

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 17 November 2009

**Public Authority:** Lancaster City Council  
**Address:** Town Hall  
Dalton Square  
Lancaster  
LA1 1PJ

### Summary

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The complainant requested information from Lancaster City Council ('the Council') regarding its decision to award an enhanced pension to a former town clerk. Although the Council provided some information, it refused to disclose the remaining information under sections 40(2) and 41(1) of the Freedom of Information Act 2000 ('the Act'). The Commissioner has investigated and considers that the requested information is exempt by virtue of section 40(2) of the Act. He has therefore not gone on to consider the Council's application of section 41(1).

### 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.

### Background

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2. The complainant has made a series of requests to Lancaster City Council ('the Council') about the granting of early retirement and an enhanced pension to a town clerk in 1995. The town clerk was involved in the 'Bobbygate' affair in which 'The World of Crinkley Bottom' theme park, a joint venture between the Council and Noel Edmonds, closed after 12 weeks, at significant financial cost to the Council.
3. In examining the 'Bobbygate' affair in 2003, the District Auditor ('DA') criticised the conduct of the town clerk and other officials of the Council, although the DA

found that any misconduct was not 'wilful'. The DA also investigated allegations of impropriety in the way the early retirement and enhanced pension was awarded. As a result of the DA's recommendations, the enhanced pension was stopped by the Council but was partially restored in 2004 following the Council's decision to consider the matter afresh.

## The Request

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4. Between 19 October and 24 November 2006, the complainant made a series of requests to the Council. As the complainant was satisfied that the Council had responded appropriately to a number of these, the requests which serve as the focus of this notice are the following (the designated numbers are those allocated during the Commissioner's investigation):

Submitted to the Council on 19 October 2006.

2. Exempt report submitted to the Council on 17 December 2003.
3. Written statements of [councillors] Hutchinson, Corker, Dudfield.
4. The relevant extracts of transcripts of interviews with the DA.
5. The further statements/responses from the DA and Pearson's legal advisors.
11. What reason was given for the enhanced pension?

Submitted to the Council on 24 November 2006

17. Personnel Committee meeting minutes dated 9 June 2004 and the referred to correspondence received from the DA.
18. Report referred to in minute 24 of the Personnel Committee meeting of 1 September 2004.
20. Any further documentation to show how the Committee reached its decision.

5. The Council responded to the complainant's requests of 19 October 2006 on 16 November 2006. Although it disclosed some information, it refused to provide all of the requested information (namely, requests 2, 3, 4, 5, and 11,) on the basis of section 40 and section 41 of the Act. In regards to the complainant's correspondence of 24 November 2006, the Council responded to the requests on 19 December 2006. Again, the Council provided some information but refused other parts of the requests (namely 17, 18 and 20) under section 40(2) of the Act.
6. The complainant appealed the Council's refusal of both sets of requests on 29 December 2006, commenting that:

"[t]he case first came to the attention of the public in 1995 through a report in the press. Over the intervening years to the present time there has been little if any information available for the public on the progress of the matter."

7. The public authority contacted the complainant again on 22 January 2007 with the outcome of its internal review. It confirmed that it was upholding the decision to withhold the requested information, claiming that it was exempt under sections 40(2) and 41 of the Act.

## The Investigation

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### Scope of the case

8. On 7 February 2007, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

“As there is a public interest in this matter, I believe both justice and democracy will be served by allowing my request for these requests to be made available to me.”

### Chronology

9. On 28 February 2008, the Commissioner requested copies of the information that had been withheld from the complainant. He also sought clarification on the basis of its refusal. The Council subsequently responded to this request on 20 March 2008.
10. The Commissioner has since sought advice from the DA who compiled the report on ‘Bobbygate’ and the awarding of the enhanced pension to the town clerk. With his correspondence, the DA has also included copies of his reports of 31 March 2003 and 15 January 2004, both of which are publicly available.

### Findings of Fact

11. The Council has identified the following information falling within the scope of the complainant’s requests 2, 3, 4, 5, 11, 17, 18 and 20. This information is being withheld under sections 40(2) and 41(1):
- a) The Council’s redacted personnel committee reports and exempt minutes.
  - b) Statements given by various members and officers, involved in the decision to grant the enhanced pension, to an employee of the Council.
  - c) Transcripts of interviews conducted by the DA with members and officers of the Council in the course of his investigation into the legality of the decision to award the enhanced pension.
  - d) Submissions from the former town clerk’s legal representatives in regards to his appeal against the Council’s decision to stop the enhanced pension.
  - e) Submissions from the DA to the Council in reference to the authority’s decision to consider whether to restore the enhanced pension.
12. The Commissioner notes that although the Council has applied section 40(2) to the majority of the requested information, it has not applied it to all of the records, particularly some of the correspondence falling under parts d) and e) of the above categories.

## Analysis

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### Exemptions

#### Section 40(2) of the Act

13. Section 40(2) of the Act provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act ("the DPA").
14. In order to rely on the exemption, 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 intention of the data controller or any other person in respect of the individual."
15. Having analysed the withheld information, the Commissioner is satisfied that all of the withheld information constitutes the personal data of the town clerk, including that falling in parts (d) and (e), as all of the information surrounds the clerk's pension and discussions about the award of the pension.
16. The Commissioner has therefore gone on to assess whether disclosure of the information would breach the requirements of the first data protection principle. The first data protection principle has two components:
  1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
  2. at least one of the conditions in schedule 2 of the DPA is met.
17. The Commissioner considers that the relevant condition in schedule 2 is the sixth. This states that personal data may be processed for the purposes of legitimate interests pursued by the data controller or by the third-parties to whom the data are disclosed unless the processing would prejudice the rights and freedoms or legitimate interests of the data subject.
18. Therefore, in considering whether the disclosure of the individual's personal data would be unfair and contravene the first data protection principle, the Commissioner has taken the following factors into account:
  - i. The reasonable expectations of the former town clerk about what would happen to his personal data.

- ii. Whether the information relates to the former town clerk's personal or private life.
- iii. The position and the role of the former town clerk.
- iv. The legitimate interests of the public in knowing details of the former town clerk's enhanced pension and the way in which a decision was reached to award this pension.
- v. Whether disclosure is necessary for a legitimate interest of the public.
- vi. Whether disclosure would be an unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects.

#### Reasonable expectations

19. Given the nature of the information, which is connected with the disputed legality of the Council's decision to award an enhanced pension and includes details of the pension itself, there would naturally be a level of sensitivity attached to the requested records. Furthermore, no evidence has been presented that would suggest that the former town clerk had any reasonable expectation that the information requested would be disclosed. The Commissioner therefore recognises that there would be an assumed right to privacy between an employee and an employer in respect of pension matters.

#### Personal or private

20. The Commissioner accepts that pension information or information relating to an appeal about pension arrangements would normally be subject to protection. In his guidance on the exemption provided by section 40(2) ('Awareness Guidance on section 40 of the Act'), the Commissioner has drawn a distinction between information about the public and private life of an employee of a public authority. The Commissioner has emphasised that disclosure of information should normally only relate to an employee's public functions, where decisions or actions may be accountable to the population they serve:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

21. It is clear that pension arrangements are directly linked to an employee's work at an authority. However, the personal nature of the information would extend beyond information about the former town clerk's official capacity as a public servant and into the private finances of the individual.

#### Position and role

22. The Commissioner has no doubt that, as a senior employee of the Council, the former town clerk would have recognised that his actions would be subject to a greater level of scrutiny. The more senior a member of staff is, the more likely it is

that they will be responsible for making influential policy decisions and decisions related to the expenditure of significant amounts of public funds.

23. This is particularly pertinent given the former town clerk's role in the 'Blobbygate' affair and the significant losses that the Council accrued through the failed venture. In his initial report of 31 January 2003, the DA examined the circumstances of 'Blobbygate' and identified the reasons for the failure of the theme park. A principal finding related to the involvement of the former town clerk and the former city treasurer in the enterprise and their 'misconduct' in the handling of the matter.

#### Legitimate public interest

24. The Commissioner has weighed up parts i – iii of the factors referred to in paragraph 19, against the legitimate public interest in the requested information. On the face of it, there would appear to be a significant public interest in knowing the grounds on which an official, who had been publicly criticised, was subsequently permitted to take early retirement.
25. To guide him in this area, the Commissioner has found it helpful to refer to the DA's report of January 2003. This found that the Council had misdirected itself in law in 1995 when considering the town clerk's early retirement and pension enhancements. The DA stressed though, that the early retirement of the former town clerk was not linked to his involvement with the Crinkley Bottom theme park.
26. In view of the DA's findings, the Commissioner does not believe that the public interest generated through 'Blobbygate' would translate itself into a legitimate public interest in the – essentially unconnected - early retirement of the town clerk.
27. The Commissioner has therefore looked at whether there would be a legitimate public interest in the pension arrangements of the town clerk, outside of his involvement in 'Blobbygate.' The most obvious case would be in holding an authority to account on the expenditure of public funds.

#### Necessity of disclosure

28. The Commissioner has considered whether disclosure is necessary to achieve the stated legitimate interest. In doing so, he shall assess whether the legitimate interests may be satisfied by means other than disclosure of personal data.
29. On the issue of accountability, the Commissioner understands that the DA's criticisms of the Council may have shaken the public's faith in the systems that were put in place by the authority. Members of the public should be able to have confidence in the public authority's ability to discharge its statutory functions. Disclosure could therefore help assuage the concerns of the public through ensuring that the workings of the authority were transparent.
30. In reaching a decision, the Commissioner has borne in mind the Information Tribunal's findings in *House of Commons v Information Commissioner* and

Leapman, Brooke and Thomas (EA/2007/0060). In ordering disclosure, the Tribunal cited the 'inadequacies of the system' as justification for the level of intrusion into MP's personal data. Where an authority does not have appropriate checks and controls for the allocation of public funds, the Tribunal decided that the release of the information was necessary for safeguarding public confidence.

31. In this case, the original decision to grant the early retirement and the enhanced pension was found to be based on an inadequate process. However, the Commissioner is aware that the DA, in his role as part of an independent watchdog, has examined and subsequently set out recommendations in this matter that the authority has acted upon. These findings are accessible through the DA's reports which attest to his inspections.
32. Furthermore, the DA was satisfied that, following its decision to reinstate the pension enhancement in 2004, the Council had applied itself properly in law. There would therefore seem to be no suggestion that the ongoing pension arrangement was not properly scrutinised. Unlike the unchecked system referred to in the House of Commons case, the existing regulatory mechanisms in place have acted as an appropriate counterweight to allegations of impropriety,
33. Owing to the DA's involvement in the matter, and the corresponding publication of his reports, the Commissioner takes the view that the legitimate public interest would not be better served through disclosure of the requested information, and indeed that disclosure would be disproportionate in view of the rights of the former town clerk to privacy. As the condition of necessity of disclosure is not satisfied, the Commissioner has decided that it would be unfair to release the requested information.

#### Unwarranted interference or prejudice

34. The Commissioner has determined that disclosure would not be necessary for the legitimate public interest. In so doing, he has found that the sixth condition of Schedule 2 of the DPA has not been met and that therefore section 40(2) is engaged. Nevertheless, the Commissioner has gone on to consider whether disclosure would cause an unwarranted interference or prejudice to the former town clerk.
35. As a senior ranking official, the former town clerk should have expected a greater degree of public scrutiny than the average citizen. Yet, the Commissioner is mindful of the personal nature of pension arrangements; the requested records pertain to information about the data subject that does not relate to his regular functions as a town clerk.
36. Coupled with the reasonable expectations of the town clerk that his personal data would remain confidential, the Commissioner considers that the release of the information would have a disproportionate adverse effect on the town clerk's legitimate privacy interests.
37. However, the Commissioner accepts that the process by which the Council decided to accept the early retirement of the town clerk and award an enhanced

pension in 1995 was flawed. Ultimately, an authority has a fiduciary duty to its taxpayers and so any decision to allocate money must be based on robust practices and procedures. The Commissioner has therefore separately explored whether information solely relating to the Council's decision to award the enhanced pension in 1995 should be disclosed.

38. The elements of the withheld information that are concerned with the 1995 decision are particularly b) and c). In both cases, members and officials were asked to recollect the reasoning behind the granting of the enhanced pension.
39. The Commissioner recognises that disclosure of the statements could help the public understand in greater depth the process by which the Council came to its decision in 1995 to grant early retirement. However, to return to the involvement of the DA, the Commissioner is satisfied that this matter has been dutifully examined and, as a result, changes made to ensure the legality of process. The Commissioner is therefore not persuaded that the disclosure of the submissions would further enhance public confidence in the accountability of the Council.
40. As the Commissioner has found that section 40(2) of the Act is engaged, he has not considered whether section 41, the other exemption cited by the Council, would also apply to any of the requested information.

## **The Decision**

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41. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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42. The Commissioner requires no steps to be taken.



## Right of Appeal

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43. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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 served.

**Dated the 17th day of November 2009**

**Signed .....**

**David Smith  
Deputy 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”.”

### **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.”