

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

Decision notice

Date: 4 July 2017

Public Authority: Natural England
Address: County Hall
Spetchley Road
Worcester
WR5 2NP

Decision (including any steps ordered)

1. The complainant requested information relating to impact assessments of badger culling and associated operations on species and habitats within licenced badger cull areas.
2. Natural England provided some of the requested information however withheld the remainder citing the exception under 12(5)(a) of the EIR (public safety). The Commissioner's decision is that Natural England was incorrect to rely on EIR exception 12(5)(a) and that the withheld information should be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Natural England shall disclose to the complainant the information withheld under EIR exception 12(5)(a). Any third party personal data and names of business should be redacted.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 23 July 2016, the complainant wrote to Natural England ("NE") and requested information in the following terms:

"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 licenced badger cull areas in 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."

6. NE responded on 27 September 2016. It provided some information by way of explanation of the assessment process undertaken together with the overall conclusions. NE also provided the complainant with copies of the assessment documents in which certain information was withheld under EIR exceptions 12(3) (personal information) and 12(5)(a) (public safety).
7. On 28 September 2016 the complainant contacted NE seeking an internal review of its decision to withhold information from its response to question 1 of the request under the EIR exception 12(5)(a). He did not challenge NE's application of EIR exception 12(3).
8. Following an internal review, NE wrote to the complainant on 23 November 2016 upholding its decision to withhold information under EIR exception 12(5)(a).

Scope of the case

9. The complainant contacted the Commissioner on 13 December 2016 to complain about the way his request for information had been handled. He specifically complained about the redacted information, stating that it "purports to indicate a lot of scrutiny but what is being hidden is a lack of correct tests and examinations. The redacted information is useless as supplied for the purpose indicated and effectively frustrates the purpose." He disagreed with the reasons given to him by NE for withholding information under EIR exception 12(5)(a). The complainant did not challenge redactions made on the basis of EIR exception 12(3) and accordingly the Commissioner has not considered these within the scope of this case.

10. The Commissioner considers that the scope of the case is whether NE correctly applied the EIR exception 12(5)(a) to the withheld information.

Reasons for decision

11. The Commissioner has been provided with a copy of the withheld information which comprises a number of redacted "SSSI feature – sensitivity screening matrices" and "Habitats Regulations Assessments" (HRAs).
12. NE has explained that the SSSI Sensitivity Screening Matrices comprise assessments of Sites of Special Scientific Interest (SSSI), which are designated as such because of their particularly interesting flora, fauna, geological or physiographical features. Each qualifying feature is assessed against the activities involved in the proposed project (in this case badger control licencing) and mitigation measures applied to each site in order that there is no risk of a significant effect towards any of the qualifying features.
13. The HRA is a formal assessment of the implications of any new plan or project capable of affecting the designated interest features of European Sites such as Special Areas of Conservation (SACs). The new plan in this case is badger control licencing.
14. In the SSSI feature – Sensitivity Screening Matrix the following information was redacted:
 - In all cases – SSSI Name and Notified Features (NE say these can be used to identify the site);
 - In most cases – Explanation/comments for level of risk given (where these provide information about location or notified features);
 - In some cases – Possible licence conditions (where these contain information about location or notified features);
 - In a few cases - Comments (where these contain information about location or notified features).
15. In the HRAs the following information was redacted:
 - In all cases – European Site names, European Site codes, component SSSIs, location description, location grid reference, name of applicant, brief description of the European Site(s) and their Qualifying Features, conservation objectives, mitigation

measures (where these contain location information or notified feature) and conditions or restrictions (where these provide location information or notified feature).

- In some cases – Possible effects of the project (where these contain location information or notified feature).

Exception 12(5)(a) – public safety

16. This exception states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety. In this case NE relies upon the adverse effect of disclosure upon public safety.
17. The Commissioner considers the wording of 'would adversely affect' in exception 12(5) of the EIR sets a high threshold in terms of likelihood which has to be met in order for any of the exceptions listed in exception 12(5) to be engaged. In other words, it is not sufficient that disclosure may or could have some level of adverse effect, but rather that disclosure 'would' have an adverse effect. Therefore the likelihood of an adverse effect must be more probable than not.

NE's position

18. NE has argued that disclosure of the withheld information would allow protestors to identify, with greater precision and certainty, the areas in which licenced activity is taking place and also participants in the licenced activity. This in turn would allow protestors to concentrate their harassment and intimidation efforts on individuals, participants and their families located within these areas which would adversely impact on the protection of private property, public buildings and the health and safety of individuals. NE states that it would also place its own staff at increased risk.
19. It is NE's position that disclosure is likely to lead to an increase in protester activity, particularly in Control Areas that would be revealed by disclosure but were not previously known, or not known with any certainty by protesters. This would adversely affect the safety of participants and other persons living in the Control Areas, particularly those who live in Control Areas that would be revealed by disclosure but were not previously known, or not known with certainty, by protesters.
20. NE has also argued that an increase in protester activity would lead to the licenced activity being disrupted and could lead to the licenced activity being stopped. In this respect the Commissioner considers that the disruption or cessation of the licenced activity (in this case badger culling) is not an adverse effect related directly to public safety and so such an argument would not engage EIR exception 12(5)(a).

21. In applying the test of whether disclosure would have an adverse effect on public safety, NE has argued that protesters have published maps online of where they believe the licenced activity is taking place, which they have refined as new information comes to light. Where previously unknown Control Areas are identified in the protestor's online maps then NE states this has led to protester activity in the newly identified areas. NE confirms that protesters have not yet correctly identified all of the Control Areas.
22. NE has informed the Commissioner that some of the protester activity is harassing and intimidating and involves threats to life and limb and criminal damage. It has described to the Commissioner the types of protester activity, ranging from anti-social to unlawful behaviour, and has made reference to material submitted by it to the First Tier Tribunal for case EA/2014-0094-0160-0234-0311:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1658/EA-2014-0094\(+3\)_09-11-2015.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1658/EA-2014-0094(+3)_09-11-2015.pdf)
23. It also informed the Commissioner that the Police have advised that behind the peaceful face of the anti-cull movement there is a more disruptive element. It says that seasoned protesters, ranging from veteran hunt saboteurs to animal rights extremists have become involved in opposing the Policy. NE is therefore concerned that disclosure of the withheld information will lead to a materially increased risk of landowners in the still unknown parts of the Control Area being victims of intimidation, harassment and criminal damage.
24. NE has also referred the Commissioner in its arguments to a publication by a well-known opponent of the Badger Control Policy in the 'Ecologist' dated 29 March 2017: '*Below-par biosecurity should mean no badger cull licence, but is Natural England turning a blind eye?*'. In this article is a discussion on the relative sizes of the participant land in relation to participant thresholds, and the fact that 1 or 2 participants dropping out would affect the licence. NE believes this is an invitation for protesters to focus on certain participants based on the size of their landholding. Disclosure of information that would allow protesters to better target their campaigns of intimidation and harassment would clearly have an adverse effect on public safety and security.
25. NE says that protesters will use the withheld information, in combination with publicly available software and information, to identify still unknown parts of the Control Areas or to confirm that what they know is correct. It has clarified that neither NE, Defra, nor the control companies have released details or a map giving the precise location or boundary of the control zones. Nor have these organisations commented on the accuracy of any maps which have appeared in the public domain.

26. NE has provided a detailed description to the Commissioner of the methodology by which it considers the withheld information can be utilised to establish precise boundaries of Control Areas together with the identity of large land holders who are most likely to be targeted by protesters (whether they are participants in the Badger Control Policy or not). It has also provided the Commissioner with a map upon which the actual Control Areas and the protester's perceived area boundaries are marked for comparative purposes.
27. An exercise was undertaken by NE staff to attempt to plot the exact Control Area boundaries using the withheld information in conjunction with software and information already publicly available. The Commissioner has not reproduced the full details of this exercise in this decision notice however has fully read and considered the details provided to her.
28. The summary of findings confirmed that the release of the qualifying features of particular designated sites or comments making reference to the type of feature being referred to makes it easier to map which sites are within the Control Area boundary and which are not. The Control Area boundaries are relatively easy to identify with more precision.
29. If the notified features were to be released but not the site name the exercise showed that it would still be possible to work out the site name using the methodology described to the Commissioner. NE's position is that it follows that if specific sites can be identified using details of notified features then Control Area boundaries can be identified with more accuracy and precision.
30. Once the Control Area boundary has been either confirmed or refined, then NE has detailed to the Commissioner the methodology by which the large landholders can be identified using information already within the public domain. NE considers that these landowners would be subject to a more targeted campaign by protesters and hence the public safety would be placed at risk.

The complainant's position

31. The complainant does not accept the position of NE. He considered that scrutiny of the information as it stood was impossible because he believed that NE had redacted key information from which understanding could be achieved or an opinion made. He felt it was not possible to clearly understand NE's methodology nor what tests had been applied during the assessments.
32. In his submissions to the Commissioner he stated that the information supplied seems to relate mainly to vehicular use and shooting

disturbance on protected sites and not the full range of impacts. He believes that NE is hiding a lack of correct tests and examinations. He claims the redacted information is useless as supplied, and effectively frustrates the purpose for which he made his request.

33. The complainant disagrees with NE's reason for withholding information due to public safety. He says that the police have indicated that despite widespread knowledge of places of culling, landowner/protestor confrontations have been few and that despite extensive 'wounded badger patrols' at night there have been very few incidents over four years. He acknowledged that there are a few anti-cull campaigners who have been involved in 'cage smashing' and there has been affray between them and hunt supporters, but this is a small group who locate cages by surveying for them once the cull boundaries become known.
34. He says he is not aware of much media reporting of protestor activity other than a few threatening phone calls and 'roadside scuffles' between pro and anti-cull groups. He has seen no evidence of more serious disturbances such as break-ins or damage to property. He thinks there may be confusion between the cost of policing and the actual risk to landowners. He does not consider that the cost of policing the cull is reflective of the actual public harm caused by it. He has provided by way of reference the following links to published articles:

<https://www.fginsight.com/news/news/pilot-badger-culls-cost-24m-to-police-594>

<https://www.fginsight.com/news/badger-culls-cost-17m-to-police-in-2015-9857>
35. The complainant has advised the Commissioner that since the cull zones are 'well known', with their exact or nearly exact boundaries published and most/nearly all of the farms involved also widely known, NE's reasoning would appear to be inconsistent with the reality of the situation. He believes that any risks caused by releasing information are low or very low, and in any case he does not seek details of landowners, only the information on sites, habitats and species.
36. His position is that location of the nature reserves that might be damaged by ecological impacts of badger culling can be deduced from the maps provided locally and during consultations over badger culling. He says it is not difficult to trace the boundary of each zone within 500 metres or so, from the maps put online by the 'Badger Action Network':

<http://badgeractionnetwork.org.uk/help-needed-in-the-cull-zones-right-now/>

37. The complainant says that it is not difficult to locate all of the nature reserves he is interested in within the boundary using the DEFRA Magic website:

<http://www.natureonthemap.naturalengland.org.uk/>

38. So, in terms of sites and species, this information is generally known; the only thing that is missing is which of the sites were evaluated by NE and what was assessed and it is the complainant's position that the information on what has been assessed could be released without endangering anyone. This is especially true as the influence of badger culling is usually close to, but not on the nature reserve itself. Given this, and the already known locations of culling, the complainant submits that additional risk to anyone would be insignificant.

The Commissioner's view

39. In relation to the complainant's submission that he is not able to understand the methodology of the assessments made by NE, nor what tests had been applied, the Commissioner notes that only information which directly identifies, or can be used to identify location has been redacted. She cannot see in any of the withheld information redaction of information relating to the method of assessment adopted or the specific tests applied. She considers that disclosure of the withheld information would not lead to greater understanding of the overall method of assessment, but would only identify, or enable to be identified, the locations which were assessed.
40. The Commissioner accepts, in view of the exercise undertaken by NE (as per paragraphs 26-30 of this decision) that a motivated individual could use the withheld info, in conjunction with software and information already in public domain, to confirm or refine the boundaries of the Control Areas. She also accepts, based upon the methodology provided by NE, that individual sites participating in the Control Zones can be identified with more certainty using the withheld information and also that the largest landholdings within those sites can be identified. The Commissioner has had regard to the fact that neither NE or other organisations such as Defra and the control companies have ever published the exact Control Area boundaries, nor have they publicly commented on the accuracy of the maps already in the public domain.
41. She also notes that it has been suggested by anti-cull protestors that by focusing protestor activity on the largest landholders within a Control Area, this is more likely to have the effect of significantly reducing the percentage of participants in the controlled activity, to the extent that the percentage participating may fall below the threshold for which the controlled activity would be permitted to continue. It is upon this basis

that NE believes that protestor activity would escalate or be targeted towards those landholdings identified within the Control Areas.

42. The complainant states that he does not require details of the individual land holdings within the Control Areas, only information on the sites assessed, habitats and species, however in light of the exercise undertaken by NE, the Commissioner agrees that it is possible to utilise publicly available software and information, in conjunction with the withheld information, to identify landholdings within the Control Areas in any event. Therefore, release of information relating to sites, habitats and species could lead a motivated individual to identify exact Control Area boundaries, sites within those boundaries and individual landholdings therein.
43. Having accepted that release of the withheld information would lead a motivated individual to more accurately confirm the Control Area boundaries, sites within the boundaries and individual landholdings, the Commissioner has gone to consider whether the release of this information would adversely affect public safety.
44. The Commissioner accepts that the Badger Control Policy is a highly sensitive issue and has provoked considerable public interest and debate. She is aware that protestor activity has taken place, on occasions placing public safety at risk, broadly based upon the maps already in the public domain.
45. In reaching her conclusion she has had regard to the complainant's position that release of the withheld information would not significantly increase that risk given that he considers that the cull areas are in his view already 'well known' and therefore protestor activity has already occurred in close proximity to the actual areas. The complainant referred to written articles (in paragraph 34 of this decision) which suggest that the costs of policing the cull has increased, however he says that the costs of policing is not to be confused with the 'actual' protestor activity which has occurred, which in his view is not significant.
46. NE's position is that by more precisely establishing the Control Area boundaries, protestor activity would be refined and would include areas which were not previously known, as well as targeting the larger landholdings within the Control Areas which could be identified as a result of release of the withheld information. NE asserts that disclosure of the withheld information will lead to a materially increased risk of landowners in the still unknown Control Areas being victims of intimidation, harassment and criminal damage.
47. NE has provided anecdotal evidence of the nature of protestor activity and the Commissioner accepts that some of this activity placed public

safety at risk. However she needs to consider whether release of *this* information would place public safety at risk.

48. NE stated that where protestor boundaries have been refined in the past, this lead to increased/ more targeted activity by protestors, however the Commissioner has not seen any evidence to support this proposition.
49. In the Tribunal decision EA/2014-0094-0160-0234-0311 referred to by NE (in paragraph 24 of this decision), whilst the information requested would not have enabled the actual Control Areas to be identified, the Tribunal concluded that disclosure of the withheld information in that case would not have caused direct or actual harm to public safety or increased risk of harm to a degree that could be said to adversely affect public safety. The Tribunal rejected any assertion of a substantial threat to public safety; the number of activists was small (albeit there was some unacceptable behaviour). It noted that some arrests had occurred in 2013 but very few since. Since an injunction had been granted there had been no violence.
50. The Commissioner considers that a distinction needs to be drawn between rightful and lawful protest and unlawful activity which puts public safety at risk. In the above case the Tribunal commented that "Increased protesting in the cull areas (or better directed protesting) is perfectly legitimate in a democratic society. We must guard against impermissibly mingling criticism of unlawful activity with criticism of legitimate protest." In that case, "the vast majority of protester activity was peaceful and lawful."
51. The incidences referred to by NE in the above case are historical; they do not relate to recent years and in any event the Tribunal in the above case found that they were not of sufficient significance to warrant a finding at that time that public safety would be adversely affected.
52. The Commissioner finds no evidence on the information available to her of increased protestor activity, either recently or as a result of refinement of protestor boundaries and therefore has no reason to consider that more weight should be placed on such evidence at this time (or at the time of the request). Whilst NE refers to the recent article in the 'Ecologist' (as per paragraph 27 of this decision) the Commissioner has seen no evidence that protestor activity has escalated since publication of that article. She considers that the arguments advanced by NE that protestor activity will become more focused on larger landholdings are not new; the effect of targeting large landholdings to effectively reduce the percentage participants was already known prior to publication of this article.

53. The Commissioner considers that sufficiently motivated individuals will already attempt to target their campaign against the largest landholdings within the boundaries already in the public domain, based upon the known premise that to do so would have the greatest potential to reduce the percentage landholding participating to the extent that the cull would no longer be effective. She is therefore unconvinced that there would be any significant increase in risk as a result of release of this information.
54. The previous cases referred to (in paragraph 49 of this decision) occurred at a time when pilot culls were taking place and when public interest and debate was at its strongest. Since that time the number of Control Areas has been extended and culls have taken place annually. The Commissioner accepts that whilst campaigning against the controlled activity has been maintained, it is on the whole lawful and peaceful and incidents affecting public safety have to her knowledge been relatively few. NE has advanced no convincing argument to suggest otherwise. After a period of strong public debate and active protests when the initial pilot culls took place, it would appear that any unrest has settled to a level which does not now pose a serious or widespread threat to public safety.
55. In conclusion the Commissioner considers that the alleged increased risk to public safety as a result of defining cull boundaries and large landholders with more certainty is at best speculative and is not satisfied that release of this information would cause direct or actual harm to public safety or increased risk of harm to a degree that could be said to adversely affect public safety.
56. For the reasons given above the Commissioner is not satisfied that EIR exception 12(5)(a) is engaged in this case. Accordingly she has not gone on to consider the public interest test.

Right of appeal

57. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

58. 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.
59. 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

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