

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2014

Public Authority: Department for Environment, Food and Rural Affairs

Address: Nobel House
17 Smith Square
London SW1P 3JR

Decision (including any steps ordered)

1. The complainant has requested from the Department for Environment, Food and Rural Affairs ("Defra") information relating to communications between Defra and the Country Land and Business Association ("CLA"), the Game and Wildlife Conservation Trust ("GWCT"), the National Trust ("NT"), the National Farmers Union ("NFU"), the Countryside Alliance ("CA") and the Farming and Wildlife Advisory Group ("FWAG"). The information requested concerns the issues of badgers, badger culling and badger vaccination. Defra provided some information and sought to rely upon regulations 12(4)(a) and regulation 12(4)(b) of the EIR as a basis for not providing some of the information.
2. The Commissioner's decision is that the exceptions are engaged and that, in all the circumstances, the public interest favours maintaining the exception. He therefore does not require Defra to take any steps to comply with the legislation.

Request and Response

3. On 26 September 2013 the complainant requested information of the following description from Defra:

"1. Please disclose copies of all communication – including minutes of meetings – between Defra and the Country Land and Business association from 1 May 2011 to 27 September 2013 where the subject of badgers and/or badger culling and/or badger vaccination were mentioned or discussed."

- 2. Please disclose copies of all communication – including minutes of meetings – between Defra and the Game & Wildlife Conservation Trust from 1 May 2011 to 27 September 2013 where the subject of badgers and/or badger culling and/or badger vaccination were mentioned or discussed.*
 - 3. Please disclose copies of all communication – including minutes of meetings – between Defra and the National Trust from 1 May 2011 to 27 September 2013 where the subject of badgers and/or badger culling and/or badger vaccination were mentioned or discussed.*
 - 4. Please disclose copies of all communication – including minutes of meetings – between Defra and the NFU from 1 September 2012 to 27 September 2013 where the subject of badgers and/or badger culling and/or badger vaccination were mentioned or discussed.*
 - 5. Please disclose copies of all communication – including minutes of meetings – between Defra and the Countryside Alliance from 1 May 2011 to 27 September 2013 where the subject of badgers and/or badger culling and/or badger vaccination were mentioned or discussed.*
 - 6. Please disclose copies of all communication – including minutes of meetings – between Defra and the Farming 7 Wildlife Advisory Group between 11 May 2010 to 18 November 2011 where the subject of badgers and/or badger culling and/or badger vaccination were mentioned or discussed."*
4. On 30 October 2013 Defra provided its response to the request dated 26 September 2013 as follows:
- (i) It disclosed four letters, two involving the NT and two involving the CLA which it stated fell within the scope of the request.
 - (ii) It refused to provide the remainder of the requested information. It stated that:
 - (a) No information was held in respect of communications between Defra and GWCT, CA and FWAG within the timescales requested. It relied upon regulation 12(4)(a) of the EIR in respect of this part of the request and did not apply the public interest test as per the guidance of the Commissioner which does not require this test to be applied in cases where the information is stated as not held.
 - (b) In respect of communications between Defra and the NFU it relied upon regulation 12(4)(b) of the EIR on the basis that the request for information was manifestly unreasonable by virtue of unreasonable costs and diversion of resources. Having applied the public interest test it concluded that, whilst the presumption was in favour of disclosure of

the information it considered the balance of public interest in this case favoured the withholding of it.

5. On 10 November 2013 the complainant requested an internal review. In respect of those bodies where Defra advised that no information was held the complainant provided information which they believed pointed to the fact that information could/should exist and asked that additional searches be undertaken for the information requested. In respect of those bodies where some information had been provided the complainant asked that additional searches also be undertaken.
6. The complainant also advised that they were not satisfied with the conclusions drawn by Defra in respect of its costing exercise in relation to the withheld information concerning communications between Defra and the NFU. They noted inconsistencies in calculations and asked that the matter be revisited as they did not accept the methodology used for the sampling exercise undertaken. The complainant also put forward arguments that releasing the information would be in the public interest.
7. On 12 December 2013 Defra advised the complainant that it required additional time to complete the internal review as it required further validation of the search results it had undertaken.
8. On 16 January 2014 Defra provided the complainant with a response to the request for an internal review. It identified two additional pieces of correspondence (one relating to GWCT and one to the NT) which could be provided, subject to third party consent, described the searches undertaken for the information the complainant had requested, provided a revised figure in respect of the calculations provided for the sample costs exercise and confirmed its views in respect of the application of the public interest test.

Scope of the case

9. On 10 February 2014 the complainant lodged a complaint with the Information Commissioner's Office stating that they were not satisfied with the response received to the request. The complainant advised the Information Commissioner as follows:
 - (a) That they were not satisfied that sufficient searches had been undertaken to locate the requested information and wished to be certain that the searches undertaken had been competent and thorough.

(b) Following the internal review two additional documents had been identified which had not been provided.

(c) The complainant did not agree with Defra's findings on the issue of costs and questioned the accuracy and fairness of the sampling exercise undertaken and relied upon.

(d) The complainant provided detailed arguments as to why they believed the public interest in the disclosure of the requested information (withheld on the basis of costs) was not outweighed by the public interest in withholding the information.

10. Since the complaint was lodged with the Commissioner Defra has confirmed that the documents referred to in (b) have been provided to the complainant. These consist of two consultation responses from both GWCT and the NT.
11. The scope of this case has therefore been to consider whether Defra is correct when it states it is entitled to rely on regulation 12(4)(b) of the EIR as a basis for refusing to provide the withheld information in relation to question 4 of the request and whether it is able to rely upon section 12(4)(a) of the EIR in relation to all of the other parts of this request.

Reasons for decision

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

12. Regulation 12(4)(a) provides that a public authority may refuse to disclose information if it does not hold that information when a request is received. In this case Defra provided copies of communications between Defra and the CLA, Defra and the GWCT and Defra and the NT. It advised the complainant that no information falling within the scope of the request was held in relation to communications between Defra and the CA and Defra and the FWAG.
13. In situations where there is a dispute between a public authority and a complainant about whether the requested information is held, the Commissioner applies the civil standard of the balance of probabilities. The Commissioner must therefore decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request. In applying this test and as part of the investigation process, the Commissioner will consider the scope, quality, thoroughness and results of the searches and other explanations offered as to why the information is not held and arguments put forward by the complainant as to why it is believed the information is held.

14. The complainant has stated that they believe more information is held because of the suggestions from the information supplied in Defra's original response to the request that discussions would have been ongoing between the organisations and Defra and that meetings took place between some of the organisations to discuss the issue of Bovine TB.
15. The complainant has advised the Commissioner they are aware that a meeting took place between Defra and the FWAG in July 2010. Further that GWCT attended a meeting where Defra were discussing the issue of Bovine TB in May 2011. They have also provided evidence that the CLA met with the Minister to discuss Bovine TB in May with the suggestion that some of the other relevant organisations also attended. The complainant's contention is that it is likely that recorded information will be available given the increasing concerns about TB and badgers at the time.
16. Defra has provided the Commissioner with a detailed overview of the way in which it handled the request for information. It explained that searches were made within the Bovine TB programme ("BTBP") for communications in relation to the non-government organisations which are the subject of this request for information. These searches encompassed emails, correspondence, consultation responses and meeting minutes within the electronic and paper files that covered the time periods included in the request (2010-2013).
17. Searches were also made of Defra's central correspondence database for communications between Defra ministers and the relevant organisations. Individuals working in the BTBP including those working in the badger culling and badger vaccination areas were asked to conduct searches on their laptops for the relevant time period to locate any communications that had not been filed centrally.
18. The search terms used including several variations and abbreviations of the names of the organisations concerned including :

"National Trust"; "NT"; "National Trust /NT Badger Cull"; National Trust / NT badger vaccination"

"Game and Wildlife Conservation Trust"; "GWCT"; "Game and Wildlife Conservation Trust/GWCT badger cull"; "Game and Wildlife Conservation Trust/GWCT badger vaccination"

"Farming and Wildlife Advisory Group"; "FWAG"; Farming and Wildlife Advisory Group/FWAG badger cull"; "Farming and Wildlife Advisory Group/ FWAG badger vaccination" "Countryside Alliance"; "CA";

"Countryside Alliance/CA badger cull"; "Countryside Alliance/CA badger vaccination"

"Country Land and Business Association"; "CLA"; "Country Land and Business Association/ CLA badger cull"

19. In addition, searches were made of the relevant paper systems. The Commissioner was advised that no paper files in storage were available beyond 2009 which was outside the period of request. As a cross check the information audit that was conducted of the BTBP team in 2011 was searched but returned a nil return for the bodies listed in the request.
20. Defra has explained to the Commissioner that the amount of material that it has been able to locate may appear little in quantity given the prominence of this issue. The reason given is that the longest serving official working on this programme has only been in post since late 2012.
21. Because of the level of staff turnover experienced within the BTBP team Defra could not categorically state whether any relevant information had been held previously on personal files of those involved in the team which should have been filed centrally but which was not. Nor could it be certain as to whether this information was still held or whether it had been deleted in the normal course of records management by the individuals concerned or upon leaving the BTBP team.
22. Given that these individuals have now moved either outside of government or work for other departments Defra advised that to attempt to try and recover 2-3 years of emails and other correspondence from personal email drives of those still remaining within government roles would mean enquiries which would, in all likelihood, lead it to come to the conclusion that the efforts required would fall within the realms of "manifestly unreasonable".
23. Defra advised that changes had been made to its IT systems over recent years which meant that stakeholder communications and meeting notes were now saved on the BTBP team's shared folder. However, it was also pointed out that individuals within the BTBP were unlikely to have regular contact with the officials of the organisations referred to in the request as contact tended to be at ministerial level by way of meetings.
24. In relation to the issue of meetings held or attended by Defra officials where representatives of the relevant organisations were present, Defra has advised that it is unlikely that minutes or notes would have been made as many of the meetings held with such organisations were on an informal basis and minutes were unlikely to have been taken on a regular basis. Specifically in relation to the complainant's query about

meetings with the FWAG and GWCT that took place in July 2010 and May 2011 searches have been made for these but no minutes or communications have been located.

25. Having considered the explanations provided by Defra and the submissions provided by the complainant the Commissioner is satisfied, on the balance of probabilities, that Defra took reasonable steps to search for information relevant to the request and does not consider there to be evidence that relevant information, other than that already identified, was held by Defra at the time of the request.
26. The Commissioner is therefore satisfied that Defra has met its obligations under the FOIA and correctly applied regulation 12(4)(a) of the EIR in so far as it relates to parts of the request save for question 4.

Regulation 12(4)(b)

27. Defra has advised the Commissioner that it continues to rely upon regulation 12(4)(b) in respect of question 4 of the request. This deals with communications between Defra and the NFU between 1 September 2012 and 27 September 2013.
28. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable.
29. At paragraph 32 of his decision on FS50440146 (Luton Borough Council)¹, the Commissioner made it clear that the inclusion of "manifestly" in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under this exception, the information request must meet a more stringent test than simply being "unreasonable". "Manifestly" means that there must be an obvious or tangible quality to the unreasonableness.
30. The Commissioner continued at paragraph 33 by saying that the regulation will typically apply in two sets of circumstances: firstly, where a request is vexatious; or secondly, where compliance meant a public authority would incur an unreasonable level of costs, or an unreasonable diversion of resources. In this case, Defra has argued that meeting the full terms of the request would place an unjustifiable demand on its resources.

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

31. Unlike FOIA and specifically section 12, the EIR does not contain a provision that exclusively covers the time and cost implications of compliance. The considerations associated with the application of regulation 12(4)(b) of the EIR are, instead, broader than with section 12 of FOIA. In particular, the Commissioner recognises that there may be other important factors that should be taken into account before a judgement can be made that environmental information can be withheld under the exception:
- Under the EIR, there is no statutory equivalent to the “appropriate limit” – the cost limit beyond which a public authority is not obliged to comply with a request – described at section 12 of FOIA.
 - The proportionality of the burden on the public authority’s workload, taking into consideration the size of the public authority.
 - The requirement, under regulation 12(1) of the EIR, to consider the public interest test.
 - The EIR’s express presumption in favour of disclosure.
 - The requirement to interpret restrictively the exceptions in the EIR.
 - The individual circumstances of the case.
32. To guide him on the respective merits of the application of regulation 12(4)(b), the Commissioner has asked Defra for clarification in the following areas: the location of the information and the extent of the information that Defra considers would be covered by the request; the role and size of the business area(s) that would need to be employed to recover and extract information; the activities that Defra would need to undertake to comply with the request and an estimate of the time needed to provide the information; and confirmation of whether the decision to apply the exception was underpinned by a sampling exercise.
33. Defra has explained to the Commissioner that it wishes to rely upon a sampling exercise carried out in 2012 which had been used in a previous ICO case FER047006² and which it still considered to be a useful benchmark in relation to the level of communications between Defra and the NFU. This matter concerned communications between Defra and Natural England and Defra and the NFU. As in the current case the request covers in the region of a year’s material.

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

34. Defra has stated to the Commissioner that the sheer scale and volume of NFU material under consideration by the department and the resources required to answer a request of this scope are evidenced by this case in which the decision of the Commissioner was to uphold the position of Defra in relation to regulation 12(4)(b) of the EIR.
35. In addition it has emphasised that the volume and intensity of the work involved in delivering Defra's TB programme has increased enormously since August 2012 when the original sampling exercise was undertaken. This has involved matters in relation to the pilot badger culls and vaccination issues both of which have resulted in considerable work within the department and communication with the NFU. Defra has concluded that it is therefore likely to be the case that the resources required to answer the current request are larger than would have been required to answer the request which is the subject of decision notice FER047006.
36. It stated that for FER0470006 Defra had provided the Commissioner with a detailed sampling exercise of a week's emails from the week commencing 6 August 2012. Eight members of the BTBP team sent and received correspondence during this period. Each member of staff required half a day to collect and deposit material falling within scope, equivalent to 28 hours staff time. 38 emails fell within the scope of the sample with it taking 120 minutes to assess the emails – reading through each item, considering the contents of the emails and making a decision about whether any content needed to be withheld.
37. From this Defra concluded that it would take up to 168 hours to answer the request for the time period involved in that case and submitted that, even after allowing for a more conservative interpretation of the time that would be required to deal with the request, the Commissioner had still concluded that on the basis of that sample to answer a year's worth of material would exceed 80 hours of work and it was manifestly unreasonable to answer the request.
38. Defra also reminded the Commissioner of his approach taken in a more recent case involving a request for NFU correspondence – FER0508147³ in which the above sampling exercise was accepted as a basis for relying upon regulation 12(4)(b) and an accurate indicator of the staff time, costs and resources involved in dealing with a request of this type of scope. This case involved NFU correspondence with the whole of Defra over a 35 working days' timeframe.

³ http://ico.org.uk/~media/documents/decisionnotices/2014/fer_0508147.ashx

39. As part of its representations to the Commissioner Defra has advised that the NFU, unlike the other organisations who are the subject of this request, is a major departmental stakeholder and the volume of communications between the NFU and Defra on the topic of badger culling and vaccination is significant in volume. It states that this reflects the importance of the issues to Defra and the farming industry and the close partnership the NFU has with Defra in examining and managing the delivery of ministerial and industry objectives.
40. As part of this current request Defra has advised that it has carried out a few initial checks to establish how long it would take to deal with this part of the request. It advised that it would need to carry out a wide ranging search to identify material which would potentially fall under scope, as the information is not held centrally, and is not easily accessible.
41. Locating the information would require searching Defra's shared drive for the TB Programme (Microsoft SharePoint) and two other shared drives used by the team. The Commissioner was advised that a search carried out for FER0508147 on the TB Programme shared drive brought up around 2,500-3,500 items when searching for variations of the search term "NFU badger culls". Also, in a separate search around 2,500 items come up for "NFU badger vaccination". It advised that it would be possible to narrow this down further, but material is spread over several parts of the drive and not just in the dedicated area for each different policy initiative.
42. Additionally, the checks would require the searching of inboxes and archives of at least six officials working on the TB programme and searching the central contact database for NFU cases logged (which would include all general NFU communications).
43. Defra advised that the collated information would then need to be catalogued and examined to ensure it fell within scope of this request or whether it was a duplicate. It advised that an estimate of five minutes per item was a very conservative estimate of the time required to be spent per item.
44. It concluded that, taking into account the potentially huge number of items that it would need to consider based on the sampling conducted in FER0508147 (5000+) it believed that even if only 5 minutes were spent on each item, and if the lowest potential figure of 2,500 items were taken (although it considered that it would be substantially more than this), it would still be in excess of 80 hours to go through this material and identify what fell under the scope of the request.

45. Defra argued that this would take officials away from delivering vital policy work at a key point in delivering the pilot culls and therefore, the request would be manifestly unreasonable to answer.
46. In relation to Defra's reliance upon regulation 12(4)(b) the complainant has stated to the Commissioner that they believe the sampling exercise used as a basis for refusing to provide the information cannot be relied upon. They have argued that communications between Defra and the NFU will fluctuate depending on what activities are being undertaken by the department in relation to badger culling and badger vaccination and will not remain at a consistently high level.
47. The complainant has also asked the Commissioner to take into account the unreliability of the calculations as to the time estimate required to deal with the request made by Defra in relation to its original response to the request (rectified on internal review). Also the fact that Defra was relying upon calculations made where the request for information included communications between two organisations, that is, the NFU and Natural England. The complainant was also of the view that the time allowed to assess items within the sampling period should be calculated at 3 minutes not 5 minutes.
48. Having considered his own findings in the cases referred to in this decision notice the Commissioner does not find it necessary to repeat the arguments and information presented in those cases.
49. In relation to the arguments presented by both Defra and the complainant in this case, the Commissioner is of the view that the hours of work required to deal with this part of the request will be at least the number estimated in the most recent case referred to. He has relied upon the sampling exercise undertaken as being a reasonable indicator of activity and being mindful of the fact that the issues of badger culling and vaccination have become more high profile as time has gone on an increase in communication between the Defra and the NFU is a reasonable expectation.
50. The Commissioner also acknowledges that the NFU are a major stakeholder of Defra and, as such, there will be a significant level of communication between the department and the NFU on the issues of badger culling and vaccination and many other farming issues which cover a multitude of subject areas. This inevitably means that extrapolating the relevant information within the scope of this part of the request from the very broad range and voluminous set of information that Defra holds in relation to the NFU will place a significant burden on the available resources of the department.

51. In the circumstances the Commissioner considers that not only is it unreasonable to expect Defra to comply with this part of the request, it is manifestly unreasonable. Consequently, it is left for the Commissioner to assess whether the strength of the public interest arguments in disclosure in this matter are sufficient to outweigh the concerns raised in this case about the diversion of resources.

Public interest arguments in favour of disclosing the withheld information

52. Defra recognises that there is a public interest in disclosure of information concerning advice and discussions on badger control, as there is an interest in transparency and accountability in controversial and emotive policy areas such as badger culling and badger vaccination.
53. There has been a significant amount of interest in the policy from members of the public and discussions in the media, and greater transparency makes government more accountable to the electorate and increases trust.
54. It recognised the strong public interest argument for publishing as much information as possible on the TB policies so that members of the public can be aware of the disease situation and can be informed and part of the wider "debate" about the issue. It recognised the presumption under section 12(2) of the EIR in favour of disclosure.
55. There is also a public interest in being able to assess the quality of advice being given to ministers and subsequent decision making. Equally Defra recognised that there is a public interest in understanding the influence or otherwise that stakeholder organisations, such as the NFU, may have had on the Department's decisions. It recognised that it needed to be clear that it was functioning in an open, accountable and reliable way with its stakeholders.
56. The complainant has strongly argued that the strength of the influence of the NFU and other non-government organisations upon Defra and its policy on Bovine TB eradication needs to be publicly examined. Also that the costs incurred in dealing with the issue of Bovine TB are a significant burden to the taxpayer and public doubts are being expressed as to the suitability of the current policy which has been adopted and which the complainant argues is being promoted by the NFU.
57. The complainant has also expressed concern about the inherent delay which appears to exist in information concerning these issues coming into the public domain.

Public interest arguments in favour of maintaining the exception

58. Defra has argued that whilst it believes in openness and transparency, it has a duty to be both accountable and transparent in the effective and wise spending of public money. It maintains that the estimates produced in this matter and the sheer volume of the information involved translates to a significant cost implication in the providing of the information. It argues that this would place a substantial burden on the BTBP team, and ultimately on the Department. It states that this would be detrimental to the work of the BTBP team, and would divert officials from the delivery of badger control policy work and other key responsibilities.
59. It suggests that the public interest has been partly met by Defra already providing material for this request to the complainant as well as information in relation to previous requests submitted by them. In addition it has also placed a large amount of information on the Defra section of Gov.uk - both through proactive publishing and through similar requests for stakeholder information previously received (as Defra publishes the responses to all EIR/FOIA requests where information has been disclosed).

Balance of the public interest arguments

60. With regard to the public interest in disclosure the Commissioner has taken into account the general public interest in transparency and accountability. He is also mindful of the presumption in favour of disclosure and the need to read exceptions restrictively.
61. However, balanced against this is the burden that would be imposed on Defra. There is also the wider public interest in protecting the integrity of the EIR and ensuring that they are used responsibly.
62. The Commissioner recognises that a public authority will always be expected to bear some costs when complying with a request. For the sake of the public interest test, however, the key issue is whether in all the circumstances this cost is disproportionate to the importance of the requested information. In the Commissioner's view, in this case, it is.
63. In coming to this decision, the Commissioner fully accepts that the request has value. It is fair to say that the request was designed to capture information of particular significance about the badger culling and vaccination proposals and the role of key organisations in relation to the same; information, in short, that where held and disclosed would be likely to have wider benefit to the public in understanding the decision making processes involved in the way policies are formulated on these issues. Yet, as voiced in his decision on FS50445154 (Hillingdon Borough

Council)⁴ the Commissioner recognises that there is a public interest in not bringing information rights legislation into disrepute by requiring public authorities to respond to manifestly unreasonable requests. This will particularly be the case where, as here, the burden on a public authority is considerable, well-exceeding, for example, the appropriate limit stated in the fees regulations associated with section 12 of FOIA. This is set at £600 for central government departments, which is the equivalent of 24 hours of work on the request.

64. The Commissioner has decided that, despite the accepted seriousness of the subject matter and the public interest in these issues, it is unfair to expect Defra to comply with the request because of the substantial demands it would place on Defra's resources and the likelihood that it would significantly distract officials from their key responsibilities within the organisation. Therefore, in all the circumstances, the Commissioner has found that the weight of the public interest arguments favours maintaining the exception.
65. The Commissioner is therefore satisfied that Defra has met its obligations under the EIR and requires no further action to be taken.

⁴ http://ico.org.uk/~media/documents/decisionnotices/2013/fs_50445154.ashx

Right of appeal

66. 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

67. 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.
68. 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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