Appeal number: EA/2017/0160

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

NATURAL ENGLAND **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondents**
TOM LANGTON

TRIBUNAL: JUDGE ALISON MCKENNA
DAVID WILKINSON
MICHAEL HAKE

Heard in public on 12 and 13 December 2017 at Field House, London

Appearances:
Rory Dunlop, counsel, for Natural England
Christopher Knight, counsel, for the Information Commissioner
Tim Nesbitt, counsel, for Mr Langton

DECISION

1. The appeal is dismissed.

2. Natural England is directed to comply with the Decision Notice.

REASONS

Background to Appeal

3. Natural England is a Non-Departmental Public Body established under the Natural Environment and Rural Communities Act 2006. It is authorised to undertake wildlife licensing activities on behalf of the Government, including for badger control.

4. Mr Langton is a conservationist with a particular interest in European and UK protected wildlife species. Mr Langton made an information request to Natural England on 30 August 2016 in the following terms:

> *"I am concerned with damage to other species of wildlife from removing badgers via the carnivore release effects.*
>
> *Please can you supply under FOI, copies of the Impact Assessments of culling and culling operations upon protected European Species and UK protected species and for all designated nature conservation areas for all of the licensed badger cull areas for 2016, with names redacted, as before if necessary.*
>
> *Can you also confirm the public or statutory consultation period under which this information was provided, as is required, or your reasons for not placing it under public consultation.*
>
> *Can you also indicate the measures taken to avoid, mitigate and monitor any such impacts".*

5. In its initial reply on 27 September 2016, Natural England disclosed some redacted habitat regulations impact assessments ("HRA"s)[1], but refused to disclose other information falling within the scope of the request, in reliance upon regulation 12 (5)(a) of the Environmental Information Regulations 2004 ("EIRs"), concerning public safety. On conducting an internal review dated 23 November 2016, Natural England confirmed its decision, explaining that:

> *"…if this information is released it would be used in conjunction with other information that is already, or may yet come into, the public domain to identify participants and could identify the control zone areas. As the Badger Control Policy*

[1] An "HRA" is a formal assessment of the implications of any plan or project capable of affecting the designated interest features of European Sites such as such as Special Areas of Conservation ("SAC"s).

is a sensitive issue, we believe that the release of this information would impact adversely upon the protection of private property, public buildings and the health and safety of individuals and our staff. In view of this risk we decided not to disclose the requested information".

6. Mr Langton complained to the Information Commissioner, who issued Decision Notice FER0659789 dated 4 July 2017. The Decision Notice concluded that Natural England was incorrect to rely on EIR exception 12 (5)(a) EIRs and directed Natural England to disclose the requested information.

7. The Information Commissioner noted in her Decision Notice that she had been provided with a copy of the withheld information, which comprised a number of redacted "*SSSI*[2] *feature – sensitivity screening matrices*" and further HRAs. She described Natural England's position as that disclosure of this withheld information would allow protesters to identify with greater precision and clarity the areas in which licensed activity (badger culling) was taking place and to identify the participants in the licensed activity. This would, in Natural England's view, allow protesters to concentrate harassment and intimidation activities on participants and their families located within these areas. Natural England argued that this would adversely affect the safety of those individuals and also of Natural England staff.

8. The Information Commissioner accepted (at paragraph 43 of the Decision Notice) that a motivated individual could use the withheld information to confirm or refine their understanding of the Control Areas, and (at paragraph 44) that badger control is a sensitive issue which has provoked public interest, debate and protest. However, she concluded (at paragraph 55) that the alleged increase risk to public safety, as a result of refining cull boundaries and identifying large landholders with more certainty, was at best speculative. She was not satisfied that release of the withheld information would cause direct or actual harm to public safety or increase the risk of harm to a degree which could be said adversely to affect public safety. As she concluded that the exception relied upon was not engaged, she did not need to consider the balance of public interest.

9. Natural England appealed to the Tribunal. It asked the Tribunal to quash the Decision Notice and allow it to withhold the requested information on the basis of the EIR exception previously relied upon. The Information Commissioner and Mr Langton opposed the appeal, and asked the Tribunal to uphold the Decision Notice and to direct that the withheld information be released.

Appeal to the Tribunal

[2] A "SSSI" is a Site of Special Scientific Interest, designated as such because of distinctive flora, fauna, geological or physiographical features.

10. Natural England's Notice of Appeal dated 31 July 2017 relied on grounds that the Information Commissioner had reached erroneous factual conclusions about the likelihood of disclosure leading to an increase in protester activity and the likely results of an increase in protester activity. Further, that the Information Commissioner had erred in law in setting the threshold for the engagement of regulation 12 (5) (a) EIR too high, because public safety and public security is adversely affected when members of the public are exposed to a higher risk of intimidation and harassment.

11. The Information Commissioner's Response dated 29 August 2017 maintained the analysis as set out in the Decision Notice, noting that Natural England's grounds of appeal relied on evidence of alleged risk which had not been placed before the Information Commissioner but which it was said would be placed before the Tribunal.

12. Mr Langton's Response dated 28 September 2017 also noted the difficulty of responding to a case which had not yet been made. He generally supported the Information Commissioner's position, but wished also to emphasise the public interest in disclosure of the withheld information which, he submitted, would allow proper and informed scrutiny of the adequacy of assessment of the environment impact of the badger cull.

13. In pre-hearing Case Management Directions, the Tribunal agreed that Natural England's witnesses could be granted anonymity in these proceedings, although their names were required to be made known to the Tribunal itself. The application for anonymity was not opposed by the other parties and the Tribunal concluded (in a reasoned Ruling) that it would be fair and just to grant that application. Its decision to do so did not involve the making of any findings of fact about alleged risk to the witnesses and may not be relied upon as supporting Natural England's views on that subject (see paragraph 38 below).

14. We heard live witness evidence from a senior employee of Natural England, who was known in these proceedings as "witness A", over a speaker-phone. We also considered the written witness statements of Natural England's witnesses "B", "C" and "D".

15. Mr Langton relied on the evidence of Mr Ray Puttock, an anti-badger-cull activist, from whom we heard in person. We also considered written witness evidence submitted by Mr Langton himself and from Mr Dominic Woodfield.

16. We are grateful to all these witnesses for their assistance, and also to all three counsel for their clear oral and written submissions.

17. We had before us agreed Open and Closed bundles of documentary material. We have not found it necessary to write a separate closed part of this Decision, as we can refer to the withheld material in this Open Decision without revealing its precise contents.

18. As mentioned above, the Tribunal considered a Closed bundle, containing the withheld information and other documents which were revelatory of it, pursuant to directions made under rule 14 (6) of the Tribunal's Rules. This bundle was not disclosed to Mr Langton or his representatives. The witness statements of witnesses A, B, C and D were provided to Mr Langton in redacted form to protect their anonymity.

19. We also heard some of witness A's oral evidence in closed session. Mr Knight, on behalf of the Information Commissioner, tested witness A's evidence in the closed session, adopting the Information Commissioner's role of guardian of the legislation, as referred to by the Court of Appeal in *Browning v IC* [2014] EWCA Civ 1050. Although Mr Langton and his representatives were required to leave the hearing room for that part of the evidence, the Tribunal gave them a "gist" of what had occurred in their absence when they returned, and offered Mr Langton's counsel the opportunity to ask further questions.

The Law

20. It was common ground that the information request in this case fell to be determined under the Environmental Information Regulations 2004. These Regulations are the domestic iteration of the UK's obligations under the Aarhus Convention and the EC Directive (referred to below) and must be interpreted consistently with those documents, following *Vodafone 2 v HMRC* [2009] EWCA Civ 446.

21. We were referred to the Preamble to the Aarhus Convention, in which the right of citizens to have access to environmental information and to participate in decision-making about environmental matters is enshrined, and to article 2 of that Convention, which defines "*the public"* as "*one or more natural or legal persons*". We noted that article 4 of the Convention provides for refusal of access to environmental information if the disclosure would adversely affect "*international relations, national defence or public security"*.

22. We were also referred to Directive 2003/4/EC, which notes at paragraph 16 of the Preamble the requirement for exceptions to the presumption of disclosure to be interpreted in a restrictive way. It also defines *"public"* in article 6 as "*one or more natural or legal persons…"*. In article 4 (2), it provides exceptions to disclosure on grounds of "*(b) international relations, public security, or national defence";* and "*(c) …the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature"*.

23. The EIRs set out exceptions to the duty to disclose environmental information as follows:

> *"12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –*
>
> *(a) an exception to disclosure applies under paragraphs (4) or (5); and*
>
> *(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
>
> *12 (2) A public authority shall apply a presumption in favour of disclosure."*

24. The exception relied upon in this case is in regulation 12 (5) (a), which provides as follows:

> *"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;

…"

25. The Tribunal's jurisdiction in this appeal is derived from the Freedom of Information Act 2000[3], as follows:

> *"(1) If on an appeal under section 57 the Tribunal consider -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

26. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal consider -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

27. The Tribunal was referred to the First-tier Tribunal's Decision in *Ofcom v IC and T Mobile* (unreported) EA/2006/0078, which concerned a request for mobile phone base station data, which was resisted by Ofcom, *inter alia,* on grounds of public safety. This involved an analysis by the Tribunal of the risk of theft, vandalism and unlawful use of the stations if their locations were revealed and the associated risk of compromising the ability of the emergency services to function if the base stations were unable to work. It was accepted that, in these circumstance, the public safety exception was engaged but that the

[3] Imported by regulation 18 of the EIRs.

public interest favoured disclosure. The appeals, to the Supreme Court and CJEU, did not disturb the Tribunal's conclusions on the engagement of the exception.

28. The Tribunal was also referred to the Decision of a differently-constituted First-tier Tribunal in *Natural England v Dale and Information Commissioner* (unreported) EA/2014/0094, 0160, 0234 and 0311, which deals with issues strikingly similar to those in this case. Natural England's appeal in *Dale* was dismissed at first instance, and there was no appeal to the Upper Tribunal. Before finding that the public safety exception was not engaged in *Dale,* the Tribunal heard evidence of harassment, intimidation and damage to property experienced by participants in the cull and which precipitated an application by the NFU for an injunction. The Tribunal had evidence before it of the facts relied on before the High Court in granting that injunction, and also evidence from the police about the number of arrests and prosecutions of protestors (paragraph 104).

29. The Tribunal concluded at paragraph 72 that *"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"* and at paragraph 73 that *"we do not consider it helpful or necessary to draw an artificial boundary between the concepts of actual harm and the 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 the latter….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."* The Tribunal concluded at paragraph 80 that the evidence of damage to badger traps was not what Parliament intended to be covered by public safety because such activity, whilst unlawful, had *"no impact on the wider community"*.

30. Natural England submitted that the Decision in *Dale* was decided on different evidence, at a different time, and that its analysis of the law was unclear. The Information Commissioner and Mr Langton submitted that the Decision in *Dale* was correct, and that this case was effectively an attempt by Natural England to re-argue the same issues and obtain a different outcome. We note here that we are not bound to follow the Decisions of other First-tier Tribunals.

31. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

Evidence

32. Witness A is a senior manager at Natural England. She explained in her witness statement that the requested information had been withheld because it would *"allow protestor groups to quickly identify, and with greater precision and certainty, the areas in which badger control is taking place"*. She exhibited to her statement some maps, showing the boundaries of the licenced badger control areas, with an overlay which showed the boundaries *"as mapped by protestor groups"*. The boundaries were not always coterminous. She said that the protestor group maps she referred to were those published by protestor groups on social media. She referred in particular to the Facebook page of a group called "Stop the Cull", which the exhibited print out showed had been "liked" 92,000 times,

and "followed" by 87,000 people. The names, phone numbers and addresses of alleged participants in the cull had been published on this website and she said this had led to people receiving nuisance phone calls, and to malicious negative reviews of associated businesses such as caravan parks being posted on-line, in order to disrupt the alleged participant's business.

33. She stated that there had been little or no harassment or intimidation of participating persons in the areas apparently unknown to the protestors (by reference to the maps) but that there had been "*direct action, damage to traps and trespass…confined entirely to the area known to protestor groups*". She concluded that, if the precise boundaries were known to protestors, "*these participants would likely be subject to significant levels of harassment comparable to that seen in the rest of the currently known area"*. In cross-examination, witness A accepted that she does not know exactly how much the protestor groups know about the boundaries of the cull zones. She also accepted that protestor groups might be keeping the extent of their knowledge a secret. However, she maintained that there is a direct correlation between incidences of harassment in the areas known to protesters (as shown by the maps) and the lack of such incidences in the "unknown" areas.

34. Witness A described a known protestor tactic which she called "*phishing*," whereby farmers are telephoned on publicly-available numbers and asked questions designed to reveal whether or not they are participants in the cull. She said that the caller may pose as a Government official or NFU official during the phone call. She thought that disclosure of the withheld information would assist protestors in making more focussed "phishing" calls to confirm the precise boundaries of control zones. She accepted in cross examination that refining the mapping is only a part of the protestor process and also that the process of refinement of protestor knowledge of the boundaries of cull zones would take place with or without disclosure of the information in dispute, as it involves on the ground knowledge and "phishing".

35. Witness A exhibited a table of figures to her witness statement, showing the incidence of damage to badger traps, which she later accepted to be incorrect because the figures in the table did not correlate to the figures in her witness statement. Some of the data she relied upon related to trap damage in 2017, with which we are not concerned in this appeal. During cross-examination on this subject by Mr Nesbitt, she accepted his estimate was that there had been damage to 707 traps over 21 cull areas, which is about 34 traps per area over the two years. She was unable to put this into context by telling the Tribunal how many traps were used in total in each area, as she said it depends on the size of the area. She said that the recommended number is 1.2 traps per kilometre squared. She asserted that, in one area, 20% of the traps had been stolen or damaged, so the extent of loss was significant, even if the actual numbers were low. She did not accept that the trap damage numbers were in single digits in some areas. She explained that the traps are owned by companies formed by consortia of landowners and farmers in each cull zone, that they are built to particular specifications and that they cost between £47 and £100 each. She was aware of some arrests in relation to alleged trap damage, but of no prosecutions. In answer to a question from the Tribunal, she said she was aware of one police caution in 2016, but that this had not been mentioned in her witness statement.

36. Witness A also referred in her witness statement to an incident of criminal damage (the severance of milking parlour pipes) in Autumn 2017, but did not explain why she thought this was related in any way to a protest about the badger cull. She referred to a "Day of Action" which had taken place as long ago as 2012, at which the police had attended. She said that it had been primarily about pheasant shooting but that a secondary motive was the badger cull. She understood it to have been peaceful and that no arrests were made. She referred to the granting of a High Court injunction against protestors in 2013 and to contempt of court proceedings against one individual who had breached the terms of that injunction in 2015. She did not refer in her witness statement to the arrest, charge, prosecution or conviction of any person in the criminal courts around the time of the information request. In cross-examination, she said that there were other incidents of harassment to individuals, known to her, but they were not mentioned in her witness statement as the people concerned were too afraid to give evidence. The Tribunal asked how many people she was referring to, and she said it was "quite a few over the years". She knew of no arrests for offences of violence apart from an incident in 2014 when she said a Natural England employee was confronted. She suggested this had resulted in a conviction for assault but it was put to her by Mr Dunlop that it was in fact a conviction for aggravated trespass. She said she could not confirm this as she did not have the details.

37. As noted above, Witness A referred to the fact that the NFU applied for and obtained an injunction against certain named protesters in 2013. She explained that the new cull zones introduced in 2016 were not covered by the terms of that injunction. She said that NFU had not applied for a new injunction in relation to the most recent licenced areas, and that was a matter for them. She said she was not aware of anyone contacting Facebook to ask to have the "Stop the Cull" page taken down when it published participants' contact details.

38. Witness A also referred in her witness statement to previous Tribunal rulings regarding the anonymity of witnesses as supporting her case about intimidation and harassment being experienced by cull participants and Natural England staff. As the Tribunal explained, the granting of anonymity to witnesses in Tribunal case management directions (as in this case) is a measure involving no formal findings of fact and may not be relied on as supporting Natural England's contentions in this regard.

39. In cross-examination, Witness A accepted that she had also given evidence to the Tribunal hearing the *Dale* case in 2014. In answer to Mr Knight, she was unable to point to any examples of adverse consequences arising directly from the release of the disputed information in *Dale*, which had also originally been withheld by Natural England on public safety grounds. Also in cross-examination, witness A accepted that the following activities of protesters are perfectly lawful: phoning a farmer for lobbying purposes; checking setts to which there is access via a public footpath; expressing opinions about the cull on social media; attending a peaceful public protest such as the "Day of Action". She accepted that the protestors were more thinly spread now that the cull zones covered more of the country, but she thought that they focussed their activities on areas applying for new licences and the use of social media.

40. In witness A's closed evidence (gisted in open) she accepted that the withheld information would not enable protesters to refine *all* the boundaries, only some.

41. Witness B also works for Natural England but is not involved with badger control licences. For the benefit of the Tribunal, he had undertaken an exercise in which he first tried to map the boundaries of two badger control areas using only information already in the public domain, and then repeated the exercise with access to the withheld information. He exhibited his findings. He was not required to attend for cross examination.

42. Witness C describes in her witness statement incidents of harassment and intimidation directed at her family over a period of six weeks during the summer of 2016. She describes late-night visits by strangers to the lane outside her house, people standing outside her house talking and making the dogs bark, and torches being shone into the house to wake up her children. She thinks there may have been some incidents of trespass to her property. She says her husband's car was "*tail-gated*" in a narrow country lane and that he was "*confronted*" outside the house. She describes feeling "*terrified*". She called the police, who attended several times but no one was ever arrested, charged, prosecuted or convicted in relation to witness C. The Tribunal asked why witness C thought that these incidents were related to the badger cull, as she did not explain this in her either Open or Closed witness statements. The Tribunal heard more about witness C's circumstances in closed session and Mr Dunlop submitted that the Tribunal could make the relevant connection on the balance of probabilities. Witness C was not required to attend for cross examination.

43. Witness D describes events in the Autumn of 2016, when his name, address and telephone number were posted on the "Stop the Cull" Facebook page. There followed some very unpleasant comments posted about him on social media, unwanted post received, silent or abusive telephone calls made both to the business landline (which is situated in the house occupied by his parents) and to his own mobile phone. He recounted (having made a log) the numerous threats to himself, his family and their property made by the callers, and describes feeling "*utterly terrified*". He states that a garage mechanic found that a tracker device had been attached to his vehicle without his knowledge. The police were frequently involved, but no one has been the subject of proceedings in relation to witness D. Witness D was not required to attend for cross-examination.

44. Ray Puttock is an anti-badger cull activist who has for some years undertaken a voluntary liaison role as between the anti-cull protestors and the police in Gloucestershire. He also gave evidence in the *Dale* case. He described the activities of the majority of protesters as involving: patrolling public footpaths in areas where badger setts are known to exist, checking that the activity of the cull participants is always lawful, and looking for badgers which have been injured but not killed by the cull marksmen. He said he has his "*ear close to the ground*" and knows what is happening beyond his home area. He was aware of unacceptable behaviour (by both sides) initially, but said that since 2013 there has been an improvement in everyone's behaviour and he knew of only one criminal conviction since then, in 2014. This was the incident which witness A had referred to. Mr Puttock said the conviction in that case was for aggravated trespass. He said that the police operation set up in 2013 ("Operation Themis") has been scaled down because fewer police resources are now required for anti-cull protests. Nevertheless, there is a police protocol which ensures that protester activity is reported back to the central command.

45. Mr Puttock said he was aware of a few arrests for damage to traps but no convictions. He knew of someone being charged for cage damage in Cheshire. He said he is always

made aware of police involvement around the country because the liaison people in each police authority area have a weekly meeting by skype. He was surprised that he had not previously heard about witnesses C and D's complaints. It was put to Mr Puttock by Mr Dunlop that he had over-stated the level of his knowledge as he did not know about witnesses C and D. Mr Puttock expressed some scepticism about witness C's evidence as it was unsupported by a crime reference number. The Tribunal pointed out that witness C complained in her witness statement that the police had not made a note when she called them, so that may be the explanation. Mr Puttock said that the regrettable behaviour towards witness D was likely to have been perpetrated by the small "Stop the Cull" group, especially in view of witness D's appearance on its Facebook page. He described witness D as well-known for his unpleasant behaviour towards lawful protesters, which had made him a target, although Mr Puttock did not agree with what had been done to him.

46. Mr Puttock was aware of the "Stop the Cull" group, which he said comprised only five people, including the person who had breached the High Court injunction. He said that they are active on-line but not on the ground and that they are not representative of the anti-cull movement. He has been involved in a liaison role with the police in respect to their activities and said he knows all of them. Mr Puttock said he had checked back over their Facebook page for the past six months and found fifteen posts which mentioned a farmer by name. Five of these had related to the same person. Mr Puttock said that he dissociated himself from the "Stop the Cull" group and he regretted that the NFU had not taken out a further injunction against them, as it had been effective. When asked about the thousands of "likes" on the "Stop the Cull" Facebook page, Mr Puttock said there are many "keyboard activists", who do not get involved on the ground.

47. As the number of those involving themselves in anti-cull activity has declined and the number of cull zones has increased, Mr Puttock said that the local groups could not increase the scope of their activities and were now focussed on protecting particular badger clans so as to allow them to re-populate after the cull. He said that in the early days of the cull there would be 200 protesters in Gloucestershire, trying to disrupt the trial of free-shooting. Now there are only 50 people consistently involved. He explained that sett surveying means spending a lot of time outside in the cold for ten months of the year when nothing is happening, whereas the cull season is for six weeks only from early September to mid-October.

48. Mr Puttock said that he personally is not in favour of damaging traps, because it is more humane to kill a badger which is confined in a trap with a clean shot than to use a free shot and risk injuring it. He did not accept that there is a large number of people damaging traps. He said that if 30 traps were damaged over the six weeks of their use, then that was five per week and one person could do that. He said that no one concerned with animal welfare would damage the pipes in a milking parlour as this would cause distress to the cows, so he did not accept that the incident referred to by witness A was related to the badger cull protest.

49. Mr Puttock did not think that the mapping of the control zone boundaries published on the internet was representative of the state of knowledge about the cull zones by the protest movement, because the wider movement is comprised of local groups with extremely detailed knowledge of their local environment, whereas the maps are published by "Stop the

Cull". He said it was immediately obvious to the local groups if there was any baiting activity (leaving peanuts on the ground) or the setting of traps. They knew which badger setts were active because they regularly checked the badgers' latrines for recent use. He said that he knew his local group had an accurate knowledge of the cull zone from its sett surveying and local intelligence. They had originally misjudged a boundary but had corrected their knowledge by sett-surveying. He did not accept that the protesters generally relied on the maps published by "Stop the Cull" or that the publication of the requested information would lead to an increase in protestor activity such as that experienced by witnesses C and D. He said that the anti-cull movement does not have sufficient supporters to take such an approach and, in any event, they generally preferred peaceful activity. His view was that witness A had misunderstood how the anti-cull movement operates.

50. Mr Langton is a professional biologist in the field of nature conservation. In his witness statement he described his interest in investigating and understanding the indirect effect upon non-target animals and eco-systems of the large-scale culling of one particular species. He described the eco-system disruption which may occur when a dominant predator is removed from an environment and the ripple-effect this has on natural communities. He outlined his misgivings about the assessment of these effects as carried out by Natural England, and explained that this concern was the impetus for the information request. The Tribunal heard that Mr Langton is also seeking permission for a judicial review of Natural England's approach to these matters. Mr Langton stated that he is worried that there is potential for widespread ecological consequences from the badger cull, which may not have been the subject of proper scrutiny by Natural England. He concludes that there "*is a lot at stake for nature…and considerable public and environmental interest in this issue*".

51. Mr Langton describes Natural England's reliance on public safety concerns to justify withholding the requested information as "*flimsy*". He regretted the unacceptable treatment of witnesses C and D but noted that such behaviour by protestors did not appear to have been widespread. He does not accept that the disclosure of the information he has requested would lead to an increase in such behaviour. He was not required for cross-examination.

52. Dominic Woodfield is a professional ecologist and environmental planning consultant. In his witness statement, he described his interest in the withheld material and the public interest in its disclosure. He referred to the necessity of the scientific community, and the public, being able to scrutinise the procedures followed by Natural England in assessing and mitigating any impact on protected sites arising from the badger cull. He gave the Tribunal the example of a protected habitat for wintering wildfowl being affected by an out-flux of badgers and in-flux of foxes. He said that the very rationale for a locality being environmentally sensitive and thus protected, for example the presence of the wintering wild fowl, could therefore be impacted by the badger cull. He was not required for cross-examination.

Submissions

53. Natural England's case was that the correct way to interpret EIR regulation 12 (5)(a) was to take note of its context within not only the EIRs but also the Directive and the Aarhus Convention, which both use the phrase "*public security*" rather than "*public safety*".

Mr Dunlop submitted that the term "*public security*" implies protecting the public from the risk of crime (including offences against property), so that an increased risk of crime must be seen to have an adverse effect on public security and that "*public"* in this context means an adverse effect on one or more people, consistent with the definition of that term in the Aarhus Convention and the Directive.

54. Mr Dunlop submitted that EIR regulation 12 (5) (a) was, on the evidence before the Tribunal, engaged as at November 2016 (the material time) because witness A's evidence was that there was almost no damage to traps in the cull areas which had not been identified as such by protesters, whereas in the "known" areas, up to 20% of the traps were damaged. Similarly, witness A's evidence was that badger cull participants in the areas unknown to protesters were not being harassed and intimidated, in contrast to the experiences of witnesses C and D who were in "known" areas. Mr Dunlop submitted that it simply could not be right to say that Natural England had an obligation to disclose information which would make children suffer in the way that witness C's children had suffered without the exception even being engaged. He submitted that the exception was engaged by the increased risk of a crime being committed, so it was immaterial if no culprit had been apprehended.

55. Mr Dunlop also submitted that, if the Tribunal found the exception to be engaged, then it should go on to find that the public interest balance weighed against disclosure, because the withheld information is not of sufficient value to outweigh the public interest in protecting the public from crime. He accepted that there was some limited value in the information requested, but made clear that Natural England did not accept the analysis put forward by Mr Langton and Mr Woodfield of the impact of the badger cull on the wider environment.

56. Mr Knight, on behalf of the Information Commissioner, submitted that the Tribunal's approach to the legal test in *Dale* was correct, namely, that all exceptions to the duty of disclosure should be read restrictively and that this exception should be viewed in the light of the other matters with which it is grouped in the EIRs: international relations, national security and defence. He accepted that "*public safety"* should be read in the same way as *"public security"* in the Directive, but commended the approach of the Tribunal in *Dale* in refusing to adopt an artificial boundary between actual harm and the increased risk of harm, but rather to consider the entire spectrum and decide whether, on the facts, an adverse effect on public safety in either way was demonstrated.

57. In responding to Natural England's case, the Information Commissioner did not accept that any increase in the risk of any sort of crime engaged the exception. Whilst it was accepted that there is a link between crime and public safety/security, it was not accepted that every criminal offence impacts upon public safety/security. As an example, it was accepted that deliberate damage to a badger trap in a field was a criminal offence, but submitted that it was a crime which had little or no impact on the public. In *Dale,* the Tribunal had considered this point by looking for an "*impact on the wider community"*.

58. Mr Knight submitted that the witness evidence relied on by Natural England did not come close to establishing the necessary standard for the engagement of regulation 12 (5) (a). He submitted that witness A had repeatedly referred in her statement to whether

disclosure *"would be likely to…"*, rather than the test in the EIRs of whether it *"would"*, have the required adverse effect. Furthermore, she had relied on examples of harassment which pre-dated the disclosures directed by the Tribunal in *Dale* without pointing to any later adverse consequences of that disclosure. Finally, her evidence as to more recent events was unsatisfactory in failing to link the isolated incidents she described to organised protest, and she had not provided equivalent data about the number of arrests which had been presented to the Tribunal in *Dale.*

59. Whilst sympathising with witnesses C and D, Mr Knight submitted that Natural England had not shown that their experiences were other than isolated cases. He submitted that isolated cases, however unpleasant, did not engage the public safety exception. He noted that the evidence which we had heard from Mr Puttock tended to support the isolated incident analysis. He submitted that the Tribunal should approach the spectrum of risk as follows: the risk of a limited harm would require a higher degree of risk to be established, whereas a lower risk could be established for a higher degree of harm. For example, the risk of one person's house being blown up could engage the exception but the risk of 100 people being sworn at would not. With that approach, it was difficult to see how damage to a badger cage in a field engaged public safety considerations. He submitted that the *Ofcom* case showed circumstances in which there was both significant harm and significant risk, but that the evidence in this case suggested a limited harm requiring a substantial degree of probability.

60. Mr Knight submitted that witness A's admission in closed session (gisted in open) that not all of the withheld information could be used to refine knowledge of boundaries suggested that Natural England had not taken a contents-based approach to the decision to withhold the requested information.

61. Having heard all the evidence, the Information Commissioner maintained the view that the public safety exception was not engaged. If the Tribunal were to find to the contrary, it was submitted that the public interest test was very finely balanced. If the Tribunal were satisfied on the evidence of Natural England's case as to the risk to the public, then very weighty public interest factors would be needed to support disclosure. On the other hand, if Natural England's evidence showed the risk to public safety to be minimal then a less weighty case would have to be made in support of the public interest in disclosure. Mr Knight commented that Natural England had not rebutted Mr Langton's scientific approach, only said it did not accept it.

62. Mr Nesbitt submitted on behalf of Mr Langton that the evidence in this case fell a long way short of engaging public safety considerations. Mr Langton relied on the evidence of Mr Puttock, that opposition to the badger cull consists for the most part of lawful protest, although there is a small group which engages in unpleasant on-line activity. This was said by Mr Puttock to be the same group of people which is covered by the injunction but the evidence points to no criminal conviction even of these activists.

63. Mr Nesbitt reminded us of Mr Puttock's evidence that the anti-cull movement already knows the areas included in the cull from the local groups' reconnoitre activity "on the ground" and that the maps relied upon by Natural England to show the extent of "known/unknown" areas do not reflect the true extent of the anti-cull movement's

knowledge. In these circumstances, he submitted that the disclosure of the withheld information could not have the impact which Natural England claimed. Mr Puttock had also given evidence of a lack of human resources available to undertake any increased protest and had described a re-focussing of local group's activities onto the protection of particular setts.

64. Mr Langton's case was that the regulation 12 (5) (a) exception was not engaged, so the Tribunal did not need to assess the public interest balance. However, the importance of the requested information was explained on behalf of Mr Langton as follows. Without it, interested members of the scientific community and the public are quite unable to assess the impact of the reduction of the badger population on any particular locality. Mr Langton's view was that a reduction in the number of badgers in an area could lead to an increase in the presence of other predators, such as foxes. Natural England's assessment of the local factors in each environmentally sensitive area was therefore seen as an important contribution to the public debate about the cull. He referred the Tribunal to the preamble to the Aarhus Convention which refers to the importance of public participation in decision-making about environmental issues, including the opportunity for the public to express its concerns and said this is what Mr Langton was seeking to do.

65. Mr Nesbitt emphasised the presumption in favour of disclosure under the EIRs and submitted that the evidence before the Tribunal in *Dale* about incidents of harassment had been stronger than in this case, but still did not persuade the Tribunal that the exception was engaged. It was accepted by Mr Nesbitt that damage to property was, in principle, capable of engaging the public safety exception but it depended on the nature of the property. He submitted that the evidence in this case fell short of making the relevant connection between damage to property such as badger traps, and a concern about public safety. Also, that an insufficient connection had been established between the undoubted stress and worry experienced by witnesses C and D and public safety considerations.

Conclusion

66. Natural England's case as to the law was largely accepted by the other parties. We also accept that: the term "*public safety*" in the EIRs should be read as importing the concept of "*public security*" referred to in the Aarhus Convention and the Directive. We accept that, in principle, harm or an increased risk of harm to one person or their property could engage the exception and that there is no additional requirement for there to be widespread disorder and chaos. We find, however, that the placement of "*public safety*" in a composite exception in the EIRs which also includes international relations, defence and national security must also be accorded some significance.

67. We also accept that the "*adverse effect*" referred to in the EIRs may consist either of actual harm or an increased risk of harm, and that whether either concept engages public safety considerations is a question of fact and degree to be assessed by the Tribunal on the evidence and applying the standard of the balance of probabilities.

68. Natural England's case on the evidence may helpfully be divided into three contentions: (a) that disclosure of the information requested would lead to anti-cull campaigners gaining more precise knowledge of the cull zone boundaries; (b) that, in turn,

this would cause or make more likely incidences of criminal damage to property and the harassment of cull participants because such activities only occur in the "known" area on the published maps; and (c) that such activities would have an adverse effect on public safety. We consider the evidence in support of each contention below.

69. As to contention (a), the evidence before us showed that disclosure of (some of) the information requested was one of the ways in which anti-cull protesters could gain more precise knowledge of the cull zone boundaries, in cases where they did not already know them. In summarising the evidence thus, we note that witness A accepted that not all of the withheld information was capable of being used to map a zone boundary, and that Natural England did not appear to have taken a contents-based approach to the withheld information in this regard. Witness B's limited exercise did not assist us in assessing the totality of the withheld information. We accept Mr Puttock's evidence that the local groups know the boundaries anyway and are not reliant on the maps published by "Stop the Cull". We found Mr Puttock to be an impressive and reliable witness, knowledgeable about the anti-cull movement and its ways of working on the ground. We accept that he has insight into the national anti-cull movement, derived from his role in police liaison and his weekly skype meetings with the liaison people in other parts of the country. We accepted his evidence about the "Stop the Cull" group, described further below. By contrast, witness A did not seem to us to have a good knowledge of the anti-cull movement. Natural England's case in this respect was predicated upon the assertion of witness A that the maps published on the "Stop the Cull" website gave us an accurate picture of the state of knowledge of the anti-cull movement as a whole. Her evidence in support of this assertion involved a process of reverse-engineering, whereby she had looked at reported incidences of harassment and related them back to the published maps. We were not persuaded by this approach. We note that she relied on incidences of lawful protest as supporting Natural England's case, some of which was at some distance in time from the date of the information request and Natural England's reply, and we regret that her evidence to the Tribunal failed to distinguish in a number of important respects between instances of lawful protest and criminal activity. On balance, we preferred Mr Puttock's evidence on contention (a), that "Stop the Cull" is a minority group and not representative of the anti-cull movement and that the local groups which comprise the movement have their own boundary maps and are not reliant on "Stop the Cull" for information. For these reasons, we were not satisfied that Natural England proved its case on contention (a), as we were not persuaded on the evidence that the disclosure of the withheld information would have any more than a minor impact of the refinement of cull zone boundaries.

70. Contention (b) is put forward as a consequence of contention (a). Although we have concluded that we were not persuaded of Natural England's factual case on contention (a), we have for the purposes of this Decision considered the evidence in support of contention (b) in isolation. Having done so, we find we were not persuaded that the experiences of witnesses C and D were anything other than isolated incidences of reprehensible behaviour perpetrated by a small fringe group. We note that witness D's experience largely post-dated the period with which we are concerned. We accept that they were truly terrified by what happened to them and we express our profound distaste for the conduct inflicted on them and their families. Nevertheless, we find that Natural England offered us no evidential connection between witness C and D's experiences and the behaviour of the wider anti-cull movement which would suggest that such behaviour would be repeated, let alone increased,

for any reason. On the contrary, we accept Mr Puttock's evidence that the number of protestors has decreased, the number of cull areas has increased and that in consequence the behaviour of the grass roots movement has changed, to focus on the protection by local groups of viable badger clans. This evidence was, in our view, consistent with his uncontradicted evidence about the scaling down of the police operation, witness A's own evidence of an almost complete absence of criminal charges and convictions of protestors in recent years, and the reported decision of NFU not to apply for a new injunction. If the protestors who targeted witnesses C and D are, as Mr Puttock thought, followers of "Stop the Cull", then we would agree with him that it is regrettable that a further injunction was not applied for when the new cull zones went live.

71. We also note here the absence of evidence from witness A about any adverse effects flowing from the release of the information in the *Dale* case. It would have been open to Natural England to rely on evidence from the police to establish the existence of an organised cohort of protestors intending to break the law by threatening cull participants, or to rebut Mr Puttock's evidence by suggesting that "Stop the Cull" in fact occupied an influential position within the wider movement, but it did not do so. We were in these circumstances not satisfied by the evidence that there is an appreciable level of risk that the treatment of witnesses C and D would be replicated elsewhere.

72. Staying with point (b) but turning to the issue of criminal damage to badger traps, Natural England's evidence here was also not persuasive. We accept that some protesters have apparently damaged traps and that this amounts to criminal damage, but the evidence about the scale and impact of such behaviour was confused and largely related to the wrong period. There was no evidence that it was a trend orchestrated, promoted or endorsed by the wider anti-cull movement. Indeed, whilst Mr Puttock accepted that it had happened, he disapproved of it for the pragmatic reason that shooting a caged badger is more likely to result in a humane kill than shooting a free one. We find that that, as the trap damage has apparently been perpetrated over a wide geographical area, there is a greater risk of it being repeated than we found to be the case in relation to the intimidation of participants. However, although we find the risk level to be higher, we found the evidence of the consequences of such behaviour to be weak. We received no witness evidence from the owner of a damaged trap, no evidence from the police about patterns of such behaviour, and found it difficult to rely on witness A's confused and confusing data.

73. Contention (c) is of course reached by first establishing contentions (a) and (b). Considering it in isolation, we find that there was no evidence on which we could base a conclusion that the incidences of harassment or damage had an effect over and above the immediate impact on those involved. We note that in *Dale* at paragraph 108, the Tribunal refers to hearing argument (in relation to a different exception) that the intimidation of participants could have had an impact on the success of the cull programme as a whole by causing participants to drop out. No such evidence of wider consequence was adduced in this case.

74. We conclude that we are not satisfied on the balance of probabilities that disclosure of the withheld information at the relevant time would have caused direct or actual harm to public safety or the increased risk of harm to the extent that it could be said to affect public safety. In reaching that conclusion, we adopt Mr Knight's approach to the assessment of

risk versus consequences at paragraph 59 above and conclude that the incidences of harassment, whilst serious, are at the low end of future risk and that the incidences of damage to property, whilst somewhat higher in risk, are lower in consequence.

75. We place no artificial gloss on the concept of "*public safety/security*", but we do note its inclusion in a category of weighty criteria for allowing an exemption to the duty of disclosure and that it should be interpreted restrictively. In seeking to interpret it, we consider that the exception requires us to identify some consequence to the public over and above concerns about the safety of a limited class of individuals. That public element could, in our view, comprise the national interest in enforcing the rule of law, but we do not consider that the exception is necessarily engaged where offences against individuals had been committed without wider consequences being identified.

76. In all those circumstances, we are not satisfied that the cumulative effect of the evidence in this case is sufficient to place the effects of disclosure of the withheld information at a place on the spectrum of harm or risk of harm where it engages the exception.

77. Those conclusions are sufficient for us to dispose of the appeal. However, if we are wrong and the exception is engaged, then we find that the public interest in disclosure outweighs the public interest in maintaining the exception. In reaching this conclusion, we take into account our finding above that the evidence indicates a low-level risk to public safety from disclosure, consisting of a low risk of incidences of harassment and the higher risk of damage to badger traps, the consequences of which are unclear. Weighed against that risk is the importance of public access to environmental information, and the public interest in holding an informed debate about a matter of considerable public interest and national environmental significance. We reach no conclusions about the theories advanced by Mr Langton and Mr Woodfield, but we do find that there is a public interest in them being published and debated by the scientific community, and considered by the wider public, with the benefit of the information contained in the withheld material.

78. For all these reasons, Natural England's appeal is dismissed. The Decision Notice is upheld and Natural England is directed to disclose the withheld information.

ALISON MCKENNA **DATE: 24 January 2018**

PRINCIPAL JUDGE