Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 June 2010

Public Authority: Brecon Beacons National Park Authority
Address: Plas y Ffynnon
Cambrian Way
Brecon
Powys
LD3 7HP

Summary

The complainant requested information about the circumstances relating to the departure of the former Chief Executive to the Authority. The Authority refused the request under sections 40(2) and 30(1)(a)(i) of the Act. The Commissioner has investigated and finds that the Authority correctly applied section 40(2) of the Act to the request. The Commissioner identified a number of procedural shortcomings in the way the Authority handled the complainant's request but requires no steps to be taken.

The Commissioner's Role

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

2. On 15 September 2008 the Authority's Chief Executive was suspended from his post following external and internal investigations examining the leadership of the Authority and the management of its planning

services. Information relating to the suspension was widely reported in the media.[1]

3. The Chief Executive left the Authority by mutual consent on 2 December 2008.

The Request

4. On 20 October 2008 the complainant contacted Brecon Beacons National Park Authority ('the Authority') and requested:

"….all items connected with complaints against [name of former Authority Solicitor], minutes of how they were dealt with and the conclusions reached".

5. The Authority wrote to the complainant on 3 December 2008 asking that he refine his request by providing a list of specific matters relevant to his request. On 7 December 2008, the complainant wrote to the Authority refining his request to:

"…information concerning the dismissal of [named person], former solicitor to the Authority. I should be grateful for copies of written complaints that affected the decision, records of telephone conversations in that connection, reports of Committee meetings on the matter, agendas and minutes as well as internal minutes sent within the Authority between and amongst members. Also minutes and letters sent from the Authority to outside solicitors and advisers concerning [named person]".

6. The Authority issued a refusal notice on 13 January 2009 in respect of that request and the complaint about that matter has been dealt with separately by the Commissioner under case reference FS50246990.

7. On 23 January 2009 the complainant wrote to the Authority regarding his initial request. In this letter, the complainant stated that he would "also like to make a second request with respect to the recent departure of the Chief Executive". This Notice is concerned with that second request.

8. The Authority provided a response in relation to both requests on 10 February 2009. In respect of the request dated 23 January 2009 for information relating to its former Chief Executive, the Authority stated

[1] http://news.bbc.co.uk/1/hi/wales/mid/7617119.stm

that the information was exempt by virtue of sections 30(1)(a), 40 and 41. The Authority's reasoning being its application of these exemptions was that *"it [the information] was held for the purposes of an investigation, the information contains personal information and the information may contain information provided in confidence".*

9. On 18 March 2009 the complainant requested an internal review of the Authority's decision in relation to both information requests.

10. On 21 April 2009, the Authority provided the outcome of its internal review and upheld its decision not to release the information requested on 20 October 2008 and 23 January 2009. The Authority did not provide any further representations in respect of either request and simply referred to its refusal notice dated 10 February 2009.

The Investigation

Scope of the case

11. On 30 April 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he had requested should be disclosed given that the information requested related to the individuals' public lives.

12. As the complainant made two separate requests for information, the Commissioner has treated each request separately. The initial request dated 20 October 2008 regarding the former Solicitor has been handled under case reference FS50246990 and the second request dated 23 January 2009 regarding the former Chief Executive under this case reference - FS50276739. All further references in this Notice to "the request" relate to the request of 23 January 2009 regarding the Authority's former Chief Executive.

13. The Authority has confirmed to the Commissioner that it interpreted the request broadly to relate to information about the circumstances of the departure of its former Chief Executive. The withheld information which the Authority considers falls within the scope of the request comprises complaints and allegations about its former Chief Executive, investigation files, legal documentation and details relating to the basis of his departure.

14. The Commissioner's view is that it was clear from the complainant's correspondence that he was interested in the reasons why that

individual left his post in the Authority. For example, in his letter to the Commissioner dated 30 April 2009 the complainant stated that he *"felt it important to know why the Authority's solicitor a few years back and the Chief Executive, only recently, left their posts".* While the complainant may have not specifically pointed this out to the Authority, given the nature of the complainant's correspondence with the Authority and his request regarding its former solicitor, the Commissioner considers it reasonable that the Authority should have been aware of, or taken steps to clarify, the nature of the request.

15. Based on the history and context of previous correspondence between the Authority and the complainant, the Commissioner considers that the Authority interpreted the request appropriately, i.e. that the complainant was interested in the information relating to the departure of its former Chief Executive. Although full details of the exact nature of the information held by the Authority cannot be provided in this Notice (see paragraph 23, below), the Commissioner is satisfied that the withheld information (as identified at paragraph 13 above) falls within the scope of the request.

Chronology

16. On 18 June 2009, the Commissioner wrote to the Authority to confirm that the complaint had been deemed eligible for formal consideration and to request copies of the withheld information.

17. On 3 November 2009, the Commissioner wrote to the Authority asking for copies of the withheld information, its representations to support its view that the information requested was exempt from disclosure and confirmation of the exemption(s) on which it was relying. Given the broad wording of the request, the Commissioner also asked the Authority to clarify how it had interpreted it.

18. The Authority provided the Commissioner with copies of the withheld information relevant to the request on 26 November 2009.

19. The Authority responded to the Commissioner's letter on 14 December 2009 and confirmed that it was relying on sections 30(1)(a)(i) and 40(2) of the Act and provided further arguments in respect of its application of the exemptions.

20. On 2 March 2010 the Commissioner contacted the Authority and requested further clarification on a number of issues. The Authority provided further responses to the Commissioner on 19 and 22 March 2010 and 7 April 2010.

Analysis

Exemptions

Section 40 – Personal Data

21. Section 40(2) of the Act provides an exemption for information that is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied. In this particular case the condition in question is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles as set out in Schedule 1 to the Data Protection Act 1998 ('the DPA'). All sections of the legislation are reproduced in the attached legal annex.

22. The Authority considers that the information requested constitutes the personal data of its former Chief Executive; disclosure would be unfair and would breach the first data protection principle. The Authority also considers that none of the relevant conditions for processing contained within Schedule 2 of the DPA are applicable in this case. The Commissioner agrees that the relevant principle here is the first principle; the requirement that any processing should be fair and lawful.

23. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this Notice about the Authority's submissions to support its position in respect of its application of this exemption and the Commissioner's consideration of those arguments is very limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to the application of the exemption. This annex will be provided to the Authority but not, for obvious reasons, to the complainant.

Is the information personal data?

24. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as:

"…data which relate to a living individual who can be identified

a. from those data, or

b. from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

25. The withheld information is comprised of details of the review carried out into a number of external and internal investigations examining the leadership of the Authority and the management of its planning services and information relating to the Chief Executive's departure, by mutual consent, from the Authority on 2 December 2008. Having viewed the withheld information, the Commissioner is satisfied that it falls within the definition of personal data as defined by the DPA. This is because the Chief Executive is the focus of the withheld information and can clearly be identified from it.

The first data protection principle

26. Having concluded that the information falls within the definition of "personal data" the Commissioner has gone on to consider if disclosure of the information would breach the requirements of the first data protection principle. The first data protection principle states that:

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

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

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

Fairness

27. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

a) Expectations of the individuals concerned

28. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example, privacy. It is accepted that every individual has the right to some degree of privacy and this right is so important that it is enshrined in Article 8 of the European Convention on Human Rights.

29. However, expectations are also shaped by a society where transparency and the Freedom of Information Act's presumption in favour of disclosure of information form part of its culture. This was recognised by the Tribunal in the case of *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016) where it was said that:

"…The existence of the FOIA [Freedom of Information Act] *in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money."* (para. 43).

30. The Commissioner's Awareness Guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules it states that:

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

31. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (ie their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).

32. The Commissioner believes that an employee who makes decisions which involve significant expenditure of public funds should expect greater scrutiny about their decisions than junior colleagues; senior officials are paid out of public funds commensurate with their level of responsibility. In this case the Commissioner appreciates that the

requested information relates to the departure of the Authority's most senior executive, its Chief Executive.

33. Notwithstanding the fact that the Chief Executive was employed in a senior position and the information relates to his public life, based on the nature of the withheld information and the submissions provided to the Commissioner by the Authority, the Commissioner is satisfied that he would have had a reasonable expectation that the requested information would be kept confidential and not passed on to third parties without his explicit consent.

b) Consequences of disclosure

34. In assessing the consequences of disclosure the Commissioner has considered what those consequences might be and has then looked at other related factors. The Commissioner has taken into account that the data subject's emotional wellbeing may be affected by disclosure even though the distress or damage caused may be difficult to quantify.

35. The Authority has confirmed that it did not publish any personal information regarding the Chief Executive around the time of his departure, other than a press release stating that he left by mutual consent on 2 December 2008. The Commissioner has not found any evidence to suggest that the Chief Executive proactively sought to put details of his departure from the Authority into the public domain.

36. The Authority considers that disclosure would be unwarranted in that it would prejudice the rights and freedoms of the Chief Executive as a former employee.

37. Having considered the nature of the information and the expectations as noted above, the Commissioner is satisfied that release of the information requested could potentially cause unnecessary and unjustified damage and/or distress to the individual in this case.

c) General principles of accountability and transparency

38. Notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure. This has been evident in cases for example involving MPs expenses (such as EA/2006/0015 & 0016) where on appeal the High Court stated:

"The expenditure of public money through the payment of MPs salaries and allowances is a matter of direct and reasonable interest to taxpayers."

39. The Commissioner has identified the following general legitimate public interest arguments that could be considered to favour disclosure:

- Transparency/accountability of public authorities
- The effective spending of public money
- Seniority of the data subject

40. The Commissioner accepts that there may be circumstances when it would be legitimate to disclose information relating to the departure of a senior member of staff – for example where there had been an instance of gross misconduct or a breach of a code of conduct that might have damaged the reputation of the public authority or had serious financial implications for a public authority. The public also has a legitimate interest in accessing information that would help explain the reason why the most senior employee within a public authority left his position.

41. However, given the nature of the withheld information, the Commissioner does not consider that the legitimate interests of the public in accessing this information are sufficient to outweigh the former Chief Executive's right to privacy. The Commissioner considers that the data subject had a reasonable expectation of privacy in relation to the withheld information and that to release this information would be unfair and likely to cause damage or distress to him.

42. In conclusion, the Commissioner finds that disclosure of the information requested would be unfair and would therefore contravene the first data protection principle. The Commissioner upholds the Authority's application of section 40(2) [by virtue of section 40(3)(a)(i)].

Section 30

43. As the Commissioner is satisfied that all the withheld information is exempt by virtue of section 40(2), he is not required to make a decision relating to the Authority's application of section 30 in this case.

Procedural Requirements

Section 17

44. Section 17(1) of the Act requires a public authority to provide an applicant with a refusal notice stating the basis upon which it has refused the information and issue this notice within the time for complying with section 1(1) of the Act.

45. The Authority's refusal notice dated 10 February 2009 did not specify the sub-sections of section 40 and 41 on which it was relying, nor did it explain why the exemptions cited were applicable. As such, the Authority breached 17(1)(b) and 17(1)(c) of the Act. This refusal notice also did not contain details of either its internal complaints procedure or the complainant's rights under section 50 of the Act. This therefore represents a breach of both sections 17(7)(a) and 17(7)(b) of the Act.

The Decision

46. 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:

- The Authority correctly withheld the requested information under section 40(2) of the Act.

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

- The Authority breached sections 17(1)(b), 17(1)(c), 17(7)(a) and 17(7)(b) of the Act as outlined in paragraphs 44 to 45 above.

Steps Required

48. The Commissioner requires no steps to be taken.

Other matters

49. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Internal review

50. In relation to desirable practice in relation to the conducting of internal reviews, paragraph 39 of the section 45 code (the "Code") states:

> "The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue…."

51. Paragraph 40 of the Code recommends that, as part of an internal review:

> "….The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."

52. The Commissioner considers that the Authority's internal review response of 21 April 2009 did not demonstrate that the request was properly reconsidered and it did not, therefore, conform to the recommendations of the Code. The Commissioner expects that the Authority's future internal reviews will conform to the recommendations of the Code and he directs the Authority to his published guidance in this matter.

Right of Appeal

53. 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.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 23rd day of June 2010

Signed ……

Anne Jones
Assistant Commissioner

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

Legal Annex

General Right of Access

Section 1(1) provides that -
"Any person making a request for information to a public authority is entitled –

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

Section 1(2) provides that -
"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –
"Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and
(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Time for Compliance

Section 10(1) provides that –
"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 17(1) provides that -
"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,
(b) specifies the exemption in question, and
(c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant t the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

Section 17(6) provides that –

"Subsection (5) does not apply where –

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50."

Personal information.

Section 40(1) provides that –

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

Section 40(2) provides that:

"Any information to which a request for information relates is also exempt information if –

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

Section 40(3) provides that –

"The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

(i) any of the data protection principles, or
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

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

Data Protection Act 1998

Section 1 - Basic interpretative provisions

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

"data" means information which—

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
(b) is recorded with the intention that it should be processed by means of such equipment,
(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

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

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

"data subject" means an individual who is the subject of personal data;

"personal data" means data which relate to a living individual who can be identified —

(a) from those data, or
(b)from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

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

(a) organisation, adaptation or alteration of the information or data,
(b) retrieval, consultation or use of the information or data,
(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
(d) alignment, combination, blocking, erasure or destruction of the information or data

Section 2 – Sensitive personal data
In this Act "sensitive personal data" means personal data consisting of information as to –

(a) the racial or ethnic origin of the data subject,
(b) his political opinions,
(c) his religious beliefs or other beliefs of a similar nature,
(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
(e) his physical or mental health or condition,
(f) his sexual life,
(g) the commission or alleged commission by him of any offence, or
(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings

Schedule 1

The first data protection principle

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

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

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

The second data protection principle

"Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes."

Schedule 2
Conditions relevant for purposes of the first principle: processing of any personal data:

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

(a) for the performance of a contract to which the data subject is a party, or
(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary-

(a) for the administration of justice,
(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

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

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied."