



First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FER0796604

Appeal Reference: EA/2019/0097

Heard at Field House London
On 22 July 2019

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

ANNE CHAFER & ROGER CREEDON

Between

PETER SILVERMAN

Appellant

and

INFORMATION COMMISSIONER

First Respondent

DEPARTMENT FOR ENVIRONMENT FOOD & RURAL AFFAIRS

Second Respondent

Appearances:-

Appellant:	in person
First Respondent:	did not appear
Second Respondent:	Tom Tabori (instructed by Ellie Keogh)

DECISION

The appeal is allowed in part.

REASONS

1. Fly-tipping (the unlawful deposition of waste materials on land), is a subject of significant concern. The Appellant in these proceedings sought information from the Government Department responsible for policy in this area, the Second Respondent (DEFRA). His initial request was considered to be unreasonably wide so on 5 March 2018 he made a more focussed request:-

“Please let me have copies of the written briefings given to Minister Coffey by DEFRA in the last six months on fly-tipping”

2. DEFRA responded by supplying some information and withholding other information relying on Regulation 12(4)(e) of the Environmental Information Regulations (EIR) which can protect the internal communications of a public body from disclosure (subject to consideration of the balance of public interest). The Appellant sought an internal review of the decision. He suggested that factual information could be disclosed, DEFRA could redact sections of documents that contain sensitive information on policy formulation and arguing that briefing notes could be disclosed.
3. In the internal review DEFRA explained that it had provided a factsheet by way of factual information. With respect to other material *“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...”*. The internal review, dated 17 October upheld the position which DEFRA had taken. It helpfully set out the information that DEFRA was withholding:-
 - 19/10/2017 advance information on official fly-tipping statistics
 - 24/10/2017 briefing to respond to a Parliamentary Question
 - 27/11/2017 Briefing on sharing data about fly-tipping
 - 16/11/2017 briefing for an end of day debate on fly-tipping
 - 25/01/2018 briefing to respond to a Parliamentary Question
 - 21/02/2018 briefing for a public engagement on fly-tipping hosted by the Country Land and Business Association
 - 01/03/2018 briefing about sentencing of fly-tippers from the Official Fly-Tipping Statistics for England
4. On 23 October 2018 the Appellant complained to the First Respondent, the Information Commissioner (“IC”)

5. In her decision notice the IC noted that at the time DEFRA was engaged in the development of a substantial policy document, the Resources and Waste Strategy which was published on 18 December 2018. She acknowledged the public interest in disclosing information about enforcement action against fly-tipping given the increase in incidents of this crime. However, she found that the strong public interest in withholding briefings to Ministers to afford them, in conjunction with officials, the opportunity to develop policy within a private space away from public scrutiny. She considered that disclosure of the information was likely to reduce the candour and quality of the advice contributing to policy development. She upheld DEFRA's position since at the time of the request the new policy was still being developed and key decisions remained outstanding.
6. In his notice of appeal, the Appellant clarified some confusion which had arisen about what he was seeking. He argued that he was seeking information about how the Minister was briefed on the issue and argued that it was in the public interest to know whether information provided to the Minister on fly-tipping was *"comprehensive and accurate. The disclosure of the documents redacted of their sensitive information would not have led to an invasion of DEFRA's safe space."*
7. In resisting the appeal, the IC emphasised the importance and sensitivity of the policy-making process at the time of the request and the internal review. In its submissions DEFRA argued that seeking to understand how civil servants had briefed a Minister on a sensitive policy issue went to the heart of the safe space argument and the choices civil servants made about what information to provide to Ministers. To disclose such information to enable checking to see if information was *"comprehensive and accurate"* did not hold government to account in any real way and damaged the safe space necessary to enable proper policy formulation. There was little public interest in re-disclosing information ultimately made public (such as statistics on fly-tipping). As the Appellant's primary argument was the public interest in disclosing all the information provided to a Minister, disclosing redacted versions would not meet the claimed public interest in disclosure.
8. On 8 July 2019 DEFRA, having re-considered the issues and the impact of the passage of time wrote to the Appellant in the following terms disclosing much of the withheld information:-

"At the time of responding to your request for copies of written briefings given to Minister Coffey by Defra in the last 6 months on fly-tipping, Defra withheld some factual information as it was considered to fall within the exception for internal communications under Regulation 12(4)(e) of the Environmental Information Regulations 2004. This information revealed how the Minister was briefed about fly-tipping, and what information including publicly available information was being provided to the Minister. As this information was provided to you in the fact sheet, it was considered that there was little additional benefit, to the public and the public

debate, in releasing information already in the public domain. However, given the passage of time, the development in the policy area, and the upcoming Tribunal hearing, to be of assistance to you, we consider it would be appropriate to now release this publicly available information, which you have already received, in the form of the briefings to the Minister. We have made redactions where we consider the balance of the public interest falls in favour of maintaining the exception under Regulation 12(4)(e). In addition, some information continues to be withheld under regulations 12(3) and 13(1), which relate to third party personal data.

Two further documents have been identified relevant to your request. Defra considers this information falls within the class of information protected by the internal communications exception under Regulation 12(4)(e). However, some of the information is factual and in the public domain and while Defra considers that there would be little additional benefit to the public in releasing the information, we feel it might be of assistance to provide you with the factual information contained in these documents, and thus have provided the information in redacted form. The remaining information is withheld as Defra considers the balance of the public interest falls in favour of maintaining the exception."

9. Mr David Read, Joint Head of the Waste Regulation and Crime team with DEFRA gave written and oral evidence on how DEFRA approached the request. His witness statement explained the policy background:-

"This policy background was key to our thinking in how we determined the request. In all of the documents withheld there were elements of our emerging thinking and discussion around aspects of policy development. While broadly, the documents demonstrate a nuanced approach to policy development in the way that officials brief ministers on various matters regarding fly-tipping

....

This is the briefing pack for a debate in the House of Commons on fly-tipping. This information was provided to the Minister in advance of a debate advising her of key matters to be discussed and advice on the position to take with regard to possible parliamentary questions.

The briefing pack specifically -contains advice for the Minister in preparation for Parliamentary Business. For example, the Minister is provided with suggested key messages from her advisers ...It is, of course, for the Minister to deploy those key messages as she sees fit and in the form she sees fit in the context of the Parliamentary Debate."

Consideration

10. The argument accepted by the IC was that the safe space for policy development was an important principle supporting the effective running of government and one which should not be lightly overturned. The Appellant accepted that the exception in Regulation 12(4)(e) that an authority could refuse to disclose information if "the request involves the disclosure of internal communications" was engaged, whilst he disputed the balance of public

interest in this case. The tribunal recognises this as a highly significant issue, however the applicability of this exception to the documents listed in the internal review (paragraph 3 above) is problematic. At the time of the request the statistics had already been publicly released and there is some force in DEFRA's argument that disclosure of the briefing would add little to what was already in the public domain. However, the other documents were briefings for parliamentary engagements and public appearances; the information contained in these briefing documents was material which the Department thought was appropriate to be stated publicly in Parliament or communicated to organisations with an interest in the question of fly-tipping which might, or might not agree with the direction of policy development.

11. If the Department considered it appropriate at the time of preparing the briefing that information could be put into the public domain by the Minister it is difficult to see that it had the sensitivities claimed when the request was made for disclosure of the information some months later. While Mr Read emphasised the Minister's discretion in whether or how she used that information in debate or answering a PQ; the basic issue is that the information was considered to be appropriate for publication long before the request for information was made. The exigencies of the pressure of time in a debate or responding to a slightly unexpected point raised in that debate does not significantly alter that point; in the event the PQs were answered in writing rather than orally. This very substantially detracts from the force of the argument for a safe space. However, nuanced the Department's view of the issue and the potential directions of policy development may be it is difficult to see how the communication of the briefing for a public statement can harm confidence in the robustness of the safe space.
12. The Department rightly indicates that the public benefit from the disclosure of the information is limited, the information was largely available and a factsheet was sent to the Appellant. The specific public benefit he identified – seeing whether the briefings to the Minister were comprehensive and accurate is modest, however in the unlikely event that there were significant errors disclosure could make a contribution to the improvement of policy formation.
13. The tribunal is therefore satisfied that, with respect to the information identified in the internal review and upon which the IC based her decision notice the balance of the public interest does lie in disclosure, the IC's decision should be set aside and (subject to redaction of the details of more junior civil servants) the information requested should be disclosed.
14. The position is however very different with respect to the two documents identified at a late stage in the process. These seem to the tribunal to be internal documents integral to the formation of government policy to which the arguments for the exemption apply with force. At the time of the request the policy to which they contributed was in formation and the importance of

robust policy formation substantially outweighs the public interest in disclosure.

15. The appeal is allowed in part.

Chris Hughes

Judge of the First-tier Tribunal

Date: 8 August 2019

Date Promulgated: 12 August 2019