

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

Decision notice

Date: 9 April 2015

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 made a number of requests to the Department for Environment, Food and Rural Affairs (Defra) for information relating to the first wave of the pilot badger culls in West Somerset and West Gloucestershire. Defra responded by providing some parts of the requested information, withholding other parts or otherwise explaining that the requested information was not held. The present notice refers to Defra's refusal to disclose the costs associated with the purchasing of badger cage traps under the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exception in the EIR. The Commissioner's decision is that the exception is not engaged. He therefore requires the requested cost information to be disclosed.

Request and response

2. On 20 March 2014 the complainant submitted seven requests to Defra regarding the recently completed pilot badger cull in West Somerset and West Gloucestershire. The full wording of the requests is reproduced in the annex to this notice.
3. Defra responded to the requests on 1 May 2014. It provided some information and explained that other parts were not held. However, with respect to requests 1 and 2 and the costs associated with the purchasing of cage traps, Defra explained that the information engaged

the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exception in the EIR. The exception is qualified by the public interest test and Defra found that on balance the public interest favoured withholding the information.

4. The complainant wrote to Defra on 5 June 2014 and asked it to carry out an internal review into its handling of the requests, including its reliance on regulation 12(5)(e) of the EIR. On 26 June 2014 the complainant wrote to Defra again to highlight what she considered were either inconsistencies or gaps in the information previously provided.
5. Defra responded to the complainant on 22 July 2014. However, this only addressed the points raised in the complainant's later letter of 26 June 2014.

Scope of the case

6. The complainant contacted the Commissioner on 3 September 2014 to complain about five different aspects of Defra's response to her requests. These are outlined below.
 - Defra's initial failure to clarify that some cage traps had been purchased by another party.
 - Defra's reliance on regulation 12(5)(e) of the EIR to withhold the cage trap cost information.
 - The possibility that Defra held information relating to the other party's purchasing of traps that had not been provided.
 - With regard to the number of badgers killed during the cull, the apparent inconsistency between the figures reported by Defra and figures reported elsewhere.
 - Defra's failure to complete an internal review within the prescribed timeframe when one had been requested.
7. With the exception of Defra's decision to withhold the cage trap costs under regulation 12(5)(e), the disputed points have been dealt with during the course of the Commissioner's investigation.
8. Defra has informed the Commissioner that it considers regulation 12(5)(e) of the EIR was correctly applied and the public interest test properly exercised. The Commissioner's consideration of the exception is set out in the remainder of this notice.

Reasons for decision

Scope of the withheld information

9. Defra has informed the Commissioner after further enquiries made during his investigation that the cost information it holds is incomplete, as not all of the records concerning the purchasing had been saved.
10. In relation to the information it does hold, Defra has explained that the same cages were used during the original six week period of the cull (request 1) and the extended period (request 2). Defra handed out the cages prior to the cull and took them back at the extended period, which effectively means the same information applies to both requests.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

11. Regulation 12(5)(e) of the EIR states –

(5) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

12. Breaking down the components of the exception, the Commissioner considers that regulation 12(5)(e) will only be engaged where each of the following conditions are satisfied –
 - The information is commercial or industrial in nature.
 - The information is subject to confidentiality provided by law.
 - The confidentiality is provided by law to protect a legitimate economic interest.
 - Disclosure would adversely affect the confidentiality.
13. If each of the conditions is met, a public authority must then go on to consider the public interest test and decide whether in the circumstances the public interest favoured disclosure despite the adverse effect.

Is the information commercial or industrial in nature?

14. Defra considers that the requested information is commercial information. The Commissioner's guidance on regulation 12(5)(e)¹ provides the following explanation of the types of information that would fall under this description.

16. For information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. In particular, information about a public authority's revenues or resources will not generally be commercial information, unless the particular income stream comes from a charge for goods or services.

15. The requested information concerns the purchase of goods – the cage traps - by Defra from a commercial third party. In accordance with the explanation set out in his guidance, the Commissioner is satisfied that the information is commercial information.

Is the information subject to confidentiality provided by law?

16. 'Confidentiality provided by law' will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
17. Defra has not specifically clarified the legal basis upon which it considers the confidentiality is provided. To this extent, the Commissioner considers that Defra has failed to demonstrate that the condition is satisfied.
18. However, the Commissioner appreciates that information relating to a contract between a public authority and a commercial entity may be covered by the common law of confidence. In this regard, the Commissioner accepts the information is not trivial and is not in the public domain. He further considers that Defra and the commercial entity are likely to have entered into the contract with an expectation, whether implicit or explicit, of confidentiality. The Commissioner has therefore gone on to consider the next condition as if this one is satisfied.

¹ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

Is the confidentiality provided by law to protect a legitimate economic interest?

19. In his guidance the Commissioner introduces the concept of a legitimate economic interest as follows.

38. Legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income. However, they will not include personal privacy concerns.

20. With regard to the question of whose economic interests are at stake, the guidance states that it may be the interests of the public authority, or a third party, or both, which could be relevant. However, where the interests of a third party are cited, the guidance continues by saying:

46. [...] the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This principle was established by the Information Tribunal in Derry City Council v Information Commissioner (EA/2006/0014, 11 December 2006). That case related to the commercial interests exemption under FOIA, but it is equally applicable to third party interests under regulation 12(5)(e).

21. Defra has explained that at the time the request was received it was in the process of tendering for cage traps. Due to the commercial competition that was taking place, Defra has argued that both its own economic interests and the economic interests of the companies that had finalised their tender should be taken into account.
22. With regard to the economic interests of the third parties, Defra has not provided the Commissioner with any evidence that the concerns cited originate from the parties themselves. In any event, the Commissioner notes that the request does not ask for the current tender information but for previous purchasing costs. He therefore considers that a case has not been made out that demonstrates why the economic interests of all the third parties entering into the negotiations should be considered.
23. In relation to Defra's own economic interests, it has claimed that disclosure would affect its negotiating position with regard to the

purchasing of the cage traps. This is because the release of the information may cause competitors to try to undercut each other, with the result of the driving down of the profit margins being that a company will be tempted to produce ineffective cages that cannot be used.

24. The Commissioner does not consider this to be a plausible argument for two principal reasons. Firstly, as highlighted by the complainant, the request only asks for the total purchasing costs and not the more useful cost per item information. Furthermore, Defra has informed the Commissioner that the cage traps are not only utilised for culling but also used for research purposes or vaccination. The possibility of re-using the cages means that the scope of the current tender may differ from the previous purchasing exercise, thereby diminishing the worth of the information to the companies vying for the tender.
25. Without further evidence, the Commissioner is also sceptical that disclosure would leave Defra exposed to the possibility of receiving poor-quality goods. Firstly, this assumes that a company would be willing to risk its commercial reputation for the sake of this one tender. Secondly, it disregards the option of including in any contract a mechanism that ensures a company does not profit from providing goods that were sub-standard.
26. For these reasons, the Commissioner has decided that the condition is not satisfied, which means the regulation 12(5)(e) exception is not engaged. The Commissioner has not therefore had to go on to consider the last of the four conditions or the public interest test.

Right of appeal

27. 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

28. 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.
29. 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 – information requests (20 March 2014)

1. Please disclose the cost of the (a) cages, (b) bait, (c) gloves, masks and disinfectant, and (d) ammunition for shooting badgers at close range, which were used during the original six weeks of the pilot badger culls in (i) West Somerset and (ii) West Gloucestershire.

2. Please disclose the cost of the (a) cages, (b) bait, (c) gloves, masks and disinfectant, and (d) ammunition for shooting badgers at close range, which were used during the extended period of the pilot badger culls in (i) West Somerset and (ii) West Gloucestershire.

3. Please disclose the labour costs of cage-trapping and shooting badgers during the (a) first six weeks of the pilot badger cull and (b) extended period of the pilot badger cull in (i) West Somerset and (ii) West Gloucestershire.

4. Who paid for the (a) cages, (b) bait, (c) gloves, masks and disinfectant, (d) ammunition for shooting badgers at close range, and (e) labour? Was it (i) the culling companies, (ii) farmers, (iii) landowners, (iv) Defra or (v) others (please identify)?

5. If Defra did not pay for the (a) cages, (b) bait, (c) gloves, masks and disinfectant, (d) ammunition for shooting badgers at close range, and (e) labour, will it be reimbursing the parties who did pay for these? Are the relevant parties asking to be reimbursed? What is the amount that Defra will be paying towards these costs in (i) West Somerset and (ii) West Gloucestershire? When will the money be reimbursed by Defra?

6. How many badgers were killed using the method of cage-trapping and shooting during the (a) first six weeks of the pilot badger culls, and (b) extended period of the badger culls in (i) West Somerset and (ii) West Gloucestershire?

7. When was the first badger killed by the method of cage-trapping and shooting during the pilot badger cull in (a) West Somerset and (b) West Gloucestershire? Please supply the exact dates in both cases.