

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

**Decision notice**

**Date:** 13 June 2013

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

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

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to the badger and bovine tuberculosis proposals shared between Defra and the National Farmers Union (NFU), and Defra and Natural England. In response, Defra has provided some information but withheld four risk and issue logs under regulations 12(4)(e) (internal communications) and 12(5)(d) (confidentiality of proceedings) of the EIR. The Commissioner has decided that regulation 12(5)(d), but not 12(4)(e), is engaged and that, in all the circumstances, the public interest favours disclosure. The Commissioner therefore requires the disclosure of the specified risk and issue logs.
2. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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3. Following the exchange of extensive correspondence between the complainant and Defra, on 23 May 2012 the complainant wrote and requested information in the following terms:

*[...] We would be grateful if you could provide us with all documentation in relation to the badger/bovine TB proposals between DEFRA and NFU, and DEFRA and Natural England in 2010.*

4. Defra responded to the request on 22 June 2012. It initially explained that the complainant was already in possession of parts of the information within the scope of the request as a result of the operation of a separate access-regime. For the remainder, Defra disclosed copies of some of the information but provisionally withheld four risk and issue logs under regulation 12(4)(e) of the EIR. The complainant was informed that Defra was seeking further advice on the question of whether or not these logs could be released.
5. On 16 July 2012 Defra wrote to the complainant and confirmed its reliance on regulation 12(4)(e) in respect of the four risk and issue logs. Defra stated that, as required by the legislation, it had considered the public interest test and had found that this favoured maintaining the exception.
6. The complainant wrote to Defra on 20 July 2012 and challenged Defra's application of regulation 12(4)(e) – arguing that the exception was unlikely to be engaged and that, even if this could be claimed, the public interest arguments in disclosure were compelling.
7. Defra subsequently carried out an internal review, the outcome of which was provided to the complainant on 14 September 2012. This found that Defra had breached regulation 5(2) of the EIR by failing to provide its final response to the request within the statutory time period of 20 working days. In relation to the requested information, Defra upheld the original application of regulation 12(4)(e) and also introduced the possibility that regulation 12(5)(d) of the EIR would apply to the same information; again deciding that the public interest favoured maintaining the exception.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way their request for information had been handled. In particular, they have

asked the Commissioner to consider Defra's refusal to release the four risk and issue logs mentioned above.

## Reasons for decision

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### Regulation 12(4)(e) – internal communications

9. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Commissioner has recently published guidance<sup>1</sup> on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
10. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance on the exception, the Commissioner acknowledged that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.
11. The information withheld is contained in risk logs prepared by officials at Defra for the TB Badger Control Project Board (the Project Board). The risk registers were presented to Project Board meetings during 2010 and relate to a variety of aspects of the development of the badger control policy at the time. The Commissioner is satisfied that these logs properly constitute a 'communication' for the purposes of the exception. He has therefore next considered whether each of the risk logs is an 'internal' communication.
12. There is no definition of what is meant by 'internal' contained in the EIR. Consequently, in the absence of one, a judgment on what is an internal communication must be made by considering the relationship between a sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, communications sent between officials within a single organisation are the clearest example of records that will be covered by the exception.

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<sup>1</sup>[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~//media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/eir\\_internal\\_communications.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~//media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx)

13. The Commissioner observes that the Project Board is made up of various individuals, including representatives of Natural England and the NFU. Defra has admitted that the NFU is neither a government department pursuant to regulation 12(8) nor one of Defra's non-departmental public bodies or traditional delivery partners. Nevertheless, it has argued that the NFU officials' level of involvement with the project means they were sufficiently embedded in the department by virtue of their role on the Project Board to allow that the risk logs continue to represent internal communications.
14. In most situations communications between a public authority and an outside agency will not qualify as internal communications. However, on the basis of the arguments advanced by Defra, the Commissioner has had to decide whether, in this context, the particular character of the partnership it has with the NFU has the effect that the exception could apply. In the Commissioner's view, it does not.
15. On the question of third parties and the application of the exception, the Commissioner has previously been guided by the Tribunal's findings in *South Gloucestershire Council v Information Commissioner & Bovis Homes Limited* (EA/2009/0032). In that case, the Tribunal resisted taking a mechanistic approach to what is and what is not covered by the exception but decided in the circumstances that reports produced by consultants for South Gloucestershire Council would not be covered by the exception. This is because the Tribunal considered that the consultants had not been integrated within the organisation – neither being seconded to, or otherwise embedded within, the Council's organisation but providing an independent view from outside the Council.
16. Defra has argued that the findings in *South Gloucestershire* have no sway here because the NFU did not function as a consultant. Rather, whereas consultancy implies and entails a contracted agreement with an external provider, no such formal agreement was in place with the NFU. Instead, the NFU was brought within the project management structure, which is considered as best practice in policy making – the involved nature of the partners to the Project Board being demonstrated by its terms of reference. Furthermore, Defra has stressed the crucial role played by the NFU when developing and assessing policy options. The fact that the NFU's inclusion was a novel approach to policy making should not, in Defra's view, mean that communications should fall outside of the exception which would otherwise be covered by more traditional working arrangements.
17. Following the approach endorsed by the Tribunal in *South Gloucestershire*, the Commissioner appreciates that caution must be exercised so as to ensure that the wording of the exception is not

interpreted too restrictively. However, in this situation, the Commissioner considers that to accept the risk logs shared with the NFU remain internal communications does not sit comfortably with a natural reading of the exception.

18. In his decision on FER0450536<sup>2</sup>, which involved the Forestry Commission England, the Commissioner assessed whether communications between partners of a board charged with the management of the New Forest could potentially be subject to regulation 12(4)(e) of the EIR. The Commissioner acknowledged that, because the partners came from different public authorities, in most situations correspondence between them would not qualify as internal communications. However, at paragraph 33 of the decision, the Commissioner outlined his view that the key consideration in the case was the existence of a:

*"[...] formal partnership agreement between the members of the HLS [Higher Level Stewardship Scheme]. This sets out shared, but focused, objectives and is intended to bind the partners together to work together in delivering these objectives. The Commissioner considers that the level of formality of the partnership agreement distinguishes this case from others where separate public authorities merely work together, co-operate or assist each other [...]."*

19. While the circumstances of the cases clearly differ, the Commissioner has found it helpful here to revisit the principle outlined above. In doing so, the Commissioner recognises that the Project Board's terms of reference sets out a number of responsibilities for its members, including significant points of decision-making; a point that to an extent supports Defra's view. However, returning to Defra's submissions themselves, the Commissioner has found decisive the clarification provided by Defra which says that it does not have a formal agreement with the NFU – defeating any claim that the NFU's officials were seconded to, or embedded within, Defra. Rather, the Commissioner considers that the value of the NFU was in providing external expertise on the matters in hand.
20. For these reasons, the Commissioner has decided that, having been shared with the NFU as well as other partners to the Project Board that are not discussed here, the risk and issues logs cannot reasonably be

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<sup>2</sup> [http://www.ico.org.uk/~media/documents/decisionnotices/2013/fer\\_0450536.ashx](http://www.ico.org.uk/~media/documents/decisionnotices/2013/fer_0450536.ashx)

classified as internal communications. As the Commissioner has therefore found the exception is not engaged, he has gone on to consider Defra's application of regulation 12(5)(d) of the EIR to the same information.

### **Regulation 12(5)(d) – confidentiality of proceedings**

21. Regulation 12(5)(d) provides that environmental information may be exempt from disclosure if disclosing it would adversely affect the confidentiality of a public authority's proceedings where the confidentiality arises from statute or common law.

For the exception to be engaged, a number of criteria must be met. The Commissioner considers each of these in turn below.

#### *Proceedings*

22. When considering the application of regulation 12(5)(d), the first question that should be asked is whether the effect of disclosure relate to the 'proceedings' properly described by the exception. In his guidance<sup>3</sup> on the regulation, the Commissioner acknowledges that the term 'proceedings' can cover a range of activities. However, he also cautioned that the word implies some formality and, as such, does not cover an authority's every action, decision or meeting. Examples given of proceedings in this sense, included: formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision making powers; and legal proceedings. In each of these cases, the proceedings are a means to formally consider an issue and reach a decision.
23. Defra has explained that the risk and issue logs were created as part of the Badger Control Project and used at Project Board meetings. Specifically, they were drawn up by the secretariat to the Project Board and the Project manager, both of whom are Defra staff on the badger control policy team. They were prepared for the Project Board and discussed at the Project Board.
24. To support its position in respect of the exception, Defra has made reference to paragraph 24 of the Commissioner's guidance, which says that the "exception is not solely concerned with information that has

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<sup>3</sup>[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/eir\\_confidentiality\\_of\\_proceedings.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_confidentiality_of_proceedings.ashx)

been prepared *exclusively* for confidential proceedings. There may be circumstances where proceedings deal with information that was originally produced for other purposes but is considered during those proceedings." Expanding on this point, and with further reference to the Commissioner's guidance, Defra has argued that the Project Board meetings were proceedings that constituted formal meetings to consider matters that are within its jurisdiction.

25. Based on Defra's submissions, the Commissioner accepts that such proceedings are of sufficiently formal nature to be considered proceedings for the purpose of regulation 12(5)(d).

*Provided by law*

26. The exception specifies that the confidentiality of the proceedings must be provided by law. The confidentiality may be provided in statute or derived from common law. Defra has informed the Commissioner that it considers the proceedings are protected by a common law duty of confidence.
27. In the Commissioner's view, the common law of confidence will apply where the following two conditions are satisfied. Firstly, the information has the necessary quality of confidence. This means that the information must not otherwise be accessible and be of importance to the confider and not trivial. Secondly, the information was communicated in circumstances importing an obligation of confidence. An obligation of confidence can be expressed explicitly or implicitly.
28. Defra has summarised its position as follows:

*"The confidentiality of these meetings is derived from common law. The information has the quality of confidence, being internally generated information relating to sensitive policy formation and has not already been placed in the public domain. It is not trivial, as it relates to Defra's policy objectives and identifies risks, mitigating action and contingency plans. The fact that that the documents were marked "restricted" demonstrates that there was a reasonable expectation that they would not be disclosed, and we can confirm that the documents were not shared beyond the Badger Control project team and project board."*

29. It is important to observe that the confidentiality of proceedings will not be demonstrated simply by the fact that information is declared as confidential or restricted. Nevertheless, the Commissioner agrees with Defra that the withheld information does possess the specified quality of confidence. This is because the information clearly is not of a trivial nature, nor is there any evidence to suggest that the information has been made accessible beyond the project team and board. The

Commissioner is also prepared to accept that there was an implicit expectation that the information would not be made public. The Commissioner considers this is owing to Defra's established practice of not disclosing information of this nature.

*Adverse effect*

30. The exception not only requires that the proceedings referred to by a public authority are confidential but also that disclosure would adversely affect that confidentiality. Returning to the Commissioner's guidance, the provision 'adversely affect' is described as follows:

*'Adversely affect' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed [...]."* (paragraph 22)

31. It is Defra's belief that an inevitable result of disclosure would be to harm the confidentiality of proceedings. Building on this point, the Commissioner recognises that at a number of the issues described in the logs will continue to shape the government's thinking on badger culling; something that would be impeded by making the information available to the public. Thus, the Commissioner has found that disclosure would have an adverse effect on the proceedings, meaning that the exception is engaged.
32. As required by regulation 12(1) of the EIR, the Commissioner's next step is to consider the balance of the public interest test. In doing so, he has been mindful that, under regulation 12(2), the EIR makes an express presumption in favour of disclosure.

***Public interest arguments in favour of disclosure***

33. Defra has recognised there is a general public interest in the transparency and accountability of authorities' decision making on environmental matters. The complainant has reinforced this point by forcefully arguing the following:
- The government's badger control policy is highly controversial and has attracted a large degree of public interest.
  - The risk logs address important issues of health and safety, knowledge of which is clearly in the public interest.



- That the 'safe space' needed to carry out decision making is no longer required.
- Leading on from the above point, maintaining the position that risk logs cannot be disclosed no matter what stage of the decision making process is tantamount to a blanket prohibition on disclosure. This would not correspond with the purpose behind, or provisions of, the EIR.
- That there is insufficient evidence to find that there would be a 'chilling effect' as a result of disclosure.

34. Each of these arguments has been considered by the Commissioner when reaching a decision, even where he has not felt it necessary to address a particular argument again in the body of this notice.

***Public interest arguments in favour of maintaining the exception***

35. It is the view of Defra that any weight the arguments for disclosure possess is clearly offset by the strength of the arguments in favour of maintaining the exception. Defra's position can be summarised as follows:

- There is always a public interest in protecting the relationship between a confider and confidant. To breach this confidence would discourage persons from confiding in a public authority – in this case, preventing Defra from drawing on the expertise of organisations such as the NFU.
- A 'safe space' is needed in which policy under development can be considered and delivered, away from external scrutiny and criticism.
- There is no overriding public interest argument for a breach of confidence.

36. Again, each of these arguments has been considered by the Commissioner when forming a view.

***Balance of the public interest arguments***

37. The Commissioner acknowledges that the public interest arguments are finely balanced, with both sides representing cogent cases for their respective position. On the one hand, it is evident that the policy of badger culling is controversial, attracting a wide range of support and opposition. This would add weight to the argument which says that there should be transparency in the government's decision-making in this area. On the other hand, the Commissioner considers that the fact

the subject matter is controversial should not distract us from the realisation that the government will often require space in which to consider fully, and decide on, complex issues.

38. There is no doubt that risk logs represent a vital managerial tool, signposting to the Project Board in this case areas of concerns and encompassing a wide range of issues that include security and political risks. In *Department for Health v Information Commissioner and Rt Hon John Healey MP and Nicholas Cecil (EA/2011/0286 & 287)*<sup>4</sup>, (the DoH case), the Tribunal observed that risk *registers*, otherwise described as *logs* in this case, “do not provide detailed explanations of the risks involved only the possible headline risk and mitigation factors so that the impact of the risk can be seen relatively at a glance for ease of use at board or decision type meetings” (paragraph 46). The general significance of risk registers or logs was further elucidated in the next paragraph of the decision, which referred to Lord O’Donnell’s comment that “risk registers are the most important tool used across government to formulate and develop policy for risk management in advising Ministers.”
39. The Commissioner recognises that the timing of the request will always, to a greater or lesser degree, have a bearing on the balance of the public interest. However, he considers that this factor is particularly influential in the consideration of the public interest test in this case. As advised, Defra has explained that the risk logs were presented to Project Board meetings during 2010 and relate to the development of badger control policy at that time. The government subsequently published in December 2011 its policy on bovine TB and badger control in England. This meant that at the time of the request, the risk logs were no longer in use.
40. Defra accepts that the risk logs are no longer ‘live’ documents. However, it contends that the management of risks and issues have been transferred into the new project board and the information in question indicates areas where the policy team believes there could still be challenges to the policy. The complainant, in contrast, disputes the continued need for safe space.

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<sup>4</sup>[http://www.informationtribunal.gov.uk/DBFiles/Decision/i729/2012\\_04\\_05;%20DOH%20v%20IC%20%20Healey%20final%20decision.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i729/2012_04_05;%20DOH%20v%20IC%20%20Healey%20final%20decision.pdf)

41. The complainant has argued that the public interest should properly be assessed at the date the internal review was conducted, particularly where the application of an exception was only introduced at that stage. To support this view, the complainant has referred the Commissioner to the Tribunal's decisions in *the DoH case* and *Chagos Refugee Group in Mauritius Chagos Social Committee (Seychelles) v Information Commissioner & Foreign and Commonwealth Office (EA/2011/0300)*<sup>5</sup>. In the *DoH case*, for example, the Tribunal considered the critical time for its purposes was around the time of the refusal notices but also stated:

*"The case law has determined that we should consider the public interest at broadly the time of the request and in any case **no later than the internal review, particularly where there has been a change in exemption claimed** [the Commissioner's emphasis] [...]"* (paragraph 61)

42. In many cases, the difference between considering the public interest at the date of the request and at the date of an internal review is negligible. However, importance has been attributed to the difference in this case because when the internal review was provided on 14 September 2012 it was, in the complainant's view, clear that not only had the government made a policy decision but that this decision had been the subject of judicial review proceedings: *Badger Trust v SSEFRA*, [2012] EWHC 1904 (Admin) and [2012] EWCA Civ 1286, the decisions on which were promulgated on 12 July 2012 and 11 September 2012 respectively.

43. The Commissioner considers that it would be appropriate to consider the circumstances as they stood at the time of the internal review, bearing in mind that this was the date at which regulation 12(5)(d) was applied. However, he does not consider that this has a fundamental bearing on his decision. Rather, he considers the more powerful point in this case is that Defra had produced its policy on badger culling at the time of the request.

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<sup>5</sup><http://www.informationtribunal.gov.uk/DBFiles/Decision/i835/20121116%20Decision%20&%20Annex%20EA20110300.pdf>

44. The Commissioner accepts that issues relating to the badger culling policy continued after the publication of the policy itself; a natural consequence of the contentious nature of the policy and the possibility of challenges to that policy. He therefore agrees with Defra that, while the logs themselves are no longer in use, some of the risks described in the logs will continue to have relevance in respect of the government's approach to the control of TB. Furthermore, the fact that the confidentiality of the proceedings is protected by law only enhances the public interest in favour of maintaining the exception.
45. Yet, the Commissioner has also been careful not to place excessive significance on the harm to the *confidentiality of proceedings* that could arise through disclosure. Firstly, he has reminded himself that the risk logs were ultimately produced for the Project Board to consider a variety of aspects connected to the *development* of the badger control policy at the time; a policy that has now been completed. Secondly, echoing the comments of the Tribunal at paragraph 64 of its decision in the *DoH* case, the Commissioner has found that the sorts of risks depicted are the sort one would expect to see in such a register. Thirdly, the Commissioner has not been presented with any compelling evidence that demonstrates there would be a 'chilling effect', whether in respect of officials or other interested parties, such as the NFU. In the latter case, the Commissioner considers it will be in their best interest to contribute to boards of this nature.
46. Where, as in this case, the public interest is in the balance, it will be necessary to recall the EIR's express presumption in favour of disclosure. The Commissioner has therefore found that, in the circumstances, the public interest arguments for disclosure outweigh those presented for maintaining the exception.

## Right of appeal

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47. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Gerrard Tracey**  
**Principal Policy Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**