

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 February 2023

Public Authority: Natural England
Address: Foss House
Kings Pool
1-2 Peasholme Green
York
YO1 7PX

Decision (including any steps ordered)

1. The complainant has requested information relating to the culling of badgers.
2. The Commissioner's decision is that Natural England (NE) has not correctly relied on Regulation 12(6).
3. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation:
 - Confirm or deny whether access has been permitted to Forestry Commission land for culling Badgers.
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 4 August 2022, the complainant wrote to NE and requested information in the following terms:

"Please disclose whether access has been permitted to Forestry Commission land for culling Badgers."

6. NE responded on 18 August 2022. It stated that it was unable to confirm nor deny whether the information was held.
7. Following an internal review NE wrote to the complainant on 16 September 2022, it stated that it was upholding its original position.

Scope of the case

8. The complainant contacted the Commissioner 2 October 2022, to complain about the way their request for information had been handled.
9. The Commissioner has considered whether NE is entitled to rely on Regulation 12(5)(a) in combination with Regulation 12(6), to refuse to confirm or deny if the requested information is held.

Reasons for decision

Regulation 2(1): Is the information environmental?

10. Regulation 2(1) of the EIR defines environmental information as:
"...any information in written, visual, aural, electronic or any other material form on—
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape, and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

11. As the requested information relates to access to land for culling beavers, the Commissioner is satisfied that the requested information is Environmental and therefore falls under EIR.

Regulation 12(5)(a) international relations, defence, national security or public safety

Regulation 12(6) A public authority may respond neither confirming or denying holding information which would adversely affect any of the interests referred to in regulation 12(5)(a)

12. Regulation 12(5) states:

"...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

13. Regulation 12(6) provides that a public authority can respond to a request by refusing to confirm or deny that it holds the requested information, if doing so would adversely affect public safety. This is often referred to as 'neither confirming nor denying' (NCND) that the information is held.
14. It is not necessary to show that both potential responses would have an adverse effect on the interests protected by regulation 12(5)(a). It is sufficient to demonstrate that **either** a confirmation **or** a denial would have an adverse effect.
15. In the circumstances of this complaint, the complainant is requesting confirmation or denial, of whether badger culling access has been granted on the Forestry Commission's land.
16. Public safety is not defined within EIR. However, the Commissioner accepts that information that would undermine the security of particular operations, or identify individuals or locations involved in controversial projects, are relevant when considering public safety.

He is satisfied that badger culling would fall into both of these categories.

17. If a public authority is likely to receive numerous similar requests, it needs to make sure that it is consistently refusing to confirm or deny whether the information is held. If, for example, NE denied holding information relating to some locations, but refused to confirm or deny holding information relating to others, a pattern would develop which would effectively signpost where badger culling was taking place.
18. Under the EIR, the exception from the duty to confirm or deny is subject to the public interest test. NE explained that Badger Control Policy is an extremely sensitive issue and has provoked considerable public interest and debate.
19. NE explained that if it were to start to confirm or deny locations where badger culling was permitted in any similar request, it would allow protestors to better locate individuals and staff members who are associated in these locations. These individuals could then be targeted for the purpose of objection whilst also putting them at risk of harm or harassment.
20. The complainant advised that the weight of the public interest in disclosing the requested information is substantial, this is due to the Government's badger control policy being highly controversial.
21. The complainant stated, "access for culling badgers has been allowed on [Ministry Of Defence] land and in [Natural Nature Reserves] and there has been no adverse effects on public safety as a result of the disclosure of this information."
22. The complainant stated that if NE was to disclose the requested information, the location of land accessible for culling would not be disclosed and landowners or tenants who had been given permission would not be identified. Meaning there would be no adverse affect on public safety.
23. The complainant also explained that "Generally, there is a strong public interest in the creation of a sustainable environment, in transparency and accountability..." this will also aid public understanding and give them an opportunity to express its concerns. In which the complainant advised "an informed and involved public helps to promote good decision making."
24. The complainant detailed to the commissioner that the requested data could be used by local wildlife groups with the purpose of protecting badgers.

The Commissioner's Decision

25. The Commissioner recognises that the term 'public safety' is not defined in EIR, but in broad terms allows a public authority to withhold information which if disclosed would result in hurt or injury to a member of the public. This hurt or injury can be anything from physical to mental health.
26. Whilst the Commissioner agrees that there may be a public interest in the requested information. He is mindful that if NE was to start confirming or denying specific locations of badger culling, individuals who may be involved or associated with that location could be at risk of some form of harm.
27. The Commissioner appreciates NE's point the need for consistency in order to prevent a "mosaic effect" from emerging (in which individual snippets of information can be pieced together to form a larger picture), however, NE must still consider each request and the effect of issuing a confirmation or a denial on its own merits.
28. As this request relates to Forestry Commission land, and not land owned by an individual or small company, it is likely that, if NE held information, it could relate to any of a large number of Forestry Commission-owned sites in that area, so a confirmation or a denial that some of that land is used doesn't provide any more precision about culling activity than knowing the approximate cull area – which already appears to be in the public domain.
29. Equally because the Forestry Commission owns land across the country, issuing a confirmation or a denial would be of no assistance to anyone wishing to identify the boundaries of the cull areas more precisely.
30. If a mere confirmation or denial that information is held cannot be used to identify cull zone boundaries more precisely, or to identify specific estates or farms where activity was likely to take place, the Commissioner cannot consider that issuing a confirmation or a denial is more likely than not to adversely affect public safety. He considers that the risk to individuals would not be significantly greater than the risk they already face as a result of being within a cull zone.
31. For the above reasons the Commissioner is not satisfied that NE has correctly relied on Regulation 12(6) to neither confirm nor deny holding the requested information.

Right of appeal

32. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

33. 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.
34. 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

Catherine Fletcher
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