

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 08 July 2010

**Public Authority:** Education Leeds  
**Address:** 10th Floor West  
110 Merrion Centre  
Leeds  
LS2 8DT

### Summary

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The complainant asked Education Leeds for information relating to training courses which it was sending its managers on. The training courses were run by a charitable organisation, Common Purpose. Some information was provided in response to his request however other information was withheld on the basis that section 43(2) (commercial prejudice) and section 40(2) (personal data) applied. The Commissioner has considered the application of these exemptions. His decision is that Education Leeds was not correct to apply section 43(2) to the information. He also decided that section 40(2) applies to some of the withheld information, but not to all of it.

### 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. Common Purpose is a not for profit organization that brings together people from a wide range of backgrounds to help them become more effective leaders in society. On its website it explains that it encourages

its alumni to act beyond their own immediate area of responsibility and to not take decisions in isolation.

## The Request

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3. The Commissioner notes that Education Leeds is a not-for-profit company, which is wholly owned by Leeds City Council. Under section 3(1)(b) of the Act companies which are wholly owned by a single public authority are considered themselves to be a public authority for the purposes of the Act. Therefore the Commissioner concludes that Education Leeds is a public authority for the purposes of the Act.

4. On 18 December 2008 the complainant requested the following information:

“I am seeking a Scrutiny Inquiry into the detailed relationship between Leeds City Council (and its subsidiary or partner organisations) and a national organisation known as "Common Purpose".

In order to conduct this Scrutiny Inquiry I am seeking copies of the following documents:

- 1) All invoices that your organisation has paid to Common Purpose over the last six years,
- 2) All surviving communications (whether by email or on paper) between your organisation and Common Purpose,
- 3) Copies of a spreadsheet prepared and circulated by Common Purpose, which appears to include personal details of people who had asked questions about Common Purpose. [This last document was repeatedly updated and I am seeking all surviving copies.]”

5. Education Leeds responded on 20 January 2009 stating the following:

- 1) It provided a document in response to part 1 of the request confirming the amount paid by Education Leeds to Common Purpose over the last six years.

- 2) It stated that section 43(2) applied but that it was in the process of deliberating whether the requested information should be disclosed in the public interest.

- 3). It confirmed that it did not hold a copy of the spreadsheet in question and that, in so far as it could ascertain, it had never held a copy of it.
6. On 3 February 2009 it wrote again to the complainant, providing a CD of material relating to Common Purpose. Some of information on the CD was redacted under section 40(3)(a)(i) of the Freedom of Information Act (Personal Information). Education Leeds also used section 43(2) (Commercial Information) to withhold other information.
  7. On 7 February 2009 the complainant wrote back to Education Leeds and asked it to review its decision to withhold the information. In that letter the complainant also stated that the disclosure appeared to be incomplete, because it did not include a "briefing note" from Common Purpose that was circulated during 2008 which offered advice to Common Purpose members on effective strategies to defeat the Freedom of Information Act. The complainant highlighted that due to the redaction of names from the correspondence the disclosed sections lost much of their meaning.
  8. On 26 February 2009 Education Leeds responded to the review. It stated that the briefing note was actually an email which was not received by Education Leeds until after the request had been made by the complainant. It further stated that the "briefing note was provided to the council in response to the council liaising with Common Purpose regarding the complainants request for information. It did not therefore fall within the scope of the request as it was not held at the time that the request was received. The Commissioner agrees that information obtained after a request is received does not fall within the scope of the request. He has therefore not considered this aspect of the request further. The council also stated that the review was now complete and its decision was that some of the information was personal data exempt under section 40 of the Act. Other information was also withheld under section 43. It did however provide the complainant with a copy of the relevant personal data relating to its own employees.
  9. On 24 April the Education Leeds wrote again to the complainant providing further information, including lists of names of council employees who had attended Common Purpose courses and the names of the courses which they had attended.

## The Investigation

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### Scope of the case

10. On 27 February 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled by Education Leeds. The complainant specifically asked the Commissioner to consider whether the information he had asked for should have been supplied to him. The information itself is comprised of correspondence between the Education Leeds and Common Purpose, and information provided to council delegates prior to their attendance on Common Purpose courses. The Complainant's complaint to the Commissioner specifically asked him to consider Education Leeds response to his request, not Leeds City Council's response. Hence the Commissioner has only considered Education Leeds response within this Decision Notice.

### Chronology

11. The Commissioner wrote to Education Leeds on 4 March 2009 explaining that a complaint had been received and asking Education Leeds to prepare for an investigation of the matter.
12. On 10 June 2009 the Commissioner wrote again to Education Leeds asking specific questions in relation to the exemptions which Education Leeds had claimed and asking for a copy of the information to be sent to him. He also asked it to explain what searches it had carried out to establish whether the spreadsheet requested at point 3 was held.
13. On 22 June 2009 Education Leeds wrote to the Commissioner providing further arguments together with a copy of the information which was being withheld. It also described the searches it had carried out to establish whether a copy of the spreadsheet was held.

### Analysis

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#### Substantive Procedural Matters

14. Education Leeds stated in response to part 3 of the request that it did not hold a copy of the spreadsheet, and as far as it could ascertain it had never held a copy of it. The Commissioner therefore asked Education Leeds to describe the searches which it had carried out to ascertain whether it held, or had ever held the information. Education

Leeds explained that it had asked all of the FOI contacts within the relevant departments to look for the information. The search had included paper records, email and other storage drives and yet no record of a spreadsheet was found.

15. The Commissioner is therefore satisfied that on a balance of probability no relevant information was held in respect of the request for the spreadsheet.

## **Exemptions**

### Section 40(2) – Personal information

16. Education Leeds claimed that some of the information was exempt under section 40(2) of the Act as it was personal data, and its disclosure would be likely to breach one of the data protection principles.
17. The public authority's main arguments centred on the application of the First Data Protection Principle. It believes that disclosure of the personal data in question would breach the fair processing requirement of the First Data Protection Principle. However, it also argued that disclosure would breach the Second Data Protection Principle.
18. The Commissioner therefore firstly needs to consider whether the information in question is personal data and if it is, whether its disclosure would contravene one of the data protection principles.

### Is the information personal data?

19. Personal data is defined in section 1 of the DPA 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.*
20. The Commissioner is satisfied that the names of individuals who attended courses and the names of those involved in delivering the courses is personal data relating to them. This is because an individual's name identifies the individual concerned. Secondly, linking their name to their role within their organisation, and with a Common

Purpose course relates to their professional/business life and as such amounts to their personal data.

Would disclosure contravene any of the Data Protection Principles?

The First Data Protection Principle

21. Education Leeds argues that the main principle to be considered in this case is the First Data Protection Principle. The First Data Protection Principle has two main components. They are as follows:
  - the requirement to process all personal data fairly and lawfully; and
  - the requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.
22. Both requirements 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 Protection Principle.
23. The Commissioner's general approach to cases involving personal data is to consider the fairness element first. Only if he believes that disclosure would be unfair would he move on to consider other elements of the first Principle.
24. It is important to note that any disclosure under this Act is a disclosure to the public at large and not just to the complainant. If the public authority is prepared to disclose the requested information to the complainant under the Act it should be prepared to disclose the same information to any other person who asks for it.

Fairness

25. The Commissioner identified 4 separate groups of individuals named within the information which need to be considered separately when applying the fairness criterion of the First Data Protection Principle:
  - i) Council employees' names
  - ii) Common Purpose employees' names
  - iii) Other individuals who are from other organisations who are named in the delegates lists
  - iv) Individuals who are associated to Common Purpose and/or who are providing services or information to Common Purpose delegates as part of their course.
26. The Commissioner has applied the criteria provided in paragraph 21 above to each group separately.

i) Council employees

27. Education Leeds clarified to the complainant in its review that all council employees' data was disclosed. However it has also stated to the Commissioner that where the names of Education Leeds delegates were included within training materials these were not disclosed. In other cases (such as a Christmas meal attendee list) they were. The Commissioner understands by this that a Christmas meal for Common purpose delegates was organised, and where council employees feature on the list of those attending the meal they were disclosed to the complainant. The Commissioner therefore understands the identities of all council employees taking part in Common Purpose courses were disclosed, however some information was redacted from some correspondence but not others.
28. Education Leeds did not provide a reason why it had done this. The Commissioner has therefore considered the application of section 40 only to the names of individuals which have been redacted, although he understands that the vast majority of council employees' names (if not all) have already have been disclosed in some form.
29. The First Data Protection Principle requires that personal information is processed "fairly". This generally (but not always) requires that individuals would have an expectation that their information would be disclosed, either because it would be reasonably obvious to the individual that that would be the case, or because the public authority told them it would be processed in that way at the time that the information was obtained.
30. In his guidance on the section 40 exemption the Commissioner states that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure 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." In previous decision notices the Commissioner has stated that he considers that occupants of senior public posts are more likely to be exposed to greater levels of scrutiny and accountability and there should therefore be a greater expectation that some personal data may need to be disclosed in order to meet that need.
31. The Commissioner notes that the nature of Common Purpose is to provide leadership training and networking opportunities to leaders and potential leaders in organisations. In the case of Education Leeds delegates the individuals are therefore relatively senior leaders,



managers or decision makers within Education Leeds. The Commissioner is therefore satisfied that due to the seniority of the employees in question it is reasonable to conclude that they may have had some expectation that this level of personal data may be disclosed if requested.

32. The Commissioner has also considered whether the information itself relates to the individual's work or to their private life. The Commissioner's guidance on section 40 differentiates between information which relates to an individual's private life and their public life, stating,

"...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.

While it is right to take into account any damage or distress that may be caused to a third party by the disclosure of personal information, the focus should be on the damage or distress to an individual acting in a personal or private capacity. The exemption should not be used, for instance, as a means of sparing officials embarrassment over poor administrative decisions."

33. The scope of this exemption was also clarified by the Information Tribunal in *House of Commons v ICO & Norman Baker MP* (EA/2006/0015 and 0016). The Information Tribunal found that where information is about officials acting in their public capacity then there should be a clearer expectation by those individuals that their actions will be subject to a greater level of scrutiny than would otherwise be the case.
34. The Commissioner has considered whether the requested information includes the personal data of the individuals acting in their official ('public') capacity and whether the disclosure of the information would in fact impact upon their private lives.
35. He firstly considers that as the delegates' lists refer to a training course it is reasonable to consider that an individual's participation in such a course does have an impact on their private lives. It refers to the particular training and experience of an individual, is likely to appear on their curriculum vitae in the future, and will have an effect on their future employment prospects and opportunities.
36. However the training is being carried out primarily because of the individual's role within Education Leeds, i.e., their public role. It is also being paid for by public funds. The Commissioner therefore considers



that in this context the information primarily relates to the individuals' public life. It refers to the opportunities and experience which individuals gain through their role in a public authority, paid for by public funds, and refers to their ability to carry out their public role in the future. As they are managers and decision makers within Education Leeds there should therefore be an expectation that some information relating to this would be disclosed. This is in order that Education Leeds is accountable for the public money it spends on such courses and because the public has a strong legitimate interest in being able to reassure itself that senior public servants taking decisions which affect their community have the necessary skills and experience to be able to carry out their role effectively.

37. The Commissioner has therefore balanced the above points and considered whether a disclosure would cause any damage or distress to the individuals involved. Education Leeds has not submitted specific arguments identifying distress factors relating to specific individuals and so the Commissioner has considered this more generally. He considers that other than the very general distress caused by the disclosure of personal information it would not cause any damage or distress to the individuals involved.
38. He has also borne in mind the fact that Education Leeds disclosed some individuals' data within the Christmas meal attendee list and so it did not consider that form of disclosure to be 'distressing', but provided no arguments stating why it might be distressing to disclose the other correspondence with the individuals identified.
39. Given this the Commissioner is satisfied that a disclosure of the names of council employees taking part in the course would not be unfair to those individuals. It would not therefore breach the fairness requirement of the First Data Protection Principle in this instance. The Commissioner must therefore consider whether a condition from schedule 2 can be met.

#### Schedule 2 Condition

40. The Commissioner considers that the most relevant condition from schedule 2 is likely to be condition 6. Condition 6 provides:

"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."

41. In the House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc) the Tribunal said that the first thing to do when applying the sixth condition was to establish whether the disclosure was necessary for the legitimate purposes of the recipient (the public) and then to go on to consider whether, even if the disclosure was necessary, it would nevertheless cause unwarranted prejudice to the rights & freedoms of the data subject.
42. The legitimate interests of the public are noted above; primarily it is to scrutinise more closely Education Leeds's use of public money on such courses but also assure itself that Education Leeds's training is appropriate for the individuals concerned to carry out their jobs.
43. The Commissioner must therefore consider whether disclosure is necessary in order for the public to achieve those aims. In considering this the Tribunal asked itself two questions;
  - (a) whether the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the individuals (and, so far as affected, their families or other individuals),
  - (b) if satisfied that the aims cannot be achieved by means that involve less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the individuals (or anyone else).
44. The Commissioner has therefore considered whether there are any alternative means of meeting the legitimate interests. He has also considered whether the disclosure of the personal data would satisfy the legitimate interest in any event.
45. The Commissioner notes that the public authority has released the amount of money that it has paid to Common Purpose by its release of the invoices it has paid. This goes some way to account for the expenditure on the course.
46. The Commissioner also notes the disclosure of the Christmas meal attendee list and the other lists of Education Leeds employees which was disclosed does provide a degree of overview of council employees who have been on the course. However no distinction was provided as to why a disclosure of that information might be fair to the individuals involved, whilst a disclosure of council employee delegates' names which were redacted from the correspondence would not be. Education Leeds also did not provide any assurance to the complainant that all

council delegates are named in the disclosed lists. The Commissioner therefore believes that the disclosure of the names and roles held in the withheld information provides additional accountability as it aids the public to understand the types of individuals and roles which Education Leeds has identified the course as being relevant to and reassures the public that all relevant employees are identified and their actions transparent.

47. There is also a legitimate interest in the public knowing how many individuals have received training from Common Purpose, in which departments these work, at what level these individuals are and how likely it is that the course could impact on their decision making in the future (i.e. the relevance of the course to their public activities). There is an element of public concern about Common Purpose, about how many individuals have been involved on their courses and how attending these courses may affect government decision making. There is therefore a legitimate public interest in understanding who these individuals are and this interest cannot be satisfied without access to the details of the individuals involved.
48. The Commissioner also considered whether those interests could be satisfied through the less intrusive way of providing information about the roles that the individuals are in. In this case he is satisfied that the individuals are likely to be identifiable from their roles in any event and therefore this would be no less intrusive. He is also satisfied that, in general their names would have already been disclosed, and it is merely redaction of their names from within the correspondence which is in question.

#### *Unwarranted Interference*

49. The Commissioner has considered the collective weight of the necessary legitimate interests and considered whether disclosure would have caused unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subjects at the time that the request was received.
50. The Commissioner notes that the information concerns only the working lives of those parties and the Commissioner does not consider that disclosure would interfere with either their personal lives or that of their families. He therefore does not consider that disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the individuals.

Would disclosure be lawful for the purposes of the First Data Protection Principle?

51. In the context of freedom of information casework, the Commissioner considers it is likely that it will be unlawful to disclose personal data where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence.

52. Education Leeds claims that a disclosure would breach the lawfulness requirement of the First Data Protection Principle because it would breach a common law duty of confidence owed by Education Leeds to Common Purpose. In evidence of this duty it points to an email signature on the bottom of Common Purpose emails stating:

"The information contained in this electronic message is intended ONLY for the confidential use of the above named recipient/s. If the reader is not the intended recipient/s you are hereby notified that you have received this communication in error, and that any review, dissemination, distribution, copying or use of this communication or the information in it is strictly prohibited. If you have received this in error, please notify the sender immediately by electronic mail at the sender's address set forth above and destroy this electronic message. Thank you."

53. The Commissioner has considered whether the above notification is sufficient to create a common law duty of confidence on the information between Education Leeds and Common Purpose. In order for the exemption to be engaged the Commissioner considers that in this case the appropriate test is that it must be shown that the information:

- was provided to the authority by another person, and
- that a disclosure of the information would give rise to an actionable breach of confidence - which in turn the Commissioner considers in this case requires that:
  - the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be disclosed in accordance with the wishes of the confider;
  - the information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
  - disclosure of the information would be unauthorised and to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy;
  - the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, for instance

that disclosure would be protected by a public interest defence.

54. The Commissioner accepts that the above does not constitute the only test of confidence, however he considers it appropriate to use it in this case.
55. In *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 the court suggested a 'reasonable person' test may be a useful one to establish whether an obligation of confidence is created– "If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."
56. The Commissioner notes that this is a general email notification rather than a specific message which Common Purpose has added clearly identifying that the information in the email should be held in confidence. It is added as an email signature on all Common Purpose outbound messages, regardless of the trivialness or sensitivity of the information contained within it. Common Purpose has not therefore added this signature specifically with the purpose of providing confidence to the information contained in the specific message as clearly it applies this to all correspondence of this sort that it sends, whether that information is trivial or not.
57. The Commissioner considers that the general application of an email signature is not sufficient to create an obligation of confidence. The general application of the clause on all emails being sent from Common Purpose undermines any specific intention to create a duty of confidence for these messages. The use of a 'broad brush' approach to all correspondence, regardless of its actual content, undermines any clear intention that the information should be held in confidence. It also undermines the creation of an obligation of confidence as it blurs the circumstances in which information is received from Common Purpose.
58. Accordingly the Commissioner does not consider this email signature is sufficient to create the necessary obligation of confidence. He does not therefore consider that a disclosure would specifically breach the lawfulness requirement of the First Data Protection Principle because it would breach a common law duty of confidence.

59. In conclusion the Commissioner's decision is that section 40(2) of the Act is not applicable to the information relating to Council employees' names.

ii) Common Purpose employees' names

60. The Commissioner has considered the application of the First Data Protection Principle to the identity of Common Purpose employees. He notes that Common Purpose employees who are named are, in general, course administrators and facilitators, or senior employees who are responsible for marketing individual courses to clients. They are therefore public facing individuals who would have an expectation that their identities would be disclosed to clients or potential clients as part of Common Purposes' activities.
61. However the Commissioner notes that the employees are not civil servants. They are private individuals carrying out their employment activities, providing services to the public and private sectors as part of their employment with a private organisation.
62. Although those individuals must have some expectation that their identities would be disclosed to potential clients of Common Purpose the Commissioner considers that there is a considerable difference between this expectation and an expectation that their personal data would be disclosed to any member of the public by Education Leeds in response to an FOI request.
63. The Commissioner also notes that there are few strong arguments why a disclosure of the identities of these individuals would be in the legitimate interests of the public. They are not public servants carrying out a public function. Their role is merely to market or administer the course to potential clients. Although there is a degree of public interest in the actions of Common Purpose being disclosed due to their role as a charitable organisation, the actions of the charity would not be clearer through the identification of the individuals held within this information. This would therefore lessen any expectation that the individual might have that their personal data might be disclosed in any event.
64. The Commissioner's decision is therefore that a disclosure of the names of Common Purpose employees in response to this request is likely to be unfair for the purposes of the First Data Protection Principle. Education Leeds was therefore correct to apply section 40(2) to this information. As he considers the disclosure to be unfair, the Commissioner has not gone on to consider any other elements of the first Data Protection Principle.



iii) Other individuals

65. The individuals referred to here are individuals whose names appear on delegates' lists or in correspondence, but who are from other organisations.
66. The Commissioner has considered this, and for the same reasons as in the above section he believes that there would be no expectation by these individuals that their personal details would be disclosed widely in response to FOI requests. These are not individuals who are associated with Education Leeds or with Common Purpose directly, but are individuals who happened to be delegates on the same course as a member of Education Leeds.
67. Although some of these individuals may work for other public authorities there would be no expectation of disclosure to a request to Education Leeds in this instance. They merely provided their information to Common Purpose in order to attend the courses. The Commissioner has therefore decided that a disclosure of this information would breach the fairness requirement of the First Data Protection Principle. The Commissioner's decision is therefore that Education Leeds was correct to apply section 40(2) to this information.

iv) Individuals associated with, or providing services to Common Purpose

68. These refer to individuals who are associated with Common Purpose in some manner but which are not specifically employees of Common Purpose. As an example, some Common Purpose modules include discussions with individuals who provide information on an area or topic because of their association or expertise in that area. These individuals are not Common Purpose employees, but professional individuals who share their professional knowledge and experience with delegates as part of their training on a particular area.
69. The Commissioner draws a distinction between individuals who are acting on behalf of a private organisation (or themselves) when providing this service to Common Purpose, and those who are doing so professionally due to their role within a public authority.
70. The individuals concerned are generally senior figures within their organisations, or within their areas of knowledge. Where they are public or civil servants they are providing their services to Common Purpose potentially at public expense. Their association with Common Purpose is likely to be on a professional basis or because they are



former Common Purpose delegates or graduates who have agreed to help because of their previous links to Common Purpose.

71. The Commissioner has considered the status of senior public servants who have associated themselves with Common Purpose in this way. He considers that where they have provided this service as part of their public role within an authority they should have had an expectation that their association with Common Purpose would be disclosed. The Commissioner considers that there would have been an onus for this information to be disclosed if a request were made to their own authorities, and in this instance the Commissioner sees little significance in the fact that it is a different authority which has been asked for the information because the individual has provided his services to that authority through the course.
72. Further to this, the Commissioner notes that there is a strong legitimate interest in the public knowing which senior civil servants have associated themselves with Common Purpose through their expertise in their public role. There is also a legitimate interest in the public being able to ascertain the types of public servants and officials who have agreed to provide course content to Common Purpose courses as this sheds light on the experiences and the training which council officers obtain by attending the courses. They are doing so from positions of authority, and potentially at public expense where they are attending courses during their official working hours.
73. However, where the individuals are not public or civil servants, or they were acting privately rather than on behalf of their authority then the Commissioner considers that it is reasonable to consider that they would have much less expectation that their details would be disclosed. Accordingly, in such cases he considers that a disclosure in these circumstances would be unfair. Education Leeds is therefore correct to withhold this information under section 40(2) of the Act.
74. The Commissioner has gone on to consider a schedule 2 condition for the disclosure of information on the public officials.

#### Schedule 2

75. The Commissioner has considered whether a schedule 2 condition is applicable to this information. He has again considered the application of condition 6 as the most likely relevant appropriate condition.
76. He has considered the legitimate interests in the public being able to ascertain the individuals' participation in the courses in paragraph 72 above.

77. The Commissioner must therefore consider whether disclosure is necessary in order for the public to achieve those aims. He has therefore again considered the information against the factors highlighted in paragraph 43 above.
78. In this case the Commissioner considers that it would be impossible for the legitimate aims identified above to be achieved in a manner that would interfere less with the privacy of those individuals. The identity of those individuals, together with their job role is essential in order to meet the legitimate interests which have been identified. The Commissioner has therefore considered whether a disclosure would have an excessive or disproportionate effect on the individuals concerned. His decision is that it would not.
79. At paragraphs 51 to 58 above the Commissioner has considered the lawfulness aspects of the processing. His decision with regard to the public officials' information also is that it would be lawful to process the personal data for these purposes.
80. The Commissioner's decision is therefore that section 40(2) is not engaged in respect of this information.

#### The Second Data Protection Principle

81. Education Leeds also argues that disclosing the information would breach the Second Data Protection Principle. The second data protection principle provides that personal data shall be processed only for one or more specified and lawful purposes. The argument of Education Leeds is that disclosure here would be incompatible with the purpose for which the information was collected. Education Leeds stated that the information requested was provided to it by Common Purpose for the purposes of the provision of a training course.
82. The Commissioner does not consider the disclosure of personal data in response to a Freedom of Information request to be a specific purpose for which information is processed. In responding to such a request a public authority is not fulfilling one of its business purposes; it is simply complying with a legal obligation. It would be difficult to argue that, as a rule, compliance with a legal obligation, such as that imposed by the Act, would be incompatible with the other purposes for which personal data may be processed. Therefore the Commissioner rejects the argument that a disclosure in response to a Freedom of Information request would, in itself, breach the second data protection principle.

### Section 43 – Commercial information

83. Education Leeds has submitted arguments in support of its reliance upon section 43 of the Act. Section 43(2) applies where a disclosure of information would, or would be likely to prejudice the commercial interests of any party. Education Leeds argues that information dealing with Common Purpose course content is exempt as its disclosure would prejudice the commercial interests of Common Purpose and Education Leeds.
84. The Commissioner notes that Common Purpose is a subsidiary body to Common Purpose Charitable Trust and is a not for profit organisation, both are a registered charity under registered charity number 1023384.
85. The Commissioner recognises that not for profit organisations often take part in commercial activities and compete in the commercial sector. The fact that the organisation's central goal is not to make profit does not prevent it having commercial interests and competing in the competitive market.
86. The argument submitted by Education Leeds is that a disclosure of the information would be likely to provide competitors of Common Purpose with information on the content and structure of its training materials and sessions. It argues that competitors would use this information to provide or enhance their own training courses, which they provide in competition with Common Purpose. Education Leeds states that "At the very least this would provide details of the services procured from Common Purpose which in itself may erode the competitive edge Common Purpose has obtained".
87. Education Leeds states that the likelihood of this occurring to be more likely than not. The Commissioner considers that this correlates with the test in section 43 that its commercial interests "would be likely" to be prejudiced by a disclosure of the information. It argues that this is based upon the natural desire of companies in the same business to compete with one another and to provide superior products and services.
88. The Commissioner agrees that a disclosure of the withheld information could provide competitors with an opportunity to consider including this sort of information in their own training courses. He recognises that the Common Purpose training materials provide an important overview of the content and structure of Common Purpose courses, and that course content is likely to be a strong element of its competitiveness in this market.

89. However, the Commissioner questions how difficult it might be for competitors to obtain information on this sort of material on Common Purpose training courses in any event. He notes for instance that Common Purpose indicates that 70% of the top 100 FTSE companies have previously used its training courses for their staff. It also has links with many different public authorities and provides training to many other organisations worldwide. The Commissioner therefore questions the commercial sensitivity of the training materials and structure when there are so many former students/graduates working in other organisations who have direct knowledge of Common Purpose training courses. He also recognises that by agreeing to pay the necessary fee most organisations could secure access to Common Purpose training course materials by sending their own delegate on one of its courses.
90. The Commissioner also considers that course materials of this nature might be protected under intellectual property laws. He recognises however that this might not prevent competitors using the knowledge of the structure of courses to enhance their own training courses, and that this might impact on the competitive edge currently enjoyed by Common Purpose.
91. The Commissioner recognises therefore that some degree of commercial prejudice would be likely to occur if competitors are able to obtain this information through a disclosure under the Act, albeit that in all likelihood they could obtain this information relatively easily from other sources if they wished to do so as described above.
92. The severity of prejudice which might occur is only relevant to whether section 43 is engaged if that prejudice would be insignificant or trivial. The Commissioner does not consider that that is the case here. His decision is that a degree of prejudice would be likely to occur should this information be disclosed. His decision is therefore that section 43 of the Act is engaged.
93. Section 43 is subject to a public interest test. The test is whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### The public interest test

##### Public interest in maintaining the exemption

94. The Commissioner has considered the arguments put forward by Education Leeds. These include:

i. Disclosure would damage the working relationship between supplier and consumer; i.e. Common Purpose and Education Leeds.

ii. Common Purpose may reconsider whether working with Education Leeds is in its best interests if this information is disclosed;

iii. Education Leeds may suffer a reduced ability to procure training from private suppliers where commercially sensitive materials are disclosed in response to a request;

iv. The prejudice which would be likely to be caused to the commercial interests of Common Purpose;

v. Disclosure would be against the express wishes of the supplier. A specific request to withhold the information was received from Common Purpose shortly after the complainant's request and a copy was subsequently disclosed to the complainant.

95. The Commissioner has considered the above arguments in turn. In considering these arguments the Commissioner has taken account of

- the actual nature of the information which has been withheld by Education Leeds,
- the wide knowledge of the courses and training which has been provided to individuals through Common Purpose courses in the past. Because of the amount of people and organisations which have previously taken part in Common Purpose courses, together with the ability to purchase places on courses, there is likely to already be a wide knowledge of course content,
- the stated charitable intent of Common Purpose, and
- information which is already in the public domain about its courses, for instance from the media and through Common Purpose's website and its course advertisements.

96. i) Common Purpose provides its services to many different public authorities in addition to private companies. All public authorities are subject to information access rights under the Act. Therefore Common Purpose would in fact have to withdraw its services from all authorities covered by the Act if it wished to ensure that its course material would not be disclosed in response to a request under the Act. Given that this

- is a fairly major part of its activities, the Commissioner places little weight on this argument when balanced against the likely severity of any damage that might be caused through a disclosure of this information.
97. The charitable aims of Common Purpose would not be best met by it withdrawing its services from the entire public sector. In addition to gaining adverse publicity through a refusal to supply its services to public authorities this could also risk the continuance of its charitable status. It would be clear that its interests lay more with protecting Common Purpose materials than maintaining its stated charitable purposes.
  98. The Commissioner also notes that many of the senior people involved in providing services to Common Purpose are themselves public servants who have previously taken part in Common Purpose courses. A withdrawal of services could therefore severely damage its own ability to provide its course content if senior public servants refused to provide their services due to a withdrawal of its services to authorities.
  99. He also considers that the relationship between Common Purpose and Education Leeds is weighted in favour of Education Leeds. Common Purpose is a supplier of a non essential service. It needs to attract clients in order to remain commercially viable and it would therefore be highly unlikely to purposely allow its relationship with Education Leeds to deteriorate on this basis. The Commissioner considers that this is particularly the case as a purposeful approach of this sort does not meet the charitable purposes of Common Purpose, and risks alienating it from numerous other authorities. As a service supplier this would be a nonsensical approach to running a commercial business.
  100. ii) The Commissioner has considered this argument but considers that many of the arguments considered above also apply here. Again, many public sector organisations work with Common Purpose and so a refusal to provide services to this council would not safeguard Common Purpose information. It would only be by completely refusing to work with public sector organisations that Common Purpose could be assured of such security. He questions the likelihood of such an approach given the wide knowledge of Common Purpose courses by individuals and the stated aims of Common Purpose as a charitable organisation.
  101. iii) The Commissioner considers that this is perhaps the strongest argument put forward by Education Leeds in this instance. If an organisation was aware that information which it relies upon to make it competitive would be disclosed if it were to be provided to Education



Leeds then it might refuse to work with Education Leeds in order to protect the security of its information. This would lessen the ability of the authority to obtain services at a competitive price. However the Commissioner considers that the arguments for point i) in paragraphs 83 -93 are also applicable here. The Commissioner has in this case balanced this possibility against his view that there will already be a relatively wide knowledge of Common Purpose course content.

102. The Commissioner is able to take the severity of the likely prejudice into account and in cases where prejudice would be severe he would add appropriate weight to the arguments for maintaining section 43. In this case he questions the likely severity of any prejudice which would be caused and on balance considers that that this argument is not strong in this instance. The Commissioner therefore dismisses this as a strong argument in favour of withholding the information in this particular case.
103. The Commissioner also notes that the withheld information relates for the most part only to course content. It is an outline of the intended course rather than specifics from the individual training modules itself. This is because much of this is "user generated", i.e. generated by discussions amongst the delegates, led by facilitators. This is carried out under the Chatham House rule.
104. Arguments iv) and v) reflect the general public interest which resides within the exemption itself. The Commissioner has placed due weight on these considerations when making his decision.

#### The public interest in disclosing the information

105. The public interest arguments in favour of disclosing the information revolve around allowing the public access to scrutinise more carefully the likely benefits which would be received in return for the public money being spent on sending relatively senior civil servants on Common Purpose training courses. There is a strong public interest in the public being allowed to scrutinise Education Leeds' use of Common Purpose training courses so that it can inform public debate on the value of such training to the community, given the costs that the training entails and that its training may often not be particularly specific to the role being carried out by the individual manager. Factors which are relevant to this balance are therefore;
  - the public interest in public authorities being transparent about their use of public resources and public money,



- the public interest in creating confidence in the decisions (including financial decisions) taken by authorities,
  - the public interest in allowing the public a better understanding of the reasons for Education Leeds sending its employees on Common Purpose courses,
  - greater knowledge of the types of courses hosted by Common purpose and of the benefits which the community might receive as a result of Education Leeds's managers attending those courses.
106. As stated, Common Purpose is a not for profit organisation and a registered charity. The Common Purpose Charitable Trust and Common Purpose UK Charitable objectives are described in its governing document as:
- “that advancement of education of the public benefit and in particular but without prejudice to the generality of the foregoing to educate men and women and young people of school age, from a broad range of geographical, political, ethnic, institutional, social and economic backgrounds to constitutional, civic, economical and social studies with special emphasis on civil and social awareness and responsibility in the United Kingdom and elsewhere.”
107. The advancement of education of the public benefit is one of the descriptions of accepted charitable purposes listed in the Charities Act 2006. The Act requires that all charities must demonstrate that their aims are for the public benefit.
108. The Commissioner has considered these aims. It is his view that such aims do not necessarily fit comfortably with a stance of protecting Common Purpose training materials from disclosure in order to protect its commercial interests. The charitable aims of Common Purpose may be likely to be better met if others had access to its training course content, even if they were then able to provide similar services. In this way more individuals can gain the knowledge and experience which Common Purpose seeks to provide through its courses and more people would be able to have access to the social and economic benefits which Common Purpose aims to provide through its training.

#### The balance of the public interest test

109. The Commissioner has considered and balanced the above. He considers that the arguments for the commercial sensitivity of the

information do not match the reality of the situation. Many organisations will already have an overview of the content of such courses. Additionally he considers that the public interest arguments in favour of withholding the information do not provide strong arguments when considered in a wider context.

110. The Commissioner has also considered the strong public interest in allowing the general public to scrutinise Education Leeds dealings with Common Purpose and to have the opportunity to hold it to account for its use of public funds on such courses should it wish to do so.
111. On the counter side the charitable aims of Common Purpose may in fact be better achieved through a wider application of the training techniques it employs. The Commissioner therefore considers that the public interest in disclosing the information is not outweighed by the public interest in maintaining the exemption.

## **The Decision**

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112. 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:
113. It correctly applied section 40(2) to personal data of delegates, Common Purpose employees and advisors to Common Purpose who were acting in a private capacity.
114. The Commissioner accepts that on the balance of probabilities the council does not hold a copy of the spreadsheet which the complainant requested.
115. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Education Leeds incorrectly applied section 40 (2) to correspondence and information on members of its own staff who attended Common Purpose courses.
  - Education Leeds also incorrectly applied section 40(2) to information on senior public servants associated with Common Purpose who had provided course content to delegates as part of their public authority duties.

- Education Leeds was not correct to exempt information on the basis that section 43(2) of the Act applied.

## Steps Required

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

- To disclose the information it holds on its own delegates to Common Purpose training courses.
- To disclose any information falling within the scope of the request relating to senior public servants from other authorities who have provided professional services to Common Purpose training courses.
- To disclose all information which was withheld on the basis that section 43 of the Act applied.

117. 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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118. 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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119. 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: 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)

120. 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.

121. 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 8th day of July 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

**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 43(2)** provides that –

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

### 3 Public authorities

- (1) In this Act “public authority” means—
- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which—
    - (i) is listed in Schedule 1, or
    - (ii) is designated by order under section 5, or
  - (b) a publicly-owned company as defined by section 6.
- (2) For the purposes of this Act, information is held by a public authority if—
- (a) it is held by the authority, otherwise than on behalf of another person, or
  - (b) it is held by another person on behalf of the authority.