



Department
for Environment
Food & Rural Affairs

Nobel House
17 Smith Square
London SW1P 3JR

T: 08459 335577
helpline@defra.gsi.gov.uk
www.defra.gov.uk

Via email

Your ref:
Our ref: RFI 5704
Date: 18 Sept 2013

Dear

**REQUEST FOR INFORMATION: DISCLOSURE OF DOCUMENTS RELATING TO THE
DECISION TO WITHDRAW PROVISIONAL ALLOCATION OF WASTE
INFRASTRUCTURE FUNDING TO BRADFORD AND CALDERDALE WASTE
PROJECT**

Further to your letters of 22 July and 3 September, and our acknowledgement letters of 23 August and 13 September, I am writing to inform you of the outcome of our consideration of your request for information under the Environmental Information Regulations 2004 (EIRs). Your letter of 22 May 2013 sought disclosure of documents relating to the Bradford and Calderdale waste infrastructure project and the points raised are dealt with, and numbered, in the order that they appear in your letter.

1. Material information relating to any further policy or other documents published by Defra or sent to the Councils which have not been referred to in the Amended Statement of Facts and Grounds, and relate to the Councils' expectations:

1.1. as to the process and criteria that applied to applications for WICs:

The applications process has evolved over time; Defra has, therefore, issued/published a number of related guidance documents. Following a careful trawl of our records we have been able to identify the following documents which fall within the scope of this request, and which are already in the public domain:-

- Advice to local authorities on changes to PFI process (2007):
<http://archive.defra.gov.uk/environment/waste/localauth/funding/pfi/documents/recent-dev-waste-pfi.pdf>
- PFI criteria (2008):
<http://archive.defra.gov.uk/environment/waste/localauth/funding/pfi/documents/pfi-criteria-aug08.pdf>



- PFI applications process map (2009):
<http://archive.defra.gov.uk/environment/waste/localauth/funding/pfi/documents/pfi-app-scrut-prcss.pdf>
- Guidance documents and information (2011):
<http://webarchive.nationalarchives.gov.uk/20130123162956/http://www.defra.gov.uk/environment/waste/local-authorities/widp/widp-guidance/>

1.2. that they would be consulted when guidance or policy was subjected to major detrimental changes (including the Defra's, HM Treasury's and DCLG's previous practice of consultation on all PFI credit guidance applicable to the WIC programme); and

There is nothing (to the best of our knowledge) published by Defra that states this – therefore, this information is not held.

1.3. that they would receive support and could expect a relationship of assistance based on good faith, trust and confidence

Following a careful trawl of our records we have identified the (attached) documents listed below which may fall within the scope of this request. For the avoidance of doubt, it is noted that your characterisation of the relationship is not accurate, but this is a matter for the ongoing legal proceedings. Please note that names of individuals, and contact details, constitute personal data which is being withheld as the information falls under the exceptions in regulations 12(3) and 13(1) of the EIRs, which relate to personal data relating to third parties.

- Bradford - WIDPs' Response to Eol v3 170507.pdf
- 2008.04.07 Bradford Endorsement Letter.pdf
- 20111207 Brad&Cald Pre PB FBC approval v1_0.pdf
- Bradford and Calderdale MoU.pdf

2. Material information relating to the date when the Review of the WIC policy was first proposed (including but not limited to all correspondence with and between, and reports considered by, persons at Defra that informed the submissions to Ministers dated 6 November 2012 and 18 January 2013)

The formal review of Defra's provisional offer of financial support to four waste infrastructure PFI projects which have not yet reached contract signature ("financial close") was first proposed on 6 November 2012. Submissions to Ministers, correspondence between Defra civil servants and civil servants from other Government Departments, internal reports and meeting notes constitute internal communications, and are therefore being withheld under exception 12(4)(e) of the EIRs. Legal advice contained in some of these documents is also being withheld under exception 12(5)(b), which relates to the course of justice, as this is legally privileged information relevant to an ongoing litigation

process. However, we note that a redacted copy of the submission of the same date to the Secretary of State was disclosed to you under the Duty of Candour (for the purposes of the judicial review proceedings only). Further explanation for these exceptions can be found in the *Public Interest Test* section below.

3. Material information relating to the date when the Review of the WIC policy was authorised

It was not a review of WIC policy as such, but a review (under our current policy) of the provisional allocation of WICs to the three projects that were still in procurement.

4. Material information relating to what actions were taken or instructions given to prevent DEFRA TRANSACTOR and other persons at Defra with whom the Councils had a working relationship from finding out about the Review, why they were taken, who authorised them and for what reasons

The WIDP Programme Director decided to restrict information (about the review) to those directly involved in the review only (which excluded NAMED DEFRA TRANSACTOR and any other Transactors). Those involved in the review had access to all relevant information about the projects under consideration without any need to inform the Transactors of the review.

5. Material information relating to what matters were raised for Ministers' consideration in the submissions dated 6 November 2012 and 18 January 2013 (including those hitherto blacked out or undisclosed and in particular what was said about the benefits of undertaking an open Review, what directions were given to him on the applicable law in order to make his decisions, and what was said about 'media and stakeholder management'/ 'presentational issues' which might have been taken into account when determining whether to undertake the Review, whether to do so in complete secrecy, and in deciding whether to withdraw WICs from one or more infrastructure projects)

These submissions, and related information, constitute internal communications and are being withheld under exception 12(4)(e) of the EIRs. Furthermore, legal advice contained in some of these documents is being withheld under exception 12(5)(b), which relates to the course of justice, as this is legally privileged information relevant to an ongoing litigation process. I note that redacted versions of the submissions have already been provided to you under the Duty of Candour, including in revised disclosure provided to you on 26 July 2013 which lifted some of the redactions. Further explanation for these exceptions can be found in the *Public Interest Test* section below.

6. Material information relating to the material data and assumed probability values which were fed into the 'Monte Carlo' model used to forecast net waste infrastructure treatment capacity, and in particular:

We have published information about the approach taken at the following links:

- Defra analytical report (“*Forecasting 2020 waste arisings and treatment capacity*”): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221027/pb13883-forecasting-2020-waste-arisings.pdf
- Review of capacity forecasting methodology: http://randd.defra.gov.uk/Document.aspx?Document=10624_EV0802NERAReviewofForecastingMethodsFinal.pdf
- Review of stochastic modelling of landfill directive targets: http://randd.defra.gov.uk/Document.aspx?Document=10623_EV0802NERAMCModelReportFinal.pdf

6.1. what assumptions were made or data input about net waste capacity in Wales, Scotland, Northern Ireland or indeed other countries, and how this might affect attainment of the UK landfill diversion target on the one hand and the additional capacity needed in England on the other;

Waste is a devolved matter. Each of the devolved administrations has a responsibility to contribute to meeting the UK landfill target. Defra’s analysis focussed on the requirements of meeting England’s share of the UK target. No assumptions were therefore made on net waste capacity outside of England – therefore, this information is not held.

6.2. what assumptions were made about local and regional under- or over-capacity for waste generation, the costs of transporting waste, and how that might affect the quantum of treatment capacity that would be needed in England;

Defra’s modelling focussed on the requirements of meeting England’s share of the UK landfill target. No assumptions were made about local or regional net capacity, or the costs of transporting waste – therefore, this information is not held. The response of 26 July 2013, under the Duty of Candour, sets out how geographical considerations were taken into account in the review.

6.3. establishing a clear list of what waste infrastructure projects were input into the model, what 'red-amber-green' ('RAG') status was allocated to each, and what probability values were assigned to each being operational at any given date in the future;

The list of projects used in Defra’s analysis is contained in the forecast model, redacted versions of which are attached:

- Forecast Excel Spreadsheet no formulae (redacted).pdf
- Forecast Excel Spreadsheet w formulae (redacted).pdf

Defra declines to release individual RAG ratings (and the associated probability values) as these constitute commercially sensitive information, and is therefore being withheld under exception 12(5)(e) of the EIRs. The need to protect confidentiality as to the individual RAG

assessments is of crucial importance, given the market-sensitive nature of such assessments. Further explanation for the exception can be found in the *Public Interest Test* section below.

6.4. what data and probabilistic assumptions were used in considering the extent to which waste would be re-used or recycled in the event that each of the infrastructure projects referred to above did or did not become operational;

Defra's analysis focussed on the requirements of meeting England's share of the UK landfill target. The assumptions made for recycling levels are outlined in Section 2 of the Defra paper, "*Forecasting 2020 waste arisings and treatment capacity*". No assumptions were made on waste re-use or recycling at the local level – therefore, this information is not held.

6.5. what assumptions were made about 'windfall' or unforeseen capacity coming into operation before 2020;

There was no inclusion of "windfall" capacity (i.e. the possibility that additional infrastructure projects could come on line that Defra is not currently aware of) for the reasons outlined in Appendix B of the Forecasting paper ("*Forecasting 2020 waste arisings and treatment capacity*").

6.6. what consideration was given in the modelling to the trajectory for reductions in waste prescribed by section 3 of the Waste and Emissions Trading Act 2003;

The focus of the modelling was on waste treatment capacity/infrastructure required to meet the 2020 EU Landfill Directive target. No specific consideration was given to the trajectory for reductions in waste prescribed by section 3 of the Waste and Emissions Trading Act 2003 – therefore, this information is not held.

6.7. what assumptions were made about future levels of Landfill Tax and how those might affect generation of waste arisings and the demand for and supply of (A) non-landfill waste treatment infrastructure capacity and (B) landfill disposal;

No assumptions were made on future levels of Landfill Tax – therefore, this information is not held. The approach taken to forecasting waste arisings and treatment capacity is outlined in the published Defra forecasting paper: "*Forecasting 2020 waste arisings and treatment capacity*".

7. Material information relating to the date when the Secretary of State finally made up his mind to withdraw WICs and, if this was earlier than 21 February 2013, what steps were made to communicate the decision to the Councils;

The date of the decision was 21 January 2013.

Following direction from Ministers about the precise nature of the decision, further work was required to ensure the communication of the decision was agreed with others in Government and the announcement was handled appropriately. On the day of the announcement, letters were sent to all projects supported by the WIDP, local MPs with constituency interests in the 3 projects directly impacted by the decision and other interested parties. On the day of the announcement (21st February) and ahead of the letters being issued, WIDP's Programme Director contacted the chief executive officers (or equivalent) of the local authorities affected to forewarn them of the letter and the decision. The decision was published on the Defra website on the same day the letters were issued, together with the report "*Forecasting 2020 waste arisings and treatment capacity*".

PUBLIC INTEREST TEST

You will have noticed that we have not provided certain data under the following exceptions allowed by the EIRs:

Regulation 12(4)(e)- Internal communications

This covers communications between civil servants (both Defra and other Government Departments), internal reports and submissions to Ministers. 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). Therefore, although some of this information has been provided under the Duty of Candour (for the purposes of the judicial review proceedings only in which you are one of the Claimants), we have decided to withhold the information, in its entirety, under the EIRs.

We recognise that there is a strong public interest in disclosure as it would inform the public of internal discussions and 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 the information on our website and the information in the Model which is attached.

On the other hand, there is a strong public interest in 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. It is for this reason that internal reports and submissions are not routinely published or released, and is particularly important in relation to waste, where the decisions made affect the funding of waste infrastructure projects, and where the decisions made are often unpopular ones.

Therefore, we have concluded that, in all the circumstances of the case, that the information should be withheld as the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulation 12(5)(b) – course of justice

We have withheld legal advice to officials and Ministers. We have considered carefully the points you made to the Treasury Solicitor's Department in a letter dated 22 July 2013 as to whether legal advice can be withheld under the EIRs but do not accept that as a result, there are no applicable exceptions. Although it is accepted that there is no express exception for legally privileged material, for the reasons set out below this information is withheld under exception 12(5)(b) of the EIRs. We also note that this information has not been provided under the Duty of Candour (for the purposes of the judicial review proceedings).

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

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 open up to scrutiny the strengths and weaknesses of Defra's case – undermining our right to private counsel and unbalancing the level playing field under which the judicial review is supposed to be carried out. This in turn would undermine the entire judicial review process, and would prejudice the course of justice, which would not be in the public interest to do so.

It is not accepted that such an approach is contrary to either the public interest nor the principle of fair access to justice. In particular, matters which are subject to litigation (including potential litigation) are governed by a different regime to ensure that relevant information is available to the parties (and potential parties) under both the Duty of Candour and the Civil Procedure Rules. The EIRs are of course for a different purpose and whether or not information is released under the EIRs is not relevant to the principle of fair access to justice.

Therefore, we have concluded that, in all the circumstances of the case, that the information should be withheld as the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulation 12(5)(e) – commercial confidentiality

Parts of the Model have been withheld under regulation 12(5)(e) of the EIRs because of commercial confidentiality. We are applying this exception to information held in the database that is of a sensitive commercial nature, which if disclosed would likely deter investors (e.g. banks) from providing necessary finance to the projects due to the risk of the projects succeeding being misinterpreted. Therefore, it would not serve the interests of the projects if they did not achieve best value for money or secure the finance needed for the success of the project. This is not in the public interest as there are strong grounds that best infrastructure deals (which would benefit whole communities) may not be progressed through lack of finance.

We recognise that there is a strong public interest in disclosing information used to inform the decision to withdraw the provisional allocation of funding from the three residual waste infrastructure projects in procurement. For this reason we have provided a large amount of the information on our website and the information in the Model which is attached.

On the other hand, there is also a strong public interest in withholding some of this information because for their part, those who have dealings with ourselves (in this instance local authorities providing us with the data to populate the database) can do so in the assurance that confidence will be respected where there is no overriding public interest in breaching that confidence. Should that confidence be breached, then investors and other stakeholders and participants in public projects would be less likely to be open in negotiations. This would hamper the effective administration of Government, and lead to poorer services and value for money for the public sector and the community. There is, therefore, a strong public interest in maintaining investor confidence and protecting the Government's ability to reach confidential commercial judgements without being forced to disclose such information.

Therefore, we have concluded that, in all the circumstances of the case, that the information should be withheld as the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulations 12(3) and 13(1) – withholding personal data relating to third parties

Personal data is being withheld as the information falls under the exception in regulations 12(3) and 13(1) of the EIRs, which relate to personal data relating to third parties. Regulation 13(1) of the EIRs exempts from disclosure personal data relating to third parties where disclosure would breach the Data Protection Act 1998 (DPA). In this case, we believe that disclosure of the information would breach the first data protection principle in Schedule 1 of the DPA in two ways. First, disclosure would not constitute 'fair' processing of the personal data and, second, disclosure would not satisfy any of the conditions for data processing set out in Schedule 2 of the DPA. In particular we do not consider that there is a legitimate interest in disclosure in this case. Release of names of junior officials (or contact details of any officials) would add nothing to the public's understanding of this matter, and although there is a legitimate interest in disclosure as it would serve to promote even greater transparency and accountability, this interest has been met through the disclosure of the documents attached. Consequently, we believe that regulations 12(3) and 13(1) of the EIRs exempt the information from disclosure and therefore we have concluded that, in all the circumstances stated above, the information should be withheld.

Regulation 12(4)(a) – information not held

The information which is not held is exempt under regulation 12(4)(a) of the EIRs. Regulation 12(4)(a) is a qualified exception, which usually means that a public authority is required to conduct a public interest test to determine whether or not information should be disclosed or withheld. However, the Information Commissioner, who is the independent regulator for requests made under the EIRs, takes the view that a public interest test in cases where the information is not held would serve no useful purpose. Therefore, in line with the Information Commissioner's view, Defra has not conducted a public interest test in this case.

I attach an annex giving 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 email address below.

Yours sincerely,

Programme Manager
Waste Infrastructure Delivery Programme (WIDP)

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

Annex

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