



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Freedom of Information Act 2000 (Section 50)

Dated 27 July 2006

Name of public authority: Denbighshire County Council
Address of public authority: Council Offices
Wynnstay Road
Ruthin
Denbighshire LL15 1YN

Information Requested

"All information that all Cabinet Members have seen in relation to the removal of Sioned Bowen. All Information from October to present date 30/3/05".

Summary Decision and Action Required

The Commissioner's decision is that the public authority was correct when it cited Section 40(2) as its basis for withholding the information that the complainants requested. However, the Commissioner finds that it failed to comply with Section 17(1)(b), Section 17(7)(a) and Section 17(7)(b) of the Act when it did not specify which exemption it sought to apply to the requested information and when it did not provide the complainants with information about its review procedure and about the right to complain to the Information Commissioner's office.

- 1. Freedom of Information Act 2000 (the "Act" or "FOIA") – Application for a Decision and the Duty of the Commissioner**
 - 1.1 The Information Commissioner (the "Commissioner") has received an application for a decision whether, in any specified respect, the complainants' request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Act.



1.2 Where a complainant has made an application for a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

2.1 The complainants had been in correspondence with the Commissioner raising concerns about the public authority's response to other earlier requests for related information. The complainants had at the same time been in correspondence directly with the public authority on this and related topics. On 21 March 2005, the public authority wrote to the complainants explaining its decision making processes. It also stated: *"Your comments about the extent of Cabinet members' knowledge of the facts are based on incomplete documentation. You will have had access only to the edited version of the cabinet report for 2 November [2004] which the council has released following a request under the Freedom of Information Act 2000. Therefore you will not have seen all the information that Cabinet Members have seen."*

2.2 The complainants then submitted a formal request to the public authority under the Act on 30 March 2005. This request asked for:

"All information that all Cabinet Members have seen in relation to the removal of Sioned Bowen. All Information from October to present date 30/3/05".

2.3 The public authority responded to this request on 1 April 2005 stating that it had interpreted '*removal of Sioned Bowen*' as a reference to her absence from office and subsequent retirement. It enclosed documents which were part of a bundle that had been released to other applicants. This bundle included correspondence between senior officials at the public authority and internal and external stakeholders such as Council Members, Council officials and senior education practitioners. The public authority did not cite specific exemptions from disclosure in this



letter but stated that it had withheld some information “*either because they constitute personal data or because, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information – disclosure would breach the confidentiality clause of the compromise agreement which both parties have signed and would expose the council to the risk and cost of legal action.*”

- 2.4 The public authority then went on to refer to publicly available Minutes of Cabinet and Council meetings which were either already available on its website or which were due to be published there shortly.
- 2.5 The complainants contacted the Commissioner again and advised the Commissioner that they had not sought an internal review of the public authority's refusal to provide all the information caught by the scope of their request but had been in correspondence with senior officials and elected Members at the public authority in order to gain further information. It should be noted that the public authority did not specifically offer an internal review in its letter to the complainants dated 1 May 2005.

3. Relevant Statutory Obligations under the Act

- 3.1 **Section 1(1)** provides that –
“*Any person making a request for information to a public authority is entitled –*
 - (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him*”.
- 3.2 **Section 17(1)** provides that -
“*(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-*
 - (a) *states that fact,*
 - (b) *specifies the exemption in question, and*
 - (c) *states (if that would not otherwise be apparent) why the exemption applies.*



3.3 Section 17(7) provides that -

(7) A notice under subsection (1), (3) or (5) must-

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50."

3.4 Section 40 provides that –

"(1) 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.

(2) 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.

(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, 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.

(4) 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).

The Commissioner does not consider that the remaining subsections of Section 40, Section 40(5) – (7), are relevant in this case.



4. Review of the case

Background

- 4.1 Sioned Bowen is the former Corporate Director of Lifelong Learning at the public authority. Her early retirement from post was announced on 30 November 2004. There was considerable stakeholder and press interest in the reasons behind Ms Bowen's early retirement. This interest had been prompted by the fact that almost two months earlier, on 4 October 2004, Councillors were informed by the Chief Executive that Ms Bowen was "*not currently in the office*". They were also informed that she was "*not on sick leave*" and had "*not been suspended*". Relevant departments of the public authority and external stakeholders were advised of this the following day.

Procedural matters

- 4.2 The Commissioner finds that the public authority's refusal notice did not satisfy the procedural requirements of the Act. It did not cite the specific exemptions that were being claimed and it did not provide the complainants with information about its internal review procedure and did not explain the right to appeal to the Commissioner. This contravenes the requirements of Section 17(1)(b), 17(7)(a) and Section 17(7)(b) of the Act.
- 4.3 The Commissioner recognises that this response was provided in the context of wider correspondence between senior officials of the public authority and senior elected representatives of the local area on what was a controversial subject. He also recognises that, as a consequence, the procedural requirements of the Act were not given priority when the response was drafted. The Commissioner also notes that in responding to a similar request two months earlier (the subject of another complaint to the Commissioner's office), the public authority had complied fully with its procedural obligations under the Act. The Commissioner intends to monitor the public authority's level of compliance with the procedural requirements of the Act but does not, at present, require the public authority to take any additional steps in this regard.

Section 40(2)

- 4.4 The Commissioner requested a copy of the information that the public authority had blocked out from documents that had been disclosed and asked for any other document which may have been withheld relating to Ms Bowen's retirement where the public authority considered that the entire text was exempt information. The public authority provided this information.



- 4.5 The Commissioner also asked the public authority to reconsider its application of Section 40 taking into account Ms Bowen's seniority and to provide further comments on the application of Section 40. He also asked for a copy of relevant confidentiality clauses in its compromise agreement with Ms Bowen and for any additional comments that the public authority may wish to make about this agreement. The public authority provided these comments and they are considered below.
- 4.6 Having read the withheld information, the Commissioner notes that the information caught by the scope of the complainants' request was personal data relating to Ms Bowen.
- 4.7 The public authority has argued that the disclosure of Sioned Bowen's personal data caught by the scope of this request would contravene the requirements of the first data protection principle of DPA 98 in that it would constitute unfair processing of those personal data.
- 4.8 The first data protection principle has two components
1. Personal data shall be processed fairly and lawfully and
 2. Personal data shall not be processed unless at least one of the conditions in DPA98 Schedule 2 is met.
- 4.9 Where sensitive personal data, such as information about an individual's health, criminal activity (including allegations of criminal activity) or religious beliefs are being processed at least one of the conditions in DPA98 Schedule 3 must also be met. Sensitive personal data are not part of the requested information in this case and, therefore, when considering the second component of the first data protection principle, the Commissioner only needs to consider whether one of the conditions in DPA98 Schedule 2 could be met. The full list of Schedule 2 conditions can be found by accessing the statute via the Office of Public Sector Information website
<http://www.opsi.gov.uk/acts/acts1998/80029--n.htm#sch2>
- 4.10 The Commissioner considers that the most applicable condition in this case is likely to be Schedule 2 (6)(1) which states

"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".



- 4.11 In considering whether disclosure of Ms Bowen's personal data would contravene the requirements of the first data protection principle, the Commissioner has taken a number of factors into consideration.
- The existence of a compromise agreement made between the parties
 - Ms Bowen's reasonable expectations about what would happen to her personal data
 - Ms Bowen's seniority
 - Legitimate interests of relevant stakeholders in Denbighshire in understanding unexpected developments at the public authority
 - Option of disclosing a "privacy-sensitive" summary
- 4.12 The Commissioner recognises the important role that compromise agreements can play in employer/employee relationships. They avoid the time, expense and stress of litigation in an Employment Tribunal where an employer/employee relationship breaks down. Both parties also have an opportunity to conclude the relationship in private and make a fresh start if they so chose. The Employment Rights Act 1996 (which establishes the opportunity to reach a compromise agreement) has built safeguards into the compromise agreement process to ensure that employees receive independent and accountable legal advice before entering into such agreements.
- 4.13 The Commissioner believes that the right to access official information and the right to reach an equitable compromise in private in an employment dispute are not mutually exclusive. However, where a compromise agreement has been reached between a County 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 a public authority's duty to respect their employees' reasonable expectations of privacy. In this case, a significant amount of information has already been released including, for example, the fact that the proposed payment to Ms Bowen would be based on the Local Government (Early Termination of Employment)(Discretionary Compensation) (England and Wales) Regulations 2000 (Statutory Instrument No. 1410 <http://www.opsi.gov.uk/si/si2000/20001410.htm>). The information which has been withheld could be characterised as "the reason why".



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4.14 The Commissioner has no grounds to assume that disclosure of “the reason why” is within Sioned Bowen’s reasonable expectations. Ms Bowen signed a compromise agreement having sought independent and accountable legal advice. The confidentiality clause in the contract, which is binding upon both parties, does not specify an agreed position in the event of an FOIA request. However, the Commissioner considers that the clause could be read widely enough to cover a full disclosure of the requested information.

4.15 The Commissioner has made it clear in his guidance on the Section 40 exemption and on other public platforms that the seniority of the individual should be taken into account when personal data about them are being requested under the Act:

“It may also be relevant to think about the seniority of staff: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair.” ICO Awareness Guidance 1 – Personal Information)

<http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%201%20personal%20info.pdf>

4.16 An employee or agent of a public authority who makes decisions which involve significant expenditure of public funds should expect greater scrutiny about their role for which they are paid out of public funds commensurate with their level of responsibility. Generally speaking, however, the Commissioner believes that information which might be deemed “HR information” should remain private, e.g., a person’s individual tax code, their pension contributions or trade union subscriptions and other information normally held by an organisation’s Human Resources department. The public authority argued there are elements of the requested information which carry a strong expectation of privacy even though they relate to Ms Bowen’s professional life rather than her personal life. The Commissioner recognises the strength of the public authority’s argument in this regard.

4.17 When considering whether a Schedule 2 condition for processing could be met (see 4.8 and 4.10 above) the Commissioner took into account the legitimate interests of the third parties to whom the information would be disclosed, i.e., the public at large which includes relevant stakeholders in Denbighshire.



- 4.18 The Commissioner acknowledges the understandable concerns of parents and education professionals in Denbighshire following an abrupt and unexpected change at the highest level of education management in that county. There was a period of almost two months from 4 October 2004 (a key phase at the beginning of the academic year) when one of the key departments of the public authority was operating without its senior director. While a key department in a public authority could find itself without its senior director for any number of reasons, there is a strong public interest in reassuring the public that the department is operating “business as usual” during any period of interregnum and is tackling any potential deficiencies in service that may arise. The protracted embargo on transparency between 4 October 2004 and the announcement of Ms Bowen’s retirement on 30 November 2005 gave rise to considerable concern and negative speculation. The information the public authority have released to date shows that this concern and speculation arose not only in the press but also in the wider education sector and among elected representatives in both the Welsh Assembly and in Westminster. This negative speculation was clearly not to the benefit of education in Denbighshire. Arguably, disclosure of the requested information would serve the legitimate interests of relevant stakeholders in Denbighshire by providing them with an explanation as to why events took the course that they did.
- 4.19 However, the Commissioner believes that their legitimate interests must be weighed against Sioned Bowen’s rights and legitimate interests. Ms Bowen has the right under the Employment Rights Act 1996 to reach a compromise agreement in private with her employer. She has exercised that right and in doing so is bound by the terms of that compromise agreement.
- 4.20 Having decided that full disclosure of the requested information would contravene the first data protection principle, the Commissioner considered whether the disclosure of an outline summary of the requested information would contravene any of the data protection principles recognising that such a summary would need to be drafted with careful regard to the potential impact on Ms Bowen’s privacy.
- 4.21 The Act allows for the disclosure of a summary of requested information where it is reasonable to do so in the circumstances. This is outlined in Section 11 of the Act which states:



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“(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,*
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and*
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,*

the public authority shall so far as reasonably practicable give effect to that preference.

(2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.

(3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.

(4) Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances”.

4.22 In this particular case, the Commissioner believes that it would be difficult to draft a “privacy-sensitive” outline summary which nonetheless explains more clearly why the public authority and Ms Bowen reached a compromise agreement but which does not contravene the requirements of DPA98. Given the considerable media and stakeholder interest in this subject, either party or both parties may find it difficult to avoid breaching the terms of their compromise agreement where pressed for further comment on a disclosed outline summary however carefully it was drafted.

Conclusion

4.20 The Commissioner recognised that there may be circumstances where it would be legitimate to release information of this nature relating to the unexpected retirement of a senior official at a public authority. However, in the circumstances of this case, he believes it would not be possible to do so here without contravening the requirements of the first data protection principle of DPA98.



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5. The Commissioner's Decision

5.1 The Commissioner's decision in this matter is that the public authority has dealt with the substantive element of complainants' request in accordance with the following requirements of Part I of the Act. However, the Commissioner finds that it did not comply with its procedural obligations under Section 17(1)(b), Section 17(7)(a) and Section 17(7)(b) of the Act when it did not specify which exemption it sought to apply to the requested information and when it did not provide the complainants with information about its review procedure and about the right to complain to the Information Commissioner's office. No further action is required.

6. Right of Appeal

6.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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@dca.gsi.gov.uk

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

Dated the 27th day of July 2006

Signed

Graham Smith
Deputy Commissioner

Information Commissioner
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