



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

Freedom of Information Act 2000 (Section 50)

Dated 27 July 2006

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

Information Requested

"All material relating to the absence of the Corporate Director of Lifelong Learning, Sioned Bowen, from her post in October and November 2004 and her subsequent retirement."

Summary Decision and Action Required

The Commissioner's Decision in this matter is that the public authority has dealt with the complainant's request in accordance with Part I of the Freedom of Information Act 2000 (the "Act"). No further action is required.

1. Freedom of Information Act 2000 (the "Act") – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the "Commissioner") has received an application for a decision whether, in any specified respect, the 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.

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

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- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.



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

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

2. The Complaint

- 2.1 The complainant has advised that on 11 January 2005 the following information was requested from the public authority in accordance with section 1 of the Act.

- 2.2 *"All material relating to the absence of the Corporate Director of Lifelong Learning, Sioned Bowen, from her post in October and November 2004 and her subsequent retirement."*

- 2.3 The public authority responded on 20 January 2005 and refused to provide the requested information citing Section 40 (Contravention of the Data Protection Act 1998) as the basis for its refusal. It also referred the complainant to press releases and a recent media briefing stating that it had placed in the public domain the information that it legitimately could but that there were *"personnel and legal limitations on the information that was being made available"*.

- 2.4 On 24 January 2005, the complainant requested a review of this refusal. He referred to the Information Commissioner's Awareness Guidance No.1 as the basis for his appeal. It quoted an extract from that guidance and put particular emphasis on the final sentence of that extract:

<http://www.ico.gov.uk/documentUploads/AG%201%20personal%20info.pdf>

*"It is often believed that the Data Protection Act prevents the disclosure of any personal data without the consent of the person concerned. This is not true. The purpose of the Data Protection Act is to protect the private lives of individuals. **Where information requested is about the people acting in a work or official capacity then it will normally be right to disclose**"*.

- 2.5 On 9 February 2005, the public authority released a bundle of documents caught by the scope of the request to the complainant and to other persons who had expressed an interest in the subject.



2.6 The complainant was dissatisfied with the extent of this disclosure and applied to the Commissioner for a decision on this matter in undated letter which was received on 25 February 2005.

3. Relevant Statutory Obligations under the Act

3.1 **Section 1(1)** provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him”.*

3.2 **Section 40** provides that –

“(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied.*

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*
 - (i) any of the data protection principles, or*
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*



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

(4) *The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)*"

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

3.3 In the course of correspondence with the Commissioner, the public authority also sought to rely upon the exemption provided by Section 36 (Effective Conduct of Public Affairs) as part of the basis for its refusal. The relevant subsections cited are as follows:

3.4 **Section 36(2)(b)(i) & (ii) and Section 36(2)(c)** provides that -
"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".

3.5 **Section 36(5)(h)** provides that -
"In subsections (2) and (3) 'qualified person' in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-

(i) the public authority, or

(ii) any officer or employee of the authority authorised by the Assembly First Secretary"

4. Review of the case

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



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

They were also informed that she was “*not on sick leave*” and had “*not been suspended*”. Relevant departments of the public authority and external stakeholders were advised of this the following day.

- 4.2 The Commissioner requested a copy of the information that the public authority had blocked out from documents that had been disclosed and asked for any other document which may have been withheld relating to Ms Bowen’s retirement where the public authority considered that the entire text was exempt information. The public authority provided this information.
- 4.3 The Commissioner also asked the public authority to reconsider its application of Section 40 taking into account Ms Bowen’s seniority and to provide further comments on the application of Section 40. He also asked for a copy of relevant confidentiality clauses in its compromise agreement with Ms Bowen and for any additional comments that the public authority may wish to make about this agreement. The public authority provided these comments and they are considered below.
- 4.4 Having read the withheld information, the Commissioner notes that it falls into two categories:
 - a) Personal data relating to Ms Bowen
 - b) Information relating to the public authority’s management structure that was created in connection with Ms Bowen’s absence from post and subsequent retirement (“management structure information”)
- 4.5 The Commissioner advised the public authority that the management structure information was not personal data relating to Ms Bowen and that Section 40 was therefore unlikely to be an appropriate exemption. This information forms part of the “*material relating to the absence of the Corporate Director of Lifelong Learning, Sioned Bowen, from her post in October and November 2004 and her subsequent retirement*” in that it was generated during that period and is inextricably linked with the information generated about Ms Bowen’s absence and departure. However, the focus of this information is elsewhere than on Ms Bowen’s employment situation
- 4.6 The Commissioner asked the public authority to advise whether or not it believed that another exemption applied and, if so, how that exemption applied.



4.7 The public authority argued that some of the information included reference to third parties and that this third party information should be exempted from disclosure under Section 40. It also asserted that the remainder of the information was exempt under Section 36 (Prejudice to the Effective Conduct of Public Affairs).

Section 40

4.8 The public authority has identified two sets of personal data which it believes is exempt information under Section 40.

1. Sioned Bowen's personal data
2. Personal data relating to third parties also referred to in the requested information ("third party personal data")

4.9 The public authority has argued that the disclosure of Sioned Bowen's personal data and third party personal data caught by the scope of this request would contravene the requirements of the first data protection principle of DPA 98 in that it would constitute unfair processing of those personal data.

4.10 The first data protection principle has two components

1. Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA98 Schedule 2 is met.

4.11 Where sensitive personal data, such as information about an individual's health, criminal activity (including allegations of criminal activity) or religious beliefs are being processed at least one of the conditions in DPA98 Schedule 3 must also be met. Sensitive personal data are not part of the requested information in this case and, therefore, when considering the second component of the first data protection principle, the Commissioner only needs to consider whether one of the conditions in DPA98 Schedule 2 could be met. The full list of Schedule 2 conditions can be found by accessing the statute via the Office of Public Sector Information website <http://www.opsi.gov.uk/acts/acts1998/80029--n.htm#sch2>

4.12 The Commissioner considers that the most applicable condition in this case is likely to be Schedule 2 (6)(1) which states

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".



Sioned Bowen's personal data

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



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

- 4.16 The Commissioner has no grounds to assume that disclosure of “the reason why” is within Sioned Bowen’s reasonable expectations. Ms Bowen signed a compromise agreement having sought independent and accountable legal advice. The confidentiality clause in the contract, which is binding upon both parties, does not specify an agreed position in the event of an FOIA request. However, the Commissioner considers that the clause could be read widely enough to cover a full disclosure of the requested information.
- 4.17 The Commissioner has made it clear in his guidance on the Section 40 exemption and on other public platforms that the seniority of the individual should be taken into account when personal data about them are being requested under the Act:
- “It may also be relevant to think about the seniority of staff: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair.”* ICO Awareness Guidance 1 – Personal Information)
<http://www.informationcommissioner.gov.uk/cms/DocumentUploads/AG%201%20personal%20info.pdf>
- 4.18 An employee or agent of a public authority who makes decisions which involve significant expenditure of public funds should expect greater scrutiny about their role for which they are paid out of public funds commensurate with their level of responsibility. Generally speaking, however, the Commissioner believes that information which might be deemed “HR information” should remain private, e.g., a person’s individual tax code, their pension contributions or trade union subscriptions and other information normally held by an organisation’s Human Resources department. The public authority argued there are elements of the requested information which carry a strong expectation of privacy even though they relate to Ms Bowen’s professional life rather than her personal life. The Commissioner recognises the strength of the public authority’s argument in this regard.
- 4.19 When considering whether a Schedule 2 condition for processing could be met (see 4.12 above) the Commissioner took into account the legitimate interests of the third parties to whom the information would be disclosed, i.e., the public at large which includes relevant stakeholders in Denbighshire.



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

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



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

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

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

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

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

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

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

Sioned Bowen’s personal data - summary

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



Third party personal data

- 4.26 As outlined in 4.4 and 4.8 above some information caught by the scope of the request did not constitute Sioned Bowen's personal data. This information is the management structure information. It includes reference to other individuals in relation to that structure. The public authority has sought to apply Section 40(2) to the information relating to those other individuals.
- 4.27 Having seen the information in question, the Commissioner agrees that the references to individuals in that information constitute those individuals' personal data. He believes that disclosure of this information to the public at large would constitute unfair processing and contravene the requirements of the DPA98 first data protection principle. The Commissioner believes that disclosure of this information, although it relates to the individuals' professional rather than personal lives, would amount to an infringement of privacy such that public release would rightly be considered unfair.

Section 36

- 4.28 As outlined in 3.3 above, the prejudice identified in Section 36 is demonstrated where qualified person at the public authority provides a reasonable opinion to that effect. Section 36 is qualified by a public interest test and additional arguments are required to show that the public interest in maintaining that exemption outweighs the public interest in disclosure.
- 4.29 The Commissioner requested a copy of the opinion of the "qualified person" at the public authority. The public authority provided a statement of opinion made by the Clerk to the Council. It also provided evidence that it had delegated authority to the Clerk to make this statement as its "qualified person". While the Commissioner believes that there could be room for doubt as to whether this accords strictly to the letter of the requirements of Section 36(5)(h) (see 3.5 above), he is, nevertheless, prepared to accept that the statement reflects the reasonable opinion of an officer of the public authority who is fully apprised of the matter at issue and is of sufficiently senior rank to offer the opinion. The Commissioner also understands that delegation of this nature accords with the approach taken by Welsh public authorities. The Commissioner is therefore satisfied that the statement is valid and not unreasonable.



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

4.30 Where the Commissioner is satisfied that the qualified person's statement is valid and not unreasonable, it follows that the s36 exemption applies. Having accepted that the exemption applies, the Commissioner went on to consider the balance of the public interest in relation to the prospective disclosure of this information.

Arguments for disclosure

4.31 A significant amount of Council funds are spent on its personnel. As such, the way a Council structures its personnel should, quite properly, be the subject of public scrutiny. The Commissioner noted that the public authority's management structure is already available to the public upon application to their offices via their FOIA publication scheme.

<http://www.denbighshire.gov.uk/LL/RecsMgmt.nsf/pbclass!OpenView>

4.32 As discussed in 4.1 and 4.20 above, it is apparent from the Commissioner's research that Sioned Bowen's absence from post and subsequent retirement generated and continues to generate considerable press interest. The Commissioner does not believe that the public interest is always served by the disclosure of information that the public is interested in. However, the Commissioner recognises that there is a public interest in assuaging the understandable concerns of parents and education professionals in Denbighshire following an abrupt and unexpected change at the highest level of education management in that county.

Arguments for maintaining the exemption

4.33 In this case, while the public authority acknowledged the importance of openness with regard to its management structure, they argued that there was a stronger public interest in ensuring free and frank provision of advice and exchange of views within the Council where its structure is being analysed for possible amendment. They explained that they are under a legal obligation to ensure Best Value for public money which required regular analysis for continuous improvement in order to remain efficient and effective. Release of this additional information would, in the public authority's view, significantly inhibit the free and frank provision of advice and exchange of views which is necessary to ensure Best Value in the future.



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

4.34 They also argued that there was a strong public interest in maintaining strong industrial relations with their employees. Consultation with employees in such circumstances is, they argued, a legislative obligation and such consultation would normally be conducted out of the public spotlight. Each party to the consultation should be permitted the opportunity to deliberate in private. Ideas canvassed in free and frank discussion at deliberation stage may get no further than initial internal discussions and would not be submitted for consultation. The public authority believe that it would undermine the consultation process to release early deliberations and that this would thereby prejudice the effective conduct of public affairs. The public authority asserted that there was an over-riding public interest in avoiding that outcome. They added that the public interest is protected through Members' scrutiny of the Executive and its officers and that the Council's actions are also subject to the scrutiny of the external Auditor.

Section 36 - Conclusion

4.35 Recognising the strong public interest arguments in favour of disclosure, the Commissioner has concluded that, in the circumstances of this case, those arguments were outweighed by the public interest in maintaining the Section 36 exemption in respect of the management structure information.

5. The Commissioner's Decision

5.1 The Commissioner's decision in this matter is that the public authority has dealt with the complainant's request in accordance with the following requirements of Part I of the Act. No further action is required.



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

6. Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 27th day of July 2006

Signed

**Graham Smith
Deputy Commissioner**

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