

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

Date: 15 November 2022

Public Authority: Natural England
Address: Foss House
Kings Pool
1-2 Peasholme Green
York
YO1 7PX

Decision (including any steps ordered)

1. The complainant has requested information relating to badger culling. The above public authority ("the public authority") said that it had provided all the information it held.
2. The Commissioner's decision is that the public authority has now provided all the information it holds. However as it failed to provide all the information within 20 working days, it breached Regulation 5(2) of the EIR.
3. The Commissioner does not require further steps.

Request and response

4. On 10 August 2021, the complainant wrote to the public authority and requested information in the following terms:

"please disclose the following:
 1. a) The number of each application area (i.e. 1,2,3,4,5,6 or 7) that has provided Natural England with an operational readiness assessment. b) The date on which each application area that has provided Natural England with an operational readiness assessment provided that assessment.

2. The number of each application area (i.e. 1,2,3,4,5,6 or 7) where the applicants have provided Natural England with a) cost estimates for a four-year licence, and b) evidence of sufficient funds to meet the costs for a four-year licence.
3. The date on which each application area provided Natural England with a) cost estimates for a four-year licence, and b) evidence of sufficient funds to meet the costs for a four-year licence.
4. a) The percentage of land within each application area that is either accessible for culling badgers or within 200 metres of accessible land.
b) The percentage of land within each application area that is accessible for culling badgers.
5. The date that each application area was signed off by a) Natural England's Chief Scientist, and b) APHA's Chief Veterinary Officer.
6. On 21 June 2021 you said in your letter to me: 'At the date of your request Natural England were in the process of "signing off" application areas in terms of meeting the initial licence criteria'. Please define what 'initial licence criteria' each application area met when it was 'signed off'.
7. The Cull Area Numbers allotted to application areas 1,2,3,4,5,6 and 7. Up to 2020, there were 54 Cull Areas (listed 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) Does application area 1 correspond to Cull Area 55 and application area 2 to Cull Area 56 and so on? Please provide clarification.
5. The public authority responded on 21 September 2022. It provided information within the scope of each element.
6. The complainant sought an internal review on 20 October 2021. They were unhappy with elements of the public authority's response as some of the wording used appeared to contradict previous responses. The complainant was also unhappy about the delayed response.
7. Following an internal review the public authority wrote to the complainant on 16 December 2021. It largely upheld its position that it had provided all the information it held, however it did clarify some of its previous responses. In relation to element 5, it now confirmed that the Chief Veterinary Officer was not directly involved in this stage of the process.

Scope of the case

8. The complainant complained to the Commissioner on 25 January 2022. They had numerous concerns including the timeliness of the public authority's response, the accuracy of its response and whether further information was held. The complainant also asked the Commissioner to consider whether the public authority had correctly responded to a very similar request, submitted several months prior to the request in this decision notice, where the public authority had denied holding the information. The complainant argued that at least some information would have been held when the public authority responded.
9. The complainant also noted that, in a further response, provided on 28 January 2022, the public authority had admitted that one of the dates it had given in its response of 21 September 2021 had been incorrect.
10. The Commissioner explained that he would not be dealing with most of the complainant's grounds of complaint. Matters pertaining to earlier requests had not been brought to his attention in a timely fashion and he is not responsible for the accuracy of the information a public authority holds – so long as it has been provided.
11. The remaining points of contention are whether the public authority holds further information within the scope of element 6 and whether it provided all the information it held in a timely fashion.
12. The Commissioner also notes that he was obliged to serve an information notice on the public authority, requiring it to provide information after the public authority asked for an extension the Commissioner considered to be unreasonable.

Reasons for decision

13. The Commissioner agrees that information on measures to control badger populations would be environmental information and therefore the public authority was correct to deal with this request under the EIR – although he notes that this has no bearing on whether information is or is not held.
14. The complainant has highlighted the responses given to element 6 in the original response and internal review. When it initially responded, the public authority stated that:

"Natural England defines the 'initial licence criteria' as those listed under section 8 (c), (d) and (e) within DEFRA's 'Guidance to Natural England: preventing spread of bovine TB'."

15. However, in its internal review, the public authority added that:

"These are the **main three** criteria which the initial assessment is based on, however Natural England can also consider other factors on a case-by-case basis and use all available evidence. However due to the delays in the application process in 2021 as stated above, this stage did not control how an application proceeded. Applicants were able to provide information concurrently." [emphasis added]

16. In referring to "the main three criteria", the complainant argued that the public authority was indicating that other criteria were also used.

17. The Commissioner asked the public authority to explain the discrepancy and it responded to say that:

"To provide further explanation, the UK Chief Veterinary Officer (CVO) published epidemiological evidence in 2021 showing the locations of known disease reservoirs in wildlife within the bTB Edge Area counties. The bTB Edge Area is a buffer zone between the High Risk Area (HRA) and Low Risk Area (LRA) of England which contains local disease fronts advancing eastwards from the HRA towards the LRA. Natural England received applications in 2021 where some of the land fell within Edge Area counties. In accordance with section 8e of the Defra Guidance to Natural England, we considered this information with regard to area boundaries, prior to giving approval for these applications to proceed to the next stage. Where possible hard boundaries (motorways, major roads, rivers, urban areas) are also considered when finalising boundaries.

"This additional assessment delayed the process of signing up land and therefore delayed the approval / sign-off of whether application areas had met the initial licence criteria. However, this did not stop applicants from continuing their preparations to try to satisfy the remaining criteria for a licence. Natural England continued to work with the companies and the companies continued to submit information when requested; even though the final decision on the exact boundaries had yet to be finalised."

The Commissioner's view

18. In the Commissioner's view, whilst the public authority has not helped itself with its inconsistent use of language, the semantical inconsistency alone does not indicate that further information is held.
19. If the Commissioner has understood the public authority's responses correctly, in normal circumstances, the application for a licence would proceed in two stages. First, the applicant would need to demonstrate that they met criteria c, d and e of the Department for Environment, Food and Rural Affairs (DEFRA) guidance. These criteria relate to the overall size of the cull area, its location and the proportion of land within the cull area that is accessible. Only once the public authority is satisfied that these criteria are met, will it go on to consider the remaining criteria – before finally issuing a licence when all criteria have been met. There is a logic to such a process – time spent considering whether an applicant is financially sound (one of the remaining criteria) is likely to be wasted if they have asked for a licence to cull in an area that is too small, in the wrong place or inaccessible.
20. However, in 2021, that two stage process did not operate as it normally would have done. Some of the applications covered the Edge Zone and therefore the public authority took additional time to confirm where the exact boundaries for each licence area should be drawn – clearly, where the boundaries are drawn will affect the overall size of each cull area and hence the proportion of land that will be accessible. As the Commissioner understands it, rather than defer the remaining parts of the process until these boundaries were defined, in this particular year, the public authority began working with applicants to determine whether they met the remaining 12 DEFRA criteria before the licence area had been agreed.
21. The Commissioner notes that criterion e of the DEFRA guidance states that:

“The size and number of areas of inaccessible land within the application area should be minimised for the purposes of effective disease control, with approximately 90% of the land within the application area either accessible or within 200m of accessible land.”
22. The guidance continues:

“The variance from 90% which will be accepted will be decided by Natural England on a case-by-case basis, taking into account such specific circumstances as Natural England considers relevant, e.g. topography, land use and badger sett surveys or any other matter that Natural England considers relevant. Natural England should have

regard to any advice on the application from the UK Chief Veterinary Officer (CVO).”

23. The Commissioner notes that according to the information provided, none of the licence applications had a proportion of inaccessible land that was 10% or lower. However he notes that the criterion only states that the percentage must be “approximately” 90%. Where the percentage dips below 90%, the criterion then goes on to state that the public authority may take account of other factors such as topography, land use and badger sett surveys.
24. The public authority has obviously considered all these factors and determined that, whilst none of the applications met the 90% threshold, they were near enough to still go forward. It is not for the Commissioner to determine whether or not that was a reasonable decision.
25. The complainant asked about the criteria each application met. The public authority has explained that, in its view, each application met criteria c, d and e – albeit because of the particular circumstances, work began on looking at the remaining 12 criteria earlier than would normally be the case.
26. Whilst the Commissioner recognises that the public authority’s inconsistent responses to this and other information requests have caused the complainant to mistrust the information it has provided, he is not satisfied that, on the balance of probabilities, the public authority holds any further information within the scope of this element of the request. The public authority has therefore complied with its obligations under Regulation 5(1) of the EIR.

Procedural matters

27. The complainant was unhappy that the public authority had made use of regulation 7 of the EIR and awarded itself additional time in which to respond to the request. They argued this was unnecessary.
28. As the Commissioner is already satisfied that the public authority provided some information outside of the 20 working day timeframe – as it provided an incorrect date in one of its responses (subsequently corrected). That is sufficient to record a breach of Regulation 5(2) of the EIR.
29. Given that the Commissioner has already recorded a breach, he does not consider that it is necessary or proportionate to determine whether the public authority was or was not entitled to award itself extra time to respond to the request.

Right of appeal

30. 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

31. 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.
32. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF