

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 4 February 2008**

**Public Authority:** Verderers of the New Forest  
**Address:** The Queen's House  
Lyndhurst  
Hampshire  
SO43 7NH

### Summary Decision

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The complainant requested the Verderers of the New Forest to release a schedule of the individual payments made to elected verderers participating in the Countryside Stewardship Scheme and a copy of legal advice it obtained from its lawyer concerning this activity and its compliance with the New Forest Act 1877. The Verderers considered the request and refused to disclose the requested information citing sections 40 and 42 of the Act. The complainant remained dissatisfied and approached the Commissioner. After considering the case and the information being withheld, the Commissioner decided that the requested information was environmental information and therefore the complainant's request should have been dealt with under the EIR. The Verderers reconsidered the request under the EIR and claimed that exception 12(5)(b) and regulation 13 applied to the requested information. The Commissioner considered the arguments presented by both parties. In respect of the legal advice requested, the Commissioner concluded that the Verderers were correct to rely on exception 12(5)(b) and that the public interest favoured maintaining this exception. However, in respect of the individual payments made to elected verderers, the Commissioner concluded that there would be no unfairness to those verderers if the information was released and that disclosure would not contravene the Data Protection Act. The Commissioner has therefore ordered the Verderers to release this information to the complainant within 35 days of this Notice.

### The Commissioner's Role

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1. The Environmental Information Regulations 2004 (the "EIR") were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR

shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part IV of the Freedom of Information Act 2000 (the "Act") are imported to the EIR.

## Background

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2. The Verderers of the New Forest (the "Verderers") are responsible for protecting and administering a former hunting area in Hampshire known as the New Forest. The Verderers derives its offices, powers and responsibilities from the New Forest Act 1877 and comprises of the Official Verderer, five elected verderers and five appointed verderers. This Notice concerns The Countryside Stewardship Scheme (the "Scheme") and the requested information relates to the application of section 16 of the New Forest Act to elected verderers participating in this scheme. The Scheme is a 10 year agreement between DEFRA and the Verderers which recognises and rewards the contribution made by commoners to the ecology of the New Forest. In return for membership and depasturing their animals for laid minimum periods, commoners receive an annual payment for each animal in recognition of the grazing benefits their animals provide in maintaining the New Forest habitats.

## The Request

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3. As the complainant is of the view that elected verderers cannot participate in the Scheme by virtue of section 16 of the New Forest Act, he contacted the Verderers on 8 August 2006 to request that it release the following information in accordance with section 1 of the Act (the full text of this section of the Act and any other exemptions/exceptions referred throughout this Notice can be found in the Legal Annex section at the end of this Notice):
  - i. "Copies of all correspondence passing between the [Official Verderer] and DEFRA and DEFRA lawyers/DEFRA officials generally (including emails) relating to the application of S.16 of the New Forest Act 1877 to Verderers, and candidates for election as Verderers, who are parties to the Verderers' Countryside Stewardship Scheme."
  - ii. "Copies of any advice/opinions from other sources other than DEFRA concerning the application of S.16 of the New Forest Act to the Verderers' Countryside Stewardship Scheme."
  - iii. "Schedule of all sums paid to individual Verderers under the provisions of the Scheme....."
  - iv. "Schedule of all steps taken and enquiries made to ascertain whether any Verderer has made a "profit" under the Scheme and copies of any documents relating to this issue."

4. The Verderers responded on 15 August 2006 as follows:
  - i. It disclosed all correspondence between the Official Verderer and DEFRA lawyers/officials concerning the application of section 16 of the New Forest Act to those verderers participating in the Scheme to the complainant.
  - ii. Concerning any advice/opinions from other sources than DEFRA, it informed the complainant that any such correspondence would be privileged and therefore exempt from disclosure under the Act.
  - iii. The Verderers disclosed a statement to the complainant, which identified those verderers that have, or may, benefit under the Scheme together with the total amounts paid or set aside in relation to their contribution. It advised the complainant that it was unwilling to disclose individual payments to each verderer as it was of the view that this would be “inappropriate”.
  - iv. The Verderers confirmed that as a result of the clarification provided by DEFRA (contained within the information disclosed under part i) it was not considered necessary to make any enquiries to ascertain whether verderers have made a “profit” under the Scheme.
5. The complainant contacted the Verderers on 21 August 2006 to raise concerns about the way his information request had been handled. Concerning its decision to withhold individual payments made to verderers under the Scheme, the complainant asked the Verderers to explain in more detail why such disclosure would be “inappropriate”. In relation to part ii of his request, the complainant asked the Verderers to confirm whether any advice/opinions were sought from other sources than DEFRA as this was unclear from its Refusal Notice. The complainant also made two further requests for information. Although similar in nature to the information request made on 8 August 2006 and addressed in future correspondence, these requests do not form part of the complaint made to the Commissioner.
6. The Verderers treated the complainant’s letter dated 21 August 2006 as a request for an internal review and issued its further response on 7 September 2006. It informed the complainant that it remained of the view that individual payments made to elected verderers under the Scheme should not be disclosed, as this constitutes third party personal data which is exempt from disclosure under section 40 of the Act. Concerning any further advice/opinions it may have sought from sources other than DEFRA, it advised the complainant that such correspondence would be covered by legal professional privilege and would therefore be exempt from disclosure under section 42 of the Act. The Verderers also responded to the complainant’s new requests for information dated 21 August 2006.
7. As the complainant remained dissatisfied with the outcome of the internal review process, he approached the Commissioner on 9 October 2006 to request that his complaint be given formal consideration.
8. Although they do not form part of this complaint, the Commissioner noted that the Verderers had not adequately responded to some of the complainant’s new

requests made at different stages throughout the correspondence listed above. He also noted that the Verderers had not issued an adequate response to element ii of the complainant's initial request as outlined in paragraph 3. The Commissioner therefore wrote to the Verderers to request that a further response be issued to the complainant addressing all outstanding matters prior to any formal investigation being commenced.

9. The Verderers issued its further response on 18 December 2006 addressing all outstanding matters. Concerning element ii of the complainant's initial request, it advised the complainant that in accordance with section 42(2) of the Act it wished to refuse to confirm or deny the existence of any further advice/opinions sought from other sources than DEFRA.
10. The complainant forwarded a copy of the Verderers' response dated 18 December 2006 to the Commissioner on 19 December 2006. As the Commissioner was now satisfied that all outstanding issues had been addressed, the complaint was accepted for formal consideration and awaited allocation to a case officer.

## **The Investigation**

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### **Scope of the case**

11. As it appears that parts i and iv of the complainant's information request were addressed by the Verderers sufficiently and these elements were not raised with the Commissioner by the complainant, the Commissioner's investigation has focused on the Verderers' response to the following requests:
  - Copies of any advice/opinions obtained by the Verderers from other sources than DEFRA concerning the application of section 16 of the New Forest Act to the Scheme (part ii of the information request).
  - A schedule of all payments to individual verderers under the Scheme (part iii of the information request).
12. Although the Council responded to the request under the Act and initially the Commissioner's investigation focused on the application of section 40 and 42 of the Act, once a copy of the withheld information was provided, it became clear to the Commissioner that the information requested fell within the scope of the EIR under regulations 2(1)(a) and 2(1)(c).
13. As stated previously the full text of the relevant regulations can be found in the Legal Annex section at the end of this Notice. However, briefly, subparagraph 2(1)(a) of the EIR defines environmental information as material on the state of the elements including land and landscape. Subparagraph 2(1)(c) extends this definition to include information on measures such as policies, legislation and activities affecting or likely to affect the elements described in subparagraph 2(1)(a) as well as measures or activities designed to protect those elements.

14. It is the Commissioner's view that the Scheme is a measure that affects or is likely to affect the elements outlined in subparagraph 2(1)(a) of the EIR, in this case the land and the requested information (any advice/opinion from other sources than DEFRA and the individual payments to verderers under the Scheme) is information on that measure.
15. For the reasons explained in paragraphs 13 and 14, the Commissioner is satisfied that the request falls within the scope of the EIR. His investigation has therefore sought to establish whether the Verderers acted appropriately by withholding the remaining information under the provisions of the EIR.

### **Chronology of the case**

16. The Commissioner wrote to the Verderers on 22 August 2007 to request a copy of the withheld information and a further explanation as to why it felt this information remained exempt from disclosure.
17. The Verderers responded on 6 September 2007. It provided a schedule of the individual payments made to verderers under the Scheme and other relevant correspondence but declined to provide any further information in relation to part ii of the complainant's initial request without appropriate guidance from the Commissioner. It referred back to its previous decision and reiterated that it would regard such correspondence as privileged and therefore exempt from disclosure under section 42 of the Act.
18. The Commissioner wrote to the Verderers on 8 November 2007 to provide some general guidance relating to the application of section 42 of the Act. The Verderers were advised of the exceptional circumstances in which the Commissioner may agree that the duty to confirm or deny applies to the requested information and asked it to reconsider its application of section 42(2) of the Act to part ii of the complainant's request. The Commissioner confirmed that if on reflection the Verderers no longer wished to rely on section 42(2), it would then need to inform the complainant whether any relevant information was held and if it was, whether it was willing to release this to him or remained of the view that the requested information should be withheld.
19. The Verderers responded on 16 November 2007. It confirmed that it had reconsidered its application of section 42(2) of the Act and was of the opinion that this does not apply to the requested information. It stated that it had now written directly to the complainant to confirm that it does hold advice/opinions from other sources than DEFRA and that it obtained legal advice from its lawyer at the request of the Official Verderer. However, it remained of the view that this should not be released. The Verderers forwarded a copy of this legal advice to the Commissioner to enable him to now consider the application of section 42(1) to this information.
20. The Commissioner reviewed the outstanding information and as explained in paragraphs 12 to 15 concluded that the information was environmental information. The Commissioner therefore wrote to the Verderers on 23 November

2007 to inform it of this and to request that it reconsider the complainant's request under the EIR.

21. The Verderers responded on 3 December 2007. It confirmed that it accepted the requested information was environmental information and explained that it wished to rely on very similar exceptions under the EIR to those previously quoted under the Act; these being exception 12(5)(b) and regulation 13.

## Analysis

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### Procedural issues

22. As the Verderers failed to identify that the requested information was environmental information it dealt with the complainant's request under the Act. As a result the Verderers issued a Refusal Notice citing the exemptions under the Act for its reasons of non disclosure. Regulation 14(3) of the EIR states that if a request for environmental information is refused by a public authority it should issue a Refusal Notice which specifies the exception(s) being relied on and the matters the public authority considered in reaching its decision with respect to the public interest test. As the complainant's information request was dealt with under incorrect regime, the Refusal Notice did not specify the exception being relied on under the EIR and the public interest arguments considered by the Verderers. The Commissioner has therefore concluded that the Council was in breach of regulation 14(3) of the EIR in this case.
23. The Commissioner notes that the EIR contains a direct equivalent to section 40 of the Act; this being regulation 13 and he will shortly proceed to consider the submissions made by the Verderers as to why the requested information outlined in part iii of the complainant's initial request should not be disclosed. However, the Commissioner notes that there is no direct equivalent of section 42 of the Act in the EIR. He notes that the Information Tribunal concluded that regulation 12(5)(b) is similar in purpose to section 42 of the Act in the hearing of *Kirkaldie v Information Commissioner and Thanet District Council (EA2006/001)* ("Kirkaldie"). This case also considered the implications of the request being addressed under the incorrect legislation. The tribunal confirmed that it would be reluctant to prevent a public authority from subsequently arguing that a substantially similar exception or exemption applied under the appropriate regime. The Commissioner has accepted these findings and has therefore treated the Verderers' refusal to supply the information requested in part ii of the complainant's request as a claim that regulation 12(5)(b) applies.
24. The Commissioner will first consider part ii of the complainant's information request and therefore the Verderers' application of regulation 12(5)(b) of the EIR.

### Regulation 12(5)(b)

25. Under this regulation a public authority can refuse to disclose information to the extent that its disclosure would adversely affect "the course of justice, the ability

of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature". In the case of *Kirkaldie* the Information Tribunal stated that the purpose of this exception was reasonably clear and that:

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

It is the tribunal's view that legal professional privilege is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase course of justice.

26. Firstly, the Commissioner has considered whether the requested information is subject to legal professional privilege.

#### Legal professional privilege

27. The Verderers confirmed that the requested information is correspondence between the Verderers and its lawyer and that it contains advice on the application of section 16 of the New Forest Act to elected Verderers participating in the Scheme. It advised that it sought legal advice on whether or not participation would disqualify elected Verderers from serving in this capacity, the advice was provided on a confidential basis and is therefore subject to legal professional privilege. The Verderers further stated that it is currently engaged in litigation where the subject of this advice has been raised.
28. The Commissioner has reviewed the requested information. He is satisfied that the requested information is a confidential communication between the Verderers and its lawyer for the purpose of obtaining legal advice and therefore the requested information is subject to legal professional privilege.
29. The Commissioner accepts that in some circumstances the right to claim legal professional privilege can be waived. In general terms, this may happen if a public authority has shared, copied or disclosed the contents of its legal advice free of restriction to a third party or the general public. Before he proceeds to consider the application of this exception further, the Commissioner needs to consider whether, in this case, the Verderers has waived its right to claim legal professional privilege.
30. In its submissions to the Commissioner, the Verderers confirmed that it had not shared, copied or disclosed the legal advice it obtained with the general public or any third party free of restriction. It reiterated that it requested this legal advice on a confidential basis and that it has remained confidential information since it was obtained.
31. The Commissioner notes that in response to the complainant's information request (part i) the Verderers disclosed the advice it obtained from DEFRA on this

issue. However, it is the Commissioner's view that the advice from DEFRA was not formally commissioned, unlike the legal advice it requested from its lawyer, and arose as a result of informal discussions between the Verderers and DEFRA's Legal Department concerning the problems facing the Verderers. For these reasons, he does not consider the advice obtained from DEFRA attracts legal professional privilege and therefore the Verderers' decision to release this information can have no bearing on its decision to withhold the legal opinion it obtained from its lawyer or constitute a waiver of the right to claim privilege. Even if the Commissioner was of the view that the advice from DEFRA attracted legal professional privilege, it would be his view that the opinions obtained (from both DEFRA and its own lawyer) are not a sequence of correspondence. The Commissioner would view each opinion as a separate transaction between client and lawyer and therefore any disclosure of part or all of one opinion would not constitute a waiver of privilege in respect of the other legal opinion.

32. For the reasons explained in paragraphs 27 to 31, the Commissioner is satisfied that the requested information attracts legal professional privilege and that the Verderers has not waived its rights to claim privilege in this case.
33. The Commissioner now needs to consider whether disclosure would have an adverse affect and to what extent. If this cannot be substantiated, the exception cannot apply.

#### Adverse affect

34. In the decision of *Archer v Information Commissioner and Salisbury District Council (EA/2006/0037)* the tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the matters set out in paragraph 23 above; the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse affect and that any statement that it could or might have such an effect was insufficient. The information is then subject to the public interest test and the tribunal confirmed that the information must still be disclosed unless the public interest in maintaining the exception outweighs the public interest in disclosing the information.
35. In reaching a decision on whether disclosure would have an adverse affect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Information Tribunal's comments in the case of *Hogan and Oxford City Council v Information Commissioner (EA/2005/0026 and EA/2005/0030)* in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse affect. The tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
36. The Verderers argued that disclosure would adversely affect its ability to defend its legal rights, as the advice is the subject of current and potential litigation.

Furthermore, it stated that disclosure would adversely affect the Verderers' ability to obtain legal advice in respect of other decisions or issues affecting it and its responsibilities. The Verderers are of the view that disclosure in this case would undermine the relationship between the Verderers and its lawyers, inhibiting the free and frank exchange of views on its rights and obligations and would be contrary to the common law principle of legal professional privilege. It explained that if there was a possibility when speaking to its lawyers that disclosure may be ordered, the Verderers would not be able to speak frankly in seeking advice. The Verderers also highlighted that there would be a risk that disclosure of privileged information could lead to reluctance in the future to record fully such advice or that legal advice may not be sought, leading to decisions being made that are potentially legally flawed. This would in turn adversely affect the Verderers ability to fulfil its statutory responsibilities.

37. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)* ("*Bellamy*") the Information Tribunal sets out the various authorities relating to legal professional privilege and described it as:  
  
"a fundamental condition on which the administration of justice as a whole rests".
38. The Commissioner accepts that if information subject to legal professional privilege were to be disclosed to the public, this would undermine the common law principle on which it rests. He also accepts that it would adversely affect the Verderers' ability to obtain such advice in the future and this would in turn adversely affect its ability to manage its assets effectively and make future decisions.
39. The Commissioner also notes that this is a live issue and that there are proceedings that touch on the legal advice in question and it is quite possible that other proceedings may follow. It is the Commissioner's view that disclosure would force the Verderers to argue its case publicly and this cannot be regarded as fair or appropriate if it does not wish to do so. He accepts that the Verderers should be able to defend its position and any claim made against it without having to reveal its legal position in advance. Disclosure would also place public authorities in a weakened position when compared to other persons not bound by the EIR or the Act. Legal professional privilege must apply equally to all parties to ensure there is a level footing in legal proceedings.
40. The Commissioner has carefully considered the arguments presented and he is satisfied that in this case it is more likely than not that disclosure of the legal advice would adversely affect the course of justice and therefore that the exception provided by regulation 12(5)(b) is engaged.

#### Public interest

41. The exception claimed is subject to the public interest test. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining

the exception should information not be released in response to a request under the legislation.

42. The Commissioner has carefully considered the arguments presented by both the complainant and the Verderers. He has kept the following in mind during his considerations, that the factors in favour of maintaining the exception relate to the particular interest which the exception is protecting. He had also considered the tribunal comments in *Bellamy*, when it stated:

“There is a strong public interest inbuilt into the privilege itself [legal professional privilege]. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.”

43. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority’s role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. In this particular case the Commissioner accepts that the complainant requires access to the Verderers’ legal advice to understand fully whether elected verderers can lawfully participate in the Scheme or whether the Verderers are in breach of the New Forest Act and upon what advice a particular decision in this regard has been made.

44. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.

45. However, it is the Commissioner’s view that there are stronger public interest arguments in favour of maintaining the exception. The Verderers argued that it needs to be able to obtain full and frank legal advice. The Commissioner accepts that if disclosure were ordered, this would undermine the Verderers’ ability to obtain such advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of its wider disclosure. In the case of *Kitchener V Information Commissioner and Derby City Council (EA/2006/0044)* the Information Tribunal stated:

“if either lawyer or client could be forced to disclose what either said to each other (whether orally or in writing) as part of the process it would undermine the very point of the process. The client could not speak frankly to the lawyer if there were a possibility that disclosure might later be ordered.”

46. It is also the Commissioner’s view that legal advice necessarily highlights the strengths and weaknesses of a particular position. If legal advice was routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by the EIR or the Act. It is therefore the Commissioner’s view that there must be a strong public interest in ensuring legal professional privilege applies equally to all parties, so that they are on a level footing.

47. For the reasons explained above, the Commissioner has concluded that in this case the public interest in maintaining the exception provided by section 12(5)(b) outweighs the public interest in disclosure.

48. The Commissioner will now consider element iii of the complainant's request and the application of regulation 13 to the requested information.

### **Regulation 13**

49. As outlined previously in paragraph 3, the complainant requested the Verderers to disclose a schedule of all payments to individual verderers under the Scheme. The Verderers refused citing regulation 13. It stated that the requested information was third party personal data and its disclosure would contravene the Data Protection Act 1998 (the "DPA"). In its submissions to the Commissioner the Verderers explained that it was of the view that disclosure would contravene the first data protection principle. It explained that the requested information would release information concerning the number of animals depastured by each verderer, which in turn could provide an indication of their financial status. In addition, the Verderers argued that the data subjects (the elected verderers) would not reasonably expect or consent to this data being released. It explained that the elected verderers are a small select group or "community" and therefore disclosure would be particularly intrusive for this small number of individuals.
50. In order to apply the exception under regulation 13 of the EIR, disclosure of the information must firstly be personal data. Personal data is defined in section 1 of the Data Protection Act 1998 (the DPA) as follows:

"personal data" means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller or any other person in respect of the individual

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

51. The Commissioner has reviewed the requested information and is satisfied that the individual payments made to those elected verderers participating in the Scheme is personal data.
52. Secondly, the Commissioner must establish whether disclosure of that data would contravene one of the data protection principles in the DPA. As previously explained in paragraph 49 above, the Verderers are of the view that disclosure would contravene the first data protection principle (the full text of this principle can be found in the Legal Annex section at the end of the Notice).
53. In determining whether personal data would be processed fairly in releasing the requested information to the complainant, the Commissioner has considered whether there would be any unfairness to the subjects of those data (the elected verderers).

54. 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.
55. With regards to the Verderers' argument that disclosure would release information about the number of animals depastured and therefore information about elected verderers' wealth and financial status, it is the Commissioner's view that there are numerous contributory factors to a person's wealth or status, many of which have more significance and by their nature would release more personal sensitive information about that person if they were disclosed.
56. In terms of lawfulness, the Commissioner is not aware and has not received any evidence from the Verderers to demonstrate that disclosure of the requested information would be in breach of any law.

## **The Decision**

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57. In respect of part ii of the complainant's information request, the Commissioner's decision is that the Verderers was correct to rely on exception 12(5)(b) of the EIR to withhold the requested information.
58. Concerning part iii of the complainant's information request, for the reasons explained in paragraphs 49 to 59, the Commissioner decision is that the Verderers incorrectly relied upon regulation 13 of the EIR for the non disclosure of this information and therefore the information should be disclosed.

## **Steps Required**

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59. In view of the matters referred to above the Commissioner gives notice that in exercise of its powers under section 50 he requires the Verderers to disclose the following information to the complainant within 35 days of the receipt of this Notice:
  - A schedule of all sums paid to individual Verderers under the provisions of the Scheme in line with part iii of the complainant's request.

## Right of Appeal

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60. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 4<sup>th</sup> day of February 2008**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### **Freedom of Information Act (2000)**

#### **Section 1**

Provides that “any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

**Section 40(1)** provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

**Section 40(2)** provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**Section 42 (1)** provides that -

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

**Section 42(2)** provides that -

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

### **Environmental Information Regulation 2004**

#### **Regulation 2 (1)**

In these Regulations –

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (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;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

**Regulation 12 (5)** provides that -

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

- a) international relations, defence, national security or public safety;
- b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- c) intellectual property rights;
- d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- f) the interests of the person who provided the information where that person –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
  - (iii) has not consented to its disclosure; or
- g) the protection of the environment to which the information relates.

**Regulation 14(3)** provides that -

The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

### **Regulation 13(1)**

To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

**Regulation 13(2)** The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
  - (i) any of the data protection principles; or

- (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (a) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

### **Regulation 13(3)**

The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

### **Regulation 13(4)**

In determining whether anything done before 24<sup>th</sup> October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

### **Regulation 13(5)**

For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

## **Data Protection Act 1998**

### **First data protection principle states –**

“Personal 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, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.