

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

**Decision notice**

**Date:** 6 December 2017

**Public Authority:** Department for Environment Food & Rural Affairs (DEFRA)

**Address:** Area 4b  
Nobel House  
17 Smith Square  
London  
SW1P 3JR

**Decision (including any steps ordered)**

---

1. The complainant has requested various pieces of information relating to DEFRA's 'Consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers'. DEFRA responded providing some of the requested information. It confirmed that it did not hold some of the requested information and cited regulation 12(4)(a) of the EIR and advised the complainant that it was withholding other information under a variety of exceptions in the EIR.
2. With regards to DEFRA's initial application of regulation 12(4)(c), the Commissioner has concluded that DEFRA was not entitled to rely on this exception.
3. In respect of question 1 of the request, for the missing consultation response the Commissioner has concluded that DEFRA has correctly applied the exception at 12(4)(a) of the EIR. For the Home Office consultation response, the Commissioner has concluded that DEFRA has incorrectly relied upon regulations 12(4)(d), 12(4)(e), 12(5)(a), 12(5)(b) and 12(5)(f) of the EIR for the non-disclosure of this information.
4. Regarding questions 3, 4.a, 4.b, 5.a, 5.b, 6.a, 6.b of the request, the Commissioner has concluded that DEFRA is not entitled to rely on

12(4)(a) of the EIR. This is because the Commissioner is of the opinion that DEFRA does hold the requested information.

5. Concerning question 7b and questions 10.a-e, 11.a-d, 12.a-d, 13.a-d and 14.a-d, the Commissioner's decision is that DEFRA is entitled to rely on regulation 12(4)(a) of the EIR.
6. In respect of question 8, the Commissioner has decided that DEFRA is entitled to rely on regulation 13 of the EIR in relation to the personal data of DEFRA staff. But it is not entitled to rely on regulation 12(4)(e) of the EIR for the non-disclosure of all other information being withheld in relation to this question.
7. The Commissioner has also recorded a breach of regulation 5(2), 11 and 14(2) of the EIR in this case.
8. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - In relation to question 1, disclose the Home Office response to the complainant.
  - In respect of questions 3, 4.a, 4.b, 5.a, 5.b, 6.a, 6.b, disclose the requested information to the complainant.
  - Regarding question 8, disclose all recorded information identified as falling within scope to the complainant with the exception of the personal data of DEFRA staff.
9. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

---

10. On 21 January 2016, the complainant wrote to DEFRA and requested information in the following terms:

**"1)** Please provide me with the full response to the *Consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers* by the following:

- a) Avon and Somerset Police
- b) Devon and Cornwall Police

- c) Dorset Police
- d) Gloucestershire Police
- e) The Bow Group
- f) British Veterinary Association
- g) British Veterinary Zoological Society
- h) Foot Anstey LLP
- i) National Beef Association
- j) National Farmers' Union
- k) National Trust
- l) Country Land and Business Association
- m) Family Farmers' Association

**2) a)** Did *Annex A: List of organisations who responded to the consultation on pages 10-12 of Defra's Summary of responses to the consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers* (published December 2015) contain a complete list of every organisation which responded to the consultation?

**b)** If *Annex A* is not a complete list, please supply the names of the remaining organisations which responded to the consultation.

**3)** In paragraph 1.8 of *Defra's Summary of responses to the consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers* it is stated that 3% of responses received by Defra were from farmers or farming organisations. Please disclose the number of responses which were received from (a) farmers, and (b) farming organisations.

**4) a)** Of the 675 responses that directly answered question 1 "duration of the period of operation" how many of the 531 responses that expressed broad opposition to the proposal were from (i) members of the public, (ii) farmers, (iii) farming organisations, (iv) vets, (v) veterinary organisations, (vi) wildlife or welfare organisations, (vii) research or academic interests, (viii) other interests (please give details of the exact nature of each of these "other interests")?

**b)** Of the 675 responses that directly answered question 1 "duration of the period of operations" how many of the 46 responses that expressed broad support for altering the duration of the period of operations were from (i) members of the public, (ii) farmers, (iii) farming organisations, (iv) vets, (v) veterinary organisations, (vi) wildlife or welfare organisations, (vii) research or academic interests, (viii) other interests (please give details of the exact nature of each of these "other interests")?

**5) a)** Of the 669 responses that directly answered question 2 "minimum size of a control area" how many of the 596 responses that expressed broad opposition to the proposal were from (i) members of the public, (ii) farmers, (iii) farming organisations, (iv) vets, (v) veterinary organisations, (vi) wildlife or welfare organisations, (vii) research or academic interests, (viii) other interests (please give details of the exact nature of each of these "other interests")?

**b)** Of the 669 responses that directly answered question 2 "minimum size of a control area" how many of the 40 responses that expressed broad support for reducing the minimum size of a control area were from (i) members of the public, (ii) farmers, (iii) farming organisations, (iv) vets, (v) veterinary organisations, (vi) wildlife or welfare organisations, (vii) research or academic interests, (viii) other interests (please give details of the exact nature of each of these "other interests")?

**6) a)** Of the 703 responses that directly answered question 3 "land access requirements" how many of the 629 responses that expressed broad opposition to the proposal were from (i) members of the public, (ii) farmers, (iii) farming organisations, (iv) vets, (v) veterinary organisations, (vi) wildlife or welfare organisations, (vii) research or academic interests, (viii) other interests (please give details of the exact nature of each of these "other interests")?

**b)** Of the 703 responses that directly answered question 3 "land access requirements" how many of the 42 responses that expressed broad support for the proposal were from (i) members of the public, (ii) farmers, (iii) farming organisations, (iv) vets, (v) veterinary organisations, (vi) wildlife or welfare organisations, (vii) research or academic interests, (viii) other interests (please give details of the exact nature of each of these "other interests")?

**7) a)** In paragraph 1.1 of the consultation, it is stated: "*The aim of badger control within the Strategy is to reduce new incidents of Bovine Tuberculosis (bTB) in cattle comparable to the relative reduction in confirmed (now termed OTFW) breakdowns as seen in the proactively culled areas of the Randomised Badger Culling Trial (RBCT).*"

Please disclose the scientific evidence held by Defra (and all the names of the scientists who have provided such evidence) which has caused Defra to conclude that a reduction in confirmed incidence of bTB in cattle within a culled area and 2km perimeter area of 12.4 to 16% will be achieved over a decade if no initial limit on the duration of the culling period is specified in the licence, if culling is allowed in a minimum area size of 100km, instead of 150km, and if "the licence

*requirement for at least 70% of the land in candidate areas to be accessible" is removed.*

**b)** Please disclose the precise reduction, as a percentage, of confirmed incidents of bTB in cattle that Defra has calculated will be achieved in a cull area and 2km ring area if the aforementioned changes are made to the culling criteria.

**8)** In paragraph 3.1 of the Consultation . . . it is stated *"Any decision by the Secretary of State to implement these proposals will be informed by . . . responses to this consultation"*.

79% of responses that directly answered question 1 were broadly against the proposal whereas 7% expressed broad support for the proposal.

89% of responses that directly answered question 2 were broadly against the proposal whereas 6% expressed broad support for the proposal.

89% of responses that directly answered question 3 were broadly against the proposal whereas 6% expressed broad support for the proposal.

Please disclose all information held by Defra which illustrates or proves that the Secretary of State's decision to implement the proposals has been informed by responses to the consultation.

**9)** In paragraph 1.5 of Defra's *Summary of responses to the consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers* it is stated:

*"Defra alerted by email over 300 interested parties considered to have cattle sector farming and welfare interests or registered on Defra's distribution lists, about the launch of the consultation."*

Please disclose the precise number of *"interested parties"* approached by Defra.

**10 a)** Please disclose the precise number of (i) farmers, and (ii) farming organisations that Defra alerted.

**b)** Of the farmers whom Defra alerted, how many responded to the consultation?

**c)** Please disclose the names of the farming organisations that Defra alerted.

**d)** Of the farming organisations alerted by Defra how many responded to the consultation?

**e)** Of the farming organisations alerted by Defra please disclose the names of those that *(i)* responded to the consultation, and *(ii)* did not respond to the consultation.

**11) a)** Please disclose the precise number of *(i)* vets, and *(ii)* veterinary organisations that Defra alerted.

**b)** Please disclose the names of the veterinary organisations that Defra alerted.

**c)** Of the veterinary organisations alerted by Defra how many responded to the consultation?

**d)** Of the veterinary organisations alerted by Defra please disclose the names of those that *(i)* responded to the consultation, and *(ii)* did not respond to the consultation.

**12) a)** Please disclose the precise number of wildlife or welfare organisations that Defra alerted.

**b)** Please disclose the names of the wildlife or welfare organisations that Defra alerted.

**c)** Of the wildlife or welfare organisations alerted by Defra how many responded to the consultation?

**d)** Of the wildlife or welfare organisations alerted by Defra please disclose the names of those that *(i)* responded to the consultation, and *(ii)* did not respond to the consultation.

**13) a)** Please disclose the precise number of research or academic interests that Defra alerted.

**b)** Please disclose the names of the research or academic interests that Defra alerted.

**c)** Of the research or academic interests alerted by Defra how many responded to the consultation?

**d)** Of the research or academic interests alerted by Defra please disclose the names of those that *(i)* responded to the consultation, and *(ii)* did not respond to the consultation.

**14) a)** Please disclose the precise number of "*other interests*" that Defra alerted.

**b)** Please disclose the names of the "*other interests*" that Defra alerted.

**c)** Of the "*other interests*" alerted by Defra how many responded to the consultation?

**d)** Of the "*other interests*" alerted by Defra please disclose the names of those that *(i)* responded to the consultation, and *(ii)* did not respond to the consultation.

- 15) a)** In paragraph 1.9. of Defra's *Summary of responses to the consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers* Defra asserted that "many responses appear to have been submitted in response to several campaigns or posts initiated by organisations such as wildlife or welfare organisations". Please disclose the information held by Defra on which it has based its assertion.
- b)** Did Defra consider whether any of the responses it received were submitted in response to campaigns or posts initiated by farming, landowning or other organisations?
- 16) a)** How many responses were received after the deadline of 25 September 2015?
- b)** Of the responses which were received after 25 September 2015 and considered by Defra please disclose the precise number which expressed broad opposition to (i) proposal 1, (ii) proposal 2, and (iii) proposal 3?
- c)** Of the responses which were received after 25 September 2015 and considered by Defra please disclose the precise number which expressed broad support for (i) proposal 1, (ii) proposal 2, and (iii) proposal 3."
11. DEFRA responded on 16 February 2016. It stated that it wished to rely on regulation 12(4)(c) of the EIR, as it considered question 8 of the request was formulated in too a general manner and it required further particulars from the complainant in order to be able to comply. DEFRA asked the complainant to clarify exactly what information she is interested in receiving and to explain the terms "illustrates or proves" used in this element of the request.
12. The complainant wrote to DEFRA on 29 February 2016. She stated that DEFRA had failed to address the other 15 questions she had asked and had therefore failed to respond to the majority of her request within 20 working days. She also stated that she disagreed question 8 was written in too general a manner and there was no need to seek further clarification. She felt this element of the request was worded clearly and it was therefore clear exactly what information she is interested in. She suggested that it was well within the capabilities of DEFRA to interpret the information request accurately and identify the information requested. However, to assist she explained that she wished "to be provided with information held by DEFRA which consisted of data i.e. examples, charts etc, relating to the Responses to the Consultation which demonstrated that the Secretary of State's decision on whether to implement the proposals had been informed by the Responses".

13. DEFRA responded on 30 March 2016. It disclosed some information but refused to release other information citing regulations 6, 12(4)(e), 12(5)(a), 12(5)(b), 12(5)(f) and 13 of the EIR. It also confirmed that some of the requested information is not held and therefore regulation 12(4)(a) of the EIR also applies.
14. The complainant requested an internal review on 25 May 2016.
15. As she received no response, she chased DEFRA on 8 August 2016. She also referred a complaint to the Commissioner.
16. The Commissioner contacted DEFRA on 25 August, 26 September, 31 October, 9, 14, 23 November, 7, 21 December 2016 and 16 January 2017 to discuss the complaint and to request that a response to the complainant's internal review be issued.
17. DEFRA updated the Commissioner at various intervals in between the above dates and an internal review was finally issued on 31 January 2017.

### **Scope of the case**

---

18. The complainant first contacted the Commissioner in August 2016 to complain about the way her request for information had been handled. At this time the complaint focussed on DEFRA's failure to complete an internal review. Once the internal review was issued, the complainant informed the Commissioner on 1 February 2017 that she remained dissatisfied with DEFRA's handling of her request. She confirmed that she did not agree with the exceptions cited and believed further recorded information is held to that already provided. She also raised again her concerns over DEFRA's initial application of regulation 12(4)(c) to question 8 of her request back in February 2016.
19. The complainant provided detailed submissions to the Commissioner on 8 August 2016 and 24 May 2017 and from these the Commissioner understands that the complainant is specifically dissatisfied with the handling of the following elements of her request:
  - Question 1
  - Questions 3, 4.a, 4.b, 5.a, 5.b, 6.a, 6.b
  - Question 7b
  - Question 8
  - Questions 10.a-e, 11.a-d, 12.a-d, 13.a-d and 14.a-d

- Question 15a

In addition to the above, the complainant remains dissatisfied with DEFRA's initial application of regulation 12(4)(c) of the EIR to element 8 of her request.

20. The complainant also raised concerns about the accuracy of the information provided by DEFRA so far, one example being the number of consultation responses and the numbers within certain categories. The Commissioner explained to the complainant that she has no remit under the EIR to dispute or indeed comment on the accuracy of any information disclosed and so these are matters which she cannot consider.

### Reasons for decision

---

21. The Commissioner will first address DEFRA's initial application of regulation 12(4)(c) of the EIR to question 8 of the request.
22. Regulation 12(4)(c) of the EIR states that a public authority can refuse to disclose information to the extent that the request for information is formulated in too general a manner and the public authority has complied with regulation 9.
23. Regulation 9(1) states that a public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants. Regulation 9(2) goes on to say that where a public authority decides that an applicant has formulated a request in too general a manner, it shall –
  - (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
  - (b) assist the applicant in providing those particulars.
24. DEFRA considered this question was formulated in too a general manner and so it needed further clarification from the complainant before it could comply. It waited almost until the 20<sup>th</sup> working day to inform the complainant of this and to suggest how she could clarify further what information she required. There is also the issue that DEFRA only applied regulation 12(4)(c) of the EIR to one of 16 questions and whether it should have issued a response to all remaining 15 questions by the statutory time for compliance or whether it was entitled to refuse to comply with all elements because it required further clarification for one.

25. Dealing with the latter issue first, the Commissioner considers DEFRA should have either disclosed the requested information or issued an appropriate refusal notice for *all* 16 questions within 20 working days of receipt. She understands that DEFRA felt that it needed further clarification from the complainant in respect of question 8 but this did not prevent it from complying with all other elements in accordance with the EIR. It has therefore breached regulation 5 and 14 of the EIR for the remaining 15 questions and these breaches will be recorded towards the end of this notice.
26. As DEFRA clearly had no intention of complying with the other 15 questions within the first 20 working days following receipt of the request, the Commissioner does not consider DEFRA issued a timely refusal notice for question 8. The Commissioner would accept that DEFRA would need the 18 working days taken or even the full 20 working days if it was going to respond to all elements. But this was not the case and the Commissioner considers DEFRA could therefore have contacted the complainant much sooner than it did to ask for the clarification it required for question 8. Again, the Commissioner will record a breach of regulation 5 here later in this notice because DEFRA failed to issue its refusal notice citing regulation 12(4)(c) "as soon as possible".
27. Turning now to whether the application of regulation 12(4)(c) of the EIR was justified in the first place and whether appropriate advice and assistance was provided in accordance with regulation 9, the Commissioner acknowledges the purpose of this regulation and the benefits of seeking clarification from applicants to enable public authorities to focus their efforts on locating the correct information required. If public authorities do not seek clarification when they receive requests that are formulated in too a general manner delays often occur and incorrect information is sought.
28. The Commissioner does not consider in this case that the complainant's request was formulated in too a general manner. She explained that section 3.1 of the Consultation stated "*Any decision by the Secretary of State to implement these proposals will be informed by . . . responses to this consultation*". She then went on to say that there was an overwhelming percentage of respondents against the proposals. Reading the wording of this question objectively, it is apparent that the complainant was seeking all recorded information held documenting the Secretary of State's decision following this consultation and any recorded information which discusses the consultation responses and how these influenced the decision made. One would expect there to be a submission to the Secretary of State and then potentially internal correspondence discussing this submission and then recorded information documenting the Secretary of State's final decision and why

this was made. The Commissioner does not consider the request is ambiguous or unclear. DEFRA will have known what information is likely to be held from knowing how it communicated with the Secretary of State over the matter and how such a decision would usually be recorded.

29. The Commissioner therefore does not agree that section 12(4)(c) of the EIR applied to this question. However, considering the fact that the complainant did provide clarification albeit disagreeing that it was in fact required and, DEFRA later responded in full, there are no further steps required here.

### Question 1

30. DEFRA provided the complainant with all responses (suitably redacted so as to comply with the Data Protection Act) to the consultation except:
- one missing response; and
  - the response from the Home Office detailing the response from a number of police forces.

In relation to the first bullet point, DEFRA stated that it had searched and searched its records trying to locate this missing response but was unable to locate it. In respect of the second bullet point, DEFRA confirmed that it was unwilling to disclose this information citing regulations 12(4)(d), 12(4)(e), 12(5)(a), 12(5)(b) and 12(5)(f) of the EIR.

31. Addressing the missing response first, DEFRA advised that this response is marked on its spreadsheet as "RESPONSE SENT BY POST – PLEASE SEE SCANNED VERSION ON TEAMSITES". The "team site" refers to DEFRA's implementation of the Microsoft SharePoint – DEFRA's official electronic records management system. It stated that it has repeated the searches made previously on two separate occasions and it is not able to locate the original or scanned copy of the missing response. DEFRA explained that the data in this response was used in the analysis of the responses and the analysis was disclosed to the complainant at the internal review stage.
32. More specifically, DEFRA confirmed that it has carried out:
- Manual searches of staff lockers of current staff.
  - Manually searched filing cabinets.
  - Electronically searched SharePoint.

- Electronically searched Team Sites (using the search facilities in SharePoint).
  - Electronically searches staff emails (the member of staff believed to have handled the original response has left DEFRA).
  - Electronically searched shared mailboxes.
33. DEFRA advised that it has searched by reference number and by date range in all the relevant and associated paper and electronic files but to no avail. It explained that it does not believe the information would be held elsewhere or by anybody else other than the relevant business team who have made the searches detailed above already.
34. The Commissioner is satisfied that DEFRA has searched all relevant records and conducted a fresh search at the request of the Commissioner to try and locate this missing response. It has thoroughly searched all paper and electronic files and locations where the response could be held but to no avail. As a result the Commissioner is satisfied that, on the balance of probabilities, DEFRA no longer holds this response or it is missing and for this reason cannot be retrieved.
35. In relation to this element of the request, the Commissioner does not require any further action to be taken.
36. Turning now to the Home Office response to the consultation containing the views of a number of police forces, the Commissioner will now address each exception applied by DEFRA in turn.

*Regulation 12(4)(d)*

37. Regulation 12(4)(d) states that a public authority may refuse to disclose information to the extent that the request relates to material in the course of completion, to unfinished documents or to incomplete data.
38. DEFRA has argued that the withheld information constitutes "material in the course of completion" as it relates to a live issue and DEFRA have not made a final decision. It stated that the work on the cull and the length and timing of the cull remain the subject of an on-going discussion with ministers, stakeholders and colleagues. The responses to the consultation will continue to be used to inform its decisions and associated policy-making.
39. The Commissioner notes that the withheld information is a finalised response from the Home Office containing the views of some police forces to the consultation. The withheld information itself is not unfinished or in the course of completion. The Commissioner also notes that the consultation closed 25 September 2015 and the Secretary of

State's decision was made by 16 December 2015, as DEFRA confirmed that the response to the consultation and guidance documents were published on GOV.UK on 17 December 2015. Therefore at the time of the request the consultation was closed and a decision reached and published. Although the Commissioner agrees the withheld information relates to the wider governmental policy on badger culling, which does remain live and ongoing, the withheld information itself fed into one small element of it; a consultation which had closed by the time of the request and upon which a decision had been reached by the Secretary of State and published. Therefore, the withheld information here did not specifically relate to information or material in the course of completion at the time of the request. The Commissioner has therefore decided that this exception does not apply.

*Regulation 12(5)(a)*

40. Regulation 12(5)(a) states that a public authority is entitled to refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
41. DEFRA has stated that disclosure of this information would adversely affect public safety. It confirmed that the withheld information makes multiple references to public safety and the impact on the police's ability to carry out their "business as usual" policing. If the information was disclosed it would adversely affect the police forces' ability to maintain public safety and respond to unforeseen threats and therefore the overall course of justice.
42. DEFRA refers to specific quotes within the police forces' responses, which it believes refer to public safety. For obvious reasons, these cannot be repeated here, as to do so would be disclosing some of the withheld information.
43. It argued that disclosure of the information would jeopardise Home Office and police operations intended to prevent behaviour likely to result in injury or harm and so impact on individual and public safety. It stated that disclosure would facilitate the frustration of operations designed to protect public health and safety (either directly or indirectly related to the badger cull) by enabling those wishing to disrupt the cull to take advantage of logistical information contained within the consultation response. DEFRA advised that there is a broad range of information included in the Home Office response that would lead to physical harm or injury to individuals, such that the exception is engaged.
44. It explained further that some members of the public are opposed to badger control and they have a right to protest. However, a small

minority have used information, threats and protests as a means to disrupt operations, including the use of tools such as social media to encourage others in these activities. One example is the Facebook group "Stop the Cull" that include a range of "invitations" to speak with farmers and people that are believed to be involved in the cull. It stated that it accepts many are peaceful and law-abiding protestors but disclosure of this information would make it available to people wishing to disrupt the cull and to others wishing to engage in unrelated areas of criminality and illegal activities (not related to the badger cull but other activities that may impact national security and safety).

45. DEFRA advised that local police forces are fully involved in the planning and coordination of badger control operations. Therefore, disclosure of the information about the operational impact of protestor tactics is detrimental and would impact on future policing operations. It stated that disclosure would also allow others to fully understand the impact of their action and target areas that will have the most significant impact and again put public safety and security at risk.
46. The Commissioner considers that there needs to be a causal link between the contents of the withheld information and the adverse effects described. She has reviewed the withheld information and whilst she may accept that this contains the free and frank views of a number of police forces to the three proposals, she does not agree, or at least to the extent claimed, that disclosure of this information would adversely affect police operations so as to endanger public safety. The Commissioner considers the comments are high level discussing the impact on resources and planning mainly, rather than any actual police operations, protestor tactics or how these would change or be adversely affected if the proposals went ahead. The Commissioner cannot therefore see how campaigners or activists could take "advantage" of this information to disrupt local police operations or the cull itself or how the information, if disclosed, would therefore result in physical harm or injury to individuals.
47. It was also noted in the First-tier Tribunal hearing of the Department for the Environment, Food and Rural Affairs (0311), Natural England (0094, 0160, 0234) v Information Commissioner (EA/2014/0094, 0160, 0234 and 0311) that there is not widespread illegal activity by protestors and that the vast majority of protestor activity has been peaceful and lawful. At paragraph 112 of this decision, the tribunal commented:

"...as we have already found there is little evidence of unlawful activity and what evidence there is mainly took place in the lead up to the first cull in September 2013."

48. The Commissioner has decided that DEFRA has failed to demonstrate sufficiently a causal link between the contents of this information and the adverse effects described relating to public safety. The Commissioner does not agree the contents are as sensitive as DEFRA has claimed or reveals any information relating to current policing, whether relating to the cull or other areas, which could be used by those wishing to disrupt the cull or participate in criminal activity. The Commissioner therefore has no alternative but to conclude that the exception is not engaged.

*Regulation 12(5)(b)*

49. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
50. DEFRA said that it considered this exception applied to the withheld information, as disclosure would adversely affect a public authority's ability (the police forces concerned) to conduct an inquiry of a criminal nature because disclosure would adversely affect the ability of those forces to carry out their duty and to protect the safety of individuals during the badger control operations and more widely day-to-day policing.
51. In terms of the adverse effect, DEFRA used the same arguments presented above in respect of 12(5)(a).
52. The Commissioner does not consider the withheld information fits within the definition of this exception. The arguments presented by DEFRA are more fitting to regulation 12(5)(a) and public safety, rather than the overall course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct inquiries of a criminal or disciplinary nature.
53. Although not exhaustive, the Commissioner guidance on the application of this exception suggests it should be used for requests for the following types of information:
- "material covered by legal professional privilege (LPP);
  - information about law enforcement investigation or proceedings. This would cover the obvious example of information about a police investigation but could also include information about types of civil or criminal investigations and proceedings, such as those carried out under the planning or charity law, or those related to

tax collection, immigration controls and health and safety regulations; and

- records of courts, tribunals and inquiries.”

([https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf))

54. The withheld information is the Home Office response to a public consultation containing the views of a number of police forces. It is not information which would fit within the above categories or the types of information for which this exception was implemented.
55. For the above reasons, the Commissioner is satisfied that regulation 12(5)(b) of the EIR is not engaged.

*Regulation 12(5)(f)*

56. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person –
- was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
  - has not consented to its disclosure.
57. The Commissioner considers the starting point must always be to consider whether disclosure would adversely affect the interests of the third party who provided the information to the public authority. This is because the exception can only apply where disclosure would result in an adverse effect on that person's interests.
58. DEFRA stated that it believes all three bullet points are met. It argued that the information was voluntarily provided by the police forces, through the Home Office submission to the consultation (shown as a single document). The information was supplied to the Home Office and then onwards to DEFRA. It confirmed that the police forces are under no legal obligation to respond to the consultation and there is no requirement for DEFRA to make this information or anything similar publically available, other than under the EIR.

59. DEFRA advised that the police forces have made it very clear to DEFRA that they have not consented to the release of this information. It explained that the document itself is marked as "Official Sensitive" and "for Home Office and DEFRA eyes only". It stated that previous and ongoing discussions have made it very clear that this and other information provided by the police forces is and was not intended for further onward communication or sharing with any third party.
60. It explained further that it considers disclosure would have a major and significant adverse effect on the working relationship between DEFRA and the relevant police forces. It stated that disclosure would have a major impact of animal and plant health as well as the government's ability to handle major emergency situations in a joined up and coordinated way, thus putting human lives at risk. Disclosure of the police responses, which it argued were provided voluntarily in response to the consultation, could adversely affect the interests of the police, who supplied information under the expectation that it would not be disclosed further. DEFRA said that disclosure would be a significant breach of trust leading to problems of policing culls (and other activities). It would have a negative impact on the ability of the police and DEFRA to work together on current and future issues and would result in a dramatic reduction in the information being shared with DEFRA. In addition, it stated that there would be a loss of frankness and candour around policy issues that would damage the quality of advice and lead to poorer decision making. This would then place the public and those operating the cull at greater risk.
61. The Commissioner considers much of DEFRA's arguments here relate to its beliefs that disclosure would adversely affect its working relationship with the relevant police forces, would result in a breach of trust and less frankness and candour around policing issues, which would in turn adversely affect decision making. Therefore, the majority of its arguments centre on the adverse effects to DEFRA itself rather than the adverse effects to the interests of the persons or organisations that supplied the information, which the Commissioner considers is the purpose of this exception.
62. The Commissioner notes that DEFRA has said that disclosure would adversely affect the interests of the police forces but has not directly stated why. She can only assume therefore that DEFRA is referring to the same submissions she received in support of the application of regulation 12(5)(a) – the police forces' ability to police the culls and maintain public safety. The Commissioner has already decided above that she does not agree the contents of the withheld information would have such effects if disclosed. This is because the Commissioner is not satisfied in this case that DEFRA has demonstrated a causal link between the information itself and the adverse effects it claims.

63. As DEFRA's main arguments in support of this exception are not relevant to the consideration of regulation 12(5)(f) and, the Commissioner has already decided that disclosure would not adversely affect the interests of the police forces concerned under her consideration of 12(5)(a), the Commissioner has decided that this exception does not apply.

*Regulation 12(4)(e)*

64. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12(8) confirms that for the purposes of 12(4)(e), internal communications include communications between government departments.
65. DEFRA has stated that the Home Office response to the consultation constitutes an internal communication, as it is a communication between two government departments.
66. The Commissioner accepts that communications between two ministerial departments constitutes an internal communication for the purposes of regulation 12(4)(e) the EIR. This is in accordance with regulation 12(8) of the EIR and guidance the Commissioner has issued on the application of this exception (in particular paragraphs 19 and 20), which can be accessed here:
- [https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)
67. However, it is noticed in this case that the withheld information is not the Home Office's response to the consultation but instead a communication between the Home Office and DEFRA which contains the responses of four police forces to the consultation.
68. It is the Commissioner's opinion that a communication from a third party (in this case the police forces) does not automatically become an internal communication just because it is later circulated within the public authority or between ministerial departments.
69. In this case it is understood that the information supplied to the Home Office from the police forces was later reproduced by the Home Office in a separate email or memo. DEFRA explained that the Home Office took the information provided by the various police forces and reviewed it, picking up on and responding to the specific points and questions in the consultation. As a result of this, the Commissioner is satisfied in this case that the withheld information is a separate email or memo produced by the Home Office rather than information supplied by a third party which is simply then forwarded on to another ministerial department. She is therefore satisfied that the withheld information

constitutes an internal communication between ministerial departments, despite the original origin of the information. This is in accordance with paragraphs 33 and 34 of her guidance (link to it provided above in paragraph 66).

70. For the above reasons, the Commissioner is satisfied that regulation 12(4)(e) of the EIR is engaged in this case.

*Public interest test*

71. DEFRA advised that it recognised the public interest in disclosure of information concerning bovine tuberculosis and the badger control policy and that disclosure can enhance public understanding of the work of government and aid accountability and transparency. It states, therefore, that it has made a substantial amount of information available about the badger cull and associated data on GOV.UK. It argued that it strongly believes that this information does allow the public to understand fully and look at the evidence and information used to make the relevant decisions and hold ministers and government to account.
72. However, on other hand, DEFRA explained that there is a strong public interest in withholding the very limited and specific information being withheld here. It stated that disclosing information relating to police tactics and logistics around a live and on-going issue would have a significant impact on the already stretched police resources and place the public at risk.
73. It confirmed that disclosure could harm the way that advice is given or decisions are made and argued that it is important that officials are able to discuss the merits of proposals and the implications of decisions internally without outside interference in order to arrive at a balanced and considered decision. Additionally disclosure could prevent free and frank discussions about future badger control operations.
74. It also stated that disclosure would damage its ongoing relationship with the police forces, as they have explicitly objected to disclosure. It would hinder the ability of DEFRA and the police forces to work together on current and future issues with a dramatic reduction in the information being shared with DEFRA. In addition it stated that there would be a loss of frankness and candour around policing issues that would damage the quality of advice and lead to poorer decision making and place the public and those operating the cull at greater risk. It argued that such consequences are not in the public interest.
75. The Commissioner considers this exception will encompass a wide range of internal communications. However, public interest arguments should

be focussed on the protection of internal deliberation and decision making processes.

76. The Commissioner is of the opinion that the need for safe space and the need for internal deliberation and discussion carries significant weight whilst the issue is still live, whilst ideas are in development and whilst issues are being debated in order that a final decision can be reached. However, once the public authority has made its decision and published it the need for safe space will diminish and this argument will carry little weight in the balance of the public interest test.
77. The Commissioner notes that the results of the consultation, DEFRA's decision and the new guidance were published by the time of the request; 17 December 2015. Although the request was made only a short while afterwards, a decision had been reached and new guidance published so there was no longer any need for safe space.
78. The Commissioner notes that in some circumstances there can be a continuing need for safe space after decisions are made to, for example, properly promote, explain and defend its key points. However, it is the Commissioner's opinion that it is for the public authority to explain why such safe space is still needed after a decision is reached based on the facts of the case. It is also the Commissioner's view that once the decision is announced there is likely to be increased public interest in scrutinising and debating the details of the decision and it is noted in this case that the results of the consultation, DEFRA's decision and the new guidance was publicly announced a month prior to the request.
79. The Commissioner notes that DEFRA has argued that disclosure could result in a chilling effect whereby the relevant police forces will be less candid and frank in future deliberations relating to the cull. The Commissioner considers such arguments will carry weight when the issue at hand is still live. She also accepts that such arguments continue to carry weight even when the issue at hand is closed but the information is very closely related to other matters which are live.
80. In this case the Commissioner recognises that the issue at hand is closely connected to the government's overall policy to cull badgers in order to prevent the spread of bovine tuberculosis and that the consultation results and revised guidance published would influence the way badger culling proceeded after the date of the request, into 2016 and possibly longer. However, the withheld information itself is a response to the public consultation. The consultation was closed, a decision made and revised guidance published just over a month prior to the request. The issue at hand was not itself live. Indeed DEFRA has confirmed that it was finalised and there was no room for further discussion or indeed internal deliberation.

81. Although the Commissioner has said that the chilling effect argument will still carry weight if the issue at hand is closely connected to wider issues which are still live, the Commissioner is of the opinion that in practice it would be hard for a public authority to argue that there would be a chilling effect on *all* future discussions with stakeholders. Especially in the context of a medium to long term governmental strategy such as badger culling. The police forces concerned are also public authorities in their own right subject to similar public scrutiny and accountability. The staff that responded to the consultation would more than likely have been senior officials within those organisations. Such officials are expected to be impartial and robust in meeting their responsibilities and not easily deterred from expressing their views by the possibility of future disclosure. It can also be argued that due to the sensitive topic and the public interest in badger culling that the public is going to want to scrutinise and analyse the decisions made, why and what information influenced those decisions.
82. The Commissioner does not consider DEFRA's public interest arguments in favour of maintaining this exception are compelling enough or carry the weight DEFRA has described to warrant non-disclosure. There are stronger public interest arguments in favour of disclosure in this case. The public interest in openness and transparency, the significant public interest and sensitivity in the governmental policy to cull badgers and decisions taken by those in authority to implement it and the public interest in providing access to information which enables those interested to understand more clearly why such decisions were taken and why guidance was amended to reflect the proposals. There was also a clear and a significant amount of opposition to the proposals and more broadly the culling of badgers.
83. The Commissioner has therefore decided in this particular case that the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure.

**Questions 3, 4.a, 4.b, 5.a, 5.b, 6.a, 6.b**

84. In the original request the complainant asked for the number of responses received from farmers and, separately, farming organisations (question 3) and then to have the total number of responses to certain questions expressing opposition and, then support, broken down into the following categories (questions 4.a to 6.b):
- (i) members of the public;
  - (ii) farmers;
  - (iii) farming organisations;

- (iv) vets;
  - (v) veterinary organisations;
  - (vi) wildlife or welfare organisations;
  - (vii) research or academic interests, and
  - (viii) other interests.
85. DEFRA disclosed the total number of responses from farming organisations or farmers (question 3) and then responded to questions 4.a to 6.b but in the following categories:
- (i) members of the public (or not disclosed);
  - (ii) farmers or farming organisations;
  - (iii) vets or veterinary organisations;
  - (iv) wildlife or welfare organisations;
  - (v) research or academic interests; and
  - (vi) other interests.
86. DEFRA stated that it was unable to provide the requested information in accordance with the complainant's categories (as listed in paragraph 84), as it does not hold this information. It therefore cited regulation 12(4)(a) of the EIR.
87. The complainant remained dissatisfied and stated that she requires the requested information separated out for the following categories:
- 1) Farmers.
  - 2) Farming organisations.
  - 3) Vets.
  - 4) Veterinary organisations.

The complainant is not content to receive the information for farmers and farming organisations combined or for vet and veterinary organisations combined. She requested the information to be provided for farmers *and* farming organisations separately and vets *and* veterinary organisations separately and does not agree that DEFRA does not hold this information. She confirmed that she has no complaint concerning the remaining categories listed in paragraph 84 above.

88. In her submissions to the Commissioner, the complainant stated that the categories she used in her original request were those created and quoted by DEFRA in its 'Summary of responses to the consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers' (page 3) and were therefore not her own. She believes DEFRA would not have been able to select the categories it used in this summary or divide all responses into categories if it did not possess the relevant information.
89. Additionally the complainant confirmed that DEFRA's online response form for respondents, under the heading 'Introduction', question 3 asked 'What is your organisation?' Therefore DEFRA was asking respondents to indicate their interest. She stated that DEFRA's chosen categories were 'Farmers *or* farming organisations' and 'Vets *or* veterinary organisations' and not more generic categories such as 'The Farming Industry' or 'The Veterinary profession'. Furthermore, the complainant explained that DEFRA published a 'List of organisations who responded to the consultation' in Annex A of DEFRA's 'Summary of responses to the consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers'. She believes that because DEFRA has already identified and listed all the organisations which responded to the consultation it should be fairly simple for it to provide the requested information in the manner she requested.
90. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold the information when the applicant's request is received.
91. DEFRA explained that it does not hold the information separately so as to identify farmers from farming organisations or vets from veterinary organisations. It confirmed that for the purposes of its analysis of the consultation responses similar interests were grouped together based on what they declared in the 'name', 'organisation' section of the response or other free text sections. The responses were grouped together in the categories outlined in paragraph 85 above. It further explained that the respondents were not specifically required to indicate their interest when completing their response and the complainant's categories as outlined in paragraph 84 above do not match those used in practise by respondents where an indication was given. It said in a number of cases it is unclear on whose behalf a person was responding so, for example, a vet may be responding on their personal behalf or on behalf of their veterinary organisation. Similarly, the National Trust in their response makes reference to their tenant farmers. This response was therefore classified as "other interests". It argued, therefore, that it could not establish with any reasonable degree of certainty the breakdown into

categories the complainant has requested and therefore it does not hold the requested information.

92. DEFRA also stated that it disclosed all but two of the consultation responses to the complainant (the Home Office response and the missing response addressed above) suitably redacted to prevent any personal data being disclosed. This was to enable the complainant to undertake her own analysis of the responses received.
93. The Commissioner questioned DEFRA further in light of the specific points raised by the complainant and asked DEFRA to supply a full copy of all consultation responses which were categorised as:
  - 1) Farmers or farming organisations.
  - 2) Vets or veterinary organisations.
94. DEFRA responded supplying the Commissioner with a spreadsheet detailing all the responses to the consultation.
95. The Commissioner has considered the spreadsheet in detail, in particular the 'Log' tab of the spreadsheet which shows how each response was actually categorised. The categories used in this spreadsheet for the consultation responses being considered here (i.e. those from farmers or farming organisations and vets or veterinary organisation) are "farmer" or "vets" and it is possible to filter this element of the spreadsheet to simply show all those categorised as "farmer" and all those categorised as "vets".
96. Taking the "farmer" filter first, it is evident from the results presented if you filter the spreadsheet to simply show all those placed in this category that DEFRA does in fact hold the requested information. Many of the responses in this category say in the 'Organisation name' column of the spreadsheet "Farmer", "retired livestock farmer", "[area name redacted] chilli farm", "smallholder" and so on. Three of the responses in this category specifically say that they are the official response from a farming organisation. It is noted that a number of responses came from limited companies. But the Commissioner considers many of these, if not most, will be from farmers who have set their businesses up in this manner due to tax purposes and so fall within the "farmer" category rather than the "farming organisation" category. The Commissioner would consider a farming organisation to be organisations such as the NFU, the Family Farmers Association and so on.
97. Taking the "vets" filter, it is evident from the results presented if you filter the spreadsheet to simply show all those placed in this category that DEFRA does in fact hold the requested information. There are a total of 8 responses in the category and two were noted as an "official

response". These are therefore two responses which definitely fall within the category of "veterinary organisation" only. The Commissioner notes that a good proportion of the remaining responses are from an individual at a veterinary practice and she would expect these to fall within the "vet" category only. They are from a private practice or potentially from an operating vet themselves. A private practice or independent vet is not an official veterinary organisation like the British Veterinary Association for example and so a definite distinction can be made between a response which originates from a "vet" and a response which originates from a "veterinary organisation". The fact that DEFRA has categorised two as official responses from veterinary organisations confirms this, at least in part.

98. The Commissioner has discussed this further with DEFRA and while it accepts her viewpoint, it still wishes to maintain that it does not hold the requested information under regulation 12(4)(a) of the EIR. This is because it cannot confirm with any degree of accuracy exactly which responses fall definitely into the refined categories proposed by the complainant. It still remains of the opinion that it did not categorise the responses in this manner for the purposes of the consultation and only categorised the responses in the broader categories it used and there are several examples where it is just not possible to make a firm judgement about whether the response falls within the "farmer" category or the "farming organisation" category or the "vet" category or the "veterinary organisation" category.
99. The Commissioner disagrees with DEFRA. She is of the view that the spreadsheet, for the above reasons, highlights that DEFRA does hold the requested information for the purposes of the EIR. DEFRA's arguments focus on accuracy and the ability to judge whether a particular response is from an individual farmer or vet or an organisation.
100. Firstly, the spreadsheet seems to prove that DEFRA definitely holds the requested information in part and has even already carried out the categorisation the complainant has requested in part as well, where it has already specifically recorded a response which is definitely from a farmer and labelled official responses from a number of official organisations.
101. Secondly, the Commissioner guidance specifically highlights that if answering the request involves exercising sophisticated judgement, the information will not be held. But if only a reasonable level of judgement is required to identify the relevant building blocks, or manipulate those blocks, the information will be held. In this case, the Commissioner is satisfied that DEFRA holds the necessary building blocks and that these can be identified, retrieved and manipulated using only a reasonable

level of judgement to provide the requested information. DEFRA therefore holds the requested information.

102. The right of access is to the recorded information which is held not information which is accurate. Just because DEFRA is unsure that it can definitely and precisely say 100% exactly how many fall within each separate category does not mean it does not hold the requested information. The Commissioner's guidance says that there will be situations where the information recorded is likely to be of variable quality and only provide a partial picture of events. However, in these situations the information should still be provided and the public authority should explain to the applicant that the information is not very reliable and only provides a partial picture of events.
103. For the above reasons, the Commissioner is satisfied that regulation 12(4)(a) of the EIR does not apply.

### **Question 7b**

104. The complainant asked DEFRA to disclose "the precise reduction, as a percentage, of confirmed incidents of bTB in cattle that DEFRA has calculated will be achieved in a cull area and 2km area if the aforementioned changes are made to the culling criteria."
105. DEFRA confirmed that it does not hold the requested information. In its initial responses to the complainant it stated that no calculations have been carried out to estimate the changes in net benefit altering these conditions will have. Therefore the requested information is not held and so regulation 12(4)(a) of the EIR applies.
106. The complainant disputes this information is not held because:

"Defra must have gathered scientific evidence for it to be able to support its assertion that its industry-led cull, which has recently departed further from RBCT methodologies by making licensing changes, will achieve Defra's aims of reducing incidents of bovine TB and achieving disease control benefits, and, indeed in Defra's Guidance to Natural England: *Licences to kill or take badgers for the purpose of preventing the spread of bovine TB under section 10(2)(a) of the Badgers Act 1992*, published on 17 December 2015, Defra states that:

*"This guidance is given by the Secretary of State...and represents the Secretary of State's **considered** views, **based on current scientific evidence**, about what is required for any cull of badgers for bovine tuberculosis (TB) control purposes to be **effective**, safe and humane."*  
(my emphasis)"

107. It is the Commissioner's opinion that just because a complainant believes a public authority *should* hold the requested information does not mean that it will. In such cases the Commissioner will check with the public authority to ensure that thorough searches have been undertaken to try and locate the requested information.
108. DEFRA advised the Commissioner that it does not hold the requested information and that it is satisfied that it does not having made further, repeated enquiries of the relevant service area. It also made the following comments.
109. With regards to 100km<sup>2</sup> issue, the calculations could in theory be done, but they have not been done and so the requested information is not held. There is no requirement to create new information in order to comply with a request for information.
110. On the 70% rule issue, it stated that it is not possible to calculate the increase or decrease in disease benefits between the previous rules of requiring 70% accessibility and requiring 90% accessibility or within 200m of accessible land, and the proposed rule of just requiring 90% accessible or within 200m of accessible land. In the RBCT variation in the proportion of accessible land made no difference to the net benefit in cattle breakdowns. DEFRA stated that the full scientific reference and details can be found in Donnelly et al (2007) in the International Journal of Infectious Diseases (2007) 11, 300-308. And, therefore, it does not hold the information.
111. In respect of the time period, DEFRA stated that it is not possible to calculate the increase or decrease in disease benefits between the previous rule of culling within a six week period and the proposed rule of a cull period of sufficient intensity. Again, therefore, the requested information is not held.
112. The Commissioner is satisfied that sufficient enquiries have now been made to establish whether DEFRA holds this information or not. On the balance of probabilities the Commissioner is satisfied that the requested information is not held and DEFRA has offered an explanation as to why it is not held. Therefore she is satisfied that regulation 12(4)(a) of the EIR applies to this element of the request.

## Question 8

*Regulation 12(4)(e)*

113. The Commissioner understands that the withheld information for this question consists of a communication from DEFRA officials to the then Secretary of State for DEFRA dated 3 December 2015 containing advice and a small selection of emails back and forth in relation to it.
114. The Commissioner understands that DEFRA has withheld this information under regulation 12(4)(e) of the EIR.
115. To recap, regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. Regulation 12(8) confirms that for the purposes of 12(4)(e), internal communications include communications between government departments.
116. DEFRA has confirmed that the withheld information is a communication and associated emails from DEFRA officials to the then Secretary of State for DEFRA. It therefore clearly fits within the definition of 'internal communications'.
117. The Commissioner has reviewed the withheld information and she is satisfied that it does constitute 'internal communications' between DEFRA officials and the then Secretary of State for DEFRA. The Commissioner is therefore satisfied that regulation 12(4)(e) of the EIR is engaged.
118. In terms of the public interest test DEFRA advised that it recognised the public interest in disclosure of information concerning bovine tuberculosis and the badger control policy and that disclosure can enhance public understanding in this area, aid accountability and transparency.
119. However, on the other hand, it recognised the strong public interest in withholding the information because the disclosure of internal communications between officials and ministers would harm the way DEFRA makes decisions or gives advice. It stated that it is important that officials and ministers are able to discuss the merits of proposals and the implications of decisions internally without outside interference in order to arrive at a balanced and considered decision. Additionally, DEFRA advised that disclosure could prevent free and frank discussions about badger control policy, which is still live, between officials and ministers in the future. It argued that the loss of frankness and candour would damage the quality of advice and lead to poorer decision making.
120. DEFRA referred to a counter argument raised by the complainant. It stated that the complainant had referred it to paragraph 53 of the ICO's guidance on the application of this exception, which states:

"...civil servants and other public officials charged with giving advice are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice..."

The guidance can be accessed via this link:

[https://ico.org.uk/media/for-organisations/documents/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf)

121. In response to this DEFRA stated that it accepted what the Commissioner's guidance says but pointed out that the guidance goes on to recognise that there are reasonable public interest arguments against disclosure, stating that:

"Nonetheless, the possibility of a chilling effect cannot be dismissed out of hand."

122. It also referred to paragraph 54 of the same guidance which states that:

"...If the issue in question is still live, arguments about a chilling effect on those ongoing internal discussions are likely to carry significant weight. Arguments about a chilling effect on closely related live discussions may also carry weight".

123. DEFRA explained further that the withheld information relates to an issue that is still live and so the chilling effect arguments to which the guidance refers apply. Moreover, it refers to paragraph 48 of the guidance, which states that the Commissioner recognises that there has to be:

"...a 'safe space' to debate issues away from external scrutiny and preventing a 'chilling effect' on free and frank views in the future."

124. It argued that it recognised the very significant public interest in transparency and accountability with regards to issues around the badger cull. For this reason, it has already made a substantial amount of information available about the badger cull and associated dates on GOV.UK. However, overall it considers the public interest rests in maintaining this exception.

125. The Commissioner's analysis of the public interest test is much the same as that previously explained in paragraphs 75 to 83 above in respect of question 1.

126. The withheld information is in the main DEFRA officials' advice to the then Secretary of State for DEFRA relating to the consultation, its results

and the new guidance it wished to implement. Although the request was made only a month afterwards, the fact remains that the consultation was closed, clearance had been sort and obtained and the consultation results and revised guidance published. DEFRA confirmed itself that by the time of the request the matter was closed and not subject to any further internal discussion or deliberation; it was finalised by this time. The issue at hand was therefore not still live. There was no need for any further 'safe space' to continue deliberations or formulate the government's guidance.

127. The Commissioner accepts that the consultation and revised guidance is closely connected to the government's overall strategy of badger culling and that this strategy remains live and evolving. DEFRA's arguments about a chilling effect therefore do carry weight and cannot be dismissed out of hand, as it has rightfully pointed out above.
128. However, the government's strategy on badger culling and reducing bovine tuberculosis in the UK is a medium to long term strategy and one which attracts significant public interest and opposition. In practice the Commissioner considers it is difficult to accept that senior public officials will be deterred in the future from giving candid and necessarily frank advice and participate openly in such future discussions. With senior positions within a public authority they are expected to be impartial and robust and not deterred from doing so because of the possibility of public disclosure. The Commissioner considers that they will in fact expect or should expect such public scrutiny considering the responsibilities they have and the obvious effects their decision making will have.
129. In this case therefore the Commissioner considers there are more compelling arguments in favour of disclosure.

### *Regulation 13*

130. Regulation 13 of the EIR states that a public authority is entitled to refuse to disclose the personal data of a third party if its disclosure would breach of any of the data protection principles outlined in the Data Protection Act (DPA) or section 10 of the DPA.

131. Personal data is defined as:

..."data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

And includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual..."

132. The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle states -

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

133. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of regulation 13 of the EIR ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

*Is the requested information personal data?*

134. DEFRA has said that it has withheld the names of a number of Badger Policy Officials and the Private Secretary of the then Secretary of State under regulation 13 of the EIR. An individual's name is quite obviously personal data; it is information from which they can easily be identified.

*Would disclosure be unfair?*

135. DEFRA confirmed that the withheld information are the names of a number of DEFRA staff who do not have a public facing role and work in policy areas that are controversial and sensitive. DEFRA's policy on the disclosure of staff personal data highlights specifically that those that work in areas that are controversial and sensitive should not have their personal data disclosed.

136. In terms of the staff members' expectations, DEFRA said that they all hold no expectation that their personal data in connection with the badger culling policy will be released into the public domain and it stated that a number of staff had explicitly stated that their name is not be disclosed into the public domain in this context.

137. The Commissioner considers that due to the controversial and sensitive nature of the badger culling policy and the clear public opposition to it, it would be unfair and unreasonable to disclose the personal data of the officials concerned. DEFRA has explained that they all hold a reasonable expectation that their personal data in connection with the policy area will not be disclosed into the public domain and that such an approach forms part of its Data Protection Policy. It has also confirmed that a number of officials have explicitly objected to the public disclosure of their personal data in this context.
138. The Commissioner is satisfied in this case that the officials concerned will hold the expectation that their personal data will remain private and confidential in this particular context due to the controversial and sensitive nature of the policy area. Disclosure against those expectations would cause the data subjects concerned considerable distress and upset.
139. In terms of any legitimate public interest in the disclosure of this information, the Commissioner does not consider the names of officials in this context will aid the public's understanding around the badger culling policy or further any public debate on any particular decisions DEFRA has made. As DEFRA has already stated, it has made a significant amount of information available to the public via the GOV.UK website and there is no overwhelming public interest in this information that would warrant the unfairness, upset and distress disclosure would cause to the data subjects.
140. For the above reasons, the Commissioner is satisfied that regulation 13 of the EIR applies.

**Questions 10.a-e, 11.a-d, 12.a-d, 13.a-d and 14.a-d**

141. DEFRA confirmed that it alerted 335 contacts about the launch of the consultation (in response to question 9 of the request). In questions 10 to 14, the complainant asked for more specific information relating to those that were alerted and for two of the categories used by DEFRA to be broken down further to provide a separate response for farmers, farming organisations, vets, and veterinary organisations.
142. DEFRA responded to these questions, citing regulation 12(4)(a) of the EIR. It advised again that for the purpose of analysing the responses received, the responses were grouped together in the categories outlined in paragraph 85. The contacts alerted to the launch of the consultation were also not categorised in the manner requested.
143. The Commissioner considers that DEFRA would need to hold information confirming exactly who the 335 contacts were, that were alerted to the

consultation, in order to respond to these questions. All questions are phrased in a way which requests certain information about those 335 contacts that were alerted. The Commissioner considers DEFRA will hold some information that confirms which organisations and individuals *responded* (saying some here rather than all because DEFRA has confirmed that in some cases this information was not provided) but this is not the information requested in these questions. Holding information that confirms which individuals and organisations responded is different to information that confirms those that responded *and* were specifically alerted to the consultation by DEFRA. It was a public consultation that was open to anyone that wished to raise their views not just those that were alerted, so the responses received will be a mixture of those that were alerted and others.

144. DEFRA has explained to the Commissioner that the complainant's assumption that it holds a list of email addresses of interested parties or those that were alerted on this occasion is incorrect, as far as it is able to ascertain from the searches it has carried out.
145. It confirmed that the email alerts were carried out two years ago and by a member of staff who has since left DEFRA. There has been significant change within the organisation with staff leaving and others moving around to new roles since this work was carried out. The email alert was issued on 28 August 2015 and invited views on two consultations, the first of which was the consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers. The emails were set to a range of stakeholders using distribution lists for this specific purpose. Additional emails may also have been sent by individuals within DEFRA or the DEFRA group. Despite various detailed searches, it is unable to find these lists.
146. In its searches it has found four emails that were distributed as a part of the alert. But other than alerting these four parties to the consultation they contain very limited information; none which would assist DEFRA in locating the entire known list of alerted parties.
147. Despite its searches it has been unable to identify a definitive source for the list of people that were sent the alert. It stated that it does not hold any other information that could positively identify the source of and the process behind the email lists that were used. As the alert took place two years ago it may be that it has now been deleted but as stated previously, the members of staff that completed the work have since moved on, so it is not possible to confirm this for definite. It advised that it has also considered whether it is able to retrieve this information from current distribution lists. It cannot. It explained that distribution lists are regularly updated and therefore change. As they do, the

previous versions are deleted in accordance with its records retention policy.

148. The Commissioner is satisfied that DEFRA has carried out sufficient searches for the information that would enable it to respond to these questions and that on the balance of probabilities it no longer holds this information. The Commissioner is therefore satisfied that, for these questions, DEFRA was correct to rely on regulation 12(4)(a) of the EIR.

### **Question 15(a)**

149. This question relates to a quote from DEFRA's Summary of responses to the consultation on Guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers (paragraph 1.9) and the complainant's belief that this assertion is incorrect. The complainant asked DEFRA to disclose the information held by DEFRA on which the assertion was based.

150. DEFRA informed the complainant that this assertion was based on:

- Stop the cull Facebook note encouraging members of the public to respond to the consultation using their suggested answers as a rough guide.
- Some responses copied Somerset Against Badger Cull's response verbatim.
- Some responses used text from the Badger Trust's response.

151. The complainant remained dissatisfied and stated that she felt DEFRA had not responded to this question. She informed the Commissioner that having reviewed the responses herself, she felt this statement was incorrect and therefore DEFRA should hold recorded information substantiating this statement.

152. The Commissioner asked DEFRA for its further comments, in light of the complainant's dissatisfaction. It stated that it felt it had answered this question in March 2016 and informed the complainant of three examples upon which the statement was based. It further explained, to assist the complainant, that it had identified a number of responses that are identical or similar to each other. In particular it referred to responses 605, 987 and 1010 which appear to copy the Somerset Against Badger Cull's response verbatim.

153. The Commissioner considers DEFRA has responded to this element of the request in accordance with the EIR. She wishes to remind the complainant that the EIR provides a right of access to recorded information that is held; not to request answers to questions or to be

provided with explanations unless the answers or explanations are already in recorded form.

154. The Commissioner considers the recorded information that is held falling within the scope of this question is the consultation responses and she notes that these have already been provided to the complainant (with the exception of two, for reasons already explained earlier in this notice). This is the recorded information DEFRA holds from which it made this assertion. DEFRA has assisted the complainant further by explaining why this assertion was made providing various examples. DEFRA has stated that it could provide more examples, but the Commissioner does not consider there is any further obligation under the EIR to do so. This constitutes further explanation, rather than additional recorded information already held, of a statement the complainant's disagrees with and disputes its accuracy.
155. As the Commissioner is satisfied that DEFRA has responded appropriately and in accordance with the EIR to this question, she requires no further action to be taken for this element of the request.

### **Procedural matters**

156. The Commissioner decided earlier in the notice that DEFRA failed to issue any response to 15 of the 16 questions in the request within 20 working days. She also felt that the response that was issued for question 8 of the request was not issued "as soon as possible", as regulation 5 of the EIR requires. The Commissioner then later decided as well that DEFRA was incorrect to rely on regulation 12(4)(c) of the EIR for question 8 and therefore a full response to this question was required within the statutory 20 working days permitted by regulation 5 of the EIR. As a result of these issues, the Commissioner has recorded a breach of regulation 5 of the EIR in this case.
157. As DEFRA failed to respond in 20 working days and would be refusing to disclose some of the requested information, it also breached regulation 14(2) of the EIR by failing to issue a refusal notice no later than 20 working days after the date of receipt of the request.
158. It is also noted that it took DEFRA over 9 months to complete an internal review in this case. This is unacceptable and excessive in any request regardless of its complexity or volume. Regulation 11 of the EIR requires a public authority to carry out an internal review within a maximum of 40 working days. DEFRA failed to do so in this case and so the Commissioner has recorded a breach of regulation 11 of the EIR.

## Other matters

---

159. The Commissioner has found DEFRA's assistance and cooperation during this investigation unsatisfactory and significantly below the level of cooperation she would expect from a public authority of this size and resource. There has been repeated delays, failed promises and an information notice was required in order for the Commissioner to gain sufficient information from DEFRA in order to produce this notice. A decision notice was almost served during the early stages of her investigation, as DEFRA failed to complete its internal review. There was also another stage in the investigation where an information notice was threatened, as DEFRA had failed to respond to the Commissioner's enquiries in a timely fashion.
160. The Commissioner appreciates that this is a lengthy request that has involved a significant amount of work and that DEFRA has received a number of similar requests from the complainant on this topic over recent years. However, this does not and should not prevent DEFRA from cooperating with the Commissioner in a timely fashion and regardless of such matters it is still bound by the requirements of the EIR including its statutory timeframes.
161. The continual delays have frustrated the Commissioner's investigation and made its completion particularly difficult and laborious.
162. The Commissioner wishes to place on record in this decision notice these issues in the hope that it will prevent a similar situation occurring again with another request or investigation.

## Right of appeal

---

163. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

164. 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.

165. 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** .....

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**