

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

Date: 18 October 2022

Public Authority: Forestry Commission England
Address: 620 Bristol Business Park
Coldharbour Lane
Bristol
BS16 1EJ

Decision (including any steps ordered)

1. The complainant has requested information about badger culling on Forestry Commission England (FC) land. Forestry England (FE), an Agency of the Forestry Commission (FC), initially provided an unclear refusal notice that suggested that regulation 12(5)(a)(public safety) of the EIR applied. At review, FC accepted that its refusal notice had not met EIR requirements and cited regulation 12(4)(a) of the EIR (information not held at the time of the request).
2. The Commissioner's decision is that FC has now produced sufficient evidence that, on the balance of probabilities, it does not hold the requested information and that it cited regulation 12(4)(a) appropriately. However, FC has breached regulation 5(2) and regulation 14(3) of the EIR.
3. The Commissioner does not require FC to take any further steps.

Request and response

4. On 9 August 2021 the complainant made the following request for information under the EIR:

“Re: Information request about badger culling on Forestry Commission land

1. Please disclose whether access has been permitted to Forestry Commission land for culling badgers. N.B. By Forestry Commission land, I am referring to the Public Forest Estate in England which is owned or leased by the Secretary of State for Environment, Food and Rural Affairs and placed at the disposal of the Forestry Commissioners under the provision in Section 3 of the Forestry Act 1967.
 2. If access has been permitted to Forestry Commission land for culling badgers, please disclose if this accessible land includes land that is a) owned by the Secretary of State for Environment, Food and Rural Affairs, or b) leased by the Secretary of State for Environment, Food and Rural Affairs.
 3. Please disclose each county where access has been permitted to Forestry Commission land for culling badgers.
 4. Please disclose the area in km² of Forestry Commission land in each county where access has been permitted to Forestry Commission land for culling badgers.
 5. Please disclose each licensed area where access to Forestry Commission land for culling badgers has been permitted. (For Badger Cull Area numbers/names up to 2020 please see the list on pages 11-12 of this document: [Setting the minimum and maximum numbers in badger cull areas in 2020 \(publishing.service.gov.uk\)](#))
 6. Please disclose the area in km² of Forestry Commission land in each licensed area where access to Forestry Commission land for culling badgers has been permitted.”
5. FC responded on 10 September 2021 and provided links to some information but stated that it did not “comment on specific activities or licenses for licensed badger control” suggesting, rather than clearly citing that regulation 12(5)(a) applied. It explained that FE staff are not directly involved in the delivery of badger controls and that it was not the decision-making authority. The complainant was also directed to Defra.

6. On 13 September 2021 the complainant asked for an internal review, stating that the response had breached the EIR because it did not explicitly confirm whether it held the requested information, had not cited the correct exception/s and that no public interest had been considered. The complainant additionally provided their reasons why they did not accept that regulation 12(5)(a) applied.
7. FC provided its internal review on 4 November 2021 apologising for not meeting EIR requirements that it should provide advice and assistance and the presumption in favour of disclosure.
8. FC has now confirmed to the Commissioner that it was not maintaining the citing of regulation 12(5)(a).
9. In the review FC explained that FE is the responsible body as it manages the land at the disposal of FC. FC responded to question one of the request as follows:

“Forestry England do permit access to land that it manages within licensed cull zones (Control Area) for population monitoring and bait point activity, which would be in proximity to control land.”

FC cited regulation 6(b)(readily available by other means) as, it stated, the information was available via the Land Registry. The location of land managed by FE was also easily accessible and provided a link to the complainant. A list of counties was provided where access for the purposes stated had been granted. However, it stated that it did “not allow badger culling only access for population monitoring and bait point activity”. “Technically”, the information was not held and it cited regulation 12(4)(a). FC explained that it was not possible to apply the public interest test to information that is not held.

10. The complainant wrote to the Commissioner on 24 November 2021 as they were not content with FC’s handling of their information request, specifically that they believed that FC did hold the requested information.
11. On 26 June 2022 the complainant asked FC for clarification regarding some of the points it had made in the internal review:

“Population monitoring and bait point activity, which would be in proximity to control land”

In your response you said:

‘Forestry England do permit access to land that it manages within

licensed cull zones (Control Areas) for population monitoring and bait point activity, which would be in proximity to control land.'

1) Please explain a) exactly what you mean by 'population monitoring' (for example, does it involve the live capture of badgers or is it surveys of badger setts or is it surveys of badger setts and badger latrines and badger activity?), and b) for what purpose the badger population is being monitored.

2) Please explain a) exactly what you mean by 'bait point activity', and b) for what purpose the 'bait point activity' is being carried out.

3) Please explain exactly what you mean by a) 'control land', and b) 'in proximity to control land'. 'Forestry England does not permit access to the land it manages for badger culling'

4) Is it the Secretary of State for DEFRA (as the owner of Forestry Commission land) who gives permission for access to Forestry Commission land for badger culling?

Agreements to permit access

In your response you said:

'Any access agreement, when granted, would not differentiate between freehold and leasehold land (both have been included).'

You have made reference to 'access agreement' (singular rather than plural) and referred me to The Land Registry and these links: <https://www.gov.uk/guidance/use-the-land-information-search> and <https://magic.defra.gov.uk/home.htm>.

5) Please can you clarify if there is a) one access agreement for a Badger Control Area, or b) if there is more than one access agreement for a Badger Control Area, or c) if there is one access agreement which covers multiple Badger Control Areas.

Autonomy of the Forestry Commission

In your letter of 4 November 2021, you said:

'The Forestry Commission (and Forestry England) is a Government Department and is responsible for the implementation of Government policy, including Bovine TB control policies and access is granted in line with the normal permissions processes.'

- 6) Does the Forestry Commission have any degree of autonomy on making decisions about the issue of badger culling or is there a strict requirement to follow government policy? For example, Section 40 of the Natural Environment and Rural Communities Act 2006 (the NERC Act) places a duty on public authorities to have regard for the conservation of biodiversity when delivering their function.
- 7) If there is a strict requirement for the Forestry Commission (and Forestry England) to implement the badger control policy, please could you provide a link to where it is stated that the Forestry Commission (and Forestry England) must implement all government policies.”
12. FC responded on 14 July 2022 under the normal course of business and responded to the seven points in the 26 June 2022 correspondence.

Scope of the case

13. The complainant contacted the Commissioner on 24 November 2021 to complain about the way their request for information had been handled as they did not accept that FC did not hold the information they had requested.
14. FC responded to the Commissioner's investigation letter on 23 August 2022 stating that it did not hold the information requested and that it knew this to be the case because "the activity in question (badger culling) does not take place". FC included two best practice guides for the Commissioner's information: 'Cage-trapping and dispatch of badgers under licence to prevent the spread of bovine TB in cattle' and 'Controlled shooting of badgers in the field under licence to prevent the spread of bovine TB in cattle'. The FC stated that because badger culling did not take place the remaining questions in the request accordingly fell.
15. On 8 September 2022 the Commissioner spoke to FC and explained that it would be necessary for FC to carry out searches.
16. On the same day FC accepted this position and agreed to carry out the searches.
17. The Commissioner considers that the scope of this case is whether FC holds any information falling within the scope of the information request and any procedural breaches that may have occurred.

Reasons for decision

Is the information environmental information for the purposes of the EIR?

18. Regulation 2(1) of the EIR defines environmental information as being information on:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

19. The requested information relates to badger culling. This is clearly an environmental measure that will affect the state of the elements of the environment referred to in (a) and therefore falls under regulation 2(1)(c) of the EIR.

Regulation 12(4)(a) – information not held at the time of the request

20. Regulation 5(1) of the EIR requires a public authority that holds environmental information to make it available on request.
21. Regulation 12(4)(a) of the EIR provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
22. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner is not expected to prove categorically whether the information is held. He is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities, following the lead of a number of Information Tribunal decisions.
23. In deciding where the balance of probabilities lies, the Commissioner considers the complainant's evidence and arguments, the FC's searches and arguments and any other relevant factor.

The complainant's view

24. Clearly the complainant is unlikely to be able to prove if FC holds any information relating to their information request so the following paragraphs outline the reasons why they believe that information is likely to be held.
25. The complainant's view is that FC has not confirmed or denied whether it holds each piece of information that they requested in the multi-part request. They are not confident that FC has carried out adequate and properly directed searches and regard FC's statement that "technically no information is held in respect to culling (as defined)" as unsatisfactory.
26. The complainant contends that this does not mean that access for culling is not being permitted on FC land because it is the land owner or occupier that permits access to land for badger culling, not Natural England. FC asserted that FE does not permit access to the land it manages for badger culling and that the granting of permission for badger culling is licensed by Natural England. FC did not refer to or refute the argument and evidence that the complainant had provided. The complainant pointed to a previous request where they had stated that a land holder needs to permit access to land for badger culling but it appeared that the validity of this statement was not accepted by FC, though it was not referred to or refuted and where it was asserted that granting of permission for badger culling was licensed by Natural England. The complainant states that Natural England assesses

applications and decides whether a licence should be authorised and considers it to be "baffling, disappointing and unsatisfactory...that [FC] continues to assert that it is Natural England that permits access to land for culling badgers when this is not the case".

27. In support of their view, the complainant provided three guidance documents provided by Natural England to applicants for a badger disease control licence. These advise about completing the 'Landlord's Undertaking'. The 'TB Management Agreement' and the agreement for adding short-term tenanted land. The complainant also provided a blank TB Management Agreement and a copy of a Badger Control Deed of Agreement, explaining that they are mentioned 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 Protection of Badgers Act 1992 (May 2021 version)¹. The complainant explained that the five documents were disclosed in 2021 and 2022 by Natural England in response to EIR information requests.
28. The complainant goes on to specifically address what they had requested. They quote from the internal review which stated: "Forestry England does not permit access to the land it manages for badger culling". The complainant points out they they did not ask whether FE had permitted access for badger culling but whether access had been permitted to FC land for culling badgers. They also state that FC land includes land that is in freehold and leasehold ownership and that FC land is also leased out to tenants that include the Ministry of Defence which, according to the complainant, admitted to allowing access to land for culling badgers in 2018². Additionally, regarding an earlier information request, FC had stated that FC land that is managed by FE is not owned by FC but by the Secretary of State for Defra. The complainant says it is Defra's badger control policy. Consequently, it is likely that the Secretary of State for Defra has allowed access to FC land for badger culling.
29. The complainant argues that correspondence between them and FC suggests that access has been permitted for badger culling on FC land:

¹ [Guidance to NE: Licences to kill or take badgers for the purpose of preventing the spread of bovine TB under section 10\(2\)\(a\) of the Protection of Badgers Act 1992 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/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-protection-of-badgers-act-1992)

² [MOD and licensed control of badgers in 2018 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/mod-and-licensed-control-of-badgers-in-2018)

“In terms of decision making, the Forestry Commission is a Government Department and if the land it manages falls within a badger disease control licence area it would work with the appropriate individuals and authorities to implement Government policy.”

They go on to say that “approximately 28,000 hectares of land are leased by the FC (this figure was 28,065 hectares in June 2018) according to the response to a parliamentary question³”. The complainant suggests that landowners of this leased land could have signed a Landowner’s Undertaking or a TB Management Agreement, depending on lease terms, allowing access for badger culling on their land. Tenants could have done the same thing but the landowner of the FC land (Defra Secretary of State) may also have been required to sign a Landowner’s Undertaking.

30. The complainant argues that the responses they have been given by FC, Forestry England and Defra to questions about whether access for badger culling has been permitted suggest that it is highly likely. Otherwise, these organisations would have responded by stating that access was not permitted and culling was not taking place. To support their view, the complainant provided the Commissioner with a link to a parliamentary question from Caroline Lucas MP:

“To ask the Secretary of State for Environment, Food and Rural Affairs, whether badger culling is (a) permitted to take place and (b) taking place on Forestry Commission land; and if he will make a statement.”⁴

The response was as follows:

“For security reasons we do not comment on specific activities or licences for licensed badger control... The Forestry Commission would handle requests for access from applicants for a Natural England licence in the same way they do for all other requests to access. If access permission was given it would not automatically mean badger disease control activity would be carried out on land they manage.”

³ [Written questions and answers - Written questions, answers and statements - UK Parliament](#)

⁴ [Written questions and answers - Written questions, answers and statements - UK Parliament](#)

31. The complainant's inability to assure themselves about whether badger culling is carried out on FC land is highlighted. They quote from the internal review where it states that:

"Forestry England do permit access to land that it manages within licenced cull zones (Control Areas) for population monitoring and bait point activity, which would be in proximity to control land."

The complainant notes that the conditional tense is used and it does not say "is in proximity to control land". They further argue that access for these purposes on land that is not accessible for badger culling is "unprecedented" and that "it is public knowledge that setts are surveyed only on participating land (i.e. land that is accessible for culling)". An example is provided regarding Annex A of Areas 1 and 2 as set out in a Defra document⁵. In 2016 the area surveyed in square kilometers was listed as "not applicable" for inaccessible land for both of the cull areas. Additionally, in Natural England's guidance when Applying for a Badger Disease Control Licence applicants must input results of sett surveys and "From this information, Natural England calculates minimum and maximum numbers of badgers that must be killed"⁶. The estimation of population size "...must relate to the whole culling area, including any land within that area on which no culling is planned to take place".

32. In a letter requesting clarification from FC, the complainant asked what was meant by "population monitoring', 'bait point activity', 'control land' and 'proximity to control land". FC stated,

"that population monitoring, 'refers to surveying the land for signs of active setts and latrines to inform activity on adjoining cull land' and that bait point activity, 'refers to activity of laying trails to draw animals onto cull land and may happen in places where setts are on or near a forest land boundary abutting cull land".

The complainant contends that this does not say that the boundary is an FC land boundary and that the adjoining/abutting cull land could be FC

⁵ [Bovine TB: Setting the minimum and maximum numbers in licensed badger control areas in 2016 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁶ [Setting the minimum and maximum numbers in West Gloucestershire and West Somerset for Year 3 of the badger cull. DEFRA. Advice to Natural England. August 2015. \(bovinetb.info\)](https://bovinetb.info)

land where a landowner/tenant has permitted access to land for badger culling. Not all FC land managed by Forestry England is woodland, it includes "associated open habitats" and "agricultural land"⁷.

33. The complainant states that badger culling is permitted on Ministry of Defence land and in National Nature reserves which, they argue, increase the likelihood that access for culling is permitted on FC land.
34. The complainant has provided a great deal of argument in support of their view, some of which addressed FC's refusal notice with its reference to regulation 12(5)(a) and provided the public interest arguments in favour of disclosure. As the internal review did not cite regulation 12(5)(a), it is not being considered here.
35. In support of their argument, the complainant has also sent the Commissioner an information request they made in August 2022 to Natural England:

"Please disclose whether access has been permitted to the Forestry Commission land for culling badgers."

The public authority neither confirmed nor denied (NCND) that it held information and suggested that the complainant ask the FC. The complainant asked the Commissioner why the choice had been made to NCND if there is no access to Forestry Commission land for badger culling.

FC's view

36. As set out earlier in this decision notice, the Commissioner insisted that FC carry out searches in order to determine whether its assertion that it knew that it didn't hold the requested information because culling was not carried out on its land was correct. He asked FC a series of questions to try and establish whether it held the requested information or had ever held it.
37. FC repeated that it had already explained to the complainant in its letters dated 4 November 2021 and 14 July 2022 that access is permitted for population monitoring and bait point activity. It also explained that because of the controversial nature of the Government's

⁷ [Written questions and answers - Written questions, answers and statements - UK Parliament](#)

policies regarding this matter it is closely controlled in the FC/FE. FC stated that across the entire estate the issues concerned and access are managed through a single point of contact who is the primary source of any held information. Media enquiries in relation to badgers are responded to by FE's Media Relations Manager. The Knowledge and Information Management Team that responded to the complainant regarding the initial request do not hold information on their own account. When they need to respond to information requests they request information from colleagues.

38. Some evidence was then provided from the records of the single point of contact that had been inherited from their predecessor which "confirm no culling takes place". These brief mentions are from 2014. There was some limited information from 2021 which related to access, rather than culling.
39. The single point of contact and the Media Relations Manager have searched electronically the information they hold using keywords. They excluded the words "cull" and "culling" as it would return almost everything in relation to access. Instead they used terms that would reveal the intention or result of culling activity. They used the terms "killed", "culled" and "firearms". FC explained that the use of firearms on land it manages which is the key element in the culling process is closely controlled. No results were returned to indicate that any culling had taken place.
40. The single point of contact also verified the position with the National Farmers' Union (NFU) because they had not worked on this project since inception. Verbal confirmation was received that the NFU has no data showing that badgers have been culled on FC/FE land. The NFU records the number of animals culled each year, per licence and area, which FC understands they report to Natural England. FC contends that the fact that the NFU has no records supports its position that no culling takes place on its land and that no information is held.

The Commissioner's view

41. This has not been an easy decision due to the various public authorities involved in this issue, the complex rules and regulations concerned regarding who has permission to access FC land, and whether this is for the purposes of badger culling or not. The complainant has an extensive knowledge of the subject acquired over some time and has produced cogent argument. They remain convinced that they have not been provided with information that they believe to be held or that they believe should be held.

42. However, it is beyond the Commissioner's remit to consider what information should be held by a public authority. He can only consider what information a public authority actually holds and only make a decision based on the balance of probability. In conclusion, the Commissioner has accepted FC's statement that it does not hold the requested information, though he has insisted on searches being carried out to establish as far as practicable that this is the case. As the information is 'not held' there is no meaningful public interest test that can be carried out as is required by most EIR exceptions.

Procedural matters

Regulation 5(2) – time for compliance

43. Regulation 5(1) of the EIR states that:

“a public authority that holds environmental information shall make it available on request.”

44. Regulation 5(2) of the EIR states that: “Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”
45. There is some slight dispute over the date of receipt of the request – the requester says it was received on 9 August 2021 and FC says it was received on 10 August 2021. FC issued its refusal notice on 10 September 2021. Even allowing for the Bank Holiday, the refusal notice was beyond the time for compliance.

Regulation 14 – Refusal to disclose information

46. Regulation 14(3) states that if a public authority wishes to refuse any part of a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exceptions and the matters it has considered when reaching a decision regarding the public interest.
47. The Commissioner considers that FC has breached regulation 14(3) as, although it referred to a previous case and to an exception cited (regulation 12(5)(a)) it did not clearly state whether it held or did not hold the information or whether it was relying on that exception. There was no consideration of the public interest for the same reason.

Right of appeal

48. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

49. 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.
50. 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

Janine Gregory
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