



Department
for Environment
Food & Rural Affairs

Area 4A, Nobel House
17 Smith Square
London
SW1P 3JR

T: 03459 33 55 77
helpline@defra.gsi.gov.uk
www.gov.uk/defra

Peter Silverman
request-463151-0828e7fe@whatdotheyknow.com

Our ref: RFI 9831
Date: 17 October 2018

Dear Mr Silverman

Internal review: Briefing given to Thérèse Coffey on fly-tipping

Thank you for your email of 12 April 2018 appealing against the decision to withhold copies of written briefings on fly-tipping that Defra gave to Minister Coffey in the last 6 months. 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. I would like to apologise for the long delay in responding to your request for an internal review and for any inconvenience caused.

Summary

In accordance with Defra's internal review procedures, your case has been reviewed by Defra's Information Rights Team in discussion with colleagues who handled your original request.

We have considered your appeal, including your arguments in favour of disclosure of the briefings, and have reviewed the public interest arguments for and against disclosure. We have concluded that the information you requested has been properly withheld under the EIRs, but we can now provide a brief summary of the information in scope of your request that we are withholding.

I set out in Annex 1 below a fuller explanation of our decision.

Yours sincerely

Nick Teall

Head of Information Rights

Email: InformationRequests@defra.gov.uk

Annex 1

Chronology

- You originally (RFI 9728) requested a “copy of briefing notes/information given to Therese [sic] Coffey which include references to fly tipping from her recent appointment to present”. We refused this request on cost grounds. Your subsequent request (RFI 9831) of 5 March was for a smaller amount of information. The 20-working-day deadline for the new request was 5 April.
- We responded to your request on 10 April, withholding most of the information but disclosing a fly-tipping factsheet from January 2018.
- On 12 April you requested an internal review of our response.
- On 25 June the Information Commissioner’s Office (ICO) notified us that they were considering your complaint that Defra had not provided an internal review.
- On 13 September we received the ICO’s decision (FER0755489) that we should respond within 35 calendar days. We calculate the deadline for our response as 17 October.

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

We have considered whether your request was correctly handled under the Environmental Information Regulations 2004 (EIRs), or whether it should have been handled under the Freedom of Information Act 2000 (FOIA).

We have found that the EIRs were correctly applied to this request because briefings on fly-tipping contain information on an activity under regulation 2(1)(c) that is likely to have an effect on the elements or factors referred to in regulation 2(1)(a) and (b) of the EIRs. In this case, the illegal dumping of waste is an activity that has a detrimental effect on both natural sites and the urban environment.

Timeliness

In addition to the specific points that you have asked us to review, we have considered whether Defra complied with the requirements around deadlines in the EIRs:

- Regulation 5(2) requires the public authority to respond to a requester no later than 20 working days after the date of receipt of the request, unless the information requested is both complex and voluminous. In such a case the deadline may be extended to no more than 40 working days, in accordance with regulation 7(1).
- Regulation 11(4) requires the public authority to notify the applicant of the results of its internal review as soon as possible and no later than 40 working days after the date of receipt of the complaint.

In this case we responded to your original request on 10 April, which was due to a clerical error that led to a misunderstanding over the true deadline. We also failed to provide any response to your request for an internal review within the 40-working-day deadline.

We apologise for the length of time that it has taken us to respond to both your request for information and your request for an internal review. This has been largely due to a heavy workload and competing deadlines, and we uphold this procedural aspect of your complaint in full.

Your representations

You raised the following points for particular consideration as part of our internal review. We have summarised them for ease of reference. Please see Annex 2 for your full representations.

1. The inclusion in the briefings of factual information that could have been disclosed.
2. The suggestion that we redact any sections of documents that contain information of a more sensitive nature, e.g. on policy formulation.
3. The public interest in disclosing the appropriately redacted information.
4. An argument that briefing notes can be disclosed, based on the example of briefing notes disclosed by the Department for Transport in respect of a different litter-related issue.
5. Extracts from the ICO's guidance on the application of the public interest test for regulation 12(4)(e).

Please find below our considered comments on these points:

1. We accept your point about the disclosure of factual material. In our original response we provided you with a copy of a factsheet from January 2018 used to brief Minister Coffey on the issue of fly-tipping.
2. The purpose of the briefings was to provide Minister Coffey with information to assist her in the cross-government debate around policy on fly-tipping. As you acknowledge, information provided in connection with policy formulation can be sensitive and may need to be withheld. It is for precisely that reason that we withheld information. Please see our further arguments below on the information that we withheld.
3. Our original response shows that we considered the public interest in disclosing information in scope of your request. If we had identified information for disclosure, we would have provided the information with the appropriate redactions to protect any sensitive information.

4. You provided an example of briefing notes on a different policy area that were disclosed by another department. We would point out that the sensitivity of information in the scope of any request must be assessed on a case-by-case basis and in the light of the circumstances at the time the request is received.
5. Thank you for including extracts from the ICO's guidance. Your comments around redacting sensitive information suggest that you recognise both the importance of protecting sensitive information and the importance of providing a safe space for policy proposals to be considered in private.

The exception under the EIRs that we relied on

Regulation 12(4)(e) – internal communications

This is a class-based exception, which means that it applies to a particular type of information and requires no adverse effect to be demonstrated in order to be engaged. Its application to the internal communications of a government department will mean that its focus will often be discussions around the formulation and development of public policy. It is intended to provide a “space to think in private” to allow candid debate around important issues.

This exception is therefore properly engaged for all the information withheld as the briefings for Minister Coffey were drafted by Defra civil servants and were shared only within Defra.

Public interest considerations

Our review of the public interest arguments set out in the response of 10 April is that the arguments were valid at the time and continue to be valid, especially in the immediate run up to the Resources and Waste Strategy, which is due to be published later this year. Internal dialogue around the policy is still ongoing and the policy intentions are still very much in development prior to the publication of the strategy.

As stated above, you suggested that Defra could have provided more purely factual information. Our disclosure of the January 2018 factsheet, which included links to further factual information, goes a good way towards meeting the public interest in information about fly-tipping. Details about what the government has done and our plans were included in the fly-tipping fact sheet. Most of the facts, figures and key messages included in the briefs are available in the official fly-tipping statistics at

<https://www.gov.uk/government/statistics/fly-tipping-in-england>

As this information is already in the public domain and easily accessible to you, regulation 6 on Form and format of information does not require us to provide it again. We do, however, include a note on the information being withheld which sets out where the factual information used in the briefings can be found.

There remains a strong public interest in withholding the information because Ministers and government officials should have the necessary space to think in private to formulate

policy. It is necessary for Defra to have the space to do this away from public scrutiny. The policy-related material in the withheld information is still being used to inform the development of policies to tackle fly-tipping, and key decisions on those policies remain to be made by both Defra and the other departments involved. If this information were to be released it would risk misleading the general public and have a detrimental impact on this policy area prior to the publication of the Resources and Waste Strategy later this year.

Disclosure of the information would be likely to reduce the candid nature and quality of advice in briefings from policy officials to Ministers. It is essential that such internal communication remains protected, so that Ministers can continue to receive candid and robust advice from their officials. Going forward it is important that officials are able to continue to communicate internally.

Therefore, our view is that the information should continue to be withheld.

The information that we are withholding

- 1. 19/10/2017 Fly-tipping stats – further information**

Information in advance of the publication of the Official Fly-Tipping Statistics for England on Thursday 19 October 2017

- 2. 24/10/2017 OPQ**

Briefing to respond to the Parliamentary Question (available on Hansard¹): ‘What steps the Environment Agency is taking to prevent illegal fly tipping on farms?’

- 3. 27/11/2017 Data sharing brief**

Briefing on sharing data about fly-tipping

- 4. 16/11/2017 - Fly-tipping in rural areas – Debate briefing pack**

Briefing for an End of day debate called by Anne Marie Morris MP (transcript available on Hansard²)

- 5. 25/01/2018 Defra oral Q17 TC fly-tipping**

Briefing to respond to the Parliamentary Question: What steps his Department is taking to reduce rates of fly-tipping?

- 6. 21/02/2018 CLA fly-tipping event Brief**

Briefing for public engagement on 27 February 2018 hosted by the Country Land and Business Association about ‘the impact of fly-tipping in the countryside’

- 7. 01/03/2018 Sentencing of fly-tippers**

Briefing about sentencing of fly-tippers from the Official Fly-Tipping Statistics for England

¹ <https://hansard.parliament.uk/Commons/2017-10-26/debates/F98AE76E-B89C-4A27-9BF5-83B5618D580A/Fly-Tipping?highlight=illegal%20fly-tipping%20farms#contribution-69825284-78F3-4DB5-AE10-F94A7DB92ADE>

² <https://hansard.parliament.uk/Commons/2017-11-21/debates/7395C69B-98C6-4FF6-996D-EF3EBFF24AAD/Fly-TippingInRuralAreas?highlight=anne%20marie%20morris%20fly-tipping#contribution-A8F0CB23-B71E-462C-932E-B0B9A2350017>

Right 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. The Information Commissioner can be contacted at:

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

<http://www.ico.gov.uk/complaints.aspx>

Annex 2 – Your request for an internal review

For ease of reference, we have copied out the representations you made when requesting an internal review:

I am writing to request an internal review of Department for Environment, Food and Rural Affairs's handling of my FOI request 'Briefing given to Therese Coffey on Fly-tipping'.

Could you please review your application of the public interest test bearing in mind:

1. That some briefing documents would have contained purely factual information such as the law applicable to fly-tipping, the relative responsibilities of the government agencies, statistics on the cost of clearing fly-tipping, the actions taken by government agencies to deter fly-tipping and on existing policy etc etc

[To avoid doubt I am not seeking information on the issues I have listed I am seeking information about how they were relayed to the Minister by your department]

2. Where such documents contain information of a more sensitive nature eg on policy formulation these sections could be redacted.

3. It would, I would argue, be in the public interest to provide me with copies of these documents

4. Please note that the DfT provided me with copies of their briefing notes to John Hayes MP when he was a Minister for roads. Please refer to https://www.whatdotheyknow.com/request/litter_on_he_network_e_mail_to_p#incoming-1037245

5. The guidance give by the ICO on the application of the public interest test which I have reproduced here::

42. Although a wide range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision making processes.

43. This reflects the underlying rationale for the exception: that it protects a public authority's need for a 'private thinking space'. As set out above, this rationale was made clear in the proposal for the European Directive which the EIR are intended to implement.

44. This approach is also supported by the duty set out in Article 4 paragraph 2 of the Directive to interpret exceptions in a restrictive way. If the public interest arguments were unrestricted, the broad scope of the exception would turn it into a 'catch-all' exception, which would seem contrary to this duty.

45. Although the public interest factors for this exception should focus on protecting internal deliberation and decision making processes, some types

of internal communication (eg legal advice or commercially sensitive information) may be afforded more protection under other exceptions, where other effects of disclosure can be taken into consideration. If more than one EIR exception applies to the information it is possible to aggregate (ie combine) the public interest factors relevant to all applicable exceptions when considering the public interest test.

46. These factors must then be balanced against the public interest in disclosure. Regulation 12(2) specifically provides that public authorities should apply a presumption in favour of disclosure. This means that a public authority will have to disclose some internal communications, even though disclosure will have some negative effect on internal deliberation and decision making processes.

47. There is no automatic public interest in withholding information just because it falls within this class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document. Arguments should always relate to the content and sensitivity of the particular information in question and the circumstances of the request.

A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.whatdotheyknow.com/request/briefing_given_to_therese_coffey

Yours faithfully,

Peter Silverman