

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

Date: 9 September 2014

Public Authority: DEFRA
Address: Nobel House
17 Smith Square
London
SW1P 3JR

Decision (including any steps ordered)

1. The complainant requested information regarding the training of marksmen for the trial culling of badgers in Gloucester and Somerset.
2. The Commissioner determined that some of the information that had been withheld should be disclosed and Defra provided this to the complainant during the investigation. His decision is that EIR 12(4)(a), 12(5)(a) and 12(5)(e) were applied correctly to the remainder of the information.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 11 June 2013 the complainant requested the following information:

"... schemes of work, lesson plans, references and all related course documentation pertaining to marksmen training and fitness for role as submitted by the two companies carrying out the badger cull pilots in Gloucester and Somerset."

5. On 30 August 2013 Defra withheld the information under EIR 12(4)(a), 12(4)(d), 12(5)(a) and 12(5)(e).
6. On 17 September 2013 the complainant requested an internal review.
7. On 18 December 2013 Defra's internal review upheld the exceptions at 12(5)(a) and 12(5)(e). It also considered that the exception at 12(5)(f) applied.

Scope of the case

8. The complainant contacted the Commissioner on 5 January 2014 to complain about the way her request for information had been handled.
9. The Commissioner observed that Defra's internal review had made no reference to its initial exceptions at 12(4)(a) and 12(4)(d). He asked for clarification as to whether or not Defra remained reliant on these. Defra said it considered the exception at 12(4)(a) to be still engaged but not that at 12(4)(d).
10. During the course of the investigation Defra reconsidered the application of 12(5)(e) to two of the documents held and provided these to the complainant. This notice therefore addresses Defra's application of the exceptions at EIR 12(4)(a), 12(5)(a), 12(5)(e) and 12(5)(f) to the remainder of the withheld information.

Reasons for decision

11. **EIR 12(4)(a)** allows a public authority to refuse disclosure of information if the information is not held when a request is received.
12. Defra informed the Commissioner that the requested schemes of work, lesson plans, references and course documentation appertaining to marksmen training were not held by Defra but by the training provider. Defra said it had reviewed the information but that this was only in meetings with the provider and in discussion over the telephone.
13. Information relevant to the request that was held by Defra comprised four documents. These were supplied to the Commissioner.
14. In relation to the information that Defra had said was not held, the Commissioner requested responses to the following search and retention inquiries:

- (i) What searches were carried out for those items?
 - (ii) If searches included electronic data which search terms were used?
 - (iii) If the information was held would it be held as manual or electronic records?
 - (iv) Was any recorded information ever held relevant to those items but deleted/destroyed?
 - (v) If those items were held but were no longer held when did the public authority cease to retain the information?
 - (vi) Does the public authority have a record of the information's destruction?
 - (vii) What does the public authority's formal records management policy say about the retention and deletion of records of this type? If there is no relevant policy please describe the way in which the public authority has handled comparable records of a similar age.
 - (viii) If the information is electronic data which has been deleted might copies have been made and held in other locations?
 - (ix) Is there a business purpose for which the requested information should be held? If so what is that purpose?
 - (x) Are there any statutory requirements upon the public authority to retain the requested information?
15. In response Defra explained that it has a dedicated folder on its systems for training information and that this folder had been searched using the relevant keywords "training", "marksman", "shooting", "lessons", "course", "provider", "approval" and "assessment" but no information had been found. It further confirmed that no paper records were kept. The Commissioner is satisfied by Defra's responses that it does not hold and has never held schemes of work, lesson plans, references or related course documentation appertaining to marksmen training other than the four items referenced at paragraph 13 of this notice.
16. **EIR 12(5)(e)** allows a public authority to withhold information if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

17. Upon examination of the four items excepted under EIR 12(5)(e) the Commissioner queried whether two of them should be withheld as they did not relate to the training provider. Defra subsequently reconsidered its exception of the two documents and disclosed both to the complainant.
18. The remaining two documents comprised a draft training course presentation and its agenda.
19. The Commissioner applies the following tests to EIR 12(5)(e):
 - (i) Is the information commercial or industrial in nature?
 - (ii) Is the information subject to a duty of confidence provided by law?
 - (iii) Is confidentiality required to protect a legitimate economic interest?
 - (iv) Would that legitimate economic interest and thereby its confidentiality be adversely affected by disclosure?
20. With reference to the test at (i) the withheld information comprised a draft framework of a commercially developed training course. The layout and contents of the material were designed specifically for commercial purchase. The Commissioner recognises therefore that the information is commercial in nature.
21. With reference to the test at (ii) the Commissioner considered whether the information had the necessary quality of confidence and whether it had been shared in circumstances creating an obligation of confidence. For information to possess the necessary quality of confidence it can be neither trivial nor in the public domain. In this case Defra confirmed that the information had been formulated and supplied on the basis that it was confidential and that Defra had agreed to maintain this confidentiality. The Commissioner has determined that the information is not trivial in nature and that it has not been placed in the public domain. He therefore accepts that the information is subject to a duty of confidence provided by law.
22. With reference to the test at (iii) the Commissioner considers that there are legitimate economic interests requiring the protection of confidentiality in respect of the withheld information. He has ascertained that there are at least twenty other companies in the UK that undertake professional marksmen training services. All these companies are potential applicants for the same sort of work that was bid for and undertaken by the training provider. Consequently the Commissioner is

satisfied that disclosure of the information in question would unfairly benefit those competitors if it were to be released into the public domain.

23. With reference to the test at (iv) the Commissioner considers that as the first three elements of the test cited at paragraph 19 of this notice have been established, it follows that release into the public domain would adversely affect the confidential nature of that information by making it publicly available and that it would consequently harm the legitimate economic interests of the training company concerned. He therefore concludes that the exception at EIR 12(5)(e) is engaged in respect of the information.
24. The exception is subject to the public interest test whereby information can only be withheld if the public interest in maintaining the exception outweighs that of disclosure. The Commissioner has first considered the public interest in disclosure.
25. Defra acknowledged that EIR 12(2) requires a presumption in favour of disclosure. Defra also acknowledged the need for government departments to be open and transparent with their policies. It recognised that the badger culling trial was a high profile and controversial policy area involving the culling of wildlife. It acknowledged the strong public interest in the welfare of badgers; the impact of the culling trial on the countryside; the impact of the spread of TB; the trial's effect on TB in cattle and the risk and disruption to people living in the trial areas. Defra also recognised the importance of the public being able to see that safety and welfare standards are maintained in the trial.
26. The Commissioner recognises that the culling trials are controversial. He is aware that people hold strong and divergent views about their effectiveness. He would add that disclosure allows public scrutiny of decisions and actions taken by Defra. It informs public debate and creates confidence in public decision making. Increasing public understanding of all the issues involved would therefore be in the public interest.
27. The complainant believed that due process had not been followed by Defra with regard to its marksman training. She maintained that Defra's approval of the draft content of training material was insufficient to be considered as an approval of the final product. The complainant said she was particularly interested to know how comprehensive the marksman training was considering the cull's use of high powered rifles at night in public areas. She referred the Commissioner to a press report of a marksman leaving live rounds in a

- field; to reports from protestors of marksmen firing shots within their vicinity; a protestor's video footage of failure to adhere to biosecurity in carcass handling and removal; failure to administer "humane" dispatch; failure to meet cull targets within the timeframe; a report of operatives attempting to prevent protestors following them by the use of evasive and illegal driving; two allegations of assault against individuals by cull contractors and an allegation that contractors had vandalised a protestor's vehicle.
28. The complainant said she was concerned that errors on the part of cull operatives potentially compromised the safety of the public, caused inhumane badger deaths and potentially assisted the spread of bovine TB. She said that she understood that mistakes can happen but that these errors may be attributed to poor quality training. The complainant said she believed the risk of compromising public safety outweighed the risk of commercial confidentiality.
29. In favour of maintaining the exemption Defra submitted that the public interest in safety and welfare procedures being followed and the public interest in staff being properly trained was being met by publication of the official report into the pilot culls. The official report and also the report of an Independent Panel are planned to be published by February 2015.
30. Defra referred to information already on line in relation to the pilot culls and considered that together with the official reports due to be published early next year, the public could be reassured that cull procedures were being properly audited and reviewed. It submitted that the public interest in disclosure had in some way been met by information already placed in the public domain and by that planned to be published.
31. Defra informed the Commissioner of an understanding that had been reached between the training provider and Defra. The understanding was that all information shared between the provider and Defra was commercially confidential and would not be circulated further. Defra supplied the Commissioner with copies of correspondence which corroborated the understanding that had been agreed.
32. Defra maintained that disclosure of the withheld information would adversely affect the training provider's chance of competing on a level footing for work in the future. It considered it was vital that companies providing services to Defra should be assured that their commercial information would not be disclosed to the detriment of those companies. Defra submitted that if competent companies such as the training provider withdrew services as a result of commercial harm

caused by disclosure, the resulting poorer quality of services available to Defra would not be in the public interest.

33. In reaching a decision as to where the public interest lies the Commissioner has understood and taken into account the concerns of those wishing to protect our wildlife and who are opposed to the culls. He recognises that there will be errors made by individuals during such processes and he has noted the particular instance of poor practice in carcass handling detailed in footage referenced by the complainant. However, in his view it does not follow that the remedy for such instances is the public disclosure of commercial training material. The remedy lies in ensuring that the training programme is followed properly by all concerned. The complainant has stated to the Commissioner that her particular interest is in knowing how comprehensive marksman training has been. However, this is not the same as disclosure of the training material being in the public interest. The Commissioner is not persuaded that the alternative to non-disclosure would be to compromise public safety as suggested by the complainant. He considers the public interest arguments for maintaining the 12(5)(e) exemption to be particularly strong. He has therefore concluded that the public interest favours maintenance of the exemption and that the information should be withheld.
34. **EIR 12(5)(a)** allows a public authority to withhold information if its disclosure would adversely affect public safety.
35. Defra applied the exception at 12(5)(a) to the names and email addresses of individuals and to the name and logo of the training provider cited within the information. Defra's stated its concern that public identification would put the safety of individuals involved at risk from protestors/saboteurs.
36. Defra informed the complainant that the training material contained significant detail as to how field operations would be carried out. This included instructions on how and where to set and bait traps; details of when the traps should be checked and instructions on the storage and collection of carcasses. The information contained details of how staff would react if confronted by saboteurs; details of staff movement in the field; their handling of firearms and also biological materials. Defra considered that if disclosed the information would be used by protestors/saboteurs to follow and confront staff and place them in danger of harassment and attack. Defra informed the complainant that during the trials operators and individuals had already been subjected to harassment and threats from protestors.

37. The Commissioner considers that the wording of 'would adversely affect' in EIR 12(5)(a) sets a high threshold in terms of likelihood which has to be met in order for the exception to be engaged. In other words, it is not sufficient that disclosure may or could have some level of adverse effect but rather that disclosure 'would' have an adverse effect. Therefore the likelihood of an adverse effect must be more probable than not. In this respect he asked Defra for supporting evidence that public safety was a concern due to the real risk of harassment from protestors/saboteurs and that this risk extended to anyone involved in the cull including the training provider.
38. Defra provided him with a documented list of incidents, some detailed in website footage, which supported the position that disclosure 'would' have the adverse effect on public safety that it feared. The Commissioner has viewed the particular website footage referenced by Defra in this regard.
39. He has set out the list supplied by Defra within a confidential annex to this notice owing to the concern that publicising the detail could encourage others to harass and intimidate those referenced. The Commissioner considers the release of the information referred to in paragraph 35 would adversely affect public safety. It therefore follows that he considers the exception at 12(5)(a) is engaged.
40. The exception at 12(5)a) is subject to the public interest test. The public interest arguments in favour of disclosure of the information are as outlined in paragraphs 25 and 26 of this notice and need not be repeated here.
41. In support of maintaining the exception Defra submitted that it is not in the public interest to harass, threaten or endanger the safety of individuals. It maintained that even though the pilot culls have closed the risk to the safety of personnel and individuals remains high particularly as ministers have yet to decide on a roll-out of the cull next year.
42. The Commissioner recognises that not all anti-cull protestors fall into the sorts of 'hardline' groupings indicated by Defra's evidence. However, having studied the evidence provided by Defra and having viewed the related internet footage the Commissioner considers the public interest argument for maintaining the 12(5)(a) exception to be powerful. He has concluded that the public interest favours maintenance of the exception and that therefore the information should be withheld.

43. As the requested information is exempt under EIR 12(4)(a), 12(5)(a) and 12(5)(e) the Commissioner has not proceeded to consider the additional exception applied by Defra at 12(5)(f) (voluntary supply).

Procedural breaches

44. EIR 5(2) requires a public authority to respond to a request for information within 20 working days. EIR 7(2) allows an extension of 20 working days where the requested is considered to be complex and voluminous. In exceeding both these limits Defra breached the EIR.
45. EIR 11(4) requires a public authority to review its initial response within 40 working days upon being requested to do so. In exceeding this limit Defra breached the EIR.

Right of appeal

46. 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

47. 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.
48. 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

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