



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**EA/2010/0130 and EA 2010/0131**

**ON APPEAL FROM:**

**The Information Commissioner's Decision No: FS50276739 and  
FS50246990, both dated: 23 June 2010**

**Appellant: Mr L D Johnston**

**Respondent: Information Commissioner**

**Determined on the papers**

**Date of decision: 21 March 2011**

**Before**

**Anisa Dhanji  
Judge**

**and**

**Richard Fox and Nigel Watson  
Panel Members**

**Subject matter:**

**Freedom of Information Act 2000 – personal data: section 40(2)  
Data Protection Act 1998: Schedule 1, Part 1, Schedule 2, paragraph 6(1)**

**Cases:**

*A v Information Commissioner (EA/2006/0012)*

*Blake v Information Commissioner (EA/2009/0026)*

*Commons Services Agency v. Scottish Information Commissioner [2008]*

*UKHL 47; 1 WLR 1550*

*Corporate Officer of the House of Commons v Information Commissioner (EA/2007/0060)*

*Durant v Financial Services Authority [2003] EWCA Civ 1746*

*Guardian News & Media Limited v Information Commissioner (EA/2008/0084)*

*Johnson v Medical Defence Union (2007) EWCA Civ 262*

*London Borough of Camden v Information Commissioner (EA/2007/0021)*

*Roger Salmon v Information Commissioner and King's College Cambridge (EA/2007/0135)*

*Waugh v Information Commissioner and Doncaster College (EA/2008/0038)*

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GENERAL REGULATORY CHAMBER  
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**EA/2010/0130 and EA 2010/0131**

**DECISION**

The Tribunal allows the appeals in part and substitutes the following Decision Notice in place of the two Decision Notices dated 23 June 2010.

**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**EA/2010/0130 and EA 2010/0131**

**SUBSTITUTED DECISION NOTICE**

**Dated:** 16 March 2011

**Public Authority:** Brecon Beacons National Park Authority

**Address of Public Authority:** Plas y Ffynnon  
Cambrian Way  
Brecon  
Powys  
LD3 7HP

**Name of Complainant:** Mr L D Johnston

**The Substituted Decision**

We allow the appeals in part and substitute the following Decision Notice in place of the Commissioner's two Decision Notices dated 23 June 2010.

The Tribunal finds that the information specified in Annex A is not exempt under section 40(2) of the Freedom of Information Act 2000 ("FOIA").

The Tribunal also finds that the Public Authority was in breach of section 1(1)(a) of FOIA.

**Action Required**

Within 20 working days of the Tribunal's determination being promulgated, the Public Authority must disclose to the Complainant the information specified in Annex A.

The Authority must, at the same time, provide that information also to the Tribunal and the Commissioner.

**The Confidential Annex**

Annex A will not be provided to the Complainant, nor published with the determination on the Tribunal's website or elsewhere.

**Signed**

**Anisa Dhanji  
Judge**

**Date 21 March 2011**

**IN THE FIRST-TIER TRIBUNAL  
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INFORMATION RIGHTS**

**EA/2010/0130 and EA 2010/0131**

**REASONS FOR DECISION**

**Introduction**

1. Mr L D Johnston (the “Appellant”), has appealed against two Decision Notices, issued by the Information Commissioner (the “Commissioner”), on 23 June 2010. The Commissioner upheld the refusal by the Brecon Beacons National Park Authority (the “Authority”), to provide the Appellant with certain information requested by him under the Freedom of Information Act 2000 (“FOIA”).
2. The two appeals have been consolidated and have been heard together since the parties are the same in each case and because of the overlap that exists between the factual context of the appeals and the issues they raise.

**Factual Background to the Requests for Information**

3. In the late 1990’s, the Appellant was involved in a dispute with the Authority over a planning matter.
4. In March 2000, the Local Government Ombudsman, published a report criticising the Authority’s handling of a different planning matter. Particular criticism was directed at the Authority’s then Solicitor, Mr T.W. Pearce. In December 2000, Mr. Pearce retired.
5. On 15 September 2008, Mr. C.G. Gledhill, the then Chief Executive of the Authority, was suspended whilst an investigation was carried out into the leadership of the Authority and the management of its planning services. Information about his suspension was widely reported in the media. On 2 December 2008, Mr. Gledhill left the Authority. The Authority released a statement to the effect that Mr. Gledhill had left by mutual consent.

**The Requests and the Refusals**

6. In a request dated 20 October 2008 (as clarified on 7 December 2008), the Appellant requested information about the circumstances relating to the “dismissal” of Mr. Pearce (“Request 1”). In particular, he asked 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”. He also requested “minutes and letters sent from the Authority to outside solicitors and advisers concerning Mr. Pearce”.

7. On 23 January 2009, the Appellant made a second request, this time for information in relation to the departure of Mr. Gledhill ("Request 2").
8. The Authority refused both requests, citing the exemption in section 40(2) of FOIA on the basis that the information requested was the personal data of Mr. Pearce and Mr. Gledhill, respectively. In relation to Mr. Gledhill, the Authority also cited sections 30(1)(a) and 41 of FOIA on the basis that the information was held for the purposes of an investigation and that it may contain material provided in confidence.
9. At the Appellant's request, the Authority conducted an internal review, but upheld both refusals.

### **The Complaint to the Commissioner**

10. On 30 April 2009, the Appellant contacted the Commissioner to complain about the way in which his requests had been dealt with. The Commissioner considered the two requests in two separate Decision Notices. In the course of the Commissioner's investigation, the Authority provided the Commissioner with the information the Appellant had requested (the "Disputed Information").
11. The Commissioner's findings in respect of each request was briefly as follows:
  - the information constituted personal data relating to Mr. Pearce and Mr. Gledhill, respectively;
  - disclosure would amount to unfair processing and would contravene the first data protection principle, and the information was therefore exempt under section 40(2) of FOIA; and
  - the Authority had breached certain procedural requirements, in particular, in relation to sections 10(1) and 17, but the Commissioner did not require any steps to be taken in relation to these breaches.
12. The Commissioner's Decision Notice in respect of Mr. Gledhill was supported by a separate Confidential Annex to avoid disclosing part of the Disputed Information.

### **The Appeal to the Tribunal**

13. The Appellant has appealed to the Tribunal against both Decision Notices. The Authority was initially joined as a party, but subsequently applied to be removed, and the application was granted.
14. The Appellant and Commissioner both requested that the appeals be determined on the papers without an oral hearing. Having regard to the nature of the issues raised, and the nature of the evidence, the Tribunal was satisfied that the appeals could properly be determined without an oral hearing.
15. In determining the appeals, we have considered all the documents and written submissions received from the parties (even if not specifically referred to in this determination), including in particular, the documents

contained in the agreed open bundle of documents, and in the closed bundle submitted by the Commissioner.

### **The Tribunal's Jurisdiction**

16. The Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
17. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

### **Statutory Framework**

18. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
19. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.
20. In the present case, the Commissioner found that the Disputed Information was exempt under section 40(2) of FOIA. Under this provision, personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the Data Protection Act 1998 ("DPA") or section 10 of the DPA (right to prevent processing likely to cause damage or distress). The exemption it attracts is absolute.

### **Issue**

21. In his grounds of appeal, the Appellant asserts that the Disputed Information does not constitute the personal data of Mr. Pearce or Mr Gledhill. He also disputes the Commissioner's finding that disclosure of the Disputed Information would contravene the first data protection principle.

22. There are, therefore, two issues before the Tribunal in respect of each request:
- Is the Disputed Information personal data?
  - If so, would disclosure breach the first data protection principle?
23. To address these issues, we need to refer, in some detail, to the Disputed Information. Part of our determination is set out, therefore, in a confidential annex ("Annex A").

## **Findings**

### **Issue 1: Is the Disputed Information personal data?**

24. Certain of the Appellant's submissions suggest he may have misunderstood what personal data means, as it is defined in law. It is much wider than just information that may be commonly thought of as private (although such information might attract added protection if it falls within the definition of "sensitive personal data" in section 2 the DPA). The legal definition of "personal data" as found in section 1(1) the DPA (and incorporated into FOIA by section 40(7)), is as follows:

*"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;*

25. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data which defines "personal data" as follows:

*"... any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"*

26. In the Court of Appeal's decision in **Durant v Financial Services Authority** "personal data" was defined by Auld LJ as follows:

*"...not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it*



*falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."*

27. The Disputed Information comprises information about the circumstances in which the employment of the two individuals in question came to an end. Certain of the information is personal or biographical in nature. All the information identifies and clearly relates to either Mr Pearce or Mr Gledhill. They are clearly the focus of the information. In our view, there can be no doubt that the Disputed Information is personal data.

Issue 2: Would disclosure breach the first data protection principle?

28. Personal data is only exempt if disclosure would contravene any of the data protection principles or section 10 of the DPA (right to prevent processing likely to cause damage or distress). Section 10 does not apply in the present case. There is no evidence that Mr. Pearce or Mr. Gledhill have served the required notice.
29. As the Tribunal has previously observed in other cases (see for example **London Borough of Camden v Information Commissioner and A v Information Commissioner**), there is an inherent tension between the objective of freedom of information on the one hand, and the protection of personal data on the other. Section 40(2) seeks to ensure that the interests of those requesting information from a public authority do not undermine, unnecessarily, the interest of those individuals whose personal data might find its way into the public domain as a result of the public authority complying with such a request. When section 40(2) is engaged, the Tribunal is required to undertake quite a different task from when it deals with other FOIA exemptions. FOIA promotes the right to information, but when section 40(2) is under consideration, the DPA determines the proper approach, and the interest of data subjects receives a high degree of protection.
30. The data protection principles set out in the DPA regulate the way in which a "data controller" (in this case the Authority), must "process"

personal data. The word “process” is defined in section 1(1) of the DPA to include disclosure to a third party or to the public at large.

31. It is common ground between the parties that only the first data protection principle is relevant. This provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. The test of fairness is a general one and not confined to a consideration of whether any of the Schedule 2 conditions is met. Even where the Schedule 2 conditions are met, disclosure may still be unfair.

Fair processing – the principles

32. It has not been argued that processing the personal data in the present case would be unlawful. The issue is whether it would be fair. We will first summarise the law and then apply it to the Disputed Information.
33. Fairness is a broad concept, capable of embracing a range of considerations. There is nothing in the wordings of the statute that requires fairness to be considered from the point of view of the data subject alone. Rather, it is entirely proper to have regard to the interests of the data user (here, the Appellant), and where relevant, the wider considerations of accountability and transparency implicit in FOIA.
34. This wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union** (at paragraph 141):

*“Recital (28) [of Directive 95/46] states that “any processing of personal data must be lawful and fair to the individuals concerned”. I do not consider that this excludes from consideration the interests of the data user. Indeed the very word “fairness” suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.”*

35. This does not mean, however, that one starts with the scales evenly balanced. Although a consideration of fairness requires other interests to be taken into account, where section 40 is engaged, the data subject’s interests are clearly paramount. We note that the continued primacy of the DPA, notwithstanding the passage and implementation of freedom of information legislation, was strongly emphasised by Lords Hope and Rodger in **Commons Services Agency v Scottish Information Commissioner** (paragraph 7). Although this case concerned the provisions of the Freedom of Information (Scotland) Act 2002, it applies equally in relation to FOIA.

Schedule 2 conditions

36. If disclosure would amount to fair and lawful processing, then the next question is whether processing would also meet the conditions in Schedule 2.
37. Schedule 2 contains 6 conditions which are applicable to the processing of any personal data. The only relevant condition in the present case is condition 6 which requires that:

*“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.”*

38. Condition 6 involves a three-part test. First, is there a legitimate interest in disclosure? Second, is such disclosure necessary to promote that public interest? In **Corporate Officer of the House of Commons v Information Commissioner**, “necessary” in the context of condition 6, was taken to reflect the meaning attributed by the European Court of Human Rights when justifying an interference with a Convention right, namely, that there should be a “pressing social need” and the interference should be “both proportionate as to means and fairly balanced as to ends”. Third, would such disclosure cause unwarranted interference with the interests of the individual whose data is in issue? Even where disclosure is necessary, it is only permissible if it would not cause such interference.

Application to the Facts

**Request 1 (Mr Pearce)**

39. It may be helpful to begin by clarifying certain matters concerning the scope of the request and the information which the Authority says it holds, relevant to the request.
40. The request was for information relating to reasons for the “dismissal” of Mr. Pearce. In particular, the Appellant asked 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”. He also requested “minutes and letters sent from the Authority to outside solicitors and advisers concerning Mr. Pearce”. We agree with the Commissioner that the Authority correctly interpreted the request more widely, to mean that the Appellant was asking for information about the circumstances of Mr. Pearce’s departure.
41. The information which the Authority says it holds in relation to Mr Pearce is contained in the closed bundle. We have listed the individual

documents in Annex A. Certain documents do not come within the scope of the request, including, for instance, Mr Pearce's employment contract and information as regards Mr Pearce's pension entitlement on his retirement, as well as information about accrued leave and his entitlement to other benefits until retirement. In our view such information falls outside the scope of Request 1, and therefore no issue of any exemption arises.

42. The Tribunal had expected that there would be more information available, relevant to the request. During the course of its deliberations, the Tribunal requested the Authority to provide it with certain additional information, but received a reply to the effect that the Authority holds no further information relating to Mr Pearce. Bearing in mind that Mr Pearce left the Authority over 10 years ago, we accept that the Authority does not now hold information other than what is contained in the closed bundle.
43. We are concerned, however, that the Authority does not appear to have informed the Appellant that it does not hold certain of the information requested. If it holds no written complaints against Mr. Pearce, records of telephone conversations, reports of Committee meetings, agendas, minutes, or internal minutes, for example, it should have communicated this to the Appellant. The first duty on a Public Authority under section 1(1)(a) of FOIA is to inform the requester whether it holds information of the description specified in the request. It may decide not to disclose the information on the basis of one or more exemptions, but with limited exceptions (not applicable here), it must inform the Appellant whether it holds the information. A requester is entitled to know why his request is not being met. In the present case the Authority refused the request citing the exemption in section 40(2). It failed to tell the Appellant that it did not, in fact, hold certain information. We consider that the Authority was in breach of section 1(1)(a) in this regard.
44. We turn now to the Disputed Information. The Appellant has been told, through the Commissioner's Decision Notice, although it seems, not by the Authority itself, that Mr Pearce was retired on the grounds of ill-health. The Authority does not appear to have raised any objection to this. It may be that that information was already in the public domain.
45. The Appellant says that he does not accept that Mr. Pearce was retired for ill-health. He considers that this was simply a smoke - screen to conceal the real reasons for his dismissal.
46. In response, the Commissioner says that medical and financial information is personal data and is exempt under section 40(2). However, the Appellant has made it clear that he is not asking for details of Mr Pearce's medical condition. He has also not requested any information as to the financial terms on which Mr Pearce was retired. What the Appellant clearly wants to know is whether there is a link between what led to Mr Pearce's suspension (the fact of the

suspension is clearly in the public domain), and his retirement on the grounds of ill-health on the other, and if so, what that link is.

47. To address this issue, we must comment on the Disputed Information in more detail. This part of the determination is dealt with, therefore, in Annex A.
48. For the reasons set out in Annex A, we find that certain of the Disputed Information in relation to Request 1 is not exempt under section 40(2) and should be disclosed. We have specified that information in Annex A.

### **Request 2 (Mr Gledhill)**

49. The request was for information “with respect to the recent departure of the Chief Executive”. In our view, the Authority correctly interpreted Request 2 to mean that the Appellant was seeking information about the circumstances of Mr Gledhill’s departure.
50. The information in the closed bundle in relation to Mr Gledhill comprises quite a substantial number of documents. In our view, some items do not come within the scope of the request and some should not be in the closed bundle at all. We have grouped the information by subject as set out in Annex A.
51. The first question is whether disclosure of the information within the scope of the request would be fair. In finding that disclosure would be unfair, the Commissioner took into account that although there had been considerable media coverage of the Chief Executive’s suspension, the only information published by the Authority at the time of Mr Gledhill’s departure was a press release stating that he had left by mutual consent. The Commissioner considered that although Mr Gledhill had been employed in a senior position and the Disputed Information relates to his public life, the nature of the withheld information was such that Mr Gledhill would have had a reasonable expectation that the information would be kept confidential. He also considered that disclosure would be unwarranted in that it would prejudice the rights and freedoms of Mr Gledhill and would potentially cause unnecessary and unjustified damage or distress to him. He considered the factors in favour of disclosure, in particular, transparency and accountability, the effective spending of public money, and the seniority of the data subject. However, given the nature of the withheld information, the Commissioner did not consider that the legitimate interests of the public in accessing this information were sufficient to outweigh Mr Gledhill’s rights as the data subject.
52. Although the Commissioner did not go on to consider the Schedule 2 conditions, as will be evident from the above, he appears to have considered condition 6 as part of his assessment of fairness. Also, having reached the view that the information was exempt under section 40(2), he did not go on to consider the other exemptions relied on by the Authority.

53. At this point, we need to comment on the Disputed Information in more detail and we will deal with this part of the determination, therefore, in Annex A.
54. For the reasons set out in Annex A, we find that certain of the Disputed Information in relation to Request 2 is not exempt under section 40(2) (nor sections 30 or 41), and should be disclosed. We have specified this information in Annex A.

**Decision**

55. For all the reasons set out above, this appeal is allowed in part. Our decision as set out in this determination and Annex A is unanimous.

**Signed**

**Date: 21 March 2011**

**Anisa Dhanji  
Judge**