

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

**Date:** 6 April 2022

**Public Authority:** Gloucestershire Constabulary  
**Address:** Police Headquarters  
No 1 Waterwells Drive  
Quedgely  
Gloucestershire  
GL2 2AN

**Decision (including any steps ordered)**

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1. The complainant has requested information about incidents of badgers, suspected to have been killed illegally, which were reported to the police in 2013.
2. The Commissioner's decision is that Gloucestershire Constabulary has correctly relied on the regulation 12(4)(b) (manifestly unreasonable request) and regulation 13(1) (personal information) EIR exceptions to refuse parts of the request and had complied with the EIRs.
3. The Commissioner does not require Gloucestershire Constabulary to take any steps.

**Request and response**

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4. The complainant has engaged in considerable correspondence with Gloucestershire Constabulary (GC) about her concerns regarding the alleged illegal killing of badgers during an authorised cull of badgers in Gloucestershire. On 25 August 2020 she wrote to GC and requested information in the following terms:

"Please disclose the information that you hold about incidents of killed badgers, suspected to have been killed illegally, which were reported to police in 2013."

5. GC responded on 21 September 2020 and refused to provide the requested information, citing section 12(1) (Cost of compliance) FOIA.
6. On 9 October 2020 the complainant requested an internal review. When doing so, along with further information, she provided GC with a link to a news report in 'The Guardian' newspaper saying that GC had received three relevant reports of badgers that had been shot apparently illegally. The complainant said that the dead badgers had been reported to GC on or around 23 and 30 September 2013 ("incidents 1 and 2") and on or around 5 October 2013 ("incident 3").
7. On 22 February 2021, GC responded and provided some information within the scope of the request, withholding it in part under section 40(2) (Personal information) FOIA. It continued to rely on section 12(1) (Cost of compliance) FOIA as inhibiting its ability to respond to the remainder of the request.

## **Scope of the case**

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8. The complainant initially wrote to the Commissioner on 22 January 2021 prior to receiving a response to her request for an internal review, which was subsequently provided on 22 February 2021.
9. On 9 April 2021, the complainant contacted the Commissioner again to complain about the way her request had been handled. She asked for the Commissioner to consider the redactions made under section 40 FOIA which she considered to be excessive. She was also dissatisfied with the scope of the searches made and of a lack of advice and assistance provided.
10. GC said that it had located records of incidents 1 and 2 and disclosed redacted copies of these records, but had been unable to locate any record of incident 3. GC initially considered the matter under FOIA and relied on the section 12(1) (cost of compliance) and section 40(2) (personal information) FOIA exemptions to withhold some information. The complainant was surprised and disappointed that GC had been unable to locate any record of incident 3. She disputed the redactions in the disclosed information. The Commissioner and the parties agreed that the matter fell to be considered under the EIR rather than FOIA since it related to measures being taken to control the badger population in a part of Gloucestershire. GC therefore reviewed its response and

confirmed that it was relying on EIR regulation 12(4)(b) and EIR regulation 13(1) to continue to withhold the information.

11. GC confirmed that no other relevant reports of dead badgers coming within the scope of the request were held. GC said it had been unable to locate any record of incident 3 and relied on the regulation 12(4)(b) EIR exception to limit their efforts to locate any police record that might still be held.
12. In his investigation the Commissioner noted the searches that GC have undertaken of its Incident Recording System (IRS) and Crime Recording System (CRS) and the search terms GC had used. He has also viewed the information being withheld from the complainant by GC relying on the regulation 13(1) EIR exception.

## **Reasons for decision**

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### **Regulation 12(4)(b) – manifestly unreasonable requests**

13. EIR Regulation 12(4)(b) states that a public authority may refuse to disclose information to the extent that a request for information is manifestly unreasonable. When engaged, the exception is subject to the public interest test.
14. GC said that the cost of compliance with the request would place a manifestly unreasonable burden on its resources.
15. The EIRs do not provide a definition of what is manifestly unreasonable in terms of cost. This is in contrast with section 12 FOIA under which a public authority can refuse to comply with a request if it estimates that the cost of compliance would exceed the “appropriate limit” as defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (‘the Fees Regulations’).
16. A public authority is expected to accept a greater burden when considering requests for environmental information. However, the “appropriate limit”, as defined in the Fees Regulations, can be a useful starting point in considering whether a request for environmental information can be refused as being manifestly unreasonable on grounds of cost.
17. The Fees Regulations define the “appropriate limit” in terms of the amount of time which staff would be expected to take in complying with a request. It is set at £600 (24 hours) for central government departments, and £450 (18 hours) for all other public authorities. It is

also specified that the relevant activities, set out below, may be calculated /charged for at a flat rate of £25 per hour of staff time.

18. The Fees Regulations specify that a public authority is only allowed to include the cost of certain activities in its estimate: determining whether the information is held; locating the information or a document which may contain the information; retrieving the information or a document which may contain the information; and extracting the information.
19. However, a key difference between EIR regulation 12(4)(b) and section 12(1) FOIA is that, since the Fees Regulations do not apply to EIR, a public authority may also take into account (under EIR) any time that it would need to spend considering whether any of the information falling within the scope of the request is exempt (that is, whether any of the EIR exceptions are engaged), and the time and cost of making any redactions.
20. Whether considering a cost estimate under either FOIA or EIR, the Commissioner expects a public authority's estimate to be realistic, sensible and supported by cogent evidence. He also expects that, where possible, a sampling exercise will have been carried out.

### **The complainant's position**

21. The complainant said that she had provided GC with a link to a Guardian report that GC had received three reports of shot badgers in 2013. She had provided GC with incident numbers about incidents 1 and 2 which had been reported to GC on or around 23 September 2013 and 30 September 2013. She also stated that a third badger carcass had been found just a few days later around 5 October 2013.
22. The complainant found it disappointing that GC has been unable to find a report for incident 3 since she believed it would have been reported within a few days of incident 2 and would have been allocated a similar incident number reporting category. She found it extremely surprising that no incident report for this badger had been located. She believed that a report was held by GC who should have been able to retrieve it as GC appeared to have shared this information with the Guardian newspaper. She considered it was not reasonable for GC to expect a member of the public to know an exact incident number in order for GC to be able to retrieve a report, particularly when other details, such as the exact or approximate date and a description of the incident have been supplied.

### **The GC position**

23. GC told the Commissioner that several searches for the information had been conducted. When a member of the public contacted the police

regarding a police matter, an incident was recorded on the Incident Recording System (IRS). Matters meeting certain Home Office criteria were recorded on GC's Crime Recording System (CRS). IRS had no marker relating to badgers, but GC assumed that an incident report of a badger having been shot illegally would generally include the term 'badger' within the text of any report. An electronic search had been conducted using 'badger'. This has resulted in 1717 instances of the term badger being recorded in incidents in 2013, relating to 875 separate incidents.

24. GC said that its response to the 2013 badger cull was called Operation Themis at this time and a review of its IRS confirmed that a marker 'Themis' had been used. There is also an IRS marker of 'RECLO' (Rural and Environmental Crime Liaison Officer). GC explained that when an incident was closed, it was updated with a result code such as 'Animals/Wildlife'. A search of those incidents with the terms 'badger', 'Animals/Wildlife' and 'Themis' resulted in 47 incident records. These had all been manually reviewed and none had proved to be relevant to the request.
25. GC added that it had also searched CRS for recorded offences relating to the killing of badgers under the Protection of Badgers Act 1992 and the Wildlife and Countryside Act 1981 that had been recorded in 2013, but there were no such records. A further search of the 2013 crime records for the term 'badger' had resulted in 41 crime records but none were relevant to the request. GC had confirmed that it held no central register of information collated in 2013.
26. GC said that it held incidents in IRS, some of which dated back to 2010. Information held in CRS dated back to 1998, but the information held was weeded from its system in line with the force retention and disposal schedule. The GC policy retention period for files held is the current year plus six years when it is destroyed.
27. Assisted by the information provided by the complainant, GC said it had searched its IRS around the dates specified and had located a record of incident 1, which referenced a dead badger. GC added that they did not knowingly hold any other, as yet undeclared, relevant information from 2013.
28. GC said that its media team had been contacted for any information held in respect of disclosures or enquiries from the media regarding Operation Themis but the team did not hold specific incident references. GC added that since it held no crime records relating to incident 3 it was probable that it had not conducted a full investigation into it.
29. GC concluded that, having already conducted targeted searches of its relevant records, any further search of its 875 potentially relevant

incident records would be manifestly unreasonable, excessive and burdensome.

### **The Commissioner's conclusion**

30. The EIRs allow public authorities to refuse a request for information which is manifestly unreasonable. The inclusion of the word 'manifestly' means that there must be an obvious or clear quality of unreasonableness. The exception can be used: when the request is vexatious, or when the cost of complying with it would be too great.
31. EIR regulation 12(4)(b) can be engaged on the grounds that potentially exempt material within the requested information needs to be located, considered and, if necessary, redacted prior to disclosure, if the time and cost of doing this can be said to be 'manifestly unreasonable'. This is different from the application of the section 12(1) FOIA exemption, when the cost of considering the requested information for exemptions and of redacting it cannot be considered.
32. The complainant drew three 2013 incidents to the attention of GC and believes that information about incident 3 should be held. While this remains possible, the Commissioner has seen that GC conducted reasonable searches some of them in accordance with requests from the complainant. He noted too that, by the time of the request in August 2020, relevant GC records dating back to 2013 could reasonably have been destroyed in line with the GC document retention policy.
33. The Commissioner saw that GC appear to have conducted diligent and thorough searches of their relevant records, including electronic searches using what appeared to him to have been reasonable search terms, including some proposed by the complainant, but to no avail. He was satisfied that GC's engagement with the complainant and searches made in line with her wishes amounted to a reasonable level of advice and assistance having been provided.

### **Public interest test**

34. Unlike its FOIA counterparts, EIR explicitly requires a public authority to apply a public interest test in accordance with EIR regulation 12(1)(b) before deciding whether or not to maintain the exception.
35. The complainant said that it was strongly in the public interest for as much information as possible to be disclosed about these badger incidents so that the public could scrutinise the circumstances surrounding their deaths and the actions taken (or not taken) by police and government. She considered that any information that was not personal data, and did not identify an individual, should be disclosed.

36. GC said that there was public interest in retrieving any relevant information relating to illegally shot badgers. However, the fact that GC held no recorded crimes suggested that it had not conducted any full investigations into such incidents. A targeted search of those incidents most likely to hold such information had been negative. Accordingly GC considered that any further search of incidents would be disproportionate and burdensome and therefore manifestly unreasonable.
37. The Commissioner has noted that public interest factors, such as proportionality had been considered by GC in deciding whether to engage the exception, also the value of the request given the passage of time since 2013. These considerations appeared to him to 'carry through' into the public interest test.
38. EIR regulation 12(2) states that a public authority must apply a presumption in favour of disclosure or, for this exception, in carrying out further searches. In effect, this means that the exception can only be maintained if the public interest in refusing the request outweighs the public interest in responding.
39. The Commissioner has noted the considerable efforts that GC had already made to locate any further relevant records but that it had been unable to find any. In effect this meant that the only course remaining open to GC would be to conduct a manual search of the 875 records identified. This would be a significant diversion of GC resources which would be so onerous as to be manifestly unreasonable and not in the public interest.

### **Regulation 13(1) personal information**

40. It is common ground between the parties that information such as the names and addresses of individuals that is clearly personal data should be withheld. However the complainant disputed whether or not some of the redactions made to the disclosed information had solely comprised what she considered to be personal information.
41. In her representations to the Commissioner of 7 February 2022 the complainant instanced three specific redactions in police reports GC-20130923-385 and GC-20130930-0336 which GC had disclosed to her in redacted form. She opined that these redactions would be highly unlikely to comprise personal information but offered no evidence to support her opinion or that the three specific redactions would not identify an individual.
42. The Commissioner notes that there are some kinds of information, such as the names and addresses, which clearly identify individuals. However



he is aware that there is often other information which, if taken in combination with additional information already held by interested parties, would lead to individuals being identified by inference through the so-called 'mosaic effect'.

43. An example of the 'mosaic effect' is where a person, sometimes referred to as a 'motivated intruder', already possesses considerable knowledge of a matter. They may then seek to add to their knowledge information which, when taken in combination with the information they already hold, enables them to identify the individuals through inferences and connections that are only possible when these pieces of information are combined.
44. An example of this would be where a strongly 'motivated intruder', who already possesses a wide knowledge of a matter, is enabled to add detailed local information to what they already know. In a police matter the mosaic effect is important if it would result in the identity of someone who has assisted the police being inferred either individually or be identified as one of a very small number of individuals whose confidentiality would then be at risk.
45. GC told the Commissioner that, for information relating to incidents 1 and 2, one incident had been called in by a member of the public. GC considered that when a person calls the police to report information, they would not realistically expect their personal information, such as their name or address, to be disclosed via the EIR provisions. As such, GC believed this information should be withheld.
46. GC added that the other incident had been reported to GC by DEFRA, but again contained the personal data of another member of the public who had reported information to DEFRA. GC believed the person reporting it would not expect their personal data to be disclosed by GC via the EIR provisions and again this should be withheld.
47. EIR Regulation 13(1) provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
48. In this case the relevant condition is contained in regulation 13(2A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
49. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection



Act 2018 ('DPA'). If it is not personal data, then EIR regulation 13(1) cannot apply.

50. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

51. Section 3(2) DPA defines personal data as: "any information relating to an identified or identifiable living individual".
52. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
53. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
54. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them, or has them as its main focus.
55. In the circumstances of this case the Commissioner, having reviewed the redacted and unredacted documents, is satisfied that the withheld information related to identifiable individuals. As discussed above, for some of the withheld information, it might need to be taken in combination with other information that is either in the public domain or would be likely to be known to some other interested persons, the so called 'mosaic effect', and so could be used to identify individuals. The requested information therefore falls within the definition of 'personal data' in section 3(2) DPA.
56. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under EIR. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
57. The most relevant data protection principle in this case is principle (a). Article 5(1)(a) of the GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.
58. In the case of an EIR request, the personal data is processed when it is disclosed in response to a request. This means that information can only be disclosed if to do so would be lawful, fair and transparent.

59. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

**Lawful processing: Article 6(1)(f) of the GDPR.**

60. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.

61. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purpose of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

62. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under EIR, it is necessary to consider the following three-part test:

- i. **Legitimate interest** test. Whether a legitimate interest is being pursued in the request for information;
- ii. **Necessity** test. Whether disclosure of the information is necessary to meet the legitimate interest in disclosure;
- iii. **Balancing** test. Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is conducted.

**Legitimate interest**

63. In considering any legitimate interest(s) in the disclosure of the requested information under EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

64. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and wider societal benefits. They may be compelling or trivial, but more trivial interests may be more easily overridden in the balancing test.

65. The complainant told the Commissioner that reporting a dead badger (a species protected by law) to the government or police deserved public

scrutiny as did the involvement of the government in the reporting of the dead badger to police and the collection by the Animal Health and Veterinary Laboratories Agency (AHVLA) of the carcasses of both badgers, which underwent necropsies performed by government staff.

66. The complainant added that it was strongly in the public interest for as much information as possible to be disclosed about the deaths of these badgers so that the public could scrutinise the circumstances surrounding their deaths and the actions taken (or not taken) by police and government. Any information that was not personal data and did not identify an individual should be disclosed.
67. The Commissioner accepted that this constituted a legitimate interest in wanting to access the information and therefore this criterion is met.

### **Is disclosure necessary?**

68. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
69. The Commissioner accepts that in order to fully meet the legitimate interests set out above, disclosure of the withheld information is necessary.

### **Balancing test**

70. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under EIR in response to a request, or if such disclosure would cause someone unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
71. In considering this balancing test, the Commissioner takes into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;

- whether the individual expressed concern about the disclosure; and
  - the reasonable expectations of the individual.
72. In the Commissioner's view, a key factor will be the reasonable expectations of the individuals. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as private individuals, and the purpose for which they provided their personal data.
73. The complainant said that in her view the public interest was best served by disclosing as much of the withheld information as possible. The Commissioner accepts that this is a legitimate interest and, when applying weight to this interest, he acknowledged that
74. However, the Commissioner believes that a key factor is the reasonable expectations of the individuals concerned. The individuals in question provided information to the police and a government agency and would not have expected their personal data to be placed into the public domain. He noted that established police custom and practice is that such personal data would be not disclosed and that this would be the reasonable expectation of the individuals concerned. Nor did he consider it reasonable to expect a member of the public to foresee that disclosure would happen. The Commissioner is satisfied that those providing information to the authorities would have had a firm, and in his view reasonable, expectation that their personal information would not be disclosed under EIR.
75. Turning to the consequences of disclosing this information, the Commissioner notes that in the context of EIR regulation 13(1) it is important to remember that the exception is designed to protect is the privacy of individuals. Moreover, in assessing any infringement of that privacy it is important to remember that disclosure of information is to 'the world' at large not simply to the requester. The Commissioner is satisfied that disclosure of the withheld information would invade the privacy of the individuals and would be likely to cause individuals some distress and infringement into their privacy.
76. The Commissioner has concluded that, on balance, the legitimate interest is not sufficient to outweigh the data subjects' rights and freedoms. In reaching this conclusion the Commissioner accepts the complainant's position regarding access to the withheld information assisting public understanding but that the cumulative weight of the reasonable expectations of the information providers and the consequences of disclosure outweigh such arguments.

77. The Commissioner therefore considered that there was no Article 6 basis for processing and that disclosure of the withheld information would not be lawful.
78. In the light of his conclusion that disclosure would not be lawful, the Commissioner did not go on to separately consider whether disclosure would be fair or transparent and decided that GC were entitled to withhold the information under EIR regulation 13(1), by way of regulation 13(2A)(a).

## Right of appeal

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79. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

80. 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.

81. 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 .....**

**Dr R Wernham  
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