

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

Decision notice

Date: 21 July 2015

Organisation: H.M. Verderers of the Forest of Dean
Address: Hucclecote Court
76 Hucclecote Road
Gloucester
GL3 3RU

Decision (including any steps ordered)

1. The complainant has requested H.M. Verderers of the Forest of Dean ('the Verderers') to disclose information relating to the feral boar in the Forest of Dean.
2. The Verderers explained that they are not a public authority for the purposes of the EIR. They therefore refused to respond to this request under the EIR.
3. The Commissioner finds that the Verderers are a public authority for the purposes of the EIR.
4. The Commissioner therefore requires the Verderers to respond to this information request in accordance with its obligations under the EIR.
5. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 28 January 2014, the complainant wrote to the Verderers and requested information in the following terms:

7. "According to the minutes of a Verderers meeting held on 13th July 2012 [2]:

"The Court was advised that the Commission believe numbers exceed 500.

"The Commission's policy is a target population of 90, but this should be increased to 400 to avoid controversy.

"The Deputy Surveyor asked the Court to support the revised total and after some discussion and questions, the Verderers agreed to support the revised management proposal."

The Conundrum

Given the degree of harm and damage and mayhem being caused in July 2012 by a target population of 90 feral boar, it seems bizarre that the Verderers should agree to any increase in the target population – let alone an increase of over 300%.

The Request

To better understand the reasons why the Verderers agreed to support the revised total, please send me:

- 1) all data and information used by the Verderers prior to making its Decision;
 - 2) details of any statistical techniques, mathematical methods, assumptions, and degrees of uncertainty that were applied to the above data and information; and,
 - 3) all reports produced that relate to the Decision, including those reports and any amendments to such reports prepared before and after the time of the Decision."
8. The Verderers acknowledged receipt of the complainant's correspondence on 31 January 2014 and advised him that it would be drawn to the Verderers attention and responded to soon.
9. The complainant wrote to the Verderers again on 10 March 2014 to chase the matter up, as he had received no further response.
10. The Verderers wrote to the complainant again on 13 March 2014 and advised him that the matter would be discussed at the next court sitting on 25 April 2014.
11. As the complainant was dissatisfied with this response, he referred the matter to the Commissioner on 17 March 2014.

12. The Commissioner wrote to the complainant on 1 April 2014. The Commissioner advised the complainant that the Verderers were not a public authority for the purposes of the EIR and as a result he has no jurisdiction to compel the Verderers to respond to his information request.
13. The complainant referred the matter back to the Commissioner on 13 January 2015. He stated that he had been in correspondence with Simon Hughes MP and Richard Harper MP and had been advised to ask the Commissioner to consider his position again.
14. The Commissioner reopened the complaint on 10 March 2015 to consider the matter afresh.
15. The Commissioner wrote to the Verderers on 11 March 2015. The Commissioner advised the Verderers that in light of the recent case of *Fish Legal v Information Commissioner & Others* (GIA/0979/2011 & GIA/0980/2011) ("Fish Legal") he is the preliminary opinion that the Verderers are a public authority for the purposes of the EIR. He asked the Verderers to reconsider their position in light of this recent hearing.
16. The Verderers responded on 24 April 2015. They stated that they did not agree that they are a public authority for the purposes of the EIR and, although it believes it does not hold any further information to that already in the public domain, it would not issue a formal response to the complainant under this legislation. The Verderers supplied no detailed argument as to why they were not a public authority.

Scope of the case

17. As stated above, the matter was first referred to the Commissioner in March 2014. It was then later resubmitted as a fresh complaint in light of the Fish Legal case in January 2015.
18. The Commissioner considers the scope of this case to be concerned with the question of whether the Verderers are a public authority for the purposes of the EIR.
19. In the recent case of *Fish Legal* the Upper Tribunal Administrative Appeals Chamber (the "UT") ruled that the Commissioner has jurisdiction to both investigate and decide whether a body is a public authority.
20. The Commissioner therefore has jurisdiction to decide this question. The First Tier Tribunal (the "FTT") may also hear appeals against the

Commissioner's decisions and the UT may hear appeals against the decisions of the FTT.

Reasons for decision

21. The EIR gives members of the public the right to access environmental information held by the vast majority of public authorities and places a duty on public authorities to respond to requests for environmental information.
22. If a public authority receives a request for environmental information they are legally obliged to provide it, usually within 20 working days, unless any of the exceptions contained within the EIR apply. If a public authority believes an exception does apply to the information that has been requested, then the public authority must explain why the exception applies.
23. The definition of public authority is given in Regulation 2(2) of the EIR. In particular it states that a "public authority" means the vast majority of public authorities as defined in Section 3 of the EIR and:
 - (c) any other body or other person, that carries out functions of public administration; and
 - (d) any other body or other person that is under the control of a public authority and:
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.
24. In considering the question of whether the Verderers are a public authority for the purposes of the EIR, it must therefore be established whether the Verderers have functions of public administration (the special powers test) or are under the control of a public authority (the control test). There is no requirement for the Verderers to carry out functions of public administration *and* be under the control of a public authority. Only one of these two elements needs to be met for the Verderers to be considered a public authority for the purposes of the EIR.

25. The Fish Legal case is relevant here. This considered the issue of whether water companies are public authorities for the purposes of regulation 2(2)(c) or (d) of the EIR.
26. The Upper Tribunal in the Fish Legal case considered whether the relevant bodies are entrusted by law with the performance of services in the public interest and whether they are vested with special powers. It also considered control of the companies and their autonomy.
27. With respect to functions of public administration, the UT in the Fish Legal case explained that persons 'performing public administrative functions' are:

"entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law".
28. It then considered the question of whether the companies in that case had 'special powers'. The UT held that the term powers was used in the general sense of an ability to do something that is conferred by law.
29. The UT also set out the test for 'control'. It explained the test applies to the manner in which functions are performed, not the functions themselves. For example, a body is not under control of the Government merely because its powers derive from statute.
30. There are therefore two elements to the test – in order for a body to be under the control of a public authority, it must:
 - (i) operate in fact in a non-autonomous manner; and
 - (ii) do so because a public authority is in a position to control it.
31. In other words, although the public authority need not actually be exercising its powers of control, the existence of the powers must have a real constraining effect on the body in question.
32. Furthermore, the UT decided that the test requires consideration of the body's overall manner of performing its services: it would not be enough to find control in 'one or two marginal aspects' of its business.
33. The UT pointed out that 'no legitimate business has complete freedom of action'. It explained that as all operate in a framework of legal and commercial constraints, something more is needed before one can say that they have lost their autonomy.

34. The Verderers website states the following:

"The Verderers now usually meet four times a year when they consider issues of relevance to the [vert](#) (the woodlands and open lands) and [venison](#) (the deer) within the [Statutory Forest](#) of Dean (see map). They advise the Deputy Surveyor and his staff on topical issues and also make representations to other administering bodies on issues affecting their interests. The Verderers also oversee sheep grazing by being represented on the multi-agency sheep liaison group."

35. It also states that the fulfillment of the Verderers role is associated with the following pieces of legislation:

- The Dean Forest (Timber) Act 1808
- The Wildlife Creatures and [Forest Laws](#) Act 1971
- The Forestry Act 1981

36. The function of the Verderers is to protect the vert and venison. The Commissioner notes that the Verderers advise and generally influence various issues that affect the Forest of Dean from planning issues, regeneration projects, local mining, the construction or revocation of byelaws to the management of the forest environment itself and its animals. They advise on the implementation of any agreed strategies or policies that are introduced in accordance with these public functions.

37. The Commissioner acknowledges that legislation such as the Wildlife Creatures and Forest Laws Act 1971 abrogated the role of ancient forest law but the functions of Verderers remained. This provides evidence that the Verderers have what could be regarded as powers.

38. In practice their function is primarily to advise and make representations to other public bodies such as the Forestry Commission, local authorities and DEFRA and they have the power to influence decision making and it make decisions themselves.

39. An example of the influence they enjoy is evidenced in the Court minutes of April 19 2013:

"There is to be a further meeting chaired by a Verderer later in the year to set a new cull target, perhaps of 200 or more."

40. The minutes of 17 January 2014 also provide an example of the function of the Verderers:

"The Senior Verderer asked if the three year agreement to cull to a population of 400 is still valid in the light of the fact the UK Wild Boar Trust is no longer in existence and the Steward commented that the boar are seen as "venison" to be protected on behalf of Her Majesty, but

the Verderers must rely on the Commission to provide the necessary information to decide on the management of the population.”

41. The Commissioner considers the functions the Verderers perform are public administrative functions relating to environment and they appear to hold powers which go beyond the normal powers that other private landowners are able to enjoy. The Upper Tribunal in the Fish Legal case also noted that powers may have a force even when they are not deployed; in this case the Commissioner's observes that the Verderers benefit from a level of influence derived from their function.
42. The Commissioner finds that the Verderers are a public authority for the purposes of the EIR as set out in regulation 2(2)(c) of the EIR.
43. In terms of Regulation 2(2)(d) the Commissioner considers that the Verderers have a level of autonomy in the functions they perform and the public authorities they work with do not have a decisive influence . The Commissioner finds that the Verderers are not a public authority for the purposes of the EIR as set out in regulation 2(2)(d) of the EIR.

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Steve Wood
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