

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 July 2013

Public Authority: Natural England
Address: Foundry House
3 Millsands
Riverside Exchange
Sheffield
S3 8NH

Decision (including any steps ordered)

1. The complainant has requested information regarding the funding arrangements for the two companies licenced to undertake pilot badger culls. Natural England withheld information on the basis that disclosure would adversely affect the confidentiality of proceedings, the voluntary supply of information and commercial confidentiality.
2. The Commissioner's decision is that Natural England has correctly applied the exception at regulation 12(5)(d) to withhold the information identified as within the scope of the request and the public interest favours maintaining the exception.

Request and response

3. On 24 October 2012, the complainant wrote to Natural England and requested information in the following terms:

"Please disclose all reports, information and communications you have received from the two companies licensed to undertake the pilot badger culls which contain information regarding the amount of funds they were seeking to raise and the amounts they had collected and by when, given that you require them to have full funding in place before the culls can proceed.

Please disclose all enquiries you have made to the two companies regarding the progress of collecting the funds required and all

reporting requirements you placed on them with respect to this issue."

4. Natural England responded on 16 November 2012. It stated that it had considered the request under the Environmental Information Regulations 2004 ("the EIR") and in regards to the first part of the request any information held was being withheld on the basis of regulation 12(5)(d) (confidentiality of proceedings) and 12(5)(f) (voluntary supply of information).
5. With regards to the second part of the request Natural England explained it had made no enquiries to companies regarding the process of collecting funds and therefore it did not hold this information.
6. Following an internal review Natural England wrote to the complainant on 9 January 2013. It stated that it upheld its decision to withhold relevant information requested in the first part of the request on the basis of regulation 12(5)(d) and 12(5)(f).

Scope of the case

7. The complainant contacted the Commissioner on 9 January 2013 to complain about the way his request for information had been handled. In particular the complainant disagreed that companies would expect a level of confidentiality when they were required as a condition of the licence to prove they had appropriate resources in place. The complainant also argued there was a strong public interest in disclosure. Similarly the complainant argued that information could not have been provided voluntarily to Natural England if it was a requirement of the licence conditions.
8. During the course of the Commissioner's investigation Natural England also sought to rely on further exceptions to withhold information:
 - Regulation 12(5)(e) – commercial confidentiality
 - Regulation 12(5)(a) – public safety
 - Regulation 12(3) – personal information
9. Regulation 12(5)(e) was applied to funding information following consultation with the companies involved. Regulations 12(5)(a) and 12(3) were applied in relation to names and contact details of individuals involved in Badger Control Policy and employees of Natural England.

10. Natural England wrote to the complainant to make him aware of the new exceptions which were being relied upon and the complainant wrote back to the Commissioner to state that he did not have any interest in names and contact details and fully expected these to be redacted. As such the Commissioner has not considered this information as part of his investigation and will not be analysing the application of regulations 12(5)(a) and 12(3).
11. The Commissioner therefore considers the scope of his investigation to be to determine if regulations 12(5)(d),(e) and (f) have been correctly engaged in relation to the information held in the first part of the request.

Reasons for decision

12. The information identified by Natural England as being within the scope of the request all relates to information received regarding the funding of the companies and includes bank statements, bank certificates, letters from the bank and funding confirmation letters. As well as this a cost calculator has been identified as being within the scope of the request as it shows the estimated costs for the cull based on estimated numbers of badgers, the cost of equipment from the companies and the number of days required. The remainder of the withheld information constitutes covering emails.

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

13. 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.
14. When considering the application of regulation 12(5)(d) the first question that should be asked is whether the effect of disclosure relates to the 'proceedings' properly described by the exception. In his guidance¹ on the exception 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 within an authority's jurisdiction, situations where an authority is exercising its statutory decision

1

http://www.ico.org.uk/for_organisations/guidance_index/~//media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_confidentiality_of_proceedings.ashx

making powers, and legal proceedings. In each of these cases the proceedings are a means to formally consider an issue and reach a decision.

15. Natural England has explained that the information that the companies supplied had to be provided to fulfil the licencing requirement, such as the bank statements. These were provided as part of a process involving the exercise of Natural England's statutory functions under the Protection of Badgers Act 1992 ("Badgers Act"). Section 10 of this Act sets out the circumstances and conditions for issuing licences for badger culling and designates English Nature² as the appropriate body for making decisions on the issuing of licences.
16. For this reason the bank statements, bank certificate and funding confirmation letter do constitute information which was required to be provided to Natural England to demonstrate the companies involved had the funding in place to be suitable to be issued with a licence for badger culling. The covering emails all relate to the funding information and the licence application process and would also therefore be covered by this exception.
17. Natural England also considers this exception applies to the cost calculators. Although these were not required to be provided as part of the proof of funding they were required as part of the licence application process and contain information about the proposed costs and funding of the pilot culls. For this reason Natural England considered the cost calculators to be within the scope of the request and covered by this exception. Having considered this the Commissioner accepts Natural England's explanations for considering the cost calculator alongside the other information required as parts of the licencing process.
18. The issuing of licences to companies to conduct culling trials is part of the Government's badger control policy and Natural England is charged with overseeing the licencing operation. As proceedings can include situations where an authority is exercising its statutory decision making powers (in this case, whether to issue licences under the Badgers Act) the Commissioner accepts that the proceedings were of a sufficiently formal nature to be considered proceedings for the purpose of regulation 12(5)(d).
19. The exception also clearly suggests that the proceedings should be confidential and that the confidentiality must be provided by law. Natural England explained to the Commissioner that the information

² Ceased to exist in 2006 and was integrated with parts of the Rural Development Service and the Countryside Agency to form Natural England

that is subject to this exception is not in the public domain and was provided with an expectation of confidentiality under common law.

20. The Commissioner's view is that the confidentiality envisaged in the exception can be provided in statute or derived from common law. The information that is subject to this exception is financial information that gives an insight into the fiscal workings of the companies. Financial information provided to meet a licencing condition is generally likely to be confidential and the Commissioner would accept that in this case it would have been provided with an expectation of confidentiality. The withheld information is therefore not trivial and the Commissioner accepts that a common law duty of confidence exists.
21. The Commissioner next considered whether disclosing the withheld correspondence '*would adversely affect*' the confidentiality of the licencing process and Natural England's statutory functions in terms of licencing under the Badgers Act.
22. Natural England recognise the need for parties to feel able to provide information in confidence. It explained that although the documents contain limited information it is the nature of the information, showing financial data, and the importance to the process of such communications being able to take place that is key. Third parties will be less willing to provide information of this nature in the future if the information is disclosed in this case.
23. In the Commissioner's opinion, '*adversely affect*' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Given the nature of the information withheld under this exception, the Commissioner accepts that disclosure would have a negative impact on Natural England. There is clearly an expectation from both parties that financial information provided as part of a licencing condition would be held in confidence, not least because disclosure could adversely affect the commercial interests of the companies involved. It is therefore more probable than not that disclosing the funding information would inhibit Natural England's ability to carry out its licencing functions and adversely affect the confidentiality of the proceedings.
24. The Commissioner therefore finds that the exception at regulation 12(5)(d) is correctly engaged in respect of the bank statements, bank certificate and funding confirmation letter.
25. The Commissioner must next consider whether in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(5)(d) outweighed the public interest in disclosing the withheld correspondence.

Public interest arguments in favour of disclosure

26. Natural England recognised the public interest in public authorities being open and transparent in their decision making to assist the public's understanding of pertinent issues. Natural England also acknowledged that disclosure enhances accountability where the spending of public money is involved.
27. With more specific reference to the withheld information, Natural England accepts that there is a clear public interest in the disclosure of information which shows its regulatory activities and processes are undertaken correctly and all necessary criteria have been met prior to issuing licences.
28. The complainant has stated that as a key requirement of the culls is for the companies running them to demonstrate they have the resources to run the culls for 4 years there is a clear public interest in ensuring that the companies who have been chosen are able to deliver on the terms of the licence. The complainant argues that as clear public statements were made that the support and resources were in place for the culls it is reasonable the public should be able to see evidence of this.
29. The complainant has also argued that there is a strong public interest in openness and transparency where the information relates to the spending of public money and given the cull is based on a combination of public and private funding transparency is particularly important.

Public interest arguments in favour of maintaining the exception

30. Natural England considers the nature of the information i.e. bank statements and financial details and the fact the Badger Control Policy is a sensitive issue are factors in favour of maintaining the exemption.
31. Natural England has also argued it is important that it is able to freely discuss the licence application and source information from the licence applicant in such a way that it is can effectively operate the statutory licensing regime and issue licences as it is required to do. Natural England therefore considers it is not in the public interest that statutory processes are disrupted or for undue pressure to be put on third parties.
32. It has also argued there is a general public interest in protecting confidential information and maintaining the confidence between confider and confidant. In support of this argument Natural England

has pointed to the Commissioner's guidance on the application of this exception which states that:

"Even where the confidentiality is not provided by statute, it may stem from a common law duty of confidence. So, where the exception is engaged there is always some inherent public interest in maintaining it."

Balance of the public interest arguments

33. The Commissioner acknowledges that the public interest arguments are finely balanced. It is evident that the policy on badger culling is controversial and has attracted a wide range of support and opposition. Whilst this could be argued as a factor in favour of disclosure in order to increase transparency in Natural England's part in the issuing of licences to companies to carry out the culls; the Commissioner also accepts the controversy surrounding the policy can also be argued as a factor in favour of withholding the information as it is important Natural England are able to make decisions on licencing away from public scrutiny.
34. At the time of the request the companies had not been issued with licences. The decision was still ongoing whilst Natural England confirmed that all of the licensing conditions had been met. The Commissioner therefore accepts that at the time of the request disclosure of the information provided as part of the licencing conditions would have been likely to impact on the confidentiality of the process and the ability of Natural England to carry out its statutory functions unimpeded.
35. The Commissioner is aware of the express presumption in favour of disclosure in the EIR and in making his decision in this case he has been mindful of the need to consider whether the arguments against disclosure are sufficiently strong to outweigh this. He has considered the media and public interest in any information relating to the decisions behind the badger culls and balanced these against the arguments presented in the preceding paragraphs as well as considering the specific nature of the withheld information which is the subject of this exception.
36. The Commissioner considers it important to highlight that the information is financial information and consists of bank statements and funding letters as well as a cost calculator. He is of the view that this information is unlikely to add anything to any debate on the issue as it will not provide the public with any greater insight into the badger control policy but will put sensitive financial information into the public domain which could harm the commercial interests of the

companies and, at the time of the request, may have negatively affected the licencing process.

37. In view of the above and the other public interest factors against disclosure mentioned in relation to regulation 12(5)(d), the Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(5)(d) outweighs the public interest in disclosure. He has not therefore gone on to consider the application of regulations 12(5)(e) and (f).

Right of appeal

38. 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

39. 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.
40. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF