

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 September 2011

**Public Authority:** East Riding of Yorkshire Council  
**Address:** County Hall  
Beverley  
HU17 9BA

### Decision

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1. The complainant has requested information about the recruitment process for the public authority's chief executive, and also details of his remuneration and pension package. After a considerable delay, some information about the chief executive's remuneration was disclosed, but information about his recruitment was withheld on the grounds that it is his personal data.
2. The Commissioner's decision is that East Riding of Yorkshire Council (the council) has correctly withheld information about the recruitment of its chief executive, but the delays in providing the information which was disclosed went far beyond the 20 working days which is permitted for a response to a request made under the Freedom of Information Act (the Act).
3. The Commissioner does not require any steps to be taken.

### Request and response

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4. On 2 June 2010 the complainant wrote to the council and requested information about the remuneration of its Chief Executive, and also a second request, in the following terms:

*"I also wish to be supplied in hard paper copy form, all recorded information, E-mails, Council meeting minutes, research & reports held by you in whatsoever files concerning the appointment of [name] to his current position of Chief Executive Officer with the Local Authority."*

5. The council responded on 16 December 2010. It disclosed some information relating to the remuneration of its chief executive, and refused information about his appointment, stating that this is exempt from disclosure under the provisions of section 40 of the Freedom of Information Act (the Act) because it is his personal data and disclosure would breach the Data Protection Act 1998 (the DPA).
6. Following an internal review the council wrote to the complainant on 22 February 2011. It continued to rely on its use of the exemption for personal data.

### **Scope of the case**

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7. The complainant initially contacted the Commissioner on 26 October 2010 to complain about the way his request for information had been handled. His complaint was that he had not, at that time, received a response to his request. Subsequent to the internal review, the complainant wrote to the Commissioner on 16 June 2011, indicating that he wished the Commissioner to investigate the timing of the response to his requests, and the validity of the council's exemption claims.
8. The Commissioner considers the scope of the complaint to be firstly about the delays in the response to the request, and secondly the application of the exemption at section 40 of the Act, relating to personal data, to the information which was withheld by the council.

### **Reasons for decision**

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9. The requested information was refused because it was personal data, and therefore refused under the provisions of section 40 of the Act. The applicable part of section 40 of FOIA states that

#### **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

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

**Section 40(3) provides that –**

“The first condition is-

(a) [...] 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”

10. Section 40(2) therefore relates to personal data which is about anybody other than the person making the request, and it may only be disclosed if, under section 40(3) that disclosure would not contravene any of the data protection principles. The applicable data protection principle is the first, which states:

*“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 [...].”*

11. For the purposes of FOIA, the applicable conditions at Schedule 2 are likely to be either condition 1 (that consent has been given for disclosure), or condition 6, which 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.”*

12. The council makes the point that, by definition from the complainant’s request, any information disclosed would clearly be linked to the Chief Executive, therefore it is his personal data and, even if disclosed in redacted form, it links back to an identifiable individual. Further, the council observes that the scope of the request is for information solely about the appointment of the Chief Executive to the position. The Commissioner accepts this argument and, having examined the withheld information, is satisfied that the withheld information is the Chief Executive’s personal data.

13. The council has argued that it would be unfair to disclose the requested details of the recruitment of the Chief Executive, that this would be contrary to the first data protection principle and consequently would breach the Data Protection Act 1998 (DPA). The argument may be

summarised as being that there is a clear and reasonable expectation, on the part of candidates for a job, that their application and the recruitment process will remain confidential. Therefore, without consent from the data subject, disclosure would be unfair in the terms expressed in the first data protection principle. It argues that this holds true regardless of the seniority of the applicant, or the position.

14. The Commissioner has previously considered matters relating to recruitment, job applications and interviews and he makes reference to a decision notice issued in case reference FS50242593<sup>1</sup>. He relies on the arguments expressed at paragraphs 18-23 of that decision notice in reaching his conclusion that, as in that case, disclosure of the requested information would be unfair. In summary, the Commissioner in that decision found that it is the reasonable expectation of an applicant for a job that the information he provides for the recruitment process will be treated as private and will not be made public.
15. The Commissioner recognises that, in the present case, the requested information will include not only the personal data submitted by the candidate in his application, but also any recorded assessment, such as notes, comments and internal correspondence, showing the deliberation of the council leading to the decision to appoint the candidate. As that information contains statements of opinion about an identifiable individual, it is also personal data. The expectations of privacy will extend to that additional information because it is reasonable for candidates to anticipate that the entire recruitment process will respect their privacy.
16. The Commissioner has given the complainant his view based on the findings of the decision in FS50242593. The complainant argues, in response, that there is considerable public interest in scrutiny of the recruitment process for the Chief Executive, because the previous Chief Executive retired early at some financial cost to the council, and his successor was a senior officer within the council, appointed in preference to two external candidates.
17. An argument which may be put forward to counter the council's position is that, even if the Chief Executive did not consent to the disclosure of this information, disclosure might still be fair, taking into account the seniority of the position and any specific circumstances of the case. If so, then disclosure might be permitted under condition 6 at Schedule 2

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[http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS\\_50242593.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50242593.ashx)

to the DPA, namely that the disclosure is **necessary** for the **legitimate interests** of the requestor, and would not be unwarranted due to prejudice to the rights and freedoms of the data subject.

18. In other words, if there is legitimate public interest in knowing the recruitment process details, and if the only way to satisfy that public interest would be for the disclosure of the information, then that might be argued to satisfy a test of 'necessity'. However, there is still a requirement to decide whether, despite this 'necessity' the disclosure would be unwarranted due to prejudice to the rights and freedoms of the data subject.
19. The complainant has provided press cuttings which indicate some public concern in connection to the additional costs to the council in funding the retiring Chief Executive's pension, and also about remuneration prior to his retirement, but nothing which would suggest any public concern about the recruitment of his successor.
20. The Commissioner acknowledges the complainant's view, which is that there is considerable public interest in public scrutiny of the recruitment process in this case. Therefore, he is arguing, it would not be unfair to the Chief Executive to disclose the information in the specific circumstances. The public interest which the complainant asserts is based on his view that the appointment may have improperly favoured the internal candidate. If true, that might be a sufficiently legitimate interest, so that it could override the normal rights and freedoms of the current Chief Executive, for example, his right to have his personal data held confidential, and his rights to privacy under, for example, the Human Rights Act 1998.
21. If the complainant had provided evidence to suggest public concern, or that the appointment was in some way improper, the Commissioner would consider that a valid proposition which warranted due consideration. He has not done so, and his arguments amount to little more than unsubstantiated supposition. While the complainant may have such concerns, he has produced no evidence that they are more widely shared, nor that there are reasonable grounds for that concern. The Commissioner therefore cannot give the arguments any weight.
22. The Commissioner concludes therefore that the disclosure would be unfair, and the information has been correctly withheld.

## Other matters

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23. The Commissioner notes that the complainant submitted his request on 2 June 2010, but did not receive a substantive response from the council until 16 December 2010, a period of 141 working days. This is substantially beyond the 20 working days set out in the Act as the statutory timescale for providing a response, and is therefore a breach of section 10(1) of the Act.

## Right of appeal

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Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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 sent.

**Signed .....**

**Andrew White  
Group Manager  
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