

Freedom of Information Act 2000 (Section 50)

Decision Notice

23 July 2007

Public Authority: Department for Environment, Food and Rural Affairs
Address: Nobel House
17 Smith Square
London
SW1P 3JR

Summary

The complainant asked Department for Environment, Food and Rural Affairs (Defra) what representations had been made to it about the application of the Single Payment Scheme (SPS) to the New Forest and what replies had been given; specifically, he asked for all correspondence with the New Forest Verderers. The Commissioner decided that the information had been correctly withheld under the exemption arising from section 41 of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 14 January 2005 the complainant asked Defra to say what representations had been made to it about the application of the Single Payment Scheme (SPS) to the New Forest and what replies had been given. He asked specifically for copies of all correspondence between Defra and the Court of Verderers, the Clerk to the Court, the Official Verderer, and any Verderer, touching upon or concerning SPS in relation to the New Forest.
3. On 11 March 2005 Defra told the complainant that it was withholding the information sought and cited the exemption at section 35(1)(a) of the Act (Formulation of government policy). On 24 March 2005 the complainant requested an internal review of that decision. On 18 May 2005 Defra reported that an internal review had confirmed the original decision that the balance of the public interest had led it to continue to withhold the information.

The Investigation

Scope of the case

4. By way of background, Defra told the Commissioner that the SPS had been introduced in the United Kingdom in January 2005 as a result of the European Union's agreement to reform its Common Agricultural Policy. The SPS was the biggest change in more than 30 years to the rules for subsidies to the agricultural industry. Under SPS, claimants have to meet the legal definition of 'farmer' and maintain their land in good agricultural and environmental condition.
5. In the case of common land, including the New Forest, Defra had to develop a payment system that established SPS entitlements between the commoners (holders of rights over common land) and the owners of that common land. For most English commons, grazing rights had been established under the Commons Registration Act 1965. However Defra said that, as the New Forest was one of those commons where quantification of grazing rights had not been established under the 1965 Act, a different mechanism for arriving at SPS payments was needed.
6. The Verderers of the New Forest are a statutory body whose role is to: protect and administer the New Forest's common land practices, conserve its landscape and safeguard the future of its common land.

Chronology

7. On 10 June 2005 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. The complainant specifically asked the Commissioner to take account of the fact that Defra appeared to have treated farmers in the New Forest differently from those in the rest of England. He said that he should be given information as to why payments to farmers with New Forest rights would be treated differently to farmers with common rights in the rest of the country; the decision appeared to him to be discriminatory. He added that he believed that interested parties might have made representations to Defra about these matters. If so, it could not be in the public interest to conceal them.
8. On 31 May 2006 the Commissioner began his investigation. On 7 July 2006 Defra told the Commissioner that it was continuing to rely upon the section 35 exemption. It was withholding from the complainant representations received from two external stakeholders who had been consulted by Defra when it was formulating and developing policy relating to SPS and its potential effects on the New Forest. Defra said that two important aspects of its SPS policy were still being formulated at the time. Defra added that, in deciding to withhold the information, it had considered the balance of the public interest. The persons consulted had provided their views in confidence. Their views on disclosure had been sought and they had indicated strongly that their representations should

not be disclosed. In the light of their strong objections, Defra had decided to withhold the information.

9. Defra also indicated that, on reflection, it considered the exemption under section 41 (Information provided in confidence) to be relevant. Defra added that it had sought a range of views, including those of the complainant, with whom Defra officials had met before coming to a decision.
10. On 27 February 2007 the Commissioner invited Defra to consider disclosing parts of the information, with some redactions. On 21 June 2007 Defra told the Commissioner that, after careful consideration and consultation with the relevant third parties, it had now concluded that this was not possible.
11. There was further correspondence between the Commissioner and both the complainant and Defra. During the course of this correspondence, Defra confirmed that it held no other relevant information falling within the scope of the request beyond that which it had identified in March 2005. It also indicated on 21 June 2007 that one of its correspondents had now agreed to the disclosure of part (the first six paragraphs) of a response.

Findings of fact

12. The Commissioner found that Defra had contacted those relevant parties who had made representations to it regarding the possible disclosure of their submissions. The parties had responded as individuals who were prominent members of a relevant New Forest organisation and as such were private individuals responding to help Defra make a decision within a very tight timescale. The parties had not responded on behalf of the organisation as a whole. The parties had objected to their representations to Defra being disclosed.
13. The Commissioner has seen that one of Defra's correspondents had said that he had provided information, which he had marked 'in confidence', as "personal observations".
14. The Commons Registration Act 1965, section 11, exempted from the other provisions of that Act, areas including the New Forest, Epping Forest and the Forest of Dean.
15. The Commissioner has considered whether the matter would be more appropriately dealt with under the Environmental Information Regulations 2004 (SI 2004/ 3391) ("the Regulations") but decided that the Act was more appropriate as the information sought related to representations about subsidy payments and not to matters having a direct effect on the environment. Defra concurred with this view and the complainant was content to accept it. Although he has not addressed the issue in detail in this Decision Notice, the Commissioner considered it probable that, had the Regulations applied instead of the Act, the information would still not have been disclosable.

Analysis

Exemption

Section 41 (Information provided in confidence)

16. The complainant said that the general basis on which SPS payments were made to owners of common rights was a matter of Government policy and that the key decision for Defra was whether to make SPS payments to the owners of land to which common rights are attached. He said that Defra had excluded the New Forest from what was otherwise a countrywide policy so that New Forest farmers who owned rights, but did not use them, were discriminated against. He considered this to be a derogation from the general policy by Defra, made as a result of representations received. He took no issue with the policy itself but said that the decision to exclude a few dozen New Forest farmers from it was a derogation from the policy that had to be justified. If the policy was applied to all farmers with common rights in England, but Defra had decided to apply a different basis to him personally on the basis of representations made to it, he questioned whether those representations ought to be kept secret.
17. The complainant told the Commissioner that he was at a grave disadvantage in dealing with what Defra had to say as he could not see the material. He said it was difficult to see how his right to a fair determination of these issues could be met in such circumstances.
18. The complainant added that his common rights were valuable rights in property and as such he was entitled to protection under the provisions of the Human Rights Act 1998. His rights had been adversely affected by Defra and he said that he would be entitled to apply for Judicial Review of its decision. Defra could not possibly argue that it was unable to tell a court what material it had considered in order to make a particular decision on the basis that the information was used to formulate policy. It would be a nonsense if the position under the Act and under the Judicial Review rules produced a different result. He said that the representations to Defra had come from interested parties and that it could not be in the public interest for those interested parties to be able to make representations which benefited them financially without their representations being available to the public.
19. As for the application of section 41 of the Act, the complainant said that it was inconceivable that the disclosure of representations made by the Verderers, a partly elected statutory body with statutory duties in respect of the commons of the New Forest, could be actionable. He added that Defra must satisfy the Commissioner to a high level of probability that it was entitled to rely on an exclusion to the otherwise general duty to disclose information.
20. Defra told the Commissioner that it had acted correctly at the time of the request in withholding all of the information in the documents; the relevant exemption had initially been section 35(1)(a) but Defra had later recognised that the section 41 exemption also applied. However, Defra added that it could now

disclose the first six paragraphs of one of the documents as the person who supplied them to Defra had recently withdrawn his earlier objection to disclosure of that part of the information. Defra said that the representations which it had received had been informed personal views from members of a relevant organisation rather than a collective, collegiate opinion. When asked by Defra, the parties had made it clear that they did not wish their personal views to be made public.

21. Defra explained that it considered that disclosure of the information would constitute an actionable breach of confidence as the information had the necessary quality of confidence. As such, Defra said, the information did not need to be novel or unique to the confider; it was enough for it to be something which was not public knowledge. Defra believed that the circumstances of the acquisition imported an expectation of confidence. There had not been a formal consultation, but Defra considered that the principles upon which it usually consulted did apply. That Defra had no mandate to publish it was demonstrated by the individuals' objections to publication; the circumstances of acquiring the information had given rise to an expectation of confidence. As regards detriment, Defra said it was an open question whether detriment was an essential ingredient of an action for breach of confidence. To the extent that detriment needed to be established, however, Defra believed that there was good legal authority that sufficient detriment could be shown if the information was to be disclosed to persons whom the confider would prefer not to have access to it. Defra therefore considered that disclosure of the documents would be an actionable breach of confidence. Defra added that it could not rely upon a public interest defence existing in relation to any breach of confidence claim. It was important for Defra to maintain the trust of those with whom it sought to consult and Defra was concerned about the possible 'chilling effect' that might arise from disclosing information against the wishes of its correspondents. This could prejudice current and future liaison with Defra at a time when it was seeking to engage with key stakeholders on both commons and other SPS related policy issues. Defra considered that the balance of the public interest did not favour a breach of confidence.
22. The Commissioner has seen that Defra had decided to gather information from informed parties – including the complainant – but that it did not conduct a formal consultation. Defra asked for, and obtained, observations from persons who occupied positions of authority within a relevant New Forest organisation as individuals who had an extensive relevant knowledge of the New Forest, and who provided observations about the application of SPS to the New Forest. The individuals have said that they responded in a personal capacity, rather than providing a corporate view on behalf of their organisation as a body. Defra asked them if they objected to the information they provided being disclosed and they made it clear that they did object. The Commissioner accepts that Defra's informants, although prominent individuals within their organisation, gave their views to Defra in confidence and in a personal capacity, and that they were not speaking on behalf of the organisation.
23. Having decided that confidential information has been obtained from third parties, and that the section 41 exemption is therefore engaged, the

Commissioner has to decide if its disclosure would give rise to an actionable breach of confidence. The preservation of confidences is important and there is a strong public interest in it. However, the duty of confidence is not absolute and disclosure is possible: with consents; when required by law; and where there is an overriding public interest. The Commissioner has seen that the information providers did not consent to its disclosure and he has seen no legal requirement for disclosure. He has considered if there is an overriding public interest leading to the need to disclose the information but he has seen none. He accepts Defra's evidence that the circumstances in which the information was provided imported an expectation of confidence and that disclosure without consent could lead to the parties suffering detriment. He considers that Defra has reason to suppose that a breach of confidence by it could be actionable and that there is no overriding public interest reason why Defra should not maintain the confidence. He has therefore decided that Defra was correct in withholding the information under the section 41 exemption.

Section 35 (Formulation of government policy, etc)

24. As the Commissioner has decided that the information was correctly withheld under the section 41 exemption, he did not proceed to consider the application of the section 35 exemption.

Other matters

25. The Commissioner has seen that the complainant has referred to the treatment by Defra of New Forest commoners and land owners in respect of SPS payments as constituting a derogation from policy and treating them differently to the rest of England. The complainant also raised issues about his property rights and the possible application to them of the Human Rights Act 1998. However, these are matters for Defra, not for the Commissioner.

The Decision

26. The Commissioner's decision is that Defra was in breach of section 10 of the Act in the length of time it took to issue a refusal notice. However Defra dealt with the request for information in accordance with the Act in so far as the section 41 exemption is concerned.

Steps Required

27. The Commissioner requires no steps to be taken.

Right of Appeal

28. 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

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 23rd day of July 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Time for Compliance

Section 10(1) provides that –
“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Formulation of Government Policy

Section 35(1) provides that –
“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,

Information provided in confidence

Section 41(1) provides that –
“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Other legislation:

Commons Registration Act 1965

Section 11 provides that -
“The foregoing provisions of this Act shall not apply to the New Forest or Epping Forest nor to any land exempted from those provisions by an order of the Minister, and shall not be taken to apply to the Forest of Dean.”