

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 12 February 2014

Public Authority: Department for Environment, Food and Rural Affairs

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

Decision (including any steps ordered)

1. The complainant has requested information relating to Bovine TB and badger control.
2. The Commissioner's decision is that Department for Environment, Food and Rural Affairs (Defra) has correctly applied Regulations 12(4)(a), 12(4)(b) and 12(4)(e) to withhold the information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 18 April 2013, the complainant wrote to Defra and requested information in the following terms:
 - a) *Please disclose copies of all the parliamentary questions on the subject of bovine TB and/or badger control which were tabled by Mr Owen Paterson MP when he held the post of Shadow Agriculture Minister in the years 2005 and 2006.*
 - b) *Please disclose copies of all correspondence between the National Farmers' Union (NFU) and Defra between 11 May 2010 and 30 June 2010.*

- c) *Please disclose copies of all correspondence between the Animal Health Welfare Board for England (AHWBE) and the TB Eradication Group (TBEG) between 1 August 2011 and 30 April 2012.*
- d) *Please disclose copies of all correspondence between the Animal Health Welfare Board for England (AHWBE) and Defra in relation to bovine TB and badger control between 1 September 2012 and 28 February 2013.*
5. Defra responded to each parts of the request on 20 May 2013. In respect to part:
- a) It provided an internet link to the UK Parliament's website stating that you could access the information required.
 - b) It refused to provide the requested information. It stated that the request was too broad and cited Regulation 12(4)(b) of the EIR as its basis for doing so.
 - c) It denied holding the requested information and cited Regulation 12(4)(a) of the EIR.
 - d) It refused to provide the requested information. It stated that disclosure of internal communications produced at the early stage of the policy-making process would not be in the public interest and cited Regulation 12(4)(e) of the EIR.
6. The complainant requested an internal review and on the same basis stated that in respect to part:
- a) She was aware of the website prior to the request but did not know the specific dates when the questions were tabled. She asked if Defra could supply them; provide more specific instructions for the website; or provide a copy of the questions.
 - b) The period from 11 May 2010 to 30 June 2010 is 36 working days and the complainant did not believe that her request was manifestly unreasonable. She also stated her belief that it was in the public interest to disclose the information requested.
 - c) No comment was made on this.
 - d) The complainant believed that TB Eradication Advisory Group (TBEAG) is a subgroup of AHWBE, and that AHWBE has overall responsibility for TB strategy, therefore wildlife control did fall within the Board's remit.

The complainant also stated that releasing the information requested would be in the public interest.

7. Following an internal review Defra wrote to the complainant on 17 July 2013. It stated that Defra's handling of the request had been broadly correct. However, it acknowledged that it could have been more complete.
8. Defra provided some further information in relation to part a) of the request but upheld its original position with regard to the remainder.

Scope of the case

9. The complainant contacted the Commissioner on 4 August 2013 to complain about the way her request for information had been handled.
 - a) The complainant stated that she continued to have difficulty accessing the information via the link provided. Therefore she would like confirmation from Defra that it does not hold the information requested, and that if it does it would be reasonable to ask them to provide it.
 - b) The internal review stated that "a period of 36 working days would generate a huge amount of correspondence". In the complainant's view this was a vague and speculative response. In her request for internal review she had explained that she was interested in a number of related issues which she knew were discussed during that time. Therefore she believed that her request was reasonable and in the public interest.
 - c) Defra's response stated that it did not hold information relating to this but did not give any reason. The complainant stated that initially she accepted their word. However, she would now like to question whether appropriate searches were done to conclude that no such information was held.
 - d) The AHWBE had asserted that 'wildlife control policy largely falls outside their remit'. The complainant challenged this as she has found information on government websites that states:

"The Board agreed that its remit is health and welfare of kept animals and that it covers wild animals only where there are linkages to disease in kept animals."
10. The complainant states that bovine TB originated in cattle and spread to badgers. As well as cattle-to-cattle infection and badger-to-badger

infection, it is supposed that there is cattle-to-badger infection and badger-to-cattle infection. There are linkages to disease between badgers (wild animals) and cattle (kept animals) and, therefore, bovine TB and badger control are within the Board's remit.

11. The complainant also stated that the decision to proceed with badger culling trials was taken on 14 December 2011 and the information she requested was from between 1 September 2012 and 28 February 2013, almost a year later.

Therefore, she did not consider Defra's argument to be valid.

12. The Commissioner considers the scope of this case is to determine whether Defra is entitled to rely on the exceptions it has cited as a basis for refusing to provide the withheld information, and if it is correct when it says that it does not hold the information requested at part c).

Reasons for decision

13. The Commissioner has first considered Defra's response to part a) of the request.

"The complainant stated that she continued to have difficulty accessing the information via the link provided. Therefore she would like confirmation from Defra that it does not hold the information requested, and that if it does it would be reasonable to ask them to provide it."

14. As there is no exception within EIR regarding 'accessible by other means', the Commissioner asked Defra to confirm on what basis it was unable to provide the information requested in part a) of the request; to confirm whether or not it held the information, and if so why this cannot be provided.

15. In response, Defra explained the information was already in the public domain and it believed its approach was in line with ICO guidance, in that this information is realistically accessible to a member of the public if the requestor is "interested enough to conduct some searches for information", which is what is required in this case.
http://www.ico.org.uk/for_organisations/environmental_information/guide/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information-in-the-public-domain-foi-eir-guidance.ashx

16. Defra further explained it attempted to assist the complainant, by providing a link to the parliament website as well as theyworkforyou.com homepage, where it is possible to search and filter results (by date and by person) by clicking "More Options" towards the

top right of the page. This allows a search for Owen Paterson's parliamentary questions between 1 January 2005 and 31 December 2006.

17. In addition historic Hansard is also available and the complainant could also contact the House of Commons Information Office as an alternative route. Therefore finding this information can be done in line with the above guidance by a member of the public. Defra also stated that in relation to the retention of PQs, Defra official policy is to hold them for 3 years and then destroy, on the basis that they are available via Hansard.
18. Given the above clarification, the Commissioner considers that Defra has endeavoured to assist the complainant in obtaining the information requested in part a) and the information is realistically accessible to a member of the public. Therefore, no steps are required in relation to this part of the request. Turning now to the remaining withheld information, the Commissioner has first considered the application of 12(4)(b) to part b) of the request.

Regulation 12(4)(b) – manifestly unreasonable

"Please disclose copies of all correspondence between the National Farmers' Union (NFU) and Defra between 11 May 2010 and 30 June 2010."

19. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
20. At paragraph 32 of his decision on FS50440146 (Luton Borough Council)¹, the Commissioner made it clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test than simply being "unreasonable". "Manifestly" means that there must be an obvious or tangible quality to the unreasonableness.
21. The Commissioner continued at paragraph 33 by saying that the regulation will typically apply in two sets of circumstances: firstly, where a request is vexatious; or secondly, where compliance meant a public

¹ http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50440146.ashx

authority would incur an unreasonable level of costs, or an unreasonable diversion of resources.

22. Unlike FOIA and specifically section 12, the EIR does not contain a provision that exclusively covers the time and cost implications of compliance. The considerations associated with the application of regulation 12(4)(b) of the EIR are, instead, broader than with section 12 of FOIA. In particular, the Commissioner recognises that there may be other important factors that should be taken into account before a judgement can be made that environmental information can be withheld under the exception:

- Under the EIR, there is no statutory equivalent to the “appropriate limit” – the cost limit beyond which a public authority is not obliged to comply with a request – described at section 12 of FOIA.
- The proportionality of the burden on the public authority’s workload, taking into consideration the size of the public authority.
- The requirement, under regulation 12(1) of the EIR, to consider the public interest test.
- The EIR’s express presumption in favour of disclosure.
- The requirement to interpret restrictively the exceptions in the EIR.
- The individual circumstances of the case.

23. To guide him on the respective merits of the application of regulation 12(4)(b), the Commissioner has asked Defra for clarification in the following areas:

- Confirm, as far as possible, where the requested information would be held and the extent of the information that Defra considers would be covered by the request.
- Describe the role and size of business areas that would need to be employed in order to recover and extract the relevant information.
- Set out clearly the activities that Defra would need to undertake in order to comply with the request.
- Provide a detailed estimate of the time needed to provide the relevant information, making reference to the activities described above. While under EIR there is no statutory equivalent to the “appropriate limit” designated in FOIA, an estimate can be a useful starting point in

establishing that complying with a request would be burdensome.

- Verify whether Defra has carried out a sampling exercise in order to determine whether the request was subject to the exception.
24. Defra explained that it was not in a position to make an assessment of the amount of Defra correspondence there may have been with the NFU during this period, but it would no doubt be considerable.
25. This is because there is no central way of collating all of the correspondence Defra receives from the NFU. The NFU is one of its most important stakeholders and officials in most of its policy areas are likely to have received correspondence from them directly.
26. Defra also explained that to give some idea of the breadth of correspondence it is likely to have had, food, farming, animal welfare, water related issues, the badger cull, wildlife, pesticides, rural development and broadband are just some of the policy areas that it will have been contacted about by the NFU.
27. Its Central Correspondence Unit can only log the letters they receive directly or are asked to log. In addition some letters to Ministers are not logged but are responded to by the Minister's office. There is also an issue in tracing the letters from the NFU, as they have numerous regional offices in addition to their national organisation, and as there will be more than one person/office writing to Defra the Central Correspondence Unit could not search by name or postcode.
28. Defra stated that it suggested the complainant narrow down her request (for example to the badger control policy) to be more helpful and in line with the other information she requested. This would have been treated as a new request.
29. The Commissioner sought further clarification from Defra. Defra explained that the kind of activities that would need to be undertaken would be:
- Determining which members of staff held the information (including staff members who had since left their team).
 - Locating the information. This would involve large-scale searching of information held in the accounts of policy teams (past and present), with special arrangements required to establish whether information could be retrieved from former employees; an examination of the files held by subject area in a shared "cloud" area; and a cataloguing of the documents retrieved with a view to establish what information was pertinent to the terms of the request.

- Examining each file in detail in order to ascertain whether the information was environmental or non-environmental, to identify and remove duplicate information and to assess whether any information needed to be withheld.
30. Defra also stated that a standard search using the term "NFU" for the entire TB SharePoint, which covers the TB Programme business area, would bring up around 10,000 items, stretching back to 2008. This would capture everything mentioning NFU, but it would require someone to go through that material to check if it fell within the terms of request.
 31. This could be refined by variations of the search "NFU pilot badger cull", which would bring it down to around 2,500-3,500 items. However, an official would still be required to go through each item to check if it fell within the terms of the request, and the majority of items related specifically to the cull would be within the last year or so when the planning and implementation of the cull has taken place. This would be with one business area only, and a request for all correspondence between Defra and the NFU, albeit for a period of one month, would be far wider than this.
 32. Defra felt that a strong guide for the kind of activities involved and the kind of information captured, as well as the public interest argument to support declaring the request manifestly unreasonable, can be found in the ICO's own recent decision notice FER0470006², which concerned a request made to Defra for correspondence with the NFU.
 33. Having considered the previous decision notice FER047006, the Commissioner does not find it necessary to repeat the arguments and information presented in that case.
 34. In his decision on FS50445154 (Hillingdon Borough Council)³, the Commissioner considered the resources needing to be expended on processing the request helped justify its decision to deem the request vexatious under section 14 of FOIA.
 35. At paragraph 36 of his decision, the Commissioner commented as follows:

² http://www.ico.org.uk/~media/documents/decisionnotices/2013/fer_0470006.ashx

³ http://www.ico.org.uk/~media/documents/decisionnotices/2013/fs_50445154.ashx

*"The Information Commissioner has some sympathy with the argument that where large volumes of information have been requested, and there are obvious and substantiated concerns about potentially exempt information, which cannot be easily isolated because it is likely to be scattered throughout the whole of the requested information, then a request could potentially be deemed to be vexatious (**or manifestly unreasonable under the EIR** [the Commissioner's emphasis]) because of the disproportionate time and effort that would be needed to review and remove the exempt information."*

36. Taking into account these different activities, and based on its experience of the separate request mentioned above, Defra has estimated that it would take 5 minutes per email to check that it was not a duplicate, was in scope, and then read and check information in the email. This, it considers, is a conservative estimate. Furthermore, Defra has informed the Commissioner that the policy team responsible for delivering the badger control policy is relatively small, which would only serve to amplify the strain that compliance would place on Defra's, and particularly the policy team's, resources.
37. Defra further stated that on the issue of redaction, the Commissioner observed that the process of considering whether information should be redacted is not an activity that can be included as part of a public authority's cost-estimate produced for the purposes of section 12 of FOIA. However, to support its position that the activity would nevertheless have a bearing in this case, Defra reminded the Commissioner of the First-Tier Tribunal's findings in FER04700065 *Salford City Council v Information Commissioner and Tiekey Accounts* (EA/2012/0047).
38. The Tribunal in that case decided that the time, and therefore the cost, associated with the redaction of information could count as a contributory factor when assessing whether a request was vexatious as described by section 14(1) of FOIA. Defra considers that this principle equally applies in respect of regulation 12(4)(b), which is designed to protect public authorities from the inappropriate use of the legislation.
39. In assessing whether the cost of complying with a request for environmental information is reasonable, the Commissioner bears in mind the EU Directive from which EIR originates, which states at 4(2) that "the grounds for refusal... shall be interpreted in a restrictive way". Furthermore, the Implementation Guide to the Aarhus Convention (page 57) notes that:

"Although the Convention does not give direct guidance on how to define 'manifestly unreasonable', it does hold it as a higher standard than the volume and complexity referred to in article 4, paragraph 2.

Under that paragraph, the volume and complexity of an information request may justify an extension of the one month time limit to two months. This implies that volume and complexity alone do not make a request manifestly unreasonable."

40. In *DBERR v ICO and Platform* (EA/2008/0096) the Tribunal were clear that regulation 12(4)(b) is not an equivalent to section 12 of FOIA (paragraph 35) and the regulation requires the public authority to consider the request more broadly (paragraph 36). The approach under regulation 12(4)(b) is more flexible, taking into account a range of factors other than strict rules on cost calculations; it is also therefore possible the exception could apply in circumstances where the costs calculations do not reach the 'appropriate limit' under section 12.
41. For instance, it is envisaged that it will be appropriate to take into account the tasks listed in regulation 4(3)(d) of the Fees Regulations as a starting point for calculating costs under EIR. However the broader scope of regulation 12(4)(b) means that there may be circumstances where it is reasonable to also take into account some costs that fall outside the Fees Regulations, although the justification for doing so would have to be clear. Such arguments should not be dismissed out of hand just on the basis of the Fees Regulations; instead, the Commissioner will consider whether those costs are reasonable in all the circumstances of the case.
42. The Tribunal in the *DBERR* case noted that there are additional factors that should always be considered in assessing whether costs of complying with a request for environmental information are manifestly unreasonable:
 - (a) Under EIR, there is no statutory equivalent to the "appropriate limit";
 - (b) Proportion of burden on the public authority's workload, taking into consideration the size of the public authority;
 - (c) Presumption in favour of disclosure under regulation 12(2);
 - (d) Public interest test under regulation 12(1);
 - (e) The requirement to interpret the exceptions restrictively; and
 - (f) The individual circumstances of the case, including:
 - the nature of the information requested;
 - the importance of the issue at stake; and

- the aggregated burden on resources where the request is one of many within one item of correspondence, or several items of correspondence submitted over a short period of time.
43. The Tribunal also highlighted that the substance of the request has no bearing on the application of section 12 FOIA, where all requests are treated alike (paragraph 35) implying that it should be considered under regulation 12(4)(b).

Public interest arguments in favour of disclosing the withheld information

44. Defra recognised that there is a public interest in disclosure of information concerning advice and discussions on badger control, as there is an interest in transparency and accountability in controversial policy areas.
45. There has been a significant amount of interest in the policy from members of the public and discussions in the media, and greater transparency makes government more accountable to the electorate and increases trust.
46. There is also a public interest in being able to assess the quality of advice being given to ministers and subsequent decision making. Equally Defra recognised that there is a public interest in understanding the influence that stakeholder organisations, such as the NFU, may have had on the Department's decisions.

Public interest arguments in favour of maintaining the exception

47. Balanced against the arguments favouring disclosure Defra stated that there is a strong public interest in protecting the integrity of the EIRs and ensuring that they are used responsibly. To support this position, Defra referred in FER0470006 to the First-Tier Tribunal's decision in Anthony Lavelle v Information Commissioner (EA/2010/0169) and specifically its comment at paragraph 37 of the decision which states:

"there is a need to maintain the integrity of information rights legislation, and this includes ensuring it is not misused at the cost of others by responding to requests that are manifestly unreasonable".

48. Furthermore, the Commissioner decided in FER0470006 that it was unfair to expect Defra to comply with the request because of the substantial demands it would place on its resources and the likelihood that it would significantly distract officials from their key responsibilities within the organisation.

49. The result of this is that, in certain situations, the Commissioner will accept that the time needed to consider whether information is exempt may be used as evidence that a request is manifestly unreasonable.
50. The Commissioner acknowledges the complainant's view that the information requested is over a short span of time. However, he also acknowledges the wide range of issues that would be covered in correspondence to Defra from the NFU.

Balance of the public interest arguments

51. With regard to the public interest in disclosure the Commissioner has taken into account the general public interest in transparency and accountability. He is also mindful of the presumption in favour of disclosure and the need to read exceptions restrictively.
52. However, balanced against this is the burden that would be imposed on Defra. There is also the wider public interest in protecting the integrity of the EIRs and ensuring that they are used responsibly.
53. The Commissioner recognises that a public authority will always be expected to bear some costs when complying with a request. For the sake of the public interest test, however, the key issue is whether in all the circumstances this cost is disproportionate to the importance of the requested information. In the Commissioner's view, in this case, it is.
54. In coming to this decision, the Commissioner fully accepts that the request has value. It is fair to say that the request was designed to capture information of particular significance about the badger culling proposals; information, in short, that where held and disclosed would be likely to have wider benefit to the public. Yet, as voiced in his decision in the *Hillingdon* case, the Commissioner recognises that there is a public interest in not bringing information rights legislation into disrepute by requiring public authorities to respond to manifestly unreasonable requests. This will particularly be the case where, as here, the burden on a public authority is considerable – well-exceeding, for example, the appropriate limit stated in the fees regulations associated with section 12 of FOIA. This is set at £600 for central government departments, which is the equivalent of 24 hours of work on the request.
55. The Commissioner has decided that, despite the accepted seriousness of the subject matter, it is unfair to expect Defra to comply with the request because of the substantial demands it would place on Defra's resources and the likelihood that it would significantly distract officials from their key responsibilities within the organisation. Therefore, in all the circumstances, the Commissioner has found that the weight of the public interest arguments favours maintaining the exception.

Regulation 12(4)(a) – information not held

"Please disclose copies of all correspondence between the Animal Health Welfare Board for England (AHWBE) and the TB Eradication Group (TBEG) between 1 August 2011 and 30 April 2012."

56. Regulation 12(4)(a) provides that a public authority may refuse to disclose information if it does not hold that information when a request is received. In this case Defra advised the complainant that there is no such information. The AHWBE met for the first time on 8 November 2011 and TBEG held its last meeting on 8 March 2012 and there was no correspondence between them.
57. In considering cases such as this, the Commissioner, in accordance with a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities. To reach a decision on this the Commissioner has considered the context of the case, the nature of the requested information, the authority's responses, the arguments provided by the complainant and any evidence to suggest that the information in question is held.
58. In order to assist with this determination the Commissioner asked Defra a range of questions.
59. During the course of this investigation Defra confirmed to the Commissioner that the relevant officials had checked and rechecked electronic files. This confirms that there was no correspondence between TBEG and the Board between the dates requested.
60. Defra also explained that because of TBEG's role in advising Defra's TB Programme all paperwork to and from the group is stored on Defra's shared computer drive rather than separately on individual laptops. This makes for much more efficient searching and finding of papers.
61. Defra stated that in this case searches of the TBEG folders for references to 'AHWBE' and 'Animal Health' were undertaken.
62. On the basis of the explanations provided by Defra, the Commissioner is satisfied that Defra took reasonable steps to search for information relevant to the request. Although he notes the complainant's concerns in this matter he must reach his conclusions on the basis of the available evidence, and does not consider there to be evidence that relevant information was held by Defra at the time of the request.
63. Based on submissions provided by both the complainant and Defra, the Commissioner's decision is that on the balance of probabilities Defra

does not hold any recorded information relevant to the complainant's request.

64. The Commissioner finds that when refusing part c) of the request, Defra correctly applied regulation 12(4)(a) of the EIR.

Regulation 12(4)(e) – internal communications

"Please disclose copies of all correspondence between the Animal Health Welfare Board for England (AHWBE) and Defra in relation to bovine TB and badger control between 1 September 2012 and 28 February 2013."

65. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Commissioner has published guidance⁴ on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
66. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance on the exception, the Commissioner acknowledged that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.
67. The information withheld under this exception consists of a variety of draft meeting notes and minutes, and secretariat reports as well as covering emails. The Commissioner is therefore satisfied that these constitute a 'communication' for the purposes of the exception. He has gone on to consider whether each of the types of identified information is an 'internal' communication.
68. There is no definition of what is meant by 'internal' contained in the EIR. Consequently, in the absence of one, a judgment on what is an internal communication must be made by considering the relationship between a sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, communications sent between officials within a single organisation are the clearest example of records that will be covered by the exception. Regulation 12(8) of the EIR states that for the purposes of the exception, internal communications includes communications between

⁴http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

government departments. The Commissioner's guidance further explains at paragraph 22 that internal communications include:

"[...] communications between an executive agency and its parent department, as an executive agency is part of the parent department for the purposes of the EIR. Communications between executive agencies, or between an executive agency and another central government department, will therefore also be internal communications.

69. Defra provided some background to the AHWBE. It explained that the AHWBE is the principal source of Departmental advice to Defra Ministers on all strategic animal health and welfare policy matters relating to kept animals (excluding the welfare of zoo and circus animals) in England. It brings experts including farmers, veterinarians and others from outside Government together with the Chief Veterinary Officer and Civil Servants to make direct policy recommendations on policy affecting the health and welfare of all kept animals such as farm animals, horses and pets.
70. Defra stated that this approach brings those affected by government decisions into the heart of the process in order to create a more direct link between those making Defra policy and those experiencing the delivery of that policy. The Chair and other non-executive members of the Board are appointed by Defra Minister's for fixed terms following an open and transparent recruitment basis. Non-executive Board members serve in an individual capacity rather than as formal representatives of particular sectors or organisations. The main role of the Board members is set out within the AHWBE's Terms of Reference which is available at: <http://www.defra.gov.uk/ahwbe/about/terms-of-reference/>. Non-executive Board members are responsible to the Minister for their individual performance which will be appraised at least annually, with advice on their performance from members of the Defra's Senior Management Committee as appropriate.
71. The non-executive members of the Board use Defra letterheads to respond to Board correspondence, have Defra business cards and also have special CJSM Defra email addresses for circulation of restricted material, which shows that in their Board capacity they are part of the Department.
72. The AHWBE forms part of the internal structure of Defra and operationally the Board is part of its decision-making process. It is not a separate legal entity, as non-executive members have only advisory powers and it does not operate on an 'arm's length' basis from Defra Ministers as it provides advice directly to them. The AHWBE was set up following the findings of the Independent Responsibility and Cost Sharing Advisory Group

73. After reviewing the outcomes of the Responsibility and Cost Sharing Report, Defra Ministers announced the creation of a new Animal Health and Welfare Board for England on 26th April 2011. Its press release on the same day confirmed the status of the AHWBE and that it was not a NDPB. The Board is ultimately responsible to Defra Ministers who are legally responsible for their decisions taken on the Board's advice and remain accountable to Parliament. Therefore, final decisions on animal health and welfare policy remain in the hands of Defra Ministers. Defra's Permanent Secretary as Accounting Officer is ultimately responsible to Parliament for ensuring that Defra policies and programmes (including any approved AHWBE recommendations on Animal Health and Welfare issues) are delivered as economically, efficiently and effectively as possible.
74. In respect of the AHWBE, the Commissioner has decided that the information withheld under this part of the request does represent an 'internal' communication.
75. The Commissioner's next step is therefore to consider the public interest test.

Public interest arguments in favour of disclosing the withheld information

76. Defra recognised that there is a public interest in disclosure of information concerning advice and discussions on badger control, as there is an interest in transparency and accountability in controversial policy areas.
77. The complainant stated that the decision to proceed with badger culling trials was taken on 14 December 2011 and the information she requested was from between 1 September 2012 and 28 February 2013, almost a year later. Therefore, she did not consider Defra's argument to be valid.
78. There has been a significant amount of interest in the issue of badger control from the press and members of the public and discussions in the media, and greater transparency makes government more accountable to the electorate and increases trust.
79. There is also a public interest in being able to assess the quality of advice being given to ministers and subsequent decision making. Equally Defra recognised that there is a public interest in understanding the influence that stakeholder organisations, such as the NFU, may have had on the Department's decisions.

Public interest arguments in favour of maintaining the exception

80. Defra explained that its TB policy covers a wide range of activities to address the problem of bovine tuberculosis. These activities include developing the draft [Strategy for achieving a Bovine Tuberculosis-Free status for England](#) which was consulted on in 2013, which includes Vaccines research, policy and deployment, Risk Based Trading, TB testing, cattle measures, action on non-bovines and controlling tuberculosis in badgers. The AHWBE provides advice to Defra Ministers on all strategic animal health and welfare policy matters relating to kept animals (excluding the welfare of zoo and circus animals) in England.
81. Controlling tuberculosis in badgers through the recent pilot culls is just one aspect of this work. It is important to set this in the context of the wider programme of work.
82. The Commissioner sought further clarification from Defra in relation to its 'safe space' arguments and asked specifically:
 - (a) when the decision for the cull was made;
 - (b) why Defra considered that it still required 'safe space' after the decision was made;
 - (c) when does Defra envisage that the 'safe space' will no longer be required;
 - (d) when was the "Bovine Tuberculosis Evidence Plan" dated October 2012 published;
83. Defra explained that the Secretary of State announced in July 2011 that she was minded to allow industry-led culling under licence from Natural England. In December 2011, Defra published its policy statement on badger control and announced that culling would proceed in two pilot areas initially. This presupposed the putting in place of acceptable arrangements for the pilots, without which they would not have proceeded. Final letters authorising culling to go ahead were issued to the licensees at the end of February 2013.
84. As described in the paragraph 80 above, TB policy covers a range of activities which address the problem of bovine tuberculosis. Discussions at the AHWBE relate to this much wider range of issues and not just the pilot badger culls. Additionally, Defra pointed out that the complainant's request did not restrict itself to information about the pilot cull, but was for all correspondence "in relation to bovine TB and badger control" between the specified dates. The request therefore encompasses the full range of information on measures to control bovine TB, which are at varying stages of discussion and policy development. While decisions had been taken on the cull by the time of the request, the same cannot be said in respect of many of the strands of policy being considered by the AHWBE and caught by the request.

85. Defra consider it is important that officials and those involved in the development of policy have safe space in which to consider ideas which may not yet be the final policy position, and which might, wrongly, be taken to represent an official view. Disclosure of internal communications produced at the early stage of the policy-making process, while various options are being considered, may satisfy curiosity but would not be in the public interest. The badger cull was a controversial policy, set amid the competing concerns of wildlife conservation and reduction in the costs of bTB control to the UK farming sector. This is a major policy area with supporters and detractors on both sides. Defra regularly publishes information on TB-related issues and has recently consulted on the draft Strategy. However, there remain areas where a safe space is still needed to protect policy discussions on the other strands caught by the request as mentioned above.
86. Also, allowing ill-informed assumptions to be made, or unduly raising expectations through the publication and discussion of views exchanged in internal communications whilst policy is still being developed will lead to resources being diverted during time critical stages of that policy development and, furthermore, disclosure of preliminary thinking might impact on the selection of the best options because of adverse public reaction.
87. Defra explained that the draft Strategy for achieving a Bovine Tuberculosis-Free status for England is a long term plan. Policy developments in this area will be regularly discussed at the AHWBE so a "safe space" will be required for these discussions for the reasons quoted above.
88. The October 2012 draft was finalised and published in March 2013 (and is so dated):

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221077/pb13909-evidenceplan-bovine-tuberculosis.pdf
89. Defra stated it believed the public interest test lies in favour of withholding the information in order to allow AHWBE to consider carefully and provide advice on a full range of policy options.
90. This is considered to be a vital part of the policy development process that enables the Board to formulate its own decisions in relation to animal health and welfare issues, which would be unduly constrained if all considerations were subject to public scrutiny.

Balance of the public interest

91. The Commissioner recognises there is a public interest in transparency, openness and accountability in relation to decisions made by

government to instigate change. In this case he considers the public interest is strong due to the high media profile and involvement of the public in protests against the cull.

92. However, he also notes that the specific content of the withheld information is likely to be of limited value in assisting the public's understanding of the decisions. The information consists mostly of draft meeting notes and minutes, and secretariat reports as well as covering emails.
93. The Commissioner also considers there is a public interest in the public being informed on this issue to enable them to engage in debate and discussion. The argument that legislative changes can best be made by informed contributions from interested parties based on the full knowledge of the evidence base behind policies and consultations is a valid argument which the Commissioner recognises and gives weight to.
94. The Commissioner also acknowledges the 'safe space' argument and recognises that part of the reason for needing a safe space is to allow free and frank discussion; the need for a safe space exists regardless of any impact on the candour of debate. The Commissioner has therefore gone on to consider the safe space arguments relevant to this request.
95. The Information Tribunal in the DfES⁵ case found that ministers and officials were entitled to time and space to agree policies by exploring safe and radical options without the threat of media involvement or external scrutiny. Therefore, the need for a safe space to debate and reach decisions without external comment is a valid argument.
96. The Commissioner recognises the public interest in preserving a safe space in which proposals can be put forward and discussed to allow the development of new legislation or policies leading to new or amended legislation. He considers that to release internal notes detailing accounts of conversations and discussions with third parties which show their provisional positions with regard to a proposal may erode the 'safe space'. The Commissioner considers there is a public interest in a public authority maintaining a safe space to allow ministers and officials to develop ideas, provide clear views and to debate live issues arising from the discussions it has with third parties which may influence the development of policy and reach decisions away from external interference and distraction.

⁵ Information Tribunal reference EA/2006/0006

97. The need for a safe space will be strongest when the issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight. The timing of the request is therefore an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072, 29 April 2008)*:

"This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."

98. Public authorities may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this sort of safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.

99. In this case the request was made on 18 April 2013. As Defra have explained above, although the decision to proceed with a cull was made in 2011, the draft Strategy for achieving a Bovine Tuberculosis-Free status for England is a long term plan. Policy developments will be regularly discussed at the AHWBE so a "safe space" will still be required.

100. The Commissioner has carefully balanced the arguments for maintaining the exception against the arguments in favour of disclosure. He considers that there is a strong public interest in assisting the public in understanding decisions made by DEFRA in this area and enhancing public debate on this issue. However, he also recognises there is a public interest in maintaining a safe space for proposals to be developed and discussed.

101. The Commissioner has therefore decided that the public interest in maintaining the exception outweighs the public interest in disclosure. Accordingly DEFRA has correctly applied this exception to the withheld information.

Right of appeal

102. 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: GRC@hmcts.gsi.gov.uk

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

103. 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.

104. 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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SK9 5AF