

FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 19 July 2006

Public Authority: Lisburn City Council
Address: The Island Civic Centre
The Island
Lisburn
BT27 4RL

1.0 Summary Decision and Action Required

The Commissioner's decision in this matter is that:

- 1.1 Lisburn City Council ("the Council") has not dealt with ("The Complainant") request in accordance with Part I of the Freedom of information Act 2000 ("the Act") in relation to part of the information that is the subject of the request in that it has failed to comply with its obligations under section 1(1)(b) of the Act ("Information to be disclosed").
- 1.2 The Commissioner is satisfied that the remainder of the information falling within the scope of the Complainant's request is exempt under section 40(2)(3)(a)(b). Therefore the Council has complied with the Act in refusing to communicate to the Complainant that part of the information in accordance with section 1(1)(b) of the Act ("Information to be withheld").
- 1.3 The Commissioner requires the Council to communicate to the Complainant the information to be disclosed within 30 days after the date of service of this Decision notice. The Commissioner has provided additional advice to the Council relating to that information which should be released to the Complainant.

2.0 Freedom of Information Act 2000 – Application for a Decision and the Duty of the Commissioner

- 2.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Act.
- 2.2 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- the application has been withdrawn or abandoned,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. 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.

3.0 The Complaint

- 3.1 The Complainant has advised that on 22 April 2005 the following information was requested from the Council in accordance with section 1 of the Act:

“Under the Freedom of Information Act I am seeking a copy of any reports/correspondence/documents about an incident in the council offices which occurred in April 2005 and which has been highlighted in the press. The documents I am seeking would include the report received from a security firm (as highlighted in the press) regarding the use of the Members Room at Lagan Valley Island. I believe this report was passed to the Chief Executive.”

- 3.2 The Council issued the Complainant with a refusal notice on 19 May 2005 stating that the information he had requested was exempt under section 40(2) of the Act.
- 3.3 On 19 May 2005 the Complainant refined his request to the “same information with the names removed or blacked out.”
- 3.4 On 29 June 2005 the Council informed the Complainant that it upheld its original decision on the use of section 40(2) of the Act and the subsequent refined request for the redacted information.
- 3.5 On 1 July 2005 the Commissioner received a request from the Complainant seeking a review of the decision of the Council to refuse the requested information.

4.0 Relevant Statutory Obligations under the Act

- 4.1 **Section 1(1)** provides that –

“(1) 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.”*

4.2 **Section 2(2)** provides that –

“(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1) (b) does not apply of or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

4.3 **Section 40(2)(3)(a)(b)** provide that:

“(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”.

5.0 Review of the case

5.1 Scope of the Review

The Commissioner considered whether or not the Council had complied with the requirements of section 1(1) (b) of the Act and in particular whether it had properly applied the exemption cited.

5.2 The Commissioner on considering the scope of the review advised the Council separately regarding the adequacy of its section 17 notice. The Commissioner has issued guidance by way of good practice for the Council when dealing with future requests.

6.0 The Commissioner's Investigation

- 6.1 The Commissioner's investigation assessed the refusal by the Council of the following information ("the information"):
- i. A handwritten security report
 - ii. A typed security report to Centre management
 - iii. A weekly security report for the Lisburn Civic Centre
 - iv. Correspondences between senior officers of Lisburn City Council and councillor x
 - v. A memorandum between senior officers of Lisburn City Council
 - vi. An email to Senior Council Officers regarding a media statement.
 - vii. Media statement issued by the Council.
- 6.2 On 24 November 2005, the Commissioner wrote to the Council with an explanation of the complaint and the context of the Commissioner's investigation. The Commissioner enquired as to which particular subsection of the section 40 exemption the Council had chosen to rely upon, and sought their reasons for doing so. The Commissioner enquired whether the information was 'personal data' within the meaning of section 1(1) of the Data Protection Act 1998 ("DPA"). In addition, the Commissioner sought to establish whether a breach of the DPA would have occurred if disclosure of the information were to have taken place at the date of the request and, if this were the case, why such a breach would occur. The Commissioner asked for a copy of the information and the context in which the information had been recorded.
- 6.3 In its response to the Commissioner of 16 December 2005, the Council stated that it was of the view that the information was 'sensitive personal data' within the meaning of section 2 of the DPA whose disclosure would breach the 1st, 2nd and 6th principles of the DPA. The Council did not however specify to the Commissioner the relevant category under section 2 of the DPA which the 'personal data' contained in the information fell. The Council stated to the Commissioner that as regards the grounds for processing (disclosing) the sensitive personal data contained in the information, there was no relevant condition under schedule 3 of the Act as the Council stated that councillor x had expressly withheld his consent to the disclosure. The Council informed the Commissioner that even if this information was released in redacted form it could still "compromise the personal information" of councillor x. The Council also confirmed to the Commissioner the extent to which some of the information was already in the public domain. The Council later confirmed to the Commissioner that information relating to councillor x which was in the public domain.
- 6.4 Having reviewed the information, the Commissioner asked the Council to clarify the functionality and expectation as to privacy of the persons using the Council's Member's room. The Commissioner also sought clarification as the purposes for which the Council processes

information within its security logs. The Commissioner asked the Council whether it had carried out a privacy impact assessment in relation to the impact disclosure may have on councillor x as part of its consideration of the complainant's request. The Commissioner asked the Council to confirm whether any of the information was held on CCTV or within the Council's security logs.

- 6.5 As a result of the Council's responses to the matters raised by the Commissioner a number of other detailed enquiries were made by the Commissioner in relation to the incident which was the subject of the information, and the Council's policy on the use of the Member's Room. The Commissioner also sought clarification of the relationship between the provisions of the Code of Conduct¹ and the fair processing requirements of the DPA.
- 6.6 The Commissioner as part of his investigations did consider whether or not the information was exempt by virtue of section 41 of the Act. However, the Commissioner is satisfied that the information was not provided to the Council by another person as it was produced by officers of Council for its own purposes and therefore the requirements of section 41(a) were not met.

7.0 The Commissioner's Decision

The Commissioner's decision in this case relates to the following categories of information within which the information requested falls.

- (1) Information that relates to the investigation carried out by the Council of the incident.
- (2) Information that falls within the scope of section 40 (2) (3) (a) (b) and relates to the private personal information of councillor x.
- (3) Information not falling within categories (1) and (2) above ("residual information").

7.1 That information which relates to the Council's investigation of the incident

- 7.1.1 The Commissioner's decision in this matter is that the Public Authority has not dealt with the Complainant's request in accordance with the following requirements of Part I of the Act:

Section 1(1) (b) – in that it the Council refused the Complainant's request based on section 40 (2) (3) (a) (b).

- 7.1.2 The Commissioner is satisfied as a result of his enquiries with the Council that some of the personal data falls within categories (a)- (d) of section 1(1) of the DPA as it is held electronically and some of the

¹ Northern Ireland Code of Local Government Conduct issued by the Department of the Environment under section 7A of the Local Government (Northern Ireland) Act 1972

information is held in unstructured files and therefore falls within category(e) of section 1(1) of the DPA. A substantial part of the information relating to the Council's investigation comprises the personal data of councillor x as it contains that individual's name, address and other information of which Councillor X is the focus including some information relating to the intentions of the Council in respect of that individual. The information also contains the personal data of officers of the Council, including a Director and the Chief Executive.

- 7.1.3 The Commissioner is satisfied that the information does contain personal data relating to a number of individuals and that such data does not constitute personal data which falls within subsection 1 of section 40 as the complainant is not the subject of that information. However, the Commissioner is not satisfied for the reasons set out below that all of the information is exempt information by virtue of the first condition outlined at section 40 (2) (3)(a) (b) being contravened.

7.2 The First Data Protection Principle

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

- *At least one of the conditions in schedule 2 is met; and*
- *In the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.”*

7.2.1 Conditions for processing

In relation to that information regarding the Council's investigation the Commissioner is satisfied that councillor x personal data contained in the information is not sensitive personal data within the meaning of subsection (a)-(h) of section 2 of the DPA, and therefore the Council in considering disclosure need only have identified a condition for such processing under schedule 2 of the DPA.

The Commissioner is satisfied that the Council does have sufficient grounds for disclosing some of the information under paragraph 6 of schedule 2 of the DPA which requires that

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

- 7.2.2 The Commissioner is of the view that there is a legitimate interest in transparency and accountability on the part of the Council to make information available to the public relating to how they conduct investigations of this nature. The Commissioner believes that there is a strong public interest in ensuring that investigations are carried out

thoroughly and fairly by the Council. Having considered the contents of the Code of Conduct the Commissioner is satisfied that disclosing the information relating to the investigation carried out by the Council would not be unwarranted by reason of prejudice to councillor X's rights and freedoms or legitimate interests. The Commissioner is mindful also of the fact that an investigation was underway in relation to a "late-night incident", and this was already in the public domain.

- 7.2.3 In relation to those members of staff named in that information relating to the Council's investigation the Commissioner drawing on his decision involving Corby Borough Council² believes that there is a higher expectation of accountability placed upon those senior Council officials in relation to information regarding their professional role and the carrying out of their professional duties, and therefore it is in the public interest for the information in this case relating to the Council's investigation to be revealed to the public. The Commissioner in Corby stated:

"The Commissioner is satisfied that in general, occupants of senior posts within public authorities have for some time understood that they are more likely to be exposed to greater levels of scrutiny and accountability than staff in more junior positions....Greater levels of Scrutiny help to ensure that they are fully accountable for their actions when carrying out their professional duties, which is in the public interest."

- 7.2.4 The Commissioner is of the view that such an expectation is not shared by those more junior members of staff contained within the information and has directed the Council accordingly.

7.3 The Second and Sixth Data Protection Principles

- 7.3.1 The Commissioner has also considered the arguments the Council submitted in relation to principles two and six of the DPA. The Commissioner does not feel that release of this information would be a breach of the DPA.

- 7.3.2 The Second Data Protection Principle states:

"Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be processed in any manner incompatible with that purpose or those purposes."

It is the Commissioner's view that the disclosure of information by a public authority for the purposes of meeting its obligations under the

² (Decision of the Information Commissioner, 25th August 2005, PA: Corby Borough Council, Case Ref: FS50062124)

Act is not incompatible with the purposes for which the information is processed.

7.3.3 The Sixth Data Protection states:

“Personal data shall be processed in accordance with the rights of the data subjects under this Act”

The Commissioner is satisfied that although the Sixth Data Protection Principle has been raised by the Council as a reason why disclosure would be a breach of the DPA, the Commissioner does not feel that this principle would be breached if disclosure were to occur as the rights of the data subject under the Data Protection Act to which this principle refers would not be infringed.

7.4 That information which falls within the scope of section 40(2)(3) (a)(b) and which the Commissioner directs should not be disclosed

7.4.1 The Commissioner in reviewing the information has identified certain information which in his view the Council was correct to withhold. That particular information comprises the personal information of councillor x within the meaning of section 1(1) of the DPA. The Commissioner is mindful of the Court of Appeal's judgment in the case of Durant³ in which Mr. Justice Auld states:

“The Information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest,... in short it is information that affects his privacy”

7.4.2 The Commissioner considers that some of the information relates to a late night incident to which councillor x had a reasonable expectation of privacy,⁴ as it did not relate to that information concerning the undertaking and carrying out of councillor x professional duties within his elected role. The Commissioner considers that Councillor x was not in the Member's Room of the Council building on the night relating to this incident in order to carry out his professional role as councillor and therefore had an expectation to privacy. It is the Commissioner's view that to release this information at the time of the request would have been a breach of the Data Protection Principles; to disclose the information would be unlawful as it would be a breach of councillor x's privacy and in contravention with Article 8 of the Human Rights Act

³ Michael John Durant vs Financial Services Authority [2003] EWCA Civ 1746. Mr Justice Auld para 28.

⁴ See dicta of Lord Nicholls on that information which is private information is “essentially the touchstone of private life is whether in respect of the disclosed facts the person had a reasonable expectation of privacy.” Campbell v MGN Ltd [2004] UKHL 22 , para 21.

1998. The Commissioner further believes that as it would be unlawful and a breach of councillor x's human rights under the Human Rights Act 1998 it would also be 'unfair' under the requirements of the first principle of the Data Protection Act.

7.5 Residual Information

The Commissioner has considered the remaining 'residual' information and is satisfied that it is innocuous and does not fall within any of the exemptions covered within the Act.

8.0 Action Required

8.1 In view of the matters referred to above the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:

The Council shall, within 30 days after the date of service of this Decision Notice, provide to the Complainant part of the information sought by him in his request dated 22nd April 2005 which constitutes that information described in categories (1) and (3) detailed at paragraph 6.1 above.

8.2 The Commissioner has provided additional advice to the Council detailing that information which he requires be released to the Complainant.

9.0 Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

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

Tel: 0845 6000 877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk
Web: www.informationtribunal.gov.uk

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 19th day of July 2006

Signed:

Reference: FS50082132



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