Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **1 November 2019**

Public Authority: **Snowdonia National Park Authority**
Address: **Bethan.Hughes@snowdonia.gov.uk**

Decision (including any steps ordered)

1. The complainant requested information about members' registers of interests. Snowdonia National Park Authority ('the Authority') withheld the information requested under section 40(2) of the FOIA. The Commissioner's decision is that the Authority has incorrectly applied section 40(2) to the request.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose the information requested to the complainant, namely previous copies of the members' registers of interests.

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. Following correspondence exchanges with the Authority regarding publication of the register of interests of members, on 1 October 2019 the complainant requested information in the following terms:

    "Can you please tell me:

1. The dates on which previous registers were published online for each year since 2015.

2. How long each register was published online.

3. Whether for each year since 2015 it was completed by every relevant member?

4. The GDPR does not apply to the regulatory requirements of member authorities where there is a requirement to publish by law.

5. It is a matter for the Board to determine issues of transparency advised by officers.

6. Please supply me with copies of the previous registers of members interests".

5. The Authority responded on 11 October 2018 and stated that the information requested was exempt under section 40(2) of the FOIA because disclosure would *"contravene Article 5(1)(a) and (d) of the General Data Protection Regulation".*

6. On 4 December 2018 the complainant wrote back to the Authority expressing dissatisfaction with its refusal not to disclose previous versions of the register of interests.

7. The Authority provided the outcome of its internal review on 20 December 2018 and upheld its decision that section 40(2) of the FOIA applied as disclosure would contravene Articles 5(1)(a) and (d) of the GDPR.

Scope of the case

8. The complainant contacted the Commissioner on 1 March 2019 to complain about the way his request for information had been handled.

9. In his complaint to the Commissioner, the complainant asked her to consider whether the Authority should publish previous versions of the register of interests on its website. The Commissioner confirmed that her role was limited to assessing whether a public authority had complied with the FOIA in its handling of the request. She explained that whilst release of information under the FOIA is, effectively, a disclosure to the general public, not just the person making a request, the Commissioner did not have any remit or powers to go on to require a

public authority to actually publish any information released under the FOIA.

10. In light of the above, the scope of the Commissioner's investigation into this complaint is to determine whether the Authority correctly applied section 40(2) of the FOIA to previous versions of the members' register of interests.

Reasons for decision

Section 40 personal information

11. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

12. In this case the relevant condition is contained in section 40(3A)(a)[1]. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:

> "*any information relating to an identified or identifiable living individual*".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

[1] As amended by Schedule 19 Paragraph 58(3) DPA.

17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

19. The withheld information in this case comprises declaration of personal interest forms completed by members of the Authority for various years going back to 2008. Each form includes the name of the member and details of the interests they have declared.

20. The Authority confirmed to the Commissioner that some of the forms relate to individuals who are deceased. As this information does not constitute personal data relating to a living identifiable individual, as defined by section 3(2) of the DPA, it cannot be exempt under section 40(2) of the FOIA. The Commissioner has not considered this part of the withheld information any further.

21. Having considered the remaining withheld information, the Commissioner is satisfied that the information both relates to and identifies the members concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. Article 5(1)(a) of the GDPR states that:

> *"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

25. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

    In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

26. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

> "*processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*"[2].

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

    i) **Legitimate interest test**: Whether a legitimate interest is being pursued in the request for information;

    ii) **Necessity test**: Whether disclosure of the information is necessary to meet the legitimate interest in question;

    iii) **Balancing test**: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

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[2] Article 6(1) goes on to state that:-

> "*Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks*".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

> "*In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted*".

29. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

30. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

31. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

32. The Authority accepts that the withheld information *"demonstrates openness, accountability and transparency in public life"*. However, it contends that as it is historical information *"it is of no relevance to any present day or future decisions made by the Authority"*. The Authority considers that any arguments in terms of transparency and accountability in disclosure are weakened in light of the fact that the current register of interests is published on its website. It does not, therefore, consider there is any pressing social need for disclosure of previous versions of the registers.

33. The Authority confirmed that it had also considered the legitimate interests of the members concerned. At the time the information was collected, the Authority accepts that the individuals were aware that their declared interests would form part of a publicly available register. This register was available for inspection only up to 2015 when it became a statutory requirement to publish the register electronically, in accordance with the Local Government Act 2000, section 81, as amended by the Local Government (Democracy) (Wales) Act 2013. However, entries on the public register only refer to current, up-to-date information. As soon as a member completes a revised form, the updated version is put on the public register and the 'old' version removed. The Authority also confirmed that 'old' entries are *"released from the requirement of being available for public inspection"*. In addition, when an individual ceases to be a member of the Authority, their information is removed from the publicly available register of interests.

34. The complainant considers that the register of interests is intended to be a permanent record of members' interests in order that the public is able to see what interests each member held at any point in time. The complainant also referred to the Local Government Act 2000, section 81 which required authorities to *"establish and maintain a register of*

interests of the members and co-opted members". The Local Government (Democracy) (Wales) Act 2013 introduced a new requirement for the register of interests to be published electronically. The complainant considers these legislative provisions require an authority to retain and make available *all* registers of interests.

35. The Commissioner has issued specific guidance[3] on the relevance of section 40(2) to 'registers of interest' as maintained by public authorities. This guidance states that:

"the public clearly have a legitimate interest in knowing that any potential conflicts are monitored and that the decisions and actions of officials are not influenced by their private interests. There is a legitimate interest in transparency in order to foster trust in public authorities".

36. The Commissioner notes that the Authority has been required to maintain a publicly available register of member's interests since 2001. She also notes that there has been a requirement on the Authority to publish the register electronically since 1 May 2015. However, the Authority confirmed that the register had not previously been published on its website prior to the current year, due to a necessary website change which was later overlooked.

37. Whilst the Commissioner appreciates that the withheld information in this case is historical information as opposed to 'current' information (which is available electronically online), the Commissioner accepts that there is a legitimate interest in disclosure of the information requested in this case.

Is disclosure necessary?

38. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

39. The Commissioner accepts that, to an extent, the legitimate interests in terms of transparency and accountability has been satisfied in light of

[3] https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

the fact that the current register of members' interests is published online.

40. The Commissioner has acknowledged that there is a legitimate interest in disclosure of previous versions of the register (which the complainant specifically requested). She considers that disclosure of the withheld information in this case is necessary to meet this legitimate interest.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

41. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

42. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

43. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

45. The Authority confirmed that it had not asked the individuals in question whether they would give consent to disclosure of their personal data and as the majority of the declarations relate to former members it would not be practical for it to do so.

46. The withheld information relates to private interests that the individuals have outside their work as Authority members. There is a statutory requirement for members to provide such information to the Authority and for the information to be made publicly available. The Authority therefore accepts that, at the time the information was collected, the

individuals would have had a reasonable expectation that the information would have been made public.

47. The Authority confirmed that the obligation to publish the register of interests electronically only refers to the 'current' register. It reiterated that when an updated form is completed by a member, the 'old' form is removed or overwritten. In addition, when a member leaves the Authority, their form is removed from the public register. In light of this, the Authority is of the view that members would not reasonably expect that any declarations of interest would remain in the public domain and therefore be subject to public scrutiny after their interests ceased to be interests or after they cease to be members.

48. The Authority pointed out that disclosure under the FOIA is essentially putting the information into the public domain and *"could be tantamount to publishing the information electronically and making it widely available to the public as the Authority would have no control over the information released".* It considers that there is a fundamental difference between making the information publicly available at the time that it was considered 'current' via inspection at its offices (to a limited number of people) and disclosure now under the FOIA, which would enable widespread circulation to the public at large.

49. The Authority contends that the individuals did not give consent for it to use their personal data in such a way nor would they have been aware that it was a possibility. As such, the Authority is concerned that *"there is no lawful basis for releasing the information and any such disclosure will leave the Authority open to a potential complaint of a breach of Article 6 of the GDPR from any of the data subjects, should this information be released".*

50. The Authority does not believe that *"the legitimate interests of the requestor outweighs the interests and rights of the data subjects in this case. Releasing the information now in our opinion would be an unwarranted intrusion into the lives of the data subjects, especially for those individuals who no longer carry out public functions, do not hold elective office or have no role to play in spending public funds".*

51. The Commissioner accepts that the withheld information relates to the individuals' private lives and their interests outside of their work as members of the Authority. However, as referred to in her guidance on the relevance of section 40(2) to 'registers of interest' the Commissioner recommends that a nuanced approach is taken, based on factors including the seniority of the individuals and the extent to which disclosure may impact on their private lives.

52. In this case, whilst the Commissioner appreciates that some of the individuals concerned no longer work at the Authority, at the time the

information was created, they held senior positions within the Authority. The Commissioner also accepts that at the time the information was created the individuals would have had a reasonable expectation that their personal data would be put into the public domain, either via inspection, or through electronic publication. As referred to in paragraph 37 of this notice, the Commissioner accepts that there is a legitimate interest in disclosure of registers of interest to foster trust in public authorities and contribute to an organisation's transparency.

53. The Commissioner is prepared to accept that the individuals concerned may not have had an expectation that their personal data would remain in the public domain either if their circumstances changed or if they left the Authority. However, the Commissioner notes that even though there has been a requirement on the Authority since 2015 to publish the register of interests electronically, for a number of reasons it has failed to do so. If the Authority had complied with its obligation to publish the register electronically since 2015 there would have been nothing to stop anyone from re-publishing or circulating the information concerned at that time.

54. The Commissioner has undertaken some research and has found that, in respect of some of the withheld information, even though it relates to individuals who are no longer members of the Authority, a significant amount of it is in the public domain. For example, many of the individuals concerned are also elected members of local authorities such as Gwynedd Council and Conwy County Borough Council. Some individuals still hold these positions and, as such, the fact that they have declared such an interest is factual information which is in the public domain. In addition, these individuals' current declaration of interests is available to view on the relevant council websites, and in some cases includes some of the withheld information.

55. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Fairness and transparency

56. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).

57. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.

58. The requirement for transparency is met because as a public authority, the Authority is subject to the FOIA.

The Commissioner's view

59. In this instance, in relation to the declaration of interest forms being the personal data of the members concerned, the Commissioner has decided that the Authority has failed to demonstrate that the exemption at section 40(2) is engaged.

Right of appeal

60. 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,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.

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

Signed .....

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