

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 22 March 2012

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 regarding the definition of a "badger sett in current use", in relation to the Protection of Badgers Act 1992. Natural England provided a response to the complainant. However, the complainant argued that Natural England had not provided the information he had requested.
2. The Commissioner's decision is that Natural England did provide the requested information.
3. Therefore the Commissioner does not require Natural England to take any steps.

Request and response

4. On 15 February 2010 the complainant wrote to Natural England and requested the following information:

"Natural England's interpretation of and the criteria it uses to determine a 'badger sett in current' use for the purposes of considering and where appropriate issuing licenses under the Protection of Badgers Act 1992."

5. Natural England responded in a letter dated 11 March 2010 and informed the complainant that it had dealt with his request under the EIR. It referred the complainant to the definition of a badger sett as given in the Protection of Badgers Act 1992, and also to two internal guidance notes entitled 'Guidance on Current Use in the definition of a

Badger Sett' and 'Interpretation of Disturbance in relation to badgers occupying a sett' – both of which are available on its website.¹ It provided the complainant with a copy of these guidance notes. It explained that,

"Beyond this definition Natural England relies on its specialists to provide expert judgement based on their practical field experience of many years."

6. The complainant wrote to Natural England again on 24 March 2010, stating that its response only partially answered his request. He then made a further request for information:

"Put as briefly as I can and using the documents enclosed I would like to know the criteria used by Natural England to determine that a licence under the Protection of Badgers Act 1992 is required. Examples to try to illustrate what I mean:

1. How would Natural England determine and advise a Local Planning Authority and/or developer that a development proposal requires a licence under the Act. I appreciate that Natural England may wish to argue that both should have instructed or should instruct a consultant, voluntary group but I wish to examine the situation where Natural England is providing advice directly. Put in a different way, 'Natural England considers a licence to be necessary because...'

2. The possible need for a licence emerged from activities carried out or under the control of Natural England alone (or contractors working for Natural England). In short, where the possible need for a licence does not involve anyone other than Natural England.

*What signs/evidence etc does **NATURAL ENGLAND** consider constitutes:*

- 1. A badger sett.*
- 2. Current use.*
- 3. Disturbance.*

¹ http://www.naturalengland.org.uk/Images/WMLG17_tcm6-11815.pdf;
http://www.naturalengland.org.uk/Images/WMLG16_tcm6-11814.pdf

I shall also be most grateful for clarification of the following in relation to your document relation to the interpretation of 'disturbance,'

1. What criteria does Natural England use to determine whether a sett is physically occupied by a badger? I assume the burden of proof lies on the prosecution to show beyond all reasonable doubt that a badger was physically in the sett.

2. Am I correct in understanding that vibration is not considered to constitute disturbance? If I am correct, what scientific research does Natural England use to determine the level of vibration frequencies etc that result in disturbance?

3. What criteria does Natural England use to determine the distance between a sett and the activity that will cause disturbance within the terms of the Act?

4. Related to 3 – from what point does Natural England consider the distant to be measured, from a sett entrance to the activity or the end of the nearest tunnel/chamber? How does Natural England determine the extent of the tunnel system? If the distance is measured from an entrance what criteria are used to assess the extent of the tunnel?

In summary...my request relates to how the various issues in your documents and as above are considered by Natural England NOT a consultant, voluntary group, etc."

7. Natural England responded in a letter dated 16 April 2010, and provided the following response:

"Natural England would normally expect a developer, for example, to engage a suitable consultant to provide advice on the need for protected species licensing in relation to any specific development. Natural England does not act as a consultant/adviser in specific development cases, but if advising in general terms would advise that if a sett was present and the proposed action would cause an offence under the Protection of Badgers Act, such as sett interference or disturbance of badgers occupying the sett (as defined in the Act), then a licence would be required.

As regards Natural England itself, or contractors working on our behalf, we/they would need a licence in the same way as anyone else and the need for, or any conditions attached to such a licence, would be determined by our Regulatory Services & Access Team, in accordance with the legislation and our published guidance.

In terms of what constitutes 'current use' or 'disturbance', Natural England cannot add anything to the published guidance already published.

Regarding the specific points of clarification in the guidance, the answers to your numbered points are as follows:

- 1. There are various methods that can be used to determine if a sett is occupied. The simplest of these would involve techniques such as lightly laying small sticks across sett entrances, such that they are displaced if a badger passes in or out, or laying sand pads at sett entrances. Others may include direct night observation, remote cameras, etc. However, since badgers may remain underground for several days these would need to be used consistently over a period of time to confirm that a sett was not occupied. The burden of proof would be for the courts to decide.*
 - 2. Vibration may or may not be considered to be a disturbance. If severe vibration takes place near a sett eg as a result of pile-driving or blasting, then this is likely to constitute disturbance. But minor vibration would not. This is a matter of judgement. Natural England is not aware of any research into what levels of vibration badgers will tolerate.*
 - 3. Natural England's latest guidance on disturbance has moved away from giving specific distances at which disturbance would or would not be caused, precisely because this will vary with the type of (potential) disturbance concerned and such prescriptive distances would, in any case, have no basis in the Act. We therefore do not advise on a specific distance.*
 - 4. This point follows from 3 and, as explained, we do not advise on a specific distance therefore this does not apply."*
8. The complainant wrote to Natural England on 7 May 2010 and requested an internal review, stating:

"Thank you for your letter of 16 April, which totally misses the point of my inquiry of 24 March...

My simple question is how do officials of Natural England interpret and implement Natural England's guidelines when considering applications for 'badger licences' by (for example) landowners and their agents, and its own officers? Put another way it seems to me that Natural England's licensing officer(s) must have to interpret Natural England's guidelines in order to determine whether or not to issue a licence.

...it is important for the public to know how Natural England's licensing officers apply the guidelines."

9. Natural England carried out an internal review, and responded on 27 May 2010. It informed the complainant that his appeal was unsuccessful, stating:

"I would refer you back to previous letters to you on 11th March and 16th April 2010. Guidance is published on the Natural England internet site and we rely on the expertise and judgement of our Wildlife Team staff to implement this."

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his requests for information had been handled. He has argued that Natural England has failed to provide him with the information he has requested.
11. During the investigation of the case Natural England disclosed an additional piece of information to the complainant that fell under the scope of the requests. However, other than this additional piece of information, Natural England stated that its position was that it had answered the complainant's requests of 15 February 2010 and 24 March 2010, and that it does not hold any additional information in relation to these requests.
12. Therefore the scope of this case has been to consider Natural England's response to these requests, and specifically whether any further information is held.

Reasons for decision

13. The requested information in this case relates to the definition of a badger sett in current use, in relation to the Protection of Badgers Act 1992. This legislation can affect the use of land around a badger sett that is in current use. Bearing this in mind, the Commissioner is satisfied that the requested information falls within the definition of environmental information, as set out in regulation 2(1)(c) of the EIR.

Is further information held?

14. As noted above, Natural England has argued that it does not hold any further information that would fall under the scope of the requests.

15. Regulation 12(4)(a) of EIR states that a public authority may refuse to disclose information to the extent that it does not hold that information when a request is received.
16. In cases such as this where there is some dispute as to whether a public authority holds information falling within the scope of the request the standard of proof to apply is the civil standard of the balance of probabilities.² Therefore the Commissioner has considered whether, on the balance of probabilities, Natural England holds further information that falls within the scope of the requests. In doing so he has particularly borne in mind any explanation as to why the requested information is not held.
17. At the outset of the investigation the Commissioner contacted Natural England. It confirmed that it believed that it had fully responded to the requests.
18. The complainant has argued Natural England has not answered his requests. In a letter to the Commissioner he has made the following arguments:

"...The information requested and the correspondence related to it...has NOT been provided. I asked Natural England how it defines (implicitly or explicitly) a badger sett in terms of the natural history of badgers, the implementation of wildlife legislation, considering badger licence applications and the imposition of conditions on a licence, the policing of the licence, in evidence to the courts in cases where the definition is an issue etc etc.

...Common sense dictates that Natural England must have its own definition of a badger sett otherwise it cannot determine whether a licence is needed, the validity of a licence application, whether the licence conditions have been infringed. In addition Natural England must be able to advise the CPS and the courts why it disagrees with the defence on whether a badger sett is a badger sett. In short, it is reasonable for a judge to ask Natural England, 'You say that the accused has contravened the legislation but the accused is of the opinion that the structure is not a badger sett but you assert that it is, therefore how does Natural England define a badger sett so that I can understand the difference between the prosecution and defence cases?'

² *Bromley et al v Information Commissioner & Environment Agency* [EA/2006/0072], para's 10 to 13.

...in any event Natural England has a moral obligation to provide guidance and advice to the public and it has a statutory obligation to advise the Government and Local Authorities. For example, it would be perfectly proper for the Secretary of State to ask Natural England for its definition of a badger sett etc and Natural England would have a legal duty to tell the Secretary of State. Equally, a member of the public is entitled to seek advice such as 'Is X a badger sett or not and why?' It would be entirely wrong for Natural England to say, 'Employ a consultant because we don't know.'"

19. Natural England has informed the Commissioner that for all legal and related purposes it relies upon the definition of a badger sett that is given in section 14 of the Protection of Badgers Act 1992. It has argued that it has issued guidance on its view of what is meant by 'current use' in relation to its licensing powers under section 10 of this Act. This is the guidance that was disclosed to the complainant.
20. In relation to the first paragraph of the additional arguments made by the complainant it has argued that this goes beyond the scope of the original requests, and was not what was asked for. In relation to the remainder of these arguments, it has stated that the complainant has suggested that it would have different responses for different audiences. It has stated that this is not so, and that it would respond with the same information. It has again stated that it does not hold any additional relevant information other than that that has already been provided.
21. The Commissioner notes that the interpretation of the nature and extent of the scope of the requests appears to be a matter of dispute between the complainant and Natural England. The complainant is arguing that the authority has not fully answered his requests, whilst Natural England has argued that it has and that the complainant's additional arguments go beyond the scope of the original requests. The Commissioner also notes that some of the complainant's points (as quoted above) seem to stray beyond the terms of the original requests, for example asking about the definition of a badger sett, "*in terms of the natural history of badgers*", or instead asking theoretical questions (although the Commissioner accepts that these may have been asked by the complainant in order to illustrate a point). In addition the Commissioner notes that complainant's reference to Natural England having a, "*...moral obligation to provide guidance and advice to the public and [...] a statutory obligation to advise the Government and Local Authorities.*" However, although the complainant obviously believes that Natural England should have further information, this does not necessarily mean that it does.
22. In order to resolve this issue the Commissioner has gone back to the original requests of 15 February and 24 March 2010. He has also

considered Natural England's responses to these requests, and the arguments it has made to the Commissioner.

23. In response Natural England has stated that for all legal and related purposes it relies upon the definitions that are provided in the Protection of Badgers Act 1992. The information that it holds that shows how it interprets these definitions is the guidance that it has disclosed to the complainant (and that is available on its website).
24. The Commissioner notes the complainant's comments as to why he believes that further relevant information is held. However, the EIR focuses on recorded information that is held by a public authority, rather than what information should be held. Despite the complainant's obvious belief that further information is held, the Commissioner does not consider that he has provided any evidence to support this belief.
25. Having considered Natural England's arguments as to why further relevant information is not held, the Commissioner considers that they are reasonable and persuasive. Given this, and as the complainant has not provided any evidence to the contrary, the Commissioner is satisfied that on a balance of probabilities Natural England does not hold any further relevant information.
26. Regulation 12(1)(b) of the EIR requires that all exceptions, including regulation 12(4)(a), are subjected to a public interest test. However, it is not possible for the Commissioner to do this given his finding that Natural England does not hold the information to which the public interest could apply.

Right of appeal

27. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

28. 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.
29. 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

Pamela Clements
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