

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

Decision notice

Date: 6 August 2013

Public Authority: Department for Environment, Food and Rural Affairs (Defra)

Address: Area 4D, Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested information relating to a planned pilot badger cull. Defra provided the complainant with some of the requested information but redacted some information under regulation 12(4)(a), 12(5)(a) and 12(5)(g) EIR.
2. The Commissioner's decision is that Defra was incorrect to apply regulation 12(5)(a) to parts 2, 4 and 5 of the request and was incorrect to apply regulation 12(5)(g) EIR to parts 4 and 5 of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Defra should now disclose the redacted information. The Commissioner would note that some of the redactions have been made to information which identifies the researchers and some safety measures that are going to be put in place to protect those researchers. As the complainant has confirmed he is satisfied with Defra's response to part 3 of the request and because information on safety measures fall outside the scope of the request, the Commissioner has not investigated whether or not this should be disclosed. He would not therefore expect this redacted information to be disclosed. This information is the names of organisations and the second redaction on page 24 of the report relating to safety measures.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 30 October 2012, the complainant wrote to Defra and requested information in the following terms:
 1. What proportion of badger carcasses will be collected for examination;
 2. How the carcasses are going to be selected for examination
 3. Who will be examining them;
 4. What examination protocols will be used to determine humaneness; and
 5. How shot and wounded badgers that retreat underground to die will be factored into any assessment of humaneness.
6. On 29 November 2012 Defra responded. It explained that 240 badger carcasses would be collected for post mortem examination. It refused to provide information as to the identity of the organisations which are to undertake the culls under regulation 12(5)(a) EIR which relates to public safety. It said that information covering the badger carcass examination protocols and how unrecovered carcasses will be accounted for cannot be released before the pilot cull takes place, as this could result in bias within the results.
7. The complainant requested an internal review on 29 November 2012. Defra sent the outcome of its internal review on 29 January 2013. In relation to part 1 of the request it explained that it did not at this stage hold the proportion of carcasses that were to be collected for post mortem (effectively applying regulation 12(4)(a) EIR). It upheld its application of regulation 12(5)(a) to parts 2 and 3 of the request. In relation to part 2 of the request it said that to disclose the way in which carcasses will be selected could risk disclosing the numbers of shooters involved, and could lead to the identification of sites and the shooters themselves. It also said that regulation 13 was applicable to part 3 of the request as the information amounted to third party personal data. It explained that regulation 12(5)(g), which relates to the protection of the environment, was applicable to parts 4 and 5 of the request.

Scope of the case

8. The complainant contacted the Commissioner on 31 January 2013 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation Defra provided the complainant with information relevant to parts 1 and 3 of the request. Although Defra did clarify that it did not hold the information relevant to part 1 of the request when the request was originally made. The complainant confirmed that he was satisfied with Defra's responses to parts 1 and 3 of the request, however he remained dissatisfied with the level of detail provided in response to part 2 of the request. Defra also confirmed that regulation 12(5)(a) was also applicable to parts 4 and 5 of the request.
10. The Commissioner has considered whether Defra was correct to make redactions to the report, relevant to part 2, 4 and 5 of the request under regulations 12(5)(a) and 12(5)(g) EIR.

Reasons for decision

Regulation 12(5)(a)

11. Regulation 12(5) of EIR states that, 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.
12. In this case Defra has argued that disclosure of the way in which carcasses will be selected could risk disclosing the numbers of shooters involved, and could lead to the identification of sites and the shooters themselves.
13. It has argued that there would be danger to public safety if protestors were active in the pilot area where live ammunition was in use, and that this would be likely to occur if the information on humaneness were disclosed.
14. The Commissioner interprets the wording of 'would adversely affect' in regulation 12(5) to set a relatively high threshold in terms of likelihood which has to be met in order for any of the 12(5) exceptions to be engaged. In other words it is not sufficient that disclosure may or could have some level of adverse effect, but rather that disclosure 'would'

have an adverse affect. In the ICO's opinion this means that the likelihood of an adverse affect must be more substantial than remote.

15. In this case the complainant has accepted that the identity of the organisations involved in the pilot badger cull cannot be disclosed under EIR. The redacted identities contained in the report will not therefore be disclosed by Defra.
16. In relation to the other redacted information which contains more detail about how carcasses will be selected and the information relating to humaneness, Defra has not provided any explanation as to how release of this information would lead to the organisations or sites being identified and therefore it has not explained how disclosure of this information would have the adverse affect claimed.
17. After viewing the withheld information, the Commissioner is unable to accept that regulation 12(5)(a) EIR is engaged in relation to the remaining redactions. However the Commissioner would reiterate that the names of organisations involved would now fall outside the scope of this investigation and he would not therefore expect this information to be disclosed.

Regulation 12(5)(g)

18. Regulation 12(5) of EIR states that, for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – (g) the protection of the environment to which the information relates.
19. Defra has argued that sharing information on what exactly will feed into the assessment of humaneness could lead those seeking to disrupt the policy to target particular aspects of the pilot operation. It believes that for this reason it engages regulation 12(5)(g), as such disruption would have a detrimental effect on the environment and on the health of the cattle herds that the cull is intended to protect.
20. Defra has also argued that contractors carrying out the cull would know exactly what they were looking for in their assessment of humaneness. It said that contractors would then be able to remove any carcasses that they identify as showing signs of inhumane death so that there was no risk of them being subject to post-mortem. The Commissioner considers that Defra has made this argument in support of its application of regulation 12(5)(g).
21. During the course of the Commissioner's investigation Defra also argued that while the document does suggest that badgers will be observed and carcasses will be subjected to radiographic and post-mortem examination it does not give any indication of how this

information will be used to determine 'humaneness'. It said that it considers part 4 of the request to be asking for an explanation of humaneness, not for recorded information.

22. With regards to badgers that are shot and wounded, Defra said that the document only describes how attempts will be made to 'determine the proportion of badgers that escape with possible injuries after being shot at with a firearm'. It does not give any indication as to how this will be done, or how the information will be used to assess 'humaneness'. Again, Defra said that it considers that part 5 of the request is not asking for any recorded information.
23. Upon viewing the withheld information, in relation to part 4 of the request, the Commissioner considers that it does contain examination protocols as requested, whilst it does not set out how this will ultimately be used to assess humaneness it is the protocol which is proposed to be used. The Commissioner therefore does consider that the report falls within the scope of the request. In relation to part 5 of the request, the Commissioner considers that information about attempts that will be made to assess the proportion of badgers that are wounded but escape, is relevant to this part of the request. Whilst it doesn't answer the whole of this part of the request it goes some way to providing the complainant with some information relevant to this.
24. Defra has argued that if this information were disclosed it may lead to protesters and contractors interfering in the process. It has also argued that if the detail of the pilot were disclosed, it may be used by protesters to spin or manipulate results.
25. The Commissioner considers that the pilot badger cull is a very sensitive issue and there are very strong feelings within groups and organisations that are against this policy. The Commissioner accepts that those against this may wish to use the information to interpret any ensuing results in an alternative way, however this is not a valid reason to withhold this information under EIR. It is open to Defra to provide as much further information as necessary to avoid as far as possible any misinterpretation of the information.
26. As stated previously 'would adversely affect' sets a relatively high threshold and the Commissioner is not persuaded that disclosure of this information would provide any greater scope for protesters to actually interfere in the process or that contractors would interfere with the process. As Defra is not going to disclose the identity of the organisations involved and as Defra has not explained how the redacted parts of the report would identify the location or how interference by contractors with the process would adversely affect the protection of the environment, after reviewing the report, the Commissioner does not

consider that Defra has demonstrated that disclosure would have the adverse effect claimed.

27. The Commissioner does not therefore consider that regulation 12(5)(g) EIR was correctly engaged in this case.

Right of appeal

28. 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

29. 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.
30. 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

Gerrard Tracey
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