

## Scottish Parliament Region: Highlands and Islands

### Case 200500696: Scottish Executive Environment and Rural Affairs Department

#### Introduction

1. On 14 June 2005 the Ombudsman received a complaint from a married couple (referred to in this report as Mr and Mrs C) that the Scottish Executive and Rural Affairs Department (SEERAD) had failed to take appropriate action concerning problems they had with a crofting tenant over access to their property.

2. The complaint from Mr and Mrs C which I have investigated was that:

SEERAD were unwilling to use their means of enforcement to ensure their tenant did not prevent Mr and Mrs C their right of access.

3. Following the investigation of all aspects of this complaint, I did not uphold it (see paragraphs 6 to 16).

#### Investigation and findings of fact

4. The investigation of this complaint involved obtaining and reading all the relevant documentation, including letters of complaint and their replies, and communication between SEERAD and the Legal and Parliamentary Services Department of the Scottish Executive. I have set out my findings of fact and conclusion. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr and Mrs C and SEERAD have been given an opportunity to comment on a draft of this report.

5. Mr and Mrs C are the owners of a property whose access from the public road is over part of a neighbouring croft. Though SEERAD own this land, Mr and Mrs C have a right of access over it and bear the full maintenance costs of both the access and the gate opening to the public road. The statutory conditions of crofting tenure are contained in the Crofters (Scotland) Act 1993. There is no written lease or other form of contract between landlord and crofting tenant.

6. On 19 April 2005 Mr and Mrs C, through their solicitor, complained to the

Senior Agricultural Officer of SEERAD that their attempts to maintain their right of access were being frustrated by the actions of the crofting tenant and asked for SEERAD's proposals for resolving the matter of maintenance, repair and usage of the right of access.

7. SEERAD had previously responded to a complaint regarding this right of access from the crofting tenant on 13 September 2004. This complaint had been against Mr and Mrs C and their actions regarding the right of access. At this time, SEERAD sought advice from the Legal and Parliamentary Services Department of the Scottish Executive. I have had sight of this correspondence. This advice was acted upon and responses outlining SEERAD's position and designed to encourage an informal resolution were sent to the crofting tenant and Mr and Mrs C. This response was repeated when a second, similar complaint was received from the crofting tenant on 5 December 2004.

8. In response to the complaint received from Mr and Mrs C, clarification of the advice given previously was sought from the Legal and Parliamentary Services Department. I have had sight of this correspondence. The advice was confirmed and SEERAD replied on 9 May 2005 to the complaint that it considered the matter to be private and between Mr and Mrs C and the crofting tenant.

9. On 26 May 2005, Mr and Mrs C indicated they were unhappy with this response and further requested SEERAD to take action to resolve the matter.

10. SEERAD sought advice again from the Legal and Parliamentary Services Department. I have had sight of this correspondence. The previous position was again confirmed. SEERAD replied to Mr and Mrs C on 8 June 2005, restating the views of their previous response.

11. Mr and Mrs C complained to the Ombudsman on 14 June 2005. They were advised on 14 July 2005 that this office could not investigate their complaint until the complaints process of the body complained about had been exhausted.

12. Also on 14 June 2005, Mr and Mrs C wrote further to SEERAD outlining their understanding of the statutory basis on which SEERAD should become involved, as they has been invited to do in SEERAD's letter of 8 June 2005.

13. SEERAD passed this correspondence to the Legal and Parliamentary Services Department, seeking confirmation of their position. The Senior Principal Officer of the Legal and Parliamentary Services Department offered to respond directly to Mr and Mrs C setting out the position again. I have had sight of this correspondence. SEERAD accepted this offer and the resulting reply was sent on 22 June 2005.

14. On 18 July 2005, Mr and Mrs C complained to SEERAD about their actions and a letter of 4 August 2005 confirmed that their complaint had not been upheld.

15. On 5 August 2005, Mr and Mrs C confirmed to the Ombudsman that they had exhausted the SEERAD complaints process. The matter was then investigated by this office.

### **Conclusion**

16. SEERAD sought advice from the Legal and Parliamentary Services Department following each complaint made to them by Mr and Mrs C regarding the right of access. On each occasion, the Legal and Parliamentary Services Department advised SEERAD that they had no right of enforcement and that the matter was a private one between Mr and Mrs C and the crofting tenant. It is clear that SEERAD reasonably considered Mr and Mrs C's complaint a continuation of the similar complaint received from the crofting tenant. Having sought an initial informal resolution following the crofting tenant's complaint, SEERAD maintained the position that they had no means of enforcement. The complainants' solicitors have made legal arguments to SEERAD, the Legal and Parliamentary Services Department and the Ombudsman's office, that SEERAD do have means of enforcement. SEERAD have been given legal advice that they do not. While these views are clearly contradictory, the Ombudsman's remit does not extend to the determining of legal questions, only to investigating maladministration and service failure. I am satisfied that SEERAD took action to satisfy themselves of their legal position in this matter and, therefore, I do not uphold the complaint. The Ombudsman has no recommendations to make.

25 April 2006

**Explanation of abbreviations used**

Mr and Mrs C

The complainants

SEERAD

Scottish Executive Environment and  
Rural Affairs Department