

FoI Request Ref 13/0843

Dear {NAME REDACTED}

FREEDOM OF INFORMATION ACT 2000: FOI REQUEST 13/0843

Thank you for your email of 28 June 2013 where you requested information concerning the recent changes in Wayleaves guidance.

This request for information is being handled under the Freedom of Information Act 2000.

Under the Freedom of Information Act 2000 ('the Act'), you have the right to:

know whether we hold the information you require
be provided with that information (subject to any exemptions under the Act which may apply).

I can confirm that the Department holds the information you have requested.

Our response to each of the points you raise is given below.

What is the identity of 'Legal Counsel' to which you refer?

Advice was sought from counsel appointed from the Attorney General's panel. We are withholding the name of counsel under the personal data exemption (s40). Section 40(2) and (3) of the Freedom of Information Act provide an absolute exemption for third party personal data, which then falls to be dealt with under the Data Protection Act. Personal data of third parties can only be disclosed in accordance with the data protection principles. In particular, the first data protection principle requires that disclosure must be fair and lawful and must comply with one of the conditions in Schedule 2 of the Data Protection Act. We do not think that it is fair to release the names of third parties and do not think that any of the relevant conditions apply.

The exemption from the duty to disclose personal data where to do so would breach a data protection principle is an absolute exemption; the public interest test in section 2 of the FOIA does not apply.

What is the full transcribe of the 'recent advice'?

Section 42(1) – Legal professional privilege

This information is withheld under Section 42(1) of the Freedom of Information Act. Section 42(1) exempts information from disclosure when it includes confidential communications between lawyers and members of the Department. This exemption is subject to the public interest test. The Department recognises that there is a general public interest in favour of disclosing information, as greater transparency makes Government more open and accountable. However protecting the principle of legal professional privilege is also in the public interest, as it ensures that departments can seek legal advice and that such legal advice can be given freely and frankly, to enable decisions to be made in a fully informed legal context. Without such comprehensive advice the quality of the government's decision making would be much reduced because it would not be fully informed. Disclosure of legal advice has a high potential to prejudice the department's legal interest – both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented frankly and impartially. Neither of these is in the public interest. The former could result in serious consequential loss, or at least a waste of resources in defending unnecessary challenges. The latter may cause poorer decision making because decisions themselves may not be taken on a fully informed basis. Having considered the public interest the Department's decision is to withhold this information.

Who paid said Counsel for the advice? In other words, was it public money?

DECC paid Counsel for their advice.

Who instigated the reference to Counsel and why?

In accordance with normal procedure, DECC Legal instructed Counsel. DECC considered that it was desirable to seek external legal advice on this issue before changing the Department's interpretation of these provisions. Counsel was asked to advise on the interpretation of Schedules 3 and 4 of the Electricity Act 1989 in respect of whether the Secretary of State has jurisdiction to consider a Compulsory Purchase Order or necessary wayleave application made more than three months after the owner or occupier has served notice to remove the electric line from their land.

Could you confirm that this change is not cost or 'target' driven? In other words is this at all related to the Department seeking to reduce costs and meet throughput targets? I am sure it is not, but as well as the adverse impact on landowners and occupiers, I suspect that it will result in fewer hearings and therefore a reduction in Department costs and quicker throughput.

We can confirm that this change in policy is not cost or target driven. It is a change in the Department's historical interpretation on a point of law.

What is the situation if the licence holder makes an application after a NTR has been served and then the licence holder withdraws its application?

There is no change to current practice.

Finally, can you confirm or otherwise whether this affects Scotland?

The Secretary of State only considers necessary wayleave applications in England and Wales; applications in Scotland are determined by Scottish Ministers. The interpretation of the legislation in respect of Scottish cases is therefore a matter for Scottish Ministers.

Appeals Procedure

If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original letter and should be sent to the Information Rights Unit at:

Information Rights Unit

Department for Business, Innovation & Skills

1 Victoria Street

London

SW1H 0ET

E-mail: foi.requests@bis.gsi.gov.uk

Please remember to quote the reference number above in any future communications.

If you are not content with the outcome of the internal review, 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

Yours sincerely,

{NAME REDACTED}

Department of Energy and Climate Change