

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 23 March 2016

Public Authority: Natural England
Address: 4th Floor, Foss House
Kings Pool
1 – 2 Peasholme Green
York
YO1 7PX

Decision (including any steps ordered)

1. The complainant has requested from Natural England information relating to the different culling methods used, either free shooting or cage trapping, in the pilot badger culls. Natural England advised that the only relevant information it holds are the estimated costs supplied by the licensed control companies, which it considered to be excepted information under regulations 12(5)(d) (confidentiality of proceedings) and 12(5)(e) (confidentiality of commercial or industrial information) of the EIR. The Commissioner has found that regulation 12(5)(d) of the EIR is engaged and that, in all the circumstances, the public interest in withholding the information outweighs the public interest in disclosure. He does not therefore require Natural England to take any steps.

Request and response

2. On 29 June 2015, the complainant wrote to Natural England and requested information in the following terms:
 1. *Any information you hold on the absolute and/or relative costs of killing badgers during the badger culls in Gloucestershire and Somerset to date by the different methods of 'free' shooting and cage trapping.*

2. *Any documents (including emails, notes, memos, reports) reviewing, considering or commenting on the absolute and/or relative costs of the two approaches and any implications of those absolute or relative costs.*
3. Natural England responded on 29 July 2015. It stated that the requested information was being withheld, citing the 'confidentiality of proceedings' (regulation 12(5)(d)) and the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exceptions to disclosure in the EIR. The exceptions are subject to the public interest test and Natural England found that on balance the public interest favoured maintaining the exceptions.
4. The complainant wrote to Natural England the following day and asked it to reconsider the handling of the requests. Among other points, the complainant asked Natural England to consider whether any of the information could be disclosed in a redacted form. Natural England therefore carried out an internal review, the outcome of which was provided to the complainant on 17 September 2015.
5. The reviewer advised that he had upheld the original decision to withhold the requested information. The reviewer considered that previous decision notices of the Commissioner, and a recent judgment of the First-tier Tribunal (Information Rights), supported this position. The reviewer further clarified that he had explored whether a redacted version of any of the material could be released but had found that the information is financial information and redaction would render it meaningless. From a procedural perspective, the reviewer did however accept that Natural England had responded one day outside the 20 working day timeframe specified in the EIR. He therefore apologised for the slight delay.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his requests for information had been handled.
7. Upon being notified of the complaint, Natural England has returned to the requests and the relevant information it holds. Natural England has found upon completion of this process that it does not hold any information covered by request 2. This is because from a cost exercise point of view, Natural England is not required to, nor from a business perspective has it needed to, analyse the comparative costs associated with the different methods of culling.

8. In light of this clarification, the complainant has agreed that the Commissioner's determination should only focus on Natural England's position in relation to request 1.

Reasons for decision

Background

9. Badgers are known to be carriers of bovine tuberculosis and scientific evidence indicates that badgers contribute to bovine tuberculosis in cattle. As part of a wider strategy for controlling bovine tuberculosis, the Secretary of State for the Department for the Environment, Food and Rural Affairs (Defra) announced in December 2011 that trial culls of badgers would be conducted in two areas of 150 sq. km in West Gloucestershire and West Somerset for four seasons. The purpose of the pilots was to confirm how effective (in terms of badger removal), humane and safe it would be to use controlled shooting as a method of removing badgers.
10. Natural England is the statutory body responsible for the oversight of the culls and the licensing of the organisations (the Control Companies) responsible for the conduct of the culls. One of the requirements was that the Control Companies should be able to evidence sufficient funding for the carrying out of the culls, including a contingency sum. Natural England issued the first culling licence, for West Gloucestershire, in September 2012 and the second licence, for West Somerset, in October 2012. In August 2015, it was announced that the culling would also be rolled out in Dorset.

The position of Natural England

11. With regard to the cost information requested, Natural England has explained as follows the nature of the figures it holds:

[...] Natural England does not hold any information on the actual costs of (a) controlled shooting, and (b) cage-trapping. Under the Badger Control Deed of Agreement, the Control Companies are required, following each year's cull, 'to notify Natural England of the full amount incurred...in that year, and the amount remaining to be paid in that year, in respect of the costs of carrying out the Licensed Activities or any activities ancillary or connected to Licensed activities'. [...] The Control Companies notify Natural England of total amounts incurred, without distinguishing between different methods of dispatch methods or identifying specific costs. Therefore, Natural England does not hold information on the actual costs of the different dispatch methods.

However, Natural England does hold some information on the estimated costs relating to the different methods of dispatch. Under the Badger Control Deed of Agreement, the Control Companies are required to provide Natural England each year with a 'current estimate' of the sums required to meet the costs of completing culling in each of the remaining years of the licence. Those estimates are based on assumptions made by the Control Companies [...]

In 2012, Natural England received estimates for 2012 and which also showed estimated costs for the future years of 2013, 2014 and 2015. These costs were based on expected target minimum numbers for 2012; however, no culling in fact took place in 2012.

The estimates received in 2013 were estimates for 2013 and again projected forward for the future years of 2014, 2015 and 2016. These costs assumed different target minimum numbers for 2012, because by 2013 it had been realised that the 2012 population estimates had been excessive and the 2013 target minimum numbers had been adjusted.

In fact, the actual numbers culled in 2013, 2014 and 2015 differed in both areas from the estimated numbers, and the actual proportions culled by the two different methods also differed from the proportions assumed for estimating purposes. Whilst the numbers of badgers culled by the different methods are in the public domain, the actual costs for each method are not known by Natural England, as stated above.

12. Natural England has maintained that the costs estimates referred to above are excepted information under regulations 12(5)(d) and 12(5)(e) of the EIR. To support this position, Natural England considers that the application of the exceptions should be read in conjunction with the decision of the First-tier Tribunal in *Natural England v The Information Commissioner & The Badger Trust & John Leston* (EA/2015/0026 & 0059, 14 August 2015) ('The Badger Trust' decision)¹. The Tribunal heard two appeals together because they involved requests made to Natural England for similar information, namely details of the funds required to be raised by the Control Companies in accordance with the licence conditions.

¹[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1630/Natural%20England%20EA-2015-0026%20&%200059%20\(%2014.08.15\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1630/Natural%20England%20EA-2015-0026%20&%200059%20(%2014.08.15).pdf)

13. The Tribunal was required to consider Natural England's reliance on regulations 12(5)(d) and 12(5)(e) of the EIR. In its judgment, the exceptions were found to be engaged and the Tribunal further concluded that the public interest favoured maintaining the exceptions.

Application of the exceptions

14. With regard to the disputed information in this case, the Commissioner has begun by considering Natural England's reliance on regulation 12(5)(d) of the EIR.

Regulation 12(5)(d) – confidentiality of proceedings

15. Under regulation 12(5)(d) of the EIR, a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.

16. The construction of the exception effectively imposes a three-stage test. First, the confidentiality referred to by the public authority must specifically relate to the confidentiality of 'proceedings'. Secondly, this confidentiality should be provided by law. Thirdly, it must be demonstrated that disclosure would have an adverse effect on the confidentiality of the proceedings. The exception will only be engaged if each of the tests are met, in which event a public authority is then required to consider the public interest test.
17. In his guidance on regulation 12(5)(d)², the Commissioner interprets 'proceedings' to mean that they possess a certain level of formality. They will include, but are not limited to: formal meetings convened to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision making powers; and, legal proceedings.
18. Natural England has explained that the costs estimates are provided by the Control Companies to Natural England to fulfil licensing requirements. Natural England requires the information in order to decide whether to authorise the licensed activity each year. This involves the exercise by a statutory body of a regulatory function

² https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

relating to licenses issued under the Protection of Badgers Act 1992. Natural England considers that the exercise of that function is a 'proceeding' for the purposes of the exception. If the information had not been provided, Natural England advised that it would not have been able to authorise the Control Companies to carry out the licensed activity.

19. Natural England asserts that this position finds support in the decision of the Tribunal in *The Badger Trust* decision, which it considers dealt with similar information:

25. The consideration by Natural England of whether or not to renew the cull licenses for a further year is an exercise by a statutory body of its regulatory functions. The requested information is a part of the information requirement to enable that consideration to take place. This process is clearly a 'proceeding' of the public body since it is an exercise of a choice as to how it discharges its functions.

20. The Commissioner accepts that the findings of the Tribunal in *The Badger Trust* case are relevant, and applying the interpretation of 'proceedings' set out in his guidance, the Commissioner has found that the first test is satisfied. The Commissioner has therefore gone on to consider whether the confidentiality of the proceedings is provided in law. If the confidentiality of the proceeding is not provided by law, either in common law or by a specific statutory provision, regulation 12(5)(d) will not apply.
21. Natural England states that the costs estimates were supplied in circumstances importing a common law obligation of confidence. According to Natural England, it was always made clear – either in the covering communication or on the face of the document containing the estimates – that the information was confidential and Natural England accepted it on that basis.
22. For information to attract the common law of confidence, it must have the quality of confidence. This means it must not be in the public domain already and it must be of importance to the confider and not trivial. Furthermore, there must also be an expectation that it would not be disclosed. The Commissioner is content that the disputed information has the necessary quality of confidence and furthermore that it was shared in circumstances that created an obligation of confidence.
23. The final test built into the exception is whether disclosure of the disputed information would adversely affect the confidentiality of the proceedings. The Commissioner reads the term 'adversely affect' to mean not only that there is an identifiable harm to the interest

described by the exception but also that disclosure *would* result in this harm. 'Would' in this sense means that the likelihood of the prejudice occurring is more probable than not.

24. Natural England considers that the application of the 'adversely affect' test should be approached in the way prescribed by the Tribunal in *The Badger Trust* case. At paragraph 24, the Tribunal stated:

24. What is protected therefore is in both cases [regulation 12(5)(d) and regulation 12(5)(e)] the principal of confidentiality, in circumstances where such confidentiality is already protected. [...] The 'purposive' interpretation of the Commissioner seeks to arrive at a conclusion convenient to the over-arching principle of disclosure of environmental information by disregarding the fundamental requirement to recognise other values. The legislation is clear, what is protected is the principal. For these exemptions to be engaged there is no requirement to demonstrate any harm beyond the harm of breaching the principal – the value of the principal is widely recognised in jurisprudence.

25. The Commissioner disagrees with the Tribunal's interpretation of the adverse effect test in relation to the principle of confidentiality and particularly its view that there is no requirement to demonstrate any harm beyond the mere fact of breaching that principle. In the Commissioner's view, this interpretation ignores both the scheme of the exceptions and the relevant guidance derived from the Directive and the Aarhus Convention.
26. The Commissioner does, however, accept that there will often be a link between disclosure and an adverse effect where information is fundamental to the confidential proceedings. The Commissioner has determined that this is one of those occasions. Although expressed in the context of the public interest test, the Commissioner considers that *The Badger Trust* decision isolated how the release of financial information would result in harm; a result that in the Commissioner's view would also apply here:

32. [...] A key function of a regulator such as Natural England is that it should be able to understand in depth the issues arising in the culls and so as to be best able to advise, counsel and warn the Control Companies. Whilst the minimalist role of a regulator may be simply to monitor and consider reports on compliance with the licence conditions, effective regulation often requires a closer attention to issues. This is especially true given novelty and complexity of what is being done. [...] As a level of trust has developed, the staff of Natural England has been given

significantly greater access to the information and decision-making within the Control Companies enabling them to scrutinise and understand the issues better and discharge their difficult functions better. If the information is disclosed, there is a real risk that the affected farmers in the cull area will be concerned that the information beyond what the licence conditions requires should no longer be provided to Natural England, since Natural England would be seen as not being able to keep a confidence. This would significantly prejudice the ability of Natural England to carry out its functions in this regard and would mean a significant loss of that accountability which is the key value of information access arrangements.

27. The Commissioner notes he is not bound by previous decisions of the First-tier Tribunal and he must carry out his own analysis of the nature and severity of any harm claimed by a public authority. Notwithstanding this, the Commissioner considers that the Tribunal in *The Badger Trust* decision pinpointed issues that are clearly important to the present case. In his view, it follows that disclosure would not only harm the principal of confidentiality but that furthermore it would adversely affect that confidentiality. He has therefore accepted that regulation 12(5)(d) of the EIR is engaged.
28. The complainant has, however, argued that even if regulation 12(5)(d) did apply to the original requests, it should be possible to provide the information in a form that would prevent the identification of the source of the information. The 'anonymisation' could take one of two forms; either for Natural England to combine the estimated costs provided by each licensing company or, alternatively, for Natural England to provide the estimated costs figures without making reference to the area (West Gloucestershire or West Somerset) to which the information related. The complainant considers that either one of these options would effectively remove any confidentiality concerns about disclosure.
29. Natural England disagrees, however. It argues that neither of the options fundamentally changes the situation and maintains that the information in the forms described would still be sensitive. Natural England again argues that this position is reinforced by the Tribunal's findings in *the Badger Trust* decision. This considered a request the request for the *'total financial amounts you have required to be raised and/or held by the two companies in Gloucestershire and Somerset combined'* [the Commissioner's emphasis] *as a condition of issuing their licences.'* The Tribunal found that the exception applied to the information request and, based on the harm identified, the Commissioner has found no reason to deviate from this conclusion. He has therefore gone on to assess the public interest test.

The balance of the public interest

30. It is accepted that badger culling is controversial. In the background section of its decision in *Department for Environment, Food and Rural Affairs (Defra) v The Information Commissioner & The Badger Trust* (GIA/79/2014 [2014] UKUT 0526 (AAC), 28 November 2014)³, the Upper Tribunal referred to the intensity of the campaigns against the culls. At the extreme edge, the intimidating methods of campaigning had resulted in Defra applying for, and the High Court deciding it necessary to grant, injunctions to prevent harassment of public servants whose work brought them into contact with the policy. The National Farmers Union had also found it necessary to take similar action on behalf of individual and their employees.
31. Whatever the merits of the different campaigns, there is clearly a wider public interest in the reasons for carrying out the culls and the effectiveness of the culls. The weight of the public interest will, of course, vary according to the information that has actually been requested. This was something that the Tribunal in *The Badger Trust* case expressly picked up on its decision:

30. As the Independent Expert Panel noted there is no experience of such a process and the cull is complex. In such circumstances it was always inevitable that the actual experience of the cull would not be in accordance with the projections made before it started. That there are such variations should be of no surprise to anyone. Furthermore, as was noted in argument, the Government's Chief Vet has pointed out the evaluation of these two culls will be carried out after they have been completed. That is obviously correct. They will be evaluated against a mass of data. As the Commissioner very thoughtfully pointed out in his July 2013 decision (see above) [FER0479985⁴] "He is of the view that this information is unlikely to add anything to any debate on the issue as it will not provide the public with any greater insight into the badger control policy." It is appropriate to consider the reality underlying the public interest: that is the effectiveness of the culls, the number of badgers and cattle killed, the potential risk to public health and the financial costs of disease and its control.

³ <http://www.osscc.gov.uk/judgmentfiles/j4368/GI%200079%202014-00.doc>

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2013/877756/fer_0479985.pdf

31. Financial issues are a major question in bovine tuberculosis. However the financial issues are dominated by the costs to farmers and the exchequer of infection in herds, not the cost to farmers of paying for the cull. The costs of the cull whether they are significantly larger or smaller than the cost figure originally estimated before the cull started are of very little salience compared with the costs, financial, in disruption of their farming and emotional which farmers consider that they face from tuberculosis. A substantial number of farmers in the affected areas consider that a cull is the best prospect that they have for controlling the disease, given the disparity between disease costs and control costs, their support for the cull is not sensitive to variations of the cost of the cull. In the short term they see it as the "only game in town". The people who bear the cost of the cull, farmers, are far more concerned with the big picture, the public are the same; as the Commissioner in his July 2013 decision notice correctly concluded. There is no public interest in the disclosure of these figures. There is no public interest in the disclosure of minimal amounts of information about a controversial policy question simply because it is controversial. The request needs to be seen in the context of the information already available, as an increment to that information and in that context how it contributes to a broader public understanding.

32. The Commissioner considers that the way in which the Tribunal exercised the public interest test in the *Badger Trust* decision is equally applicable to the circumstances of the present case.
33. There is no doubt that the complainant believes that the requested information would meaningfully add to the public debate on the rights and wrongs of the badger cull policy. He has not though sought to draw a specific distinction between the disputed information in this case and the information considered in *The Badger Trust* case, such that a different outcome of the public interest weighting exercise should be reached. The Commissioner is of the view that, following the lead of the Tribunal, the information here similarly does not cut to the principal public interest issues relating to the culls: *that is the effectiveness of the culls, the number of badgers and cattle killed, the potential risk to public health and the financial costs of disease and its control*. Against this, is the harm that the Commissioner has accepted would result from disclosure.
34. Balancing the weight of the competing arguments – specifically, the value of the information to the public versus the prejudice to Natural England's ability to discharge effectively its functions in respect of the culling pilots - the Commissioner has decided that in all the

circumstances the public interest in maintaining the exception outweighs the public interest in disclosure.

35. In view of his finding on regulation 12(5)(d), the Commissioner has not been required to go on to consider Natural England's application of regulation 12(5)(e) to the same information.

Right of appeal

36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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