IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case Numbers EA/2014/0094, 0160, 0234 & 0311

ON APPEAL FROM:

The Information Commissioner's
Decision Notices FER0509733 25/03/2014;
FER0509734 29/05/2014; FER0535294 26/08/2014;
FER0523511 12/11/2014

Appellants: **(1) DEPARTMENT FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS (EA/2014/0311)**

(2) NATURAL ENGLAND (EA/2014/0094, 0160, 0234)

First Respondent: **INFORMATION COMMISSIONER**

Second Respondent: **ANNA DALE**

Heard on 28, 29 & 30 September 2015 at Field House London

Before
John Angel
(Judge)
and
Pieter de Waal and
Rosalind Tatam

Subject matter: EIR regulations 12(4)(a) whether information held, 12(5)(a) & (g) public safety and protection of the environment

Cases: *APPGER v IC & FCO* [2015] UKUT 0377 (ACC);
Archer v Information Commissioner and Salisbury DC [2011] I Info LR 1405;
DEFRA v ICO & The Badger Trust [2014] UKUT 526 (AAC);
Department for Communities and Local Government v Information Commissioner & Robinson [2012] UKUT 103 (AAC);
FCO v ICO & Plowden [2013] UKUT 0275 (AAC);
Hogan v Information Commissioner [2011] 1 Info LR 588;
Home Office & Ministry of Justice v ICO [2009] EWHC 1611(Admin);
Natural England v ICO & Badger Trust & Leucston (EA/2015/0026);

Office of Communications v Information Commissioner [2011] PTSR 1676;
Ofcom v IC & T-Mobile (EA/2006/0078);
R (on the application of Evans) and another v Attorney General [2015] UKSC 21;
R (Ofcom) v Information Commissioner [2009] EWCA Civ 90.

DECISION

The Tribunal allows Defra's appeal EA/2014/0311.

The Tribunal dismisses NE's appeals in cases EA/2014/0094 and 0160. The Tribunal orders that NE disclose the withheld information within 30 days of the date of this decision.

NE withdrew its appeal EA/2014/0234.

REASONS FOR DECISION

Background

1. All of the appeals relate to the policy introduced by the Government in December 2011 to allow groups of farmers and landowners to apply for licences in certain areas to cull badgers with the purpose of preventing the spread of bovine tuberculosis ("bTB") in cattle in those areas. Natural England ("NE") issues those licences under section 10(2)(a) of the Protection of Badgers Act 1992.

2. The Department for the Environment, Food and Rural Affairs ("Defra") has issued Guidance[1] to NE concerning the grant of culling licences ("the Guidance"). The Guidance requires that the land be at least 150km^2, access for culling to at least 70% of the total land area in the application, at least 90% of the land within the area must be accessible or within 200m of accessible area, the cull will be for a minimum of four years and all land holders covered by the agreement must permit access to land for culling. There is a 2km ring around each cull area, which relates to the perturbation of badgers, i.e. them

[1] *Guidance to Natural England* – Licences to kill or take badgers for the purpose of preventing the spread of bovine TB under section 10(20(a) of the Protection of Badgers Act 1992 – published in 2011.

moving from the cull area into neighbouring areas and increasing the spread of disease. There are various other conditions in the Guidance concerning the effectiveness and humaneness of the cull. All applicants must submit a Badger Control Plan ("BCP") to evidence how the conditions will be met.

3. The Guidance states that Government intervention will be "*considered*" (but need not necessarily occur) where various aspects of the Guidance are not met, including where the area of accessible land has dropped below 70%.

4. The cull policy was the subject of a pilot in two areas: West Gloucestershire ("WG") and West Somerset ("WS"). Culling occurred in the summer and autumn of 2013, 2014 and 2015. North and West Dorset ("Dorset") was designated as the reserve area, and (at the time of the hearing) a new cull had just started in Dorset. Information concerning the performance of those culls will be likely to impact on the development of badger culling policy. On 28 August 2015, Defra commenced a consultation process[2] concerning updating the Guidance issued to NE. The proposals include reducing the minimum area size to 100km^2 and removing the 70% rule.

5. There is a significant amount of public interest and public debate over the policy to permit badger culling, including considerable opposition from many quarters. The Upper Tribunal described the badger culling policy in *DEFRA v ICO & The Badger Trust* [2014] UKUT 526 (AAC) as "*controversial*" at [12] and [80].

The appeals

6. During the case management process it was decided to hear the four appeals together because they involved similar evidence and legal issues. The cases were not consolidated. Anna Dale, one of the requesters, was joined as a respondent. During the course of the proceedings disputed information has been released and concessions have been made as to further information to

[2] *Consultation on guidance to Natural England on licences to control the risk of bovine tuberculosis from badgers* – 28 August 2015.

be released. Prior to the hearing NE disclosed the information requested in EA/2014/0234 and formally withdrew its appeal at the hearing. As a result the scope of the appeals has much reduced and now revolve around the following requests:

(1) The number of "landowners" who gave permission for badgers to be culled on their land in the WS and WG pilot areas [EA/2014/0311];

(2) The total area of each ring area or buffer zone in square kilometres for WG and WS: part 4(b) of the request in EA/2014/0094; and

(3) The information in the BCPs of all applicants in the WG and WS Pilot Areas and the reserve pilot cull area for Dorset which has not already been disclosed, except for the applicants' identity[3] and the area of each participant land holder or farm business which during the course of the hearing Ms Dale informed us she no longer required. Also the total perimeter in kilometres (Kms) had been disclosed shortly before the hearing. So what is left is the detailed breakdown of the perimeter in terms of boundaries and buffer zones in Kms for each type of boundary (e.g. sea coast, lakes, motorways) and buffer (e.g. where farmers with vulnerable livestock have agreed to the risk of perturbation) [EA/2014/0160].

7. The relevant requests to NE were respectively made on 9 April 2013 (/0094), 2 May 2013 (/0160) and 10 October 2013 (/0311). The requests were responded to by NE on 30 April 2013, 5 June 2013 and 3 December 2013. The internal reviews were carried out on 19 July 2013, 19 August 2013 and 21 March 2014. These time points set the relevant scope for the Tribunal's consideration of the application of the exceptions and the balance of the public interest. It is more complicated for appeal /0311 in that although Defra originally claimed it held the information but refused to disclose it on the basis of claimed exceptions, more recently Defra changed its position and now claims it does not hold the information.

[3] See letter from Ms Dale dated 2 May 2013 confirming she is not seeking the details of individuals.

8. Although the parties were at one time happy to allow the appeals to be considered on the papers it was later decided, during the case management process, that the appeals should be heard orally. Also under the same process certain parts of the undisclosed information and some evidence relating to the information were allowed to be considered in confidence under the First-tier Tribunal's GRC rules of procedure. This meant that a small part of the hearing was held in closed session. Also two of NE's witnesses were allowed to give evidence anonymously.

The Legal Framework

9. The Environmental Information Regulations 2004 ("the EIR") implement Directive 2003/4/EC on public access to environmental information ("the Directive"), which itself transposes relevant provisions of the Aarhus Convention on Access to Information (and other matters) ("Aarhus"). The Preamble to Aarhus states that the signatories recognise *inter alia* that in order to enable citizens to live in healthy environments and to protect and improve the environment for the benefit of present and future generations, "*citizens must have access to information … in environmental matters*", and that "*in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns*". These values condition the interpretation of the EIR.

10. It is well-recognised that the Directive, particularly through its recitals, imposes a clear general rule in favour of disclosure of environmental information. Those recitals include:

"*(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.*

...
(8) It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest.

(9) It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies. The future development of these technologies should be taken into account in the reporting on, and reviewing of, this Directive.
...
(14) Public authorities should make environmental information available in the form or format requested by an applicant unless it is already publicly available in another form or format or it is reasonable to make it available in another form or format. In addition, public authorities should be required to make all reasonable efforts to maintain the environmental information held by or for them in forms or formats that are readily reproducible and accessible by electronic means.
...
(16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive." (emphasis added)

11. Article 1(b) of the Directive additionally provides that an objective of the Directive is "*to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information*".

12. The CJEU has confirmed in Case C-71/10, *Office of Communications v Information Commissioner* [2011] PTSR 1676 at [22] that:

"*It should be noted that, as is apparent from the scheme of Directive 2003/4/EC and, in particular, from the second sub-paragraph of article 4(2) thereof, and from recital 16 in the Preamble thereto, the right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal.*"(emphasis added)

13. All the parties in these appeals agree that the information requested is environmental information as defined under regulation 2(1) EIR.

14. The EIR expressly implements the presumption in favour of disclosure in regulation 12(2):

"*A public authority shall apply a presumption in favour of disclosure*."

15. There are three relevant exceptions to the ordinary position of disclosure for the Tribunal to consider in these appeals. These are firstly under regulation 12(4)(a), that:

"*For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that-*

(a) it does not hold the information when an applicant's request is received;"

and secondly under regulation 12(5), that:

"*(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*

(a) international relations, defence, national security or public safety;

...

(g) the protection of the environment to which the information relates".

16. A public authority may only rely upon an exception in regulation 12(5) to permit non-disclosure of the information where "*the public interest in maintaining the exception outweighs the public interest in disclosing the information*": regulation 12(1)(b).

17. Regulation 12(5) implements Article 4(2) of the Directive, which itself adopts the wording that the exceptions can only be relied upon "*if disclosure of the information <u>would adversely affect</u>*" (emphasis added) the relevant interest. The wording of regulation 12(5)(g) is materially identical to Article 4(2)(h). The wording of regulation 12(5)(a) is slightly different to that of Article 4(2)(b), which is drafted in terms of "*international relations, public security or national defence*" (and this wording reflects that in Aarhus).

18. Although we are not bound by other decisions of the Information Tribunal and the First-tier Tribunal ("FTT"), it is well-established that the presumption in favour of disclosure mandated by regulation 12(2) applies both to whether the

exception is engaged and to the public interest balance, and requires "*that in any case where there is doubt of the applicability of the exception that doubt must be resolved in favour of the disclosure i.e. the exception does not apply*": *Burgess v Information Commissioner* (EA/2006/0091) at [38]. We consider that this is the correct approach and adopt it in these appeals where relevant. We also accept that, as the FTT found in *Burgess* at [37], the adverse effect must be real, actual or of substance.

The Defra appeal (/0311)

19. The request to Defra was for the information described in §6(1) above: The number of "landowners" who gave permission for badgers to be culled on their land in the pilot areas of WS and WG. At first Defra said they held the information. Then in a letter to Ms Dale dated 1 April 2015 they said that they were mistaken and did not hold the information.

20. Patrick Burke, a civil servant in Defra, provided 4 witness statements prior to the hearing explaining how this mistake and the delay in uncovering it had happened, and apologising for it. During the course of his evidence on the first day of the hearing it became clear that the searches undertaken had not involved some relevant Executive Agencies who were part of Defra. The tribunal asked Mr Burke to carry out further searches during the course of the hearing and on the third day a fifth statement was produced explaining that further searches had been made and the information was still not held. Whilst Defra may have held information on the land holders (the farmers, whether owners or tenants), it neither held nor had ready access to information on the owners of tenanted land.

21. In the light of the first 4 witness statements the Commissioner had already accepted before the hearing commenced that the information was not held. Ms Dale accepted that the information was not held following the fifth statement. Therefore the tribunal was not required to consider the matter further. On the evidence before us, however, we agree that Defra did not hold the information.

22. We therefore allow the appeal.

23. We would observe that much unnecessary time has been taken with the Defra appeal. If Defra had undertaken its searches properly and with reasonable effort and diligence at the time of the request, this appeal would no doubt have been avoided. We hope that Defra has learnt from its experience in this case so as to avoid unnecessary and costly mistakes in the future.

24. For the remainder of these reasons for the decision we refer to the remaining requested information described in §6(2) and (3) above (and requested from NE) as the "Withheld Information".

The evidence in the NE appeals (/0094 and /0160)

NE's evidence

25. The extensive evidence provided to us in these appeals relates to the background to the badger culls, the two exceptions claimed for refusing to disclose the Withheld Information, namely public safety and the protection of the environment, and the public interest test.

26. Two witnesses were given anonymity.

27. Witness A is the manager of the bTB licensing team within NE. The witness has day to day responsibility for the licensing regime that implements government policy on bTB and badger control. This is as a result of an agreement between NE and the Secretary of State ("SoS") dated 29 September 2006 made under section 78 of the Natural Environment and Rural Communities Act 2006 authorising NE to issue wildlife licences on behalf of the SoS. The authorisation includes granting licences under section 10(2)(a) of the Protection of Badgers Act 1992 (as amended) '*for the purpose of preventing the spread of disease, to kill or take badgers, or to interfere with a badger sett, within an area specified in the licence by any means specified'.*

28. NE is an executive non-departmental public body, sponsored by Defra.

29. The Government introduced a policy in 2011 – *The Government's policy on Bovine TB and badger control in England* ("the Policy") which allows groups of farmers and landowners in the worst affected areas to apply for licences to cull badgers. The Government also issued the Guidance to NE (referred to in §2 above) in relation to the granting of licences related to the cull.

30. The Policy and the Guidance set out criteria which must be met before a licence may be granted. The criteria have been derived from a trial carried out over a 10 year period (known as the 'Randomised Badger Culling Trial' ("RBCT")). It is said that it is known from this trial that a controlled reduction of the badger population, carried out in accordance with strict criteria, will reduce the incidence of bTB in cattle in a local area. It will take time for the benefits to cattle bTB incidence to be realised (3-4 years) but, based on the results of the RBCT, if culling was conducted over an area of 150km^2, after 9 years an average net reduction in bTB incidence of 16% across the culled area and 2km-wide ring of land (equating to the prevention of 47 cattle herd breakdowns relative to similar unculled areas) could be expected. The Guidance has set criteria which effectively seek to reflect the approach adopted as a consequence of the RBCT and therefore includes criteria relating to minimum area size, a minimum % access to the total land area and reasonable measures to mitigate the risk to non-participants.

31. The RBCT also found that culling was associated with an initial increase in cattle bTB in the 2km ring outside the culled area – the so-called 'perturbation effect' – hypothesised to be due to disrupting the local badger population. (This ring is also sometimes referred to as the "buffer zone").

32. Having assessed the known and estimated effects of badger culling and vaccination, Defra veterinary and scientific advice was that culling in high cattle bTB incidence areas, carried out in line with very specific licence criteria, would reduce the number of infected badgers and thus the weight of bTB infection in badger populations in the treatment area more quickly than

vaccination, and therefore have a greater and more immediate beneficial impact on the spread of bTB to cattle and the incidence of infection in cattle. Accordingly, in order to help reduce the growing incidence of herd breakdowns in high incidence areas, and prevent spread of the disease, the Government introduced the Policy in December 2011 which allows groups of farmers and landowners in the worst affected areas to apply for licences to cull badgers.

33. Witness A explained that one of the key criteria that must be complied with in order to obtain a licence from NE is that, within the licence area, 70% of the land must be participating in the cull. This is one of the criteria that ensure the disease control benefits are achieved. If the percentage of participating land falls below 70% the cull cannot continue; new participants would need to be identified until the percentage of participating land is over 70% again, and a new licence granted. We note, however, that the Guidance states that Government intervention will be "*considered*" (but need not necessarily occur) where various aspects of the Guidance are not met, including where the area of accessible land has dropped below 70%.

34. Witness A explained that the Policy was piloted in two areas (WS and WG) in 2013 in order to assess the effectiveness (in terms of badger removal), humaneness and safety of controlled shooting. An independent expert panel ("IEP")[4] reviewed the effectiveness of the pilot cull. It concluded that "*controlled shooting alone (or in combination with cage trapping) did not deliver the level of culling set by government*" and that other targets were not met, but that it was "*confident that controlled shooting can be carried out safely, even in the context of protester activity, if Best Practice Guidance is covered*." Following its assessment the Government determined that the culls would continue in 2014 in both WS and WG.

35. The IEP was only appointed to undertake an assessment of humaneness, effectiveness (in terms of numbers of badgers removed) and safety for the

[4] *Pilot Badger Culls in Somerset and Gloucestershire* March 2014

2013 pilots. NE and the Animal and Plant Health Agency (an executive agency sponsored by Defra) ("APHA") continue to be responsible for the assessment and monitoring roles.

36. For all three culls, licences were granted for a period of four years with a cull expected to take place over a 6 week period in the open season[5] in each of the four years.

37. Witness A concurs with the Commissioner and Ms Dale that the Policy is controversial and has provoked considerable public interest and debate. At one point NE was advised by the Police that, behind the peaceful face of the anti-cull movement, a more disruptive element had emerged. Seasoned protesters, ranging from veteran hunt saboteurs to animal rights extremists, have joined the badgers' cause.

38. On 28 August 2015, the Government announced that the cull would continue in WS and WG and also be extended to Dorset. On 3 September 2015 the Government announced that culling had begun in the three areas.

39. Witness A explained that the reason for not disclosing the Withheld Information was to prevent the intimidation and harassment of those participating in the cull. Witness A claims that the level of intimidation and harassment has already been unprecedented in terms of the matters that NE regulates.

40. A High Court injunction was granted on 22 August 2013[6] prohibiting harassment of Protected Persons (i.e. certain named individuals), all farmers and land occupiers participating in the culls, employees, officers and members of the National Farmers' Union ("NFU"), any person participating in the culls (including suppliers and contractors), and the families of such Protected Persons and other interference with the badger culls. Since then,

[5] It is not possible to undertake the badger cull in the 'closed season' which for cage trapping and shooting is between 1 December to 31 May and for controlled shooting only is between 1 February and 31 May.
[6] *National Farmers' Union and Others v Jay Tiernan and Others* (Case No: HQ13X04162)

contempt of court proceedings have been successfully taken in one case[7] where Jay Tiernan was subsequently sentenced to six months imprisonment, suspended for two years.

41. Witness A says that, by knowing the exact boundary of the Control Area (i.e. the area for culling), protesters can focus their activities such as disruption of contractors' sett survey work, searching for traps and removing or damaging them, identifying participating farmers and disrupting night time controlled shooting and contractor activity. If they carry out these activities in areas not within the Control Area they are wasting time, manpower and fuel for vehicles on areas where no culling will be carried out. By knowing the boundary, the protesters can also target landowners/farmers within the Control Area. She gave two examples of large Estates, one in Somerset and one in Gloucestershire, which experienced action from protesters once it was suspected they were taking part in the cull. It appears that the tactic behind this action was to try to get a large Estate to withdraw from culling and thus reduce the area of participating land to below the required 70%. Witness A quotes reports in the press and in social media in May 2013 to this effect prior to the licence activity starting.

42. Witness A gave examples of protester activities. These included entries on protester websites showing photos of an Estate owner with his landline and mobile number and other details, which were followed by abusive and intimidating phone calls (some in the middle of the night) and ‘threatening’ emails, and demonstrations at the Estate gate with chanting and verbal threats. A participant farmer reported his cattle had been let out of a field, and more than one participant complained people had shone torches in home windows at night. Additionally, contractors’ vehicles were followed at night and tracking devices hidden on the vehicles of contractors and participating farmers.

43. In evidence we were shown that the protesters had produced their own maps of the cull areas. These were being constantly modified. Witness A explained

[7] *NFU & Ors v Tiernan & Ors* [2015] EWHC 69 (QB)

that if the Withheld Information was disclosed the protesters would be able to refine their maps leading to more accurate targeting of participating farmers which would lead to the intimidation and harassment of these farmers.

44. Witness A said that despite these incidents no participants in the cull had dropped out.

45. Witness A pointed out that recent disclosures (by Defra) of the percentage of participating land in WS and WG had already had the effect of targeting farmers taking part in the cull who might be persuaded to withdraw, and gave an example of a farmer who supplies M&S with asparagus. 'Stop the Cull' had advocated that protesters should write polite letters to M&S seeking to get the company to withdraw from its contract with the landowner. Witness A regarded this as a continuing example of harassment.

46. Witness A provided us with a table showing the number of cull traps damaged or removed in the cull areas in 2013, 2014 and so far in 2015. These were in the hundreds in 2013, a relatively small proportion of the total number of traps put in place. In 2014 the frequency of this activity was much less. There were no criminal prosecutions for trap damage or theft, largely because it is difficult to identify and catch the perpetrators.

47. Witness A also gave evidence in closed session. After the session a summary note was disclosed to Ms Dale. In effect it explained that Witness A gave oral evidence explaining the content of the Withheld Information found in the BCPs, what the information would tell a protester (or member of the public) who received it, and how individual farmers could be identified from the hectarage figures in the BCPs. Questions were asked seeking to establish and test precisely how the Withheld Information could be used by anti-cull protesters to more accurately establish the pilot cull areas and boundaries. This questioning covered both the differences between the two pilot areas, and the differences between the categories of Withheld Information.

48. Witness B is employed by the NFU. The witness explained that, as a result of what she described as intimidation and harassment of farmers in WS and WG and criminal damage to traps, the NFU took action to obtain a High Court injunction against the protesters. In support of the court application, the NFU provided two lever arch files of evidence of incidents of harassment and intimidation. The incidents had been particularly bad leading up to July/August 2013. The injunction was granted on an interim basis on 22 August 2013 (just before the start of the cull) with a return date of 5 September 2013 when it was extended indefinitely. It still remains in place. As described by Witness A it is a very wide ranging injunction not just covering unlawful activities but also activities which would otherwise be lawful. The injunction applies to several District Council areas in various counties and appears to cover areas which are larger than just West Somerset, West Gloucestershire and North and West Dorset. It has been effective, although there have been a couple of committal proceedings. As mentioned, Mr Tiernan has been convicted. Another case was dropped, apparently on a technicality. Mr Tiernan committed breaches of the injunction which did not involve acts of violence or damage to property.

49. There are 55,000 members of the NFU. Only a proportion of farmers are members of the NFU. Most farmers in the cull areas support the cull but there are a substantial number of farmers who are against it.

50. Witness B gave evidence of the details of the incidents put before the High Court. These included signs being vandalised, some incidents of trespass, protesters wearing balaclavas or the like in a threatening way, a rape alarm going off near homes in order to waken residents, etc. There was no evidence of physical injury, but according to Witness B farmers suffered considerable stress and fear due to protester activity. The witness was not aware of any medical or clinical injuries or issues relating to farmers or their families, but would not expect members to provide such information.

51. James Griffiths owns one of the farm estates referred to by Witness A. He gave evidence to us in open court. He is a dairy farmer in Gloucestershire. He

explained that the pilot cull in WG started in August 2013 and then his family had been subjected to a campaign of harassment and intimidation carried out by protesters against the badger cull. He took us through incidents in 2013 and 2014 and a more recent one in September 2015 after the announcement that the cull would be continued. The incidents included frequent phone calls from protesters and others (some threatening, some in the middle of the night), vehicles parked at the top of the farm drive making farm access difficult, family members being followed in their cars, trespassing on his land including damage to the maize crop prior to harvest and particularly unsavoury behaviour close to his 83 year old mother's house at the farm drive entrance which made her afraid. This activity was not only extremely disturbing to his family but also upsetting to his farm workers.

52. He cannot recall when his name became public in association with the pilot but the unwarranted telephone calls started in September 2013, at the beginning of the cull. Mr Griffiths was aware shortly before the hearing that he was among 25 farmers in his vicinity named (with personal details published) on the Stop the Cull website, and as a result received further silent and abusive calls. He spoke to about 6 others at the time, and knew that another farmer had contacted some of the others to offer solidarity. Some were angry and upset by the calls, particularly a lady who had recently lost her husband and whose daughters had gone to university. Mr Griffiths also described an encounter at night in mid-September 2015 in which he feared for his own safety.

53. Mr Griffiths is a supporter of the cull because of the problems his farm has experienced with bTB over some years, but did not see himself as a vocal supporter. However he was the only farmer in his area to speak out publicly (through the media) in favour of the cull and about the harassment and intimidation.

Ms Dale's evidence

54. Anna Dale made the requests in three of the appeals. She made the requests in her private capacity. She is personally concerned about wildlife and nature. She became interested in badgers sometime ago and introduced a badger into a children's book she wrote. In 2012 she became aware of the Government's badger control policy.

55. Her requests were prompted by her wish to know specific and important facts about the culls in order to participate in and allow proper and open debate about the issues the cull gives rise to. It had nothing to do with refining maps in order to increase harassment and intimidation of participants in the cull. She wanted to check whether the culling criteria were being adhered to, particularly:
    a. that the risk to non-participating farmers (within and beyond the Control Area) from badger perturbation was not increasing;
    b. the adequacy of the buffers and barriers and other measures to mitigate the spread of bTB to areas outside the cull zones;
    c. the extent of local support (and whether culling was taking place on cattle farms or in areas without cattle);
    d. that the monitoring of the badger culls was being properly carried out.

56. In Ms Dale's view, since making her requests it has become clear that the culling companies have departed from the culling criteria and that, having read the IEP's report, the culls have not been effective or humane. Also she considers that the Government's policy is no longer science-led.

57. Ms Dale is a member of the Badger Trust and has taken part in some marches. She organised one in Winchester. These were entirely peaceful. She considers that the degree of seriousness of the incidents referred to by Witnesses A and B does not tally with her experience and other public information.

58. Ray Puttock gave evidence in support of Ms Dale. He has trained as a vaccinator of badgers and believes vaccination provides an alternative route to reducing bTB. Mr Puttock lives in Gloucestershire and is involved in campaigning for badger protection. He is involved in running a telephone line coordinating badger patrols called Gloucester Badger Office. Since 2013 he has acted as police liaison representative for those opposed to badger culling in the Gloucester area. He goes out to the countryside with people on badger patrol and confirmed that contractors are not allowed to shoot badgers when people are present nearby, for reasons of public safety. He has meetings with local police nightly during the culling season to discuss and address any issues. In this way the anti-culling community seeks to work closely and co-operatively with the police in order to ensure that criminal activity does not take place and that the local rural community is not disrupted. Mr Puttock considers the campaign is now almost wholly unmarked by intimidation, harassment, violence or other unlawful activity, although given that feelings run high 'on both sides' there continues to be isolated cases of damage. His car was damaged a few days before he gave evidence (but the perpetrators are unknown). In his view well over 99% of campaigner activity and intervention takes place wholly peacefully. Both at an official policy level and on the ground those involved in organising the anti-culling campaign and nightly patrols are avowedly opposed to, and committed to avoiding, activity which involves harassment, intimidation, aggression, criminal damage and still less violence. He regards these types of activity as reprehensible and self-defeating to the anti-cull cause, which is to protect badgers from harm and to persuade farmers to withdraw from the cull. Those involved are very largely peaceful members of the local community who abhor and avoid all conduct of the kind that would be harassing or illegal. 90% of the anti-cull protesters are women.

59. He accepts that in 2013 there were incidents of harassment but considers that the evidence given by the NE witnesses is exaggerated as to their severity and frequency. Also, the incidents were not in his view carried out by those centrally involved in the pro-badger movement. Where protesters were asked to avoid congregating near a particular house or using a particular footpath,

these requests were followed. Although there were arrests following accusations of aggravated trespass he is not aware of any relating to intimidation or threats of violence and very few prosecutions let alone convictions have taken place, except Mr Tiernan who was not physically violent. He seems to consider that most incidents can be explained away as perfectly lawful activity, although he accepts what Mr Griffith and another farmer suffered was reprehensible. In any case he says the injunction seems to have served its purpose and there are now very few incidents. This is apparent from the number of arrests, which reduced markedly in 2014.

60. He points out that there have also been incidents of harassment and intimidation against, and damage to the property of, anti-cull protesters.

61. He believes the anti-cull movement can only achieve its aims if they get the public on its side, which means ‘winning the hearts and minds of local people’. One of the aims is to vaccinate badgers and cattle rather than shooting or trapping badgers as this would be, in his view, much more effective in eradicating bTB.

62. The local Badger Trust protesters operate in an area which they believe is 10 miles wider than the actual cull parameter because the perturbation area and the collection of evidence on the health of badgers through surveying setts is very important to them. Also he believes unlawful killing of badgers is taking place outside (but under the shadow of) the permitted cull zone. Therefore more precise identification of actual boundaries will not change the activities of anti-cull protesters in the Badger Trust because they choose to extend their area of patrols beyond the Control Area. In any case Mr Puttock said they know the farmers who are participants in the cull because of their activities on the ground in observing both contractor movements and the location of traps. He points out that he is unaware of any protesters being discovered with stolen traps in their vehicles despite a number of vehicle searches by police.

The timing of consideration of the exceptions

63. Under FOIA and EIR it has long been considered by the Information Tribunal and FTT that the public interest factors existing at the time of the public authority's decision in relation to a request is the time when the public interest balance should be considered. If there is an internal review then that would be the relevant timeframe (or thereabouts) for considering public interest factors and the weight to be attributed to them.

64. This practice of the Tribunals has now been given authority by the Upper Tribunal in cases like *APPGER v IC & FCO* [2015] UKUT 0377 (ACC) at [55] and [56]. More recently the Supreme Court in *R (on the application of Evans) and another v Attorney General* [2015] UKSC 21 clarified that [72]:

> *"It is common ground, in the light of the language of sections 50(1), 50(4) and 58(1), which all focus on the correctness of the original refusal by the public authority, that the Commissioner, and, on any appeal, any tribunal or court, have to assess the correctness of the public authority's refusal to disclose as at the date of that refusal."*

Here we take the Supreme Court to mean the date of the internal review which is when the final decision by the public authority to refuse to disclose the information is taken.

65. The Supreme Court went to find that [73]

> *"However, although the question whether to uphold or overturn…. a refusal by a public authority must be determined as at the date of the original refusal, facts and matters and even grounds of exemption may, subject to the control of the Commissioner or the tribunal, be admissible even though they were not in the mind of the individual responsible for the refusal or communicated at the time of the refusal to disclose (i) if they existed at the date of the refusal, or (ii) if they did not exist at that date, but only in so far as they throw light on the grounds now given for refusal."* (emphasis added)

66. None of the parties took issue with this position which is understandable in view of the Supreme Court's judgment.

The meaning of the public safety exception

67. The first exception claimed is regulation 12(5)(a):

> "*(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – international relations, defence, national security or public safety;*

68. What is the scope of the exception?

69. The first point of issue between the parties is the meaning of 'public safety'. NE considers that it is sufficient to engage the exception if disclosure of the Withheld Information would increase the risk of harm to members of the public, and that "adverse effect on public safety" should not be restricted to actual harm or injury. It says the interest in question is safety, not health, i.e. ensuring that people are safe and free from a risk of injury. The Commissioner considers that this is too broad and that the question is whether disclosure would cause an actual adverse effect on the health of members of the public. NE contends that the Commissioner is ignoring the distinction between 'public health' and 'public safety/security'. NE argues that, to be safe/secure, a person must not merely be free from injury but free from the risk of injury. This argument seems to have been developed because the evidence is not clear as to whether activities relating to the badger cull have led to actual physical or mental harm to anyone. What is clearer is that protester activity may well have caused 'stress and worry' to cull participants causing an adverse effect on their lives and a potential risk to personal health, safety or security. NE believes that disclosure of the Withheld Information would permit protesters to refine their maps and to focus on the precise area of the cull zone, thus increasing the risk of 'flashpoints'.

70. NE also relies on the reference to 'security' in the Directive - see §17 above. Parliament has chosen to implement the relevant Directive article in regulation 12(5)(a) by using the words 'public safety' and we must therefore assume that Parliament considered they had the same meaning.

71. Neither the EIR nor the Directive seek to distinguish between different categories of public safety/security. However, the Directive does make clear that the exceptions should be construed restrictively: Recital 16 and *Ofcom*, §12 above. Where the particular element of public safety/security relied upon is the adverse effect on individuals, the Commissioner argues that a fair reading of the exception requires an effect which is quantifiable and of some significance. The Directive places public security alongside international relations and national defence. On ordinary principles of construction, the concept of public security must be read in that context. It would be surprising, the Commissioner argues, if the causing of an unquantifiable level of worry or stress is to be considered equivalent to the imperilment of national security.

72. We agree with the Commissioner's approach. As a point of departure if we were to accept that mere worry and stress or an increased risk of injury (which does not amount to an adverse effect on physical or mental health) automatically falls within the scope of the exception, then we would be applying a construction to the exception that is wider than (and contrary to) the intention reflected in the Directive and the restrictive approach taken by the CJEU in *Ofcom*. While public disclosure of information may cause stress, worry or an increased risk of injury, it must be of sufficient substance to constitute an adverse effect on public safety. Many disclosures may cause stress, worry or concern, justified or unjustified, to individuals linked to the information and may even increase a risk of harm. But that cannot be the litmus test, in our view, for the engagement of the exception. This approach is similar to that approved by the FTT in relation to the health and safety exemption under section 38(1) FOIA, where a similar distinction has been drawn (also not derived from the pure text of the Act) to ensure that the exemption is kept within appropriate and proper bounds.[8] This does not prevent NE from relying on protester activity including campaigns of intimidation and harassment (or the risks they pose), only that it must demonstrate an adverse effect on public safety. This approach seems to us to

[8] For example see *British Union for the Abolition of Vivisection v IC & Newcastle University* EA/2010/0064.

strike an appropriate balance, which is particularly important in the context of lawful protesting which might nonetheless cause stress or worry.

73. We also do not consider it helpful or necessary to draw an artificial boundary between the concepts of actual harm and increased risk of harm or to determine, as an absolute test, whether an adverse effect to public safety may be caused only by the former and not by the latter. As mentioned, we agree with the Commissioner's restrictive approach as a general principle but it will be a matter of fact and degree as to where the spectrum of harm (or risk of harm) lies, and whether it is sufficient to demonstrate an adverse effect on public safety. We also do not accept that NE's isolated analogies and examples of increased risk of harm (none of which involve the public disclosure of information) would necessarily meet the public safety test. Again, any increased risk of harm (and whether it amounts to a threat to public safety) as a result of public disclosure of information would have to be assessed on the facts and circumstances of each case.

74. A good example is the Tribunal's decision in *Ofcom v IC & T-Mobile* [EA/2006/0078], on which NE relies to support its view that an increased risk to personal health or well-being can engage the public safety exception. (Although this case was eventually referred to the CJEU and the Supreme Court, that was only to determine whether 'aggregation' of public interest across exceptions should be undertaken. The higher courts did not consider on appeal the Tribunal's decision on whether regulation 12(5)(a) was engaged.) Although we are not bound by the Information Tribunal's decision on this matter we consider it is worth exploring further.

75. The *Ofcom* decision involved a request for disclosure of information about the location, ownership and technical attributes of mobile phone cellular base stations. One of the exceptions relied upon for withholding the information was adverse effect on public safety.

76. A significant amount of information about base stations was already in the public domain (largely contained in a database), and mobile network

operators were already suffering a degree of theft, vandalism and damage. Therefore a material feature of the case (and of the assessment of "adverse effect on public safety") was the extent to which disclosure of the remaining information in the database would increase those risks to the extent that it would threaten public safety. It was, in essence, an incremental analysis on the evidence. And upon that analysis the Tribunal found (at [40]):

> *"We accept that the release of the whole database would provide some assistance to criminals. We think that use of the database for criminal purposes is more likely to be for the purpose of either increasing the efficiency of a trawl of the most valuable sites in an area, or disrupting the public or police communication network in order to hamper the coordination of the authority's reaction to a particular crime. It is therefore more likely to occur at a relatively localised level with the information being obtained by interrogating the Sitefinder database through the relevant website maps. However, it is conceivable that data manipulation would enable sophisticated criminals to detect patterns of development in base station construction, which could assist their activities and we did receive some evidence suggesting that criminals working in this area are beginning to operate on a national basis. We believe that greater risks might result from the release of the five figure grid reference numbers. This would enable criminals to establish the precise location of, and (in an urban environment), the resulting ease of access to, base stations. However, the vulnerability of base stations in a populated area may be reduced by their location and, in some areas at least, the location may already be publicly available in the form of details published by local planning authorities of the current and proposed base stations in their area as part of the rollout plans mentioned in paragraph 9 above. Nevertheless the disclosure of the requested information will to some degree increase the risk of attacks and in that way may adversely affect public safety."* (The emphasised sentence is the one relied on by NE in this appeal.)

77. We do not read this to mean that the Tribunal considered that any degree of increased risk of any type of harm or injury would satisfy the test for adverse effect on public safety. Rather, on the facts of that case and based on the level and extent of harm already suffered and the degree of risk of further harm, the Tribunal accepted that disclosure of the remaining information would have an adverse effect on public safety. It does not detract from the general principle that a restrictive approach should be taken to the engagement of the exception, and that the evidence must establish a real and substantial adverse effect on public safety – whether it is a direct, actual effect or an increased risk of harm.

78. Counsel for NE argued that the Commissioner's approach will lead to "drastic and terrifying results", and that it "could endanger people's safety for no good reason" and that it is "a reckless and thoughtless construction." We do not consider our approach can be described in this way. We do not exclude the possibility that, in an appropriate case, a real and sufficiently high degree of risk of substantial public harm could constitute an adverse effect on public safety. However, for the reasons set out further below, we do not believe that this is such a case.

79. All parties agree that public safety can include an adverse effect on property. However, Ms Dale argues a proportionality point, i.e. that this can only be the case where property damage is of a sufficiently serious kind to pose a threat to the health and well-being of members of the public. So, for example, damage to a farmer's house whilst his family are in residence is likely to meet the public safety test but damage to badger traps would not.

80. NE argues that property damage must be covered by the public safety exception because that is the only way to give adequate and proportionate protection to individuals' rights to peaceful enjoyment of their possessions under Article 1 Protocol 1 of the European Convention on Human Rights ("A1P1"). We did not receive lengthy submissions on this point and this may be because property damage is perhaps not the thrust of NE's case in these appeals. The main evidence of damage to property directly attributable to anti-cull protesters relates to badger traps. Although there is no dispute that such activity is unlawful, we do not consider that property damage of this sort, which has no impact on the wider community, is what Parliament intended to be covered by public safety.

The test under the public safety exception

81. There is a significant difference between the EIR formulation of the exception in regulation 12(5) and analogous FOIA exemptions (such as the health and safety exemption in section 38(1) FOIA): FOIA uses "*would or would be likely to*", while the EIR uses "*would*".

82. Under FOIA the Information Tribunal and FTT have considered the test to be applied on many occasions. The "would" element has generally been considered to indicate a higher test than "would be likely to". This has also been recognised when applying the "would adversely affect" test under EIR. For example in *Archer v Information Commissioner* [2011] 1 Info LR 1405 at [51] the Tribunal found "*it is necessary to show that disclosure "would" have [the claimed adverse effect] – not that it could or might have such effect*". That Tribunal concluded that, when considered in combination with the presumption in favour of disclosure and the public interest test, the effect of this was that "*the threshold to justify non-disclosure is a high one*".

83. That question is to be resolved on the balance of probabilities. Accordingly, "*would*" in practical terms means "*more likely than not*". This is to be distinguished from the FOIA context, where the "*would be likely to*" test encompasses a "*real and significant risk … even if it cannot be said that the occurrence … is more probable than not*" (*Hogan v Information Commissioner* [2011] 1 Info LR 588 at [35]).

84. The Upper Tribunal has confirmed this approach in *Department for Communities and Local Government v Information Commissioner & Robinson* [2012] UKUT 103 (AAC); [2012] 2 Info LR 43 (when considering the exception of adverse effect on the course of justice in regulation 12(5)(b), in the context of legal privilege) at [54]:

> "*it would of course have to be borne in mind, when considering the significance of an adverse effect on the course of justice in the particular case, that the exception is only engaged if the course of justice <u>would</u> be adversely affected. We agree with the decision in* Maiden *EA/2008/0013 that this means that, at the material time, the adverse effect must be more probable than not.*" (original emphasis)

85. This domestic approach is entirely consistent with the Aarhus Implementation Guide (2nd ed.) at p.86, which provides that:

> "*Adversely affect means that the disclosure would have a negative impact on the relevant interest. The use of the word "would" instead of "may" requires a greater degree of certainty that the request will have an adverse effect than applies in other provisions of the Convention*".

86. We return at this point to the Information Tribunal's *Ofcom* decision and the passage quoted at paragraph 76 above, which potentially leaves room for doubt.

87. Before dealing with the exceptions on the facts, the Tribunal endorsed (at [34]) the general approach set out in the decision of *Archer v the Information Commissioner and Salisbury DC* (EA/2006/0037):

"*First, it is not enough that disclosure should simply affect the interest in question; the effect must be "adverse". Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure "would" have an adverse effect - not that it could or might have such effect."* (emphasis added)

88. And at [35] of the *Ofcom* decision the Tribunal continued:

We also have in mind, in considering regulation 12, that we must apply the civil standard of proof; we must be satisfied on the balance of probabilities that the relevant harm would be suffered. Finally, we must bear in mind that Article 4 of the Directive requires us to interpret grounds for refusal to disclose in a restrictive way."

89. So far, so good. However, in its assessment of the evidence and of whether disclosure of the disputed information would adversely affect public safety, the Tribunal imparted the following (at [40]):

*"Nevertheless the disclosure of the requested information will to some degree increase the risk of attacks and in that way may adversely affect public safety." (*emphasis added*).*

90. It may be that the use of the word "may" was an inadvertent slip because the Tribunal was analysing the degree of risk of harm and the potential effect of such harm. We do not interpret the Tribunal's use of the word "may" in that context to mean that "would adversely affect" means something less than "more likely than not". To the extent that it does, and is therefore inconsistent with the established balance of probabilities approach as set out above, we are not bound by it.

91. We would add that, if the Directive had intended a broader "*likely to*" or "*may"* approach to be adopted, it would have said so expressly. So, for example, in Article 2(1)(b), environmental information is defined in terms which include

"*factors…affecting or likely to affect the elements of the environment*" (and see Article 2(1)(c) and recital 10, Article 7(2)(e) and Article 7(4) similarly).

92. We have already dealt with NE's submissions about whether an increased risk of harm would adversely affect public safety. That point is also relevant to the balance of probabilities test, and we would add at this juncture that the "risk of harm" approach is more akin to those categories of exemptions under FOIA which require a prejudice that "*would be likely*" to happen. It is something which, by definition, cannot be said on the balance of probabilities will occur; rather that the risk of it occurring has increased from (say) 10% to (say) 30%. However, an adverse effect which would occur requires at least a 50% likelihood. A mere increase in risk of harm is not itself an adverse effect if it does not undermine public safety; the regime already applies an appropriate balance by recognising that a public authority is only required to demonstrate that an adverse effect on public safety is more likely than not (rather than certain or beyond reasonable doubt or some other standard). The approach involves risk only in the limited sense that any counterfactual exercise (what would eventuate if the information were disclosed) involves an assessment of probabilities.

93. NE also rely upon the recent decision of this Tribunal in *Natural England v ICO & Badger Trust & Leston* (EA/2015/0026) at [24], where it was held that the Commissioner's conclusion – that disclosure of confidential financial information would not cause significant harm and so the regulation 12(5)(d) and (e) exemptions were not engaged – disregarded "*the fundamental requirement to recognise other values*" and there was "*no requirement to demonstrate any harm beyond the harm of breaching the principal* [sic]". We agree with the Commissioner in this case that it is not at all clear what [24] means. Whilst we fully accept the exceptions are a part of the statutory structure of the EIR that does not alter the express statutory and jurisprudential guidance that there is a general principle of disclosure and exceptions to that principle that must be construed restrictively.

94. The IC and Ms Dale have argued that the effect of disclosing each piece of information should be considered separately, rather than in aggregate. NE contends that this is wrong and contrary to binding authority. In *FCO v ICO & Plowden* [2013] UKUT 0275 (AAC) at [16] the Upper Tribunal found that the FTT had erred by taking the approach advocated by the ICO:

> *"16. I also consider that the tribunal failed to take account of the information as a package."*

95. We are bound by the decision in *Plowden.* However we are dealing with two separate appeals which although being considered together have not been consolidated. We are also not sure that *Plowden* extends to the circumstances in these appeals because *Plowden* involved two parts of a conversation, rather than separate pieces of information. In any event, we accept that the Withheld Information in both requests relates to one subject and should be considered together.

Is the public safety exception engaged?

96. There has been extensive evidence in this case referred to above. We would summarise it as follows.

    a. Badger culling is a very controversial subject and there are strong views on both sides of the matter;
    b. In 2013, possibly going back to 2012, leading up to the start of the pilot culls, there is evidence of incidents of protester activity against the cull;
    c. NE witnesses tend to describe this activity in terms of harassing and intimidating behaviour. They particularly provide details of two farmers who were subject to multiple incidents;
    d. This led to the NFU applying for and obtaining an injunction in August 2013 which still applies and has the effect of making many activities of protest (which would otherwise be permissible) unlawful;

e. The protesters accept that there were many incidents but as far as they are concerned they were very largely lawful forms of protest that are permitted in a democratic and open society;
f. The mainstream anti-cull movement like the pro-cull movement deplore illegal activity and any harassment or intimidation of farmers;
g. However there has been some unacceptable behaviour but this involves a small number of activists. This sort of behaviour has largely ceased since the injunction has been in place;
h. Although there were some arrests in 2013 there have been very few since and almost no prosecutions throughout the cull;
i. There is evidence of damage to and removal of traps but these relate to a very small percentage of traps being set by contractors and such incidents have been reducing;
j. Since the injunction there has been one conviction and that did not involve acts of violence.

97. We are required to determine whether disclosure of the limited amount of information still in dispute would adversely affect public safety according to the applicable law set out above. We are particularly mindful of the relevant timeframe to be considered for engagement of the exception. In relation to the relevant requests the internal review letters were dated 19 July 2013 and 19 August 2013. It has been agreed by all parties that we should consider the cases together so it makes sense that we should be considering the application of the exceptions as at the summer of 2013. We shall refer to this period as the 'applicable time'.

98. We would note that the summarised evidence in §96 above, relating to the evidence provided by the witnesses, was often provided in vague terms as to dates and timeframes.

99. NE argues that if the information is disclosed it will enable protesters to refine their maps of the cull areas so they can target more accurately the

participants in the cull and this would lead to a risk of further and/or increased harassment and intimidation of farmers.

100. The evidence before us shows that the protesters have continually been refining their maps from published material, the 'drip-drip' of disclosures by NE and Defra, and their work on the ground to identify the areas more clearly. We can see this from the protester maps shown in evidence in June and then November 2013. Although the latter date is later than the applicable time we can assume this was a continuous process. There is no evidence that the Withheld Information itself would have enabled the protesters to discover the exact boundaries but the evidence before us shows it would have helped at the time, together with other information in the public domain or collected on the ground, to further refine their maps.

101. Does this mean that the refining of maps would adversely affect public safety? Firstly it is not clear whether map refinement would have reduced or increased protester activity. The evidence is that protesters patrol beyond the cull areas, and it can also be assumed that any inaccuracy of protester maps (particularly if they are larger than the actual cull areas) could lead to greater activity. Most of the incidents described seem to us to be perfectly lawful protester activity, such as marching or demonstrating to gain public support for their cause; or identifying participants who can be lobbied and using largely lawful methods to try to persuade them to cease involvement in the culls through social media, phone calls, writing polite letters to retailers of farm produce etc.

102. We believe we can take the injunction into account because at the applicable time the injunction was about to be or had been granted (August 2013). In any case proceedings leading up to the injunction had taken place before this, and the proceedings must have been a factor relevant to the internal reviews undertaken by NE. Even if it was not, the injunction was in place and should have been taken into account, particularly in relation to the likely effects of disclosure. As we know from the evidence, the injunction has been largely effective in preventing harassment and unlawful activity.

103. The NE claims there was an increasing risk that any further disclosure at the applicable time would have led to further incidents including harassment and intimidation. While this may be correct, we do not consider that such increased risk constituted an adverse effect on public safety.

104. Even on NE's own, more generous test, the evidence is speculative. The Tribunal does not doubt that some farmers have been subjected to protests, and that the conduct of some protesters has crossed the line of unlawful conduct (civil or criminal). However, the limited police figures and correspondence available in evidence (and no separate figures are provided by NE) do not support widespread chaos and illegality across the the WG and WS cull areas: Avon & Somerset Police made eight arrests in 2013 (two of which were de-arrested), and received 108 complaints in 2014 (including 13 by protesters), while Gloucestershire Police made 38 arrests in 2013 and 2 in 2014, with 30 recorded crimes in 2014. Very few arrests led to prosecutions. The High Court injunction granted to the NFU appears to have very largely worked.

105. We are required to consider whether, on a balance of probabilities, it is more likely than not that disclosure of the Withheld Information at the applicable time would have adversely affected public safety (either directly or, as NE submits, as a result of increased risk of harm). On the evidence before us we cannot make that finding. In our view, on the balance of probabilities, the disclosure of the Withheld information would not have caused direct or actual harm to public safety or increased the risk of harm to a degree or extent that it could be said to adversely affect public safety. We make this finding for each of the appeals which are still in dispute.

106. We therefore find the exception is not engaged for both appeals.

Is the protection of the environment exception engaged?

107. We need to consider whether disclosure of the Withheld Information, again at the applicable time, would have adversely affected the protection of the environment to which the information relates.

108. NE argues that if the information is disclosed it could enable and motivate the protesters to lobby or intimidate cull participants, in order to persuade them to withdraw from the cull thereby reducing the area below the 70% threshold resulting in the possibility of the pilots being stopped (as the Licence condition is no longer met). If the culling has to stop until new participants are identified and a new Licence is granted, the robust data anticipated from a sustained minimum four year cull would be lost. This in turn would adversely affect the aim of eradicating or reducing bTB in cattle to the detriment of the environment.

109. Despite all the protester activity leading up to the start of the cull in September 2013 it was not stopped. Any consideration as to whether or not it should be stopped is likely to have taken place before or during the applicable time.

110. It is fair to say that NE does not place nearly the same emphasis or reliance on this exception as they do on the public safety exception.

111. The evidence before us shows that no participants in the cull areas withdrew before the start of the cull in September 2013 or have withdrawn since then, despite the intimidation and harassment alleged by the NE witnesses. Even Mr Griffiths, who seems to have suffered much more than most of the participants, has not been deterred in his determination to take part in the cull in WG.

112. Although there may be a risk that participants may withdraw in the future if harassed or intimidated, 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. In any case it has now been disclosed that WS was well above the 70% threshold so it is very unlikely that disclosure of the Withheld Information would have had an adverse effect in this area. Government policy does not seem to mandate that the threshold be achieved, whatever was believed by NE, protesters and participants. Also it is interesting to note that the Government is currently consulting on the threshold level, among other things. Therefore there is no certainty that if the threshold levels had been breached the cull would have been stopped, particularly because of the history of badger culling trials where even though their effectiveness has been questioned the Government has continued to pursue them.

113. There is also a counter argument that protecting badgers also protects the environment. Badgers are a protected species in England. The anti-cull movement believe that vaccinating badgers and other measures such as restricting cattle movements are the way to protect the environment including cattle. These views, we are informed, are supported by many scientists.

114. We find on a balance of probabilities that disclosure of the Withheld Information would not, at the applicable time, have adversely affected the protection of the environment in the pilot areas. In other words we cannot find that it would be more probable than not that, at the applicable time, disclosure would have led to the culls being aborted or in any way held up to the detriment of the environment. Therefore we find that the exception is not engaged in both appeals.

The public interest test

115. If we are wrong in our determination that neither (or either) of the exceptions are engaged, we must consider the public interest balance.

116. The Tribunal needs to consider the public interest factors in favour of maintaining the exception/s and those favouring disclosure in order to

determine the public interest balance. We also need to consider what weight to give to the various factors in order to help us with the exercise.

117. NE correctly points out that we are required to assess each side of the public interest balance on a 'contents basis' (see *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC) at [33]). That means that the public interest must be assessed on the basis of what effect disclosure of this particular information would have. The fact that the badger culls are a matter of significant public interest does not mean that there is a strong public interest in the disclosure of every piece of information in relation to the badger culls. It is necessary to identify how disclosure of the Withheld Information will inform public debate.

118. As to the public interest in disclosing this information, there are two related classes of public interest issues: the general and the specific. Generally, there is a strong public interest, inherent in the EIRs, in the creation of a sustainable environment, in transparency and accountability, and in the facilitation of public participation and public debate on matters of environmental concern. These include the use of the disclosed information, together with information already made public, to "*enable [the public] to challenge decisions*": *Creekside Forum v Information Commissioner* (EA/2008/0065) at [39]. The clear link between public access to information, public action, and the desired result of a sustainable environment is set out in recital 1 to the Directive. In *Home Office & Ministry of Justice v ICO* [2009] EWHC 1611 (Admin) at [34] Keith J said:

> *"I do not see why in principle a "generalised" factor should be of less significance than a more specific one."*

119. Further, the whole basis of Aarhus and the Directive is to encourage public participation in environmental matters. That participation encompasses, as a central feature, public protest on matters of environmental concern. Where, as here, Government policy on an environmental issue is a matter of substantial debate and concern, the provision of environmental information, including information facilitating protest, is vitally important. Increased protesting in the

cull areas (or better directed protesting) is perfectly legitimate in a democratic society. We must guard against impermissibly mingling criticism of unlawful activity with criticism of legitimate protest.

120. Furthermore, the scheme of the EIR and the Directive recognises that it can sometimes be in the public interest to disclose information even though public safety would be adversely affected. Given that in many cases things which adversely affect public safety are unlawful (in civil or criminal law), Parliament must have been taken to be providing that it is not necessarily the case that every unlawful activity must be avoided. This point was made expressly by the Court of Appeal in *R (Ofcom) v Information Commissioner* [2009] EWCA Civ 90 at [54]-[59]. Doubtless the balance must be affected by the certainty with which the evidence establishes the adverse effect, and the severity of that effect. There is, for example, no necessary need to treat an adverse effect on property (such as a badger trap) as having the same weight as an adverse effect on safety from a physical attack on a person or an inhabited dwelling.

121. We accept that the public interest must be considered by reference to the specific Withheld Information. It is right that not every piece of information relating to the badger cull should be released simply because the Policy is controversial. However, that controversy, combined with the regulation 12(2) presumption in favour of disclosure, does importantly set the context for the balancing exercise.

122. NE considers that the risk of people suffering the kinds of things Mr Griffiths has suffered far exceeds any public interest in disclosure.

123. There is a very strong public interest in helping to prevent threats to and harassment of participating farmers. However the evidence in this case is that Mr Griffith's experience was not experienced by more than a small number of farmers after the injunction was in place, and that the vast majority of protester activity was peaceful and lawful. Moreover, the granting of the injunction provided a high degree of protection, which has been seen in

practice. These factors go some way to diminishing the strength of this public interest.

124. The Commissioner and Ms Dale consider there is weighty specific public interest in support of disclosure.

125. The Commissioner argues that one of the critical objections to culling in the RBCT was that it actually increased the incidents of bTB in the surrounding area of the cull zone. The Government sought to deal with that problem, whilst still implementing a cull, by recognising the need to bound the cull zones with a mixture of buffers and barriers, such as hard boundaries like motorways or water, combined with soft boundaries in areas where badgers are vaccinated or other control measures taken. This can be seen from the Impact Assessment, 30 November 2011, internal p.5. Release of BCP information which provides the length of the kinds of boundaries and buffers will enable the public to engage in an informed debate as to the success of that safeguard. Similarly, the perturbation effect will be harder to discover or analyse without the length of the perimeter of the pilot areas. It is also hard to understand why this is withheld when the area figure has been given.

126. NE disagrees and suggests that the Withheld Information cannot add much to the public debate particularly as the information already disclosed by the time of the hearing clearly indicates that there is no information held on the nature of barriers or buffers in WG. Ms Dale disagrees, and the fact that she now knows there are no barriers and buffers recorded in the BCP for WG is ‘significant in itself’ (a legitimate cause for concern in assessing the cull).

127. Given Defra’s inadvertent release of the area figures for WS and WG, welcomed by Ms Dale, it is slightly surprising that it is maintained by NE that there would be no public interest in the release of the area figures for the surrounding rings. It would appear to be relevant to assess the effectiveness of anti-perturbation measures to know the area of land deemed to be potentially affected, as well as understanding the way in which NE and Defra are carrying out their assessment functions.

128. The ability to monitor and assess the effectiveness of the pilot culls is a significant public interest particularly in view of the public controversy surrounding the badger culls. The IEP was not set up on a continuing basis and had a particular brief. In any case the IEP's report is not a reason why Ms Dale or any other member of the public should not be able to use the Withheld Information to help them test the adequacy of barriers, buffers and other measures to mitigate the risk of perturbation and the cost effectiveness of the Policy.

129. We note that NE is now performing the monitoring function without there being any IEP assessment and as a body implementing Government policy NE will not be perceived by the public to be entirely objective. In view of the IEP's limited brief it could have been anticipated at the applicable time that the Government would not necessarily have renewed its appointment.

130. The fact that the Government is now, as might always have been expected, carrying out a consultation on aspects of the Policy supports the need for respondees to that consultation to have access to as much information as possible so as to provide informed responses.

131. The other principal public interest in protecting the environment advanced by NE (regulation 12(5)(g)) is that disclosure could lead to the stopping of the cull which would adversely affect the testing of the effectiveness of badger culling on the reduction of bTB in cattle.

132. There is no evidence in this case that, despite the incidents leading up to the August/September 2013 cull, any participants withdrew their participation. There is no reason to believe that disclosure of the Withheld Information would make any difference. We note that there have been many disclosures since the applicable time and still no participants have withdrawn their participation in the pilot culls.

133. Therefore we do not place much weight on this public interest factor.

134. Under regulation 12(1) EIR the public authority may refuse to disclose environmental information requested if –

> *"(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information."*

135. We take heed of the fact that we are required to aggregate the public interest in favour of maintaining the exceptions.

136. We have considered the public interest balancing exercise and also the presumption in favour of disclosure and find that in all the circumstances of these appeals the public interest in maintaining the exceptions does not outweigh the public interest in disclosure for the reasons given above. In summary we find that in the circumstances of this case the weight we give to the ability of protesters to be able to more effectively monitor the effectiveness of a controversial Government policy is greater than the weight we give to the combined increasing risk of harm to farmers and the stopping of the culls.

Conclusion

137. We dismiss the appeals in cases EA /2014/0094 and 0160 and order that the Withheld Information is disclosed within 30 days of the date of this decision.

Signed:

Prof. John Angel
Judge

Date: 9 November 2015