

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

### **Decision Notice**

**Date: 23 June 2011**

**Public Authority:** Isle of Anglesey County Council  
**Address:** Council Offices  
Llangefni  
LL77 7TW

### **Summary**

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The complainant requested a briefing note provided to the Political Group Leaders regarding the allocation of Councillors to committees. The Council stated that the information was legally privileged and exempt under section 42(1) of the Act. The Council also stated that the information contained the personal data of individual Councillors and was exempt from disclosure under section 40(2) of the Act. During the course of the Commissioner's investigation the Council also sought to rely on section 44(1) of the Act. The Commissioner has determined that the Council correctly applied section 40(2) to a small amount of the withheld information. However he found that the majority of the withheld information was not exempt under section 40(2) and that section 42(1) and 44(1) were not engaged. The Commissioner has ordered disclosure of all but a small amount of the withheld information.

### **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. Following an exercise during which Council asked Councillors to undergo Criminal Records Bureau (CRB) vetting, the complainant submitted two information requests to the Council. The first was made on 2 July 2010 and asked a number of questions about a CRB vetting exercise undertaken by the Council. The second request - and the one to which

this notice relates - was made on 21 July 2010 and was for a copy of a "confidential advice note" that the complainant understood to have been submitted to a meeting of political group leaders. The Commissioner has considered each request separately and issued separate decision notices. This notice relates to the request of 21 July 2010.

3. As set out in the Council's refusal notice of 28 July 2010, the withheld information in this case is an advice note that was prepared by officials for meeting of the Council's Political Group Leaders, the Leader of the Council and its Interim Managing Director on 13 May 2010.

## The Request

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4. On 21 July 2010 the complainant emailed the following request to the Council:

"Can you treat this as a request [sic] for information under the Freedom of Information Act.

If the Council will release the "Confidential Advice Note" submitted to a meeting on 13 May 2010.

I believe that meeting to be a meeting of political group leaders and was convened to allocate seats to unaffiliated members. The proceedings of the meeting were minuted

Part of the minutes contains the line: ".....ought not to be given a seat on a Committee where there is a likelihood of him coming into contact with children or young people"

The application for release of the legal advice is based on the contention that part of the information is already in the public domain by virtue of the fact that the proceedings in the meeting were minuted and because of the public's right to know more about this delicate matter, surely far outweighs any other consideration"

5. The Council refused the request on 28 July 2010 and stated that the information was exempt under sections 40(2) and 42 of the Act.
6. On 4 October 2010, the complainant asked the Council to review its handling of his request. The Council responded on 18 October 2010 with a letter that referred to its handling of the requests of 2 July 2010 and 21 July 2010. The Council concluded that its handling of the requests had been appropriate.

## The Investigation

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### Scope of the case

7. On 2 November 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The letter accompanying the complaint did not specify whether the complaint was about one or both of the requests made to the Council. On 7 December 2010 the complainant confirmed that his complaint related to both requests. In relation to the request of 21 July 2010, to which this notice relates, the complainant clarified that his complaint was about the refusal by the Authority to release a particular Legal Opinion.
8. It is quite clear to the Commissioner that the nature of the withheld information is not in doubt. The Commissioner has therefore considered whether the information was appropriately withheld by the Council.

### Chronology

9. On 6 January and 16 February 2011, the Council provided the Commissioner with arguments to support its decision to withhold the requested information. The Council clarified that it was relying on section 42(1) and that it considered the public interest to favour maintaining the exemption. The Council also said that it considered some personal information within the advice note to be exempt under section 40(2) of the Act.
10. On 23 February 2011 the Council provided the Commissioner with further submissions to support its decision to withhold the information requested, and the Council introduced section 44. This section of the Act provides that information is exempt if disclosure is prohibited by or under any enactment.
11. Following further consideration of this case the Commissioner wrote to the Council on 21 March 2011 to set out his view that section 42 was not engaged but that some of the requested information was exempt under section 40(2) of the Act. The Commissioner asked the Council if it would be prepared to disclose some of the information.
12. The Commissioner discussed this case with the Council in a telephone conversation on 22 March 2011 and it expressed concerns about disclosing any of the withheld information. The Commissioner therefore decided to proceed to a formal decision notice to consider the Council's application of the various exemptions applied.

## Analysis

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### Exemptions

13. The full text of all sections of the Act referred to in this notice is available in the Legal Annex at the end of this Notice.

### Section 40(2)

14. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles.
15. The Council argued that the requested information was personal information as defined by the Data Protection Act 1998 (the "DPA") and that it was exempt from disclosure.
16. In order to reach a view regarding the Council's application of this exemption, the Commissioner firstly considered whether or not the requested information was in fact personal data.

Is the requested information personal data?

17. Personal data is defined in section 1(1) of the Data Protection Act 1998 and when considering whether the information is personal data, the Commissioner had regard to his own published guidance: "*Determining what is personal data*".<sup>1</sup>
18. Taking into account his guidance on this matter, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
  - "*Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?*"
  - "*Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?*"
19. In this case, the Commissioner is satisfied that the information in its entirety relates to identifiable individuals and that it meets the definition

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/what\\_is\\_data\\_for\\_the\\_purposes\\_of\\_the\\_dpa.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf)

of personal data set out in the DPA. The Commissioner has therefore considered whether disclosure would breach any of the data protection principles set out in the DPA.

The first data protection principle

20. The Council has argued that disclosure of the withheld information would breach the first data protection principle and the Commissioner considers that principle to be relevant in this case.
21. The first data protection principle requires that the processing of personal data be fair and lawful and that personal data is not 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 met
22. In the case of personal data, both requirements (fair and lawful processing and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair and lawful?

23. In considering whether disclosure of the withheld information would comply with the first data protection principle, the Commissioner has firstly considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the data subjects and the consequences of disclosure. He has then balanced against these the general principles of transparency and accountability as well as any legitimate public interest in disclosure.
24. In order for the Commissioner to reach a decision on whether disclosure would be fair he considered the content of the withheld information in some detail. To provide the full detail of his considerations in the body of this notice would effectively disclose the content of the withheld information and he has therefore provided a confidential annex setting out his full findings.
25. The Commissioner has determined that, with the exception of the information referred to in paragraphs 11 and 12 of the confidential annex, disclosure would be fair.

If disclosure was fair, was it necessary?

26. The first Data Protection Principle states that personal data shall only be disclosed in circumstances where it is fair and lawful to do so and where at least one of the conditions in Schedule 2 is met. Having determined that disclosure would be fair (with one exception, outlined at paragraph 25 above) the Commissioner therefore considered whether a schedule 2 condition could be met. The Commissioner considers condition 6 to be most relevant in this case. Condition 6(1) states that:

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

27. The Commissioner has set out his detailed findings on this matter in the confidential annex and concluded that the sixth condition is satisfied.

Lawfulness

28. In the context of freedom of information requests, the Commissioner considers it is likely that it will be unlawful to disclose personal information where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence. In the current case he has seen no evidence that any of these breaches would occur, and as a consequence he has concluded that disclosure would not be unlawful.

Summary

29. The Commissioner has determined that disclosure of the withheld information, apart from that referred to in paragraphs 11 and 12 of the confidential annex, would not be unfair or unlawful and that a Schedule 2 condition can be satisfied. As such, he does not consider that disclosure of this information would breach the first data protection principle and does not consider that section 40(2) is engaged.

### **Section 42(1)**

30. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023) the Information Tribunal described LPP as:

*“... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges*

*between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation..."(paragraph 9).*

31. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.
32. The Council clarified that it considers advice privilege to be relevant in this case and the Commissioner has therefore considered whether the information attracts advice privilege.
33. Legal advice privilege attaches to communications between a client and its legal advisers, and any part of a document which provides evidence of the substance of such a communication. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice from a lawyer to a colleague on a line management issue will not attract privilege.
34. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact which can usually be found by inspecting the documents themselves.
35. The Commissioner's view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is also capable of attracting LPP. However, this is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information.
36. In this case the Council has stated that the information was provided to the Political Group Leaders by the Legal Services Manager, via the Interim Managing Director in his capacity as solicitor and legal adviser to the Council. The Council stated that the context of the provision of the advice was that on 11 May 2010 the full Council decided to refer the allocation of committee seats to unaffiliated members (i.e. Councillors not affiliated with a political party) to Political Group Leaders. The Commissioner has been unable to locate publicly available minutes of the meeting of 11 May 2010 that refer to this matter but he did find on

the Council's website minutes of a full Council meeting of 5 May 2010 during which the same issue was discussed<sup>2</sup>.

37. The Council went on to say that the Political Group Leaders agreed in a meeting on 13 May 2010 that the Council leader should make the final allocation.
38. The Council does not have a written record of the request for advice but says that it was prepared for the Council leader by a Council solicitor (the Legal Services Manager) prior to the meeting of the Political Group Leaders on 13 May 2010. The advice note was passed from the solicitor to the Interim Managing Director before being distributed to Political Group Leaders. The Commissioner has seen evidence that the matter of 'unaffiliated members' was on the agenda for discussion at the meeting of Political Group Leaders on 13 May 2010.
39. The purpose of the advice in this case was to provide Political Group Leaders with guidance on factors that it should take into account when making a decision about the allocation of committee seats to unaffiliated Councillors. It is not possible for the Commissioner to set out any level of detail about the issues considered in the advice note because to do so would disclose the nature of the withheld information itself. However, he is not satisfied that the advice was provided in a relevant legal context. He has provided further detail in the confidential annex to this notice.
40. On the basis of the above, the Commissioner is not satisfied that legal advice privilege applies in this case. He does not therefore consider section 42(1) to be engaged.

### **Section 44(1)**

41. During the course of the Commissioner's investigation the Council also sought to rely on section 44 of the Act. The Council did not state which subsection it was seeking to rely on but it is clear to the Commissioner that it intended to rely on section 44(1)(a), which states that information is exempt if its disclosure by the public authority holding it is prohibited by or under any enactment. This is commonly known as a statutory bar to disclosure.
42. As set out in paragraph 2 of this notice, the Commissioner is investigating two separate complaints from the complainant. It is not clear whether the Council was seeking to rely on section 44(1)(a) in

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<sup>2</sup><http://isleofanglesey.maximaasp.com/TROVEPROGS/TroveAMDocLink.aspx?IS=1062457819/LI=Isle+of+Anglesey/ID=40/OS=1/DI=836/PA=215/DS=836/LO=1/FP=AA9qKx18L3Ug/XD=836/RW=1680/RH=1050/CD=16/VD=Aglsey/WV=6/ST=ac/AC=AD/FI=164/AM=1/HU=http://www.anglesey.gov.uk+doc.asp?doc=2422&cat=2456>



relation to the request to which this notice relates or the request relating to the other investigation being undertaken by the Commissioner. For the sake of completeness the Commissioner considered whether section 44(1)(a) is engaged in this case and concluded that it is not. The full details of his reasoning are set out in the attached confidential annex.

## **Procedural Requirements**

43. As the Commissioner has decided that, aside from the information referred to in paragraphs 11 and 12 of the confidential annex, the withheld information is not exempt from disclosure, he believes the information should have been provided to the complainant in line with the duty at section 1(1)(b). By failing to provide this information within 20 working days of the request the Council breached section 10(1).

## **The Decision**

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44. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It correctly withheld the information referred to in paragraphs 11 and 12 of the confidential annex.

45. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- It breached section 1(1)(b) by not disclosing the remainder of the withheld information.
- It breached section 10(1) by failing to disclose that information within 20 working days.

## **Steps Required**

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46. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- To disclose the withheld information apart from the information referred to in paragraphs 11 and 12 of the confidential annex to this notice.

47. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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48. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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

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

Tel: 0300 123 4504

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)

50. 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.

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

**Dated the 23rd day of June 2011**

**Signed .....**

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

## Legal Annex

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### 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."

### Time for Compliance

#### **Section 10(1) provides that –**

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

### Personal information

#### **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."

## **Legal Professional Privilege**

### **Section 42(1) provides that –**

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

## **Prohibitions on disclosure**

### **Section 44(1) provides that –**

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (c) is prohibited by or under any enactment,
- (d) is incompatible with any Community obligation, or
- (e) would constitute or be punishable as a contempt of court.”

## **Data Protection Act 1998**

### **Section 1 - Basic interpretative provisions**

(1) In this Act, unless the context otherwise requires—

“data” means information which—

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“personal data” means 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;

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data

## **Schedule 1**

### **The first data protection principle**

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

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

### **Schedule 2**

Conditions relevant for purposes of the first principle: processing of any personal data:

“1. The data subject has given his consent to the processing. 2. The processing is necessary-

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary-
  - (a) for the administration of justice,
  - (b) for the exercise of any functions conferred on any person by or under any enactment,
  - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
  - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. (1) 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.  
  
(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied."