

**FREEDOM OF INFORMATION ACT 2000 (SECTION 50)**

**DECISION NOTICE**

**Dated 24<sup>th</sup> November 2005**

**Name of Public Authority: Calderdale Council**

**Address of Public Authority: Town Hall  
Halifax  
HX1 1UJ**

**Nature of Complaint**

The Information Commissioner (the "Commissioner") has received a complaint which states that on 4th January 2005 the following information was requested from Calderdale Council under section 1 of the Freedom of Information Act 2000 (the "Act"):

*In 2003/04 your council sent people to Australia/New Zealand to recruit social workers. Please can you let me have the following information under the new FOI Act 2000:*

- 1. Which council officers went abroad?*
- 2. What expenses they claimed and which hotels they stayed in?*
- 3. The company you engaged to help you to recruit and how much they were paid?*
- 4. The total cost of the whole exercise and how many social workers/other staff were recruited from abroad?*
- 5. Details of the legal advice you took at the outset on the process and a copy of it*

It is alleged by the complainant that Calderdale Council failed to provide him with the information requested in Questions 1 and 5 above in accordance with their obligations under Section 1(1) of the Act as they have inappropriately applied the exemption in Section 40 (2) of the Act to Question 1 above and have inappropriately applied the exemption in Section 42 of the Act to Question 5 above.

It is noted however that Calderdale Council have already disclosed the information requested in Questions 2, 3 and 4 above. This Decision Notice therefore purely relates to Questions 1 and 5.

The issue under consideration in respect of Question 1 is whether the exemption cited by the Council, namely Section 40, as grounds for withholding the information can be relied upon. If the information requested is third party personal data then it cannot be provided to the complainant if to do so would breach any of the data protection principles.

The Council have applied Section 42 exemption to Question 5. Section 42 states:

*“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.”*

### **The Commissioner’s Decision**

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

The Commissioner’s decision is as follows:

In respect to Question 1 and the application of Section 40 the Commissioner has concluded that the information requested is personal data. However he does not consider the disclosure of this information would breach any of the data protection principles.

In respect to Question 5 and the application of Section 42 the Commissioner is satisfied that the application of this exemption is valid. The Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

An explanation for this decision is enclosed in the attached Statement of Reasons

### **Action Required**

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

*Calderdale Council shall, within 30 days of the date of this Decision Notice, disclose to the complainant the names of the council officers who went abroad in accordance with question 1 of the complainant’s request for information.*

### Failure to comply

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

### Right of Appeal

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

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: <a href="mailto:informationtribunal@dca.gsi.gov.uk">informationtribunal@dca.gsi.gov.uk</a>
Leicester	
LE1 6ZX	

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 24<sup>th</sup> day of November 2005

Signed: .....

Graham Smith  
Deputy Commissioner

Information Commissioner  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## STATEMENT OF REASONS

The following document provides a statement of reasons for the decision in case ref FS50068973

The Information Commissioner (the "Commissioner") has reviewed the information in question and has decided that Section 40 of the Act has not been correctly applied. Whilst accepting the information requested will constitute personal data he is satisfied its release would not breach the data protection principles. However he accepts that Section 42 of the Act has been correctly applied. Section 42 is a qualified exemption and subject to the public interest test.

### 1. The request and the application of the exemptions

The complainant requested the following information:

"In 2003/04 your council sent people to Australia/New Zealand to recruit social workers. Please can you let me have the following information under the new FOI Act 2000:

1. Which council officers went abroad?
2. What expenses they claimed and which hotels they stayed in?
3. The company you engaged to help you to recruit and how much they were paid?
4. The total cost of the whole exercise and how many social workers/ other staff were recruited from abroad?
5. Details of the legal advice you took at the outset on the process and a copy of it?"

The council have disclosed the information relating to Questions 2, 3 and 4. In relation to Question 1 they have disclosed the positions of the officers concerned but have declined to disclose their names citing the section 40 exemption as the basis for withholding the requested information. In respect of Question 5 the Council rely on the Section 42 exemption as the basis for withholding the requested information.

### 2. The Section 40 exemption

Section 40(2) of the Act states 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 second condition below is satisfied."*

Section 40 (3) states:

*The first condition is:*

- (a) in a case where the information falls within any of the 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 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)....."*

It is the contention of the public authority that the disclosure of the information would breach the first data protection principle.

Schedule 1 Part 1 of the Data Protection Act 1998 states the first principle as:

*"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 2 is also met"*

The key considerations facing the Commissioner in this case are therefore:

- (a) Whether the information in question is personal data?
- (b) If so, would its disclosure breach any of the data protection principles?

The Commissioner notes the Council have confined its argument to the first data protection principle. The Commissioner is satisfied that disclosure of the information in question would not involve issues of compliance with any other data protection principle. He has also concluded that section 10 of the Data Protection Act is not relevant on the basis that neither of the officers concerned appear to have served such a notice.

### ***Is the Information personal data?***

Personal data is defined in section 1(1) of the Data Protection Act 1998 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"*

The Commissioner has seen the disputed information. It identifies the employees that went to Australia and the Commissioner is satisfied that the information constitutes personal data of which those individuals are the data subjects.

***Would disclosure breach the first data protection principle?***

Calderdale Council have concluded that it would be unfair to disclose the names of the officers concerned and therefore to do so would breach the first data protection principle.

The Commissioner has taken into account a number of arguments raised by the Council which it believes substantiates its argument. The Commissioner has noted:

1. The employees were not aware at the time of their visit to Australia in 2003, of the possibility of their names being released at that time or in the future, following a freedom of information request. The Code of Conduct for employees also provides that personal employee information will not be disclosed without consent.
2. When the original request was received the Officers involved declined to provide their permission for their names to be disclosed.
3. Whilst there is a stronger presumption of disclosure in respect of people acting in a work or official capacity, the Council do not feel the employees are sufficiently senior in the Council's hierarchy to merit the release of their names without breaching the first data protection principle.
4. The Council believe the type of work undertaken by these staff is very sensitive and are concerned that adverse references and comparisons could be made regarding the employees visit to Australia to any reductions in service provision/ serious budgetary implications if it were to be reported irresponsibly. The Council are therefore concerned disclosure of the names will generate negative reaction from the press and / or the public and that disclosure would cause unnecessary and unjustified distress to the individuals concerned.

**The Commissioner's view on the first data protection principle**

When assessing compliance with the Data Protection Act and whether disclosure will breach the first data protection principle the Commissioner will take into account, and has in this case, the following factors:

1. Fairness does not necessarily depend on whether consent has been given. Some processing of personal data can be intrinsically fair even though the data subject has not been explicitly informed of the processing. Similarly, intrinsically unfair processing cannot be made fair by telling the data subject about such processing.
2. The Commissioner does however accept that an individual's legitimate and reasonable expectation is one factor that needs to be considered in assessing whether the processing of personal data about that

individual is fair. The Council's code of conduct stating that no personal employee information will be disclosed without consent will have some bearing on what are the legitimate expectations of employees. However the code of conduct does provide for an exception where the council is under a duty to release such information. The Commissioner considers the Freedom of Information Act 2000 creates a duty to disclose, unless the information is exempt under the Act.

3. The Commissioner concludes that the accountability to which all public authority employees are, to some extent, subject will have an effect on their expectations and therefore on standards of fairness pertaining to them. The Commissioner will take into account the public nature of the employees' role when reaching his decision.
4. In assessing compliance with the data protection principles, the Commissioner will consider the distinction between personal information about an individual's professional life and personal information about an individual's private life. He will also consider the sensitivity of the information and the effect of its release on individual employees. The disclosure of information about an individual's private life is, in general, more likely to breach the data protection principles than the release of information about his or her professional life.

In this case, the Commissioner has taken into account all the arguments raised by the Council and has concluded that disclosure of the names of the officers in question would not breach the first data protection principle. The Commissioner has taken the view that the request for these employees' names is a request for professional personal information. It specifically relates to their employment and their duties in carrying out that employment. Secondly, whilst he is mindful of the fact that the employees have not given their consent to disclosure or been informed disclosure would take place, he has taken into account the public nature of their role. The nature of their role and the task they undertook means that they should expect to be the subject to some public scrutiny. Whilst appreciating the council's view that they do not consider these employees senior enough to justify the disclosure of their names, seniority is not necessarily the only factor to consider – the nature of their role, the extent of public money incurred in carrying out that role and indeed the level of responsibility they were given by the council to carry out this particular task should also be taken into account.

The Commissioner has also considered the Council's arguments as to the effect disclosure would have on these employees and in particular the negative media attention that may be directed at them. However the Commissioner is not persuaded this argument merits withholding the names of the Officers. The fact they were carrying out their official duties has a significant bearing on this. The recruitment and employment of social workers from Australia was not uncommon in public authorities at that time in view of the shortage of qualified social workers in the UK job market. The resultant recruitment crisis in this area was felt by a number of other local authorities

who then also carried out overseas recruitment. Two years have now elapsed since this recruitment exercise took place and there is plenty of information freely available to the public via the media, including the internet, in which other councils have openly explained how and why they have undertaken overseas recruitment exercises of this sort. The Commissioner has noted that specialist recruitment companies are still working with local authorities and overseas recruitment is still taking place. The Commissioner has not been provided with any evidence to show that this overseas recruitment campaign has led or will lead to any public acrimony or risk to individual employees involved in such recruitment.

The Commissioner has also considered whether any of the conditions in schedule 2 of the Data Protection Act 1998 can be met. Personal data must be processed fairly and lawfully and cannot be processed unless at least one of these conditions is met. The Commissioner has concluded that the processing is necessary for the purposes of the legitimate interests of the complainant to whom the data is disclosed (that is to comply with the complainant's freedom of information request) and that the processing is not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects concerned. Therefore a condition in schedule 2 of the Data Protection Act 1998 can be met.

In conclusion, the Commissioner is satisfied that the information requested by the complainant in question 1 of his request is not exempt by virtue of section 40 because its release would not contravene the data protection principles or section 10 of the Data Protection Act 1998.

## **2. The Section 42 exemption**

Section 42 (1) states:

*“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.”*

The exemption is designed to protect the confidential relationship between a legal adviser and a client to ensure that any communication with such adviser will be treated in confidence and not revealed without the consent of the client. The privilege to which this particular request relates is known as legal advice privilege. To establish legal advice privilege it is necessary to demonstrate that the dominant purpose of the communication between the Council and its legal adviser is that of seeking or providing legal advice. The Commissioner has examined the subject matter of this part of the request and accepts that the Council's communications with its legal advisers on the subject of the overseas recruitment of social workers is covered by this exemption and he is therefore satisfied the exemption applies.



## **Public Interest Test**

Having determined that the section 42 exemption applies, the Commissioner then considered whether the public interest in maintaining this exemption outweighed the public interest in disclosing the information. The public interest test is set out in section 2(2) (b) of the Act.

### ***1. The Public Authority's view***

The Commissioner has considered the following points favouring withholding the legal advice:

- a. The Council is concerned that if such advice were published, it would leave the Council in difficulty when it comes to obtaining confidential legal advice on major matters of public law. They believe Officers might not ask for legal advice when they should, or might not reveal all the relevant facts when they do, which would not be in the public interest.
- b. The Commissioner is also aware that overseas recruitment still takes place. Recruitment companies specialising in overseas recruitment of social workers still promote this activity on the internet and therefore it is possible local authorities, such as Calderdale Council, may have to undertake this exercise again.
- c. The Commissioner notes that Council officers work on the basis that their requests for advice are treated as confidential and therefore the Council is concerned that if the officers believed their requests for advice could be made public then this may result in a very carefully worded series of communications, expressed in very guarded terms, between the officer and the legal advisers. This may result in wasted time and effort by both parties. The Council is also concerned that officers may not ask for advice as they have no confidence that it will be treated as confidential. The Officers may take the view that the cases they are dealing with are so sensitive that their desire to maintain confidentiality is greater than their desire to seek legal advice. The Commissioner has noted that the Council believes this leaves it at risk of making wrong decisions or taking the wrong course of action in a particular situation and may leave it vulnerable to the possibility of litigation resulting from inadvisable actions. The Council considers this to be an unacceptable way of running a public authority and not in the public interest
- d. The Council is concerned its reputation may also be damaged once it became common knowledge that privilege was not being maintained. It may find it more difficult to procure legal advice and damage its relationship with its internal and external customers who would lose confidence in the authority.

As a result the Council has concluded that the public interest in maintaining the exemption is greater than the public interest in disclosing the information.

## ***2. The Complainant's View***

The complainant has argued that the public has a right to know that the Council followed legal advice in carrying out the recruitment exercise, particularly in relation to the need to follow the European Procurement Rules and its own standing orders. He has also argued that as this exercise took place a few years ago there is no prospect of a legal challenge, only embarrassment if the Council did not follow the lawyer's advice.

## **The Commissioner's View**

The Commissioner has seen in confidence the information in question and has taken into account the arguments made by both parties.

It is in the public interest that Councils are able to seek legal advice and consult their lawyers in confidence and that information can be shared fully and frankly without the knowledge that such advice will be put in the public domain. This is the basis of legal professional privilege. There is also an argument that external legal advisers may be reluctant to do business with the Council if there is a risk the work it has undertaken for the Council will become public knowledge. This would then reduce the ability of councils being able to obtain external legal advice which could damage the relationship between the council and its internal and external customers. It is argued by the Council that it would therefore not be in the public interest for the information requested by the complainant in question 5 to be disclosed as it would damage the public interest and prejudice its ability to carry out its public functions.

However there is also a public interest in ensuring transparency in the use of resources by public authorities and that those public authorities are ensuring, through the taking of legal advice, that the decisions they take are lawful. There is also a public interest argument in knowing whether legal advice has been followed and that all issues surrounding the recruitment of social workers overseas have been properly considered and addressed so that it can be seen that high quality and thorough decision-making has emanated from the receipt of sound legal advice. The Commissioner accepts there is a clear public interest in understanding how and why legal advice is obtained and in knowing whether such legal advice has been acted upon. He also accepts that within a local community there will be strong views and opinions on matters that directly concern that community and understanding how decisions are made.

In this case however, the Commissioner does not consider the public interest in disclosure to be sufficiently strong to override the principle of legal professional privilege and the public interest in maintaining the exemption. His reasons for reaching this conclusion are provided below.

The Commissioner has noted the Council's argument that disclosure may prejudice its ability to seek legal advice in the future. The Council has highlighted the difficulties of obtaining legal advice if there is a risk of confidentiality being threatened and the possible reluctance of staff to seek independent legal advice. The Commissioner has also noted that overseas recruitment still takes place by local authorities and therefore it is possible the council may need to seek further legal advice in the future if it decides to repeat this exercise.

He has also taken into account the fact that the Council is subject to scrutiny by its own Monitoring Officer. Under the provisions of the Local Government and Housing Act 1989 Councils have a duty to appoint a Monitoring Officer to ensure the lawfulness and fairness of Council decision-making. If therefore the Monitoring Officer of the Council considered that aspects of this recruitment exercise would have given rise to unlawfulness he would have had a duty to report this to the appropriate authority within the Council and the proposal or decision could not have been implemented until the report had been considered. The Monitoring Officer therefore has an important role in reassuring the public on the lawfulness of the Council's actions. The Commissioner is persuaded this should help to satisfy the public interest in knowing a decision such as this has been thoroughly considered and has been taken lawfully.

In summary, the Commissioner is keenly aware of the need for public authorities to be accountable and transparent in their actions, and to show that they have sought and obtained appropriate legal advice when carrying out an exercise of this nature and assessing the implications to the funding of services in the local community. However he is not persuaded that the public interest arguments in favour of disclosure in this particular case are sufficiently strong to outweigh the public interest in maintaining the exemption. He is therefore satisfied that the public interest is best served in maintaining the exemption in this case.