



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2012/0244

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FER0446596
Dated: 31 October 2012**

Appellant: MR FRANK TILLYER

First Respondent: INFORMATION COMMISIONER

Second Respondent: NEW FOREST NATIONAL PARK AUTHORITY

Heard at: SOUTHAMPTON COMBINED COURT CENTRE

Date of hearing: 20 MAY 2013

Date of decision: 10 JUNE 2013

Before

ROBIN CALLENDER SMITH
Judge

and

MELANIE HOWARD and RICHARD FOX
Tribunal Members

Attendances:

For the Appellant: Mr Frank Tillyer represented himself
For the First Respondent: not represented at the hearing
For the Second Respondent: Ms Hannah Slarks, of Counsel.

Subject matter:

Environmental Information Regulations 2004 (EIR)

Exceptions, Regs 12 (4) and (5)

- Confidential information (5) (e)
- Interests of an individual (5) (f)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 31 October 2012 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The background circumstances to the appeal are slightly unusual because they relate to a Map/plan of the New Forest and surrounding area which Mr Tillyer and at least two other members of the public have seen but which the New Forest National Park Authority (NFNPA) does not wish to disclose to the Appellant, the general public or other interested parties any further.
2. The Map was provided to the Tribunal as Closed Material. The Tribunal has been able to reach its conclusions in an Open Decision without the need to attach a Closed confidential annex.
3. To maintain the environment within the New Forest National Park it is necessary that the right type and number of animals graze there. Commoners (according to the Verderers' website) are those "who occupy land or property to which attaches one or more rights over the forest" (ie the requirement is to occupy land or property, not to be engaged in any particular occupation).
4. The Verderers of the New Forest protect and administer the agricultural

commoning practices and conserve its traditional landscape. The Verderers' Court administers the rules of the New Forest: this requires a viable working relationship between them and the Commoners.

5. The Commoners are required to remove their animals from the New Forest National Park in particular circumstances, for example when they are ill.
6. Some Commoners maintain their own back-up grazing land for this purpose. Others rent back-up grazing land from landowners who are not themselves commoners or organise back-up grazing on an ad hoc basis, by using the land of friends or neighbours, as and when it is needed.
7. Back-up grazing land is a sensitive issue. There is a widespread perception that if land has been used for back-up grazing, permission is less likely to be granted for a change of use because of a fear that this can drive down the value of land known to have been used for back-up grazing. This, in turn, may make landowners reluctant to rent out land to be used as back-up grazing.
8. In 2003, the Verderers established a Countryside Stewardship Scheme. Commoners who participated in the scheme were entitled to receive annual payments for each animal they allowed to graze (*depasture*) in the National Park. Commoners could still exercise their rights of common without participating in the Scheme but did not receive that payment. As part of the application to the Scheme, Commoners were asked to provide information about the land they used for grazing. The application form included a confidentiality notice, stating

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

9. In 2006, the Authority asked the Commoners to form a group with other parties and lead a review into the state of commoning (the NPA Commoning Review). The purpose of the review was to identify the problems faced by commoning and find solutions to them. The purpose was for the recommendations from the NPA Commoning Review to be fed into the NFNPA's first ever Management Plan. The review did not include any study of back-up grazing sites.
10. In 2007, the Verderers decided to undertake a review of back-up grazing. The review would use the information provided to them by Commoners in their original application forms. The Verderers sought written permission from the Commoners for their information to be used in this way. About half of the Commoners granted their permission.
11. The Map did not show that Mr Tillyer's land had been used for back-up grazing because he was not a practising Commoner and therefore was not included in the survey.
12. The Verderers asked the NFNPA to create the Map as part of the review, because it had the necessary software and Ordnance Survey licence.
13. In the event, the Map was unusable because it was incomplete and misleading. It accidentally included information from some Commoners who had not granted their permission for the information to be used.
14. At this point, the Verderers asked for the Map back. An employee of the of the NFNPA assured the Verderers that it would not retain a copy and that the information would not be used by anyone other than the Verderers.
15. In or around 2008, the Verderers also carried out a review on behalf of the New Forest District Council (NFDC) in relation to their Sites and Development Management DPD. They used local knowledge to highlight land known to have been used, be in use, or be potentially

available for back-up grazing (the DPD Back-up Grazing Review). This was a separate process, unrelated to the information that Mr Tillyer requested from the NFNPA.

16. Local knowledge submitted to the DPD Back-up Grazing Review suggested that Mr Tillyer's land had recently been used for back-up grazing.
17. Mr Tillyer is now involved in a dispute on this matter and wants to use the Map to challenge the findings of the DPD Back-up Grazing Review on the basis that the Map is evidence that his land has not been used for back-up grazing.
18. The Map itself contains no information about the historical use of this land one way or the other.

The request for information

19. On 10 February 2012, Mr Tillyer asked the NFNPA:

Further to meeting with you and your colleague [name and job title redacted] on Tuesday 31st January 2012.

I would like to formally request the National Park Authority, to let me have 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.

20. On 1 March 2012, the NFNPA told Mr Tillyer that it did not hold an official or adopted copy of the Back Up Grazing Plan (the Plan). It added that he had been provided with a copy of a document which showed the results of a survey of Commoners but it relied on regulation 12(5)(f) to withhold this information. The NFNPA also found that the public interest test favoured maintaining the exception.
21. On 16 March 2012, Mr Tillyer sought an internal review of NFNPA's decision to withhold the disputed information. On 19 April 2012, it upheld its claim of regulation 12(5)(f) and also cited regulation 12(4)(d).

The complaint to the Information Commissioner

22. On 1 May 2012, Mr Tillyer complained to the Commissioner who – after investigating the matter – upheld NFNPA’s reliance on the exemption claimed in his Decision Notice.

23. The Commissioner found that the information used to create the Plan had been collected by the Verderers from the Commoners by way of a 2006 survey. He found that the Commoners were under no obligation to provide this information to the Verderers and nor were the Verderers under any obligation to provide this information to NFNPA. As the survey response form contained a clear confidentiality statement; the Commissioner found that the Commoners and Verderers would not expect that the information they provided would be used for any purpose other than that as set out on the form. The Commissioner also found that neither the Commoners nor Verderers had consented to the disclosure.

24. The Commissioner found that the disclosure of the requested information would have an adverse effect on both the Commoners and Verderers and that Regulation 12(5)(f) was engaged.

25. He went onto consider the public interest test and found that the disclosure of the specific information withheld in this case would be unlikely to inform public debate and instead the public interest in maintaining the voluntary supply of information and in avoiding the harm to the interests of the persons who provided that information outweighed any public interest in the disclosure of the requested information.

The appeal to the Tribunal

26. The Commissioner identified five grounds of appeal and Mr Tillyer agreed that those represented a summary of the issues the Tribunal had to consider.

Ground One

27. Mr Tillyer maintained that a named employee of the Authority

... volunteered unconditionally to show an associate of mine (who then invited me), the 2008 NPA Back-Up Grazing Plan...if the Plan is so potentially damaging to the interests of the commoners, and by extension therefore to the National Park, then the NPA should not have recorded the information in such a formal manner, let alone shown the plan to anyone outside the NPA. This plan was made available for inspection and used by the NPA to support their planning position, voluntarily and without hesitation...

Ground Two

28. Mr Tillyer stated that the disputed information was sent directly from the Commoners to the Authority in response to a 2006/7 survey conducted by the New Forest Commoning Review Group. This was relevant for the two reasons:

- Firstly, Mr Tillyer believed it is therefore incorrect to say that the disputed information was passed by the Commoners to the Verderers who then passed that information onto the Authority. Instead, his position is that the Authority collated the information directly from the Commoners; and
- Secondly, the assurance regarding confidentiality was made in relation to any responses made by the Commoners to a survey relating to the Countryside Stewardship Scheme and not in relation to responses provided in response to the 2006/7 New Forest Commoning Review Group which meant that the NFNPA were using an incorrect form to maintain their stance.

Ground Three

29. Mr Tillyer argued

...I have seen no written credible evidence, that the Verderers have made it clear that they would not be happy for the plan to be disclosed to the public...The Verderers were not attached to the information, in my view. ...[and that the Commissioner's view that the Commoners would object to disclosure of the plan was]...highly subjective and does not appear to be factually based.

Ground Four

30. Mr Tillyer did not accept that the Commoners' interests would be adversely affected by disclosure.

...How are the commoner's interest (of which I am a commoner myself) who provided the information, which I believe through written evidence, went directly to the NPA going to be adversely affected, and also adversely affect the Verderer's relationship with the commoners?...The issue of trust is being raised to a degree, where the claimed consequences of its breach would result in what is, in my view an entirely unreasonable assumption, in that the inference is that the level of co-operation between the parties would no longer occur, to the extent that the fabric of the New Forest itself would be affected, such that its ecological and environmental status would not be maintained or be future enhanced.

Ground Five

31. Mr Tillyer's argued that the public interest test, properly applied, favoured disclosure:

- ...without the ability of interested parties to produce or refer to the plan in a public forum, it is impossible to determine what weight may be afforded to the document. It is not for the Commissioner to assume that the disclosure of the plan might mislead or confuse matters. It is a matter for the Inspector conducting the Public Inquiry / Examination to decide, not the Commissioner, in my view.
- ...Is it in the public interest for the NPA to be seen protecting the interests of a minority of people (the Verderers and the practising commoners amount to 700 approx.), at all costs, despite the rights or wrongs in doing so? It is in the public interest to know that the NPA are carrying out their duties correctly. The argument being put forward that the wider public interest may be harmed, i.e. the fabric of the New Forest, by possibly upsetting the commoning fraternity by releasing information necessarily collected and utilised by an authority, in either a direct or in an advisory planning role, must make nonsense of the NPA's position as an authority. How can it satisfactorily fulfil its functions, if it is neither obliged or statutorily required to be examined in a transparent and publicly accountable manner, in this particular case? I feel they are not.
- The right to share information must be a significant part of the role, which the public authorities maintain in order that they can undertake their statutory obligations. By extension therefore, this information must be able to be examined if necessary in public.

Evidence

32. The Tribunal heard oral evidence, on which there was cross-examination, from the Appellant, Mr Tillyer and Mr John Penny as well as considering a written witness statement from Ms Katharine Penna. The NFNPA's witnesses – who were also cross-examined – were Mr David Illsley (Policy Manager for the Authority) and Mr Colin Draper (Grazing Scheme Manager for the New Forest Verderers). From the evidence provided by the NFNPA's witnesses it was clear that the Map does not provide any evidence one way or another for the correct classification of Mr Tillyer's former property and could never have resolved the issue with which he is concerned.

Conclusion and remedy

33. There is no doubt in the Tribunal's mind – or indeed any of the other parties involved with this appeal - that Mr Tillyer was shown the Map that is the subject of this information request. This was an error.

34. The error was compounded by Mr Tillyer being given assurances – after first seeing the Map – that he could have a copy up and until it became apparent that it should not have been disclosed to him. That created an understandable sense of dissatisfaction on his part.

35. The information in that Map came from Commoners responding to the Verderers. It was given subject to an *express* confidentiality clause. The expectation of confidentiality increased when the Commoners were then asked to give express permission for the information to be used as part of the Back-up Grazing Review. They never consented to that: they objected.

36. Colin Draper, in his oral evidence, confirmed that the Verderers objected to the disclosure of the information. The Verderers required and were given an assurance by the NFNPA that it would not retain a copy of the Map and that the Map would not be used by anyone but the Verderers.
37. The Map includes information from a number of Commoners who never consented to the information being used in the Back-up Grazing Review at all let alone to it being disclosed publicly.
38. Mr Tillyer argues that there would be no adverse effect on the Commoners if the information was disclosed. The Tribunal finds that argument misses the point at the root of this appeal.
39. He mistakenly believes that the information was provided directly by the Commoners to the NPA but that is not the case. He believes that the environmental impact of disclosure is relevant to the “adverse effect” test. It is not. Only the adverse effect on the relationship vis a vis the Commoners and Verderers is relevant in this appeal.
40. The Tribunal has no difficulty in finding that the information was given in confidence by the Commoners to the Verderers in conditions of clear, assured confidentiality.
41. Disclosure would damage the Commoners’ and Verderers’ relationship of trust with each other and with the NFNPA, potentially hampering their ability to work together and collectively protect their common interests. It would discourage landowners from renting out their land for back-up grazing, directly interfering with the Commoners’ ability to run their businesses.
42. In terms of the operation of the public interest test, Mr Tillyer argued eloquently that

The right to share information must be a significant part of the role, which the public authorities maintain in order that they can undertake their statutory obligations. By extension therefore, this information must be able to be examined if necessary in public.

43. The Map, however, is of no probative at any public inquiry into what land is actually used for back-up grazing. The information on it is not complete or reliable.
44. The Map does not allow the public to understand and review how the NFNPA performs its functions. All the NFNPA was doing in creating the Map was compiling (incomplete and therefore misleading) information on behalf of the Verderers using its software. The Map has not been relied upon in relation to any decision-making or actions by the NFNPA.
45. The Tribunal agrees with the NFNPA's description of the Map as "a useless document" that has not been and cannot be used for any practical purpose. Putting misleading information into the public domain serves no purpose.
46. Conversely, there is a strong public interest in maintaining good relationships between the Commoners, Verderers and the NFNPA. There is also a strong public interest in maintaining the willingness of landowners to provide land for back-up grazing. Disclosure of information requested would not advance either of these public interests.
47. The Tribunal acknowledges the tenacity and clarity with which Mr Tillyer advanced his appeal even though he will, understandably, be disappointed by the result.
48. However – in the evidence provided by Mr Colin Draper for the Verderers – it seems that there may be other routes available to Mr Tillyer to get the land in question re-classified. He believes a mistake has been made and that mistake may be corrected by way of a direct application to the Verderers so that the position can be reviewed.

49. Our decision is unanimous.

50. There is no order as to costs.

Robin Callender Smith

Judge

10 June 2013