

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

Date: 16 December 2022

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a multipart request to the Ministry of Defence (MOD) seeking information about the use of its land for badger culling. The MOD responded by withholding some information on the basis of regulation 12(5)(a) (defence and public safety) of the EIR and by stating that it did not hold the remainder of the information.
2. The Commissioner's decision is that the MOD is entitled to rely on regulation 12(5)(a) to withhold the information to which this exception has been applied. The Commissioner is also satisfied, on the balance of probabilities, that the MOD does not hold any further information falling within the scope of the request. However, in handling the request the Commissioner has concluded that the MOD breached the following procedural regulations in the EIR: 11(4) and 14(2).
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 9 June 2021:
 1. Please disclose whether access has been permitted to Ministry of Defence (MOD) land for culling badgers.
 2. If access has been permitted to MOD land for culling badgers, please disclose if this accessible land includes land that is a) owned (freehold), b) owned (leasehold), or c) held through rights, for e.g. held on a short-term or contractual basis or through grants for a specific purpose.
 3. Please disclose each county where access has been permitted to MOD land for culling badgers.
 4. Please disclose the area in km² of MOD land in each county where access has been permitted to MOD land for culling badgers.
 5. Please disclose each licensed area where access to MOD land for culling badgers has been permitted. (For Badger Cull Area numbers/names please see the list on pages 11-12 of this document: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915124/badger-cull-areas-min-max-2020.pdf)
5. The MOD responded on 25 June 2021 and confirmed that it held some information falling within the scope of the request. More specifically, in relation to part 1 of the request it confirmed that badger culling was allowed on the MOD estate. The MOD also confirmed that such land included that described at parts 2 a) and b) of the request. However, in relation to part 2 c) the MOD stated that the use of such land would be the landowner's decision rather than the MOD's. In relation to part 3 of the request the MOD explained that such information was exempt from disclosure on the basis of section 38 of FOIA. Finally, the MOD explained that it did not hold any information falling within the scope of parts 4 and 5.
6. The complainant contacted the MOD on 6 July 2021 and asked it to conduct an internal review of this response. She asked the MOD to consider the following points:
 - She argued that the request should have been considered under the EIR rather than FOIA.
 - She disputed the decision to withhold the information sought by part 3.

- She argued that the MOD was likely to hold information falling within the scope of parts 2 c), 4 and 5 of the request.
7. The MOD informed her of the outcome of the internal review on 22 October 2021. The MOD accepted that the request should have been handled under the EIR. In relation to part 3 of the request the MOD explained that it considered such information to be exempt from disclosure on the basis of regulation 12(5)(a) of the EIR as disclosure of it would adversely affect both public safety and defence. In relation to parts 2 c), 4 and 5 of the request the MOD confirmed its position that the requested information was not held and therefore regulation 12(4)(a) of the EIR applied.

Scope of the case

8. The complainant contacted the Commissioner on 14 September 2021 in order to complain about the MOD's handling of her request. She raised the following grounds of complaint:
- She disputed the MOD's reliance on regulation 12(5)(a) to withhold information falling within the scope of part 3 of her request;
 - She disputed the MOD's position that it did not hold information falling within the scope of parts 2c, 4, and 5; and,
 - She was unhappy with the MOD's processing of the request, namely its failure to initially consider this under the EIR, its delays in completing the internal review in 40 working days and in her view the MOD's failure to fully consider the points she set out in her request for an internal review.
9. The complainant provided the Commissioner with detailed submissions to support her complaint and these are referred to below.

Reasons for decision

Regulation 12(5)(a)

Part 3 of the request

10. The MOD withheld the information requested by part 3 of the request on the basis of regulation 12(5)(a). This provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.

11. For the exception to apply a public authority must show that disclosure is more likely than not to have the adverse effect (ie a more than 50% chance). It is not enough to show that disclosure could or might have an adverse effect.
12. The Commissioner recognises that it is not possible to prove beyond doubt that the adverse effect would happen. However, a public authority must still show that:
 - the causal link between disclosure and effect is so convincing that the adverse effect is clearly more likely to happen than not. This applies even if the adverse effect would happen only once or affect only one person or situation; or
 - disclosure is more likely to have an adverse effect than not, given the potential for the adverse effect to occur, and how frequently these circumstances arise (ie the number of people, cases or situations in which the prejudice would occur).

The MOD's position

13. The MOD explained that the elements of regulation 12(5)(a) that are of relevant to this request are those relating to 'defence' and 'public safety'. It explained that whilst some counties may contain several MOD-owned areas or sites, there are those that contain only one or two MOD establishments. Providing confirmation of the county would, therefore, identify specific MOD owned sites where access has been permitted for culling activities.
14. The MOD argued that this could impact upon both the MOD's use of the land for defence purposes and the health and safety of those that have legitimate access to it. This was on the basis that if it released information that potentially identifies individual military sites to which those involved in licensed culling activities have access, there is a risk that those sites will be targeted by protestors. The MOD explained that the defence estates on which licensed culling is permitted includes both open spaces, used for military training, and establishments that are home to military personnel and their families. Individuals wishing to disrupt culling activities by protesting at or on these sites would also disrupt defence activity. For example, any military training taking place would have to be suspended if any unauthorised persons entered the training area.
15. The MOD explained that it also took the view that the release of the information sought would impact adversely upon the health and safety of people living in these areas and might even cause disruption and hindrance to the lives of people unconnected with the cull programme if parts of the Defence estate under tenancy were wrongly suspected of being involved in it.

16. The MOD drew the Commissioner's attention to the decision cited by the complainant of *Natural England v Dale* and the Information Commissioner EA/2014/0094, 0160, 0234 and 0311. The MOD noted that this was sympathetic to the view that peaceable protests would be better directed if the details of cull sites were placed in the public domain. The MOD argued however that this conclusion assumes that the land on which culling is taking place is primarily used for agricultural purposes.
17. It emphasised that the majority of the MOD estate where culling has been permitted consists of designated training areas, some of which are licensed for the use of live ammunition during military exercises. It explained that it has responsibilities towards the safety of all those who train on the MOD estate, as well as ensuring the safety of others who may wish to access the estate for recreational or other purposes
18. In response to the complainant's fifth point (details below), the MOD explained that it was not aware of any anti-cull protests that have taken place on the Defence estate. It took the view that her argument that such protests would not result in any disruption or other harm to defence training activities or members of the public is purely speculative. However, the MOD advised the Commissioner that previous incursions (unrelated to protests) by members of the public at military training sites have caused disruption to training activities and required urgent action to be taken to prevent injury to the public, especially where live ammunition has been in use.

The complainant's position

19. The complainant provided the Commissioner with detailed submissions to support her view that disclosure of the information sought by this part of her request would not result in harm to either public safety or defence. The Commissioner has summarised these submissions as follows:
 - i. She has emphasised that a number of Information Tribunal decisions and an ICO decision notice have all decided that information about badger cull areas, which could lead to directed protesting against culls, was not entitled to be withheld under regulation 12(5)(a) on the grounds of public safety.¹

¹ *Natural England and Defra v Information Commissioner and Anna Dale* EA/2014/0094, 0160, 0234 and 0311; *Natural England v Information Commissioner and Tom Langton* EA/2017/0160; and Decision Notice FER0659789.

- ii. She noted that in these Tribunal decisions the public authority in question, Natural England, had failed to demonstrate a link between lawful protest, the activities of the anti-cull community and any harm subsequently occurring to public safety.
- iii. She argued that the MOD had also failed to provide any evidence that disclosure of the information sought by part 3 would adversely affect either public safety or defence. Rather, the position set out in the internal review was merely speculative and contradicted by the Tribunal decisions above.
- iv. In addition, she noted that since the requests which were the focus of the above decisions had been submitted, the number and area of cull areas had increased significantly.² As a result she argued that it was logical to suppose that the anti-cull community was much more thinly spread than at the time of those requests, thus reducing the impact of their activities (which in any event she did not accept would harm public safety or defence).
- v. She noted as set out in the Tribunal decisions, there was evidence that within the anti-cull community, local groups have accumulated knowledge of the location of cull areas and the land within these areas that is accessible for culling. She therefore argued that it was highly likely that the anti-cull community had already carried out peaceful protest on MOD land without any harm occurring to public safety or defence.

The Commissioner's position

20. The Commissioner has carefully considered the submissions of both parties along with the previous caselaw that has been cited. The Commissioner accepts that the previous decisions have, as the complainant notes, rejected a sufficiently strong link between identification of cull areas, peaceful protests in such areas, and harm occurring to health and safety. The Commissioner also acknowledges the point that since such cases the likelihood of the anti-cull movement being able to undertake such protests in targeted locations has arguably reduced due to the factors identified by the complainant. Taken together, the Commissioner accepts that this is strong evidence to challenge the MOD's reliance on regulation 12(5)(a).

² The complainant cited the following figures in support of this point: in 2017 cull areas covered 12 counties and an area of approximately 8,571 km²; in 2021 cull areas covered 20 counties and an area of 27,886 km².

21. However, in the Commissioner's view there is a key distinction between the information sought in the previous cases and the information sought in this case, namely that the land in question is used for military training activities, and in some cases involves the use of live ammunition, as opposed to land used for agricultural purposes.
22. Therefore, whilst the Commissioner recognises and acknowledges the points made by the complainant, he has to also acknowledge that if peaceful protests took place on MOD land then such activities carry with them a different set of risks to the same activities carried out on agricultural land. The Commissioner considers it plausible to argue that such protests would disrupt military training activities and in his view would harm the defence interests protected by regulation 12(5)(a). Similarly, the Commissioner considers it plausible to argue that the risk to protesters (or indeed military personnel) from disruption of such training would pose a risk to their health and safety. In reaching this finding the Commissioner notes the MOD's point that previous incursions by members of the public at military training sites have caused disruption to training activities and required urgent action to be taken to prevent injury to the public, especially where live ammunition has been in use.
23. In reaching this conclusion the Commissioner notes that disclosure of the withheld information would, for some counties, identify the specific sights where culls have been licensed. The Commissioner also notes that to date no such protests have taken place on MOD land.
24. In reaching this conclusion the Commissioner wishes to emphasise that he appreciates that the number and frequency of such protests on MOD land as a result of the withheld information being disclosed may well be low. However, in his view the risks from such protests to the health and safety of those protesting is significantly increased by the fact that this land is used for military training. For the same reasons, the different use of land in comparison to the previous cases, introduces the risk of a threat to the defence interests.
25. The information sought by part 3 of the request is therefore exempt from disclosure on the basis of regulation 12(5)(a) of the EIR.

Public interest test

26. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(a) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
27. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), 'If application of the first two stages has not resulted in disclosure, a public authority should go on to consider

the presumption in favour of disclosure...' and 'the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations' (paragraph 19).

Public interest in favour of disclosing the information

28. The complainant provided detailed submissions to support her view that the public interest favoured disclosure of the information. The Commissioner has summarised these below.
29. She emphasised that badger control policy is highly controversial and widely opposed. She cited opposition by members of the public as well as opposition by leading scientific experts in the field who have called for the cull to be halted. The complainant also pointed to evidence which questioned the effectiveness of the cull, especially after the relaxation of the licensing requirements in 2015 by the government.
30. The complainant also emphasised the very significant costs to the public purse of the cull, amounting to tens of millions of pounds. She argued that the public interest was best served by the best use of public resources. She argued that as MOD land had assisted in the rollout of the cull this added cost to the taxpayer and therefore there was a public interest in knowing how many and which counties and cull areas MOD land had been used for.
31. She argued that the public should be made aware of the MOD's role in enabling the cull, facilitating the rollout and negatively affecting biodiversity. She argued that there was a public interest in transparency, accountability and good decision making about the issue of badger culling on MOD land.
32. The complainant also noted that there was evidence of public concern of the use of public sector land for the cull and residents in a number of areas had requested that their local authorities did not permit their land to be used for such activities.
33. Finally, the complainant also noted that the strength of the public interest in disclosing information about the badger cull areas has already been proved in the First-tier Tribunal. In the decision of *Natural England v Dale* and the Information Commissioner, it was stated:

'We have considered the public interest balancing exercise and also the presumption in favour of disclosure and find that in all circumstances of these appeals the public interest in maintaining the exceptions does not outweigh the public interest in disclosure for the reasons given above. In summary we find that in the circumstances of this case the weight we give to the ability of protesters to be able to more effectively monitor the effectiveness of a controversial Government policy is

greater than the weight we give to the combined increasing risk of harm to farmers and the stopping of the culls.'

34. For its part, the MOD acknowledged that release of the information would provide transparency as to the extent of its cooperation with the culling programme managed by Natural England on behalf of DEFRA.

Public interest in favour of maintaining the exception

35. The MOD argued that it was not in the public interest to release this information in the interests of safeguarding the MOD's use of this land for defence purposes and to protect service personnel and their families, civilian MOD employees and agricultural tenants from unnecessary harassment or physical risk.
36. The MOD also noted that it should be borne in mind that the operatives of the scheme are paid contractors carrying out Government policy to which MOD has little or no option but to comply with as a department of state. The MOD argued that the public's ability to exercise its democratic freedoms of protest and object to the culling programme managed by Natural England is not dependent on knowing the counties in which MOD sites have been included in the cull programme.
37. Furthermore, the MOD noted that Natural England already publishes lists of all the counties and designated areas to which licences have been granted, thus the public interest in knowing the scale of the cull programme is already met to some extent.

Balance of the public interest arguments

38. The Commissioner recognises that the badger cull policy is a controversial one for the reasons highlighted by the complainant. He accepts that disclosure of the withheld information would provide greater transparency regarding the use of MOD land that has been used by the cull. Disclosure of the information could also allow opponents of the cull to monitor how the cull is being implemented on MOD land.
39. However, the Commissioner acknowledges the MOD's point that the use of its land for culling is not a decision or policy that it had particular influence over. He also accepts that those opposed to the cull programme are still in a position to oppose and protest the policy, including the use of MOD land as part of it, without knowing which specific MOD sites are being used. Furthermore, the Commissioner considers there to be a significant public interest in ensuring that defence interests, and the safety of those on defence sites – be it military personnel or the public – are not harmed. On balance, the Commissioner finds that despite the strong public interest in disclosure, the risk to these interests tips the balance of public interest in favour of maintaining the exception.

Regulation 12(4)(a)

40. Regulation 12(4)(a) of the EIR allows a public authority to refuse to provide the requested information if it does not hold it at the time of the request being received.
41. In cases such as this where there is some dispute as to whether information falling within the scope of the request is held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
42. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request.
43. In applying this test the Commissioner will consider the scope, quality, thoroughness and results of the searches, and/or other explanations offered as to why the information is not held.

Part 2c of the request

44. This part of the request was as follows '2. If access has been permitted to MOD land for culling badgers, please disclose if this accessible land includes land that is... c) held through rights, for e.g. held on a short-term or contractual basis or through grants for a specific purpose.'
45. In its internal review response the MOD explained that it had not permitted any access to land that falls within category (c) and therefore no recorded information is held. The MOD explained that the reason that such information is not held is because in cases where the MOD has a short-term agreement to use land owned by another party, it has no powers to permit access to that land to other parties. The MOD noted that it would be necessary for the landowner in category (c) to grant access to the land for the purposes of badger culling.
46. In her submissions to the Commissioner the complainant provided detailed submissions to support her view that the MOD would hold information falling within the scope of this request. The Commissioner summarised the submissions below:
 - i. The complainant referred to the argument she made in her request for an internal review where she stated that 'I believe that the MOD does hold the information... It is logical to deduce that there must have been communication between landowners who have made land accessible for culling and the MOD in order to ensure that there was no "conflict with military and operational use".'

In support of this point she noted that a significant portion of MOD land is held through rights and further that most of land held in this way is

held for training, and as result the operational requirements of such land are subject to change.³ Therefore, the complainant believed that the MOD has a business need to hold such information and that it is highly likely that there is a need for communication between the landowner and/or cull company to ensure that it is safe for the MOD or for cull contractors to use the land safely at any given time.

- ii. The complainant has noted that the internal review (in response to a different part of her request) explained that 'MOD holds maps in some form or another for most of the areas in which access has been requested'. She acknowledged that it is unclear what these maps are, but they may be maps supplied by the cull companies, in which case they may show land that is accessible for culling that is rights-held MOD land. Such maps could therefore be used to answer this part of the request.
- iii. The complainant noted that internal review stated that 'The reason that this [information in part 2(c) of the request] is not held is that, in cases where MOD has a short-term agreement to use land owned by another party, it has no powers to permit access to that land to other parties. It would be necessary for the landowner in category c) to grant access to the land for the purposes of badger culling.' However, the complainant cited the guidance issued by Natural England which states that 'If your area has met the land access criteria (this is the 90% figure), you can add short-term tenants annually who were unable to provide an undertaking signed by their landlord'.⁴ These short-term tenants enter into an access agreement with the cull company and not into a TB Management Agreement with Natural England.

The complainant suggested that in order for Natural England to allow the addition of short-term tenanted land where the landlord has not provided an undertaking to allow culling, there must be instances where the agreements between short-term tenants and their landlords allow the short-term tenants to make a decision about allowing access for badger culling.

47. In response to the Commissioner's enquiries about this aspect of the complaint, the MOD explained that its interpretation of the information sought by this part of the request was at variance with the

³ In support of this view the complainant cited the figures contained at this link <https://www.gov.uk/government/statistics/mod-land-holdings-bulletin-2021/mod-land-holdings-2000-to-2021>

⁴ The guidance from which this quote is taken is attached to this letter.

complainant's. The MOD explained that it made declarations in relation to the recorded information it held at part 2(a) in relation to freehold land and at part 2(b) in relation to land which it leases as a tenant. The MOD explained that in its view part 2(c) relates to land 'held on a short-term or contractual basis' where the MOD is not responsible for its management and where, in the MOD's view, only the landowner can grant access for the purposes of badger culling under the Government scheme.

48. The MOD explained that by way of an example, land that would fall within part 2(c) would be where it holds specific licences to carry out military training or to overfire in a specific area. With overfiring rights, MOD may not enter the area but the licence provides for the owner/occupier to prevent any entry to the area while we are firing. As such, MOD only requires to know that the land is free during military firing times.
49. The MOD explained that it also had Training Over Private Land Agreements (TOPL) which allow specific units to use areas of land at agreed times of the year through agreement with the landowner. In such cases, the landowners state when MOD may access their land. The MOD explained that once again, there is no obligation on the part of the landowner to tell the MOD what activities are being conducted on their land when military units are not using it. The MOD also explained that it had no control over the landowner's use of the land at other times and the possible third-party access by Natural England or cull companies.
50. The MOD explained that the complainant's assumption that it has a business requirement to have sight of any communications between the landowner and/or cull contractor is incorrect. Rather all the MOD requires is confirmation of the dates and times when the land is available for our use. It does not require any details of other uses or users outside of those times.
51. The MOD also explained that it does not grant access to land that it does own/occupy and any maps that it holds of these areas would not be useful in providing an answer to this part of the request.
52. The MOD explained that it tended to enter into short-term 'leases' or contracts that are limited to use of the land at specific times under agreement with the owner/occupier. As MOD does not hold or occupy such land under a tenancy agreement, the Natural England's guidance on 'Adding short-term tenanted land' to the cull programme does not apply.
53. The Commissioner is satisfied that on the balance of probabilities, the MOD does not hold any recorded information falling within the scope of part 2(c) of the request. In reaching this conclusion the Commissioner

considers the MOD's interpretation of part 2(c) to be a reasonable one, bearing in mind how it has interpreted parts 2(a) and 2(b) and given its arrangements for the use of such land. Furthermore, the Commissioner is satisfied that no recorded information is held because, based on the MOD's submissions, he accepts that it has no business need to hold such information, that any maps it does hold would not answer this part of the request and that given the arrangements it has for accessing land of this nature, the Natural England guidance is not applicable.

Part 4 of the request

54. Part 4 of the request sought the following information 'Please disclose the area in km² of MOD land in each county where access has been permitted to MOD land for culling badgers'.
55. In its internal review the MOD explained that whilst it holds maps in some form or another for most of the areas in which access has been requested, it does not hold maps detailing the precise area (in km²) to which access has been granted.
56. The MOD explained that at the internal review stage a representative sample of documents provided in support of requests to access MOD land was examined. The MOD explained that from this exercise it had established that any mapping included differs considerably in terms of the detail provided in each case. When access is granted, the MOD provides the requester with a narrative description of the area for which access is permitted, noting any restrictions, and the size of the area (in km² or any other measure) is not recorded. The MOD argued that detailed mapping would have to be created to enable the MOD to calculate the actual area of the land to which access has been granted for each county.
57. Furthermore, the MOD explained that where MOD land is held on full agricultural tenancies, it is the decision of the tenant whether to allow their tenanted land to be included within the cull. The MOD would therefore need to liaise with each tenant to gain this information; it is not information held by the department.
58. In her grounds of complaint to the Commissioner the complainant argued that the MOD did hold the building blocks required to generate the information and no complex judgement is required to produce it.
59. In support of this position she made the following points:
 - i. She noted that the Who Owns England website includes detailed information about MOD land holdings. She suggested that if, for example, access for culling was requested for Everleigh Ashes, Pewsey, Wiltshire, which is part of the Salisbury Plain training area, the area is listed as 220.121 hectares. To calculate the area in km² is simple; you

just divide the area by 100. Therefore, Everleigh Ashes is 2.2km².

- ii. She cited this case study of the MOD's use of data, mapping and GIS technology.⁵ She argued that in view of this it was logical to conclude that the MOD has a very sophisticated system for storing and managing its data. It is also logical to assume that the MOD may be storing information on land accessible for culling badgers. This would assist with the planning of training exercises and manoeuvres, for example.
60. In response to the Commissioner's enquiries, the MOD reiterated its position that when access is granted, the MOD provides the applicant with a narrative description of the area for which access is permitted, noting any restrictions. MOD does not record the geographical size of each cull area and does not hold the building blocks to calculate them. The information is not held.
 61. Furthermore, the MOD argued that it would need to would need to undertake a comprehensive programme of mapping by county to enable it to determine the actual areas of the defence estate to which access has been granted. The MOD noted that in the complainant's example, she suggested that the size of the site being accessed could be taken from the 'Who Owns England' website and easily converted from hectares to provide an answer to this part of the request. However, the MOD explained that this assumes that the amount of access to defence locations granted to cull teams is expressed in cartographic terms.
 62. Based on its submissions to him the Commissioner is satisfied that the MOD does not hold the necessary building blocks to compile the information sought by part 4 of the request. In reaching this conclusion the Commissioner notes that the MOD does not record the geographical size of each area. He also notes that from the samples of maps it has examined relating to applications for culling on MOD land information which could be used to fulfil the request is not held.

Part 5 of the request

63. Part 5 of the request sought the following information 'Please disclose each licensed area where access to MOD land for culling badgers has been permitted. (For Badger Cull Area numbers/names please see the list on pages 11-12 of this document:
<https://assets.publishing.service.gov.uk/government/uploads/system/up>

⁵ <https://resource.esriuk.com/esri-resources/defence-estates/>

[loads/attachment_data/file/915124/badger-cull-areas-min-max-2020.pdf'](#)

64. In its internal review response the MOD explained that while it holds some information about the licences issued by Natural England to those who have requested access to MOD land, it does not hold information that links an individual licence to a badger cull area as listed on pages 11-12 of the document the complainant referenced. The MOD explained that it is possible that this information is, however, held by Natural England as it is they who have prepared the listing and know which licenced areas include parts of the defence estate.
65. In her submissions to the Commissioner the complainant made the following points to support her view that the MOD would hold information falling within the scope of this request:
 - i. It should be simple for the MOD to identify the cull areas where there has been only one licence issued in a county and access has been permitted to MOD land for badger culling. These are area 32 Cumbria; area 45 Derbyshire, area 48 Leicestershire and area 54 Lincolnshire.
 - ii. It is also possible for the MOD to identify the first three cull areas that were licensed because these were all in different counties. Licences were issued for Area 1: West Gloucestershire and Area 2: West Somerset in 2012. A licence was issued for Area 3: Dorset in 2015. Therefore, if access to MOD land for badger culling was requested and permitted in any of these counties before these licences were issued, then the licence areas are identifiable by the MOD. Thus, the dates of the applications for land access for culling, and/or the granting of that access, may lead to the matching of cull areas with licences.
 - iii. It is highly likely, that the MOD holds information about badger cull licences or areas, which has been sent by Natural England, Defra, the National Farmers Union, or the cull companies or which the MOD has accessed, for example, by downloading it.
66. In response to the Commissioner's enquiries, the MOD explained that it understood this part of the request to be seeking disclosure of a list of licensed areas where access to MOD land for culling badgers has been permitted detailing the Badger Cull Area numbers/names assigned to them by Natural England. The MOD confirmed its position that it does not hold the information required to collate a response. The MOD emphasised that it does not need to know how the MOD sites at which culls have taken place relate to Natural England's wider national cull programme.
67. Furthermore, the MOD explained that it did not accept the methods which the complainant proposed might assist with the identification of

some information in scope of this part of her request. The EIR require the provision of information that is held by MOD. There is no obligation on MOD, or any other public authority, to access or obtain information held by third parties for the purposes of answering a request.

68. The Commissioner accepts on the balance of probabilities the MOD does not hold the recorded information sought by this request. The Commissioner has reached this conclusion because he notes that the MOD has no business need to hold the requested information. Furthermore, the Commissioner agrees with the MOD's position that under the EIR it is no obligation to access and use information held by third parties in order to answer a request.

Procedural requirements

69. Regulation 14(1) of the EIR requires a public authority to issue a refusal notice to a requester if it is seeking to refuse a request on the basis of exceptions contained within 12(1) of the legislation.
70. Regulation 14(2) requires that any such refusal notice should be issued within 20 working days of the request.
71. In this case the MOD failed to issue such a refusal notice within 20 working days because it initially refused the request on the basis of the exemptions contained in FOIA. It therefore breached regulation 14(2).
72. Regulation 11(4) requires a public authority to complete any internal review within 40 working days. The MOD failed to do so in this case and therefore breached regulation 11(4).
73. Regulation 11(3) states when considering a requester's representations for an internal review will:
- '(a) consider them and any supporting evidence produced by the applicant; and
 - (b) decide if it has complied with the requirement.'
74. The complainant argued that the MOD had failed to consider the representations and supporting evidence she had made. The Commissioner's notes that the complainant made detailed representations in her request for an internal review. The Commissioner is satisfied that the MOD did consider these as part of its internal review, even if every particular aspect of the representations are not reflected in the internal review response, and even though the outcome of the internal review concluded that the requested information was either not held or exempt from disclosure.

Right of appeal

75. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

76. 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.

77. 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

Jonathan Slee
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