

From: Peter Silverman
Sent: 09 July 2014 12:15
To: 'robert.goodwill@dft.gsi.gov.uk'
Cc: Andrew Gwynne MP ; James Miller
Subject: Our littered motorways 6

Dear Robert,

Our Correspondence

Please refer to my e-mail to you of [2nd June](#) and [an e-mail from Mrs Davies](#) of the Highways Agency of 24th June in response. In the past you have kindly replied in person. This new approach is of concern to me. Let me explain why.

It means I have no confirmation that you have read my e-mail and thus been made aware of the further evidence I have presented of DfT's failure to comply with both [EPA S89\(1\)](#) (duty to keep the motorways clear of litter) and the Environmental Information Regulations.

If it was diverted without your having the opportunity to read it I do not know if this was as a result of a standing instruction from you or at the initiative of a civil servant.

If it was the former I would ask you to re-consider your decision bearing in mind that the Secretary of State is *personally* responsible for fulfilling the EPA S89(1) duty and there is no independent organisation charged with monitoring compliance with it that I can petition.

By trying to fulfil this role myself I am channelling the concerns of such people as the Ford Desmoineaux, who recently wrote to me saying: "*Area 10 - Excellent work – keep it up! Area 10 is filthy under this new contractor! ... the agency were disinterested.*" You can read his comments in full and a further 136 on the subject on my [messages of support page](#).

If you have not already done so I would be grateful if you could now read my e-mail of the 2nd June and confirm that you have done so. Could you also confirm receipt of my e-mail of 27th March 2014.

In the meantime I would like to develop further the three following issues.

Further evidence of failure to comply with the Environmental Information Regulations

In my e-mail of 2nd June I explained that James Miller had requested a copy of the sweeping and cleaning sections of the Area 2 Management Requirements Plan. I said that the Agency failed to respond within the statutory time period and, when they did so, refused his request on the grounds that these sections contained "commercially sensitive information". I pointed out that this was not a valid exception under the EIR and asked you to expedite a copy for him.

Quite a lot has happened since then providing more evidence of DfT EIR compliance failings.

Mr Miller received a letter from Highways Agency FOI Officer, Chris Barnes dated 17th June following up a complaint Mr Miller had made to the Information Commissioner's Office (ICO).

Mr Barnes reported that he had carried out a review of the initial decision to refuse the information. He acknowledged the fact that the Agency had not met its obligation under EIR 5(2) – *info to be made available in 20 days*. However, as the information had been refused the breach was of EIR 14(2) – *refusal to be made in 20 days* and not of EIR5(2). He agreed that the refusal did not specify the exception being relied upon in breach of EIR 14(3)(a).

However he went on to uphold the refusal under EIR12(5)(e) - *the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*. He made no reference to the fact that such decisions are subject to a public interest test and I presume he omitted to carry one out in breach of EIR14(3)(b).

He admitted that Mr Miller was not informed of his rights under EIR 11 that he could apply to the Agency for a review of its decision. This is a breach of EIR 14 (5)(a). He did not however admit that the refusal notice failed to inform him about the appeal provisions under EIR 18 which is a breach of EIR 14 (5)(b).

He complied with EIR 11(5)(b) by stating what remedial action would be taken (staff training etc) but failed to say when this would be completed in breach of EIR11(5)(c).

Mr Miller made further representations to the ICO on 25th June pointing out that Mr Barnes seemed to have ignored the public interest test requirements.

On 30th June Mr Barnes e-mailed Mr Miller to say that the decision to redact the information (i.e. the Sweeping and Cleaning provisions) was taken following a Public Interest Test. If this was a reference to Mr Miller's information request it was not correct. Mr Barnes went on to say that Mr Miller could view the findings via a [disclosure log](#) on the Highways Agency web site. Clicking on the link however takes one to an earlier case in which someone had applied for several items of information including the Area 2 Maintenance Requirements Plan (MRP). Parts of the latter including the Sweeping and Cleaning provisions had been redacted. The reasons for so doing were given in a letter of 21st August 2013. This is, in my opinion, another seriously flawed document.

The Sweeping and Cleaning provisions, and much if not all of the other information requested, was environmental information as defined in the Environmental Information Regulations 2004. However, all of the items requested were considered under the Freedom of Information Act 2000.

The letter cites FOIA Section 43(2) as one of the exemptions applicable saying that it exempts trade secrets which is not the case. Section 43(2) states *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)*.

A Public Interest Test was carried out. However this lumped 5 different documents types (e.g. MPRs and Incident Response Plans) into one test. It then quite bizarrely weighed factors in favour of disclosing one document type against factors supporting non-disclosure of another.

It listed as one of the factors favouring the disclosure of the MRP for Area 2 the fact that no significant reputational or commercial damage had resulted from the disclosure of the MRP for Area 10. It listed no factors supporting the non-disclosure of the MRP. It concludes that the factors for disclosure outweigh the factors for non-disclosure. However, it said there were some instances where the information being released could harm commercial interests and so will be redacted under the "previously stated exemptions".

The whole of the Sweeping and Cleaning provisions were redacted in this way. This is a breach of Section 17 (1)(c) which says the public authority applying an exemption should state (if that would not otherwise be apparent) why the exemption applies. Saying it could harm commercial interests is just an abbreviated restatement of the exemption itself.

It is also in breach of Section 17(3)(b) as the Agency failed to state why the public interest in maintaining the exemption outweighed the public interest in disclosing the Sweeping and Cleaning provisions.

In total I make that 13 breaches of the EIR / FOIA in total.

Mrs Davies says that Mr Miller's request was treated as general correspondence rather than an EIR request. This is simply not correct. Mr Miller was told in response to his request: *"Please see the link to the Maintenance Requirements Plan. The section covering sweeping and clearing (B11) has been redacted as it contains commercially sensitive information"*.

She went on to say that: *"Mr Miller was directed to a previous decision to exempt the Maintenance Requirements Plan, dated August 2013 and a link was provided to the published request, which did cite the valid exceptions"*. She failed to say that this was only after he had pointed out to the ICO five days previously that the Agency had ignored their duty to carry out a public interest test.

Once again could I ask you to please expedite a copy of this information for Mr Miller.

Please note that since March this year the ICO have already issued 4 Decision Notices admonishing the Agency / DfT for 9 breaches of the EIR / FOIA in handling my own and Mr Miller's information requests.

Infrastructure Bill

Clause 107 of the Bill amends S89 of the EPA so that the new company will become responsible for the [EPA S89\(1\) duty](#). The Secretary of State for Transport will thus be relieved of this responsibility.

I can however see no reference to this in the [associated policy papers](#) and wonder if any thought has been given to how this will pan out. Will anyone be given the responsibility for monitoring compliance by the new company with EPA S89(1)? Will the ORR have a role to play in this? Would the DfT be involved?

M40

Please refer to [my e-mail of 13th March](#). I drove the length of this motorway on Friday. Apart from the first 10 km (southern end) the motorway was generally free of litter and refuse. I also saw two separate cleansing crews in operation. This is the second time I have witnessed litter picking at two locations on this motorway on the same journey. Yet when I travel elsewhere on the network I rarely see any cleaning going on. What you do see, in contrast to the M40 is lots of litter. Since I raised the issue in March has anything been done to explain this discrepancy and to see what lessons can be learned?

I look forward to hearing from you.

Kind regards

Peter Silverman

www.cleanhighways.co.uk