

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 October 2019

Public Authority: The Department for Environment, Food & Rural Affairs

Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested the final report of a review of Forest Holidays (owned by the Forestry Commission) from the Department for Environment, Food & Rural Affairs (Defra). Defra refused to provide the information withholding it under section 35(1)(a)(formulation or development of government policy).
2. The Commissioner's decision is that section 35(1)(a) is not engaged in relation to the withheld information. The Commissioner has also found that Defra breached section 10(1) of the FOIA by not responding to the complainant within the statutory timeframe.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information that was withheld under section 35 of the FOIA, with the exception of any third party personal data relating to junior employees.
4. The public authority must take these steps 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

5. On 3 October 2018 the complainant made the following request for information under the FOIA:

"On 16th July, in response to a question by Mr Philip Dunne MP, the Minister, Dr Coffey announced a review of Forest Holidays [Official Report, 16 July 2018, Vol. 645, c. 2MC.]

I would be grateful for information concerning the review, including:

- who is conducting it;*
- how they were appointed;*
- the scope, terms of reference and objectives of the review;*
- any evidence so far received by the reviewers;*
- the procedure for members of the public to submit evidence to the review; and*
- when the review is expected to report.*

Please could you supply any relevant information as may be held on the review..."

6. Defra responded on 19 October 2018 to explain that it needed to extend the deadline in order to consider the public interest in this matter but did not specify which exemption was being applied.
7. A response was issued on 28 November 2018 which provided some information. Defra explained that the review was carried out by the Government Internal Audit Agency (GIAA) and that it was appointed because it delivers an internal audit service to Defra, the terms of which are set out in a memorandum of understanding. Defra also explained that there was no procedure for members of the public to submit evidence for the review, as internal auditors normally obtain evidence from their client organisation (although some evidence may originate from third parties). The final report of the review was issued on 19 September 2018. The remainder was withheld under section 35(1)(a) – formulation of government policy.
8. On 29 November 2018 the complainant asked Defra for the following:
- "...I note, however, that the final report of the review was issued on 19th September 2018.*

I am unable to find this online, therefore please could you send me a copy or provide a link?"

9. Defra did not respond so the complainant chased a response. On 7 January 2019 Defra responded by explaining that the report was internal and not available in the public domain.
10. On 8 January 2019 the complainant made an internal review request. The internal review was provided on 11 March 2019 which maintained Defra's original position. The review also stated that the complainant's 29 November 2018 email should have been classed as a new request and not a follow-up query. The second request was also withheld under the same exemption.
11. Defra has informed the Commissioner that it has been advised that, as the review was carried out by the Government Internal Audit Agency (GIAA), it would also object to disclosure of the information.

Background

12. The Forestry Commission (FC) is a non-ministerial department of the government, staffed by civil servants. It is not directly controlled by ministers but by a board usually appointed by a minister and Defra is its parent department. The log cabin holidays were originally run by the FC but, in 2006, the Treasury asked the FC to find a private sector partner. Forest Holidays Ltd is not a public authority for the purposes of the FOIA whilst the Forestry Commission and Defra are a public authority for the purposes of the FOIA.

Scope of the case

13. The EIR provides an applicant with the right to formally request access to environmental information. Regulation 2(1) of the EIR clearly defines what environmental information is for the purposes of these regulations. Defra stated that it had considered both regimes, but felt that, on balance, the request should be handled under the FOIA, as the information related to issues of governance and finance, and as such was too far removed from the definition of environmental information in regulation 2 of the EIRs. The Commissioner agrees and this request has been investigated under the FOIA. The complainant has not suggested that the EIR should have been considered.
14. The complainant contacted the Commissioner on 20 March 2019 to complain about the way his request for information had been handled.

15. The complainant was not content with the adequacy of the review. He found it quite surprising that the third and fourth paragraphs of page two of Defra's review are identical to two paragraphs in the original response letter in November 2018 which dealt with an earlier request. The complainant believes that the review should only have dealt with the refusal to provide the Forest Holidays report itself as he had not asked for a review of his earlier request. He suggests that the internal review was either only dealing with the first request or was a copy and paste exercise from the November response. Whichever scenario is correct, the complainant states that the review is inadequate and that disclosure should be ordered on that basis. The Commissioner has not considered the adequacy of the internal review, she notes that internal reviews often use material from the original response and that this has not been a factor in her decision.
16. The Commissioner considers the scope of this request to cover the internal audit report which was withheld from the complainant under section 35(1)(a) of the FOIA.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

17. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to-

(a) The formulation or development of government policy...

The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

18. The Commissioner's guidance states that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant minister.
19. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world;

- and the consequences of the decision will be wide-ranging.
20. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
 21. The complainant has directed the Commissioner to page two of the internal review where it is explained that Defra fears that "*releasing this part of the requested information would have the potential to cause speculation and misinformation about Defra's current policy in considering the governance of FC and its ability to generate revenue*". His view is therefore that the Forest Holidays review is not about Defra formulating new policy but protecting current policy and consequently the exemption is invalid.
 22. The complainant supports his argument by reference to the Commissioner's section 35 guidance where it says that departmental policies relating to the internal management and administration of individual departments etc are not government policy. He states that it is clear that the review was commissioned "*in order to form part of Defra's consideration of its policy concerning the governance of FC [Forestry Commission]...*" He goes on argue that the FC is a non-ministerial department within the Defra family and, as such, the review is, in effect, a departmental policy relating to the internal management and administration of the FC for which section 35(1)(a) does not provide an exemption.
 23. Additionally he argues that speculation and misinformation could be avoided by publishing and providing an explanation or context and provides a link to the Commissioner's advice to that effect¹.

The Commissioner's view

24. The exemption does not cover information relating purely to the application or implementation of established policy.

¹ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

25. Defra had explained to the Commissioner that the GIAA review actively considers the governance of the Forestry Commission. Having had sight of the withheld information, the Commissioner asked Defra if it could explain how this particular information relates to the formulation or development of government policy in more detail.

26. The Commissioner's guidance on section 35 was quoted by way of explanation as follows:

"In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives."

"To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy."

27. The Commissioner expressed the view that the scope and limitations of the audit report of the FC's decision-making suggest that it is looking at an existing process and whether key decisions were made in line with that process. The exemption does not cover information relating purely to the application or implementation of established policy. The withheld information is an audit review of various decisions taken by the FC and whether they were consistent with its obligations. Virtually all the suggested actions concern an audit of an existing process within its current framework. Any formulation or development in policy that might occur in the future regarding policy is clearly to be the work of other hands.

28. Defra was asked how the requested information fitted in with the key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
- the government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

29. Defra responded by stating that the exemption included the process of reviewing or improving existing policy. It considered that the GIAA report was a review of an existing policy, and that the government intended to achieve the outcome of considering Defra's policy concerning the future governance of the FC which would be a decision for ministers. Defra pointed out that the FC is the largest landowner in

the UK with a combined estate covering 2.2 million acres and consequently its future governance and activities have wide-ranging implications.

30. The Commissioner however considers that the withheld information is an audit of existing policy as it has been implemented and that whilst it may provide the impetus to review or improve existing policy it is not in itself engaged in developing or formulating policy. In the Commissioner's opinion, the exemption is not engaged. Therefore Defra cannot rely on section 35 to withhold the information.

Section 10 - time for compliance

31. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *'no later than the twentieth working day following receipt.'*
32. Defra acknowledged that the complainant's correspondence of 29 November 2018 should have been treated as a new request.
33. As a consequence, it was only considered as part of the internal review on 11 March 2019.
34. Defra therefore breached section 10(1) of the FOIA by failing to respond to the complainant's request of 29 November 2018 within 20 working days.

Right of appeal

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

36. 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.
37. 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

Pamela Clements
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