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Peter Silverman
By email: request-684085-8a8cd560@whatdotheyknow.com

Our ref: IR2020/23621
6 November 2020

Dear Peter Silverman,

INTERNAL REVIEW: Roadside Litter on Trunk Roads managed by Highways England

Thank you for your email of 11 September 2020 appealing against the decision to withhold information regarding roadside litter on trunk roads managed by Highways England (HE). Your original request was dealt with under the Environmental Information Regulations 2004 (EIRs). We have handled your request for an internal review under the same legislation.

Summary

In accordance with Defra's internal review procedures, I have reviewed your response in discussion with colleagues from the appropriate policy team who handled your original request.

I have considered your appeal, including your arguments in relation to whether the exception actually applies. Your complaint is specific to our use of regulation 12(4)(d) of the EIRs, which relates to unfinished documents or incomplete data, in relation to letters sent to local authorities. I have concluded that this exception has been incorrectly applied under the EIRs.

However, on review I think that the exception in regulation 12(5)(d), which relates to the confidentiality of proceedings, applies instead and that therefore the information should continue to be withheld under EIRs.

I set out in the annex below a fuller explanation of our decision.

Yours sincerely,

Andrew Mobsby

Head of Information Rights

Email: InformationRequests@defra.gov.uk

Annex

Chronology

Date	
12 August 2020	<p>Defra received your initial request, which was as follows:</p> <p><i>1. Please provide me with an electronic copy or a link to the results of the survey described by Rebecca Pow as an</i></p> <p><i>" independent survey of roadside litter on those parts of the Strategic Road Network (SRN) where Highways England is responsible for maintenance but the local authority is responsible for clearing litter".</i></p> <p><i>2. Please provide me with copies of the communications to each relevant local authority sharing the results of the survey with them.</i></p>
9 September 2020	<p>Defra responded to your request by disclosing the raw data from the 2018 pilot survey provided by Keep Britain Tidy and withholding the letters sent to local authorities under regulation 12(4)(d) of the EIRs. We explained that as a result of the ongoing work regarding clarifying responsibility for litter clearance, the results contained in the letters sent to local authorities needed to be revised. These letters were therefore withheld as we considered them to be material still in the course of completion which fell under the exception in regulation 12(4)(d) of the EIRs</p>
11 September 2020	<p>Defra received your request for internal review as follows:</p> <p><i>I wish to question your decision to withhold the letters.</i></p> <p><i>You say that the results contained in "the letters sent to local authorities" may need to be revised and consider these to be material still in the course of completion which thus fall under the exception in regulation 12(4)(d) of the EIRs.</i></p> <p><i>But surely if a letter has been "sent" it cannot still be in the course of completion, or be an unfinished document, or be incomplete and cannot be therefore exempted under 12(4)(d).</i></p> <p><i>It does not matter if it might contain errors of fact which you have still to correct. By writing the letters DEFRA have created new information i.e. what they told a LA on such and such a date about such and such a road.</i></p> <p><i>If the letters are yet to be sent then please say so as my argument then falls away.</i></p> <p><i>Otherwise, please carry out an internal review of this decision.</i></p>

Consideration of which legislation applies (i.e. FOIA or EIRs)

I have considered whether your request was correctly handled under the EIRs, or whether it should have instead been handled under the Freedom of Information Act 2000 (FOIA).

Regulation 2(1)(a) of the EIRs defines environmental information as information on the state of the elements of the environment, such as air and atmosphere, water, land and natural sites including wetlands, coastal and marine areas, and the interaction among these elements, and b) factors, such as waste, emissions and discharges affecting or likely to affect the elements of the environment referred to in (a).

In the case in point, the information you request is on a measure affecting or likely to affect the state of the elements of the environment set out above, directly or through the factors in (b). This is because it relates to the Litter Strategy for England, which is a measure likely to affect the environment. The information you have requested is therefore 'environmental information' as defined in regulation 2(1)(c) of the EIRs above. In conclusion, this review found that the EIRs were correctly applied to the request.

Timeliness

In addition to the points that you have raised, I have considered whether Defra complied with the requirement in regulation 5(2) of the EIRs to respond to a requester no later than 20 working days after the date of receipt of the request for information, except where the legislation provides extensions to the deadline. Your request was received on 12 August 2020 and the deadline to respond was 12 September 2020. As the response was sent on 9 September 2020, the requirement in regulation 5(2) of the EIRs was met.

Where it appears to the requester that the public authority has not complied properly with the requirements of the EIRs, regulation 11(4) requires the public authority to review its original decision within a maximum period of 40 working days. Your request for a review was received on 11 September 2020, and the 40th working day is 6 November 2020, and so the EIRs have not been breached.

Exception in Regulation 12(4)(d) – Material which is still in the course of completion

Regulation 12(4)(d) of the EIRs provides an exception to the duty to make environmental information available when the request relates to material which is still in the course of completion or incomplete data. We considered that this exception was engaged as the information referred to relates to data which was still undergoing review.

However, I note your point that the letters, having been sent, "cannot still be in the course of completion, or be an unfinished document, or be incomplete and cannot be therefore exempted under 12(4)(d)". I agree that the information was complete enough to be able to be sent out to the local authorities. I am also conscious of the case-law setting out what constitutes "material" in the Upper Tribunal's decision on *Manisty*.

I therefore find that this exception does not apply.

Exception in Regulation 12(5)(d) – the confidentiality of proceedings

Regulation 12(5)(d) EIRs provides an exception to the duty to make environmental information available when the request relates to information covered by the confidentiality

of the proceedings of that or any other public authority where such confidentiality is provided by law. In this case I consider that the confidentiality arises from the common law expectation that this information is kept confidential.

Public interest considerations

As Regulation 12(5)(d) is a qualified exception a public authority is required to conduct a public interest test to determine whether or not information should be disclosed or withheld, and in considering this exception we have applied a presumption in favour of disclosure, as required by the EIRs.

I recognised that there was a public interest in disclosure of information concerning local authority performance in meeting their statutory duty under EPA 1990 s.89 to keep land and highways clear of litter and refuse, in order for those bodies to be held to account for that performance.

However, on the other hand I feel there is a stronger public interest in withholding the information. Our letters to local authorities explained that in the Litter Strategy we set out our aim to publish the results of this survey, and to set a deadline for authorities falling below the standard set out in the Code of Practice to improve their performance. Before doing so, we told them that we would like to understand better the issues and challenges that they faced in achieving the required standard, and which may be preventing a higher standard being consistently obtained. We explained that this would be considered in the context of the next steps, as well as in our aim to explore and identify means to address the practical barriers to keeping our roadsides clear of litter, including issues relating to both cleaning and litter-prevention, and asked them to be as forthcoming as possible. I consider that local authorities would not have expected us to publish or release their results until the questionnaires had been analysed and conclusions drawn. As this has created an expectation of confidentiality, combined with the necessary quality of confidence of the information, it means that Defra has a duty of confidence in relation to these proceedings. Please note that we are in the process of this analysis at present, having been delayed by departmental reprioritisation.

Furthermore, as we have told local authorities that we will not publish the results of this survey by authority until we understand how a higher standard of cleaning can be consistently obtained by all, releasing the results at this time could negatively affect the willingness of local authorities to work with us going forward. I consider that this would be sufficient harm to the public interest to outweigh the factors in favour of disclosure,

Therefore, I have concluded that in all the circumstances of the case, the public interest test is weighed in favour of the information being withheld under regulation 12(5)(d).

Rights of appeal

We hope that the above answers your complaint satisfactorily. However, if you remain dissatisfied, you have the right to apply directly to the Information Commissioner for a decision. <http://www.ico.org.uk/complaints.aspx>

The ICO's offices are currently closed so please visit their website on how to contact them during this period, here:

<https://ico.org.uk>