

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 December 2014

Public Authority: Natural England
Address: Foundry House
3 Millsands
Riverside Exchange
Sheffield
S3 8NH

Decision (including any steps ordered)

1. The complainant has requested information relating to the cost of badger culling. Natural England refused the request, citing the exceptions for adverse effect to the confidentiality of proceedings (regulation 12(5)(d)) and adverse effect to commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that Natural England:
 - Failed to demonstrate that the exceptions in regulation 12(5)(d) and regulation 12(5)(e) are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. 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.

Background

5. The request relates to the Government's policy regarding the culling of badgers as a method of controlling the spread of Bovine tuberculosis (TB) and, specifically, to the on-going pilot culls in West Somerset and West Gloucestershire¹.
6. The cost of the culling was to be paid for by farmers and carried out by licensed culling or "Control Companies". In order that culling was to proceed effectively, the Department for Environment, Food and Rural Affairs' (DEFRA) guidance to Natural England ("NE") – "Licenses 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" - required control companies to ensure that sufficient funding was made available:

*"Applicants must have arrangements in place to deposit sufficient funds in a reputable bank to cover the total cost of a four-year cull, plus a contingency sum of 25%."*²
7. These requirements were imposed on licence holders through conditions set out in NE's TB Area Control Licences for both West Gloucestershire and West Somerset and the associated Badger Control Deed of Agreement (2012), which licence holders were required to sign.
8. The first culling took place in late 2013 and the design of the monitoring protocols and analysis of results were overseen by an Independent Expert Panel ("IEP"), which published a report on 3 April 2014³. DEFRA's response to the report accepted a number of the IEP's critical findings, including those relating to the effectiveness and the humaneness of the cull.⁴
9. The complainant has stated that, as the culling involved more extensive use of cage trapping, as opposed to the cheaper but less efficacious and

¹ See, for example <http://www.bbc.co.uk/news/science-environment-22614350>

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69464/pb13692-bovinetb-guidance-ne.pdf

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300382/independent-expert-panel-report.pdf

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300424/pb14158-defra-response-independent-expert-panel.pdf

less humane free shooting, that the cost of the cull must have been higher than was originally anticipated. The complainant was, therefore, concerned that there might not have been full compliance with the financial conditions set out in the guidance, licenses and Deed. It is within this context that the request was made.

Request and response

10. On 11 April 2014 the complainant wrote to NE and requested information in the following terms:

"Please confirm the previous and new total sum deposited, and the cost estimates for future culling in line with the licence conditions."

11. NA responded on 1 July 2014. It stated that it was refusing the request under regulation 12(5)(d) and regulation 12(5)(e) of the EIR.
12. Following an internal review NE wrote to the complainant on 22 September. It stated that it was maintaining its position.

Scope of the case

13. On 22 October 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
14. The Commissioner confirmed with the complainant that his investigation would consider whether NE had correctly withheld the requested information.

Reasons for decision

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

15. NE has applied this exception to all the requested information. This consists of the following:

In relation to (separately) West Gloucestershire and West Somerset:

- The previous sums deposited (relating to licence activity in 2013) by Control Companies;
- New sums deposited (relating to year 2 of licence activity in 2014)

- The cost estimate for future culling (in line with licence conditions).
16. Regulation 12(5)(d) allows a public authority to refuse a request if disclosing the information would adversely affect the confidentiality of the proceedings of that public authority, or any other public authority, where that confidentiality is provided by law.
 17. The term 'proceedings' is not defined within the EIR but the Commissioner considers that an activity has to have a degree of formality to qualify as such. For example it will include, but is not limited to, formal meetings to consider matters that are within the authority's jurisdiction, situations where an authority is exercising its statutory decision making powers and legal proceedings. In each of these cases the proceedings are a means to formally consider an issue and reach a decision.

Proceedings

18. The Commissioner has first considered whether the information falls within the scope of the exception, namely, whether the withheld information relates to proceedings which are subject to confidentiality provided by law.
19. NE has explained that the Control Companies had to provide it with the withheld information to fulfil licensing requirements. NE confirmed that the information was provided as part of a process where NE was exercising its statutory duty of making a decision on whether to issue a licence. It explained that this statutory function is provided by Protection of Badgers Act 1992. It confirmed that the information is not already in the public domain, that it does not have to be disclosed under company law (except to the extent that it can be derived from the company's published accounts, as and when they are published) and that there was an expectation of confidentiality when it was provided.
20. The Commissioner's view is that the confidentiality envisaged in the exception can be provided in statute or derived from common law. The information in this case is financial information that gives an insight into the fiscal workings of companies. Financial information provided to meet a licencing condition is generally likely to be confidential and the Commissioner accepts that, in this case, it would have been provided with an expectation of confidentiality. The withheld information is, therefore, not trivial and the Commissioner accepts that a common law duty of confidence exists.

Adverse Effect

21. Even where proceedings are confidential in the terms set out above, the exception is only engaged where disclosing the information would adversely affect that confidentiality.
22. "Adversely affect" means that there must be an identifiable harm to or negative impact on the interest identified in the exception. The threshold for establishing "adverse effect" is a high one, since it is not sufficient that disclosure may or could have some level of adverse effect, rather it is necessary to establish that disclosure *would* have an adverse effect. "Would" in this context means that it is more probable than not, that is, that there is a more than 50% chance that the adverse effect would occur if the information were disclosed.
23. NE has stated that The Badger Control Policy is a well reported and sensitive issue. Disclosure would likely result in undue pressure being brought to bear on the Control Companies by the media or members of the public and would also breach the duty of confidence owed by NE.
24. Whilst the Commissioner acknowledges the importance of confidentiality being maintained, particularly in relation to financial information, he considers that it is for public authorities to identify in any given case, what form harm would take and to demonstrate how disclosure would result in the harm being caused. For regulation 12(5)(d) to be engaged, it is not sufficient to simply show that information falls into a certain category (as in the case of a class-based exemption under the Freedom of Information Act 2000) and to identify a vague outcome of disclosure. Harm must be clearly defined, linked to the relevant information and the likelihood of harm must be shown to be more probable than not.
25. Having considered NE's submission, the Commissioner considers that it has failed to demonstrate that disclosure of the information *would*, in this case, result in adverse effect. In addition to the vague nature of the harm identified, which is not explicitly linked to the specific withheld information, the very wording of NE's submission simply asserts that disclosure "...would likely" result in certain effects. There is no "would be likely to..." threshold under the EIR.
26. As the Commissioner has determined that NE has failed in this case to demonstrate that disclosure would result in adverse effect he has concluded that the exception is not engaged. He is therefore not required to go on to consider the public interest test.

Regulation 12(5)(e) – commercial confidentiality

27. NE has applied regulation 12(5)(e) to all the withheld information, as set out in paragraph 15 above.
28. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
29. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

30. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
31. NE has stated that it considers that the information is commercial in nature. It has confirmed that the two Control Companies themselves are not operating commercially, for example in a commercial environment, but that the individuals making up the Control Companies do.
32. Having considered the withheld information, the Commissioner agrees that it is commercial in nature, as it relates to services provided those making up the Control Companies in exchange for a fee. He has concluded that this element of the exception is, therefore, satisfied.

Is the information subject to confidentiality provided by law?

33. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided

by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.

34. As the Commissioner has already concluded, in his consideration under regulation 12(5)(d) above, that the information is subject to a common law duty of confidence, he has found that it also engages this element of the exception.

Is the confidentiality provided to protect a legitimate economic interest?

35. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
36. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.
37. The Commissioner considers that public authorities will, therefore, need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.
38. The Commissioner notes that it is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – that is, more probable than not) that disclosure would cause some harm.
39. In this case NE has stated that, following consultation with the Control Companies, it has determined that disclosure would affect the interests of the Control Companies and the individuals / organisations / businesses that make up the Control Companies.
40. As to the form that the adverse effect would take, NE has stated that the operation of the Badger Control Policy has an impact on the commercial operations of the individuals making up the Control

Companies and any disruption to the operation of the policy could have a negative impact on those operations.

41. NE has not provided the Commissioner with any explanation of the operation of the Control Companies nor has it provided any details of the operating relationship between the referenced businesses and individuals which comprise the Control Companies. On the basis of the submissions provided, therefore, it is not apparent what specific interests would be affected by disclosure of the information, nor how they would be affected. Having considered this matter himself, based on publicly available sources, the Commissioner has no basis for concluding that any obvious harm would arise.
42. Beyond the general ascription of "disruption" as a possible consequence, NE has not defined the nature of any harm, in relation to legitimate economic interests, which disclosure would cause, nor has it explained how disclosure of the specific information would cause harm. There is no indication that the information would, for example, be of value to competitors or that it would in any way undermine the relevant parties' legitimate economic interests.
43. As noted in relation to NE's application of regulation 12(5)(d), the Commissioner wishes to reaffirm that it is insufficient for authorities to engage an exception simply on the basis that information falls within its generally defined ambit. Where the exception claimed is based on adverse effect resulting from disclosure, it is for public authorities to demonstrate how, in the circumstances of the particular case, the adverse effect, of the kind envisaged by the exception, would arise.
44. It is not the Commissioner's role, as an independent adjudicator, to generate arguments on behalf of public authorities. He notes that NE has been provided with due opportunities, at the time of the original request, the internal review and during the Commissioner's investigation to make submissions in support of its application of the exception. He can find no evidence amongst any of these submissions that NE has presented an adequate explanation of how disclosure of the information would result in adverse effect to the legitimate economic interests of the parties identified. .
45. The Commissioner would like to clarify that the focus of the exception is on the adverse effect to economic interests. The Tribunal in EA/2014/0025 stated:

"The wording of the exception is perhaps slightly odd since it is the economic interest which is liable to suffer the adverse effect and which the exception is intended to protect. The maintenance of confidentiality is simply the means of protection. A breach of confidentiality which does

*not harm the underlying economic interest does not engage the exception.*⁵

46. In this case, the Commissioner has found that NE has failed to identify the adverse effect which disclosure would cause. He has concluded that any breach of confidentiality which would result from disclosure of the information would not harm any underlying economic interests. He has, therefore, found that the exception is not engaged. In view of this he has not gone on to consider the public interest test.
47. The Commissioner notes that, in its submissions, NE directed him to a previous decision notice which, it says, addressed a comparable request for information⁶. On the basis of the submissions provided to him by NE, the withheld information in this case and his own analysis, the Commissioner does not consider the case to be directly comparable. In any event, the Commissioner would point out that he is not bound by the conclusions reached in any previous decision notice and that he must determine each complaint on its own facts and merits.

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1386/St%20Albans%20City%20&%20District%20Council%20EA.2014.0025%20\(18.09.2014\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1386/St%20Albans%20City%20&%20District%20Council%20EA.2014.0025%20(18.09.2014).pdf)

⁶ Issued 8 July 2013; ICO reference: FER0479985.

http://ico.org.uk/~/media/documents/decisionnotices/2013/fer_0479985.ashx

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
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SK9 5AF