



Department
for Environment
Food & Rural Affairs

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Your ref:
Our ref: RFI 6017
Date: 16 January 2014

Dear

**REQUEST FOR INFORMATION: NORFOLK COUNTY COUNCIL WASTE
INFRASTRUCTURE PROJECT**

Thank you for your request for information, which is copied below:

“Under the provisions of the Freedom of Information Act 2000 and/or the Environmental Information Regulations, please provide copies of information relating to any advice or information sought from external advisors/bodies in relation to Norfolk County Council’s residual waste infrastructure project as part of, or to inform, the review of waste infrastructure credits. Please provide, for each advisor/body:-

- *The name of the advisor/body;*
- *Details of what the advisor/body was asked to provide advice on, including a copy of the relevant brief or initiation document;*
- *A copy of the advice;*
- *The total amount paid to the advisor/body for the advice;*
- *Details of any meetings (including face to face, tele and video conferencing) with the advisor/body in relation to the advice, including the dates of any meetings, names of attendees, copies of any minutes/notes/action points;*
- *Copies of any correspondence, notes, minutes or other exchanges between Defra and the advisor/body in relation to the advice;*
- *Information on how the advisor/body was selected to provide advice to Defra, including the type of procurement/selection process used and any assessment/consideration of the technical and professional capabilities and experience of the advisor/body;*



- *The names of any other waste projects where waste infrastructure credits were applied for or awarded and where the advisor/body has provided advice, and what the current status of the project is.”*

We have considered your request under the Environmental Information Regulations 2004 (EIRs). The EIRs apply to requests for environmental information, which is a broad category of information defined in regulation 2 of the EIRs. Public authorities are required to handle requests for environmental information under the EIRs. They give similar access rights to the Freedom of Information Act 2000 (FOIA).

Firstly we would like to make it clear that in responding to this request, we are interpreting it as limited to information of an advisory nature that we have requested from bodies external to Government and also to cases where we have formally asked for that information. We are taking this approach because it is consistent with the information that you are seeking in the bullet points of your request.

Defra appointed Nera Economic Consulting to audit the model used to forecast progress towards the 2020 landfill target as part of the review of Waste Infrastructure Credits. Nera did not advise specifically on the Norfolk Project and are therefore not within the scope of your request for information relating to any advice or information sought from external advisors/bodies in relation to the Norfolk Project. However, we attach Nera's report, '*Audit of WIDP Monte Carlo Model*', which might be helpful nonetheless. Further information on the forecasting analysis is available on Defra's website, at the following location:-
<https://www.gov.uk/government/publications/forecasting-2020-waste-arisings-and-treatment-capacity-norfolk-county-council-residual-waste-treatment-project>.

1. Legal advice and related documentation

As you would expect, Defra sought advice from leading Counsel on matters relevant to the review of the allocation of Waste Infrastructure Credits to the Norfolk project. We consider that the Instructions to Counsel, Counsel's advice and all related documentation benefits from legal professional privilege and is therefore exempt from disclosure under (1) Regulation 12(5)(b) of the EIRs, which relates to disclosures that would materially affect the course of justice; and (2) Regulation 12(5)(d) of the EIRs, which relates to the

confidentiality of proceedings – in this case, the review of the allocation of waste infrastructure credits to the Norfolk project.

We recognise that to apply the exception at 12(5)(d) of the EIRs, there must be confidentiality that is provided by law. When considering a common law of confidence there are a number of factors to consider, as outlined in the Information Commissioner's guidance, whether the information has a necessary quality of confidence and whether it has been held in confidence. We can confirm that both of these factors apply, and that the information therefore has a confidentiality provided by law. The information does have the necessary quality of confidence, is not trivial and has not been placed in the public domain.

Both of these exceptions are subject to a public interest test. We recognise that there is a strong public interest in ensuring that Defra is following clear and sound legal advice and in understanding the advice given to Ministers on which they make a decision.

However, there is an inherent public interest in safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. To disclose information that is subject to legal professional privilege would undermine our right to private counsel and unbalance the level playing field.

We therefore consider, taking all the circumstances of this case into account, and applying a presumption in favour of disclosure as required under the EIRs, that the public interest test under the EIRs balances in favour of withholding the legal advice and related documentation in its entirety.

In answer to your first, fourth and seventh bullet points, we can confirm that leading Counsel appointed by Defra was David Forsdick of Landmark Chambers. As regards Defra's selection of Counsel, the Attorney General has panels approved to take on government work. There are three London Panels (A, B and C) depending on experience, with the A Panel consisting of the most experienced Counsel. Counsel was selected from the Attorney General's A Panel as having the right expertise. He has been paid a total of £3,780 (including VAT) to date.

As regards bullet point eight of your request, we can confirm that the Isle of Wight Waste PFI Project is the only other project where waste infrastructure credits were applied for or awarded and where David Forsdick has provided advice to Defra. The current status of that project is post financial close.

2. Internal communications

There are emails/documents related to action points following discussions with Counsel. In addition to the legally privileged nature of any advice contained therein, these documents also engage the exception in Regulation 12(4)(e) of the EIRs, which relates to the disclosure of internal communications. In accordance with the EIRs, we have had to consider carefully the fact that this information, if released, will have to be put in the public domain (and published on the Government website).

We recognise that there is a strong public interest in making people aware of internal discussions so as to inform people of the process by which decisions are made in government. This is a high profile area, and it is important that the Department is transparent in the decisions taken, particularly where these decisions affect funding for local waste infrastructure projects (for this reason we have provided a large amount of information on our website).

However, this has to be balanced with the need to provide a safe space where officials are free to consider all views and ask what are at times uncomfortable questions with no repercussions should that approach not be adopted. This retains the impartiality of the civil service, which might be undermined if advice was routinely made public as there is a risk that officials could come under political pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making, which would not be in the public interest.

We therefore consider, taking all the circumstances of this case into account, and applying a presumption in favour of disclosure as required under the EIRs, that the public interest test under EIRs balances in favour of withholding these documents in their entirety.

Attached below are two annexes. Annex A explains the copyright that applies to the information being released to you. Annex B gives contact details should you be unhappy with the service you have received.

If you have any queries about this letter please contact the WIDP Programme Office at the address below.

Yours sincerely

WIDP Programme Office

Email: widp.programmeoffice@defra.gsi.gov.uk

Annex A

Copyright

The information supplied to you continues to be protected by copyright. You are free to use it for your own purposes, including for private study and non-commercial research, and for any other purpose authorised by an exception in current copyright law. Documents (except photographs) can be also used in the UK without requiring permission for the purposes of news reporting. Any other re-use, for example commercial publication, would require the permission of the copyright holder.

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Copyright in other documents may rest with a third party. For information about obtaining permission from a third party see the [Intellectual Property Office's website](#).

Annex B

Complaints

If you are unhappy with the service you have received in relation to your request you may make a complaint or appeal against our decision under section 17(7) of the FOIA or under regulation 18 of the EIRs, as applicable, within 40 working days of the date of this letter. Please write to Mike Kaye, Head of Information Standards, Area 4D, Nobel House, 17 Smith Square, London, SW1P 3JR (email: requestforinfo@defra.gsi.gov.uk) and he will arrange for an internal review of your case. Details of Defra's complaints procedure are on our [website](#).

If you are not content with the outcome of the internal review, section 50 of the FOIA and regulation 18 of the EIRs gives you the right to apply directly to the Information Commissioner for a decision. Please note that generally the Information Commissioner cannot make a decision unless you have first exhausted Defra's own complaints procedure. The Information Commissioner can be contacted at:

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