

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Dated 3 July 2008**

**Public Authority:** North East Wales Institute of Higher Education

**Address:**  
Plas Coch Campus  
Mold Road Campus  
Wrexham  
LL11 2AW

### **Summary Decision**

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The complainant requested a copy of a report on the public authority's engineering department, written by an external assessor. The public authority refused to release the full report, citing the exemptions at sections 40, 41 and 43 of the Act. The authority did however provide the complainant with information that related specifically to the complainant. The authority stated that the report was provided to it in confidence and that disclosure would constitute an actionable breach of confidence. The Commissioner has decided, in this case, that the authority applied the Act appropriately by refusing the request by virtue of section 41. The Commissioner has also decided that parts of the report constitute the personal data of third parties, the disclosure of which would breach the data protection principles. In addition, the Commissioner decided that the authority breached section 17 of the Act in its initial response.

### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

### **The Request**

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2. The complainant has advised that on 6 July 2006 the following information was requested from the public authority in accordance with section 1 of the Act:

*'a copy of the report written by Prof Monk which was on the research within Engineering.'*

3. It should be noted that the original request for information refers to a report prepared by Professor Monk. However upon investigation it has become clear that no such report was either commissioned or prepared by this individual. It has been confirmed by the authority that the report in question was in fact prepared by another external assessor.
4. The public authority responded on 17 July 2006 by issuing a refusal notice. The notice states that the information is exempt by virtue of sections 40, 41 and 43 of the Act. The refusal notice did not contain any discussion of why the exemption at section 43 of the Act had been applied or of the application of the public interest test in this regard.
5. The complainant wrote to the public authority on 24 July 2006, expressing his disappointment about the decision to withhold the information requested and seeking an internal review. He also stated requested that the authority provide him with "all extracts from the report which refer to me."
6. On 11 August 2006 the public authority responded, providing more information about the reasons for refusal and stating that the authority would be consulting the author of the report with a view to disclosing the information relating to the complainant.
7. Following further correspondence, the public authority wrote to the complainant on 29 August 2006 indicating that it was not prepared to release any of the information contained in the report.
8. In view of the above, the complainant contacted the Information Commissioner's Office on 1 September 2006 requesting a determination.

## The Investigation

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### Scope of the case

9. On 1 September 2006 the complainant contacted the Commissioner to complain that the public authority, in its refusal to disclose the information requested, had wrongly applied both the Data Protection Act 1998 and the Freedom of Information Act.
10. The Commissioner considered the complainant's request for assessment under the Data Protection Act 1998 separately and no details are contained in this Notice, which is solely concerned with the information contained in the report that is not the personal data of the complainant.
11. The Commissioner has considered the public authority's use of the exemptions at sections 40, 41 and 43 of the Act to refuse to provide the information

requested.

12. The complainant contends that the information requested is of such a general nature that it cannot, in practice, be regarded as personal information and that it should not therefore be withheld from the public, and in any case information of this nature would normally appear on a University web site. The complaint further argues that reports of this nature are routinely discussed widely and therefore cannot be considered confidential.
13. It is the authority's case that the report was provided by the external assessor in confidence. Furthermore, the authority argues that the individuals identified in the report would not expect details of what is essentially an internal staff assessment to be placed in the public domain.

### **Chronology of the case**

14. The complainant made a complaint to the Commissioner on 1 September 2006. The Commissioner initially wrote to the public authority on 18 April 2007 requesting further details in respect of the exemptions being relied upon.
15. The public authority responded to the Commissioner on 18 April 2007. At this stage, the authority was under the impression that the matter had been concluded as it had released to the complainant the information it held in respect of him.
16. It was explained to the authority that in addition to the subject access request, the complainant had also requested a copy of the full report under the Freedom of Information Act, and the Commissioner was under a duty to consider the authority's response.
17. Initially the authority was reluctant to release the requested information to the Commissioner and in correspondence dated 2 July 2007 sought reassurances that upon its release to the Commissioner the report would remain confidential.
18. The Commissioner confirmed the information would not be disclosed whilst deliberation was ongoing and in the event of the Commissioner ordering disclosure of the document, the authority would have an opportunity to appeal such a decision to the Information Tribunal. The report was disclosed to the Commissioner on 19 September 2007.
19. Having considered the arguments of both parties, the Commissioner wrote to the complainant on 28 November 2007, setting out his view that for the information constituting personal data of third parties, the section 40 exemption had been applied appropriately. The complainant did not agree with these preliminary views and confirmed that he wished the Commissioner to make a formal decision.
20. Following a review of the progress of the case in May 2008, the Commissioner sought additional information from the public authority as to the circumstances in which the report was commissioned and prepared. The authority responded on 13 and 19 June 2008, providing additional information to the Commissioner.

## Findings of the case

21. The report in question was commissioned by the public authority to consider possible submissions to the 2008 Research Assessment Exercise (the RAE), a process carried out by the UK higher education funding councils to evaluate the quality of research undertaken by higher education institutions. The report was written by an external assessor as part of a more detailed review of the authority's Engineering Department.
22. The public authority has stated that the report in its entirety was provided to it by the author in confidence, and that the disclosure of the report would prejudice the authority's own commercial interests. The Commissioner has seen evidence to demonstrate that the author was assured of confidentiality before he agreed to write the report. Furthermore, he has also seen evidence from the author that he regarded the report as confidential and objected to its disclosure in August 2006.
23. The public authority, in dealing with the request, has provided the complainant with his own personal information – i.e. that information within the report that relates to the complainant in isolation, and which would otherwise have been referenced in this Notice as exempt by virtue of section 40(1) of the Act.

## Analysis

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24. The Commissioner has considered the public authority's response to the complainant's request for information.

## Procedural matters

### Section 17

25. Any public authority wishing to refuse a request for information must do so in compliance with the requirements of section 17 of the Act. Section 17(1) states that an authority must state the exemption (or exemptions) it is seeking to rely upon and explain (if it would not otherwise be apparent) why the exemption applies. In this case the refusal notice did not specify the relevant subsection of section 43, and did not explain why the information requested may prejudice the commercial interests of the authority if it were released, although this was subsequently explained in more detail to the complainant. The full text of all relevant sections of the Act is included at the Legal Annex to this Notice.
26. Section 17(3) requires a public authority, where it is relying on a qualified exemption, to explain in its refusal notice how it has applied the public interest test. Section 43 is a qualified exemption but the refusal notice of 17 July 2006 did not contain any reference to a public interest test.

27. Section 17(7) states that a public authority must provide to the applicant particulars of any procedure provided by the authority for dealing with complaints about the handling of requests for information (or state that the authority does not provide such a procedure) and provide the applicant with details of his rights under section 50 of the Act. The refusal notice of 17 July did not contain any such particulars.
28. The Commissioner therefore believes that the authority breached sections 17(1)(b) and (c), 17(3)(b) and 17(7)(a) and (b) of the Act in its response to the complainant's request for information.

## **Exemptions**

### **Section 41**

29. Section 41 of the Act provides an absolute exemption for information that was obtained by the public authority from any other person and which, if it were disclosed, would constitute a breach of confidence actionable by that or any other person.
30. In this case it is clear that the information withheld was obtained by the authority from another person (the author of the report), and so the first test is met. The Commissioner has gone on to consider whether disclosure would constitute an actionable breach of confidence.
31. The Commissioner considers that, in order to engage the section 41 exemption, a public authority must demonstrate the following tests (*Coco v A N Clark (Engineers) Limited [1968] FSR 415*):
- That the information has the necessary quality of confidence;
  - That the information was imparted in circumstances importing an obligation of confidence; and
  - That there was an unauthorised use of the information to the detriment of the confider.
32. A breach will no longer be actionable when there is a defence in the public interest.

#### Quality of confidence

33. The report that is the subject of this case is an assessment of the quality of the research carried out by certain members of staff in the authority's Engineering Department. The Commissioner is satisfied that the information contained in the report is not widely known and is not in itself trivial. Accordingly, he believes that it has the necessary quality of confidence.

#### Obligation of confidence

34. The second element of the test of confidentiality relates to how the information was imparted from the confider (the author of the report) to the authority. An authority must demonstrate that there was either an explicit or implicit obligation

of confidence.

35. In this case the public authority has provided to the Commissioner a copy of a letter dated 20 July 2005 and sent to the author, asking him to write the report. That letter states, "I would be very grateful if you would consider visiting the Institute to give your confidential opinion ...". The letter goes on to state, "Any conclusion you might reach on the quality of the eventual submission will not be quoted in relation to the actual outcome for this UOA [Unit of Assessment] ...".
36. The Commissioner believes that this letter provided the confider with a reasonable expectation that any report he later wrote in relation to this matter would be treated in confidence. Indeed, the confider was consulted by the authority in August 2006 (at the time of the request) and stated that he did not consent to any disclosure on the grounds that he provided the report in confidence to the public authority.
37. The Commissioner is therefore satisfied that the information was imparted in circumstances giving rise to an obligation of confidence.

#### Detriment

38. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. In some cases there is no need to prove the element of detriment, and indeed the Information Tribunal has taken the view (such as in *Bluck v the Information Commissioner & Epsom & St Helier University NHS Trust – EA/2006/0090*) that the loss of privacy is a sufficient detriment in itself.
39. Nevertheless, the Commissioner has considered the issue of detriment in this case. The content of the report is a professional opinion about research carried out in the authority's Engineering Department. The author has clearly not written the report for a wider audience and had no expectation that his conclusions would be subject to public scrutiny. Indeed, it is clear that the report itself is only a summary of more detailed conclusions that were reported by the author verbally.
40. The Commissioner considers that such information could have a detrimental impact on the confider if it became widely known. He has taken into account the fact that the confider was acting in an individual capacity, had no reasonable expectation of disclosure and had been given specific assurances prior to writing the report that its conclusions would not be disclosed.

#### Public interest

41. Finally, the Commissioner notes that a public interest defence can be mounted to any breach of confidence. This involves a balancing exercise similar to that set out in section 2(2)(b) of the Act, except that where the competing factors are

equal, the information should not be disclosed.

42. The Commissioner considers that there is a public interest in increasing the understanding of the RAE process and how individual institutions, including the public authority, prepare for this assessment. There is also a public interest in the likely grades of the research being carried out in the authority and information upon which major decisions about the future of the Department may be taken.
43. However, the Commissioner does not believe that the report itself would add significantly to the public understanding of the overall RAE process, or of the likely assessment scores for the institution. This is because the report is essentially an expert opinion, given some three years in advance of the formal 2008 RAE assessment, of the quality of research within the Department at that time. The Commissioner notes that public interest in the outcome of the 2008 RAE will be satisfied by the disclosure of information on [www.rae.ac.uk](http://www.rae.ac.uk) from 18 December 2008.
44. In terms of the public interest in maintaining the confidence in this case, the Commissioner believes that it is important for public authorities to be able to commission and receive sensitive advice on matters directly affecting staff without necessarily putting that advice into the public domain. The Commissioner notes that the author agreed to write the report on the basis that it would remain confidential and has explicitly withheld his consent for disclosure.
45. Whilst accepting that there are generic benefits to greater openness and transparency, the Commissioner does not believe that the public interest in disclosure in this case is particularly strong. On the other hand, he recognises that there is a public interest in maintaining confidences, and particularly in this case where there was such an explicit obligation of confidence imposed at the outset and the likelihood of detriment to the confider (as set out in paragraphs 38 to 40, above).
46. Accordingly, for the reasons set out above, the Commissioner considers that disclosure of the report by the public authority would constitute an actionable breach of confidence and therefore the authority applied the Act appropriately in citing the exemption at section 41 of the Act.

## Section 40

47. Although the Commissioner has determined that the whole report is exempt on the basis of the section 41 exemption, he has also considered the authority's application of the section 40 exemption.
48. It is not clear from the public authority's refusal notice whether it has cited the exemption at section 40(2) of the Act to withhold the report in its entirety, or only to withhold certain sections of the report. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure

would breach any of the data protection principles contained in the Data Protection Act 1998 (the "DPA").

49. In order to rely on the exemption provided by section 40(2), the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal data as:

*"...data which relate to a living individual who can be identified*

- a) from those data, or*
- b) from those data and other information which is in the possession of or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"*

50. Whilst the report does not contain any names, the Commissioner is satisfied that some parts of the report contain personal data within the meaning of section 1(1) of the DPA as they relate specifically to living individuals who can be identified and contain expressions of opinion about those individuals. However, he does not believe that the whole report can be considered personal data.

#### The first data protection principle

51. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
52. In considering whether the disclosure of the requested information would be fair the Commissioner has considered the reasonable expectations of the data subjects as to how the information would be used by the authority and what the effect of disclosure would be on the data subjects.
53. The Commissioner accepts that employees of public authorities should be open to scrutiny and accountability because their jobs are funded by the public purse. The Commissioner's guidance states that 'if the information requested consists of names of officials, their grades, jobs or functions or decisions made in their official capacities, then disclosure would normally be made'.
54. The Commissioner takes the view that a distinction must be drawn between personal data relating to an individual's public and private life. Whilst it is therefore appropriate to scrutinise a senior officer in his/her professional capacity, including that person's ability to perform the duties that their role demands, the Commissioner is not persuaded by the argument that those, less

senior, would expect details of what was effectively an expert opinion on the quality of their research being made available to the public.

55. In light of the above the Commissioner believes that to disclose those elements of the report that constitute personal data would breach the fairness element of the first data protection principle and therefore the authority applied the Act appropriately in relying on the exemption at section 40 of the Act as a basis to withhold those sections of the report that fall within the definition of personal data.

### **Section 43**

56. As the Commissioner has determined that section 41 applies to the entirety of the information withheld and section 40(2) applies to some of that information, he has not considered the application of the section 43 exemption in detail in this case. However, whilst the Commissioner recognises the significant financial impact of the RAE process, he does not consider the information withheld in this case to relate directly to a commercial activity within the meaning of section 43 of the Act.

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### **The Decision**

57. The Commissioner's decision in this matter is that the public authority has dealt with the complainant's request in accordance with the requirements of Part 1 of the Act because it applied the Act correctly in refusing the request by virtue of the exemption at section 41 of the Act. He has also decided that the exemption at section 40(2) of the Act applies to some of the information withheld.
58. The Commissioner further finds that the Authority breached section 17(1)(b) and (c) of the Act in that it failed to specify the subsection of section 43 upon which it was relying and to further explain why the exemption applied. The Commissioner further finds that the authority breached section 17(3)(b) by failing to include particulars of the public interest factors considered in relation to a qualified exemption and section 17(7)(a) and (b) in failing to set out the details of any complaints procedure and details of the complainant's section 50 rights.

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### **Steps Required**

59. As the Commissioner's decision is that the public authority has responded to the complainant's request in accordance with the Act, no remedial steps are required.

## Right of Appeal

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60. Either party has the right to appeal against this Decision Notice to the Information 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](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the 3rd July 2008**

**Signed .....**

**Anne Jones**  
**Assistant Commissioner**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

### General Right of Access

**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.”

**Section 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

**Section 1(4)** provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”. ”

## **Refusal of Request**

**Section 17(1)** provides that -

“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.”

**Section 17(2)** states –

“Where—

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

**Section 17(3)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the

information."

**Section 17(4)** provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information."

**Section 17(5)** provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

**Section 17(6)** provides that –

"Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

**Section 17(7)** provides that –

"A notice under section (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."

### **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
- (b) either the first or the second condition below is satisfied."

**Section 40(3) provides that –**

“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.”

**Section 40(4) provides that –**

“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).”

**Section 40(5) provides that –**

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

**Section 40(6) provides that –**

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

**Section 40(7) provides that –**

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;  
"data subject" has the same meaning as in section 1(1) of that Act;  
"personal data" has the same meaning as in section 1(1) of that Act.

### **Information provided in confidence**

**Section 41(1)** provides that –

“Information is exempt information if–

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

**Section 41(2)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

### **Commercial interests**

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

**Section 43(3)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”