



# Tribunals Service

Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0020**

**Information Commissioner's Ref: FER0148337**

**Heard on the papers at Procession House**

**Decision Promulgated**

**On 4<sup>TH</sup> September 2008**

**On 29<sup>TH</sup> September 2008**

**BEFORE**

**DEPUTY CHAIRMAN**

**Fiona Henderson**

**And**

**LAY MEMBERS**

**Jacqueline Blake**

**And**

**Malcolm Clarke**

**BETWEEN:**

**JULIAN NORMAN RUDD**

**Appellant**

**And**

**THE INFORMATION COMMISSIONER**

**Respondent**

**And**

**THE VERDERERS OF THE NEW FOREST**

**Additional Party**

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**Decision**

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The Tribunal refuses the Appeal and upholds the Commissioner's Decision  
No. FER0148337 on the grounds set out below.

The Tribunal has seen a copy of the disputed information and feels able to deliver its decision without resorting to a closed schedule.

## **Reasons for Decision**

### **Introduction**

1. The Verderers of the New Forest (the Verderers) are responsible for administering the New Forest in Hampshire. Their authority is derived from the New Forest Act of 1877 which includes the prohibition set out in section 16 of the Act:
  - (1) *“A person shall be disqualified from being an elective Verderer who...*
  - (2) *Is concerned in or participates in the profits of any contract entered into by the verderers”*
  
2. The Verderers have entered into a 10 year agreement with DEFRA called “the Countryside Stewardship Scheme” (the CSS) which provides an annual payment (paid via the Verderers) calculated per animal, to any Commoner (person who holds rights of Common) who grazes their animals on the New Forest (because of the environmental benefits that such grazing provides in maintaining the Forest habitat).

### **The Request for Information**

3. Mr Rudd made an information request to the Verderers by email on 8<sup>th</sup> August 2006. In this email he explained his reasons for requesting various pieces of information:
  - (1) *“..it is my opinion that no person can stand for election as a Verderer if he or she participates in the Verderers’ Countryside Stewardship Scheme. This comes about by reason of Section 16 of the New Forest Act 1877”.*
  - (2) This appeal is concerned only with the second part of this request which was for:

(3) 1A “Copies of any advice/opinions from other sources other than DEFRA concerning the application of S.16 of the New Forest Act to the Verderers’ Countryside Stewardship Scheme”.

4. Mr Draper replied on behalf of the Verderers by letter on 15<sup>th</sup> August 2006 and in (who had responsibility for dealing with the Freedom of Information Request) relation to item 1A of the request stated:

(1) “any correspondence with the Verderers’ solicitors is privileged and as such is “exempt” under the Freedom of Information Act”.

In the same letter pursuant to another part of the request, Mr Draper disclosed legal advice that had been received upon the same topic from a lawyer at DEFRA. This consisted of emails dated 21 January 2004 and 6<sup>th</sup> February 2004 and 10<sup>th</sup> February 2004 from Jane Cowell a DEFRA lawyer.

5. On 21<sup>st</sup> August 2006 Mr Rudd emailed the Verderers asking:

“Please confirm that the Verderers have advised (sic)/opinions from sources other than DEFRA and what those sources are – this is a request under FOI s1(1)(a)...”

This had not been specifically addressed in the refusal notice. The Verderers treated this email as a request for an internal review. The results of the review by Mr Montagu (Appointed Forestry Commission Verderer) were notified to Mr Rudd by letter dated 7<sup>th</sup> September 2006. The review insofar as it related to information request 1A:

- Clarified that section 42(1) FOIA was being relied upon in support of the refusal to disclose the information.
- Provided details of the factors which were relied upon by the Verderers in concluding that the balance of public interest in maintaining the exemption outweighed the public interest in disclosure.
- Did not clarify whether any advice/opinions from sources other than DEFRA had been sought pursuant to the request in Mr Rudd’s email of 21<sup>st</sup> August.

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

6. Mr Rudd complained to the Commissioner on 9<sup>th</sup> October 2006. In a letter dated 8<sup>th</sup> December 2006, the Commissioner noted that the Verderers initial refusal was in breach of section 17 FOIA in that it did not:
  - State the exemption relied upon,
  - State why the exemption applied,
  - Provide details of the complaint procedure,
  - Provide details of the right to complain to the Information Commissioner.
  - But noted that these breaches had been acknowledged and remedied in the review. This letter also gave the Verderers the opportunity to address various outstanding issues relating to the request as a whole.
  
7. The Verderers replied by letter from Mr Draper to Mr Rudd dated 18<sup>th</sup> December 2006 stating, in relation to element 1A, that in accordance with section 42(2) FOIA it wished to refuse to confirm or deny whether further advice/opinions had been sought.
  
8. On 16 November 2007, following correspondence with the Commissioner Mr Draper, on behalf of the Verderers, wrote to Mr Rudd explaining that in light of the guidance they had received from the Commissioner's office, they were now of the opinion that section 42(2) FOIA did not apply to element 1A. They wrote:

*(1) "to confirm that the Verderers obtained advice from their lawyers at the request of the Official Verderer. There is a letter from the Verderers solicitors which is held on file"...*
  
9. The Verderers forwarded a copy of the withheld information to the Commissioner to enable him to consider the application of the exemption. They were informed by the Commissioner that he designated the withheld information environmental information in a letter dated 23<sup>rd</sup> November 2008. By letter dated 3 December 2007 the Verderers confirmed to the Commissioner that in light of the application of the EIRs to the request, they were withholding the information pursuant to regulation 12(5)(b). This regulation provides:

*“ 12. - (1) Subject to paragraphs (2), ..., a public authority may refuse to disclose environmental information requested if -*

*(a) an exception to disclosure applies under paragraph... (5); and*

*(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

*(2) A public authority shall apply a presumption in favour of disclosure...*

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

*(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;”*

10. In the same letter the Verderers gave their reasoning in support of their reliance upon this exemption as including the following:

- The advice was provided on a confidential basis and is subject to Legal Professional Privilege (LPP),
- The Verderers were then engaged in litigation where the subject of this advice had been raised,
- Disclosure would adversely affect the Verderers’ ability to defend their legal rights by disclosing advice which is the subject of current and potential future litigation.
- It would adversely affect the Verderers’ ability to obtain legal advice in respect of other matters as it would inhibit the free and frank exchange of views on their rights and obligations,
- There was a risk that the disclosure of privileged information could lead to a reluctance in the future to record fully such advice,
- There was a risk that legal advice might not be sought, leading to decisions being made that were potentially, legally flawed,

- This would have an adverse affect on the Verderers' ability to fulfil their statutory responsibilities.
  - Thus disclosure was not in the public interest.
11. A Decision Notice was issued dated 4<sup>th</sup> February 2008 which decided:
- The request should have been considered under the Environmental Information Regulations 2004 (EIR) under regulations 2(1)(a) (being information on the state of the elements of the environment, such as land and landscapes) and 2(1)(c) (measures (including administrative measures), such as policies, and activities affecting or likely to affect the elements and factors referred to in (a) as well as measures or activities designed to protect those elements),
  - CSS is a measure that affects or is likely to affect the elements outlined in regulation 2(1)(a) and any advice/opinion from other sources than DEFRA is information on that measure.
12. The Decision Notice found that the Verderers were in breach of 14(3) EIR as the refusal notice (referring as it did to FOIA) did not identify the correct exemption under EIR or the matters the public authority considered in reaching its decision with respect to the public interest test.

### **The appeal to the Tribunal**

13. The aspect of the Decision Notice that is the subject of the appeal, is the Commissioner's decision that the Verderers were correct to rely on exception 12(5)(b) of the EIR to withhold the legal advice that was the subject of the information requested as item 1A. In coming to this conclusion, the Commissioner found that inter alia:
- LPP had not been waived by the disclosure of the DEFRA advice because the DEFRA advice did not attract LPP,
  - Even if the DEFRA advice were privileged, LPP in the withheld information was not waived as it was a separate transaction,

- Reg 12(5)(b) was engaged as it was more likely than not that disclosure of the withheld advice would adversely affect the course of justice,
- The balance of public interest lay in withholding the information.

Mr Rudd appealed to the Tribunal on 22<sup>nd</sup> February 2008.

### **Questions for the Tribunal**

14. Mr Rudd's grounds of appeal can be summarized as follows:
- 1) The Verderers had waived privilege over the disputed information by disclosing the advice obtained by DEFRA, as both sets of legal advice formed part of the same sequence,
  - 2) The Commissioner was wrong to find that legal professional privilege was a key part of the activities that will be encompassed by the phrase "course of justice",
  - 3) A "course of justice" required a series of linked events, none could be identified here, so there was nothing to be adversely affected and the exemption was not therefore engaged,
  - 4) In any event, disclosure of the disputed information would not adversely affect the course of justice,
  - 5) Even if disclosure would adversely affect the course of justice, the balance of public interest favoured disclosure,
  - 6) There is a distinction in the nature of advice, between a public corporation seeking advice on the conduct of its affairs, and one seeking advice on its status in relation to its statutes, which the Commissioner had failed to take into consideration when deciding where the balance of public interest lay.
15. All parties accept that this request is covered by the EIRs. There is also no dispute that the withheld information is subject to legal professional privilege (it being a confidential communication between the Verderers and its lawyer for the purpose of obtaining legal advice.)

## **Evidence, legal submissions and analysis**

### Waiver of Privilege

16. The Commissioner concluded that there was a distinction between the status of the DEFRA advice and that of the disputed material because, although the Verderers voluntarily disclosed the advice it obtained from DEFRA on this issue:

- It did not “formally commission” the advice,
- The Advice arose as a result of informal discussions between the Verderers and DEFRA’s legal Department concerning the problems facing the Verderers.
- Therefore the DEFRA advice never attracted Legal Professional Privilege and its disclosure did not therefore constitute a waiver.

17. The Tribunal does not agree with this analysis of the DEFRA advice. From the papers before the Tribunal (in particular the email from Jane Cowell dated 21 January 2004) it is clear that:

- DEFRA was the sponsoring department in relation to the CSS,
- DEFRA had an official advisory role; The Annex to the CSS agreement No. 16CSS012140 provides that: *“In delivering this agreement the Verderers will be assisted by an Advisory Group which will comprise of Defra..[and others].”*
- From the email of 21st January Jane Cowell indicated that she understood her role to be the provision of legal advice to the Verderers and DEFRA:
  - (1) *“... I shall continue to contribute insofar as advice on the interpretation of the 1877 Act is required.”*
- The DEFRA advice was legal advice from a Lawyer acting in her professional capacity,
- The Advice was proffered in response to requests by the Official Verderer:

*“During yesterday’s telephone conversation you asked me to consider whether the provision in section 16(3) of the New Forest Act 1877 would*



*apply so as to disqualify elective verderers who participated in the proposed countryside stewardship scheme for the new Forest..” and*

The email from the Official Verderer to Ms Cowell sent 4<sup>th</sup> February 2004 in which he sets out an idea for a scheme account withholding the CSS payments until after the participants ceased to be elected Verderers:

*“I would value your opinion on this idea”.*

18. In light of the above, and in the absence of any evidence to the contrary, the Tribunal is satisfied that the DEFRA advice was subject to Legal Professional privilege which the Verderers waived when they disclosed the advice to Mr Rudd in response to his freedom of information request.
19. The Commissioner in his Decision Notice found that in the event that privilege had attached and been waived in relation to the DEFRA advice, that advice and the advice from the Verderers’ own Solicitor was not a sequence of correspondence. Each was a separate transaction between client and lawyer, therefore any disclosure of part or all of one opinion would not constitute a waiver of privilege in respect of the other legal opinion.
20. The Tribunal has had its attention drawn by the Commissioner to: *Fulham Leisure Holdings Ltd v Nicholson Graham and Jones (a firm) [2006] 2 All ER 599*. This case reviewed the body of case law relating to the partial waiver of privilege and based on the authorities defined the relevant process to follow as being:
  - “i) One should first identify the “transaction” in respect of which the disclosure has been made ii) That transaction may be identifiable simply from the nature of the disclosure made – for example, advice given by counsel on a single occasion. iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed. iv) When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed...”*

21. In applying these principles to the facts in *Fulham* Mann J defined the transaction as “*the advice given by Mr Briggs and by DJ Freeman respectively..*” He refused to order further disclosure “*save that there shall be disclosed such later advice as was given by Mr Briggs or by DJ Freeman which is an alteration, amplification or extension of the advice already disclosed*”.

22. The Tribunal notes that this limits the Transaction both in relation to the lawyers who gave the advice (in that it was not all advice given to the recipients by the named lawyers) and the topic itself (in that it would not require the disclosure of any other advice received on the same topic by any other lawyers). This Tribunal agrees with the analysis of the case law set out in the *Fulham* case and applies the principles to this case as follows:

- The Transaction can be defined as the legal advice provided by DEFRA to the verderers in relation to the application or otherwise of section 16(3) of the *New Forest Act 1877* upon the elected Verderers who are participants in the CSS.
- The **Transaction** encompasses more than the privileged communications in that it could be said to encompass the Letter from Martin Froment of DEFRA dated 2 February in which he states:

*“I confirm that DEFRA has no reservations concerning Verderers, who are also commoners, entering animals and receiving payments under the Verderers commoners scheme...*

*I might suggest you consider whether entering Stewardship is really a “profitable” activity under the meaning of the 1877 Act... payment (or grant) rates under Agri-environment Schemes are calculated under an income-foregone basis and I can confirm that from our perspective we do not consider the CSA grant as profit”.*

Whilst he stresses in the letter that he is not a legal professional, and privilege does not attach to this letter, it is clear from the context of the letter that he has spoken to Jane Cowell (the source of the DEFRA legal advice) and he is setting out DEFRA’s official thinking. Since this would appear to be DEFRA’s qualification of its own legal advice it would clearly be misleading if the

DEFRA legal advice were left to stand alone in light of this letter. This letter has already been disclosed to Mr Rudd.

23. The Tribunal is satisfied that the legal advice that the Verderers sought from their own Solicitor is a different transaction in that it comes from a different source and has a different focus. The fact that it is on the same or a similar topic is not conclusive. DEFRA are an interested party, and consequently the advice that they gave was not impartial. Any advice from them would have to be viewed through “DEFRA spectacles”, in that the advice would have to reflect the interests or agenda of the department. Whilst the specifics of what they told the Verderers would attract privilege, they would not be precluded from making public pronouncements on the topic if the situation required. The Verderer’s Solicitors are not so constrained and can approach the instructions entirely from the perspective of their clients.
24. Having concluded that the disputed material is a separate transaction, and having seen the disputed advice, the Tribunal is further satisfied that this is not a case where a wider disclosure is necessary to avoid unfairness or misunderstanding of what has been disclosed. The rest of the correspondence relating to section 16(3) NFA and the CSS from DEFRA has been disclosed so that there can be no unfairness relating to the totality of their advice, and no misunderstanding of the fact that there are conflicting interpretations from within DEFRA. The Tribunal does not accept that there is any authority for suggesting that a second advice becomes disclosable by virtue of an earlier disclosure, regardless of the circumstances in which it was obtained, the timing or source of the legal advice. To draw the thread to its natural conclusion, a party cannot know when a first disclosure is made what subsequent advice may be obtained.

#### The Course of Justice

25. Mr Rudd challenges the Commissioner’s finding that disclosure of the disputed information would adversely affect the course of justice for the following reasons:

- a) The EIRs do not create an exemption for material merely because it is covered by Legal Professional Privilege which is excluded from consideration under the EIRs.

Mr Rudd argues that unlike FOIA where legal professional privilege is expressly itemised as an exemption (section 42) the EIRs make no direct reference to legal profession privilege under regulation 12(5)(b). Since the legislation could have been framed to expressly include legal professional privilege, he contends that there was never any intention that legally privileged documents would be caught under the regulations and that consequently “the course of justice” must relate to something else.

26. The Tribunal does not agree with this logic. There is no direct reference to legally privileged documents within the EIRs, conversely there is no express prohibition on privileged information being included within the exemption. The Tribunal notes that the “course of justice” is wider than legal professional privilege and includes matters beyond legal advice. In light of the importance attributed by the Courts to the ability of parties to seek and receive frank legal advice in confidence, it would be surprising if the EIRs had intended to prevent consideration of legal professional privilege when identifying the course of justice.

27. Additionally he argues that:

- b) A course of justice has to be identified.

Mr Rudd argues that a course of justice, much like a course of conduct, requires a series of linked events. He argues that the Commissioner did not consider whether the Verderers had identified such a situation., and that in fact, there is no course of justice to be identified. As set out above, he disputes the Commissioner’s contention that legal professional privilege is a key part of the activities that will be encompassed by the phrase “course of justice” arguing that it is a bare assertion.

28. The Commissioner relies upon *Kirkaldie v Information Commissioner [2006] UKIT EA 2006 001* which considered regulation 12(5)(b) EIR and concluded:

*“21. The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation.”*

29. The Tribunal finds no reason to depart from this analysis and reminds itself that the Regulations refer to “**the** course of justice” and not “**a** course of justice”. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to “the smooth running of the wheels of justice” rather than a series of linked events upon which the specific legal advice must impinge. Legal professional privilege has long been an important cog in the legal system. The ability of parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them to decide whether to litigate, or whether to settle; and when to leave well alone, has long been recognized as an integral part of our adversarial system.
30. Mr Rudd further contends:
- c) That in any event, disclosure of the disputed information would not adversely affect the course of justice.
31. The Tribunal (differently constituted) in the case of *Archer v IC and Salisbury District Council EA/2006/0037* held that firstly an adverse affect has to be identified and then the Tribunal must be satisfied that disclosure “would” have an adverse affect not “could” or “might”. In *Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and EA/2005/0030* – the definition of “would” in the context of the phrase “would prejudice” was considered. In that case “would” must be demonstrated as more probable than not. The Tribunal agrees with the Commissioner’s contention that the *Hogan* definition of “would” is transferrable, and is therefore applicable in this case.
32. Mr Rudd suggests that there is no evidence before it from which the Tribunal can draw the conclusion that the course of justice would be adversely affected.

He argues that not only “has no evidence been adduced” that clients and lawyers would feel inhibited if they felt there was a risk of the advice becoming public, but that were e.g. the Law Society to be asked they would point to the duty of their members in giving advice.

33. The Tribunal is entitled to take into consideration the evidence contained within the documents in the agreed bundle and relies upon the letter to the Commissioner from Mr Draper on behalf of the Verderers dated 3<sup>rd</sup> December 2007 in which he explains that:

*“The Verderers are currently engaged in litigation where the subject of this advice has been raised... Disclosure would adversely affect the Verderers’ ability to defend their legal rights by disclosing advice which is the subject of current and potential future litigation. Furthermore, it would also adversely affect the Verderers’ ability to obtain legal advice in respect of other decisions or issues affecting them and their responsibilities. It would undermine the relationship between the Verderers and their lawyers, inhibiting the free and frank exchange of views on their rights and obligations, ... If there is a possibility when speaking to their lawyers that disclosure may be ordered then the Verderers will not be able to speak frankly in seeking advice. There is a risk that the disclosure of privileged information could lead to a reluctance in the future to record fully such advice, or that legal advice may not be sought, leading to decisions being made that are potentially legally flawed. This would have an adverse affect on the ability of the Verderers to fulfil their statutory responsibilities.”.*

34. The Tribunal is satisfied that the activities identified by Mr Draper, all form part of the course of justice, and that there would be an adverse affect upon these matters in the event that the legal advice were disclosed.

#### The Public Interest Test

35. Mr Rudd argues that the Commissioner has erred in finding where the balance of public interest lay, in particular he failed to draw a distinction between a public corporation seeking advice on the conduct of its affairs and a public body created by Act of Parliament seeking legal advice as to its status viz a viz its

statutes. He argues that legal advice received in the latter context should be in the public domain.

36. Mr Rudd draws the Tribunal's attention to the case of *Turco and the Kingdom of Sweden v Council and Others [2008] EUECJ C-39/05 and C52/05.* Although dealing with the disclosure of legally privileged material, the Tribunal does not find that case of direct relevance to this case as it deals with European regulations unrelated to the EIRs, which necessitates the consideration of different wording (in terms of the obligations to disclose and the scope of the exemption).
37. The Tribunal notes that the Verderers' initial refusal under section 42 FOIA dated 15<sup>th</sup> August 2006 which stated:
- “any correspondence with the Verderers’ Solicitors is privileged and as such is “exempt””*
- could have been interpreted as an automatic reliance upon the exemption just because the information was privileged, almost as if it were an absolute exemption, in that no reasons or explanation of the public interest balancing exercise was provided. This failure to justify reliance on the exemption was remedied by the Verderers in the review conducted by Mr Montague and in his Decision Notice the Commissioner rehearsed the public interest considerations that he took into account.
38. In conducting its own balancing exercise this Tribunal notes that:
- public authorities using public money are in a different position to a private individual pursuing a cause, in that they have a responsibility to the public, unlike a commercial enterprise or a private individual. Clearly if legal advice were evidence of malfeasance or fraud or waste of public money then there would be a very strong public interest argument in favour of disclosure.
  - It is clearly a matter of public importance that the public know the status of a public body re its founding statute,

- There is a public interest in disclosing information that enables scrutiny of a public authority's actions, and encourages transparency in its decision making process,
39. Additional factors in favour of disclosure are:
- Despite the long history of legal professional privilege and its perceived importance in the English legal system, Parliament chose not to make it an absolute exemption,
  - The EIRs contain a specific presumption in favour of disclosure,
  - There is uncertainty arising out of the conflicting opinions emanating from DEFRA and that it is in the public interest to resolve that,

Public Interest Factors in favour of withholding the information

40. However, this Tribunal agrees with the observations of the Tribunal (differently constituted) in the case of *Bellamy v The Information Commissioner [2006] UKIT EA:*

*“there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that in certain cases, of which this might have been one were the matter not still live, for example where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.”*

41. This Tribunal also notes that:
- Whilst the advice relates to the “founding” statute of the Verderers (rather than e.g. a commercial dispute) it is relevant to a live issue in existing, and potentially in relation to future, litigation.
  - A legal opinion is not a definitive interpretation of the law and, whatever its contents, in light of the conflicting existing information already in the public domain, it is unlikely to resolve any uncertainty it would just add to the debate. The only true way to resolve the situation is a ruling from a Court.
  - The opinions of DEFRA (the sponsoring department) are arguably of greater public interest than the opinion of a private firm of Solicitors instructed by the



Verderers and the conflicting views of DEFRA are already in the public domain.

42. Additional Public Interest Factors in favour of withholding the information are that:
- It is clearly in the public interest that Public Authorities are not disadvantaged in conducting their legal affairs, in the ways envisaged by Mr Draper in his letter of 3<sup>rd</sup> December 2007 ( see para 34 above).
  - It would be against the public interest if litigation were to become more expensive or less successful for public authorities or they were to find themselves the target of litigation because of the inequality of having to disclose their legal advice unilaterally to their opponents.
43. The Tribunal has considered the disputed legal advice and is satisfied that taking all the above matters into consideration the balance of public interest lies in withholding the disputed information. The appeal is therefore refused.

Fiona Henderson  
Deputy Chairman

28<sup>th</sup> September 2008