

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 31 October 2012

Public Authority: New Forest National Park Authority

Address: Lymington Town Hall
Avenue road
Lymington
Hampshire
SO41 9ZG

Decision

1. The complainant has requested a copy of a map, the New Forest National Park Authority's 2008 back up grazing plan. The New Forest National Park Authority refused to disclose the information because the information is incomplete, under the exception provided at regulation 12(4)(d) of the Environmental Information Regulations 2004 (EIR), and also because disclosure would adversely affect the interests of the persons supplying the information, under regulation 12(5)(f) of the EIR.
2. The Commissioner's decision is that the New Forest National Park Authority has correctly refused the requested information under the provisions of regulation 12(5)(f) of the EIR.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 10 February 2012, the complainant wrote to the New Forest National Park Authority (the authority) and requested information in the following terms:

"[...] a copy of the New Forest National Park Authority's 2008 Back Up Grazing Plan, which was kindly made available for viewing during the meeting."

5. The authority responded on 1 March 2012. It stated that it did not hold the information he had requested, in the sense that the authority does not have an official or adopted copy of a 'Back Up Grazing Plan'. However, its understanding was that, at a recent meeting with it, the complainant had seen a document (a map or plan) which showed the results of a survey of commoners¹ who had indicated the whereabouts of their back-up grazing land, and that this map was the information he was requesting.
6. This was refused on the grounds that it was information which had been requested by the Verderers² on the express basis that it would not be used by third parties, and that the interests of the people who provided the information would be adversely affected if the plan were to become publicly available. It concluded that the balance of the public interest test supported maintaining the exception and withholding the information.
7. Following an internal review the authority wrote to the complainant on 19 April 2012. It stated that the requested information was being refused under regulation 12(5)(f) of the EIR, that disclosure would adversely affect the interests of the person supplying the information; and also under regulation 12(4)(d) because the information was incomplete. It confirmed its view that the balance of the public interest falls towards maintaining the exception and not disclosing the information.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained that he had viewed the plan in person during a visit to the authority and that a copy was required to assist him in making submissions at a forthcoming public inquiry into the soundness of the New Forest District Council's development plan document. He complained that his request had been refused by the New Forest National Park Authority.

¹ 'Commoners' are people who own property which has 'commoners rights' eg to turn out livestock into the New Forest National Park.

² The Verderers are a body whose role is to regulate the New Forest's agricultural 'commoning' practices. Their powers derive from an act of Parliament of 1877.

9. The Commissioner considers the scope of the case to be to determine whether the requested plan was correctly or incorrectly refused under the EIR. The Commissioner agrees with the public authority that the requested information will be environmental information, and therefore that the correct disclosure regime will be the EIR.

Background

10. The authority explains that, in order to exercise commoners rights, a commoner must 'occupy' (own or rent) property with the right of pasture. This is not always property with land attached, and in some cases is actually a flat or apartment with no land. Commoners are legally obliged to remove stock from the New Forest if ordered to do so by the Verderers. This may be, for example, in case of disease or for other animal welfare reasons.
11. Commoners must therefore have access to sufficient 'back up grazing land' to house any livestock which must be removed from the forest, but their arrangements for this are their own business. It is not an obligation for a commoner to provide adequate back up grazing in order to exercise rights of common and it is not a legal requirement that they necessarily have their own back up grazing. A commoner without back up grazing might simply rely on a neighbour or friend, or the availability of rented land, for back up grazing when required.
12. Land which is used for the purposes of back-up grazing has been, broadly, considered to be unsuitable for development.

Reasons for decision

Regulation 12(5) states:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure”

13. The requested information is a plan (map), based on a 1:45,000 Ordnance Survey map of the New Forest area, on which areas have been marked as being used for back up grazing.

Regulation 12(5)(f)

14. The authority has explained that the information used to create this plan was collected by the Verderers of the New Forest, not by the National Park Authority. The information was provided to the Verderers by commoners, in response to a 2006 survey by the Verderers relating to the Countryside Stewardship Scheme. The evidence seen by the Commissioner shows that not all commoners responded to the Verderers' survey, indeed a substantial minority did not respond.
15. There was no obligation on the commoners to provide the information to the Verderers in the first place, and the authority initially stated to the complainant that approximately one third of commoners did not respond to the survey. Subsequently, in its submissions to the Commissioner the authority explained that another estimate, produced by an officer in the authority, indicates that only slightly over half the commoners responded.
16. It is not disputed by the complainant that not all commoners responded to the survey, therefore the information recorded on the plan cannot be definitive. The authority also comments that the responses were, to some degree, subjective rather than factual and based on people's perceptions and expectations at the time in respect of back up grazing land. Furthermore, the authority explains that the availability and use of land for backup grazing is not static, but fluctuates from year to year. Therefore the information on the plan is not up to date and is unlikely to accurately reflect the current situation.
17. There is no obligation on a commoner to make provision for back up grazing, merely an obligation to remove his livestock from the forest if instructed to do so. The Commissioner recognises that commoners cannot be put under any legal obligation to provide information on back up grazing if there is no obligation on them to make provision for back up grazing. Similarly, the Commissioner understands that there was no obligation on the commoners to provide the information to the Verderers.
18. The information was collected by the Verderers on a clear understanding that it would be treated as confidential. The Commissioner has seen a copy of the application form circulated at the time, which clearly states on its first page, that:

"The information provided on this application is confidential and will only be used in connection with the New Forest Countryside Stewardship Scheme."

19. The authority explains that, prior to the creation of the plan which has been withheld, the commoners were asked whether information they had previously supplied could be used to inform the authority's back up grazing review of 2008. Not all commoners gave their consent. However it is believed that some information has inadvertently been included, relating to commoners who withheld their consent. This is one concern of the authority, that there is a clear obligation on it to respect the expressed wishes of the commoners, and disclosure of the plan would breach that obligation due to elements of the plan having been inadvertently recorded where they should have been omitted. It confirmed to the complainant that the Verderers have made it clear that they would not be happy for the plan to be disclosed to the public.
20. As the requested information was shared with (ie, provided to) the authority by the Verderers, it is firstly their interests which must be adversely affected in order to engage the exception. It is apparent, from the above, that the Verderers would have reason to object to the disclosure of the plan, as it would be likely to damage the relationship of confidence between the commoners and the Verderers.
21. The authority has commented that the information was, in point of fact, 'owned' by the commoners not the Verderers, who arguably had no clear right to share it with the authority. Consequently, the commoners' interests are also relevant and if they are adversely affected, this would be a further factor in support of maintaining the exception. The Commissioner agrees and, insofar as this is applicable, he recognises that while the Verderers may find it helpful to share information with the authority in this fashion, if that leads to disclosure under the EIR, then their relationship with the commoners would be adversely affected.
22. With respect to the claimed exception at regulation 12(5)(f), in order for the exception to be engaged, three criteria must be met. The first is that the person providing the information was not under, and could not be put under, any obligation to provide the information. It is clear that the information was shared with the authority by the Verderers. The authority has confirmed that it cannot place the Verderers under any legal obligation to provide the information. Moreover, the ultimate 'owners' of the information, the commoners, were under no obligation to provide the information to the Verderers, as recognised at paragraph 15, above.
23. The second criterion is that the information was not supplied in circumstances such that the authority would be entitled to disclose it.

The Commissioner notes that the first page of the form which requests the information contains a clear and explicit confidentiality statement, consequently the expectations of the commoners who submitted the forms would clearly be that the information would not be used for any purposes other than those set out in the form. The authority has confirmed to the Commissioner that the plan was drafted using the information collected from that form, having been provided with it by the Verderers. It is therefore clear that the authority does not have the right to disclose the information.

24. The third criterion is that the person who provided the information has not given their consent. As noted at paragraph 17 above, subsequent consent to use the data for other purposes was refused by some commoners who had provided the information to the Verderers in the first place and it is clear that the Verderers have serious concerns about the disclosure, for that reason, and have not given their consent. The Commissioner is satisfied therefore that neither the commoners nor the Verderers have given their consent.
25. The Commissioner is satisfied that these three criteria are met. The exception may therefore be engaged, if it can be shown that disclosure would adversely affect the interests of the Verderers, who provided the information.
26. The Commissioner recognises that if information is collected from one group, with a clear expectation of confidentiality given by the body which collected it, then for the information to subsequently be made public will be likely to lead to an erosion of trust between the two parties. It does not matter greatly whether there are consequences to the supplying group of the publication of the information, it is likely, in the circumstances, to be sufficient that a breach of trust has occurred. The erosion of that breach of trust is likely to be an adverse effect for both sides.
27. This relates also to the authority's view, at paragraph 17 above, that it is obliged to respect the wishes of the commoners. Some of the information on the map is believed to have been included despite the preference of those who supplied it, that it not be used for other purposes than the countryside stewardship scheme for which it was collected. To discount those preferences might be reasonable in some circumstances, but then to make the information public would certainly be contrary to any reasonable expectations. This is clearly an adverse effect of disclosure, on both commoners and Verderers.
28. The authority has given its view on another adverse effect of disclosure on the commoners who provided the information used to compile the plan in the first place. It explains that disclosure could potentially affect

land values, as land which is identified as being used for back up grazing is considered less likely to be granted permission for development. Whether or not the information held on the plan is correct, therefore, its disclosure to the public could adversely affect values of land which is depicted as available for back up grazing and therefore perceived as unavailable for development.

29. A secondary consideration mentioned by the authority is that land owners who have previously made land available for back up grazing might choose to withdraw it, if they felt that this would adversely affect their chances of developing the land in future. This might therefore affect any commoners who relied on that land for backup grazing.
30. The Commissioner is therefore satisfied that there are reasonable grounds to assume that the commoners would object to the disclosure of the plan. Consequently, disclosure would be likely to damage relations between the Verderers and the commoners. He accepts that, on the balance of probabilities, disclosure would be likely to have an adverse effect on the Verderers who provided the information to the authority and, furthermore, on the commoners who provided the information in the first place. Consequently he finds that the exception at regulation 12(5)(f) of the EIR is engaged. Whether the information is disclosed will therefore depend on the balance of the public interest factors for maintaining the exception, compared to those for disclosing the information.

The public interest

31. The authority argues that there is significant public interest in protecting the interests of the Verderers and commoners which the exception at regulation 12(5)(f) is intended to achieve. There is a risk that this argument may become circular, and moreover it also relates to the interests of a subsection of the public, not the public interest in its wider sense. Nevertheless the Commissioner recognises the considerable inherent public interest in a public authority being able properly to protect the interests of those who conduct business with it.
32. It also argues that disclosure of the information contrary to a clear undertaking, at the time it was collected, to hold the information confidential, would cause serious harm to the relations between the commoners, the Verderers, and the authority. Close co-operation between these parties is necessary to ensure the smooth-running of the New Forest National Park, including a degree of information sharing. If disclosure of this information, contrary to an explicit undertaking of confidentiality by one party, were to cause mistrust or distress in the commoners, this would be extremely detrimental to the work to assure

the future of commoning in the New Forest as it would be likely to reduce the supply of information from the commoners in future.

33. Therefore, there are two sets of interests at issue here. Firstly, the interests of the Verderers who were directly responsible for providing the information to the authority; and secondly, the commoners, who were the source of the information in the first place.
34. It seems clear that, if the information is disclosed, this could adversely affect the commoners by distorting or suppressing property prices, albeit this harm is, to a degree, somewhat speculative. There is no firm evidence that property values would definitely be adversely affected, though the Commissioner recognises that, to some degree, the perceived value of property and land is affected by these sort of considerations. He accordingly gives this element a small amount of weight.
35. Of greater weight is the fact that the information was provided voluntarily by the commoners to the Verderers, who chose to share it with the authority in pursuit of their common interests. There is no evidence before the Commissioner to show that the commoners would object to this practice, however if a consequence of this information-sharing was to cause it to be disclosed to the wider world, the Commissioner accepts the authority's argument that this would be highly likely to be objected to by those commoners. This, in turn, would be likely to lead to an increased reluctance to provide information in future, and an erosion of the trust between commoners and Verderers.
36. The complainant counters that, from his recollection of viewing the map, his land was correctly shown as not being used for backup grazing, contrary to other claims made by the authority to the district council in the course of a review of its Development Plan Document. He argues that the value in disclosure lies in assisting him in correcting this incorrect claim, at a forthcoming public inquiry.
37. While the Commissioner recognises the public interest in providing material for a public inquiry, he also recognises that the interests claimed to be at stake are the complainant's own personal interests, not the wider public interest. Any weight the Commissioner might afford this public interest argument is therefore based on an assumption that the plan might similarly assist other interested parties. Given that there is no evidence before him to this effect, the Commissioner finds that, on this factor, the public interest in disclosure is weak. There can be no public interest in providing information to a public inquiry which might mislead or confuse matters, when no route for clarification or correction of the information is available to it.

38. The authority has commented that, if the complainant sought to argue his position at the public inquiry by reference to the plan, it would be obliged to inform the inquiry of the inherent unreliability of that plan which is summarised at paragraphs 14-17 above.
39. For this reason, the Commissioner finds that the content of the information would be unlikely to inform the public debate and there is no public interest in disclosure on that basis.
40. The Commissioner therefore accepts that there is a strong public interest in the Verderers being able to protect information given to it in circumstances where there was a clear expectation of confidence, but also being able to make use of the information by sharing it, where appropriate, with other public bodies. Disclosing it in response to a request under the EIR is not therefore in the public interest and he finds that the public interest in maintaining the exception, in this case, exceeds the public interest in making the information available.
41. The Commissioner concludes that the requested information has been correctly withheld under the provisions of regulation 12(5)(f). The Commissioner's guidance³ states that, in cases where more than one exception to disclosure has been applied, if the balance of the public interest in relation to any one of them is in favour of maintaining the exception, then the information is exempt from disclosure.
42. For this reason he has not gone on to consider the public authority's application of the exception provided at regulation 12(4)(d).

³ See paragraph 71:

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_effect_of_exceptions_and_the_public_interest_test.ashx

Right of appeal

43. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

44. 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.
45. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF