IN THE FIRST-TIER TRIBUNAL **EA/2010/0032**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM
The Information Commissioner's Decision
No. FER0253845, dated: 21 December 2009

Appellant:	**Imogen Bickford-Smith**
Respondent:	**Information Commissioner**
Additional Party:	**Rural Payments Agency, as agent of DEFRA**
Date of hearing:	**14 June 2010**
Date of decision:	**19 August 2010**

Before

Judge Claire Taylor

Richard Fox

and

John Randall

Subject matter:
EIR, reg. 5(1): Whether information held regulation
EIR, reg.s 12 and13: Personal data

Representation:
Ms. Imogen Bickford-Smith
Laura Elizabeth John for the Information Commissioner
Maya Lester for the Additional Party

Cases:
Bromley (EA/2006/0072)
Durant ([2003] EWCA Civ 1746)
Johnson (EA/2006/0085)
Baker (EA/0006/0015) - "Baker"
Decision Notice (FER0112249)

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DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal in part and substitutes the following decision notice in place of that Decision Notice dated 21 December 2009:

IN THE FIRST-TIER TRIBUNAL EA/2010/0032
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

SUBSTITUTED DECISION NOTICE

Public authority: The Rural Payments Agency (An executive agency of the Department for Environment, Food and Rural Affairs)

Address: Area 1B Ergon House Horseferry Road London, SW1P 2AL

Complainant: Imogen Bickford-Smith

Action Required: Within 35 calendar days from the date of promulgation of the Tribunal's determination, the Public Authority must disclose to the Appellant:

In respect of only those applications for entitlements made using the Single Payment Scheme – 2005: Application for the Single Payment Form SP5a ("2005 forms") where claimants have identified any Adjacent Commons within the Annex 5c or affidavit:

1. Where the claimants are not sole traders or partnerships:
    a. Either copies of or all the information contained in the Annex 5c and affidavits; and the name and address of the business; confirmation that such claim was successful; and
    b. Confirmation that such claim was successful and where the 2005 claim relates solely to Adjacent Commons, the details of the entitlements awarded.

2. Where the claimants were unsuccessful in all parts of the 2005 forms:
    a. Either copies of or the information contained in the Annex 5c and affidavits, with names, addresses and CPH references redacted; and
    b. Confirmation that such claim was unsuccessful.

3. Where the claimants are sole traders or partnerships and were successful in part or whole for their application for entitlement:
    a. Either copies of or all the information contained in the Annex 5c and affidavits; and the business address and CPH references with the name of applicant redacted; and
    b. Confirmation that such claim was successful and where the 2005 claim relates solely to Adjacent Commons, the details of the entitlements awarded.

Scope of substituted Decision Notice: This Substituted Decision Notice replaces paragraph 46 of the Information Commissioner's Decision Notice No. FER0253845.

Rights to Appeal set out below.

Signed

Judge Claire Taylor

19 August 2010

IN THE FIRST-TIER TRIBUNAL EA/2010/0032
GENERAL REGULATORY CHAMBER
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REASONS FOR DECISION

Introduction

1. The Appellant sought information from the Rural Payments Agency ('RPA') about claims for subsidies made in relation to the 'Adjacent Commons' in the New Forest.

2. She now appeals against the Information Commissioner's Decision Notice which concluded that on the balance of probabilities, the RPA does not hold the information she requested.

3. The dispute before the Tribunal covers whether the RPA holds the information, and if so, whether any of that information is personal data that should not be disclosed by virtue of regulation 13 of the Environmental Information Regulations 2004 ('EIR').

Background

4. In the New Forest, the land owned by the Crown is known as common land, and the privately owned land next to it is known as Adjacent Commons. (Together, the 'perambulation').

5. There are rights of common, (such as rights to graze), attached to land or property within the New Forest. Unlike elsewhere, there are no limits to the numbers of stock associated with properties carrying these rights.[1]

6. The Verderers[2], among others, manage the forest. Farmers wishing to graze their stock, apply to the Verderers' clerk, who confirms the existence of their rights and requires a marking fee for each animal grazed. Reduced fees are paid in relation to certain grazing over Adjacent Commons, for limited numbers of animals. The Verderers maintain a record of those entitled to reduced fees.

7. The Single Payment Scheme ('SPS') is the EU's principal agricultural subsidy scheme. The RPA, as an executive agency of the Department for Environment, Food and Rural Affairs ('Defra'), administers the scheme for the UK. Recipients of aid are required to maintain the land in good condition for agricultural and environmental purposes.

8. SPS payments are made to farmers owning or occupying eligible hectares of land. SPS payments are also made to farmers using or with a right to use common land, provided

[1] Verderers' Countryside Stewardship Scheme, Grazing Management Plan, May 2005.
[2] A'pubic authority' for EIR purposes.

those rights were registered under a specified Act. Common rights in the New Forest perambulation could never be registered under that Act, and were also unquantifiable.[3]

9. As it was not possible to establish and quantify a particular commoner's right of use in the New Forest, Ministers decided to allocate notional hectares for SPS purposes based on actual usage. This was measured by how many animals qualifying farmers had grazed in the year before the decision was announced. Farmers had to produce marking fee receipts[4] as proof of the numbers of animals grazed.

10. The Appellant's request for information was in the context of her having been refused SPS entitlement. Much of the information the Appellant provided for this appeal related to this refusal and her dispute as to the fairness of the method of allocation. To the extent it is not within our ambit, we do not repeat it below.

The Request for Information

11. On 5 March 2009, the Appellant wrote to the RPA as follows:

    a. *"... Defra appears to be showing extraordinary bias in knowingly accepting claims from those with no registered right of pasture whilst refusing to allow claims for entitlements from farmers who own rights on the adjacent land."*

    b. "*…Defra rules are very clear that no one may claim[5] in respect of any common land over which stock can stray but where there is no registered right to graze…The New Forest Act 1964 did not confer on those with Forest rights the right to graze on Adjacent Commons - and that is the position today. It is therefore important to know exactly how many eligible hectares have been allocated to those who do not have a registered right of common or only have a right to stray over Adjacent Commons. "*

    c. *"Please provide under the Freedom of Information Act/Environmental Information Regulations the following details of entitlements allocated under 'New Forest' to ensure this Appeal can be properly understood by the Panel:*

        i. Full details of what entitlements were claimed and by whom on each of the various Adjacent Commons – and what entitlements were awarded to whom.

        ii. How were the rights of the claimants verified?"

12. On 16 March 2009, the RPA responded that it held the information but considered it exempt from disclosure as being third party personal data (EIR regulations 12(3) and 13).

[3] According to the Verderers' website and the decision reached by the RPA panel in relation to the Appellant's appeal for SPS payments, any records of common rights in the New Forest have no legal effect and in any case do not quantify the rights available. This was the reason given why extant records could not be used to calculate notional hectares for SPS purposes. *(See below).*

[4] or an affidavit. *(See below).*

[5] This refers to a claim for an SPS entitlement.

13. The Appellant requested a review on 2 April 2009. She argued that it was Government policy to publish information on EU subsidies, and that SPS payments would be published online that year. Further, she thought the RPA should be assisting farmers, and so should have indicated to her what information they could provide, and at least told her the numbers of claimants in respect of each adjacent common and how many entitlements were awarded.

14. On 27 April 2009, the RPA review concluded that in fact the requested information was not held within the meaning of regulation 12(4)(a). They explained: "*entitlement data is not available for the Adjacent Commons claimants because we do not know which of them claimed initially on an adjacent common*." In respect of the issue of entitlement, the RPA confirmed that claimants who did not exercise their right to graze in the relevant period, did not receive payments.

The Complaint to the Information Commissioner

15. The Appellant complained to the Commissioner on 10 June 2009, maintaining that the RPA did hold the information.

16. In his Decision Notice, the Commissioner concluded:

    a. Information Held?: The RPA did not hold the information requested at the time of the request because it was unable to differentiate applications by individual Adjacent Commons. The RPA breached regulation 14 by incorrectly claiming that it held relevant recorded information at first instance.

    b. Advice and Assistance: The RPA breached regulation 9 by failing to provide adequate advice and assistance to the Appellant as to what could be disclosed. The Commissioner ordered the RPA to contact the Appellant to discuss what sort of information could be provided, within 35 calendar days. He specified what sort of information he envisaged being provided.

17. The factors informing this decision included:

    a. Scope: Both parts of the request required the RPA to identify the claimants on each of the various Adjacent Commons. This was because the second part was directly connected to the entitlements that were to be identified in the first part.

    b. Held: On balance, the RPA did not hold any relevant information because:

        i. Although marking fee receipts identified whether they related to either the New Forest or generically Adjacent Commons, it was not possible to distinguish different Adjacent Commons from the receipts;

ii. It did not have a business reason to differentiate between each adjacent common: The New Forest was dealt with as a single administrative area without differentiating between the New Forest and the 'Adjacent Commons' because both were treated identically for SPS purposes. Applicants for either part just had to tick the box CL0999 (labeled the 'New Forest') on the claim form.

c. Externally available information:

i. There was no information available in the public domain about all the individuals who held rights on the 'Adjacent Commons' to enable the RPA to look through its applications for those names.

ii. It was not possible to differentiate applications by checking their addresses against a map acquired from the Verderers.

iii. The RPA were not required under the EIR to contact other public authorities, such as the Verderers to assist so as to gather the relevant information.

The Appeal to the Tribunal

18. Ms Bickford-Smith appealed to the Tribunal by Notice dated 14 January 2010. The Tribunal joined the RPA as a party.

19. At the hearing, on 14 June 2010, the Tribunal heard from Mr Dunnill of the RPA and Ms Bickford-Smith. The Tribunal also had the benefit of and has considered the written statements from these witnesses; all oral and written submissions from the parties; the bundle of documents submitted by the parties; and further documents and authorities submitted at the hearing and submissions served subsequent to it. We have considered all of this material, even if not specifically referred to below.

Evidence

The Appellant's Grounds of Appeal and Evidence

20. The Appellant's grounds for disputing the Commissioner's decision are (1) on the balance of probabilities, the RPA holds the information requested; and (2) the information is not personal data that should not be disclosed because it relates to businesses rather than to individuals in their personal capacity.

21. In support of this, she included, amongst other things:

a. Annex 5c of her "Single Payment Scheme – 2005: Application for the Single Payment Form SP5a" ("2005 form") which was the common land section of the

SPS claim form. In this, the Appellant had written the individual Adjacent Commons against which she asserted a claim.

b. Part D of Appellant's "Single Payment – 2006: Application for the Single Payment in England – SP5 ("2006 form")[6]. It was clear that the RPA had already inserted discrete 'CL' numbers for each of the Adjacent Commons she had entered in the 2005 form.

c. Defra News Release 'SPS and the New Forest', of 21.3.05, stating:

> "*...The method for allocating a notional area of the New Forest common under the Single Payment Scheme has been agreed... the fairest and simplest way is to allocate one eligible hectare of common land for each livestock unit grazed in the Forest in the 12 month period immediately preceding the date of this announcement...*
>
> *Notes for editors*
>
> *1... Entitlements must be established in 2005...The full flat rate of payment of around £200-£220 per entitlement...*
>
> *5...Grazing levels will be determined by considering the number of marking fees paid, or, [for] those who are in dispute over the payment of such fees, an affidavit..."*

d. Appellant's statement of 22/2/10, including that the RPA had apparently not verified any rights of common and did not believe they have a reason to do so.

e. A statement within the Appellant's skeleton argument: Prior to the SPS, farmers were subsidised by the Integrated Administration and Control System (IACS). The Appellant registered for this with RPA in 1994. Her business had to be individually identified and the land she owned mapped for RPA allocation of a unique County Parish Holding number (CPH number)[7]. She claimed for her agricultural land, the New Forest and Adjacent Commons. Adjacent commoners had different CPH numbers, and could be individually identified.

22. At the hearing, the Appellant confirmed that all affidavits submitted with the 2005 claims were likely to relate to Adjacent Commons. There was an ongoing dispute as to whether commoners should have to pay marking fees for Adjacent Commons and she thought affidavits would be used where commoners grazed but had disputed, and so not paid, marking fees. (In the witness box, Mr Dunnill for the RPA had been unsure about this.)

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[6] As the RPA later explained, entitlements were separately established in 2005 as a one-off exercise, but had to be activated every year in order for payments to be received. The purpose of this 2006 form was for applicants to activate such payments.

[7] From reviewing the RPA website, the CPH numbers are used to identify agricultural holding(s) and premises where cattle, sheep, etc. are kept, and to report animal movements.

The Additional Party's Evidence

23. Kevin Dunnill, RPA's SPS Management Unit Team Leader, served a statement on 6 May 2010 and gave oral evidence at the hearing.

24. His written testimony included:

    a. Despite commoners not owning the relevant land, the RPA subdivided and allocated land between them so as to confer SPS entitlements. Notional hectares were allocated to each commoner in proportion to his/her rights of common. For most common land, this was a simple process because the rights of common could be gleaned from the Common Land register in accordance with the Commons Registration Act 1965. The New Forest was excluded from the register. Therefore, for the New Forest, notional hectares were to be allocated in proportion to grazing levels and these were to be determined by reference to the marking fee receipts or affidavits.

    b. **Calculation of SPS Entitlement for Common rights:** He explained how entitlements were allocated. Essentially, a total area of all eligible common is devised, and divided by a total number of 'livestock units' (LUs). An individual is allocated notional hectares by multiplying this number by the number of LU rights he/she has claimed. **(**Cattle and horses are worth one LU, and pigs, 0.3 LU, etc.)

    c. The Verderers manage the common and administer grazing on the New Forest. They are the main source of information regarding the grazing that occurs there. They might hold information on who has rights related to Adjacent Commons and the exact numbers (and type) of animals the farmers are allowed to graze. They might need this to verify [farmers] claims to common rights. However, they were not under an obligation to provide this to the RPA. The RPA is completely separate from the Verderers. Its only involvement with the New Forest and Adjacent Commons is in administering the SPS. The RPA liaises with the Verderers to ensure that only applicants who have paid marking fees can claim SPS payments.

    d. The Adjacent Commons are considered part of the New Forest for SPS purposes, and no distinction is made. There are no physical boundaries between them and the New Forest itself. A right of common derived from the adjacent common confers (on payment of the marking fee) the right to graze across the entire New Forest.

e. **Information Held:**

i. To enter an SPS application on the computer system, a Common Land (CL) number is required, and a common land name. The CL number for the whole New Forest perambulation is CL0999 New Forest. On the form, applicants are not required to give the names of Adjacent Commons.

ii. The RPA holds information on 259 claimants on CL0999. Each applicant's details can be accessed from the computer system through their reference number, known as the 'single business identifer' (SBI). Stored details include names and addresses, number of animals claimed, resultant LU and notional hectare values, the number of entitlements calculated and subsequent SPS payments.

iii. Whilst marking fee receipts stated whether they related to Adjacent Commons or commons, the RPA did not need the information to validate an SPS claim. The marking fees did not specify any particular area of adjacent common, but the affidavits might. However, the RPA has no record of which applicants provided affidavits. The only way to ascertain would be to open and read all scanned documents for all 300 applicants for all scheme years.

f. He had reviewed a sample 15 files to see whether a reference was made on Annex 5c to the rights being held over Adjacent Commons. This involved going into the screens for each applicant and [also] searching for the marking fee receipt or affidavit amongst the other documents. His colleague estimated it would take 46 full-time employees four weeks [to complete this for all 2005 claims within the perambulation][8]. They had revised the figure of 26 employees after taking into account "*efficiency considerations to review all the documents. The figure was forecast using a workforce planning tool which applies generic timings to various tasks*."[9]

g. After this, there would still be a significant resource requirement to investigate each SBI to see if they had been paid on only their New Forest rights or on their Adjacent Commons rights also.

h. At the end of the process, much of the information requested could not be provided because the applicants would never have given it to the RPA in the first place. There was also no guarantee that any applicant will have claimed all the rights they have access to in any given year, so any information gained might

[8] Words in square brackets added for clarification.

[9] The RPA said it had not provided the advice and assistance envisaged in the Decision Notice because it had calculated it would take 26 days to produce, and regarded this as unreasonable presumably either for the purposes of EIR, regulation 9 or 12.

not reflect the true picture. Further, there was no guarantee that all the applicants who named an Adjacent Commons on the claim forms actually had rights over those specific areas. This would need to be checked with the Verderers.

25. On the morning of the hearing, the RPA produced a file of copies of Annex 5c forms, with what was said to be personal information blanked out. They asserted that this was not the requested information, and was provided in goodwill. They had offered these to the Appellant in the days beforehand provided she withdrew her claim.

26. In his oral evidence, Mr Dunnill said:

    a. The papers disclosed were all the Annex 5cs held for the New Forest. It was thought that there were around 270 forms. Around 247 were marked as "New Forest" in column A. Others had named an adjacent common, or referred to the commons generically. (We later learned from the Appellant that the papers did not include her form or others she knew of. The RPA then corrected their position, explaining that the forms disclosed were the list of applicants who had been successful.)
    b. Even where New Forest was marked, he thought this still could relate to Adjacent Commons as the applicants were not obliged to differentiate. He believed the information they held was sufficient to ensure the distribution of funds was accurate and fair, because they did not need to differentiate between commons for these purposes.
    c. Claimants could be awarded more than one type of entitlement. For forms with Adjacent Commons marked on them, the RPA could not tell whether an entitlement amount had been awarded specifically for that common. The RPA only held a final entitlement figure, not a breakdown according to specific commons. To work out which part of the total notional hectares awarded related to a common, it would be necessary to re-engineer the determination of each claim. In other words, an extra and complicated calculation would be needed to respond to the relevant part of the Appellant's request.

27. Under cross-examination, we learned:

    a. No search had been done to see if the information regarding Adjacent Commons was held elsewhere in Defra.[10]

[10] In reply to further directions issued on this point, the RPA stated that whilst they had on file some details of the IACS, they would not be able to compile a list identifying who applied in relation to adjacent commons, as opposed to the New Forest.

b. As regards the time estimate, (*in 24(f) above*), no one had actually timed how long a sample file would take to review. The estimate was based upon there being 15000 scanned documents to check, assuming 50 documents for each of 300 claimants. (Later at the hearing, the RPA said that the Annex 5c forms provided had taken three people one day to produce).

28. At the request of the Tribunal, the following were submitted:

a. A sample full 2005 form;

b. RPA's SPS Guidance for completing the 2005 form. Under the section entitled "*How to complete Annex 5c - Field Data Sheet - Common Land":*

> *"Column A - Common land name:*
> *327. Enter the full name of the common where you farm land.*
> *Column B - CL Number:*
> *328. Each common within the UK has a number allocated to it which begins with the prefix CL. Enter the specific number for each common. These can be obtained from the local authority responsible for the common*."

c. In response to our question on the matter: the RPA confirmed that whilst it had on file some details of the IACS scheme that preceded the SPS, it would not be able to compile a list of farmers who registered for the scheme as having applied in relation to particular adjacent commons.

Legal Submissions and Analysis

29. A summary of the key submissions is set out below. They lacked analysis of the applicability of regulation 13 on personal data, such that the panel invited further submissions to be lodged after the hearing.[11]

30. The Appellant's submissions included:

a. Analysis of Request:

i. It was only the 2005 forms that were relevant to her request as only these established entitlements.

ii. The RPA had acknowledged that some applicants had stated on their forms or affidavits the Adjacent Commons they claimed on. This was part of the information she requested.

iii. The RPA said it would not be possible to provide the information because not everyone claiming on adjacent land would have (or needed to have) identified them as such. But she had requested the information that was

[11] These are contained within each of the paragraphs entitled "personal data" below.

held rather than that which was not possible to give. Besides, those with Adjacent Commons were proud of the fact and would have named them within Annex 5c.

b. Information Held:

i. The 2005 forms stated that *"if you hold common right, please provide details of all rights."* (We presume her position is that this was support that those with common rights on Adjacent Commons would identify them, and therefore, the RPA would hold such information.)

ii. The RPA pre-populated her 2006 form with what they called dummy numbers. For Gorley Common, CL1054 and Ibsley Common, CL1072.

iii. The authority has a duty to verify rights of common for SPS payments, which comprise substantial amounts, and so should hold the information.

iv. The RPA and Verderers entered into a stewardship agreement. As this specifically excludes the Adjacent Commons, the RPA would have kept information verifying which are the Adjacent Commons.

v. Adjacent Commons have discrete CPH numbers, and are individually identified. (Although not explicitly stated, the Appellant may have been postulating that since the RPA allocated CPH numbers for each adjacent common, which they needed to grant IACS subsidies, they ought to have a list of those with commoners rights against CPH numbers.)

c. Personal Data:

i. Scope: She required names of claimants and their addresses; CPH numbers and land parcel co-ordinates, to work out holding sizes; stock type and numbers.

ii. She refuted the Commissioner's postulation that details of an applicant's holding were not within the scope of the request, because they were not on the SPS claim form'.(*See 31b below*). She seemed to be stating that since the SPS entitlements are based on an eligible hectare of land, holdings are relevant. However, she suggested land parcel coordinates may be more acceptable as they were part of the SPS form details.

iii. Fair and Lawful Disclosure: the legitimate interest in disclosure echoed those in Decision Notice FER0112249, relating to agricultural subsidies under the EU's Common Agricultural Policy ("CAP"). Namely:

1. knowing how agricultural subsidies involving large amounts of pubic funds have been spent;
2. the efficient and equitable distribution of public money and the accountability of those making the payment;
3. informing debate on subsidies, which have a high profile.

iv. It was vital to have all information on the perambulation for "*cross compliance, good agricultural and environmental condition and statutory management requirements. e.g for stocking levels/impact on the environment/animal welfare/TB movement rules biosecurity etc*."

v. Policy precedent: The Government were prepared to disclose EU farm subsidies paid under the previous scheme, including details of common rights, areas of land, and names of those holding rights. Payments under the Verderers Countryside Stewardship Scheme should have already been made available to the public.

vi. Claimants may expect data to be disclosed: Part T of the 2005 form tells claimants *"We will protect any personal data we receive in line with the Data Protection Act 1998. We will use the data primarily to support the application that it is for. But we may also use it - in line with the Data Protection Act and in keeping with the safeguards of that Act - for other purposes... We may also disclose the data in order to comply with Freedom of Information Act and the Environmental Information Regulations."*

31. The Commissioner's submissions included:

a. Information Held: The test to be applied is not one of certainty, but the balance of probability. (*Bromley case, para.13*)[12]. The Commissioner and Tribunal are not to consider whether the public authority should hold the information, but whether it did, on balance, do so at the time of the request. In determining this, the Commissioner must, to some extent, accept the truth and reliability of what he is told by the public authority. On balance, the RPA does not hold the information requested:

i. The marking fee receipts can be used to identify Adjacent Commons as a group, but not each adjacent common.

ii. The Commissioner was informed that entitlement to payments is the same irrespective of whether grazing rights pertain to the common land or the Adjacent Commons. Once livestock is legally 'depastured' it can generally graze over common and adjacent land without hindrance.

iii. The Appellant's 2006 form indicated that the RPA did not treat the whole New Forest as a single administrative area. However, the RPA had clarified that the Adjacent Commons had been allocated a 'dummy number' for administrative reasons. The 'dummy numbers' were subsequently deleted, and so were not held at the time of the request.

[12] See front page for case references.

iv. In the original response to the Appellant's notice of appeal, Ms John for the Commissioner stated that it appeared from the documents appended to that notice (i.e. her 2005 and 2006 forms), that the RPA did once hold the requested information. However, she assumed they did not at the time of the request. When the Annex 5cs were produced, the Commissioner's position was that they did not comprise the requested information.

b. Personal Data:

i. Personal Data: The scope of the request included the names and address of claimants and address of the holdings, if different. All of these relate to an identifiable individual and so are 'personal data' within the Data Protection Act 1998 (DPA). The scope did not include the size of holdings, which was not relevant or required for the SPS claim form, numbers/type of stock and CPH holding numbers.

ii. Balancing legitimate interests: Referring to the Baker decision, at paragraph 90, the following factors were relevant in balancing interests:

1. A legitimate interest in knowing how SPS entitlements have been allocated within the perambulation.
2. The Appellant challenges the basis upon which entitlements have been granted in respect of the Adjacent Commons. There is an interest in releasing personal data of applicants whose claims to SPS entitlements were accepted, but not those that were refused, since they received no public funds. The public interest test would necessitate releasing the personal data where applicants were successful to some degree, having claimed in respect of both the New Forest and Adjacent Commons. This was even if the applicant's claim on Adjacent Commons had failed. This was because it was not possible to satisfy the public interest in knowing where public funds were spent through less intrusive means. (This reasoning was based on the RPA's statement that records of entitlement awards were not broken down according to each adjacent common, such that it could not be readily known whether a claim was successful in relation to the Adjacent Commons.)

c. Advice and Assistance: As regards the Commissioner's direction that the RPA contact the Appellant to discuss what it did hold and could disclose:

i. Ms John agreed with the Appellant that the RPA had not taken the steps required of it.

ii. It seemed that the RPA held the sort of information the Commissioner envisaged (but did not order) to be disclosed in accordance with the order to advise and assist. The RPA suggestion that it would take 46 full time employees a month to collate this information was surprising given the Appellant's request was limited to 2005 claim forms. Ms John calculated that with 259 claimants, this equated to three and half days to search each claimant's records. Further, even if this estimation was accurate the RPA did not appear to have considered whether something less onerous than the Commissioner's suggestion was feasible, for instance, on payment of a fee in accordance with regulation 8 of EIR. After having seen the forms provided at the hearing, she concluded that more could have been done to satisfy the Commissioner's request and that given these were produced in only one day, the cost estimate they had asserted seemed somewhat surprising.

32. The RPA's submissions included:

a. Information Held:

i. The RPA's records did not distinguish between Adjacent Commons, and did not need it to. It would take vast amounts of work for the RPA to review individual files to determine whether any forms specified Adjacent Commons. That it would take time to review did not mean it was not held

ii. The scheme for the New Forest was unique and administered in a way that was agreed by the Government. (We note one implication of this would be that the Appellant's references to the SPS in Dartmoor would not be relevant.)

iii. There was no formal relationship or information sharing agreement between the Verderers and RPA.

iv. The information requested regarding "*what entitlements were awarded to whom"* was also not held. The list of entitlements held by the RPA was not broken down according to whether and which Adjacent Commons it related to. It was not possible to produce this information without re-determining each relevant claim.

b. Personal Data:

i. CPH numbers had been redacted from the Annex 5cs that they had provided because, at least for sole traders or partnerships, they constituted "personal data"[13] that could not be released because it would breach the first data protection principle (*fair and lawful processing*),

[13] Under s.1(b) DPA, so that regulations 12(3) and 13 EIR were engaged.

unless any conditions in Schedule 2 of DPA would be met. The only relevant condition could be paragraph 6 (*weighing legitimate interests*).

ii. The RPA had already satisfied the legitimate interests that the Appellant had quoted from Decision Notice FER0112249. They published details of SPS payments:

1. For October 2003 to 2005 - broken down including by region, name and total payment received;
2. From October 2007 - giving names, town or city and postcode suffix, but not the full address.[14]

iii. The disclosures from 2007, were in accordance with Commission Regulation 259/2008. The EC had already weighed the proportionality of releasing this degree of personal information against the need for transparency. The DPA and EIR must be interpreted compatibly with the balance struck by Regulation 259/2008.

iv. It is appropriate to release the information required by Regulation 259/2008 for all aid recipients, but identifying those recipients specifically applying for SPS entitlements in the New Forest or linking names and addresses to the Annex 5c forms already released goes beyond what is necessary, or considered by the Commission or the RPA to be justified.[15]

v. If the RPA were to disclose un-redacted versions of Annex 5c, it may reveal the total number of animals a person grazes on the New Forest. This is precisely the information that the Commissioner did not consider should be disclosed, in the Decision FER0148337 *that the Appellant referred:*

> *"In that case, the applicant sought disclosure of a schedule of individual payments made to the New Forest Verderers under a Countryside Stewardship Agreement between the Verderers collectively and Defra. The ICO considered whether there would be unfairness to the data subjects if the general public were to learn how many animals each verderer depastured, but only because the ICO concluded that it would not "be possible to identify from the individual payment made to a verderer exactly*

[14] The data is found at http://www.cap-payments.defra.gov.uk/Default.aspx.

[15] We note the RPA drew our attention to the Advocate General's opinion on the release of personal data deriving from the Common Agricultural Policy in the case of: *Volker und Markus Schecke GbR v Land Hessen (Case C-92/09) and Hartmut Eifert v Land Hessen (Case C-93/09).* This appears to be on the validity of EC legislation requiring publication of subsidy data online. Since no submissions were made on this, and an opinion is in any event advisory, no further reference is made to it here.

how many animals they graze in the New Forest" (para 54)." [We presume, this should end: "should he order disclosure".][16]

This does not accord with our interpretation of the Decision Notice.

The Task of the Tribunal

33. The Tribunal's remit is governed by section 58 Freedom of Information Act 2000 (FOIA). This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

The Questions for the Tribunal

34. The questions for the Tribunal in this appeal are as follows:

    a. What is the scope of the request?
    b. Does the request fall to be decided under EIR or FOIA?
    c. Does the RPA hold any or all of the information?
    d. To the extent that information is held, is it personal information that should not be disclosed?

A. What is the scope of the request?

Findings of the Tribunal

35. We found that there was a lack of reasoned argument presented as to the scope of the request. We have based our findings on the information before us.

36. The Appellant has agreed that her request was with reference to the 2005 claim forms as these contained the entitlement claims. Accordingly, we interpret as follows:

    a. "*Full details of what entitlements were claimed and by whom on each of the various Adjacent Commons*":
        i. This is limited to details found within the 2005 form, since this is where the details were given.
        ii. On a plain reading, the term '*full details*' relates to the entitlements rather than to the claimants. These would be all details of entitlements claimed that can be found within Annex 5c and any accompanying documents that were submitted, such as marking fee receipts. This includes information in columns A, B, C, D, E, and G (i.e. commons name and CL number,

[16] The paragraph in quotation marks is a quote from the RPA's submission. It does not accord with our interpretation of paragraph 54 of the Commissioner's decision, which is set out in paragraph 69(d) of this decision.

type and number of common rights, confirmation that establishing rights and whether owner of the commons). There appears to be a separate CPH for Annex 5c. Presumably, this relates specifically to the entitlements for commons and therefore should be included. The Appellant seemed to be stating that since the SPS entitlements are based on an eligible hectare of land, holding sizes were relevant, although she would be satisfied with land parcel coordinates. However, for New Forest commons, SPS entitlements were allocated using *notional* hectares, based on animal kind and quantity grazed rather than eligible hectares of land. To the extent land parcel coordinates are within Annex 5c, the marking fee receipts or affidavits, then these are within scope.

iii. "By Whom": "Full details" does not relate to the identity of the claimant. As such, the request is purely for the identity and does not include the claimant's personal identifier number, SBI, telephone number, email address, 'main CPH' or other identifying numbers found in Part A "Claimants Details". It is common ground that it includes the name and business address.

iv. This part of the request includes details of claims on Adjacent Commons that were unsuccessful.

b. "*– and what* entitlements *were awarded to whom":* given the juxtaposition of this part of the request with the previous part, this asks for details of what entitlements were awarded in relation to the adjacent common claims already identified in paragraph 34(a). The Commissioner interpreted this as such in the Decision Notice (*see 17a above*) and this was not refuted. The SBI that is used to identify the subsidy payment would not be within the scope as it is a reference number rather than an entitlement.

c. "*How were the rights of the claimants verified?"*: this asks how claims for entitlements were verified by the RPA.

B. Does the request fall to be decided under EIR or FOIA?

The relevant law:

37. If the requested information is considered 'environmental', the appeal falls to be determined under the EIR. *(Under s.39 of FOIA).*

38. Environmental information is

a. "*any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment, such as... land, landscape and*

natural sites including wetlands, .. biological diversity ...(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;" (See Reg. 2(1), EIR. Emphasis added.)

39. The Commissioner decided that the requested information fell within EIR. This is because he decided that the SPS was a measure likely to affect the land and landscape and designed to protect those elements.

Findings of the Tribunal

40. For the following reasons we agree with the Commissioner:

    a. The request is for information in a material form;
    b. According to the papers submitted, the New Forest perambulation is of primary importance for the preservation of biological diversity in Europe. The Forest has also been designated a wetland of International Importance.[17] It would therefore seem to be 'land' falling within regulation 2(1)(a);
    c. The request concerns the administration of the SPS within the New Forest. The SPS in this area seems to have rewarded grazing activity and recipients are required to maintain the land in good condition for agricultural and environmental purposes. This would seem to be a 'measure' designed to protect and/or that is likely to affect the land within regulation 2(1)(c); and in any event
    d. None of the parties gave us any reason to determine otherwise or objected to the Commissioner's conclusion.

C. Does the RPA hold any or all of the information?

The relevant law

41. Subject to exceptions, a public authority that holds environmental information must make it available on request. (See Regulation 5(1) of EIR.)

42. In deciding whether information is "held" by a public authority for the purposes of both regulation 5(1) of EIR and section 1 of FOIA, previous decisions have found it useful to apply a test established in Bromley, which the Tribunal was referred to:

    "There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records.

[17] Page 3 of 'Verderers' Countryside Stewardship Scheme' – Agreement between DEFRA and New Forest Verderers - May 2005.

This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency ... argued ... that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information..." (Bromley, para 13. Emphasis added.)

43. Since it is difficult to establish with certainty whether a large organisation 'holds' requested information, we agree that we need to decide this 'on the balance of probabilities'. In reaching a decision where the authority has asserted that it does not hold information, we consider the following to be relevant factors in this case: (1) the quality of the initial analysis of the request; (2) the rationale for, extent and method of searches.

Findings of the Tribunal

44. Analysis of the request: The RPA stated that they do not hold the information because they do not know who claimed on which Adjacent Commons. This appears to be premised on the argument that since they did not need the information to allocate entitlements for the area, they do not hold it. This appears to be the extent to which the RPA analysed the request and consequently, they did not appear to proceed with any search at the time of the request.

45. Search: The RPA argued that they did not hold any of the requested information, but they also claimed it would take too much time to review individual files to determine whether any forms specified Adjacent Commons. Essentially they seemed to be saying since a search would take too long, they did not hold the information. They appeared not to realise until late in the appeal that the information being requested would most likely be found in the 2005 forms, given this was the only form which New Forest commoners could use to establish entitlements. Had they recognised this, they may have been able to

focus and therefore speed up a search.

46. The RPA claimed in their submissions that even where an applicant stated in a form that it was claiming on a specified area, this might not be accurate - presumably because the Verderers' records may have stated differently and the RPA had not needed to check this, or because in any case the Verderer records had no legal basis. However, the Appellant asked for details of what entitlements were 'claimed', not 'accurately claimed'.

47. Additionally, the RPA noted that some forms stated 'commons' but did not distinguish between Adjacent Commons, so they did not hold a complete picture. However, as the Appellant confirmed in the hearing, she requested that which the authority holds, not that which it does not hold.

48. We conclude that the RPA's analysis and search were insufficient to properly conclude that they did not hold information. The RPA should have attempted to understand what the Appellant might be said to be requesting. If there was doubt about whether the request made sense, the RPA should have contacted the Appellant from the outset to clarify this. This would have been particularly appropriate given the complexity of the SPS rules, (with different rules for the New Forest), and the confusion of New Forest applicants being instructed to enter the full name of the common where they farmed their land even though the RPA said this was not relevant to their claim.

49. On our analysis, the request may be broken down into:

    i. *Part 1: Full details of what entitlements were claimed and by whom on each of the various Adjacent Commons -*
    ii. *Part 2: and what entitlements were awarded to whom.*
    iii. *Part 3: How were the rights of the claimants verified?"*

Part 1:

50. We analyse the request as follows: Applicants might be said to be (and might have thought they were) claiming *on* specific Adjacent Commons, either because they identified one in their application, or their grazing rights in fact originated from particular adjacent commons:

    a. In relation to the former, we would have expected the RPA to have at least searched within the 2005 forms to see whether Adjacent Commons had been identified either at Annex 5c, dealing with applicants from commoners, or the affidavit, which were only relevant to those grazing on the adjacent commons. (We accept that marking fee receipts did not appear to identify individual adjacent commons.) We know from the information disclosed that some, but not all applicants did identify adjacent commons in these forms.

b. In relation to the latter, this would depend on investigating whether there was a list of commoners and the Adjacent Commons to which their rights attached:

i. In the public domain: the Commissioner found no list.

ii. Within the public authority: Although the RPA seems to have made no effort to search whether it or Defra might hold such information, they have now confirmed they do not hold a relevant list within the IACS subsidy scheme, and this seems to be the most likely place to search.

iii. Within another public authority: it seems likely that the Verderers maintain some sort of record[18] showing entitlements to graze. Given the rights to reduced marking fees for the Adjacent Commons, the list may well specify particular Adjacent Commons over which the grazing rights are exercised. We requested at the prehearing that the parties address whether the Verderers might be regarded as agents of the RPA or part of Defra and therefore required to collaborate to produce information for Part 1. We were told the Verderers were not obliged to provide this information under any existing agreement.

51. On the basis of the above, we conclude that for Part 1, the RPA holds some of the information requested but only within Annex 5c forms and the affidavits. (We note that Part 1 properly construed, includes claimants who were unsuccessful in relation to the Adjacent Commons claim).

Part 2:

52. The Appellant asked what entitlements were awarded for each of the claims on adjacent common.

53. The request might have been construed as asking for the total entitlement the claimants of Adjacent Commons were awarded. However, the Appellant did not seek to argue that and it is a poorer interpretation of the text. In submissions after the hearing, the Appellant stated that she asked to know, amongst other things (1) how many entitlements each applicant has been awarded; and (2) full details of all those who have been awarded SPS entitlements. However, we do not think this is within the scope of the original request on a plain reading of it.

54. Mr Dunnill explained what information was stored on the computer system, and that the information requested in Part 2 could not be obtained from searching the database. Where a claim had contained different types of entitlements, there would be have been

[18] But see footnote 3.

different calculations made within that claim. The RPA would now need to work backwards from the final entitlement figures that were stored on the system, to produce a figure that that could be said to relate to each particular adjacent common claim. He said this was not a simple exercise.

55. In other words, it seems that the RPA were arguing that they did not hold Part 2 information and there is no obligation on a public authority to create information in response to an EIR request. Whilst they could work out what entitlements could be said to have been awarded on each adjacent common, they would need to create this information. This was a complex process given the different types of entitlements and various calculations involved.

56. We accept that save for any applications where the claimant has only applied for SPS in relation to specified adjacent commons, the information was not readily retrievable from the computer system and therefore not held.

Part 3:

57. Mr Dunnill's testified that claims within the perambulation were verified by receipt of the marking fees and affidavits, and that they may have contacted the Verderers to check the validity or accuracy of these. In our view, this is the response to Part 3.

Conclusion

58. In summary, the RPA holds information within Part 1 and 3, and only holds Part 2 information to the extent that any claimants only made no entitlement claims on specified Adjacent Commons.

D. Is the information that is held, personal information that should not be disclosed?

The relevant law

59. To the extent that requested information that the RPA holds contains personal data of anyone other than the requestor, it shall not be disclosed if this would contravene the data protection principles in Schedule 1 of DPA. (Regulations 2(4)(b), 12(3) and 13). It is therefore necessary to consider (a) which parts of the requested information are personal data, and (b) whether disclosure would contravene any data protection principles.

60. A) Personal Data:

a. The definition of **data** includes information "*processed by means of equipment operating automatically in response to instructions given for that purpose*", and recorded information held by public authorities. (s.1,DPA).

b. What makes data **personal** is where it relates to living individuals who can be identified from the data available.(s.1(1) DPA.) Whether it "relates to" the person identified depends on context and whether the information is sufficiently personal and focused on him/her:

> *"... In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity." (Durant, para.28).*

61. B) Data Protection Principles (DPP)

a. The first DPP requires: *"1.1Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met" (Sched.1, para1 DPA)*

b. We are to interpret 'fair' in accordance with principles including:

> "*1 (1)... regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed*…."

c. The conditions in Schedule 2 include:

   i. *Condition 1: "1.The data subject has given his consent to the processing."*

   ii. *Condition 6: "6.(1) 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."*

d. In this context, the type of "processing" we are concerned with is disclosure to the Appellant as a member of the public. The 'data subject' means the claimants whose details may be disclosed.

e. Condition 6 is satisfied if the legitimate interests of the public outweigh those of the claimants in protecting their personal data. In this reasoning, we follow the Baker decision:

   i. "...*Paragraph 6 requires a consideration of the balance between: (i) the*

legitimate interests of those to whom the data would be disclosed which in this context are members of the public (section 40 (3)(a)); and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs. However because the processing must be 'necessary' for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should the personal data be disclosed." (Baker, Para 90).

Which Parts of the Request are Personal Data?

Findings of the Tribunal

62. None of the parties gave extensive analysis as to what would or would not be considered personal data. It seems common ground that names and business addresses are personal data, and we agree. We were not told whether anyone could identify a claimant from being given a CPH reference. If so, we would consider this too to be personal data.

63. We are satisfied that none the remaining information that we have found to be both within the scope of the request (in 36(a)(ii) and 36(c)), and held, is personal data. This is because if it were provided on its own (without the names and addresses), no one of sufficient proximity could be identified from it.

64. We note that where applications did not relate to sole traders or partnerships, the RPA accepted the all information within the relevant parts of the application were not personal data.

Would disclosure of personal data contravene the data protection principles?

65. The first DPP provides that personal data must be processed fairly and lawfully and may not be process unless at least one condition in Schedule 2 is satisfied.

66. As regards condition 1, we do not think the claimants gave unrestricted consent to disclosure because the 2005 forms warned claimants that their data may be disclosed to comply with the EIR. It is reasonable to assume an implicit consent provided disclosure complies with EIR.

67. As regards condition 6, the main **legitimate interests** of the public in the disclosure of the personal information, may be summarised as:

    a. According to the Commissioner, knowing how SPS entitlements have been allocated within the perambulation, and in how subsidy payments have been distributed on the basis of those allocations.
    b. According to the Appellant:

i. Knowing how agricultural subsidies involving large amounts of pubic funds have been spent;
ii. In the efficient and equitable distribution of public money and the accountability of those making the payment;
iii. Subsidies have a high profile and disclosure would inform debate.
iv. Knowing what area is farmed by the applicant is vital for "*cross compliance, good agricultural and environmental condition and statutory management requirements. e.g for stocking levels/impact on the environment/animal welfare/TB movement rules biosecurity etc*."

68. No party analysed in any detail the main prejudices to the "rights, freedoms and legitimate interests" of the claimants that disclosure of personal data would cause. It is clear that the main concern would be that the disclosure would be releasing personal data of claimants, as data subjects and would therefore prejudice their right to privacy.

69. As regards the **weight** of the public interest in disclosure, against the need to protect privacy, arguments put to us were:

a. The Commissioner considers that the most weighty factor to be taken into account is a right to transparency in knowing how public funds are spent: In the Commissioner's view, this public interest outweighs privacy rights for successful SPS claimants, because public funds would be received.
b. The RPA accepted the validity of certain interests cited by the Appellant, but regarded these as satisfied by the RPA's general publication of information on all aid recipients, in accordance with Regulation 259/2008. However, to identify recipients specifically applying for SPS entitlements relating to the New Forest would go beyond what is necessary. The RPA appeared to consider the further disclosure relating specifically to the Adjacent Commons part of the New Forest would bring further focus and this was unwarranted.
c. The RPA also asserted that the DPA and EIR must be interpreted compatibly with the balance struck by Regulation 259/2008. Since the Commission have already decided the appropriate balance to strike between interests in releasing personal information and the need for transparency, we should not go further.
d. The RPA were concerned that disclosing the personal data would result in disclosing total number of animals a person grazed on the New Forest, which it viewed as a particular invasion of privacy. The RPA claimed that the Commissioner had agreed that this would be problematic based on a previous Decision Notice (FER0148337), but we interpreted the Commissioner as saying the opposite. The relevant paragraph 54 stated:

"*It is the Commissioner's view that there would be minimal impact and therefore no unfairness to the data subjects if the general public were to learn how many animals each verderer depastured. The Commissioner notes that there are set amounts per animal, these do not vary depending upon the member of the scheme and that there is a maximum amount of animals per member. The set amount per animal is also different depending upon the type of animal depastured and for some animals there are no payments. The Commissioner therefore does not agree that it would be possible to identify from the individual payment made to a verderer exactly how many animals they graze in the New Forest."*

*(*Para. 54 of FER0148337. Emphasis added*).*

e. The Appellant argued that it is Government policy to disclose EU farm subsidies, including the details of common rights, the area of land, and the name of person who holds those rights. She argued that enabling scrutiny of a public authority's role and actions, and allowing the public to understand its decision making process enhances transparency, should be given more weight than the privacy rights of the recipients.

Findings of the Tribunal

70. We have considered the interests identified in 67 above as follows:

a. Transparency and Accountability: There is a general public interest in enabling scrutiny of a public authority's role and actions, and allowing the public to understand its decision making process. Responding to requests that members of the public ask and therefore consider of relevance is a significant means of facilitating transparency and understanding as to the workings of the public authorities. Informing the public of how public funds are to be distributed within the SPS scheme enables scrutiny. From the documents submitted, we have seen that the administration of the SPS payments involved substantial sums and some controversy. Given there were separate rules for commoners within the New Forest, and again, these rules met with controversy, there is reason to disclose and provide focus to these entitlements.

b. Efficient and equitable distribution of public money and the accountability of those making the payment: We do not think that disclosure of the personal data would contribute meaningfully to knowledge of the efficiency and equity of the scheme. Disclosure of the information may help the Appellant to work out

numbers of successful/unsuccessful claimants in relation to each commons, but in the absence of clear argument, we are sceptical as to what real value there is in disclosing the personal data (in particular personal names) associated with these numbers. (Whilst the Appellant has questioned the fairness of distributions, it is already known that the RPA awarded entitlements for the area based on actual grazing rather than registered rights, and this appears to be at the root of what the Appellant considers unfair. Applicants who were successful under the previous CAP scheme may have been unsuccessful under this one, and this might affect the value of their holdings).

c. Informing debate: it is possible that the disclosures will help to inform debate, but it is unclear in what way.

d. Compliance: As for the Appellant's assertion that knowing what area is farmed by the applicant is vital for "*cross compliance, good agricultural and environmental condition and statutory management requirements",* we were not given any arguments to support this claim. It would seem to be a valid interest to be able to identify aid recipients who are required to maintain the land in good condition. However, given we were told there were no boundaries to grazing in the area, it is not clear what value would be brought by disclosing of personal data for only one group of recipients.]

71. In deciding whether the interests of the public as listed above outweigh the privacy rights of the claimants, we consider the following:

    a. We accept the Commissioner's argument in 69(a). The privacy rights of non-recipients should prevail where no public funds have been awarded to them.

    b. We accept that disclosing information related to the adjacent commoners in particular brings this group within a particular focus. However, given these would still be a group receiving public funds, we consider the interest of transparency prevails.

    c. We have not been given compelling arguments or referred to any law that might substantiate the assertion that we are restricted in our interpretation of EIR by Regulation 259/2008. In any event, the context of the EC's decision on the proper balance to be struck in requiring disclosures is different to ours. The EC was not considering the SPS rules related to the New Forest.

    d. We do not accept the RPA's position that disclosing the numbers of animals grazed by a person receiving is a particular invasion of privacy. Again, the RPA provided no strong analysis, save for quoting the Commissioner's Decision Notice FER0148337, which in reality appears to support our view.

e. We would add the following considerations:

i. The applicants were claiming in a business capacity. We think this significantly weakens the potency of the privacy intrusion.

ii. Taking into account the interpretation of "fairly" set out in 61(b) above, claimants had been advised that, whilst data protection principles would apply, some information might be disclosed under Freedom of Information or EIR provisions.

72. In short, we consider the strongest public interest identified is transparency and accountability of public authorities, and the SPS process in particular - given its intricate (and confusing) rules, which clearly were the focus of controversy.

73. However, in view of the publications the RPA already undertake, and our scepticism of what value the disclosures will provide when made specific to Adjacent Commons, we do not consider this interest particularly strong.

74. Against this, we have been given few compelling reasons to regard the disclosure of the personal data as a particular interference with privacy or private life of the claimants. This is particularly where they are acting in a business capacity, are in receipt of public funds and are required to contribute positively to the environment, as a condition of receipt of those funds.

75. Weighing the respective interests and taking account all the circumstances of the case and in particular the factors we have mentioned above, we have therefore concluded that where public money has been spent, the interest in transparency and accountability outweighs the legitimate right to privacy of claimants. Therefore:

a. For claimants who were completely unsuccessful, their personal data should not be disclosed.

b. For those who were or may have been successful (having been awarded some entitlements which the RPA cannot easily identify as specific to the Adjacent Commons), the disclosure of the business address and CPH number specific to Annex 5c is proportionate to the legitimate aim pursued. The names of the claimants who are acting as individual sole traders or in partnership should be withheld as unnecessary to that aim.

<u>Other Observations: On Charging For Information</u>

76. When the RPA lodged further submissions on personal data, at the request of the Tribunal, they ended with the following paragraph

"Finally, the RPA notes that if it is required to disclose any further unredacted copies of Annex 5c, it would have to incur an extra cost over and above the approximately £600 already incurred; the RPA would have to charge for this, given the work it has already undertaken in disclosing Annex 5c."

77. Regulation 8(1) of EIR allows a public authority to charge an applicant for making information available subject to certain conditions, including:

> *"A public authority shall publish and make available to applicants— (a) a schedule of its charges; and (b) information on the circumstances in which a charge may be made or waived." (Regulation 8(8)EIR).*

78. When asked for a copy of its schedule of charges, the RPA replied that:

    a. Its website states: "*How much do publications cost? Most information is free, however some charges may apply which you will be advised of in writing before we process your request*."
    b. It adopts the Defra publicly available guidance on this:
        i. "*The EIR fee guidelines have been aligned to the FOI fees regime wherever possible. Under the terms of the Directive, the EIRs require that: (i) information made available for inspection, and explaining where information is made publicly available, should be free of charge (ii) any charges be 'reasonable'.*
        ii. *Defra guidance suggests that requests should be free up to the same appropriate limit as FOI requests - £600 for central government, £450 for local government. Above that limit, charges for EIRs will need to meet the EU requirement of reasonability*."

79. We make the following observations:

    a. Since the RPA has not published and made available to the Appellant a schedule of charges, seeking to charge her for providing the information would not accord with regulation 8(8);

    b. It would also not accord with the RPA's stated policy of providing the applicant with charges before processing the request. It would be unreasonable to seek to inform her of charges after she has spent well over a year progressing her request;

    c. In the course of the hearing there was a lack of credible and consistent evidence presented by the RPA on assessing the cost of providing such information.

80. In the light of these observations we would consider it would be unreasonable for the RPA to impose any charge for providing the information we have ordered to be disclosed, and

would not accord with regulation 8(8).

Other Observations: On Conduct

81. We have been concerned by the lack of care with which the RPA conducted its case. This included:

    a. Failing to either appeal or comply with paragraph 48 of the Commissioner's Decision Notice (FER0253845) in that the Appellant was never invited to discuss what sort of information it holds and can provide;

    b. Annex 5c forms: 1) Providing inaccurate information as to whether the forms disclosed at the hearing were the complete amount held – such that this significant evidence was only released after cross-examination; 2) Failing to provide the Annex 5cs until the day of the hearing, where they were clearly relevant to the case notwithstanding that during the prehearing many weeks earlier the Judge had asked for examples of such claim forms to be supplied as part of the RPA's evidence;

    c. Providing inconsistent, unsubstantiated and seemingly preposterous assertions as to the time it would take the authority to provide the information held in relation to the Appellant's request[19];

    d. Failure to provide other information requested by the Judge in the prehearing, until it was repeatedly requested by the panel – e.g. a complete claim form, and

[19] They estimated it would take 46 full-time employees four weeks to look at the screens to see whether 2005 forms specified an adjacent commons.

- There was no anaylsis of how this figure was reached. We were told "*the figure was forecast using a workforce planning tool which applies generic timings to various tasks*", but no one had actually timed how long one file took.
- The estimate was based upon there being 15000 scanned documents to check, assuming 50 documents for each of 300 claimants. On this calculation, it would nearly 26 minutes for an official to look at one page of a document, based on a 7-hour working day.
- However, we were given no evidence to support that there were 50 documents for each claimant. On the evidence before us, we have seen that the 2005 forms were 24 pages, and were not densely filled. However, the only relevant pages would be the front page, the Annex 5c and any affidavit. An estimate of 4 pages for each claimant would be more realistic. Even if there were 300 claimants, the RPA estimate would mean it would take an official an average of 5 hours 22 minutes to look at one page on the screen, to see whether the claimant had identified an adjacent commons.
- The RPA's estimate is inconsistent with the RPA having managed to produce the Annex 5cs for successful claimants within one day, which they said took three employees to do.
- Even within the same documents the RPA gave different numbers for the total numbers of claimants/claim forms held in relation to the New Forest, varying from 259 to 300.

substantive information on the nature of the relationship between Defra/RPA and the Verderers.

Conclusion and remedy

82. For the reasons set out above, we find that the RPA holds part of the information requested, and must provide it in accordance with the substituted decision notice.

83. Our decision is unanimous.

84. Under the relevant rules of procedure an appeal against this decision on a point of law may be submitted to the Upper Tribunal. A party wishing to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed:

Judge Taylor

19 August 2010

IN THE FIRST-TIER TRIBUNAL **EA/2010/0032**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

RULING ON APPLICATION FOR PERMISSION TO APPEAL

Introduction

1. Ms Bickford-Smith (the "Appellant") has made an application for permission to appeal to the Upper Tribunal against a decision of the First-tier Tribunal (Information Rights) dated 19 August 2010. That decision allowed the Appellant's appeal in part against a Decision Notice issued by the Information Commissioner (the "Commissioner"), of 21 December 2009.

Background

2. The Appellant had made a request for information from the Rural Payments Agency ("the RPA") (An executive agency of the Department for Environment, Food and Rural Affairs) about claims for subsidies made in relation to the 'Adjacent Commons' in the New Forest.

3. The Tribunal broke down the request into parts:

    i. Part 1: Full details of what entitlements were claimed and by whom on each of the various Adjacent Commons
    ii. Part 2: and what entitlements were awarded to whom.
    iii. Part 3: How were the rights of the claimants verified?

4. It found that:

    i. For Part 1, the RPA held some of the information requested, to the extent it was within the Annex 5c forms and the affidavits.
    ii. For Part 2, where claimants had only made one claim and these were for specified Adjacent Commons, the information was held, but in other cases, the information was not readily retrievable from the computer system and therefore not held.
    iii. Part 3 was held and provided by witness testimony, made during the appeal to the Tribunal.

5. The Tribunal then considered whether the information that was held was (1) personal data and (2) if so, whether it should not be disclosed by virtue of regulation 13 of the Environmental Information Regulations 2004 ('EIR'). It found that:

    i. The requested information that was held and was not personal data should be disclosed.
    ii. Certain of the requested information relating to sole traders or partnerships was personal data.[1]
    iii. In relation to that information that was personal data:
        1. It should be withheld where it related to claimants who were completely unsuccessful;
        2. Names of claimants acting as individual sole traders or in partnerships should be withheld;

[1] See para. 62 of the Decision and its application at para.75 and in the Substituted Decision Notice.

3. In all other cases (ie where claimants had been awarded some entitlements whether through being completely or partially successful in their applications), the business address and CPH number specific to Annex 5c should be disclosed, and the names withheld, unless the claimants were not making claims as sole traders or partnerships, in which case the names should also be disclosed.

6. Therefore, the Appellant has been unsuccessful in her appeal only insofar as:

   i. it related to information that the Tribunal found was not held, or
   ii. the information was considered to be personal and either
      1. the claimant had been totally unsuccessful in its subsidy application - the personal data was to be withheld; or
      2. was a sole trader or partnership - the names were to be withheld.

7. The Tribunal ordered certain of the personal information to be withheld. This was because it decided that the legitimate interests of the public did not outweigh those of the claimants in protecting their personal data.

The Rules

8. The right to appeal arises out of section 11 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007"). This provides that any party to a decision of a First-tier Tribunal has a right of appeal to the Upper Tribunal on any point of law but the right may only be exercised with permission. Under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules"), permission to appeal must first be sought from the relevant First-tier Tribunal.

9. Under Rule 42, applications must identify the alleged error or errors of law in the decision and state the result the party making the application is seeking.

10. Rule 43 provides that on receiving an application for permission to appeal, the Tribunal must first consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 44. Rule 44(1) provides that the Tribunal may only undertake a review if it is satisfied that there was an error of law in the decision. If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action, the Tribunal must consider whether to give permission to appeal to the Upper Tribunal. An appeal to the Upper Tribunal lies only on a point of law.

11. It is noted that the distinction between an error of law and an error of fact is not always clear-cut. In limited circumstances a finding of fact may be set-aside on the ground that this was an error of law. For instance, making a perverse or irrational finding on a factual point that has a material bearing on the outcome, or giving weight to immaterial facts can amount to errors of law. An Upper Tribunal can overturn a pure finding of fact on the ground of error of law where it is perverse in the sense that it appears the lower tier "have acted without any evidence or upon a view of the facts which could not be reasonably entertained."[2]

12. In addition, Rule 41 allows the Tribunal to set aside a decision or part of a decision and to remake the relevant part in certain circumstances where it is in the interests of justice to do so.

[2] See the Commissioners for HMRC v Brander [2010] UKIT 300 (TCC) at 55-56 quoting Viscount Simonds in Edwards v Bairstow [1956] AC 14

This Application

13. The first step is to consider whether the Appellant has satisfied the requirements set out in rule 42 in identifying any errors of law in the First-tier Tribunal's decision, and stating what result she is seeking.

14. Whilst the Appellant has submitted an eighteen-page addendum to her application, it is largely not clear from this or the fact that she was mainly successful in her appeal, what result she is now seeking. It would seem that she is looking for a statement from the court that farmers who had commons rights in the New Forest could register those rights under the Commons Registration Act 1965, and that these would be quantifiable and have "legal effect". The Appellant seems to consider any statements to the contrary in the Decision, to be an error of law.

15. I am satisfied that this was not an error of law. In reaching this conclusion, I note that:

    a. The facts that the Appellant disputes are not material to the outcome of the appeal. Further, the only statement that the Tribunal made as to the legal effect or lack of it of the common rights in the New Forest was in the "Background" section of the decision. (The other reference was repeating the testimony of the witness, and not a statement made by the Tribunal itself).
    b. Even if the Appellant's requested statements were accurate, they would have had no bearing on our findings, as summarised in paragraphs 2 to 7 above[3].
    c. On the basis of the evidence that was before the panel, I am satisfied that we correctly interpreted the facts and properly construed the material presented to us, including the contested sentences. In addition, I am satisfied that our interpretation of the facts was a reasonable one based on what was presented to us.
    d. During the appeal process, it was explained to the Appellant many times that her dispute as to the fairness of the method of allocation of subsidy payments, and of her own failed application for these particular subsidies was beyond the ambit of the Tribunal, and as such this was not the appropriate forum to give air to any such grievances. As noted in paragraph 8 of the Decision:

        > "*Much of the information the Appellant provided for this appeal related to this refusal and her dispute as to the fairness of the method of allocation. To the extent it is not within our ambit, we do not repeat it below.*"

        In a similar way, asides from part of section 8, all paragraphs in the Appellant's application make no reference and have no relevance to our findings, and instead relate to the Appellant's grievances. They are beyond the scope of the Tribunal, and are not repeated here. They also contain new evidence, which in any event would not affect are findings.

[3] Whilst the findings are summarised generally here, for the detailed findings, it is necessary to read the Decision including the substituted Decision Notice.

e. Section 8a. states:

> **8. EU Regulations.**
>
> a. At paragraph 70 (d) I may not have made it clear to the Tribunal that knowing the identity of each farmer and what area is farmed by every applicant is not just vital it is a condition of EU subsidy payment. (Cross-compliance, good agricultural and and environmental condition and statutory management requirements)
> (and as required on Dartmoor where most of the 92 separately registered commons are 'without physical boundaries between them'. Page 161-162 of bundle)

"

I have considered whether this could be of relevance to the finding summarised in paragraphs 5(iii)2 and 7 above, in that the Tribunal ordered the names of claimants awarded subsidies who were applying as individual sole traders or in partnerships to be withheld. This was because the Tribunal decided in respect of of disclosing these names, the legitimate interest of the public did not outweigh those of the claimants in protecting their personal data. I do not think the Appellant has identified an error of law in this regard, because:

i. This is new evidence that was not substantiated either at the oral hearing in the presence of the other parties or in earlier submissions.
ii. This new evidence is also not substantiated in this application such that the information as presented would have made no difference to the Tribunal's assessment of the legitimate interests in its findings;
iii. It is not clear whether the Appellant is stating that the EU conditions required the public to know the identity of successful claimants as opposed to the RPA, as administrator of the scheme;
iv. It is not clear that "identity" would mean the name, as opposed to the business address and CPH reference. The Tribunal satisfied itself that for sole traders, the disclosure of business address and CPH reference numbers was sufficient to satisfy what legitimate interests of the public there were - which in any event it found not to be strong;
v. There is no analysis as the weight to be given by this Tribunal to any EU subsidy condition, or where this condition derives from. The RPA made submissions in relation to Commission Regulation (EC) No 259/2008, which is stated to lay down "*the rules for the application of Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD)*". In relation to this, the Tribunal found at paragraph 71(c) of the Decision that:

> "*We have not been given compelling arguments or referred to any law that might substantiate the assertion that we are restricted in our interpretation of EIR by Regulation 259/2008. In any event, the context of the EC's decision on the proper balance to be struck in requiring disclosures is different to ours. The EC was not considering the SPS rules related to the New Forest*."

Paragraph 71(c) would be relevant to this point also.

f. Having reread the decision, and considered the procedures adopted by the panel, there are no other reasons why the Tribunal made any error of law.

16. To conclude, the Appellant has not clearly articulated what results she seeks such that the formal requirements of rule 42 are not satisfied. Assuming that the results sought could be said to be (a) to correct any statements about the legal validity of

any register that there might be for New Forest commoners in relation to subsidies; and (b) to reverse the finding the that names of traders and partnerships who successfully claimed subsidies should be withheld, I am satisfied that the Appellant has not disclosed any errors of law. Even if she had, taking into account the overriding objective in rule 2(a), and that the Tribunal found there were not strong legitimate interests in disclosure of what was disclosed let alone of the particular names of successful sole traders and partnerships, I would not have been satisfied of the need to review the decision in accordance with the procedures set out in rule 44. I do not give permission to appeal.

17. Under Rule 23(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, the Appellant has one month from the date this Ruling is sent to her to lodge an application for permission to appeal directly with the Upper Tribunal by sending it to: The Upper Tribunal (Administrative Appeals Chamber) 5th Floor, Chichester Rents 81 Chancery Lane London WC2A 1DD. DX:0012 London/Chancery Lane.

Other Matters

18. It is noted that whilst the Appellant's application was made on 14 September, it did not reach the Information Rights office of the Tribunal until some time later, and an apology was sent to the Appellant.

19. On 17 September, the Appellant wrote to the Tribunal office to complain that the RPA had not disclosed the information she expected to receive as a result of the substituted notice. It seems from her letter that the RPA may not have fully complied with the Decision and substituted Decision Notice. (The Appellant presumably acts as a sole trader or partner and therefore falls within paragraph 3 of the Decision Notice.) The findings of the Tribunal have been broadly summarised above. It is for the Commissioner's office to address non-compliance of a Decision Notice. If she has not already done so, the Appellant should contact them. In this regard, it is hoped that the Commissioner will not consider there has been any undue delay in view of the Appellant having contacted the Tribunal office promptly.

Signed

Tribunal Judge
Claire Taylor **29 October 2010**