

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

### **Decision notice**

**Date:** 5 November 2013

**Public Authority:** Department for Environment, Food and Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

#### **Decision (including any steps ordered)**

---

1. The complainant is the Executive Secretary of Organic Food Federation (OFF). On behalf of OFF he made a complaint to the Department for Environment, Food and Rural Affairs (DEFRA) about Soil Association Certification Ltd (SACL) that it had breached EU regulations by removing the organic status of some oats that were already certified by OFF. As part of the complaints process SACL submitted a statement to DEFRA and the complainant requested a copy of this statement.
2. DEFRA released the majority of the report during the Commissioner's investigation but withheld one small section under section 41 of the FOIA.
3. The Commissioner has reviewed the case and he has concluded that DEFRA was correct to withhold the remaining withheld information under section 41 of the FOIA. He therefore requires no further action to be taken.

#### **Request and response**

---

4. On 10 July 2012, the complainant contacted DEFRA by telephone and requested it to disclose a copy of the statement SACL submitted to it as part of the complaints review process.

5. DEFRA responded on 12 July 2012. It stated that it held the requested information but considered it was exempt from disclosure under section 41 of the FOIA.
6. The complainant requested an internal review on 20 July 2012.
7. Following an internal review DEFRA wrote to the complainant on 7 September 2012. It stated that it remained of the view that the requested information was exempt from disclosure under section 41 of the FOIA.

### **Scope of the case**

---

8. The complainant first contacted the Commissioner on 26 September 2012 to complain about the way his request for information had been handled. For reasons the Commissioner is unable to explain this correspondence was not received and therefore actioned at this time. The complainant contacted the Commissioner again on 23 April 2013 and resubmitted the documentation he supplied back in September 2012. A case was then set up.
9. During the Commissioner's investigation DEFRA decided to disclose the majority of the requested information to the complainant. The remaining withheld information therefore consists of two small paragraphs in the statement and the remainder of this notice will focus on DEFRA's application of section 41 to this remaining information.

### **Reasons for decision**

---

10. Section 41 of FOIA states that information is exempt from disclosure 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.

*Was the information obtained by DEFRA from any other person?*

11. The requested information is a statement supplied by SACL to DEFRA in response to an appeal OFF made against DEFRA's initial decision on the complaint it made against SACL. The requested information is therefore quite clearly information obtained by DEFRA from 'any other person'.

12. The Commissioner now needs to consider whether disclosure of the remaining sections of this statement would constitute an actionable breach of confidence.

*Would disclosure constitute an actionable breach of confidence?*

13. The Commissioner considers the relevant consideration here is whether the requested information has the necessary quality of confidence, was imparted in circumstances that gave rise to a duty of confidence and whether disclosure would cause any detriment to the confider – SACL in this case.
14. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.
15. The requested information in this case is SACL's submissions to DEFRA in response to a complaint made against it by OFF, which had by the point this statement was produced been upheld by DEFRA. The statement details SACL's assurances of actions it intended to take to ensure a complaint of this nature did not occur again. It was a frank and honest statement supplied by SACL to assure all parties the matter had been taken seriously and actions had been taken to rectify any issues.
16. The withheld information is information which SACL considers is confidential and was supplied to DEFRA for the purposes of the appeal review only. It considers the withheld information contains information of a commercial nature and is therefore of importance to it as a business.
17. The Commissioner has reviewed the remaining information and he is satisfied that it is not of a trivial nature and it is not otherwise available to the public. DEFRA confirmed that the information is of commercial importance to SACL and would potentially cause it detriment if it were to be released. The Commissioner considers that the information cannot therefore be regarded as trivial information. The Commissioner is also not aware of any circumstances in which the remaining information has been disseminated to the general public.
18. As the Commissioner is satisfied that the requested information is not trivial in nature or otherwise available to the public, he now needs to consider whether the information was supplied in circumstances giving rise to a duty of confidence.
19. DEFRA confirmed that SACL was content for the majority of the statement to be disclosed in response to this request due to the passage of time. However, SACL considered a small section still remained

confidential due to its commercial sensitivity. It stated that when it supplied the statement as a whole to DEFRA it was done so with the expectation that it would only be used for the purposes of the appeal enquiry, to alleviate any concerns OFF still had about the complaint it had made and that it would remain confidential.

20. DEFRA stated that complaints of this nature are extremely rare. It does not routinely receive complaints from one business against another. Usually it becomes involved in disputes raised by a particular business about how policies and procedures should be interpreted and implemented. In these circumstances DEFRA often produces advice notes for the whole sector but these are of a general nature to reinforce the application of a particular issue or element of procedure.
21. DEFRA advised that this complaint was therefore unique. It had no intention of making any details of the complaint public and considered it was in part a private dispute between two businesses in which it became involved in its role as the UK designated Competent Authority and because OFF alleged a breach of regulation had occurred. Considering the unusual circumstances of this case DEFRA felt it was reasonable to say that SACL had and could expect that this matter would be investigated in a private manner and details of any correspondence it submitted to assist DEFRA in the exercise of its functions would remain confidential.
22. The Commissioner considers the key consideration here is the expectations of SACL, as the party complained against and whether these expectations are reasonable in the circumstances. It is the Commissioner's view that most complaints whether against DEFRA or another public authority relating to all sorts of matters are in the main investigated on a private basis. Often complaints are not publicised unless there are extenuating circumstances because this can cause detriment, whether personal or commercially, to the complained against. The Commissioner is not commenting on the validity of this complaint and indeed it is noted that DEFRA upheld OFF's complaint against SACL. However, it is often the case that complaints made against a particular party are unfounded and in some cases malicious. It is therefore generally accepted that details of complaints against a particular individual or company will remain confidential, not widely publicised (which disclosure under the FOIA effectively involves) and will only be used for the purposes of that complaint investigation.
23. The Commissioner considers in this case it is reasonable to assume that SACL would have the expectation that the information they supplied honestly and frankly to DEFRA in relation to this complaint would remain confidential. Due to the way complaints are often investigated it is reasonable to say that a party submitting evidence or a statement

addressing the issues complained about would do so on a confidential basis.

24. For the reasons explained above, the Commissioner is satisfied that the requested information was imparted in circumstances giving rise to a duty of confidence. He therefore now needs to consider whether there would be any detriment to the confider (SACL) if this confidence was breached.
25. Where commercial information is purported to have been imparted in confidence (which is the case here) the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider (SACL) for the exemption to be engaged.
26. DEFRA confirmed that SACL felt the remaining withheld information was commercially sensitive and that if it were to be disclosed it could damage its reputation, its commercial interests and its ability to compete fairly in a competitive market.
27. The Commissioner considers it is very difficult to comment on the commercial sensitivity of the remaining withheld information in this case, as to do so in depth could release details of the withheld information itself.
28. He has, however, reviewed the withheld information and considers SACL's arguments in depth and he is satisfied that on the balance of probabilities disclosure of the remaining withheld information could cause commercial damage to SACL as a business. He considers the statement supplied by SACL was an honest and frank statement to DEFRA that was supplied to alleviate any concerns that the complaint made against it had not been taken seriously. The statement details what specific actions it took as a result of DEFRA's investigation and the Commissioner is satisfied in this case that the remaining information could cause detriment to SACL if it were to be released into the public domain.
29. Although section 41 of the FOIA is an absolute exemption and is therefore not subject to the public interest test outlined in the FOIA, case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
30. The Commissioner must therefore now consider whether there is a public interest defence on which DEFRA could rely. Public interest considerations under section 41 are different to the considerations of the public interest test outlined in the FOIA. In the FOIA a presumption in favour of disclosure must always be applied. However, under section 41

the starting point is that the information must not be disclosed *unless* the public interest arguments in favour of disclosure exceed the public interest arguments in favour of maintaining the confidence.

31. DEFRA stated that it appreciates there is a public interest in transparency, ensuring its policies and procedures are correctly implemented, that certification is carried out accurately and any complaints made about this process are investigated fairly and without bias. However, it considers any public interest has already been met by the fact that the results of its investigation have been communicated to the complainant and the majority of the statement is now in the public domain following SACL's agreement for this to be released.
32. As stated previously, the remaining information would be likely to cause commercial detriment to SACL which would be unfair and unjustified and it considers there is no overwhelming public interest in breaching the duty of confidence it owes to SACL.
33. The Commissioner has given this matter careful consideration. He agrees with DEFRA that any public interest has already been met by the disclosure of the majority of the statement and DEFRA's openness with the complainant as their complaint about SACL was investigated. He does not consider there is any further wider public interest that needs to be met by disclosing the remaining withheld information.
34. The Commissioner considers in this case there is a strong public interest in maintaining the duty of confidence that it owed to SACL. SACL provided a honest and frank response to the complaint made against it to enable DEFRA to investigate the matter fully and to reassure all those involved that the complaint had been taken seriously and actions taken to resolve the matter. If this confidence was breached SACL and other companies would be less reluctant to engage so frankly with DEFRA, this could hinder DEFRA's ability to investigate concerns thoroughly and possibly lead to a less functional certification process. Such consequences would not be in the interests of the public.
35. For the reasons explained above, the Commissioner is satisfied that section 41 of the FOIA applies to the remaining withheld information.

## Right of appeal

---

36. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.
38. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**