-spend until very late in the financial year and had not been forecasting such financial pressures. Details were first reported to Members at the Cabinet meeting on 12th March 2009 once the over-spend became apparent.
 - There had been no consistent pattern of over-spend in earlier years to alert SDC to the likelihood of the problem.

36. The Tribunal notes from the KPMG report that:

“the housing Asset Manager reported that she did highlight to the Strategic Director as early as November 2008 the potential for an overspend on the capital budget.”

This does not alter the Tribunal's conclusion because⁹ at that date the Tribunal is satisfied that the retirement and its terms had already been agreed.

37. It is accepted by all parties that the Council owes a fiduciary duty to its residents/council tax payers to show how public money is spent, including ensuring that the Council is effectively overseeing the terms of the retirement of an employee.

38. Mr Pycroft argues that there is insufficient existing scrutiny:

- The retirement agreement is not approved by the Council,
- The internal and external auditors cannot be expected to challenge the decision of the Chief Executive as to do so could have negative career or commercial consequences.

39. SDC deny that the use of properly conferred delegated powers avoids public accountability or scrutiny. Whilst there is no requirement for the agreement to be approved by the Council, the Tribunal does note that Mr Hagg did not make the decision in isolation, he consulted with 2 appropriate senior colleagues. The Tribunal also notes that the Chief Executive's discretion is not unfettered, he has to act within the Council's policy at the time and within the statutory pension regulations. From the evidence of Mr Spencer the monitoring officer and Mr Hagg, the Tribunal is satisfied that he did. In light of the Tribunal's finding that there was no causal nexus between the HRA overspend and the retirement, the Tribunal is satisfied that there is no evidence of bad faith¹⁰, or that the Council has not applied itself properly.

40. Mr Pycroft argues that there would be no effective challenge from the internal or external auditors. The Tribunal disagrees, and considers that had the agreement raised affordability issues or been in breach of the policy or regulations it is likely that this would have been the subject of challenge at

⁹ SDC's letter of 15th October 2009 distinguishes capital overspend from revenue overspend which did not come to light until 2009.

¹⁰ In this respect this case differs from *House of Commons v IC and Leapman, Brooke and Thomas EA/2007/0060* where inadequacies of the system for scrutinising expenses were a significant factor in ordering disclosure.

audit. The Tribunal observes that internal auditors are required to act independently. Indeed, The Institute of Internal Auditors ("IIA")¹¹ offers the following description of the internal audit role:

"Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organisation's operations. It helps an organisation accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes"

41. Additionally the external auditor is not a Council employee under the Chief Executive's jurisdiction but is appointed by the Audit Commission. The Tribunal does accept that the level of scrutiny afforded by an auditor is likely to have a different focus to that undertaken by a concerned council tax payer who may be less concerned with the financial propriety and more interested in the moral justification for any such agreement.

42. The Tribunal also observes that in light of the Strategic Director's seniority and the problems with the HRA overspend this would have been a high profile retirement and that sufficient information was already in the public domain to enable the propriety and timing of such a retirement to be debated in any event without disclosure of the terms.

Conclusion and remedy

43. The Tribunal has concluded therefore that disclosure would be unfair and unwarranted in view of the rights of the former Strategic Director to privacy. The Tribunal orders no steps to be taken.

Other Matters

44. The Tribunal notes that in his arguments Mr Pycroft has raised issues relating to the performance of other SDC officers, the adequacy of the most recent

¹¹ Source:<http://www.deloitte.com>

accounts, and the desirability of retirement decisions relating to senior employees being taken by Members of the Authority (in Committee) rather than by the Chief Executive. The Tribunal has no jurisdiction to consider these matters as part of this appeal, but has taken them into consideration insofar as it is relevant to the issues of scrutiny and accountability set out above.

Dated this 11th day of February 2011

Fiona Henderson

Judge