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)

1. The complainant has requested from Defra copies of correspondence and documentation between, firstly, Natural England and Defra and, secondly, the National Farmers Union (NFU) and Defra, since 2011 in relation to a number of specified issues relating to the proposed badger cull. Defra refused to comply with the request on the basis that it was manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR. The Commissioner's decision is that the exception is engaged and that, in all the circumstances, the public interest favours maintaining the exception. Accordingly, the Commissioner does not require Defra to take any steps as a result of this notice.

Request and response

2. On 21 December 2011 the complainant made a request for copies of records dating from 1 January 2010 between; (i) Natural England and Defra, and (ii) Defra and the National Farmers Union, in relation to the proposed badger cull. On the advice of Defra, the complainant agreed on 2 February 2012 to narrow their request; limiting it to a single year. Defra initially refused to disclose this information under a number of exceptions but subsequently revised its position, claiming in its letter of 27 June 2012 that the request was manifestly unreasonable for the purposes of regulation 12(4)(b) of the EIR.

3. Following further exchanges of correspondence between the parties, the complainant wrote to Defra on 16 August 2012 and, among other points, proposed narrowing still further its request for information. It is this request that serves as the focus of this decision notice, the terms of which are set out in the annex (A) attached to this notice.

4. Defra responded on 14 September 2012 and explained that it considered the request to represent a new application for information under the EIR. Defra further advised that it had decided that the request fell under regulation 12(4)(b) of the EIR. This was because of the distraction and diversion that compliance with the request would have on the department's other work.

Scope of the case

5. The complainant contacted the Commissioner on 24 October 2012 to complain about the way their request for information had been handled. In particular, the complainant has asked the Commissioner to consider whether an exception – regulation 12(4)(b) – relied on by Defra was properly applied.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

6. 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.

7. 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.

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

8. 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.

9. 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.

10. 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.

11. Defra has firstly explained that information subject to the request would be held across the mailboxes of the Defra policy team and individuals who had left the team during the period of the request. Some emails would also be held on a shared "cloud", filed in a number of different folders by subject matter rather than by sender/receiver. Defra

therefore considers that locating the information is not necessarily a straightforward matter.

12. To place the task of complying with the request in context, Defra has directed the Commissioner to its experience of handling a similar request for information made by the complainant. This, however, only covered a period of 2½ months rather than the 19½ months featured in the request in question. Defra advised that approximately 650 items were identified that fell into the scope of emails between Defra and Natural England and Defra and the NFU. Extrapolating from the volume of information retrieved in that instance, Defra expects that some 5000 emails could potentially fall within the scope of the request.

13. Allowing that this analysis ultimately derives from the practical knowledge obtained from dealing with a related request, the Commissioner is prepared to accept that Defra's estimate as reasonable. The Commissioner has therefore gone on to consider the activities needed to be completed for Defra to comply with the request and the time flowing from these. According to Defra, these activities would comprise the following:

    - Determining which members of staff held the information (including staff members who had since left the team).

    - Locating the information. This would involve: large-scale searching of information held in the accounts of the policy team (past and present), with special arrangements required to establish whether information could be retrieved from former employees; an examination of the files held by subject area in a shared "cloud" area; and a cataloguing of the documents retrieved with a view to establish what information was pertinent to the terms of the request.

    - Examining each file in detail in order to ascertain whether the information was environmental or non-environmental, to identify and remove duplicate information and to assess whether any information needs to be withheld.

14. On the last point, it can be observed that the process of considering whether information should be redacted is not an activity that can be included as part of a public authority's cost-estimate produced for the purposes of section 12 of FOIA. However, to support its position that the activity would nevertheless have a bearing in this case, Defra has reminded the Commissioner of the First-Tier Tribunal's findings in

Salford City Council v Information Commissioner and Tiekey Accounts (EA/2012/0047)[2]. The Tribunal decided that the time, and therefore the cost, associated with the redaction of information could count as a contributory factor when assessing whether a request is vexatious as described by section 14(1) of FOIA. Defra considers that this principle would equally apply in respect of regulation 12(4)(b), which like section 14 of FOIA is designed to protect public authorities from the inappropriate use of the legislation.

15. Taking into account these different activities, and based on its experience of the separate request mentioned above, Defra has estimated that it would take 5 minutes per email to check that it was not a duplicate, was in scope, and then read and check information in the email. This, it considers, is a conservative estimate. Furthermore, Defra has informed the Commissioner that the policy team responsible for delivering the badger control policy is relatively small, which would only serve to amplify the strain that compliance would place on Defra's, and particularly the policy team's, resources.

16. In his decision on FS50445154 (Hillingdon Borough Council)[3], the Commissioner considered among other issues the authority's arguments that the resources needing to be expended on processing the request helped justify its decision to deem the request vexatious under section 14 of FOIA. In that case, the Council found that it would need to examine 4896 emails in response to the request and estimated that 10 minutes per email would be required to consider exemptions.

17. At paragraph 36 of his decision, the Commissioner reflected on these arguments as follows:

*The Information Commissioner has some sympathy with the argument that where large volumes of information have been requested, and there are obvious and substantiated concerns about potentially exempt information, which cannot be easily isolated because it is likely to be scattered throughout the whole of the requested information, then a request could potentially be deemed to be vexatious (**or manifestly unreasonable under the EIR*** [the Commissioner's emphasis]*)*

[2] http://www.informationtribunal.gov.uk/DBFiles/Decision/i873/20121030%20Decision%20amended%2031-10-12%20EA20120047.pdf

[3] http://www.ico.org.uk/~/media/documents/decisionnotices/2013/fs_50445154.ashx

because of the disproportionate time and effort that would be needed to review and remove the exempt information.

18. The result of this is that, in certain situations, the Commissioner will allow that the time needed to consider whether information is exempt may be used as evidence that a request is manifestly unreasonable. The Commissioner, however, did continue by expressing some reservations about the Council's estimate in that case – considering that the estimate of 10 minutes per email to consider exemptions was excessive.

19. Similarly, it is the Commissioner's belief that Defra had not initially supported its estimate that it would require 5 minutes to review each email. This is because he had not been presented with any specific evidence that suggested the process of confirming whether information was subject to the request should be particularly time-consuming. Nor was the Commissioner originally made aware of any *obvious and substantiated concerns about potentially exempt information*.

20. In order to protect the integrity of the legislation, and the usefulness it possesses as an access-regime, the Commissioner envisages that a public authority will only include redaction time as a relevant factor for the purposes of the exception when the activity itself is realistically expected to contribute significantly to the burden of compliance. Furthermore, when the occasion does permit, it is not sufficient for a public authority to simply assume that redaction will impose a burden but must instead be based on its prior knowledge of, and general familiarity with, the nature of the information that has actually been requested. Bearing these principles in mind, the Commissioner has felt it appropriate to ask Defra to carry out a sampling exercise, covering a representative week, of information falling within the terms of the request.

21. In response, Defra agreed to work through information on the same subject that it had already pulled together for a week in August 2012. This collation had been done in response to a separate action, the specifics of which do not concern us here. Defra considered that this was a typical week in the time period and the Commissioner has not seen any reason to doubt this contention. Based on the outcome of the exercise, Defra informed the Commissioner of the following findings:

    - Eight members of the TB programme sent and received correspondence during the period in question.

    - Each member of staff would require half a day to collect and deposit in a shared file space the correspondence falling within scope. This equated to 28 hours of staff time.

- The sampling exercise identified 38 emails as falling within the terms of the request.

- It took the policy team a total of 120 minutes to assess the emails. This time comprised: reading through each of the emails identified, considering the content of the emails; and assessing whether information needed to be withheld.

22. Defra has pointed out that there will always be a limit to the representativeness of a one-week sample. However, developing on its findings, Defra has estimated that a search of the full 84 weeks covered by the request might be expected to identify 3192 documents. Allowing that it took two hours to assess 38 emails, this would mean 168 hours to locate and consider the full range of the information covered by the request. Furthermore, Defra has specified that the time taken to actually apply redactions to the 38 emails by blanking out text was three hours. Again, following this to its natural conclusion, Defra considers that an additional 252 hours would be required to process the requested information with a view to its disclosure.

23. Having had sight of the information on which the sample was based, the Commissioner still has some reservations about the estimated time required to comply with the request. However, the Commissioner recognises that even if he were to cut the estimate down drastically, it could reasonably be expected that compliance would still amount to over 80 hours of work – the figure reported in the *Hillingdon* decision. In the Commissioner's view, this is a large burden for any public authority, including central government departments (even setting aside for a moment, Defra's claim that the policy team required to deal with the request is relatively small).

24. The Commissioner therefore considers that not only is it unreasonable to expect Defra to comply with 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 are sufficient to outweigh the concerns raised in this case about the diversion of resources.

25. There is no dispute in this case about the seriousness of the request, with both Defra and the complainant agreeing that the policy decision to cull badgers is a controversial one that divides opinion. This was reinforced by Defra in its response to the complainant's earlier request of 21 December 2011:

    We recognise 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 policy areas.

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. There is a public interest in being able to assess the quality of advice being given to ministers and subsequent decision-making. Equally we recognise that there is a public interest in understanding the influence that stakeholder organisations, such as the NFU, may have had on the Department's decisions.

26. Defra, however, also considers that there are strong countervailing public interest arguments in favour of maintaining the exception. In particular, it claims that there is a public interest in protecting the integrity of the EIR and ensuring that they are used responsibly. To support this position, Defra has referred to the First-Tier Tribunal's decision in *Anthony Lavelle v Information Commissioner* (EA/2010/0169)[4] and specifically its comment at paragraph 37 of the decision where it said:

There is a need to maintain the integrity of information rights legislation, and this includes ensuring it is not misused at the cost of others by responding to requests that are manifestly unreasonable.

27. It should be noted that this argument was put forward as part of Defra's internal review of 27 June 2012 completed in response to the earlier information request, the arguments in which have also been relied on here.

28. 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.

29. 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 proposals; information, in short, that where held and disclosed would be likely to have wider benefit to the public. Yet, as voiced in his decision in the *Hillingdon* case, the Commissioner recognises that there is a public

[4] http://www.informationtribunal.gov.uk/DBFiles/Decision/i611/20111130%20Decision%20EA20100169.pdf

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.

30. The Commissioner has decided that, despite the accepted seriousness of the subject matter, 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.

Right of appeal

31. 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
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.

33. 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

Annex A – schedule of requests

Request	Terms of request
16 Aug' 2012	On that basis, the [complainant] would also propose narrowing its request for information to (1) all correspondence and documentation between Natural England and Defra and (2) all correspondence and documentation between the NFU and Defra since 1 January 2011 in relation to the proposed cull concerning the following issues: i. Costings of the different methods of culling; ii. Humaneness of the different methods; iii. Safety of culling including any documents relating to the Health and Safety Executive's views of the risks; iv. Risk to non-participating farmers; v. Evaluation of the results of culling; vi. Badger population issues; vii. Licence conditions; viii. Simultaneous culling condition; ix. Badger removal rates x. Perturbation xi. Impact assessments